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COMPARABILITY OF DISSIMILAR JOBS
IN WAGE DISCRIMINATION CASES:
VUYANICH V. REPUBLIC NATIONAL BANK

by
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Abstract

Comparability of dissimilar jobs has been hotly debated both in legal and academic circles. The most thorny issue is whether dissimilar jobs can be compared by measuring their relative worth on a common scale. Recent legal developments, especially in the case of Vuyanich v. Republic National Bank, have begun to lay the foundation for the principle and method for comparing dissimilar jobs. These developments may have far-reaching implications not only for measurement of wage discrimination in general but also for the larger more complex issue of comparable worth. An analysis of the Vuyanich case is supplemented with implications for the future of wage discrimination cases in the courts.
Under the provisions of the Equal Pay Act of 1963 (EPA),\textsuperscript{1} allegations of discrimination in wages must conform to the criterion of "equal work." Jobs are equal for the purposes of the Equal Pay Act if they have substantially the same content.\textsuperscript{2} The performance of these jobs must require equal skill, effort and responsibility and the jobs must be performed under similar working conditions. Since most of the female workforce is employed in sex-segregated jobs,\textsuperscript{3} the EPA has provided scant protection against wage discrimination for the majority of women. Although institutional, policy and research investigations have treated the issue of wage discrimination and job segregation separately; it may be argued that the two are essentially the same problem.\textsuperscript{4} Even though the causal link between job segregation and wage discrimination may prove tenuous, it is empirically observed that most of the gross male-female wage differential may be explained by the segregation of women into certain low wage occupations.\textsuperscript{5} If rates paid for traditionally segregated jobs have been allegedly depressed, there is a need to compare jobs, even if they are dissimilar, to assess the nature and extent of these differentials. 

Comparability of dissimilar jobs has two important dimensions: legal and econometric. Recently, important developments have taken place on both fronts. First, the U.S. Supreme Court ruled in the case of Gunther v. County of Washington\textsuperscript{6} in June 1981, affirming that Title VII protection is available to claims of wage discrimination even if the jobs are not "equal" as the term is used under EPA. This decision has essentially established a precedent for comparing dissimilar jobs to
examine allegations of wage discrimination. If dissimilar jobs can be compared, how is one to compare them? In other words, the principle established by the court in the case of Gunther must be made operational. Another significant development was the case of Vuyanich v. Republic National Bank (August, 1980) where the U.S. District Court ruled on the methodology acceptable to the court for comparing dissimilar jobs, namely, by controlling for relative value of jobs in earnings functions. This paper focuses primarily on the development in the latter case. In the first part, different methodologies used in academic research are reviewed. In the second part, the Vuyanich decision is critically examined in the light of alternatives available to the court. Although the idea of comparable worth of jobs is currently being deemphasized in policy circles, assessing relative worth of jobs to investigate allegations of wage discrimination may, over time, become a prevalent and acceptable practice due to developments such as the Vuyanich decision.

The Equal Pay Act and Title VII

Until recently, the issue of equal pay was clouded by the apparent overlap and conflict between provisions of the Equal Pay Act (1963) and Title VII of the Civil Rights Act (1964). To ward off potential confusion, Senator Bennett introduced an amendment to Title VII which created an analytical link between Title VII and the Equal Pay Act. The Bennett amendment indicated that a compensation differential based on sex would not be unlawful if it was authorized by the Equal Pay Act. Since the provision of the Equal Pay Act is
"equal pay for equal work," it does not allow for dissimilar jobs to be used in allegations of wage discrimination. Also the EPA covers only sex discrimination and, therefore, automatically excludes discrimination based on race or other factors. The implication of the amendment was that women could not seek protection from wage discrimination under Title VII unless the jobs in question were "equal." This apparent inequity in protection for women was the substance of two important cases of which one was decided by the Supreme Court in 1981. In Gunther vs. County of Washington,8 the U.S. Supreme Court upheld a ruling of the Ninth Circuit Court of Appeals that sex-based discrimination charges under Title VII are not limited to claims of "equal pay for equal work." In a similar case of International Union of Electrical, Radio and Machine Workers (IUE) vs. Westinghouse Electric Corporation,9 the Third Circuit had ruled in 1980 that sex-based wage discrimination was unlawful even if the jobs are dissimilar or unequal. This case was later denied certiorari by the U.S. Supreme Court.

Empirical Studies of Male-Female Wage Differentials

Most research studies adopt the procedure where actual wage differentials are first recorded and then a theoretical model is used to "explain" these differentials in terms of productivity characteristics of the subjects. At the center of all analyses lies the human capital theory which views an individual's earnings as a return on the human capital that the individual possesses in terms of education, experience, training, etc. This implies that the observed gross wage differential reflects differential endowments in
terms of productivity characteristics such as education, experience, etc. Some representative studies of this kind are those by Fuchs, Oaxaca, Malkiel and Malkiel, and Gwartney and Stroup. All these studies use human capital variables for control in addition to dummy variables for region, city size and other demographic conditions that may have an effect on earnings. While these studies used aggregate male and female groups, Mincer and Polachek and Sandell and Shapiro used samples of married women only and used time spent at home as a control variable.

Other kinds of control variables not always within the purview of the human capital theory are sometimes used. For example, number of children was used by Oaxaca as a proxy for time spent at home and away from work. The underlying assumption is that ideally all of the difference in wages could be explained by differences in such individual characteristics. After controlling for all productivity-related variables, if the differential has not been fully accounted for, the remainder is attributed to discrimination. In this kind of modelling, therefore, the critical issue is what characteristics of the person can be used as control variables. The controversy is particularly heated over the question of whether the job status of a person can be or should be considered a productivity characteristic.

Use of Occupation or Job Status as a Control

Although Sanborn used human capital variables such as age (a proxy for experience) and education, his inclusion of occupation as an additional control variable raises questions about an important underlying assumption regarding measurement of discrimination.
Using occupation as a control variable implies that a person's job is an important determinant of his earnings. This, in fact, is substantiated by empirical results. Where occupation was not included, researchers could only explain 0% to 49% of the observed earnings gap using other control variables. Sanborn was able to explain 57% of the earnings gap using a broad classification of occupations. When a more narrowly defined occupational classification was used, 71% of the earnings gap was explained by the control variables. The implications are interesting for measuring wage discrimination.

Wage discrimination is measured as the residual unexplained portion of the differential. Because the inclusion of occupation as a control variable explains more of the gross wage differential, it reduces the unexplained portion and hence estimates of the discrimination effect are smaller. The argument for using occupation or some similar control to obtain a sense of what the person is doing on the job, is that while a person may be paid for education, experience, etc., he/she is also paid based upon the job being performed for the employer. Some employers have argued in the courts that in order to cope with the task of economic performance, the workplace can only pay a person in relation to the economic worth of his job. Thus, the employer pays for the job done and not for what skills the individual holding the job may possess. Consider the example of a person who voluntarily accepts underemployment (e.g., a secretary with a college degree) for reasons of future prospects or family situation. We can hardly argue that the employer should pay the person commensurate with his
or her qualifications (college degree) when the worth of the individual's work to the employer is that of secretarial duties.

Apart from the employers' point-of-view, there are other arguments that suggest the need to include some measure of job status in explaining earnings. When such analysis is performed on employees within a single organization, statistical variations arise from the fact that promotions are fewer and far between as one goes up the organizational ladder. Wise\textsuperscript{19} has shown that all individuals of like characteristics cannot be promoted at the same time as the promotional process is necessarily stochastic. This places an upper limit on the proportion of the variance that can be explained by a conventional human capital model. Job level in that case clearly becomes an important and substantial determinant of earnings.

Some studies seek to avoid the controversy over inclusion of job level by estimating separate earnings functions for each job level.\textsuperscript{20} In the limit, each person could belong to a separate job level which will make earnings and job levels analytically equivalent. Chiplin\textsuperscript{21} argues that since there are clear discontinuities in earnings progression, for the purpose of empirical examination, "it would seem to make more sense to allow for these discontinuities by including "occupation" or job level within the model." Further, the case for inclusion of occupational status can be argued in terms of Mincer's\textsuperscript{22} statement that occupational advancement is a medium for converting human capital into earnings. Movement of people across jobs can thus be viewed as a transmission mechanism through which discrimination can be perpetuated. Again as
Chiplin notes, "In terms of discrimination, therefore, the argument is much more one for the inclusion of occupation (or job level) within a simultaneous system rather than exclusion."

There is, however, a serious objection to using occupation or job status as a control variable from theoretical considerations. The argument against using this control is that since it is the employer, prejudiced or not, who determines and controls work allocation inside the organization, he can easily use his prerogative to allocate work in a way so as to discriminate against certain groups. Job or occupational status thus may hide discrimination effects upon wages. The problem is of separating the true effect of discrimination from the effect of non-uniform movement of people with similar characteristics because of the stochastic promotion process. Empirically, inclusion of job or occupational status explains more of the observed gross male-female wage differential. Sanborn was able to explain as much as 88% of the wage differential through the use of narrowly defined job categories. In fact, it has been argued by Fuchs that if the occupation of a person was so finely defined that it made the job extremely unique, it may be possible to "explain away" nearly all of the differential. In the extreme, we may be able to explain why wages are different but we will still be left with the question of why occupations are so different for men and women. Is that occupational distribution due to discrimination or something else?

From statistical theoretical considerations, both sides of the argument imply some biases and it is important to bear them in mind. If occupational control is used in explaining the wage gap,
the magnitude of the discrimination effect is likely to be underestimated. This is because the procedure accepts potentially discriminatory occupational assignment. If control for job or occupational status is omitted, one effect may be the upward bias in estimates due to stochastic nature of the promotion process. It is sometimes argued that this bias is not critical in the case of studying large populations because differences in job levels within groups will average out in the absence of discrimination. Frequently, groups that have been discriminated against have much lower representation across job levels than the reference group within a single organization. In such cases, the averaging out of differences within smaller groups will not take place even in the absence of discrimination.

**Wage Comparability of Dissimilar Jobs**

The need to account for job status emanates from the fact that most individuals do not hold identical or even similar jobs. Given that their jobs are different, any comparison of wages necessitates that the jobs, no matter how dissimilar they are, be compared. Using job status as a control in wage regressions accomplishes precisely this task. Job status can be entered in quantitative analysis either as a dummy (dichotomous 0 or 1) variable or as a continuous variable. To enter it as a continuous variable, each job needs to be "evaluated" or calibrated through some procedure on a continuous scale. The "value" of each job on this scale can then be entered as an independent variable in an earnings function. Each of these methods leads to problems of different kinds.
When job status is represented by a dichotomous (0/1) variable, it usually is entered in terms of job level in the organizational hierarchy of jobs. This implies that if a person belongs to a certain level, the level variable takes the value 1, otherwise it is 0. The only problem with this approach is that often within organizations where discrimination cases arise, level is frequently associated with other variables such as race or sex which is the object of investigation. In such cases, the employer (usually the defendant) would like to include the level variable. Inclusion of the level variable will reduce the coefficient on sex or race variable (since the two are highly associative) leading to a finding of no discrimination. The plaintiff would normally like to exclude the level variable so that the fact that there are few women (or minorities) in the higher levels of the organization would be captured by the sex (or race) coefficient leading to a positive finding of discrimination.

In a 1977 case, Agarwal v. Arthur G. McKee & Co., the U.S. District Court (Northern District of California) ruled that the plaintiff's exclusion of "job level" from the analysis was fatal to his cause. The court found that the plaintiff "failed to treat salary as a function of job position and salary grade." The Agarwal court clearly affirmed the need to include job level as an explanatory variable. A similar judgement followed in the case of Presseisen v. Swarthmore College. In this case, the U.S. District Court (Eastern District of Pennsylvania) rejected the plaintiff's analysis because it objected to the exclusion of "academic rank" as an explanatory variable. The court held that in
the absence of discrimination, the exclusion of job level will lead to an upward bias in the sex coefficient. This will indicate presence of discrimination when none is there. Another recent example of such a ruling was the 1981 case of Valentino v. U.S. Postal Service where the court cited both the Agarwal and the Presseisen rulings in rejecting the plaintiff's models that excluded job level as an explanatory variable. At the same time, the Valentino court accepted the defendant's regression that included job level as an explanatory variable.

In each of the above cases, job status is treated as either a dichotomous (0/1) variable or as a variable measured on an ordinal scale such as, Level 1, Level 2, Level 3, etc. The courts, in each case, ruled on the need to include some measure of job status in regressions that attempt to explain earnings but elaborated little on which of the many forms may be acceptable. In Vuyanich v. Republic National Bank, the District court considered at some length the question of inclusion of job status as well as the form in which such a variable may be entered.

Control for Job Status and the Idea of "Comparable Worth"

Part of the debate on whether to include job or occupational status in explaining earnings has been motivated by econometric considerations of developing a valid structural form for an earnings function. A similar idea has gained currency in recent years under the name of "comparable worth" which, however, is motivated by social concerns of speeding the process of bridging the male-female earnings gap. The persistent earnings gap between males and females
in this view reflects the segregation of women into certain low-skill, low-wage occupations. The proponents of the comparable worth idea contend that those jobs traditionally occupied by women have been systematically undervalued due to past discrimination. Unless the compensation of these jobs is improved in relation to other jobs, women will continue to lag behind men in earnings. Thus, these groups advocate revaluing all jobs and, in fact, establish a new economic order of jobs in the economy. The comparable worth proponents support an active government intervention through legislation and policy formulation to bring about the revaluation of jobs.

In 1979 The Equal Employment Opportunity Commission (EEOC) sponsored a study of job evaluation as a technique to compare the relative worth of jobs. The study was undertaken by the National Academy of Sciences whose final report has recently been published.\textsuperscript{29/} The final report concluded that although the use of job evaluation in examining possible undervaluation of female jobs is at best "problematic," it would be "unwise" to reject the use of job evaluation plans altogether. These problems although substantial are still not insurmountable.\textsuperscript{30/} Namely,

1. The relative ranking of jobs tends to be highly dependent upon which factors are used in the evaluation and how heavily each factor is weighted.

2. Job Evaluation is inherently subjective, making it possible that well-known processes of sex-stereo-
typing will be operative in this context as well, resulting in an undervaluation of jobs held predominantly by women.

3. Many employers use more than one job evaluation plan -- one for shop jobs, one for office jobs, etc., a procedure that makes it impossible to compare the worth of jobs in different sectors of a firm.

But as the report points out, further study is needed to assess how "problematic" the situation is and asserted that "[d]espite their limitations, they [job evaluation plans] do provide a systematic method of comparing jobs to determine whether they are fairly compensated."\(^{31}\) Meanwhile, a fairly intense debate is taking place between those who predict that espousing the "comparable worth" idea will lead to "not only highly arbitrary and controversial results, but also to an administrative quagmire"\(^{32}\) and those who suggest that women will not gain their rightful place until the systematic undervaluation of their jobs is eliminated.\(^{33}\) It appears likely there will be little or no development in government policy on this issue in the next few years.

Internationally, the origins of the comparable worth idea can be traced to the ILO Convention No. 100 in 1951 in which the signatory nations agreed to "ensure the application to all workers of the principle of equal renumerations for men and women workers for work of equal value " (emphasis added). Since then some of the
countries including Canada, Netherlands and France have enacted legislation to this effect. In Canada, the first case under the new legislation was recently decided in which the court ruled that the jobs of predominantly female librarians was systematically undervalued compared to the mostly male "historical researchers."34/ This suggests that the idea of comparable worth has some proven operational feasibility.

In the U.S., a much publicized successful attempt to apply the concept of comparable worth took place during 1979-1981 in the city government of San Jose, California. San Jose, the 17th largest city in the U.S., committed itself to an analysis of its complete pay plan to examine if salaries were comparable to the inherent worth of jobs. The consulting firm of Hay Associates was retained by the city to direct the analysis of all jobs and salaries.35/ The employees' union, AFSCME Local 101, was a full participant in these efforts. The analysis yielded many inequities. For example, the job of a Neighborhood Recreation Supervisor (typically female) was found to have greater relative "worth" but lower pay than a Gardener (typically male). After a more equitable structure of the relative "worth" of jobs was drawn up, both management and union officials endorsed the accuracy of work by Hay Associates. In July 1981, after a brief and highly publicized strike over a new contract,36/ an agreement was reached which effectively put the first pay system born out of the comparable worth idea in place in the U.S.

The Vuyanich Case

Action was brought under Title VII of the Civil Rights Act of
1964 by a group of female and black employees against the Republic Bank of Houston, Texas, the eighth largest bank in the South. The plaintiffs alleged widespread race and sex discrimination by the employer. In its ruling of October 22, 1980, the presiding District Judge Higginbotham found the bank liable on some charges but ruled that the plaintiffs had been unable to establish a \textit{prima facie} case on some other charges. The court's rulings in the case of compensation discrimination are specially interesting in the matter of using job or occupational status as a control in measurement of discrimination.

After establishing the principle of examining wage differentials using multiple regression analysis and the underlying human capital theory, the court ruled that it would favor the position that the intent of Title VII is "equal treatment" rather than "equal achievement."\textsuperscript{37} The proponents of equal achievement, in the opinion of the court, would have the employer bear the burden of correcting societal discrimination such as unequal education and training. To do so would frustrate the stated purpose of Congress in enacting Title VII. Thus the equal treatment doctrine adopted by the court only examines if all persons are treated equally by the employer without regard to their racial or sexual group status. Of course an employer does not discriminate if he pays a white who is more productive in a job compared to a black in the same job. In the 1971 precedent-setting \textit{Griggs vs. Duke Power Company} case,\textsuperscript{38} the court ruled that practices that are, "fair in form but discriminatory in operation," are unlawful under Title VII. Thus the requirement of a test is discriminatory if blacks and whites
consistently perform differently on the test. The court defined the important exception to this rule as, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

To examine discrimination in compensation in Vuyanich the District Court admitted statistical evidence from both sides in the form of multiple regression studies. The plaintiffs' models were presented by several experts. One set of studies done by Dr. John Spaulding\(^{39}\) concentrated on the issue of changing 17 non-exempt grades to 10. The court found Dr. Spaulding's models not illuminating because of three reasons. First, the study failed to separate salary discrimination from promotion discrimination. Second, the regression used the variable changes in salary rather than salary itself. Third, only one explanatory variable, namely, performance evaluation on the job, was used. The court after concluding that this analysis is not of "independent probative value," did not consider this evidence any further.

Another set of studies by Drs. Francine Blau and Janice Madden were admitted as evidence and used by the court extensively in arriving at the final ruling. Drs. Blau and Madden ran several sets of regressions in all of which the dependent variable was the salary. Independent variables were differently chosen for each set. For example, Set 'A' was run on age and education whereas, Set 'B' was run on dummies for level of education achieved and age in months minus 72 as a proxy for general labor market experience. Of particular interest to us is Set 'B' in which the researcher
included among other independent variables, Hay Points assigned to each job by the employer.

Hay Points and Job Evaluation

Job evaluation is sometimes defined as, "a generic term covering methods of determining the relative worth of jobs."\(^{40}\) The Hay method of job evaluation was developed by E.N. Hay & Associates between 1951 and 1954.\(^{41}\) Although the Hay method was originally applied mainly to managerial jobs, its development in recent years has led to its application to a much wider array of jobs. Briefly, this system evaluates jobs relative to one another along three main dimensions: know-how, problem-solving, and accountability. Jobs are evaluated along these dimensions both for breadth as well as depth. Both breadth and depth are measured along a scale of a number of "degrees." For example, education may be measured in eight degrees starting from elementary school (1st degree) to doctoral-level achievement (8th degree). Each degree has pre-assigned number of points. After jobs have been evaluated in each dimension, their point scores are summed up yielding a total score.\(^{42}\) This score for each job has been referred to by the court as Hay Points. In the subsequent step of wage determination, the score of each job is tied to wages. Although the wage for the lowest and the highest paid jobs may be fixed externally, this method, working from some reference point, establishes a relatively objective way of determining the relative worth of all other jobs.

The Court's View of Comparability

Before the court could consider the interpretation of these
findings, it had to rule on the legal issue of whether dissimilar jobs could be compared for allegations of wage discrimination.

The Supreme Court ruling on the Gunther case was not available at the time the Vuyanich case was before the District court although the Ninth Circuit ruling was available and duly considered by the Vuyanich court. Along with the Ninth Circuit ruling, the court also considered a similar ruling by the Third Circuit Court of Appeals in the case of International Union of Electrical, Radio and Machine Workers (IUE) vs. Westinghouse Electrical Corp. The Vuyanich court did not decide on whether to agree with the rulings in the Gunther and IUE cases but, clearly, in admitting statistical studies that used Hay points to represent the "worth" of jobs, the court agreed with the principle that dissimilar jobs can be compared on a scale representing their "worth" to the employer. This is an important indirect development towards the "comparable worth" idea.

In its rulings, the court paid careful attention to the inclusion of Hay points. The plaintiffs could show discrimination across dissimilar jobs by controlling for "worth" of each job. In determining the worth of these jobs, the Court suggested, one should focus on what is the job "worth" to the employer. Since this has been determined by the bank itself through the use of the Hay Point System, the plaintiffs should not hesitate from using it. There remains the question of validity of the Hay Point System which may contain inherent discrimination against women. On this issue the court suggested:

"Using the Bank's own valuation system should not give us pause. Indeed, if a plaintiff can show
wage discrimination using the Bank's own valuation system, it is all the more impressive because of the possibility of inappropriate valuation by the Bank of jobs."

The court also recognized the problem that the inclusion of Hay points in the earnings regression function may run afoul of the marketplace where jobs may be valued differently. In that case one can presume for the purposes of the prima facie case that overall, across the many positions of a large employer such as Republic National Bank, no systematic bias would occur from using such a control. If the plaintiffs comply with so much then it would be up to the Bank on rebuttal to show how this control for work is not adequate in the face of marketplace realities.

In applying the law to the studies presented, the court rejected the female plaintiffs case because they failed to establish a prima facie case of wage discrimination. The court said that the plaintiffs had not compared equal jobs and if the requirements of the Equal Pay Act were to be applied, the charges would have to be expelled. Even if the Equal Pay Act requirement of "equal work" were not applied, the plaintiffs' case had to be rejected because of the problems with the proxies used for experience in the regression.

The black plaintiffs case was presented separately for the years 1969-72 and 1973-78. For the years 1969-72, the court rejected the plaintiffs models primarily because there was no control for comparing dissimilar jobs through the use of Hay points. The court said that the models only controlled for productivity characteristics and officer or exempt status. If wage discrimination were to be inferred on these results it would imply that we expect two persons, one black and the other white, with the
same productivity characteristics and officer or other exempt status to hold the same job. In practice each of such twins may hold different jobs which implies that in order to compare wages directly, some control for the value of those jobs must be applied. It is precisely for these reasons and following a very similar set of deductive logic that the court ruled that in case of black plaintiffs, for the years 1973-78, a *prima facie* case of wage discrimination was established. In these regressions, the model controlled for productivity characteristics in addition to job value as measured by Hay points.\(^45\) Through this ruling the Vuyanich court has clearly suggested that despite the many problems associated with job evaluation procedures and results, it is one acceptable way to deal with the question of comparing dissimilar jobs.\(^46\)

**Implications of the Vuyanich Case**

The judgement in this case is a fairly strong statement on the need to include job status as a control in wage discrimination cases on one hand and the *form* in which job status is to be used on the other. No doubt the judgment will continue to stir up controversies. The *Vuyanich* decision leaves some important issues open to question. While inclusion of job status measures such as occupational control or Hay Points do provide a measure of discrimination, it nonetheless is an *underestimate* of the actual discrimination. The method suggested by the court does not adequately address the issue of measuring discrimination inherent in the promotion system, i.e. discrimination reflected in the job
status of a person. Roberts suggests that since some groups of employees do not compete with all others for the same jobs, they may be aggregated into "non-competing" groups\(^47\). This classification will allow a separate equation to be estimated for each group with no control for job status. On the other hand, Osterman, among others, has argued that an equation combining all employees into one group and using no control for job status would provide a defensible measure of discrimination\(^48\). Both these research studies raise issues that the Vuyanich court did not or could not consider given other constraints. Also, as a purely legal development, it must be kept in mind that this decision has come at a district level and while it may be a significant development, it does not as yet represent an area of settled law. While the debate goes on, this precedent-setting case will undoubtedly influence others and it is important at this stage to take stock of its implications. In our opinion the judgment provides definitive statements on the following.

1. The inclusion of some measure of job status in wage regressions is necessary to establish a prima facie case of discrimination. This should not be confused with the issue of measuring the extent of wage discrimination which was not an issue before this court. Inclusion of job status in wage regressions will result in statistical evidence that will not only be acceptable to a court of law but also convey considerable weight in case of a positive finding. Because job status is strongly influenced
by the employer, finding wage discrimination in this fashion will be the most conservative by far and hence most persuasive.

2. The court affirmed its view that no mathematical model can be completely error-free. But such errors cannot completely disqualify all regressions and models for evidentiary purposes. The court laid down well-articulated criteria which may be applied for rebutting a model or rejecting regression findings. In the court's words,

"To challenge a model successfully, the defendant must do more than point to possible sources of error which would bias the modelling results against him."

The court suggested three conditions which must hold for defects to cause the modelling results to lose probative effect.

a) The error must be either egregious or systematic

b) The error must actually (rather than merely theoretically) affect the results predicted by the model or regression

c) If the error is systematic, it must be shown that the particular model in use is sensitive to this bias

The implications of the Vuyanich case for the idea of comparability of jobs is substantial because the Vuyanich court insisted on representing job status in terms of Hay Points whose stated purpose is to determine the relative "worth" of jobs. Hay
Points are determined by a job evaluation procedure the kind of which comparable worth proponents have been calling for. By admitting statistical evidence derived from Hay Points of each job, the Vuyanich court has provided the initial impetus required to bring the idea of comparable worth to the judicial arena. Of course, these are developments in the courts which admittedly require large amounts of time and money before they can have an impact on the workplace. But these developments in contrast to government policy formulations, are relatively more free of influences from the outside. This means that the course is slow but steady and will not be affected by tides of change in administrations or the ideological platforms these administrations choose to follow.

Legal Outlook

Meanwhile, it is clear that the idea of comparing dissimilar jobs to examine alleged wage discrimination based on sex will continue to evolve in the courts. In April 1981, the U.S. District Court (Western District of Pennsylvania) ruled in the case of Taylor v. Charley Bros. Co. and found the defendant employer and the defendant union, Teamsters Local 30, guilty of violating Title VII in respect of compensation discrimination among other charges. Although no statistical analysis was presented in the case, the court found the employer discriminated against female employees by paying them less than male employees who performed work substantially equal to that performed by the women. The court further reinforced the idea of comparable worth or comparability of
dissimilar jobs by finding that since the employer had not undertaken "any evaluation which would have indicated the (relative) value of the jobs held by either men or women," it may be inferred that the employer intended to discriminate against women in setting their wage rates lower than men. Within the community of legal scholars, there are dissenting voices over the judgements in Gunther and IUE cases. These scholars argue that the courts have erred in their interpretation of the intent of the law. Yet, it appears as if the legal community is recognizing this development as one they will have to work with. By requiring that dissimilar jobs be compared, the courts are not necessarily seeking to reorder the economic hierarchy of all jobs in the larger market. All lawsuits to date have been confined to the organizational context. Thus jobs are compared to others within the organization. This may reorder the economic hierarchy of jobs within the organization which is the kind of incremental change that may be feasible from a perspective of formulating public policy and ease of administering the change.

Second, it is true that some employers use several job evaluation plans making it difficult to compare the worth of jobs from one group to another. Even in this case, if the idea of comparability were accepted, greater equity would result because male and female jobs will be more equitably treated at least within each category. Again, this is the kind of incremental change referred to above. As long as a large number of male and female jobs are present under each job evaluation plan comparability would guarantee equity across sexual boundaries. This intent will be
defeated only if employers construct separate job evaluation plans for male and female jobs. In order to be operational, the concept of equity must work within some defined structure. A completely structure-free concept would have every person in the economy at large compare his or her job to any other without regard to employer, industry or region. This obviously is unworkable and this is not the intent of those who advocate comparability of different jobs.

Lastly, it is true that job evaluation procedures may be subject to the sex-stereotyping bias of the evaluator. But as long as the evaluator is a third party who commands legitimate authority and is not predisposed to favor one party over the other, the process of job evaluation can be successfully used in legal proceedings. If the court is presented with evidence of the current evaluation plan being biased, the court may order its own counsel on a bias-free plan. There is subjectivity in the very essence of our judicial system and frequently the courts arbitrate as they must. The same can be done in the case of subjective job evaluation systems without loss of judicial credibility. The parties will and must accept as they do other decisions of the courts.

The enormous amount of attention that has been paid to comparable worth recently should persuade more employers to see some solutions that may not necessarily derive from litigation of this issue.
Footnotes


3. Two thirds of the female labor force would have to change jobs to eliminate over-representation of women in certain jobs and their under-representation in others. F.D. Blau and W.E. Hendricks, "Occupational Segregation by Sex: Trends and Prospects," Journal of Human Resources, 14, 2 (Spring 1979), pp. 197-210. See also U.S. Commission on Civil Rights, Social Indicators of Equality for Minorities and Women, in order for majority-group men and women to have identical occupational distributions, approximately 66% of female workers in 441 occupational categories would have to change jobs; 1978, pp. 42-44.


6. Gunther vs. County of Washington, 602F. 2d 882 (9th Cir. 1979) 20 FEP 792


8. Gunther v. County of Washington, 23 FEP Cases 592-593, see note 6 supra.


17. Among the studies mentioned in notes 10-16 supra.


20. For example see the Bank's models in Vuyanich v. Republic National Bank, note 7 supra.


23. Brian Chiplin, see note 21 supra.
24. See Fuchs, note 10 supra.
31. See Note 29 supra, p. 81.
33. Ruth G. Blumrosen, see note 4 supra.
37. See Note 7 supra, p. 157.
39. See note 7 supra, especially p. 175-6.


43. See note 9 supra.

44. See note 7 supra., p. 174.

45. See note 7 supra., p. 192.

46. Several months after this decision, the U.S. Supreme Court ruled in the case of Texas Department of Community Affairs vs. Burdine (25 FEP Cases 113-20) enunciating the legal principle of burden of proof remaining on the plaintiff throughout the case. Subsequently, the Vuyanich court invited counsels' comment regarding the Burdine decision. The Republic National Bank responded with a request for reconsideration of all but one liability finding. After a detailed reconsideration of the Burdine decision, the court ruled on August 4, 1981, that the U.S. Supreme Court's decision does not affect allocation or order of proof in action by employees. Thus, the earlier findings of liability against the Bank were left undisturbed. The court also ordered the employer to mail notice of remedial decree and proof of claim found to class members eligible for back pay. In addition the Bank was required to publish copies of a notice to this effect in seven newspapers, twice a week for four weeks. (Vuyanich v. Republic National Bank, 26 FEP Cases 1127-44).


50. See note 47 supra., p. 614.


APP 3-6 1987

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