

Comparable Worth: A Common Dilemma

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Introduction

There is currently a vigorous debate in the United States over the concept of comparable worth.¹ This debate, however, has virtually ignored the European experience in grappling with the important questions surrounding this issue.² Indeed, many American participants³ in the debate are shocked to discover that comparable worth has been a legal requirement in the European Economic Community (EEC)⁴ for almost ten years. I believe that an examination of Europe's experience with comparable worth can inform the American debate.⁵

For example, the European experience may help to answer some issues currently raised but as yet unresolved: Do claims for comparable worth

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1. See, e.g., N.Y. Times, Feb. 1, 1986, at A8, col. 6 (Washington state legislature approves settlement with union on comparable worth claim); *id.*, Sept. 6, 1985, at A18, col. 3 (union and women's groups vow to continue comparable worth fight despite adverse court ruling); *id.*, Aug. 17, 1985, at A7, col. 6 (U.S. Dep't of Justice files amicus brief with Supreme Court opposing comparable worth).

2. The American literature is voluminous. Much of it is discussed in Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986).

3. There has been one prior American treatment of the European experience on comparable worth. See Bellace, *A Foreign Perspective*, in COMPARABLE WORTH: ISSUES AND PERSPECTIVES (E. Livernash ed. 1980). This article did not, however, grasp the full significance of the European developments because it was completed prior to some of the more important developments discussed below. This limitation was partially corrected by the author in a subsequent article. See Bellace, *Comparable Worth: Proving Sex-Based Discrimination*, 69 IOWA L. REV. 655, 702-03 (1984). Nevertheless, the earlier article appears to have led subsequent commentators to assume that Europe has only a limited experience, see, e.g., Weiler, *supra* note 2. Few commentators appear to have noted Bellace's perceptive references in her more recent article to the relevance of the European experience for the American debate. Unfortunately, she has failed to expand on her initial observations.

4. The EEC consists of Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, and the United Kingdom.

5. On the issue of comparable worth, the European Parliament has termed the European Community "one of the most progressive judicial areas in the world." EUROPEAN PARLIAMENT, *THE SITUATION OF WOMEN IN EUROPE* 12 (1984).

ignore the "economic realities" of supply and demand?⁶ Would they involve agencies and courts "in the impossible task of ascertaining the worth of comparable work, an area in which they have little expertise?"⁷ Is it possible or desirable to compare dissimilar jobs satisfactorily?⁸ Would comparable worth result in a major restructuring of the American economy by challenging basic cultural assumptions about the relative value of the activities of different social groups?⁹ Europe's experience can provide invaluable background to the problems faced by the United States. Sometimes we need not reinvent the wheel.¹⁰

This Article provides an introduction to the law of comparable worth in the countries of the European Economic Community. It will describe how the concept of comparable worth evolved and examine how it has come to operate in practice.¹¹ Part I will sketch the development of the comparable worth (or equal value)¹² standard by the EEC, up to the adoption of the standard by all Member States. Part II provides a legal analysis of comparable worth in Europe.¹³ It will both assess the sub-

6. *County of Washington v. Gunther*, 452 U.S. 161, 184 (1981) (Rehnquist, J., dissenting). See also *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985); *N.Y. Times*, Feb. 1, 1986, *supra* note 1.

7. *Gunther*, 452 U.S. at 184 (Rehnquist, J., dissenting).

8. See generally *COMPARABLE WORTH AND WAGE DISCRIMINATION* (H. Remick ed. 1984) [hereinafter cited as *WAGE DISCRIMINATION*]; M. GOLD, *A DIALOGUE ON COMPARABLE WORTH* (1983); Krauthammer, *From Bad to Worth*, *NEW REPUBLIC*, July 30, 1984, at 16.

9. See, e.g., *WAGE DISCRIMINATION*, *supra* note 8.

10. The United States' experience has been influential, for example, in the development of British anti-discrimination legislation. See McCrudden, *Institutional Discrimination*, 2 *OXFORD J. LEGAL STUD.* 303 (1982). See also Covington, *American and British Employment Discrimination Law: An Introductory Comparative Survey*, 10 *VAND. J. TRANSNAT'L L.* 359 (1977).

11. My concerns in this Article are limited, but not, I hope, idiosyncratic. I do not intend to analyze the *practice* of comparable worth in Europe, except to look briefly at the extent of litigation. See *infra* notes 86-88. Such analysis would involve detailed research into the extent to which comparable worth has been incorporated into collective bargaining. Some countries appear to approach the issue almost entirely from this perspective and see litigation as peripheral. Perhaps the best example is Denmark, see *infra* note 87. I shall neither attempt to estimate the possible economic effects of the equal value standard on levels of employment, wages, or inflation, nor attempt to assess the advantages of achieving the goals sought by alternative methods (e.g., by enforcing those laws requiring equal access to jobs, or affirmative action in hiring and promotions). I shall also not attempt to prove or disprove hypotheses as to how the labor market operates in order to base the comparable worth strategy.

12. Three terms are used in different countries for a similar concept: "comparable worth" tends to predominate in the United States, "equal value" in Europe, and "pay equity" in Canada. For a discussion of the Canadian experience, see Cadieux, *Canada's Equal Pay for Work of Equal Value Law*, in *WAGE DISCRIMINATION*, *supra* note 8, at 173. The Canadian province of Ontario is currently considering whether to enact some form of comparable work legislation. See, e.g., *ONTARIO ATTORNEY GENERAL AND MINISTER RESPONSIBLE FOR WOMEN'S ISSUES, GREEN PAPER ON PAY EQUITY* (1985) [hereinafter cited as *ONTARIO GREEN PAPER*].

13. One must approach the task of comparing the case law of the Member States of the EEC on this issue with a considerable degree of trepidation and with a recognition that the

stantive law of the Member States and present many of the most important elements of the statutory and case law on equal value. This will be accomplished by examining five main questions. First, what does "equal value" mean? Second, what is the scope of comparison (by which jobs may be compared)? Third, what, if any, defenses are available to an employer to justify differences in remuneration between men and women engaged in work of equal value? Fourth, which benefits provided by an employer to her employees should be regarded as pay, and thus subject to the equality principle? Fifth, what is the relationship between the equal value requirement and collective agreements? Though comparable worth has a lengthy history in Europe, there still exist many legal ambiguities and substantial uncertainties yet to be resolved. Finally, in concluding this Article, Part III briefly analyzes the development of comparable worth in the EEC and points to some of the lessons learned. I hope that these final thoughts will sharpen the American debate by providing relevant experiences of others who have tried and sometimes succeeded in implementing this important concept.

I. The Evolution of the "Equal Work" Standard by the EEC

A. *The "Equal Work" Standard of Article 119*

The EEC is a customs union whose *raison d'être* is the promotion of free trade and a free labor market among the Member States of the Community. When the Treaty of Rome,¹⁴ which established the EEC in 1957, was being drafted, some countries with equal pay laws in their national legislation feared that they would be at a competitive disadvantage to those future Member States without such laws.¹⁵ This problem was solved by inserting article 119 into the Treaty, which provided that equal pay for equal work was henceforth a Community legal requirement. Article 119 required Member States "during the first stage," that is, by De-

task is full of dangers. See Kahn-Freund, *On the Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974). I would have fallen into error much more frequently without the assistance of both the national reports of the European Network from which I have drawn, and COMM'N OF THE EUR. COMM., NATIONAL REPORTS (1985) [hereinafter cited as NATIONAL REPORTS], a collection of papers prepared for the European Conference on Equality in Law Between Men and Women in the European Community, organized in Louvain-La-Neuve, Belgium (May 22-24, 1985). An earlier version of Part II of this Article was presented as a paper during this conference. A useful analysis was published while this Article was in preparation. See E. LANDAU, *THE RIGHTS OF WORKING WOMEN IN THE EUROPEAN COMMUNITY* (1985). This book includes the texts of many of the national laws discussed. See *infra*.

14. Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11. For a useful sourcebook for this treaty and for the Directives discussed below, see generally BASIC COMMUNITY LAWS (B. Rudden & D. Wyatt eds. 1986).

15. D. COLLINS, *THE EUROPEAN COMMUNITIES: THE SOCIAL POLICY OF THE FIRST PHASE 2* (1976).

Comparable Worth

ember 31, 1961, “[to] ensure and subsequently maintain the application of the principle that men and women shall receive equal pay for *equal work*.” For the purposes of the article, “pay” meant the “ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment from his employer.” Equal pay without discrimination based on sex meant: “(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for the same work at time rates shall be the same for the same job.” Member States were not at that time willing to follow the International Labour Organization’s (ILO) broader phraseology of “equal pay for work of equal *value*” found in ILO Convention No. 100, apparently because they foresaw difficulties of interpretation that this standard might create.¹⁶

Little progress was made in achieving even this limited aim of equal pay for equal work, and in May 1960, the Council of Ministers of the EEC¹⁷ declared its wish to hasten the achievement of a number of social policy goals, including equal pay.¹⁸ It requested that the European Commission¹⁹ prepare detailed suggestions for achieving the aims of article 119. The Commission made several proposals,²⁰ including one requiring Member States to implement article 119 before the end of June 1961 “by taking action to exclude any discrimination based on sex so far as the remuneration of workers is concerned.”²¹

It soon became clear that little would be accomplished towards achieving equal pay by December 31, 1961, the end of the first stage. Some Member States were unwilling to move from the first stage to a second stage in any other area of EEC activity without progress by all Members on achieving equal pay. Agreement on principles giving greater effect to article 119 was viewed as “form[ing] part of the ‘package deal’ which cleared the way for the transition” to the second stage of the “transitional period of the common market,” as provided for by article 8(3) of

16. *Id.* at 84. See also *infra* note 43.

17. The Council of Ministers is a body of representatives of Member State governments charged with lawmaking powers under article 145 of the Treaty of Rome, *supra* note 14.

18. EUR. ECON. COMM. COMM’N, THIRD GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 195 (1960).

19. The European Commission is the policy-making secretariat of the Treaty of Rome. See *supra* note 14.

20. Recommendations by the Commission to the Member States relating to article 119 of the Treaty, BULL. EUR. ECON. COMM. NOS. 6 & 7, Aug./Sept. 1960.

21. *Id.* at 46.

the Treaty of Rome.²² At the end of 1961, the governments agreed in a resolution "that the progressive implementation of the principle of equal remuneration for men and women workers is intended to abolish all discrimination in the fixing of wages"²³ Member States further "recognize[d] that any practices of systematic downgrading of women workers shall be incompatible with the principle of equal remuneration when . . . criteria in job evaluation for the classification of workers are used which are not related to the objective conditions in which the work is done."²⁴ A timetable was then drawn up for the elimination of discriminatory differentials by the end of 1964. Unfortunately, the Community did not adhere to the timetable, and both the Commission and the individual Member States remained silent.

B. *The Development of the "Equal Value" Standard*

Despite its slow beginnings, the equal pay standard of the EEC developed rapidly during the 1970's. To understand the details of these developments, a brief introduction to lawmaking in the EEC is necessary. The EEC treaty is largely a framework that may be filled in by both supplementary legislative action and by judicial interpretation. Legislative power is given to the Council of Ministers to act on a proposal from the European Commission, usually after consulting the European Parliament and the European Economic and Social Committee.²⁵ New laws may take various forms with different legal implications for the Member States. One of the most common methods, however, is for the Council of Ministers to legislate by way of a Directive. This binds Member States as to the ends to be achieved but not as to the means.²⁶

Judicial interpretation arises, most relevantly for the purposes of this Article, in two ways. First, the Commission may initiate proceedings directly against a Member State in the European Court of Justice (ECJ) alleging that the state is not complying with its obligations under the Treaty or a Directive. In addition, where the requirements of the Treaty or a Directive are directly effective in the Member State, an individual may make use of them directly in domestic legal proceedings, even where there is no such provision in the national legislation. If a national court is faced in this way with a question of EEC law, it may, and in some

22. 3 H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY—A COMMENTARY ON THE EEC TREATY* ¶ 119.04, at 3-762 (1985).

23. Equal Remuneration for Equal Work as Between Men and Women Workers, *BULL. EUR. ECON. COMM.* NO. 11, Jan. 1962, at 8.

24. *Id.*

25. *See supra* note 17 & *infra* note 36.

26. Treaty of Rome, *supra* note 14, art. 189.

Comparable Worth

circumstances must, refer the issue to the ECJ for a preliminary decision.²⁷

After 1971, the ECJ was faced with an increasing number of references by national courts arising out of domestic cases based on article 119. At first the ECJ was cautious. In an early decision,²⁸ for example, a woman unsuccessfully alleged that differential pension rights contravened article 119. Despite the cautious holding in that case, however, the Advocate General did indicate that article 119 could be relied on in *some* circumstances by individuals in national courts.²⁹ Thereafter, the ECJ became more assertive as more cases were referred to it. In the 1976 decision, *Defrenne (No. 2)*,³⁰ the ECJ held not only that article 119 was in part directly effective (i.e., it gave a woman a right to equal pay enforceable in the national courts), but also that it was a right enforceable against private as well as public employees, insofar as it was directly effective in the Member State. This decision had the consequence that individual women could now act directly to enforce the Treaty. Despite the tardiness of the Commission, therefore, enforcement action was now possible.

In 1972, a report on the employment of women in the EEC concluded that widespread sex discrimination in employment existed in all Member States.³¹ Following this, a 1973 European Commission report expressed for the first time the Commission's intention to initiate proceedings against Member States that had breached their obligation to implement article 119.³² At first, however, little action was taken on this threat.

Another impetus for the development of a standard was a growing concern by the EEC in the early 1970's about its image as solely an economic institution. In response to this concern, the EEC soon developed a progressive social policy in a number of areas, including sex discrimination. This new attention led the EEC to enact several far-reaching legal requirements concerning employment discrimination against women,³³

27. *Id.* art. 177.

28. *Defrenne v. Belgian State*, 1971 E. Comm. Ct. J. Rep. (Preliminary Ruling).

29. *Id.* at 454-62.

30. *Defrenne v. Sabena (Belg. Airlines)*, 1976 E. Comm. Ct. J. Rep. 455.

31. E. SULLEROT, *THE EMPLOYMENT OF WOMEN AND THE PROBLEMS IT RAISES IN THE MEMBER STATES OF THE EUROPEAN COMMUNITY 47-50* (1972) (report published by Comm'n of the Eur. Comm.).

32. 1973 EUR. ECON. COMM. DOC. (No. 3,000 final) pt. 248 (July 18, 1973); a report on the new members of the Community (Ireland, Denmark, and the United Kingdom) was drawn up in 1974 EUR. ECON. COMM. DOC. (No. 742 final) (July 17, 1974). The Commission's power to initiate proceedings against a Member State (termed "infringement proceedings") before the European Court of Justice is based on article 169 of the Treaty of Rome. *See supra* note 14.

33. In addition to the Equal Pay Directive, *see infra* note 42 and accompanying text, the EEC has two other binding directives on sexual equality: the Equal Treatment Directive, Council Directive 76/207/EEC, 19 O.J. EUR. COMM. (No. L 39) 19 (1976); and the Social

including requirements relating to equal pay. In January 1974, the Council adopted a Social Action Programme that contained recommendations on how to achieve "equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay. . . ."³⁴

Meanwhile, in November 1973, the European Commission had submitted a proposal for a Council Directive on the further development of article 119's principle of equal pay for men and women.³⁵ The European Parliament,³⁶ after a report by its Committee on Social Affairs and Employment,³⁷ welcomed the initiative but proposed several amendments designed to counter various aspects of discrimination felt to be inadequately covered in the Commission's proposals.³⁸ The Economic and Social Committee³⁹ approved this initiative with some further amendments in March 1974.⁴⁰

The amended Commission proposal was presented to the Council of Ministers in July 1974.⁴¹ In February 1975, the Council adopted the version of the Commission proposal amended by the Economic and Social Committee as Directive No. 75/117.⁴² The Directive's effect was to toughen up the equal pay standard of article 119. While article 119 spoke of "equal pay for equal *work*," the new standard became that of the ILO Convention 100, by now ratified by all Member States:⁴³ "equal pay for work of equal *value*"—or "comparable worth" as it is known in the United States. The 1975 Directive defined article 119's "principle of equal pay" to mean pay "for the same work *or for work to which equal*

Security Directive, Council Directive 79/7/EEC, 22 O.J. EUR. COMM. (No. L 6) (1979). See E. WALLACE & E. DAVIES, *WOMEN OF EUROPE* (1986); *RIGHTS OF WOMEN: EUROPE, WOMEN'S RIGHTS AND THE EEC* (1983).

34. 17 O.J. EUR. COMM. (Nos. C13/1, 13/3) (1974).

35. 16 O.J. EUR. COMM. (No. C114/46) (1973) (communications and information).

36. The European Parliament is largely a debating and advisory forum.

37. 1974 EUR. ECON. COMM. DOC. (No. 21/74/Rev.)

38. 17 J.O. COMM. EUR. (No. C55/43/45) (1974) (communications and information).

[Editor's note: all translations of foreign sources completed by author].

39. This committee is a body composed of representatives of employers and labor.

40. 17 J.O. COMM. EUR. (No. C88/6) 8 (1974).

41. 1974 EUR. ECON. COMM. DOC. (No. 1010 final) (July 1974).

42. 18 J.O. COMM. EUR. (No. 19) (1975) (legislation of the European Community).

43. See ILO, *INTERNATIONAL LABOR CONFERENCES, 60TH SESS., REPORT III (REPORT 2), EQUAL REMUNERATION* (1975); ILO, *REPORT OF THE COMMITTEE OF EXPERTS: OBSERVATIONS CONCERNING RATIFIED CONVENTIONS* (1977, at 192-97); (1980, at 138-47); (1981, at 149-50); (1982, at 152-56); (1984, at 188-202). The ILO Convention No. 100 of 1951 (Equal Remuneration Principle) was ratified by the EEC Member States as follows: France (1953); Federal Republic of Germany (1956); Italy (1956); Denmark (1960); Belgium (1962); Luxembourg (1967); Netherlands (1971); United Kingdom (1971); Ireland (1974). *Id.*

Comparable Worth

value is attributed, [and] the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.”⁴⁴

This was the first time that article 119 was defined to mean equal pay for work of equal *value*, for this definition had been included in neither the European Commission’s initial nor its later amended proposals. In adding this definition, the Council of Ministers was responding to various developments. During parliamentary debates, for example, members had argued for equalizing pay for work of equal value and for removing discrimination in job evaluation schemes.⁴⁵ A resolution of the European Parliament also stated that “discrimination continues in job evaluation with less importance attached to skill, speed and concentration than to muscle power although more equitable methods have been known for many years.”⁴⁶

The opinion of the Economic and Social Committee was even more forthright. The Committee, in arguing that article 119 should not be interpreted restrictively, drew attention both to the passage of the resolution of December 30, 1961,⁴⁷ and to the ratification of ILO Convention No. 100 by nine Member States.⁴⁸ The Committee also urged the amplification of the article 119 requirement of equal treatment for men and women in conditions of remuneration. It recommended that equal pay should be defined as “equal treatment of men and women, without discrimination on the grounds of sex, in respect of their conditions of remuneration, including assessment criteria.”⁴⁹ Moreover, the Committee had recommended that the term “equivalent work” should be used instead of “equal work,” because substituting the former term would “stop the practice of classifying women who do equivalent work to men in ‘low-wage groups.’”⁵⁰

C. *The Adoption of “Equal Value” by the United Kingdom, Ireland, and the Other Member States*

So far, I have shown that the equal pay concept was originally included in the EEC Treaty because of the economic competition between Member States who had already adopted the concept and those who had not, and that the meaning of the concept was expanded during the 1970’s

44. *See supra* note 42, art. 1 (emphasis added).

45. *See* Remarks of Mr. van den Gun, 17 O.J. EUR. COMM. (No. 175) 177, 177-78 (1974); *see also* Remarks of Lady Elles, *id.* at 180.

46. Resolution of European Parliament during debates on art. 119, *id.* at Point 2.

47. *See supra* notes 23-24 and accompanying text.

48. *See supra* note 43.

49. 17 J.O. COMM. EUR. (No. C88/8) (1974).

50. *Id.*

to include equal pay for work of equal value. Before examining the enforcement of this standard in the various Member States, I will first consider the initial adoption of the standard by two states that were *not* original members of the EEC—the United Kingdom and Ireland. The policy of these countries displays different ways of considering the issue of equal pay.

The British Equal Pay Act of 1970⁵¹ was developed partly in anticipation of future United Kingdom membership in the EEC. The Act steered a middle course between what the United Kingdom perceived as the two extremes: the “equal work” standard of article 119 of the Treaty of Rome and the “equal value” standard of the ILO Convention 100. The United Kingdom thus adopted standards of “like work” and “work rated as equivalent.” Where a woman’s work fell into one of these two categories, equal pay was required, unless the employer proved that any variation between a man’s and woman’s contract of employment was “genuinely due to a material difference other than the difference of sex.”⁵²

The British Act defined “like work” as work that was “the same” or of a “broadly similar nature,” where the differences “are not of practical importance in relation to terms and conditions of employment.”⁵³ A woman’s work was to be rated as “equivalent” to a man’s work if “her job and [his] job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision),” by a study undertaken to evaluate those demands.⁵⁴ These standards went beyond what was thought to be necessary to comply with article 119, but they did not go as far as mandating the equal *value* standard.

Ireland, contemplating the consequences of its future EEC membership, predicted a different standard for the EEC. The Irish government established a Commission on the Status of Women in March 1970. This body examined what legislation should be introduced and what action should be taken to increase equality of opportunity. The final report to the Minister for Finance, published in December 1972,⁵⁵ contained recommendations that have formed the basis for much subsequent Irish

51. Equal Pay Act, 1970, ch. 41. For a background to the Act, see E. MEEHAN, *WOMEN’S RIGHTS AT WORK* 29-58 (1985).

52. *Id.* § 1(3).

53. *Id.* § 1(4).

54. *Id.* § 1(5).

55. COMMISSION ON THE STATUS OF WOMEN, *REPORT TO THE MINISTER OF FINANCE* (1972) (Republic of Ireland).

Comparable Worth

legislation, including the provision that an "equal value" test be incorporated into the proposed equal pay legislation.⁵⁶

The Commission had two reasons for recommending the equal value test. First, it found the "same, or broadly similar work" test was too limiting, for:

Outside the public service such a provision would affect only a relatively small proportion of women workers. A considerable number of women who are performing the jobs the requirements of which may well be judged to be equivalent to the requirements of the jobs performed by men, but which are remunerated less well, would be unaffected.⁵⁷

Second, the Commission was anticipating Ireland's membership in the Community. Although article 119 provided for equal pay for equal work, "[s]ubsequent interpretations of the intention of the Treaty have tended . . . to widen this provision to extend it in the direction of equal pay for work of equal value."⁵⁸ The Commission's recommendations were accepted, and an Anti-Discrimination Act regarding pay provisions was passed in 1974 incorporating the equal value test.⁵⁹ This act provided that persons would be regarded as performing like work not only where the work is performed under "the same or similar conditions," or is "of a similar nature,"⁶⁰ but also "where the work performed by one is equal in value to that performed by the other in terms of the demands it makes in relation to such matters as skill, physical or mental effort, responsibility and working conditions."⁶¹ The Irish Act contained no restrictions like those in the British Act requiring that job evaluation schemes be introduced voluntarily before "equal value" could be used to initiate a claim.

Whatever the explanations for the development of different equal value standards in the U.K., Ireland, and the Member States of the EEC in the period up to 1974,⁶² the increasing economic problems that Europe en-

56. *Id.* para. 92.

57. *Id.* para. 91.

58. *Id.* para. 90.

59. Anti-Discrimination (Pay) Act, 1974, 1974 ACTS OF THE OIREACHTAS 211 (Republic of Ireland).

60. *Id.* §§ 3(a)-3(b).

61. *Id.* § 3(c).

62. Some view the evolution of legal provisions in essentially crude materialist terms, seeing them as part of the ideological superstructure, the content of which is determined by the material base of economic and technological developments. They might well view the development of "equal value" at this time as an attempt to update European ideology to square it with changes that had already occurred or were rapidly occurring. The availability of effective contraceptives, for example, contributed to the influx of more and more women into the European labor force. An ideology of the value of the work women do based on the needs of an earlier economy was thus increasingly out of date. A new ideology was therefore developed that reinforced and explained these changes.

countered in the mid-1970's contributed to a change in political and economic priorities. Governments no longer assumed that their economies would continue to grow; instead, they planned for continued high levels of long-term unemployment. Member States turned away from the European Commission's social proposals, including equal value.⁶³ Resistance to incorporating the provisions of the Equal Value Directive in the domestic legislation of the Member States increased.

Despite this resistance, by 1978 the Commission began to prepare for more direct enforcement action against Member States that had not implemented the Directive. This development was undoubtedly stimulated by the criticisms of the Commission by the ECJ⁶⁴ and by the European Parliament.⁶⁵ In January 1979, the Commission published a report discussing the means by which the principle of equal pay should be applied, and indicated yet again that it would institute proceedings against Member States that had disregarded the Directive.⁶⁶ This time, in sharp contrast to its inaction in 1973, the Commission initiated proceedings.⁶⁷

The Commission sent formal notice of failure to implement the Directive to Belgium, Denmark, Germany, France, Luxembourg, the Netherlands, and the United Kingdom. The Italian constitutional and legislative provisions⁶⁸ and the Irish legislation⁶⁹ had, by contrast, satisfied the requirements of the Directive. Actions against France, Ger-

63. In Ireland, for example, the Anti-Discrimination (Pay) Act, *supra* note 59, was passed in 1974. An amending bill was introduced in the Irish Parliament by the government in December 1975. Its purpose was to postpone until December 31, 1977, at the latest, the implementation of equal pay in the private sector which was experiencing difficulties. The government notified the European Commission on February 5, 1976 and made an application to derogate from applying Directive 75/117, *supra* text accompanying note 42, on the basis of article 135 of the Treaty of Accession. The Commission, while acknowledging the difficulties of the Irish economy, was unable, on grounds of principle, to comply with this request, and the bill was therefore withdrawn.

64. In *Defrenne v. Sabena* (Belg. Airlines), 1976 E. Comm. Ct. J. Rep. 455, 481, the ECJ pointed out that the absence of infringement actions against Member States by the Commission was likely to reinforce the impression that article 119 was more limited in effect than it is.

65. The European Parliament had "deplore[d] the lack of urgency with which [the European Commission] appear[ed] to be encouraging the Member States to respond to Article 119." Burrows, *The Promotion of Women's Rights by the European Economic Community*, 17 COMMON MKT. L. REV. 191, 198 (1980).

66. 1978 EUR. COMM'N DOC. (No. 711 final) para. 6.1.79, at 144.

67. See Forman, *The Equal Pay Principle Under Community Law: A Commentary on Article 119 EEC*, in 1 LEGAL ISSUES EUR. INTERGRATION 17 (1982).

68. See Act No. 903, Respecting Equality of Treatment as Between Men and Women in Questions of Employment, 343 *Gazette Ufficiale della Repubblica Italiana*, [Gaz. Uff.] 9014 (1977) (Italy), reprinted in 2 ILO LEGIS. SERIES, at It. 1 (1978).

69. Anti-Discrimination (Pay) Act, 1974, *supra* note 59, amended by the Employment Equality Act, 1977, ACTS OF THE OIREACHTAS (Republic of Ireland), reprinted in ILO LEGIS. SERIES, at Ire. 1. See also N. WAYNE, *LABOUR LAW IN IRELAND* 160-307 (1980). The Irish Department of Labour is, at the time of this writing, preparing proposals for new legislation. Nesbitt, *Ten Years of Unequal Pay*, *Irish Times*, Feb. 19, 1986, at 10, col. 1.

Comparable Worth

many, and the Netherlands were not pursued. This was due to the May 1978 repeal of a discriminatory provision in France that provided for accommodation allowances limited to the "head of household;"⁷⁰ to the adoption by Germany of a satisfactory law in August 1980;⁷¹ and to the extension of equal pay rights to the public service in a Dutch law of July 1980.⁷²

Cases against Belgium, Luxembourg, Denmark, and Great Britain were subsequently brought before the ECJ. Those involving Belgium and Luxembourg challenged the different conditions for men and women attaching to the head of household allowances in the public service of these two countries. The Commission withdrew the case against Belgium following legislative changes and won the cases against Luxembourg⁷³ and the United Kingdom.⁷⁴ Luxembourg⁷⁵ and the United Kingdom⁷⁶ have since adopted new legislation, which provides that equal pay applies only to the "same work," and not to work of "equal value."⁷⁷

70. The French law has since been largely amended. See Act No. 83-635 to Amend the Labour Code and the Penal Code as to Equality in Employment Between Women and Men, 1983 Journal Officiel de la République Française [J.O.] 2176, reprinted in 2 ILO LEGIS. SERIES, at Fr. 2 (1984) [hereinafter cited as French Equal Pay Law]. This has been supplemented by Circular of 2 May 1984 on the Application of Law No. 83-635 of July 1983, reprinted and translated in 131 EUR. INDUS. REL. REP. 27 (1983).

71. See Act Respecting Equality of Treatment for Men and Women at the Workplace and the Maintenance of Claims in the Event of the Transfer of Establishments [Labour Law (European Communities Harmonisation) Act], 1980 Bundesgesetzblatt, Teil 1 [BGB1] 48 (W. Ger.), reprinted in 2 ILO LEGIS. SERIES, at Ger. F.R. 3 (1981).

72. See Act of 2 July 1980 (Equal Treatment of Men and Women in the Civil Service Act). This supplements the primary Act to Lay Down Rules for the Entitlement of Workers to a Wage that is Equal to the Wage Earned by Workers of the Other Sex for Work of Equal Value, 129 Staatsblad voor het Koninkrijk der Nederlanden [Stb.] 1975 (Netherlands), reprinted in 2 ILO LEGIS. SERIES, at Neth. 1 (1975) [hereinafter cited as Netherlands Equal Wage Act].

73. Commission of the European Communities v. Luxembourg (Case 58/81), 1982 E. Comm. Ct. J. Rep. 2175.

74. Commission of the European Communities v. United Kingdom (Case 61/81), 1982 E. Comm. Ct. J. Rep. 2601.

75. Act of Apr. 20, 1983, amending Grand Ducal Regulation of July 10, 1974 (Lux.).

76. Equal Pay (Amendment) Regulations, 1983 STAT. INST. No. 1784, amending the Equal Pay Act, *supra* note 51. Northern Ireland has separate legislation that provides almost exactly similar terms. The Equal Pay (Amendment) Regulations, STAT. R. & O.N. IR. No. 16 (1984), amending the Equal Pay Act, STAT. R. & O.N. IR. No. 32 (1970). The British provisions are examined in greater detail in McCrudden, *Equal Pay for Work of Equal Value: The Equal Pay (Amendment) Regulations 1983*, 12 INDUS. L.J. 197 (1983). In addition, a set of regulations introduces special procedures by which equal value claims are to be heard and decided. These are examined in McCrudden, *Equal Pay for Work of Equal Value (cont.)*, 13 INDUS. L.J. 50 (1984). The legislation has been the subject of a large and expanding academic and legal literature. See Szyszczak, *Pay Inequalities and Equal Value Claims*, 48 MOD. L. REV. 139 (1985); M. RUBENSTEIN, *EQUAL PAY FOR WORK OF EQUAL VALUE* (1984); Townshend-Smith, *Legislation: The Equal Pay (Amendment) Regulations 1983*, 47 MOD. L. REV. 201 (1984).

77. Act Respecting Equal Wages for Men and Women, Law No. 32 (1976) (Den.), reprinted in 2 ILO LEGIS. SERIES, at Den. 1 (1976).

The Danish government argued that the Danish term for "same work" had wider application than assumed by the Commission, but the Commission contested this argument. The Commission also won this case.⁷⁸ Greece adopted legislation in 1981, shortly after joining the Community.⁷⁹

The infringement proceeding against the United Kingdom by the European Commission is the most interesting for the purposes of this Article. The Commission argued that women, under British law, could not obtain equal pay for work of value equal to that of their male counterparts unless job evaluations were conducted in their individual companies. Therefore, the United Kingdom was not properly fulfilling its obligations under the 1975 Equal Pay Directive.⁸⁰ The United Kingdom, however, countered that such an argument was inconsistent with the wording of article I of the Directive because it overlooked the words "to which equal value is attributed."⁸¹ Article I did not give employees, the United Kingdom argued, the right to insist on having pay determined by a job classification scheme. Furthermore, the United Kingdom argued that the practical considerations involved in implementing the Commission's compulsory job evaluation interpretation, compared with the advantages under the system then in use in the United Kingdom, had a bearing on whether the interpretation contended for by the Commission was likely to be that subscribed to by all Members of the Council in the Directive.

In response to this argument,⁸² the Commission reviewed the different systems adopted by the Member States. It pointed out that in Belgium, France, Italy, Luxembourg, and West Germany, many problems were resolved by "works inspectorates." Where a question was reserved for the courts, the courts were not necessarily bound by the results of the job evaluation schemes. In the Netherlands, the question whether work was of equal value was assessed through a reliable system of job evaluation. Under the Irish legislation, which the Commission "believe[d] to be an example of how the United Kingdom could comply with its obligations"⁸³ under the Directive, any dispute on the subject of equal pay

78. *Commission of the European Communities v. Denmark* (Case 143/83) (judgment of Jan. 31, 1985) (slip op. on file with the author).

79. 1981 Law on Equality, Act No. 1414, Respecting the Application of the Principle of Equality of the Sexes in Employment Relationships, *reprinted in* 2 ILO LEGIS. SERIES, at Gr. 1.

80. *Commission of the European Communities v. United Kingdom* (Case 61/81), 1982 E. Comm. Ct. J. Rep. 2601, 2602.

81. *Id.* at 2606.

82. *Id.* at 2608.

83. *Id.* at 2613.

Comparable Worth

could be referred to an Equality Officer who, after investigating, would issue a recommendation.

In rendering its 1982 judgment, the ECJ disagreed with the British arguments and required Britain to pass new legislation allowing women to claim equal pay for work which, though apparently different on its face from jobs performed by men, was of equal value to that work as assessed by judicial proceedings. Both the judgment of the ECJ, and even more explicitly the opinion of the Advocate General Verloren Van Themaat, left open which specific type of system had to be adopted:

It is not for the Court to indicate how the United Kingdom should adapt its legislation in order to ensure that the principle of equal pay for work of equal value is actually applied in every case. It is important to note that in this matter the Member States must moreover take account of their "national circumstances and legal systems" as stated in Article 6 of the Directive. It is precisely in this area that the practice of Member States differed greatly owing to the greater or lesser amount of freedom enjoyed by the two sides of industry.⁸⁴

II. The Substantive Law of Equal Value

In this part, I will examine the statutory and case law of the EEC Member States⁸⁵ and address the five questions set out in the introduction. First, what does "equal value" mean? Second, what is the scope of comparison (which jobs may be compared)? Third, what, if any, defenses are available to an employer to justify differences in remuneration between men and women engaged in work of equal value? Fourth, which benefits provided by an employer to her employees should be regarded as pay, and thus subject to the equality principle? Fifth, what is the relationship between the equal value requirement and collective agreements? I hope that this examination will clarify the many parallels between the EEC Member States' experiences with comparable worth and the likely experience of the United States in this area.

Before doing so, however, two caveats must be discussed briefly. First, although I shall not examine in detail how equal value is implemented, the mechanics of implementation and litigation are crucial to the likely operational effect and development of the equal value standard.⁸⁶ Sec-

84. *Id.* at 2624.

85. This study will not, however, discuss the laws of Spain or Portugal, which joined the EEC in 1985.

86. The content of the procedures in Ireland and the United Kingdom illustrates three important features of an evolving European approach to implementing the equal value standard. First, the task of implementing the standard has been given to the already existing, specialized labor institutions (the Irish Labour Court and the British industrial tribunals and

ond, an examination of how the courts of the Member States have addressed themselves to some basic questions does not tell us very much about how effective the equal pay laws are in practice. Progressive legal interpretations do not necessarily translate into comparative wage rates.⁸⁷

Central Arbitration Committee). This has been done not only because of their relatively informal method of adjudication and their "tripartite composition" (i.e., one with representatives of management and labor, plus an "independent"), but also because equal pay is regarded largely as a labor law issue rather than as a quasi-constitutional issue as in the United States. Second, there has been a concern to introduce into these procedures extra elements which, in the language of recent American legal literature, reflect a preference for "alternative dispute resolution" and "managerial judging." See *ALTERNATIVE DISPUTE RESOLUTION: BANE OR BOON TO ATTORNEYS?* (L. Ray ed. 1982) (compiled by Special Committee of the American Bar Association). In particular, this is reflected in the use of Equality Officers in Ireland and "independent experts" in Britain to carry out initial assessments of "value." Third, a tension has evolved in the crafting of a system of enforcement between those who consider equal value claims as essentially "individual" and those who consider them "collective," as the issue is discussed in Britain, or between those who view them as "disputes of right" and those who characterize them as "disputes of interest," as it is discussed in Ireland.

87. The amount of litigation is one indication of the degree of change occurring in the Member States. If the experience of the United States can be generalized in this area, litigation tends to increase as inequality is perceived to be a problem. Low rates of litigation may reflect lack of change. If this is the case, then the comparatively small amount of litigation on equal pay throughout Member States is a cause of concern.

In the Report of the Commission to the Council on the Application as of February 12, 1978 of the Principle of Equal Pay for Men and Women, COUNCIL OF MINISTERS DOC. NO. 711 final (1979) [hereinafter cited as 1979 REPORT], several Member States reported the amount of equal pay litigation up to 1979. The Belgian government believed that there were few cases; in Denmark, no case had been brought before the courts; in France, three cases reached the highest court, the Court of Cassation; West Germany could not state the number of actions since specific statistics for such actions did not exist, but it indicated that judgments of the Federal Labor Courts in this area were rare; and finally, though the Italian government could not determine the exact number of actions brought, ten judgments were delivered in the relevant period. Even in Ireland and Britain, where the amount of litigation is substantially higher than in other Member States, it is almost insignificant in comparison with, for example, unfair dismissal claims. See generally *Equal Value Round-Up*, 4 EQUAL OPPORTUNITIES REVIEW 6 (1985) [hereinafter cited as EQ. OPP. REV.].

Various reasons have been given for this phenomenon: lack of awareness of the legal provisions; resolution of disputes through collective bargaining; women workers' fear of taking action given the possibility of retaliation by employers; lack of awareness of the discrimination by the women themselves; difficulty of proving discrimination; absence of help for women in taking cases; and a lack of interest by trade unions in the issue. One individual has argued that there has been a "marked shift throughout the Community from litigation over equal pay to disputes over discrimination concerning other conditions of employment, especially access to employment, and dismissal and redundancy. These are topics of great concern in a period of recession and unemployment." See Landau, *Sexual Equality in Employment in the EEC*, 123 INT'L LAB. REV. 53, 63 (1984).

In addition to the more obvious explanations for the low rates of litigation, a recurring theme in studies of this issue is that women, their unions, and their legal advisors often do not perceive the legal system as a way to tackle the undervaluation of women's work. The availability of a relatively sophisticated legal remedy for such discrimination may therefore be considerably ahead of women's perception of what law can do. This attitude should not be regarded as arising from ignorance or wrong-headedness. Similarly, among academic legal commentators there is a perception that legal means of redress must, almost of necessity, be relatively limited in what they can achieve. See Landau, *supra*, at 67-68. As law is used to

Comparable Worth

A. "Equal Value" Considered

1. The Meaning of "Value"

In theory, the "value" of a job can be assessed in at least three ways. First, one might look at the market value of a job. This, clearly, is not the meaning intended by the principle of "equal pay for work of equal value," and this definition has not been adopted in the case law or legislation of any Member State. A second concept of value is marginal productivity, or the value that the work adds to the total output of the enterprise. Finally, a third approach would look to the job's "content."

Whether the second method of assessing value should be adopted was litigated only in Italy. During the 1960's, several Italian courts upheld the practice of underpaying women on the grounds that their work was, on average, less productive than the corresponding work of men. The Court of Cassation subsequently decided, however, that the concept of equal value referred *not* to equal output, the second approach, but rather to equal job *content*, the third approach.⁸⁸ This third approach has since been adopted in all Member States, either by legislation or through case law.

2. Value: Facial Similarity or Underlying Similarity

A consensus appears to be developing on a number of further questions including, most importantly, whether two jobs, dissimilar on their face, may nonetheless be regarded as equal based on a job content test. The earlier British Equal Pay Act of 1970 adopted a "like work" standard.⁸⁹ This was defined as work that was "the same" or of a "broadly similar" nature, where the differences were "not of practical importance in relation to terms and conditions of employment."⁹⁰ In considering "like work," British tribunals compared the job content of the work of men and women to assess whether jobs were the same or broadly similar *on their face*, without considering their underlying value.⁹¹ This was broader than the "same work" test but narrower than an approach to "equal value" that would allow comparison of jobs with different con-

tackle the more ingrained structural discrimination in pay, this issue is likely to come more into prominence.

88. See *Spa Costruzioni Meccanidre Cerlani v. Maffi*, No. 1231 of Apr. 18, 1969; *Saletti v. Soc. Lauficio Fratelli Sbracci*, No. 707 of Mar. 17, 1970; *Soc. Alemagna Panettoni v. Bussetta*, No. 672 of Mar. 12, 1974; *Soc. paz. Ceschina Sauilaria & C. v. Delvo*, No. 2188 of June 14, 1976; *Cesdrin v. Giacometti*, No. 1593 of Apr. 25, 1977. See also Morgenstern, *Women Workers and the Courts*, 112 INT'L LAB. REV. 15, 20 (1975).

89. See *supra* notes 51-54 and accompanying text.

90. Equal Pay Act, *supra* note 51, § 1(4).

91. See, e.g., *Capper Press Ltd. v. Lawton*, [1977] 1 Q.B. 852; *Waddington v. Leicester Council for Voluntary Services*, [1977] 2 All E.R. 633; *Dugdale v. Kraft Foods Ltd.*, [1977] 1 All E.R. 454.

tent. The legislation passed after the infringement proceedings by the European Commission incorporated this wider approach into British law, and permitted jobs to be compared "for instance [under such headings as] effort, skill, [and] decision," even if the employer had carried out no such assessment in the past.⁹²

The requirement of the new legislation⁹³ has been interpreted by the industrial tribunals to rule out reliance solely on non-analytical systems of job evaluation such as rating, job classification, and paired comparison. Instead, the tribunals have emphasized factor analysis, which may be carried out with or without attaching points which is known as the "points method." The points method breaks down each job into factors, most commonly including skill, responsibility, physical and mental requirements, and working conditions. An independent expert awards points or grades for each evaluated/significant factor, and the total number of points decides the comparative value of the job.⁹⁴ This approach to the meaning of "value" also appears to be the most commonly accepted method in judicial and administrative decisions interpreting national equal pay legislation in other Member States. Two examples, recent British cases, illustrate the approach and indicate the current practical effects of equal value legislation.

In *Hayward v. Cammell Laird Shipbuilders Ltd.*,⁹⁵ an independent expert devised a version of the factor comparison method. The jobs under consideration were viewed as the source of a number of key "demands" upon those who performed them. To reflect these demands, unweighted factors were selected, each having some relationship to job difficulty or value. The expert tried to avoid overlap of factors to prevent double-counting features of the jobs. To reach a decision when comparing the applicant's job with another job, judgments were made about whether demand under each factor was at one of three levels: low, moderate, or high. The five factors chosen were: (a) physical demands, or "the need for physical effort and stamina and the application of human energy in applying the skills necessary to the performance of the tasks;"⁹⁶ (b) environmental demands, "which arise from the physical conditions of the work station, and the general conditions of work which apply to the job holder in that job, for example noise, cold, dust, fumes, wetness, heat

92. Equal Pay Act, *supra* note 51, § 1(5). See also *supra* note 76.

93. See *supra* note 76.

94. Considerable flexibility is permitted in the way in which the independent expert carries out his or her responsibilities. In particular, the expert has discretion over the techniques to be used and the choice of factors. Other than through appellate decisions, no attempt has been made to ensure uniformity of approach.

95. [1984] INDUS. REL. L. REP. 463. The expert's report is published in part in 330 INDUS. REL. REV. & REP. 14 (1984) [hereinafter cited as Expert's Report].

96. Expert's Report, *supra* note 95, at 330.

Comparable Worth

and humidity;”⁹⁷ (c) planning and decisionmaking demands, “the dynamic element in carrying out the decisions related to the work tasks including reasoning, thinking and judgment, the level of discretion, the level of supervision received;”⁹⁸ (d) skill and knowledge demands, “the depth and breadth of knowledge required for doing the actual job as indicated by possession of recognized training and qualifications;”⁹⁹ and (e) responsibility demands “for tools, equipment and materials.”¹⁰⁰

The woman applicant and the males with whom she was comparing herself (the comparators) were all employed by the same company, Cammell Laird Shipyard in Birkenhead. All were members of the General Municipal, Boilermakers and Allied Trade Unions (GMBATU). The applicant, a cook in the workers’ cafeteria, spent approximately 80% of her time preparing meals, 15% cleaning and serving, and the remaining 5% doing miscellaneous work.

The comparators, who supported her claim, were shop stewards and craftsmen engaged in shipbuilding trades. One was a painter, one was a thermal insulation engineer, and one was a joiner. The independent expert received detailed submissions and held separate discussions and consultations with both parties and their representatives, and with the comparators. After encountering some difficulties, the expert requested additional comparators. Beyond this, meetings were held in the workplace where the expert conducted observational studies of the jobs under consideration. A report was prepared comparing the two jobs under all these factors.¹⁰¹ On the basis of his calculation, the expert decided that the applicant’s work was of equal value to that of all three comparators.

The independent expert’s method of evaluation was subsequently challenged before the industrial tribunal by Cammell Laird as “so simple as to be crude and lacking in precision.”¹⁰² The attack was rejected by the tribunal, which held that the legislation “does not appear to look for the question of equal value to be dealt with by way of precise mathematical

97. *Id.*

98. *Id.*

99. *Id.* at 331.

100. *Id.*

101. Taking the expert’s assessments under each factor heading, the scoring may be summarized as follows:

<i>Factor heading</i>	<i>Cook</i>	<i>Painter</i>	<i>Joiner</i>	<i>Thermal Insulation Engineer</i>
Physical demands	Moderate	Moderate	Moderate	Moderate
Environmental demands	Moderate	Moderate	Moderate	Moderate
Planning and decisionmaking demands	Moderate	Low	Low	Low
Skill and knowledge demands	Equal	Equal	Equal	Equal
Responsibility demands	Low	Moderate	Moderate	Low

102. *Hayward v. Cammell Laird Shipbuilders Ltd.*, [1984] INDUS. REL. L. REP. 463, 467.

calculation.”¹⁰³ Looking broadly at the jobs’ similarities and differences was “consistent with industrial common sense.”¹⁰⁴ There was, in the legislation,

nowhere to be found a requirement to adopt any particular method of assessment; had there been a desire on the part of the legislature that a particular method should be used it seems likely to us that a specific requirement would have been made. We find that the method used was, in fact, adequate for its particular purpose. Only if we considered that the expert had gone badly wrong would we feel justified in interfering. We do not think that he has done so.¹⁰⁵

In the second example, *Wells v. F. Smales & Son (Fish Merchants) Ltd.*,¹⁰⁶ fourteen women fish packers claimed that their work was of equal value to that of a male laborer paid almost £6.00 more per week. The independent expert who evaluated the claims found that the applicants performed a range of tasks, and decided to examine the content of the individual tasks performed by the packers and the comparator. Because of the variations in job patterns and the likely variations in value between them, the expert decided to value the component tasks individually, and then calculate from these comparisons a set of “personal values” reflecting the proportion of time spent on each. He spent nearly two weeks at the factory.

The four main factors considered were: a) skill and experience, which embraces “all matters involving expenditure of time by the worker in fitting himself/herself for the job;”¹⁰⁷ b) responsibility, “limited to product materials, plant and equipment;”¹⁰⁸ c) working conditions, “covering unpleasant or inimical surroundings, hazard and similar conditions;”¹⁰⁹ and d) effort of various kinds. Each of these four factors was divided into eight subdivisions. The expert originally wished to avoid attaching numerical values to the assessments “because this can give an impression of accuracy which is not justified by the subjective nature of the basic judgments,”¹¹⁰ but he decided that some form of numerical value would have to be used to apply the percentages shown in the time assessments. The “simplest method”¹¹¹ was to use values from zero to eight, that is two units for each main level within each factor.

103. *Id.* at 469.

104. *Id.* at 470.

105. *Id.*

106. 2 EQ. OPP. REV. 24 (Indus. Tribunal 1985).

107. *Id.* at 31.

108. *Id.*

109. *Id.* at 32.

110. *Id.*

111. *Id.* at 33.

Comparable Worth

The valuations were carried out within sub-factors for each of the thirteen individual jobs and that of the comparator. Scores for the relevant sub-factors were then added to obtain total scores for each main factor. Percentages of time spent on each job by each applicant and the comparator were then applied, and a total numerical score was calculated for each applicant and the comparator under each main factor. Finally, values for all four main factors were added together to obtain a total score for each applicant and the comparator.¹¹²

The scores indicated that nine applicants had higher scores than the comparator's. Five applicants scored between 79% and 95% of the comparator. The expert concluded that the nine applicants who scored higher than the comparator were employed on work of equal value but the five applicants who scored lower were not. The industrial tribunal, however, held that *all* the applicants held jobs of equal value to the comparator since they scored "so closely that the difference between them and the comparator are not relevant or make real material differences [sic]."¹¹³ The industrial tribunal in effect accepted the expert's method, agreed with the majority of the expert's conclusions, and determined that the female applicants' claims justified raising their wages and awarding them back pay.¹¹⁴ These two examples illustrate an approach, the points method, that may be used to compare two or more facially dissimilar jobs in order to evaluate the equivalent job content for equal pay purposes.

3. How "Equal" is "Equal"?

A different problem is how the word "equal" is to be interpreted. The legislative provisions of every Member State except for the Netherlands speak of equal pay for work of equal value. The Netherlands provides that, for calculation purposes, in the absence of a male worker doing work of equal value, work of *approximately* equal value will suffice.¹¹⁵

Even a standard of equality may be flexible. In *Wells v. Smales*,¹¹⁶ the industrial tribunal took a realistic approach to the problem of equality. Other courts have not been as flexible or have confronted situations where even a realistic approach could not allow a finding of equality.¹¹⁷

112. *Id.* at 35.

113. *Id.* at 30.

114. *Id.*

115. Netherlands Equal Wage Act, *supra* note 72, § 3(1).

116. 2 EQ. OPP. REV. 24 (Indus. Tribunal 1985).

117. *See, e.g.,* Brown & Royle v. Cearn & Brown Ltd., 6 EQ. OPP. REV. 27 (Indus. Tribunal 1985).

For Member States, two further problems have arisen in interpreting the word "equal." One problem arises where the value of the woman's job is *higher* than that of the man's job yet she is paid less. In a number of cases, the Irish Labour Court has held that where the job demands on the claimant are higher than those made on her comparator, her work could not be described as being "equal" in value, and the woman was thus unsuccessful even though her job was *more than equal*.¹¹⁸ The second problem is the reverse of this: A woman performs job A, which is less skilled and less responsible than job B filled by a man, yet the woman earns less than the man would were he doing job A. The Irish Labour Court has held that Irish law provides no remedy for this situation.¹¹⁹ These problems remain largely unresolved in most Member States.

4. Total Package Approach

To some extent, the effect of the limitations discussed above are eased by the agreement in Member States that different factors may be balanced against each other.¹²⁰ In Ireland, for example, one may balance the demands of physical work against the concentration required in particular skills. This has become known as the "total package" approach. The case in which this approach was first used, *Pauwels Trafo Ltd. and 15 Women Winding Machine Operators*,¹²¹ best illustrates the "total package" concept. The Equality Officer concluded that there was "no method" to determine

with mathematical precision if the equation between each woman's work and the man's work comes out exactly the same. The Equality Officer

118. Department of Agriculture and ITGWU, Determination Under the Anti-Discrimination (Pay) Act No. 6-79 [hereinafter cited as DEP No.], THE LABOUR COURT, 33d ANNUAL REPORT (1979) [hereinafter cited as LAB. CT. ANN. REP. with volume and year]; 29 Female Employees and A Board Telecom, DEP No. 6-84, 38 LAB. CT. ANN. REP. (1984); One Female Employee v. Arthur Guinness Son & Co. (Dublin), DEP No. 11-83, 37 LAB. CT. ANN. REP. (1983). The claimants in the *Guinness* case have appealed to the High Court. Nesbitt, *supra* note 69, at 10, col. 3.

119. See, e.g., Department of Agriculture and ITGWU, DEP No. 6-79, 33 LAB. CT. ANN. REP. (1979). It also appears that British law gives no remedy for such wage discrimination. During the consultation on the drafting of the new legislation, the Union Trade Congress pressed for a definition of equal value that would eliminate all possible discrimination from any aspects or conditions of employment that related to the sex of the worker concerned. Its comments reiterated the organization's earlier British law of a "national man" test. This test would consider, in circumstances in which work was exclusively or predominately performed by females, what the rate of pay would be for male employees with the same or substantially similar skills, responsibility and service carrying out the work under the same or substantially similar degrees of effort.

120. For a discussion of the theoretical problems of aggregating interfactor comparisons, see generally, A. MACKAY, ARROW'S THEOREM: THE PARADOX OF SERIAL CHOICE 61-77 (1980). I am grateful to Les Green for this reference.

121. Recommendation Issued by Equal Pay Officers, No. 48/81, 35 LAB. CT. ANN. REP. (1981) [hereinafter cited as EP No.].

Comparable Worth

must, therefore, take a practical approach to the work under examination and determine whether the total package of every individual's work under examination can be reckoned as being of equal value.¹²²

Similarly, a recent French government circular interprets the 1983 French law's definition of equal value as providing that "equality of value must be recognized whenever, despite the differences between the jobs being compared, each job, *when assessed globally*, involves a comparable aggregate of knowledge and skills"¹²³ Thus, while there are many difficulties inherent in the term "equal value," there are suggestions and solutions that can go a long way toward resolving the most troublesome of these difficulties.

B. *The Scope of Comparison*

The second major issue concerning the substantive law of equal value concerns the scope of comparison in comparable worth evaluations. In other words, which employers, facilities, and job descriptions can be reached by equal pay legislation? Theoretically, comparison between men and women¹²⁴ is possible in numerous circumstances: between groups in the same establishment or the same undertaking; between groups in enterprises in the same industry or occupation; between all other employees with similar levels of pay or movements in pay, as shown by earnings surveys or indices of earnings.¹²⁵

Despite this range of possibilities, Member States have actually adopted a limited scope of comparison. Under British legislation, the men and women compared must work in the "same employment;"¹²⁶ that is, they must be employed by the same employer in the same establishment. Section 1 of the Equal Pay Act permits comparison with men in another establishment of the same employer only if "common terms and conditions of employment are observed" at the two establishments. Comparison may also be made with employees at establishments of *other* employers where there are common terms and conditions, but only if the

122. *Id.*

123. See *supra* note 70. In Britain, the *Hayward* and *Wells* cases adopt a similar approach. See *supra* notes 95-114 and accompanying text.

124. All Member States apparently permit male and female claimants to make an equal value complaint and do not specifically require a male to be employed in a female-dominated occupation before being eligible as a claimant. However, a claim by a male in a non-female-dominated occupation is likely to be defended easily by an employer under the material factor and equivalent defenses, see *infra* notes 139-41 and accompanying text. The Ontario Green Paper proposes to restrict the coverage of Ontario legislation to allow only female employees and employees in female-dominated occupations to maintain claims. ONTARIO GREEN PAPER, *supra* note 12, at 18-19.

125. See Kessler, *Comparability*, in *PAY POLICIES FOR THE FUTURE* 85 (1981).

126. Equal Pay Act, *supra* note 51, § 1(b).

employers are "associated." Such association occurs if one is a company that the other (directly or indirectly) controls or if both are companies that a third person controls.¹²⁷

Selecting the appropriate comparisons within the establishment is difficult and very important to the applicant's success. Recent British industrial tribunal decisions have, however, given some assistance here. In one case, a "nursery nurse" employed by the local authority claimed that her work was equal in value to that of higher paid male clerical workers. The tribunal granted discovery.¹²⁸ The Employment Appeal Tribunal upheld this order, reasoning that the woman had a prima facie case of disparity because of a joint recommendation by the employers and the union admitting that there was a disparity in the local authority's comparison between nursery nurses and nursery staff. As a result of these discovery orders, eleven male employees were nominated as comparators. Though she was successful at the discovery stage, the nurse lost at the preliminary stage before the industrial tribunal.¹²⁹ The applicant and comparators had a common employer, but they were not employed at an establishment where "common terms and conditions of employment" were observed for employees of the relevant groups. The contractual terms relating to work hours and holidays of the employees were sufficiently different to go "to the heart" of the contracts.¹³⁰

The Irish Anti-Discrimination Pay Act provides that "a woman . . . employed in any place . . . shall be entitled to the same rate of remuneration as a man who is employed in that place by the same employer (or an associated employer . . .), if both are employed in like work," and that "place includes a city, town or locality."¹³¹ The inclusion of the "place" restriction in the Act was designed to ensure that legitimate regional differences in pay would not be disturbed. The restriction may prevent a female worker from bringing a claim where there is no male comparator

127. See, e.g., *Hasley v. Fair Employment Agency*, EP No. 8/85 (unreported Northern Ireland Industrial Tribunal decision, Sept. 9, 1985).

128. *Clwyd County Council v. Leverton*, [1985] INDUS. REL. REP. 197. See also *Langley v. Beecham Proprietaries* (unreported industrial tribunal decision, Nos. 2321/85 to 2335/85, Aug. 29, 1985), *digested at* 4 EQ. OPP. REV. 45 (1985).

129. The employer argued that the comparators nominated were unsuitable because the grades with which the comparison was made were filled mainly by females. The tribunal found that though a majority of the employees in the grades were female, a significant number were male. The eleven comparators were not remote exceptions, and comparison was appropriate. See *Clwyd County Council v. Leverton*, [1985] INDUS. REL. REP. 197.

130. *Id.*

131. *Anti-Discrimination (Pay) Act*, *supra* note 59, § 2(1). See also 35 LAB. CT. ANN. REP. 138-43 (1981).

Comparable Worth

in the same “place,” but where there would be a comparator in the same employment if the constraint on place were removed.¹³²

While a centralized agreement applying to all employees does not make their place of work necessarily “the same,” neither do different agreements for workers employed in the same place necessarily mean that those employees cannot be compared. For example, in a 1981 case, the work of employees in three separate establishments was considered.¹³³ The employer argued that because the wage agreement with the catering staff in one place differed from that with the catering staff at the other two, the duties of the staff at the first could not validly be compared with the staff duties at the other two. The Equality Officer rejected the employer’s arguments, and found the comparison valid.

A similar issue arose in France in the *Essilor* case¹³⁴ under a 1972 equal pay law. In 1981, the court ruled that French equal pay legislation did not apply where an undertaking (“enterprise”) failed to provide equal pay for the same work or work of equal value done by employees working in different plants (“établissements”) in locations about sixty-one miles apart. The court noted that the management at the two plants operated independently of each other and that terms and conditions of employment were distinct. New French legislation, on the other hand, now provides that “differences in remuneration between establishments of a single undertaking may not be based on the fact that the workers of such establishments belong to either sex.”¹³⁵ According to a French government circular, this legislation “allows employees to contest before the tribunal any difference in pay based on sex, found between the distinct establishments of one and the same undertaking.”¹³⁶

The requirement of common employment appears to prevent women from comparing themselves with contract workers employed *indirectly* by their employer. This is particularly noteworthy since, if equal value is effectively enforced, companies may use such contract workers to avoid comparison between men and women in different types of jobs. Nor do

132. Irish Transport and General Workers Union, DEP No. 8-84, 38 LAB. CT. ANN. REP. (1984). See also Midland Health Board and Stokes, EP No. 26/82, 36 LAB. CT. ANN. REP. (1982); Department of Posts & Telegraphs and Six Telephone Officers, EP No. 9/83, 37 LAB. CT. ANN. REP. (1983). But see PMPA and Three Women Insurance Officials, EP No. 29/81, 35 LAB. CT. ANN. REP. (1981).

133. Oslanna Iompair, Eireann Teo. and Nine Female Employees, EP No. 38-81, 35 LAB. CT. ANN. REP. (1981).

134. [1982] Cass. civ. soc., Arret N. 1.179 (Cass.) (Apr. 11, 1980); Bull. Civ. Arret N. 1.180 (Rejet), Pourvoi N. 81-40.347 (Jan. 23, 1981).

135. French Equal Pay Law, *supra* note 70, § 5.

136. French Gov’t Circular on Equal Pay, para. 1.3.2 (French Gov’t Publishing Office 1985) (copy on file with the author).

these approaches give much hope to women employed in homeworking where work is done for an employer at the home of the worker herself, or to those women employed by small, single establishment employers in work places where few or no men work and where the types of jobs are limited.

In contrast to the limited comparison of jobs available under British, Irish, and French law, Dutch law provides:

[W]here no work of equal or approximately equal value is done by a worker of the other sex in the undertaking where the worker concerned is employed, the basis shall be the wage that a worker of the other sex normally receives, in an undertaking of as nearly as possible the same kind in the same section [of industry]."¹³⁷

These differences illustrate that the debate as to how far equal pay legislation should allow comparison between jobs is a continuing one. The resolution of the issue in favor of a broad or narrow permitted comparison is likely to be a crucial element in determining whether the equal value standard will have a marked or a relatively limited effect.

C. *The Employer's Defense*

Now I turn to the third major issue: What, if any, defenses may an employer use to justify differences in remuneration between a man and a woman engaged in work of equal value in the sense of equal in job content? Legislation in all the Member States—except for Ireland, the United Kingdom, and the Federal Republic of Germany—does not explicitly specify available defenses. In Ireland, employers may justify a variation if they can show “grounds other than sex”¹³⁸ for a disputed variation in pay. In Britain, employers will succeed if they can prove a

137. Netherlands Equal Wage Act, *supra* note 72, § 3(2). The European Commission's 1979 Report on the implementation of the principle of equal pay argued that the 1975 Directive required a wider comparison than that of just the “same establishment.” Rather, “[t]he ‘value of the work’ of the two posts or duties which are to be compared must therefore be established, where there is in the undertaking or undertakings in question no appropriate system for reevaluating jobs, simply ‘on an equitable basis’ having regard to the available data,” and in accordance with the terms used in the Dutch law. 1979 REPORT, *supra* note 87, at 140. See generally Crisham, *The Equal Pay Principle: Some Recent Decisions of the European Court of Justice*, 18 COMMON MKT. REV. 601 (1981); Plender, *Equal Pay for Men and Women: Two Recent Decisions of the European Court*, 30 AM. J. COMP. L. 627 (1982).

To extend the scope of the Act to allow comparison with an employee in another employer's establishment would inevitably necessitate answering a number of questions, including whether there should be restrictions on the geographical area of comparison, clarification of what types of employment are comparable, and specification of which method of comparison is to be adopted. See Szyszczak, *Pay Inequalities and Equal Value Claims*, 48 MOD. L. REV. 139, 150-57 (1985).

138. Anti-Discrimination (Pay) Act, *supra* note 59, § 2(3).

Comparable Worth

“genuine material factor which is not the difference of sex.”¹³⁹ This replaces the earlier and more restrictive “material difference” defense of the 1970 Act. In Germany, the employer must prove that “material reasons unrelated to a particular sex” justify the differential.¹⁴⁰ Similarly, the case law on valid employer defenses to complaints of unequal pay also comes mainly from Britain and Ireland.¹⁴¹

Employers have in the past raised a wide range of defenses. Some employers have argued that they receive different average profits from the work that men perform than from the work that women do. But is this a valid defense? There is general agreement in the case law that an employer may not claim as a defense that the claimant is a female and the comparator is a male. Arguments have long been made that women are statistically more likely to miss work, that they cost more to employ, and that, therefore, they should be paid less. These arguments apparently have not been accepted in any Member State as sufficient to defend against a claim of a violation of equal pay legislation. However, other defenses raised by employers have given rise to more variation in treatment in the courts of various Member States.

1. Protective Provisions

A difficult problem arises when other legislative provisions or a collective agreement afford extra protection to women. Is the employer permitted to justify a lower rate of remuneration on a quid pro quo basis? The German Federal Labor Court was among the first to confront this issue. In 1974, the court held that the prohibition of night work for women must not be used to weaken the principle of equal pay.¹⁴² This approach has been incorporated in the German law of 1980.¹⁴³ The courts of some other Member States have adopted this approach. In Italy, the Court of Cassation recently held that a lower rate of remuneration for women could not be justified because of the working mother’s statutory right to be absent occasionally from work.¹⁴⁴

139. Equal Pay (Amendment) Regulations, *supra* note 76, § 1(3).

140. Gesetz über die Gleichbehandlung von Männern und Frauen am Arbeitsplatz und über die Erhaltung von Ansprüchen bei Betriebsübergang (Arbeitsrechtliches EG-Anpassungsgesetz), Aug. 13, 1980, BGBI. I 1308, art. I(r)(1) (“*nicht auf das Geschlecht bezogene, Schliche Gründe*”) [hereinafter cited as Arbeitsrechtliches EG-Anpassungsgesetz].

141. In Britain, all but two cases have been interpretations of the earlier “material difference” defense. There has been little case law on “material factor.”

142. 5 AZR (Ger. Fed. Labor Ct.) 567-73 (Sept. 11, 1974).

143. Arbeitsrechtliches EG-Anpassungsgesetz, *supra* note 140, art. I(3).

144. Sentence No. 42, Jan. 5, 1984; see Ballestrero, *Equality Between Male and Female Workers in Italian Law*, in NATIONAL REPORTS, *supra* note 13, at 7.

2. Personal Factors

In a number of cases, British courts have allowed an employer to justify lower pay to women because of other factors *personal* to the particular men or women being compared. Unequal pay has been held to be justified by a number of personal differences such as: a different performance rating, where the rating was based on a system of performance appraisals; seniority, where employees receive periodic pay increases based on their tenure with the employer; and "red circling," a procedure whereby the position of an employee is re-evaluated and, as a result, downgraded, but his or her wages are temporarily fixed until the wages appropriate to the downgraded position are equivalent to his or her wages.¹⁴⁵

In these types of cases, the courts have been careful to scrutinize the employer's justification. If the court finds that the personal difference alleged is merely a pretext for intentional discrimination, or if intentional discrimination was a causal element in the variation, the employer will lose. Problems of interpretation have arisen, however. In particular, there has been a question about whether an employer should be permitted to rely on a material factor that has its roots in direct discrimination in the past. The answer in this instance has, on the whole, been "no."

3. Grading Structure

In a number of Irish cases, an employer has argued that differential pay resulted from women occupying a lower level on the company's grading structure. Only where the grading structure is held not to be sexually discriminatory did the employer's argument succeed. In one case,¹⁴⁶ the company introduced a unisex grading structure to replace a discriminatory one. The claimants sought equal pay with female clerks who were on the highest grade of the new scale. The claim failed. The equality officer held that the salary scales of the claimants differed from those of the women because they held different positions in the company grading structure. The grading structure did not, at the time of the claim, discriminate on the basis of sex; therefore, the differences between the claimant's rates of remuneration and those of the two women were on grounds other than sex.

When the grading structure is found to be discriminatory, the employer will not prevail. Particularly interesting are the factors taken by

145. See, e.g., *Snoxell v. Vauxhall Motors Ltd.*, [1978] 1 Q.B. 11; *Sun Alliance Ltd. v. Dudman*, 1978 INDUS. CAS. REP. 551; *Shields v. E. Coomes (Holdings) Ltd.*, 1978 INDUS. CAS. REP. 1159.

146. *Calor Kosangas Ltd. and Nine Male Clerical Employees*, EP No. 41/80, 34 LAB. CT. ANN. REP. (1981).

Comparable Worth

Irish equality officers to indicate a discriminatory grading structure. Where only women are employed in the company's lowest paid grade and where the work being performed by women is of equal value to work performed by men, then an argument that the difference in pay is due to the grading structure will rarely be accepted.¹⁴⁷

In some Irish cases, the continuing effect of past discrimination has also invalidated the employer's argument. In one case, the Equality Officer concluded that:

the fact that only women are employed in the grade of carriage cleaners and at a salary below that of any male workers in the grade structure shows an obvious element of selective treatment. This perpetuates the situation as it existed prior to the [equal pay legislation] one which the Act was designed to remedy.¹⁴⁸

In another case,¹⁴⁹ the Labour Court held even more clearly that, though the Act did not prohibit differences in pay based on different recruitment, career, and promotion prospects, where the "difference in the basis of recruitment was in the past related to the sex of the recruits,"¹⁵⁰ the court would not accept the employer's argument that pay differentials were legitimately based on "grounds other than sex."¹⁵¹ This reasoning should be adopted by any tribunal enforcing equal pay legislation so that facially neutral selection criteria neither perpetuate the past effects of discrimination nor mask new discrimination.

4. Disparate Impact

Perhaps the most difficult issue today in the implementation of equal pay legislation arises when the courts consider an employer's attempt to justify unequal pay by relying on factors that, though facially neutral, have a disparate impact on women. Such a defense, in other words, disproportionately disadvantages women as a group. The resolution of this issue is vital to how broad the effective scope of equal pay legislation will be. Though the courts of a number of Member States have considered defenses that have a disparate impact, no common approach has yet emerged in the national courts. Consideration of two specific issues illustrates the general problem: part-time workers and market forces.

147. *Ostlanna Iompair, Eireann Teo. and Nine Female Employees*, EP No. 38/81, 35 LAB. CT. ANN. REP. (1981).

148. *C.I.E. and 6 Female Carriage Cleaners*, EP No. 6/80 at 6, 34 LAB. CT. ANN. REP. (1980).

149. *Irish Civil Service Building Society and Female Clerical Staff*, DEP No. 7-78, 32 LAB. CT. ANN. REP. (1978).

150. *Id.*

151. *Id.*

a. Part-time Work

Many of the most important cases concerning employer defenses relate to the part-time worker issue. Given that part-time workers are more often women than men, is it equitable or legal to pay part-time workers a lower rate per-hour than full-time workers (usually male) who do the same tasks? The Dutch Law of 1975 provides that "the wage to which the worker would be entitled if in full-time employment shall be proportionately reduced in so far as it is calculated on the basis of a unit to time."¹⁵² Most Member States, however, appear to leave this question to the judiciary.¹⁵³

In one British case, a female part-time worker sought pay equal to that received by male full-time workers.¹⁵⁴ The English Employment Appeal Tribunal held that any difference in pay must be "objectively justified even if this confers on employees greater rights than they would enjoy under article 119 of the EEC Treaty."¹⁵⁵ The tribunal therefore held that to show a "material difference," an employer must show that the lower pay for part-time workers is reasonably necessary to achieve some justifiable objective other than a gender-related objective—for example, greater efficiency. It would not be enough to show that the employer intended to achieve this legitimate objective; the employer would have to show that the different objective was actually achieved.

A recent Irish case took a similar approach.¹⁵⁶ Nineteen part-time female employees working in a university college claimed a rate of pay equal to that of a male colleague who worked full-time. The college did not dispute that the claimants were engaged in work similar to the male comparator's, but argued that his pay was greater because he worked

152. Netherlands Equal Wage Act, *supra* note 72, § 6.

153. Whether a pension provided by an employer to workers may lawfully exclude part-time workers is the subject of continuing litigation in Germany. The Federal Labor Court has referred a question relating to the requirements of the 1975 Directive, *supra* note 42 and accompanying text, and the EEC Treaty, *supra* note 14, to the ECJ. Since the case began, new legislation relating to part-time work provides that proportional payment is required for part-time work unless there are objectively justified reasons for the differences (e.g., payment for a daily meal to full-time workers but not part-time workers who did not stay over lunchtime at the plant), or unless provided for by the collective agreement. Such information was supplied to the author by K. Bertelsmann.

154. The English Employment Appeal Tribunal (E.A.T.), initially referred the issue to the European Court of Justice which replied somewhat ambiguously. *See Jenkins v. Kingsgate (Clothing Productions) Ltd.*, 1981 E. Comm. Ct. J. Rep. 911 (Preliminary Ruling). When the ECJ judgment was considered by the E.A.T., the E.A.T. decided that it was possible for British law to confer greater rights on the woman than European law could confer. It thus applied a more restrictive test to whether the employer could use, as a defense, the fact that a woman worked part-time than the ECJ was prepared to do. 1981 INDUS. CAS. REP. 715.

155. 1980 INDUS. CAS. REP. 6.

156. *St. Patrick's College, Maynooth and 19 Female Employees*, EP No. 4/84, 38 LAB. CT. ANN. REP. (1984), *recommendation upheld on different grounds*, DEP No. 10-84, 38 LAB. CT. ANN. REP. (1984).

Comparable Worth

full-time, not because of sex differences. The dispute arose because of the widespread practice throughout the Irish public service of not paying incremental increases in pay to part-time workers. The equality officer accepted that the College's policy was not intended to reduce the pay of women workers as such. Nevertheless, he considered that a requirement to work full-time to qualify for a higher rate of pay could *possibly* constitute sex discrimination. He reasoned that "a substantially greater proportion of men than women are in practice able to work full-time because of difficulties encountered by women with children, and not generally by men, in arranging to work on that basis."¹⁵⁷ The equality officer continued:

[I]n considering whether the College's practice of paying the claimants a lower rate of pay because they work part-time is *actually* indirectly discriminatory on the basis of sex, it seems relevant . . . to consider whether the practice is essential for some [other] reason which is objectively justifiable on grounds which do not discriminate in any way on the basis of sex.¹⁵⁸

b. *Market Forces*¹⁵⁹

Employers have also pointed to market forces as reasons for differences in remuneration. They have argued that it is necessary to maintain a balance between the internal wage structure and the external wage structure. The employer is, in effect, claiming that external job-for-job comparison should be used to limit internal factor comparison, which otherwise would conclude that two "different" jobs generally compensated differently should instead be paid equal wages.

Interpreting the earlier "material difference" defense in the British Equal Pay Act, Lord Denning on the Court of Appeal¹⁶⁰ confined the defense to the "personal equation of the woman as compared to that of the man,"¹⁶¹ such as much longer length of service, or superior skill or qualification, or greater output or productivity, or "red circling." The court, however, would not consider in its analysis any *extrinsic* forces that led to the man being paid more. An employer could not avoid his obligation under the Act by saying, "I paid him more because he asked for more," or "I paid her less because she was willing to work for less." If any such excuses were permitted, Lord Denning held, "the Act would be a dead letter. Those are the very reasons why there was unequal pay

157. *Id.* at EP No. 4/84, para. 32.

158. *Id.*

159. In addition to the scholarly articles cited, *supra* notes 76 & 137, see *Market Factor Defence*, 5 EQ. OPP. REV. 9 (1986); Schofield, *A Material Factor—Defences to Claims for Equal Pay*, 47 MOD. L. REV. 740 (1984).

160. *Clay Cross v. Fletcher*, [1979] 1 All E.R. 474.

161. *Id.* at 477.

before the statute. They are the very circumstances in which the statute was intended to operate."¹⁶²

Since that case, however, the authority of this rejection of the "market forces" argument has been weakened. In a more recent case,¹⁶³ a Scottish appeals court upheld an employer's market forces defense. A Health Board argued that the almost £3,000 difference between a male prosthetist and a woman claimant was justified because she had been recruited directly into the National Health Service, whereas he had transferred in at the higher rate that he had previously enjoyed in the private sector. Although all of the prosthetists at the higher rate were men, and all but one at the lower rate were women, the majority of the court upheld the differential because it was essential to recruit from the private sector at higher rates in order to staff the service.

Two more recent cases on "equal value," in which the market forces argument has been used, provide some limited additional guidance. In one, the tribunal declared that where an employer claimed he had relied on economic factors or market forces, no evidence had actually been adduced to prove those factors, "even were they permissible considerations, which we do not consider is the case."¹⁶⁴ In a second case, an employer argued at the preliminary hearing that a genuine material factor defense was available because the nursery services provided by the local authority were not statutorily required.¹⁶⁵ Accordingly, if an order by the tribunal substantially increased the expense to local authorities of employing nursery nurses, such an increase could reduce such services available to the community. The tribunal was "skeptical" about that argument for two reasons: it "could be construed as being *in terrorem* of the tribunal;" and "market forces" arguments were "less clearly capable" of being a material factor.¹⁶⁶ The tribunal did not consider that it was appropriate to reach a final decision on that issue. It did, however, decide that it was for the employer

to show that the factor upon which they rely was reasonably necessary to achieve some objective other than an objective related to the sex of the worker. It is too high a burden to call on them to prove necessity at one extreme; while mere convenience on the other hand plainly would not suffice.¹⁶⁷

162. *Id.*

163. *Rainey v. Greater Glasgow Health Board*, [1986] INDUS. REL. L. REP. 414 (Court of Session). For an interesting critique of the earlier E.A.T. decision, see Fredman, *Market Forces and Equal Pay: Rainey v. Greater Glasgow Health Board Eastern District*, 13 INDUS. L.J. 122 (1984).

164. *Scott v. Beam College Ltd.*, 3 EQ. OPP. REV. 38, 40 (Indus. Tribunal 1985).

165. *Clwyd County Council v. Leverton*, [1985] INDUS. REL. REP. 197.

166. *Id.* at 199.

167. *Id.* at 199.

Comparable Worth

Employers in the EEC thus have raised various defenses to claims under equal pay legislation. The treatment of these defenses by tribunals has differed from country to country, but generally they have scrutinized these defenses carefully and have eliminated those that run counter to the core purposes of the equal pay statutes. A number of these defenses, however, have yet to be resolved in many Member States. Before assessing the ultimate impact of equal pay legislation, it is necessary to await the outcome of the conflicts and see what their effect is on the practical implementation of comparable worth.

D. *The Meaning of Pay*

The fourth substantive legal question concerns which benefits provided by an employer to his employees are to be regarded as "pay" or "remuneration." The issue at the heart of this recurrent problem is how closely employers should be held to the principle of equality in the provision of benefits, which from one point of view are acts of benevolence, but from another are the tangible results of the employee's contribution to social welfare. The courts of the Member States have generally considered the question in the context of claims by women doing the same or similar work as men. Yet, the courts appear even here to have taken inconsistent positions.¹⁶⁸ In equal value cases, the question becomes even more complicated; this will be examined by looking again at the British case of *Hayward v. Cammell Laird*.¹⁶⁹ First, however, one must consider the issue in the context of "same" or "similar" work.

1. The Nexus Between Work and Benefit

Perhaps the most restrictive approach to the question of what constitutes pay is to be found not in case law but in legislation. The 1981 Greek law on equality defines "remuneration" as "the wage, together with any other additional benefits in cash or in kind awarded by the employer to the worker either directly or indirectly *in exchange for work performed*."¹⁷⁰ The narrowness of this definition is eased by the later provision that "marriage allowances and child allowances . . . shall hence forth be paid in full to the spouse or the parent who works, independent of his or her sex."¹⁷¹ Nevertheless, the definition appears narrower than that in previous Greek constitutional case law.¹⁷² It also leaves open to

168. For the interpretation by the European Court of Justice, see Worringham and Humphreys v. Lloyds Bank Ltd. (Case 69/80), 1981 E. Comm. Ct. J. Rep. 767.

169. [1984] INDUS. REL. L. REP. 463. See *supra* notes 95-105 and accompanying text.

170. 1981 Law on Equality, *supra* note 79, § 4(2).

171. *Id.* § 4(5).

172. See, e.g., 1983 O.P. III 520 (decision 520/1983 of the Cabinet).

doubt whether all the bonuses and allowances paid by employers, which in Greece often constitute very sizeable complements to the basic salary and determine its real value, will be considered part of a worker's remuneration. This doubt is due to the uncertainty of what will qualify as a benefit awarded "in exchange for work performed."¹⁷³

In Irish law, the definition of "remuneration" more exactly follows that of article 119 of the EEC Treaty, including "any consideration, whether in cash or in kind, which an employee receives, directly or indirectly, in respect of his employment from his employer."¹⁷⁴ This has been interpreted to include bonus payments, marriage gratuities, preferential loans, subsidized living accommodations,¹⁷⁵ commissions paid to sales assistants,¹⁷⁶ disability benefits for injuries arising under the terms of an income continuance plan provided and paid for by the company,¹⁷⁷ and pensions.¹⁷⁸ As yet, there exists no commonly accepted definition of "pay," and the legal recognition of what constitutes remuneration differs among Member States.

2. "Pay" and Equal Value Claims

In *Hayward v. Cammell Laird*, the industrial tribunal decided the applicant's work was of equal value to that of the comparators. After *Hayward*, an "equality clause" was deemed to operate in British law in relation to any variation between the applicant's contract of employment and those of the male comparators. The tribunal did not determine the precise effect of this, leaving open a further application to the tribunal if the parties failed to agree. Despite negotiations after this first tribunal decision, agreement was not reached on how the decision would be implemented, and Hayward returned to the tribunal.¹⁷⁹

173. Koukoulis-Spiliotopoulos, *La législation hellénique de l'équité des hommes et des femmes*, in NATIONAL REPORTS, *supra* note 13, at 36.

174. Anti-Discrimination (Pay) Act, *supra* note 59, § 1(1).

175. Cleary & Co. (1941) and 47 Female Employees, DEP No. 2-84, 38 LAB. CT. ANN. REP. (1984).

176. *Id.*

177. Shield Insurance Co. Ltd. and 2 Female Employees, DEP No. 8-84, 38 LAB. CT. ANN. REP. (1984).

178. In a series of cases, the Irish Labour Court has decided that "remuneration" included occupational pensions. *Linson Ltd. and ASTMS*, DEP No. 2-77, 31 LAB. CT. ANN. REP. (1977); *Department of Public Service and Robinson*, DEP No. 17-79, 33 LAB. CT. ANN. REP. (1979); *University College, Galway and Employment Equality Agency*, DEP No. 2-85, 39 LAB. CT. ANN. REP. (1985). Despite at first suggesting that the issue be appealed to a higher court on a point of law, *Linson Ltd. and ASTMS*, *supra*, the Labour Court has held since 1979 that the inclusion of pension schemes within the scope of remuneration "is now firmly established." *Review of Decisions on Equal Pay*, 33 LAB. CT. ANN. REP. 107 (1979) (Appendix XIII).

179. *Hayward v. Cammell Laird Shipbuilders Ltd.*, 4 EQ. OPP. REV. 12 (1985).

Comparable Worth

The employer contended that he did not have to pay the applicant the same basic wage and overtime rates as the male comparators because, considered as a whole, the applicant's terms and conditions were not less favorable. Hayward argued that once she had shown that she did work of equal value, she was entitled to point to specific terms in her contract that were less favorable than the comparators' terms, and then to have the terms amended. The industrial tribunal declined to make the unqualified declaration that the plaintiff had requested that her basic and overtime pay be the same as that of her male comparators. Instead, it applied what it considered to be a purposive interpretation of article 119, which referred to "any other consideration whether in cash or in kind, which the worker receives directly or indirectly in respect of his employment from his employer,"¹⁸⁰ and which considered the total remuneration involved.

The problem was recognized by the tribunal as not having arisen previously because,

in dealing with matters on the earlier basis of "like work," the possibility, indeed the probability, was that those whose jobs were being compared would be subject to similar overall terms and conditions of employment coming, as they did, from the same broad grouping. It was unlikely that the applicant would turn out to be on staff conditions whilst the other was hourly paid.¹⁸¹

Newer equal value claims had broadened the range of possible comparisons considerably and, in consequence, had increased the likelihood that in such claims "the comparison being made may very well be between persons whose basic terms and conditions of employment are different, one being on staff conditions and the other regarded as a manual worker."¹⁸² This is exactly what happened in the *Hayward* case itself.

To accept Hayward's argument, however, might encourage an escalation of wage claims. If the tribunal simply put the applicant's basic rate of pay and overtime up to that of her comparators then,

far from being as well off as they are, she could, in fact, be better off. The corollary to that is not, of course, hard to see. There would, if the matter is, in fact, properly viewed in that way, and so dealt with, almost inevitably be a leap-frogging effect leading to consequential claims from the other involved in the situation.¹⁸³

Furthermore, the tribunal believed that the general trend in labor law was toward a broader view of pay:

180. *Id.* at 13.

181. *Id.* at 14.

182. *Id.* at 14.

183. *Id.* at 15.

It seems to us quite clear that in modern economic conditions, many of the benefits of employment are, in fact, received in forms other than cash. It may well be that, in the past, the narrower view of the term 'pay' as money and nothing else, was both acceptable and, in relation to earlier times, realistic. . . These things are not immutable, and new norms will emerge over a period or time, as to what is acceptable. So we believe it to be with pay, and that it would not now be sensible to cling to a narrow and outmoded view of that term.¹⁸⁴

So, while "fully appreciat[ing]" that there was a risk that the tribunal would "become involved in a complicated balancing act beyond our capabilities and, indeed, outside our jurisdiction," it decided that this should not deter it from "seeking to avoid too narrow a construction."¹⁸⁵

The tribunal did, however, leave one major point undecided: whether "contingent or potential rights" (e.g., sick pay) should be included. The tribunal wrote: "Whilst not, at this stage, expressing any final or definitive view, we entertain considerable doubts, and feel that our ultimate conclusions on the point might well prove to be at variance with the respondent [Cammell Laird]. The matter requires further consideration."¹⁸⁶ The tribunal quite properly recognized many of the dangers inherent in Hayward's claim, yet it declined to resolve most of them. These problems will be worked out in various ways in the future, though it is impossible now to predict how that will be done.

E. *Collective Agreements*

In all Member States, the legal questions examined here have been addressed in the context of a system of collective bargaining. The courts, therefore, have often had to consider when the principle of equal pay as judicially interpreted should supersede and replace voluntary collective arrangements between employers and employees. This theme runs through much of the national case law relating to equal pay, and through labor law generally.

1. Challenging Collective Agreements

Although the decision by the ECJ in *Defrenne*¹⁸⁷ upheld a challenge to the results of a collective agreement, the approach taken in the Member

184. *Id.* at 15.

185. *Id.* at 16.

186. *Id.* *Hayward* has recently been upheld by the E.A.T. See *The Times* (London), June 4, 1986. Cf. *Midland Health Board and Stokes*, DEP No. 2-83, 37 LAB. CT. ANN. REP. (1983) (Irish Labour Court held that subsidized staff accommodation provided by the Board did not constitute remuneration because the accommodation "was only incidentally available").

187. *Defrenne v. Sabena* (Belg. Airlines), 1976 E. Comm. Ct. J. Rep. 455. See *supra* text accompanying note 30.

States appears to vary from country to country. Under the original 1970 British equal pay legislation, for example, where a collective agreement contains any provision applying specifically only to men or only to women, parties to an agreement or the Secretary of State may refer it to the Central Arbitration Committee (CAC) to declare what amendments need to be made in the agreement so as to remove that discrimination between men and women.¹⁸⁸ The extent to which discrimination in collective agreements may be challenged directly is therefore limited and would not appear to permit a successful claim based on equal value.¹⁸⁹ Similarly, a 1979 Italian Court of Cassation decision held that wage and job evaluations made by collective agreements cannot be challenged and annulled by courts unless the criteria adopted are openly discriminatory—where they apply different criteria for men and women.¹⁹⁰

It is equally clear, however, that equal value claims have the potential for indirectly challenging the results of collective agreements. In one case, for example, a British industrial tribunal rejected an argument that a claim was inappropriate because one ancillary effect might be to overturn established bargaining procedures.¹⁹¹ The tribunal commented that the legislation “is indeed a piece of remedial legislation which may have far reaching and often unforeseen consequences.”¹⁹² Thus, though indirect challenges may be successful, direct attacks on the inequity extant in collective bargaining agreements appear to have more chance of success.

2. The Position of Voluntary Job Evaluation Exercises

An equally controversial issue is the extent to which voluntary job evaluation exercises are regarded as determining the question of how value is to be assessed and when jobs are to be regarded as equal. Yet

188. Equal Pay Act, *supra* note 51, § 3. Until 1979, CAC had interpreted this jurisdiction widely in a number of respects. In particular, the CAC went beyond the restriction that an agreement must have a provision applying to men only or to women only, and intervened to alter agreements where no such provision appeared on the face of the agreement but where discrimination nevertheless was found. The Committee's definition of discrimination encompassed not only hidden intentional discrimination, but also cases in which the employer had not completely eliminated the historical concept of a “woman's rate of pay.” See Davies, *The Central Arbitration Committee and Equal Pay*, 1980 CURR. LEG. PROB. 165.

189. The United Kingdom has recently introduced a bill to amend this provision. Sex Discrimination Bill, H. L. (72) 48/3 (1986). This provides that a term in a collective agreement which contravenes the Equal Pay Act, as amended, would be void. *Id.* cl. 2. The bill would preserve an individual's right to complain to an industrial tribunal about any action taken by an employer under the agreement, but would provide no specific remedy against the discriminatory collective agreement. It would repeal section three of the Equal Pay Act of 1970. *Id.* cl. 5.

190. See generally Ballestrero, *supra* note 144.

191. *Leverton v. Clwyd County Council*, Case No. 24349/84 (unreported decision, July 12, 1985), *digested at* 4 EQ. OPPOR. REV. 45 (1985).

192. *Id.* at 46.

again we come to the question faced by the courts of how far the law should interfere with the results of collective bargaining. In this area there appears to be a consensus that these agreements should be given a degree of deference, though there is no agreement on how much deference should be given.

In Ireland, the Labor Court has held that the 1974 Act does not bar the use of the results of a voluntarily agreed job evaluation in the consideration of a claim of equal pay: "[T]he results of a job evaluation exercise can and should be among the considerations which an Equality Officer ought to bear in mind."¹⁹³ The Court went on to hold, however, that while relevant, "[t]hat does not mean that they must be accepted . . ."¹⁹⁴ Indeed, the *Labour Court Review* has noted that while job evaluation schemes have been produced in a number of cases, they have not formed the basis of any decision. Of course, "[t]his may be due to the fact that when produced by one party only the other side usually claims bias."¹⁹⁵

In contrast, it appears that Italian case law provides that the value of the job is "as normally evaluated by collective agreements or company practices."¹⁹⁶ The 1975 Dutch Act is somewhat less voluntaristic in its approach, providing that

work shall be assessed in accordance with a reliable system of job evaluation; to this end recourse shall be had as far as possible to the system customary in the undertaking where the worker concerned is employed. In the absence of such a system the work shall be fairly assessed in the light of the available information.¹⁹⁷

The new British legislation allows an equal value claim to be resisted by an employer on the basis that a voluntary job evaluation scheme has already found the work not to be of equal value.¹⁹⁸ The concern that such a scheme may be sexually biased is explicitly taken into account with respect to already existing studies. Before a tribunal may exclude an equal value claim on the basis of an already existing scheme, it must decide that "there are no reasonable grounds for determining that the evaluation contained in the study was . . . made on a system which discriminates on grounds of sex."¹⁹⁹

193. *Data Products (Memories) Ltd. and Simpson*, EP No. 20/78, 32 LAB. CT. ANN. REP. (1978).

194. *C.H. Arthur and Sales Finance Co. and ITGWU*, EP No. 3/77, 31 LAB. CT. ANN. REP. (1977).

195. *Labour Court Review*, 32 LAB. CT. ANN. REP. 82 (1978).

196. Ballestrero, *supra* note 144, at 5.

197. Netherlands Equal Wage Act, *supra* note 72, § 4.

198. *See Equal Pay (Amendment) Regulations*, *supra* note 76, § 2(A).

199. *Id.* § 2A(2)(a).

Comparable Worth

In one case,²⁰⁰ a British industrial tribunal held that there was no presumption that a voluntary scheme discriminated on the grounds of sex. The burden of proof, the tribunal asserted, lay on the employees to show that there were reasonable grounds for believing that it did discriminate. The tribunal adopted a particularly narrow test for determining whether discrimination can be inferred: whether there is good reason to suppose that any comparative value set by the system on any demand or characteristic would have been given a more favorable value had those determining values not consciously or subconsciously been influenced by consideration of the sex of those on whom the demands would chiefly be made. The tribunal added that there would be sufficient reason for such a supposition if it had found that a traditionally female attribute was undervalued.²⁰¹ The treatment of voluntary job evaluations has differed among Member States and has posed difficulties for all.

3. Scope of Comparison and the Collective Agreement

Although the collective agreement is often seen as a barrier to the implementation of equal value, there is no reason why this has to be the case. The collective agreement may be facilitative in a number of ways, including the determination of the proper scope of comparison. The approaches of the Member States vary on this issue, but are in general quite narrow, and in the case of the United Kingdom, are largely restricted to comparisons within an employer's establishment.

The British Central Arbitration Committee was not so restrictive in its approach. Where, for example, a collective agreement covered an entire trade, women were held to benefit even where there were no men in the establishment in which they were employed.²⁰² Davies has put forward an explanation for the differences in approach between the CAC and the tribunals:

[I]f the parties to the collective agreement have themselves chosen a wider geographical scope for its provisions than the establishment, the Committee may also be permitted to range more broadly, but . . . the industrial tribunal will in general not be in a position to know whether it is safe to do so, unless

200. *Neil v. Ford Motor Co.*, [1984] INDUS. REL. L. REP. 339.

201. *Id.* at 402. For a criticism of this decision, see RUBENSTEIN, *EQUAL PAY FOR WORK OF EQUAL VALUES* 84-85 (1985). The dispute continued after the decision, erupting into industrial protests which in turn led to the appointment of an independent job evaluation panel by the company with the agreement of the unions. The panel found the work of the women sewing machinists to be undervalued by the company's job evaluation system in 8 out of 28 characteristics that the panel recommended regarding. The panel's conclusions were accepted by the company.

202. CAC Award No. 3313 (copy on file with the author).

it can see that common terms and conditions apply in the different establishments and that the employers are the same or, at least, associated.²⁰³

4. Pay as Determined by the Collective Agreements

The extent to which the terms of the collective agreement should be regarded as determining the meaning of "pay" has been an important issue in Italy and West Germany, with apparently inconsistent decisions being reached by the relevant courts. In Italy, a recent decision of the Court of Cassation²⁰⁴ modified its previously wide interpretation and held that whether particular benefits such as extra bonuses and allowances should be regarded a remuneration is to be decided by reference to the collective agreement rather than by applying a more specific pre-existing legal definition.²⁰⁵

In West Germany, however, the Federal Labor Court has taken a different approach in a number of cases. In 1973, for example, the court held that the principle of equal pay in the Basic Law was breached by a term in a collective agreement governing private insurance undertakings.²⁰⁶ The agreement provided that a family supplement was payable once per household to male employees, but only in more limited circumstances to female employees. A woman did not qualify for the allowance, for example, if her husband was a professional who received a higher income than she did and contributed more towards the upkeep of the children. Male workers did not face the same restriction. This was unacceptable to the court.

In 1982, the German Federal Labor Court held that women doing the same work as men have the same claim to additional pay supplements over and above basic rates laid down in the collective agreement.²⁰⁷ In a similar case regarding a collective agreement for the metalworking industry in Berlin which provides that a married person's supplement is only paid to married men, not to married women, the German Federal Labor Court upheld the claims of married women seeking payment of this supplement,²⁰⁸ but only for the past payments that had been missed. From the time of the decision on, no one was eligible to receive the payment because the whole clause was declared null and void.

The relationship between voluntary collective agreements and compulsory equal pay standards has particular poignancy in the area of equality

203. Davies, *supra* note 188, at 171.

204. Sentences No. 1069-1089/1984 (Court of Cassation) (copy on file with the author).

205. See Ballestrero, *supra* note 144, at 6-7.

206. See 4 AZR 339/72 (May 9, 1973).

207. See 5 AZR 1182/79 (Sept. 9, 1981), 197 EUR. INDUS. REL. REP. 4 (1982).

208. Bertelsmann & Rust, *Equal Opportunity Regulations for Employed Women and Men in the Federal Republic of Germany*, in NATIONAL REPORTS, *supra* note 13, at 11-12.

Comparable Worth

between men and women at work. On the one hand, collective bargaining and union representation are likely to be the most effective avenues by which real changes will be brought about, for the courts simply cannot take over wage determinations in every industry. On the other hand, an important part of the structure of pay inequality between men and women is derived from, or is encapsulated in, previous arrangements agreed to by these very unions. The trend appears to be towards the replacement of voluntarism with legal regulation, but there are dangers in such a movement. Unions in particular should be willing to adapt their strategies to the new possibilities for legal action. Unfortunately, relatively few appear to have done so.²⁰⁹

III. Conclusion

Equal value, or comparable worth, as it is better known in the United States, is an extremely complicated issue. To do it justice, one should have a thorough grounding in industrial relations and organization theory, labor economics, psychology, statistics, feminist theory, and law, preferably both labor and employment discrimination law. This Article has no pretensions to comprehensiveness in its review of the ever increasing literature on the issue in these various disciplines. If it has value, it will be because its comparative law perspective stimulates some alternative ways of viewing the limited questions with which this Article began. Europe has by no means yet succeeded in inventing the best wheel, but (for better or worse) its comparable worth jurisprudence is currently "state of the art."

No doubt American readers will draw their own conclusions from this study. I suggest three at this time. First, the jurisprudence surrounding equal value in Europe shows the complexity of the issues. A common law approach, that is, a case-by-case interpretation of broad and flexible standards, has played a major role in permitting experimentation in Europe. Legislatures in the United States should perhaps not try to define comparable worth too narrowly at this time, but instead permit an equivalent period of development.

Second, if litigation is to be an important strand in a strategy of reducing pay inequality, the legal process is probably going to have to be adapted to handle the resulting problems.²¹⁰ It is arguable that the use of modified labor law institutions, rather than the court system, has eased

209. For the results of a survey of the 20 largest British trade unions' policy on equal value, see *Unions' Experience of Equal Value*, 4 *EQ. OPP. REV.* 12 (1985).

210. See McCrudden, *Anti-Discrimination Goals and the Legal Process*, in *ETHNIC PLURALISM AND PUBLIC POLICY* 54 (N. Glazer & K. Young eds. 1983).

the incorporation of equal value into the law of the Member States of the EEC. That is currently the subject of some controversy. Perhaps the American debate might usefully turn from considering whether comparable worth is possible to considering what institutional modifications to the traditional litigation model might serve an equivalent facilitative function in the United States.

Finally, European subsidiaries of American companies now operating in Europe have been subject to the legal requirement of equal value ever since its implementation. The sky has not fallen. Perhaps the onus now lies with those who would argue that their United States parent companies should not be held to comply with an equivalent standard.

In considering all the issues surrounding comparable worth, and in examining the few initial comments just proposed, it is vital that there be a more systematic flow of information among Member States,²¹¹ and between Europe and the United States, in order to facilitate the sharing of experience on this question. All problems benefit from shared knowledge and from lessons learned through past experience. I hope that this Article will contribute to that continued exchange and will help sharpen the debate on comparable worth on both continents.

211. See Landau, *supra* note 87, at 68. Language differences present a problem for developing a more systematic flow of information. Landau's suggestion seems eminently sensible: "If national court decisions were to be made more easily available . . . throughout the Community, by means of centrally monitored data, this would encourage cross-fertilisation and a transfer of 'know-how' from one to another." *Id.*