

January 1992

## Women's Work: Finding New Meaning Through a Feminist Concept of Unionization

Janelle M. Rettler

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Labor and Employment Law Commons](#), and the [Law and Gender Commons](#)

---

### Recommended Citation

Janelle M. Rettler, *Women's Work: Finding New Meaning Through a Feminist Concept of Unionization*, 22 Golden Gate U. L. Rev. (1992).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol22/iss3/6>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# WOMEN'S WORK: FINDING NEW MEANING THROUGH A FEMINIST CONCEPT OF UNIONIZATION

JANELLE M. RETTLER\*

## I. INTRODUCTION

In our work force today, many occupations are still predominantly held by one sex.<sup>1</sup> Today, half of the female work force<sup>2</sup> is concentrated in jobs made up of at least 70% women.<sup>3</sup> Confronted by these statistics, it is highly relevant to talk about "women's work."<sup>4</sup>

---

\* Golden Gate University School of Law, Class of 1993.

1. Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1751 (1990). Female sex segregated jobs include: secretaries (98% female); bookkeepers (91% female); nursing aides (88% female); cashiers (79% female); textile sewing machine operators (90% female), and waitress (80% female). *Id.* See also American Federationist, April 5, 1986, at 5. In 1983, women accounted for 99% of secretaries, 97% of typists, 96% of registered nurses, house cleaners and servants, 92% of bookkeepers and bank tellers, 87% of cashiers, 82% of elementary school teachers, 75% of food service workers and 70% of retail clerks. Schultz, at 1751 n.1. Male sex segregated jobs by contrast: retail sales (85% male); machinists (97% male); protective services (89% male); construction workers (99% male); truck drivers (98% male); and janitors (78% male). *Id.*

2. Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1, 1. "A startling fact about the American workplace is that half of all women workers are employed in segregated jobs *i.e.* jobs that are at least 70% women." *Id.* See also Milkman, *Women Workers, Feminism and the Labor Movement*, in *WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR AND HISTORY* 300 (1985) (hereinafter *WOMEN, WORK AND PROTEST*) See also, Dowd, *The Metamorphosis of Comparable Worth*, 20 SUFFOLK U. L. REV. 833, 837 (1986).

3. Chamallas, *Exploring The "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1, 1. The 70% figure is often used as the cut off point for identifying "female jobs".

4. Blumrosen, *Wage discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REF. 397 (1979). The concept of "women's work" has a long historical tradition dating back to the beginning of the industrial age when women factory workers held jobs that were specifically identified as "women's jobs". The concept of "women's work" in the industrial age dates back to the New England textile mills which had segregated jobs for the young women who lived and worked at the mill. This job segregation is sometimes defined as an occupational result of sex-typing, a feature which is an associated normative expectation that this is how things should be. *Id.* at 402-403.

Historically, women's participation in the work force was conceptualized differently than men's<sup>5</sup> since women's income was merely supplementary to that of men's. This societal perception of women's lesser contribution inevitably fueled the inequality women faced in the work force.<sup>6</sup> This inequality in the work force has been attacked on many fronts: through legislation,<sup>7</sup> through union efforts<sup>8</sup> and through the womens' movement of the 1960s and 1970s.<sup>9</sup> However, even with the gains women had fought for and won, a large portion of the female work force is still concentrated in "womens' work": secretaries, 98% female; bookkeepers, 91% female; nurses' aids, 88% female; registered nurses, 96% female.<sup>10</sup> There are perceived advantages to "women's work." A career with fewer responsibilities and flexible schedules may be what many working women desire, since women are still responsible for the majority of child care.<sup>11</sup>

However, for the few benefits women may derive from careers in areas dominated by women, the endemic problems associated with women's work have traditionally been, lower pay, fewer benefits and a work environment unsympathetic to their individual situations. Therefore, while women's work is quite valuable and satisfying, changes must be made to allow women who are in these occupations to gain the most from them.

---

5. May, *Bread Before Roses: American Workingmen, Labor Unions and the Family Wage*, in *WOMEN WORK AND PROTEST 1* (1985). Society believed that women were in the work force only to supplement their husbands' income. Therefore, through the doctrine of the "family wage", a man would be able to support his family and keep his wife in her rightful place, the home.

6. *Id.* at 8-14.

7. *See infra*, Section II, B.

8. *See infra*, Section II, A.

9. Milkman, *Women Workers, Feminism and the Labor Movement Since the 1960s*, in *WOMEN WORK AND PROTEST 300* (1985). The postwar decades, and especially the 1960s and 1970s, have seen dramatic increases in women's relationship to work. The vast increase in female labor-force participation which occurred in this period produced equally vast social and cultural shifts, transforming family relations as well as women's sense of 'place' in the larger society. *Id.*

10. *See supra*, note 1.

11. M. Mason, *THE EQUALITY TRAP: WHY WOMEN SHOULDN'T BE TREATED LIKE MEN*, 107 (1988) [hereinafter, *EQUALITY TRAP*]. Women on the average put in 38.4 hours on the job and 24.8 hours at home for a total of 63.2 hours each week. Men put in 42.6 hours on the job but only 12.6 hours at home for a total work week of 54.2 hours. *Id.* (citing *Ms.* at 60 (July 1984)). *See also* Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 85 (1989). A fundamental conflict exists between the time needed to perform family and wage work. For women, the time conflict is exacerbated by an overload of family and childcare work. Women's entry into the paid workforce has not led to equitable redistribution of work. Rather, the predominant pattern has been the addition of wage work to women's existing unpaid household and childcare work. *Id.*

One reason many women are still concentrated in women's work is that some still subscribe to the stereotype that their working outside the home is only temporary,<sup>12</sup> and that once they marry and have children they will leave the work force.<sup>13</sup> The nursing profession provides a good case study<sup>14</sup> to explore the possibility of moving beyond the concept of merely achieving equality in the workforce.<sup>15</sup> I argue that even if women were to achieve equality, all of their needs would still not be met. Women need to remove themselves from this male model of equality in order to fully validate women's work experiences.

In the first section I examine the traditional structures used to change the workplace to adapt to changing societal demands. I address what these structures have accomplished and the limitations of these structures in dealing with the problems endemic in women's work. Secondly I address why women's needs in the workforce should be confronted differently than they have been in the past. And lastly, I assert that by combining traditional structures with a clearer focus on women's needs, new concepts of reform will emerge to legitimate women's work experiences.

## II. TRADITIONAL STRUCTURES FOR CHANGE

### A. LABOR UNIONS

The rise of labor unions was an effective structure for change.<sup>16</sup> Beginning as early as the 1830's, workers began to

12. THE EQUALITY TRAP at 20. Most women are flooding the workplace, not driven by the desire to become a corporate executive, but struggling to maintain a decent lifestyle for their families, or simply to survive as a single parent. *Id.*

13. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1164 (1991). "[T]he cultural expectation that wage earning women would eventually marry and leave the workforce spawned the argument that women were transient and temporary members of the workforce; therefore allowing them to occupy positions that could be filled by men was pointless and unfair to the ousted male worker." *Id.* Women themselves internalized these cultural stereotypes and behaved accordingly. *Id.*

14. Westfall, *Legal Staffing Issues and the Nursing Shortage*, 10 CAL. NURSING REV. 18-19 (1988). 97% of all registered nurses in the United States are women. See also Schultz, *supra* note 1. Nurses aides are 88% female. *Id.*

15. THE EQUALITY TRAP, at 232. "A vision of the future must focus on quality of life not equality between the sexes." *Id.* See also Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 596 (1982). Equality will cease to mystify - and cease to skew moral and political discourse - when people come to realize that it is an empty form having no substantive content of its own. *Id.*

16. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 1000, BRIEF HISTORY OF THE AMERICAN LABOR MOVEMENT 74 (1976).

realize the power of collective action.<sup>17</sup> Through collective action workers fought for shorter working hours,<sup>18</sup> a “family wage”,<sup>19</sup> and better working conditions.

Unfortunately, from their very inception labor unions discriminated against working women.<sup>20</sup> First, union rhetoric proclaimed that every working man was entitled to a living wage,<sup>21</sup> enabling him to support his family without having his wife work. Under the “family wage” philosophy,<sup>22</sup> unions viewed women’s participation in the workforce as an impediment to their success.<sup>23</sup> Secondly, the labor movement had originally focused on particular industries and crafts which effectively excluded women.<sup>24</sup> When women were included, it was for the underlying, co-opting purpose of “lessening the ill effects of female competition.”<sup>25</sup>

---

17. A. COX, D. BOK, R. GORMAN & M. FINKIN, LABOR LAW: CASES AND MATERIALS, 12-17 (11th ed. 1991) (hereinafter Cox) In the 1830’s city central “trades unions,” federations or local journeymen’s unions, began forming in a number of cities. *Id.* at 14.

18. *Id.* at 13. The first federation and its city centrals, the National Trades union, was founded in 1834. The main objective was the achievement of the ten-hour work day. *Id.*

19. May, *supra* note 5, at 3. The family wage ideology emerged in the first half of the 19th century as a response by working men to specific industrial and social conditions: the inadequacies of wage rates; the difficulties of securing subsistence; the relative fluidity of the labor market, with its high turnover rates, decreasing skill requirements, and technological innovations; and the presence of a powerful ideology defining gender roles. *Id.*

20. Crain, *supra* note 13, at 1159. Historically, there was a conflict within the unions about allowing women into the ranks as full participants in the struggle for workers rights. Because the AFL (American Federation of Labor) focused its energies on a philosophy of pure wage consciousness, it sacrificed worker solidarity for pure economic gains by marginalizing workers such as women. The [unions’] short term focus on increasing the wages for its [male] members resulted in a considerable ambivalence by the [union] toward organizing female workers. *Id.* at 1161.

21. May, *supra* note 5, at 2. The “living wage” was transformed into the political rallying cry of the late 1800’s. The term later evolved into the “family wage”. See *supra* note 19.

22. *Id.* at 3. The family wage philosophy has its roots in the traditional belief that the husband was the provider for the family and the woman’s true calling was to keep the home and raise and nurture the children. Without the family wage, unions argued, a working man could not fulfill his proper role, nor could he be assured a ‘proper’ family life. *Id.*

23. *Id.* at 6.

24. Crain, *supra* note 13, at 1160. “Before 1873, nearly all male-dominated trade societies and unions completely barred women.” Protest by workingmen over a large population of poorly paid workers entering a trade was not confined just to women. These skilled workers were also against employing unskilled workers, prison labor and immigrants. See also May, *supra* note 5, at 6.

25. May, *supra* note 5, at 6. When women were allowed to join trade unions, it was in the hope of lessening the ill effects of female competition. The theory for this was the family wage itself, job competition between men and women led men to use male privilege as a means to achieve access to better wages and conditions, while leaving women out of the process of labor organization. *Id.* at 7.

As the labor movement gained momentum, unions remained disinterested in organizing areas of labor dominated by women.<sup>26</sup> There was the general belief that women were difficult to organize and would not be willing to take the risks necessary to reach the goals of unionization.<sup>27</sup> There was also an underlying social stereotype that women were not meant to be union members, they were much more suited to be wives and mothers.<sup>28</sup> As a result of overt discrimination and covert stereotypes, women were left with a sense that unions neither wanted nor needed their active participation.

#### B. THE POLICIES AND PROCEDURES OF THE NATIONAL LABOR RELATIONS ACT<sup>29</sup>

A second structure created to transform the American workforce was the National Labor Relations Act of 1935<sup>30</sup> (hereinafter N.L.R.A.). The N.L.R.A. was enacted during the New Deal period, in response to violent clashes between labor and management in the industrial and manual labor sectors.<sup>31</sup>

The N.L.R.A.'s main purposes were to assure worker freedom to participate in and be represented by a union,<sup>32</sup> to elim-

26. Crain, *supra* note 13, at 1161. The [union's] ambivalence derived from competing and conflicting concerns between a fear of being undercut by cheap female labor, and a commitment to the patriarchal view of women's role as homemakers. *Id.*

27. *Id.* at 1171-1176. The general belief among union organizers was that women workers were difficult to organize, which meant more difficult to organize than men. "There are generally three reasons why, until recently, women did not join unions. 1) Women saw themselves as secondary wage earners. 2) women were more afraid of antagonizing their employers by engaging in organizing activity and 3) women perceived male-dominated unions as insensitive to issues such as equal pay, child care, and maternity leave." *Id.* at 1172.

28. *Id.* at 1162. The stereotype that women were the "fairer sex", the protector of the home and the upholder of virtue left many with the conflict that women could not belong to unions because they would be going against their own nature. *Id.*

29. National Labor Relations (Wagner) Act §1 et. seq., 29 U.S.C. §151-169 (1988).

30. *Id.*

31. Cox, *supra* note 17, at 84-89. The sponsors of the National Labor Relations act urged that the enforcement of the right to bargain collectively would be the best method of achieving industrial peace without undue sacrifice of personal and economic freedom. *Id.* at 87.

32. National Labor Relations Act §7, 29 U.S.C. §157 as amended (1988). It states:

employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

inate the causes of obstructions to the free flow of commerce,<sup>33</sup> to avoid unnecessary, disruptive strikes and labor unrest,<sup>34</sup> and also to jump-start a faltering economy.<sup>35</sup> The N.L.R.A.'s objective was neither to establish mutual harmony between the employer and employee nor to eradicate discrimination and economic disparity.<sup>36</sup> The goal of the N.L.R.A. was to have a pressure valve on the flow of commerce, not to raise the social position of all workers or equalize disparities. Therefore, the specific issues women faced as part of the labor force were not a component of the organized movement's agenda.<sup>37</sup>

To implement their goals, the N.L.R.A fostered collective bargaining between labor and management.<sup>38</sup> Today, the N.L.R.A. is a procedural system which guides labor and management in the struggle to do business. In 1974, Congress amended the N.L.R.A. to incorporate health care workers, including nurses, under the jurisdiction of the act.<sup>39</sup> The

---

33. COX, *supra* note 17, at 89. (Citing, Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).) "[T]he fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce." *Id.*

34. See *supra* note 31.

35. COX, *supra* note 17, at 84-85. "The impetus for general legislation aiding unionization came from the search for measures to halt the deepening depression. Keynesian economics pointed toward increasing mass purchasing power as a way of speeding up economic activity. One method Congress could have used was to fix minimum wages and maximum hours (to spread employment), and another was to encourage unionization." *Id.* at 84.

36. *Supra*, note 16. See also Brooks v. Nat'l Labor Relations Board, 348 U.S. 96 (1954). The underlying purpose of the statute was to foster industrial peace. *Id.* at 103.

37. Milkman, *supra* note 9, at 302. "Women were organized without any particular attention to the fact of their gender but rather as members of occupational groups which happened to be largely female in composition. Because they were organized on those terms, the result of their extensive recruitment over the postwar period is that women are now squarely *in*, but still not generally *of* the labor movement." *Id.* at 302.

38. National Labor Relations Act §1, 29 U.S.C. §151 as amended (1988). It states:

Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

39. National Labor Relations Act § 2, 29 U.S.C. §152(4) as amended (1988). It states:

The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

purpose in allowing healthcare workers, such as nurses, to bargain collectively,<sup>40</sup> was the proliferation of strikes at the time and their potential impact on the quality of health-care.<sup>41</sup>

Although nurses were encompassed under the jurisdiction of the N.L.R.A., conflicting legal theories regarding appropriate bargaining units<sup>42</sup> kept nurses from effectively organizing.<sup>43</sup> The conflict over appropriate bargaining units was the most effective tool used by health care employers to keep nurses from effectively organizing.<sup>44</sup>

---

40. Healthcare workers were given the ability to bargain collectively with the following exceptions. National Labor Relations Act §8(d), 29 U.S.C. §158(d) as amended (1988). It states:

Whenever the collective bargaining involves employees of a health care institution, the provisions of 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute

41. S. Rep. No. 93-766, 93rd Cong., 2nd sess. 5, *reprinted in* 1974 U.S. Code and Cong. & Admin. News 3946, 3953. "Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act of 1974" One of the major concerns Congress had against allowing health care workers to collectively bargain was the proliferation of bargaining units, which would make the collective bargaining process unwieldy and a threat to the health care system. *Id.*

42. National Labor Relations Act §9(a), 29 U.S.C. §159(a) as amended (1988). It states:

(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees is a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

43. Cooper & Brent, *The Nursing Profession and the Right to Separate Representation*, 58 CHI. KENT L. REV. 1053, 1058 (1982).

44. Note, *Nursing and the Future of Health Care: The Independent Practice Imperative*, GOLDEN GATE U. L. REV. 595, 603 (1990). The appropriate remedy for the problems faced by the nursing profession is for individual nurses to become independent contractors. The main reasons cited for this remedy was the failure of unions to combat fierce and obstinate employer resistance to collective bargaining. *Id.*



Traditionally, appropriate bargaining units for health care workers were determined by the National Labor Relations Board (hereinafter Board) on a case by case basis.<sup>45</sup> This case by case<sup>46</sup> determination frustrated unions' attempts at organization in the health care industry.<sup>47</sup>

In 1991, the Supreme Court addressed the determination of appropriate bargaining units in *American Hospital Association v. National Labor Relations Board*<sup>48</sup> (hereinafter *American Hospital*). The Court affirmed the Board's authority<sup>49</sup> to promulgate specific rules delineating appropriate bargaining units in the healthcare industry.<sup>50</sup> This affirmation of the

---

45. *St. Francis Hosp. and Int'l. Bhd. of Elec. Workers*, 271 N.L.R.B. 948 (1984). The court believed that a community of interest standard was insufficient to protect against bargaining unit proliferation. The court therefore held that the best way to effectuate the intent of Congress was to adopt a case by case analysis applying a disparity of interest test. *Id.* at 950. Thus, it is not the similarity of employees' training, hours, conditions or activities which determine the appropriateness of the unit, but rather the dissimilarity of interests relevant to the collective bargaining process which will determine whether employees are to be included in a proposed unit. *Id.* at 952. (Citing *Nat. Labor Relations Board v. St. Francis Hosp.*, 601 F.2d 404 (9th Cir. 1979).)

Prior to the case by case resolution the court had concluded in *St. Francis Hosp. and Int'l Bhd. of Elec. Workers*, 265 N.L.R.B. 1025 (1982), that seven identified groups of employees were deemed to be "potentially appropriate" for health care bargaining units, those seven were: physicians, registered nurses, other professional employees, technical employees, business office clerical employees, service and maintenance employees, and skilled maintenance employees. Appropriate bargaining units were to be determined under community of interest criteria. The court believed this determination accommodated both the N.L.R.B.'s direction to "ensure employee's the fullest freedom in exercising the rights guaranteed by this Act" under §9(b), and did not ignore the congressional mandate that the Board prevent proliferation of bargaining units in health care institutions. *Id.* at 1034.

46. *National Labor Relations Act*, §9(b), 29 U.S.C. § 159(b) as amended (1988). It states:

(b) The Board shall decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof... (emphasis added)

47. Note, *supra* note 44.

48. *American Hosp. Ass'n v. Nat'l Labor Relations Board*, \_\_ U.S. \_\_ 111 S. Ct. 1539, 113 L. Ed. 675 (1991).

49. 111 S.Ct. at 1543. "The mandate to decide 'in each case' does not prevent the Board from supplanting the original discretionary chaos with some degree of order, and the principle instruments for regularizing the system of deciding 'in each case' are classifications, rules, principles, and precedents." *Id.* at 1543 (Citing, K. DAVIS, *ADMINISTRATIVE LAW TEXT* 145 (3d ed. 1972).)

50. 29 CFR §103.100 (1991). It states:

Appropriate bargaining units in the health care industry.

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances

Board's unit determination finally established a solution to the conflicting interests between Congress and health care workers. The Court construed the phrase 'in each case'<sup>51</sup> as meaning that if problems exist with a bargaining unit, whether it is too small or not unique enough, the Board has the authority to review the units in each case.<sup>52</sup>

The decision in *American Hospital*<sup>53</sup> has alleviated some of the problems regarding organization of nurses.<sup>54</sup> Management is no longer able to delay union organizing by dragging a unit determination through the court system. As a result, there is renewed hope that organizing efforts in the health care industry will be more effective.<sup>55</sup>

However, the battle is not over once a unit determination has been made. Even after a union has won a representational campaign,<sup>56</sup> the employer may still make it very difficult for the

---

in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that if sought by labor organizations, various combinations or units may also be appropriate:

- (1) All registered nurses.
- (2) All physicians.
- (3) All professionals except for registered nurses and physicians.
- (4) All technical employees.
- (5) All skilled maintenance employees.
- (6) All business office clerical employees.
- (7) All guards.
- (8) All nonprofessional employees except for technical employees skilled maintenance employees, business office clerical employees, and guards.

*Provided that* a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

51. *Am. Hosp. Ass'n v. Nat'l Labor Relations Board*, 111 S.Ct. at 1542. "The more natural reading of these three words is simply to indicate that whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute." *Id.*

52. *Id.* at 1153.

53. *Id.*

54. See generally Note, *supra* note 44.

55. *Supreme Court Affirms Appeals Court Decision Upholding Labor Board Rules in Union Elections by 9-0 Vote*, U.S. Newswire, April 23, 1991. (LEXIS, Nexis library, Wires file). "For the first time ever, the playing field is level for union organizing in hospitals." John Sweeny, president of the Service Employees International Union.

56. *Cox*, *supra* note 17, at 487. In order to gain recognition as the collective bargaining representative of the employees, the union must either get recognition voluntarily or win a representation election.

employees to organize<sup>57</sup> and exercise their rights under the N.L.R.A..<sup>58</sup> Section eight of the N.L.R.A. deals with employer misconduct and obstruction of employee's rights.<sup>59</sup> These range from the employer's refusal to allow union representatives to distribute literature,<sup>60</sup> to the employer's banning all union activity and recruitment in and around the facility.<sup>61</sup>

An employer's manipulation of the rules under the N.L.R.A. may thwart efforts to unionize women to a greater degree. While men generally may be more willing to accept this adversarial process as a component of unionizing, women may not be as willing to accept it.<sup>62</sup> The opportunity costs of unionizing may be too high a price for women to pay if there is a significant threat of a hostile work environment. The employer can create such an environment and by distorting the pic-

---

57. Ladd-Taylor, *Women Workers and the Yale Strike*, 11 FEMINIST STUDIES 465, 470 (Fall 1985). An example of this was the attempt to organize clerical workers at Yale University. "The university's response to the clerical workers' union drive exposed the limits of Yale's paternalism and revealed its assumptions about womens' work. Although the university was constrained by its liberal reputation...Yale conducted a traditional anti-union campaign. The administration claimed that the union, as an "outsider" to the Yale community, would destroy Yale's collegial atmosphere and assured employees that it would "protect" them from harassment by union organizers. The administration's claim that vacation, personal leave, and health coverage compensated for low salaries demonstrated that most women were secondary wage earners, for whom wages were less important than the time off to be with their families." *Id.*

58. National Labor Relations Act §7, *supra* note 32.

59. National Labor Relations Act §8(a), 29 U.S.C. §158(a) as amended (1988).

It states:

- (a) It shall be an unfair labor practice for an employer-
  - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under section 7;
  - (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;
  - (3) by discrimination in regards to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;
  - (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
  - (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

60. *E.g.* Southern Maryland Hosp., 293 N.L.R.B. No. 136 (1989).

61. *E.g.* Rocky Mountain Hosp., 298 N.L.R.B. No. 138 (1988).

62. C. GILLIGAN, IN A DIFFERENT VOICE 19 (1982). "The morality of rights differs from the morality of responsibility in its emphasis on separation rather than connection, in its consideration of the individual rather than the relationship as primary." *Id.*

ture, make it seem as though the hostility is union created.<sup>63</sup> Regardless, the issue remains, whether the employees have been obstructed in exercising their limited rights under section seven.

### C. WOMEN'S LEGISLATION: E.P.A. AND TITLE VII

The first legislation dealing directly with women in the workforce was the Equal Pay Act<sup>64</sup> (hereinafter E.P.A.). The E.P.A affirmatively established that a woman doing the same work as a man was entitled to the "same pay".<sup>65</sup> Previously, employers were free to pay women less money for the same work simply because they were women.

The Supreme Court then established that women doing "substantially the same" work were allowed equal pay.<sup>66</sup> However, even with the modification substituting "same" with "substantially the same", the E.P.A. has been unable to wipe out the overall wage disparity between men and women.<sup>67</sup> It

63. Ladd-Taylor, *supra* note 57, at 470. The university constructed a traditional anti-union campaign. The administration claimed the union, as an "outsider" to the Yale community, would destroy Yale's collegial atmosphere and assured employees that it would "protect" them from harassment by union organizers. *Id.*

64. The Equal Pay Act of 1963, 29 U.S.C. §206(d) (1982). It states:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

65. *Id.*

66. *See Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970). The employer had established, through a collective bargaining agreement with its union, an artificial classification for female selector packers, paying them 10% less than men for almost identical work. Under the E.P.A., the employer's artificial job classification, where male and female jobs do not substantially differ, violates the Act. *Id.* at 262.

67. Barrett, *Women in the Job Market: Occupations, Earnings and Career Opportunities*, in *THE SUBTLE REVOLUTION* 31, 47 (1979). Although the Act was established to forbid blatant sex discrimination, it did absolutely nothing for women, such as nurses, who worked in areas where there was no male wage scale to compare their pay to. The Act, in trying to combat sex discrimination in the workplace, applied only where workers doing the same job were of different sexes. The effect was

has even lead to a more sexually segregated workplace as employers try to comply with the act.<sup>68</sup>

The second law affecting women in employment is Title VII of the Civil Rights Act of 1964. Title VII<sup>69</sup> is intertwined with the E.P.A. Title VII was originally created to combat discrimination in employment.<sup>70</sup> The analysis of Title VII involves determining whether there has been disparate treatment or a disparate impact between different employees in the workplace, resulting in discrimination against an employee due to her sex, race, religion or national origin.<sup>71</sup>

Traditionally, women have entered the nursing field disproportionately to men.<sup>72</sup> As a result, the nursing profession is compromised predominantly of women workers. The issue here is not sexual discrimination in jobs originally or traditionally held by men, but rather, as a predominantly female

---

to leave intact the segregated and discriminatory structure of the workplace. In the context of a hospital, therefore, the hierarchical structure could not be challenged under the existing framework of the Act. *Id.* The argument has even been made that the motivation behind the E.P.A. was to increase job security for men who did not want competition from women who were willing to do the work for lower wages. See Newman & Vonhof, "Separate but Equal"-Job Segregation and Pay Equity in the Wake of Gunther, 1981 U. ILL. L. REV. 269.

68. NEWMAN & VONHOF, "Separate but Equal"-Job Segregation and Pay Equity in the Wake of Gunther, 1981 U. ILL. L. REV. 269, 300. Most economists agree that occupational segregation is a major cause of the national wage gap between male and female workers. *Id.* The average male worker today earns nearly 70% more than the average woman, and the overall difference in earnings between men and women is greater now than it was in the 1950s. Because occupational segregation adds significantly to the earnings gap, the E.P.A. with its focus on job integration has not been able to eradicate the wage disparity between the sexes. *Id.* at 284-285.

69. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §2000e - 2000e-17 (1982). It states:

§703(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin... (emphasis added)

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. (emphasis added)

70. See Chamallas, *supra* note 3, at 2. "Until quite recently, litigation under Title VII of the Civil Rights Act of 1964 in combatting sex discrimination has focused on securing equal access to jobs." *Id.*

71. Chamallas, *supra* note 3, at 6.

72. See Westfall, *supra* note 13, at 18-19.

dominated field, nurses may suffer inherent discrimination through lower pay and fewer benefits.<sup>73</sup>

However, even Title VII, a monumental piece of legislation cannot wipe out stereotypes, socialization<sup>74</sup> or the market forces at work which keep nurses wages and expectations suppressed. Title VII does not begin to influence the social stereotypes of "women's work",<sup>75</sup> the socialization women have experienced<sup>76</sup> or the "market wage"<sup>77</sup> upon women's pay. As a result, the problems women face in the workforce have not been alleviated by governmental intervention. It may be argued that the government has given women too little, too late. However, the better argument may be that laws by themselves cannot counterbalance societal stereotypes, biases and covert discrimination against women in the workforce. Because legislative efforts have not adequately addressed the issues and problems facing women in the workplace, it is imperative that a new formulation for women's empowerment be constructed.

### III. EXPLORING FEMINIST THEORY: TAKING INTO ACCOUNT ALL OF WOMENS' NEEDS

"It is obvious, that the values of women differ very often from the values which have been made by the other sex."<sup>78</sup>

The traditional structures<sup>79</sup> created to assist workers in their fight for economic strength and a share of control over their work have limited value when applied to professions

---

73. Chamallas, *supra* note 3, at 24. "While most economists agree that the male-female wage gap is substantially attributable to occupational segregation, they disagree over the causes of this segregation." Three possible causes of segregation are frequently discussed: (1) women are excluded from high paying jobs; (2) jobs held by women are underpaid because they are held by women; (3) women choose jobs that pay poorly. *Id.*

74. Blumrosen, *supra* note 4, at 417. An example of socialization operating on women is a psychological study in which female college students were asked to assess two identical groups of professional articles for value, competence, persuasiveness and writing style, where the articles had been attributed to a male author in one group and a female author in the other, the articles in the "female authored" group received significantly lower ratings. *Id.* (citing, Goldberg, *Are Women Prejudice Against Women?*, 5 TRANSACTION 28-30 (1968).)

75. Crain, *supra* note 13, at 1214-1217.

76. May, *supra* note 5, at 17.

77. Sullivan, *Monopsony Power In the Market for Nurses*, 32 J. OF L. & ECON. 135 (1989).

78. V. Woolf, *A ROOM OF ONE'S OWN*. (1929).

79. See Section II, *supra*.

which are dominated by women. The reason these structures fall short for most women is that many women's needs are not being addressed.<sup>80</sup> The problem may lie in the structures themselves. To determine why these structures fail to address the needs of women two questions must be asked; first, who defined the structures and secondly, what are the structures seeking to achieve.

Historically, the answers to the first question has been "men". However, male created structures have repeatedly left different perspectives out of the process.<sup>81</sup> Carol Gilligan, in her book *In A Different Voice*,<sup>82</sup> argues this observational bias, of implicitly adopting the male life as the norm,<sup>83</sup> has effectively taken womens' perspectives and voices out of any structure created to address their problems and concerns.<sup>84</sup> Therefore, even though women's concerns may have been addressed, by disavowing women's perspectives throughout the process of formulating solutions, any solution was going to be inherently inadequate.

Answering the second question reveals that the structures were generally created to alleviate problems workers experience in the workforce. However, by assessing the solutions to problems faced by workers in the past, it becomes apparent that many women's needs were not met. Therefore, in addressing the second question, it is imperative to first determine women's needs. Only when those needs are established can a structure for change adequately meet them.

Marion Mason, in her book *Equality Trap*<sup>85</sup> states, "arrangements at work must complement arrangements at home to

---

80. Mason, *supra* note 11, at 25-26. By trying to conform to a male construct of equality, women are being penalized by failing to take into account their inherent and societally dictated differences. *Id.* at 25.

81. Gilligan, *supra* note 62.

82. *Id.*

83. *Id.* at 6.

84. *Id.* at 14. [S]ince it is difficult to say "different" without saying "better" or "worse", since there is a tendency to construct a single scale of measurement, and since that scale has generally been derived from and standardized on the basis of men's interpretations of research and data drawn predominantly or exclusively from studies of males, psychologists "have tended to regard male behavior as the 'norm' and female behavior as some kind of deviation from that norm." Thus, when women do not conform to the standards of psychological expectation, the conclusion has generally been that something is wrong with the women. *Id.*

85. Mason, *supra* note 11.

make up a life that is workable not just exhausting."<sup>86</sup> From this basic need flows many others. Women need higher and fair pay,<sup>87</sup> fully benefitted jobs allowing accommodation for the needs of women with children,<sup>88</sup> paid maternity leaves and additional family leaves,<sup>89</sup> and available flexible-time and part time work.<sup>90</sup> In sum, these needs support the general notion that work environments must change. In addition to these more traditional issues of pay and benefits, addressing women's needs in the work place must include an examination of the work environment itself. Such an examination reveals that women need an environment where their voices will be heard and their ideas will be respected.<sup>91</sup>

For women such as nurses, this need to be heard may also require a change in attitudes about nurses' responsibilities in the hospital setting.<sup>92</sup> Nurses' need to be heard is even greater because it extends beyond the employment relationship to potentially affect third parties.<sup>93</sup> This shift in responsibility is

86. *Id.* at 230.

87. *Id.*

88. *Id.* at 230. See also Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 86 (1989). In addition to problems caused by insufficient time, there are problems related to the use and control of time. On a regular basis, the time schedules of the school day and the school calendar clash with the workplace day and the workplace calendar. *Id.*

89. Mason, *supra* note 11, at 230. See also, Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 87 (1989) Even more fundamentally, family time and work time conflict due to the clash between the occupational cycle of the workplace and the life cycle of the family and individual members. *Id.*

90. Mason, *supra* note 11, at 230.

91. Note, *Finding a Voice through the Union: The Harvard Union of Clerical and Technical Workers and Women Workers*, 12 HAR. WOMEN'S L.J. 260, 267 (1989). "We were not really trained to open our mouths, if we were housewives and mothers, so you translate your job a little bit like your marriage- you do everything that the boss says. We have learned in the meantime that we have talents also, that we have some good ideas. Sometimes you want them at least listened to an appreciated, and once in awhile adhered to, too." *Id.* at 267 (citing Interview with Agnes Pilot, Harv. Univ., (Jan. 19, 1989).

92. Markus, *The Nurse as Patient Advocate: Is there a Conflict of Interest?*, 29 SANTA CLARA L.REV. 391, 392 (1989). Conduct which has been sanctioned [as beyond the nurse's scope of responsibility] includes, granting a patient's request to discuss treatment alternatives, reporting unsafe conditions to the hospital's accreditation organization, and refusing to perform kidney dialysis for a terminal patient in order to avoid further complications. *Id.*

93. *Id.* at 394. Because of her high degree of patient contact and medical knowledge, the nurse stands out as the health care professional most suited to the role of patient advocate. *Id.* Nurses with their emphasis on human values, are in an ideal position to contribute to controversial treatment decisions and evaluate their impact on individual patients. *Id.* at 421. "The nurse's obligation as an advocate has three basic components: (1) to inform patients of their rights in a particular situation, (2) to



not to suggest a usurpation of the physician's authority. But, due to nurses' contextual role as caregivers,<sup>94</sup> they are in a position to know what is happening on an individual patient basis<sup>95</sup> as well as the daily routines of a hospital.<sup>96</sup> It is imperative therefore, that nurses voices be heard with respect to their environment and its impact on their patients.<sup>97</sup> Unfortunately, the totality of these needs have not been addressed in the hospital setting. Consequently, many nurses have left the nursing profession, leaving a perpetual shortage of qualified nurses.<sup>98</sup> By gaining a voice with regard to the work environment, combined with pay and benefit increases, nurses' professional needs and the corresponding goal of increased patient welfare may ultimately be fulfilled.<sup>99</sup>

#### IV. CURRENT STRUCTURES AND PROPOSED REFORMS

In order to fulfill the needs of nurses in the workforce, it is essential to examine the current structures and legislation, to determine their deficiencies, and to devise an agenda for change.

---

ensure that patients are given all the information necessary to make an informed decision, and (3) to support patients in decisions the make." *Id.*

94. *Id.* at 395-396. The skills of the nurse in her image as mother nurturing her young were considered to be instinctive, but the possession of such skills did not elevate the status of a giver of such care. *Id.* at 396. *See also* Donley, *Nursing's Mission: Spiritual Dimensions of Health Care*, 7 J. OF CONT. HEALTH L. AND POLICY 207, 209 (1991). The spiritual dimension of nurse-patient relationships are important at a time when the medical and nursing professions and the health care system itself emphasize material and technical values. *Id.* Compassionate presence, meaning-giving, and the alleviation of suffering have been presented as a paradigm for nurses' spiritual mission. *Id.* at 217.

95. Markus, *supra* note 92, at 394.

96. *Id.* at 392.

97. *Id.* at 421. Nurses welcome the responsibility and accountability concomitant with the status of nursing as an independent profession. They have expressed their dissatisfaction with the reluctance of physicians and institutions to allow their input into decisions regarding their patients by leaving the profession. This has created a widespread severe shortage of nurses, often to the detriment of the patient population. *Id.*

98. U.S. Dep't Health & Hum. Servs., Secretary's Comm. on Nursing: Interim Report (1988). *See also* Markus *supra* note 92, at 415-416. (The frustration of responsibility for patient welfare in the absence of authority to make decisions has contributed to the chronic nursing shortage). Lupica, *Pay Equity - "A Cockamamie Idea?" The Future of Healthcare May Depend Upon It*, 13 AM. J. OF L. & MED. 597, 598 (1988). (The nursing profession is presently having difficulty keeping and reinforcing its ranks.) Godbey, *Comparable Worth and Its Relevance to Nursing*, 2 U. FL. J. OF L. & P.P. 107, 109 (1988-1989). (Wage rates remain low despite a recurring shortage of nurses in the profession.)

99. *See generally* Markus, *supra* note 92.

## A. CURRENT STRUCTURES

The traditional unions today do not correspond to the expectations<sup>100</sup> or needs of women workers, such as nurses.<sup>101</sup> Women working in female dominated professions for the most part have defied traditional union methods used to organize them.<sup>102</sup> A pre-set campaign strategy of allowing employees to vote for or against a union, run by outside efforts, not the employees themselves, removes women from any process addressing their needs and expectations.<sup>103</sup> While most working women would welcome the union bargaining with management for issues such as maternity leave,<sup>104</sup> flexible work schedules<sup>105</sup> and better pay,<sup>106</sup> there are other underlying issues which must also be addressed.

One alternative organization which has addressed these underlying issues for nurses is the American Nurses' Association (hereinafter ANA). The ANA is devoted primarily to promoting nursing as a profession<sup>107</sup> and to the professionalism of its individual members.<sup>108</sup> Because of the ANA's posture as an association devoted specifically to nurses, it is

---

100. Milkman, *supra* note 9, at 260. The Dominant cultural imagery of labor organization and of union power remains male and blue collar. This image of the union member is very uncomfortable for women workers who see themselves as part of an organization, such as a hospital, not as an individual who has conflicting interests with others in the organization. *Id.*

101. Crain, *supra* note 13, at 1211. Unions will only be capable of increasing the numbers of women and their locus of power within labor unions if they can overcome the admittedly poor image of unions in the eyes of many women workers. *Id.*

102. Crain *supra* note 13, at 1212. "The traditional model is as follows: (1) the union targets "hot shops", shops where the workers already have indicated a desire for organization; (2) the organizers attempt to entice workers, promising better wages and fringe benefits; (3) the organizing strategy is based entirely upon appealing to workers' identities as workers, rather than appealing to their own identities-racial, gender, religious, ethnic and so on; (4) the union views organizing ability as a technical skill rather than an ability that grows out a shared experience of community building; (5) classic organizing tactics are those developed to reach a workforce employed by a large, centralized plant, including for example, leafletting and mass meetings; (6) the union places nearly all of its efforts on winning the representation election- shops where a quick victory seems unlikely, or where an election has already been lost, are largely ignored by unions; further, once an election has been won, the organizing task is considered to be over." *Id.* at 1213.

103. *Id.*

104. Mason *supra* note 11, at 230.

105. *Id.*

106. *Id.*

107. Flanagan, ONE STRONG VOICE: THE STORY OF THE ANA. (1976). Originally, the American Nurses' Association was established to standardize the educational programs of nurses and to promote laws which would guarantee competent nursing care for the sick. *Id.* at vii.

108. *Id.*

uniquely positioned to be a trend setter in creating a new reformed organization for the many nurses in this country.<sup>109</sup> Yet, the ANA has limited goals for itself and has not truly taken on the challenge of taking women's voices into the collective bargaining process.<sup>110</sup> Only by merging feminist principles with the existing structures will the ANA be a system capable of fully addressing nurses' needs.

Two organizations which have linked the concepts of unionization and feminism are 9 to 5,<sup>111</sup> and the Coalition of Labor Union Women (hereinafter C.L.U.W.).<sup>112</sup> Each organization has had a different approach to solving the problems women face in the workforce. The organization 9 to 5 began as an alternative model for organizing clerical workers. Instead of focusing solely on unionizing women workers, 9 to 5 has concentrated specifically on consciousness raising, a process developed during the women's movement of the 1970's. 9 to 5 also focuses expressly on issues affecting women office workers.<sup>113</sup>

C.L.U.W., by contrast, worked within the traditional labor union structures. Its focus was on obtaining more of a voice for women workers in traditional labor unions.<sup>114</sup> By promoting women workers into positions of authority it believes it can influence labor unions' agendas regarding women's issues.<sup>115</sup>

---

109. Cooper & Brent, *supra* note 43, at 1078. Representation of registered nurses by professional nursing organizations has been a significant factor in Board determinations. This fact of professional representation means that the nurse's labor organization is going to be particularly responsive to community health care needs, to the nursing tradition of patient care. *Id.*

110. LaViolette, *Schizophrenia Makes ANA prime Target for Other Unions' Attacks* 10 MOD. HEALTHCARE 65, 72 (Sept. 1980). Prior to the decision in *American Hosp. Ass'n v. Nat. Labor Relations Board*, *supra*, note 48, a 1980 survey revealed that the ANA and its state affiliates represented approximately 107,800 nurses. However, the nursing organizations have traditionally been reluctant to organize, traditional labor unions have now begun to organize nurses. *Id.*

111. Milkman, *supra* note 9, at 314-318. 9 to 5 was created completely outside of the traditional labor movement. *Id.* at 315. 9 to 5 was established in 1973 to serve previously unorganized office workers. *Id.* at 314.

112. *Id.* at 311-314. Coalition of Labor Union Women, C.L.U.W.'s goal is to work within the traditional labor structure by promoting women into positions of leadership, organizing women as union members, and pushing for a labor union agenda which includes womens' issues such as affirmative action and safer work environments. *Id.* at 311.

113. *Id.* at 316. Some of the issues relevant to clerical workers are equal opportunity, age discrimination and the recent focus on the health hazards of video display terminals. *Id.*

114. *Id.* at 311.

115. As the C.L.U.W. slogan "A Woman's Place Is in her Union" implies, all the needs of women can be taken care of within the existing framework of...unionism. *Id.* at 313.

Both of these two organizations, while trying to establish women's voices and power in the workforce, have had mixed success.<sup>116</sup> For 9 to 5 the problem has been their limited success outside of the public sector. All of its successes in organizing clerical workers have come from the public sector. However, most clerical workers are employed in the private sector. 9 to 5 must reach out to these workers in order to actually gain the strength necessary to make the changes women need. C.L.U.W., on the other hand, suffers from the endemic problem of numbers. Women traditionally have not joined labor unions in proportion to men.<sup>117</sup> Therefore, while C.L.U.W. promotes women from within the ranks of union members, its voice has been diluted simply because they are a small minority in the total labor union pool.

Although these organizations prove that there are alternative forms operating within and without the traditional labor union structure, both have chosen to focus on only one element of the process instead of taking a comprehensive approach to women's needs in the workforce.

#### B. FAILED LEGISLATION: THE EQUITABLE PAY ACT

In the legislative arena, Congress has been unwilling to establish that women doing work of comparable worth to the employer, relative to the work done by men, should receive the same pay. An Equitable Pay Act<sup>118</sup> would have established a standard whereby a woman doing work of comparable worth<sup>119</sup> would be paid the same amount as a man who was doing different work, but of the same worth to the employer. The goal was to place the value on the job, not on the person performing it, which if a woman ultimately meant less pay.

Because nursing is predominantly a female profession, there is no male wage scale for comparison. This makes the Equal Pay Act<sup>120</sup> an ineffective vehicle to accomplish a pay

---

116. *Id.* at 318.

117. *Union Membership Down to 16.4 percent in 1989*, 133 LAB. RELATIONS REP. 209, 210 (Feb. 19, 1990).

118. Godbey, *Comparable Worth and Its Relevance to Nursing*, 2 U. FL. J. OF L. & P.P. 107, 116 (1988-1989). Comparable worth was first introduced in the Senate in 1983. Every year since then, comparable worth legislation for federal employees has been introduced and rejected. *Id.*

119. *Id.* at 107. Comparable worth is defined as equal pay for work of comparable worth or value to an employer. *Id.*

120. *Supra*, note 64.

change. The concept of comparable worth would focus on the problem female occupations face, that of having no male counter-part to make a comparison.<sup>121</sup> Unfortunately, the major problem in the theory of comparable worth is the concept of market forces.<sup>122</sup>

The argument repeatedly made against the comparable worth theory is that the market system dictates how much an employer will pay someone to do the work.<sup>123</sup> Therefore, the individual employer is incapable of paying a person what they are worth to the organization because the market has already established the worth of the work.<sup>124</sup> The "market wage" legitimizes established pay inequalities by allowing employers to do circumspectly what they are not allowed to do directly.<sup>125</sup> The issue remains; how are women to increase their worth under the firmly entrenched premises of the market system?<sup>126</sup> One solution was to enter the judicial arena. The pursuit of comparable worth, as a theory under Title VII has been a bit more successful in the judicial sphere, although the trend has not

---

121. Chamallas, *supra* note 3, at 2. "The pay equity debate highlights that sex discrimination may infect the terms and conditions of female jobs even when no specific male employee doing equal work is treated more favorably than his female counterparts". *Id.*

122. Sullivan, *supra* note 77, at S136. The chronic nursing shortage has not been alleviated by market forces. *Id.* "The argument is, owing to imperfect competition, an individual hospital faces an upward-sloping supply curve for nurses and, thus, at its optimal level of employment pays wages below the relevant marginal product. As a result, the hospital would be willing to hire additional nurses at its current wage but would be unwilling to raise that wage to attract more nurses since the benefits would be outweighed by the increase in wages paid to its existing workforce." *Id.*

123. Godbey, *supra* note 118, at 121. Many economists claim that competition alone determines the wage rate. If there is great demand for nurses and low supply, wages will increase, causing more people to enter the profession. *Id.* See also Sullivan, *Supra* note 77, at S135 (1989). "The market for hospital nurses is literally *the* textbook example of monopsony power in the labor market. Monopsony power is defined as a single buyer for a given product or service from a large number of sellers." *Id.*

124. Lupica, *Pay Equity - A "Cockamamie Idea?" The Future of Health Care May Depend Upon It*, 13 AM. J. OF L. & MED. 597, 601 (1988) Wages are not based merely on objective tasks found in a job description but reflect history, job availability and relative bargaining power positions and supply and demand. *Id.*

125. Godbey, *supra* note 118, at 121. Employers base wages on both external and internal market factors. Internal factors adopted by employers such as merit, seniority and job evaluations are biased against women because they reflect cultural stereotypes as to the relative worth of the work done. The external factor, the market wage is not pure because factors such as entry barriers into an occupation and collusion in wage setting make the labor market noncompetitive. *Id.*

126. *Id.* at 613. Union support is the single most powerful impetus for implementing comparable worth. See also, Lupica, *supra* note 124, at 602. Collective bargaining has been used successfully by groups of nurses and other classes of female workers in their pursuit of pay equity. *Id.*

proven as positive as first hoped.<sup>127</sup> The first case to test the theory of comparable worth was *County of Washington v. Gunther*.<sup>128</sup> The plaintiffs, female prison guards, sued the county under Title VII. The female guards alleged that the defendants denied them equal pay for substantially equal work,<sup>129</sup> that the defendants fired them, and that the defendants refused to rehire them because of their demands for equal pay. The plaintiffs argued that under the "substantially similar" test,<sup>130</sup> they were denied equal pay for work which was "substantially similar" to the male prison guards.<sup>131</sup> The Court concluded that the state had intentionally discriminated against its female guards because it had failed to pay them the full evaluated worth of their jobs.<sup>132</sup>

After *Gunther*, however, the courts examined comparable worth restrictively. In *American Federation of State, County and Municipal Workers v. Washington*,<sup>133</sup> the state of Washington commissioned a pay equity study. This study discovered that women in traditionally female jobs had been paid less than men for work of comparable value to the state. The state, however, chose not make wage adjustments.<sup>134</sup> The court held that the state had not discriminated against its female employees. The court found that the state had no obligation to correct an economic inequality it did not create.<sup>135</sup>

Even though the decision in *American Federation* was in the states' favor, it none the less created a short wave of wage

---

127. *Id.* at 107. Comparable worth is defined as equal pay for work of comparable worth or value to an employer. In April 1985, the United States Civil Rights Commission rejected comparable worth as a method to end wage discrimination against women. *Id.* at 116.

128. *Washington v. Gunther*, 452 U.S. 161 (1981).

129. 452 U.S. at 180. The County of Washington evaluated the worth of both the female and male guards' jobs. The county then determined that they should be paid at a rate 95% of the that paid the male guards. The county only paid the female guards 70% of that amount, while paying the male guards full evaluated amount of their worth.

130. *Id.* at 164.

131. *Id.* at 165. Previously, the district court found that even though the work was substantially the same, the male prison guards' jobs required more effort and responsibility. Therefore, the district court held that the work of the female guards was not substantially similar enough to warrant equal pay, and dismissed their claim that defendant had violated Title VII by paying different wages solely based on gender.

132. *Id.* at 181.

133. *American Fed'n. of State, County and Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985).

134. 770 F.2d at 1403.

135. *Id.* at 1407.

adjustments at the state level.<sup>136</sup> Soon after the decision however, comparable worth theory was even more severely limited in *American Nurses Ass'n. v. Illinois*.<sup>137</sup> The 7th Circuit concluded that Illinois' failure to implement a comparable worth program for its state employees did not, by itself, violate Title VII.<sup>138</sup>

### C. REFORMED STRUCTURES: WORTH, VOICE & EMPOWERMENT

There are interests which must be appraised when formulating a new structure to take into account nurses' needs. Initially for nurses, attaining the true value of their work has been a long and continuing struggle.<sup>139</sup> For many nurses the value of their work is derived in large part from their responsibilities as caregivers.<sup>140</sup> Thus, for nurses to establish their abilities in the workforce, they must also validate the concept that the care they give has value.<sup>141</sup> "Women's work", specifically nursing, has great value,<sup>142</sup> and through organizing efforts society will come to value women's work and its worth.

---

136. Godbey, *supra* note 118, at 118. By 1987, twenty three states had implemented comparable worth for state employees: Alaska, California, Connecticut, Delaware, Georgia, Hawaii, Kentucky, Idaho, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, Oregon, South Dakota, Vermont, Washington and Wisconsin. *Id.*

137. *American Nurses Ass'n. v. Illinois*, 783 F.2d 716 (7th Cir. 1986). "Comparable worth is not a legal concept, but a shorthand expression for the movement to raise the ratio of wages in traditionally women's jobs to wages in traditionally men's jobs." *Id.* at 719.

138. *Id.* at 723. If all that the plaintiffs in this case are complaining about is the state of Illinois failure to implement a comparable worth study, they have no case and it was properly dismissed. *Id.*

139. Markus, *supra* note 92, at 414. Since the early 1970's, modern nurse practice acts have redefined nursing as an independent profession with a unique body of knowledge distinct from medicine. Studies done by the American Hospital Association in response to the severe nursing shortage of the late 1970's and early 1980's found that "nurses left the profession most frequently because of their inability to participate in the clinical decision making process in a meaningful way." *Id.* at 416.

140. Gilligan, *supra* note 62, at 17. "Women not only define themselves in a context of human relationship but also judge themselves in terms of their ability to care." *Id.*

141. *Id.* "Women's place in a man's life cycle has been that of nurturer, caretaker, and helpmate, the weaver of those networks of relationships on which she in turn relies. But while women have thus taken care of men, men have, in their theories of psychological development, as in their economic arrangements, tended to assume or devalue that care." *Id.* at 17.

142. Markus, *supra* note 92, at 413. The nurse is often the only consistent presence in the patient's hospital environment. Nurses provide sustained and intimate care for the patient and are thus able not only to interpret the baffling array of unfamiliar procedures, but also to understand their impact on the patient as a unique individual. *Id.*

Secondly, for a large group of women in our society the focus on sexual equality in the workforce has not been consistent with the realities of many women's personal experiences. Many women view themselves and their positions in the work environment differently than men. Therefore, traditional union methods which use an adversarial model of organization may not be effective and may even be distasteful to many women who see themselves, not as participants in a battle against management, but rather as part of a larger working group which shares group goals.<sup>143</sup> Thus, to obtain a voice through collective action, women must organize in a manner suitable, and yet still develop a structure designed to fulfill their needs.

Finally, rooted deeply in the inequities of the work place is the reality that women have historically faced difficulty concerning economic and decisional power.<sup>144</sup> Thus, an organization representing a profession dominated by women must position itself to be more than a representative for purposes of traditional collective bargaining.<sup>145</sup> The concept of collective bargaining itself must be expanded to incorporate issues which go beyond the traditional subjects of wages, hours, terms and conditions.<sup>146</sup> A reformed organization must also work to affirmatively establish that women's work, such as nursing, has a value far above what the market is now willing to pay.<sup>147</sup>

As discussed, the existing structure and focus of unions are inadequate for women, especially in the context of nursing, where the product is patient care. Because patient health is at risk, many nurses have historically been unwilling to strike,

---

143. *Supra* note 91, at 269. "The classical observation of labor organizers that women ... resist unionization because of their personal relationships with management, and the feeling that they "work for but also identify with the company." *Id.*

144. Crain, *supra* note 13, at 1210.

145. *Id.* at 1218. "The obligation to bargain collectively under the NLRA is statutorily limited to issues involving 'wages, hours, and other terms and conditions of employment.' All subjects falling within the scope of the statutory obligation are mandatory, and must be bargained over; all others are permissive, and may be discussed but not insisted upon to impasse. Because issues such as child care, maternity benefits, and parental leave have not been pressed by unions at the bargaining table, the Board has never faced the question whether they are mandatory subjects of bargaining." *Id.*

146. National Labor Relations Act §8(d), 29 U.S.C. §158(d) (1988).

147. Sullivan, *supra* note 77, at S173. In the study of the inverse elasticity of supply and demand for nurses, the most important factor which was left out was the effect of labor unions. Though the results of the survey of nursing personnel indicate that unionization is still fairly uncommon, its extent is by no means trivial. *Id.*



and relinquish care of their patients.<sup>148</sup> However, the strike is the bottom line for a traditional union<sup>149</sup> and the inability of nurses to strike is seen by traditional union organizers as a severe handicap, as well as an affirmation that women are not committed to organizing. Traditional unions have been slow to recognize that women view their work and their work relations differently and that women's concepts of voice, empowerment and control must be conclusively recognized and fostered. As a result, traditional union strategies to organize women workers such as nurses have not been as effective as they potentially could be. By adding feminist strategies to the existing structure, nurses will find expanded concepts of worth, voice and empowerment.

It is imperative that a new model of organization combat the problems women face, particularly in female dominated professions such as nursing.<sup>150</sup> Nurses' value to the health care system, nurses' role in that system, and nurses' ability to participate in economic and decisional issues they and their patients face, all demand attention in the new model of union organization. This new organization needs to be responsive to women and women's issues; not an imposed, structured, pre-packaged and prescribed union.<sup>151</sup> It is also important to determine the type of structure most capable of effectuating empowerment and control. In the context of nursing, the best structure to affect the work environment is one where each member is connected to and actively involved in the organization itself and the creation of its strategies.<sup>152</sup> Because women have a different sense of self, one which is connected and intertwined with others,<sup>153</sup> connection with the group is essential to a model built on serving its women members. A structure created to instill women's empowerment can not rely on

---

148. Lupica, *supra* note 124, at 617.

149. Cox, *supra* note 17, at 487. "[T]he strike or the fear of a strike is the motive power that makes collective bargaining operate." *Id.*

150. Blumrosen, *supra* note 4, at 415. Job segregation remains the most common characteristic of women's work. "[T]hese segregated jobs are concentrated in the lowest paying of the occupations." *Id.*

151. Crain, *supra* note 13, at 1212.

152. *Supra* note 91, at 268. The union cannot not simply replace the employer as an authority figure. Rather, it must empower employees to take a stand for themselves. *Id.*

153. Gilligan, *supra* note 62, at 62. "The reinterpretation of women's experiences in terms of their own imagery of relationships thus clarifies that experience and also provides a nonhierarchical vision of human connection. Since relationships, when cast in the image of hierarchy, appear inherently unstable and morally problematic, their transposition into the image of web changes an order of inequality into a structure of interconnection." *Id.*

traditional union methods, instead the use of community building and networking must be utilized to establish a organization with a sense of community and purpose. Once this support is created, the members themselves would define the issues and concerns most relevant, and define the paramount methods of alleviating them. Through a system which utilizes individuals to build the organization member by member, as opposed to the target method of traditional labor organizations, women will ultimately be in a position to affect change in their work environment and in patient care.

The central aim of a reformed feminist organization must be the empowerment of women in the work environment. By focusing on organization, issues, and goals, the empowerment of nurses can be accomplished. The issues emphasized must be of power, self respect and self-representation combined with the welfare of their patients.<sup>154</sup> For nurses this means they have the ability to control what happens to them and their patients in the hospital setting.<sup>155</sup>

## V. CONCLUSION

Today we often hear that there is a nursing shortage.<sup>156</sup> Yet apart from specific geographic areas, nurses are not paid what a market economy determines they should be paid.<sup>157</sup> As conditions at most hospitals are beginning to hit crisis situations,<sup>158</sup> nurses often complain that they are spread too thin,<sup>159</sup> that they have too many patients, and that as a result, patient care is declining.<sup>160</sup>

To address these problems, this paper argues that women, specifically nurses, must create their own organizations. The model constructed here is one in which women are in control

---

154. *Id.* at 272.

155. Markus, *supra* note 92, at 421.

156. Markus, *supra* note 92, at 415-416. The frustration of responsibility for patient welfare in the absence of authority to make decisions has contributed to the chronic nursing shortage. *Id.* at 415. See also Lupica, *supra* note 124, at 598. (The nursing profession presently is having difficulty keeping and reinforcing its ranks.) Godbey, *supra* note 118, at 109. (Wage rates remain low despite a recurring shortage of nurses in the profession.)

157. Godbey, *supra* note 118, at 109.

158. Markus, *supra* note 92 at 415. The serious shortage of working nurses has lead to widespread understaffing in hospitals. *Id.*

159. *Id.*

160. *Id.* at 421. Nurse's dissatisfaction with their lack of imput into patient care has created a wide spread nursing shortage, which is a detriment to the patient population. *Id.*

of their destiny in the workplace. Women must be able to organize in the way they feel comfortable,<sup>161</sup> and yet still be effectively heard.

Government intervention through legislation is also extremely important. Making comparable worth the law and enforcing it is vital in order to meet women's needs. These two elements, legislation and reformed womens' organizations, must work together and focus in on the basic issues which keep women's occupations, such as nursing under paid and under valued, leaving those in the profession with little sense of empowerment or control. Sex segregation, blatant, inherent, or socially directed cannot be fully corrected by legislation. Therefore, the need for other correctional alternatives is a pressing concern for nurses and all women who do "women's work."

---

161. *Supra* note 91, at 269-270. The Harvard Union adopted a non-adversarial posture towards management, which allowed women who had no personal complaints with the university to support the union. *Id.* at 269.