University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1984

Comparable Worth in Antidiscrimination Legislation: A Reply to Freed and Polsby

Mary E. Becker

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the [Law Commons](#)

Recommended Citation

Mary E. Becker, "Comparable Worth in Antidiscrimination Legislation: A Reply to Freed and Polsby," 51 University of Chicago Law Review 1112 (1984).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Comparable Worth in Antidiscrimination Legislation: A Reply to Freed and Polsby

Mary E. Becker†

Freed and Polsby's basic insight is that comparable-worth issues arise under the Equal Pay Act.¹ They consider the acceptance of the Act to be anomalous, given the controversy over the merits of a comparable-worth rule.² Whether they mean to say more than this is not clear, but they seem at least to suggest that the Equal Pay Act's interference with market values should be more controversial.³ Further, they seem to be making an indirect argument about the merits of a comparable-worth rule: given the existing case law, there is reason to doubt the competency of courts to decide comparable-worth claims.⁴

I think that Freed and Polsby's basic insight is quite right: there are comparable-worth issues in current Equal Pay Act cases. I also agree that courts should be reluctant to decide cases solely on the basis of comparable-worth arguments. Congress considered and rejected a comparable-worth standard when it enacted the Equal Pay Act,⁵ and courts should apply the antidiscrimination legislation Congress did enact in a manner consistent with congressional intent.

Nevertheless, I have three major problems with Freed and Polsby's analysis. First, Freed and Polsby purport to be criticizing Equal Pay Act case law only because of courts' willingness to decide cases on the basis of comparable-worth arguments.⁶ But their real objection may be to antidiscrimination legislation as such. Comparable-worth problems are not unique to Equal Pay Act cases; they are innate in the implementation of any antidiscrimination legislation. If Freed and Polsby disagree, on the merits, with

† Assistant Professor of Law, University of Chicago. I thank Frank H. Easterbrook and Cass R. Sunstein for helpful comments on earlier drafts of this paper.

¹ Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982).

² Freed & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078, 1079 (1984).

³ See, e.g., *id.* at 1079, 1085, 1104-05.

⁴ See, e.g., *id.* at 1090, 1102.

⁵ See *infra* note 76 and accompanying text.

⁶ See, e.g., Freed & Polsby, *supra* note 2, at 1079, 1087, 1090, 1110.

the Equal Pay Act because comparable-worth issues tend to affect the outcome of cases under it, they should also disagree, on the merits, with Title VII, which mandates that employers treat employees equally regardless of race, sex, religion, color, or national origin.⁷

Second, the fact that there is widespread controversy over comparable worth and widespread acceptance of the principle of equal pay for equal work is no anomaly. The comparisons required under the Equal Pay Act are fairly limited in scope: for example, do hospital aides and orderlies perform substantially similar tasks under substantially similar conditions, even though the orderlies' patients are men and the aides' patients are women? True, different jobs are being compared, but the question the courts must address is whether the differences between the jobs are minor. Under a comparable-worth standard, the inquiry would be whether quite different jobs were valued properly relative to each other: for example, do secretaries and janitors—or receptionists and truck drivers—receive comparable pay in light of the relative worth of their jobs to their employers or to society as a whole? The difference between Equal Pay Act claims and comparable-worth claims seems to be more than a difference of degree and is certainly sufficient to explain the general acceptance of the one and the rejection of the other.

Third, courts have not been as incompetent at handling comparable-worth issues as Freed and Polsby maintain. If they are arguing indirectly against the merits of a comparable-worth standard on the basis of "bad" Equal Pay Act case law, the argument is undermined by their inaccurate presentation of that case law.

Freed and Polsby organize their discussion into four topics: the methods available to courts for comparing nonidentical jobs in Equal Pay Act cases; the relevance of job segregation to such claims; defenses to Equal Pay Act claims; and a detailed discussion of three cases raising comparable-worth issues. Like Freed and Polsby, I will leave aside questions about the merits of existing antidiscrimination legislation and of comparable worth. I limit my discussion to the issue they directly address: comparable-worth issues in current case law.

I. COMPARING NONIDENTICAL JOBS

Since it is rare that any two jobs are exactly identical, Freed

⁷ Civil Rights Act of 1964, tit. VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a) (1982).

and Polsby are correct in pointing out that Equal Pay Act cases often require courts to determine whether nonidentical jobs are so similar as to offer a proper foundation for Equal Pay Act claims.⁸ Further, few plaintiffs present "smoking gun" evidence of discriminatory intent.⁹ Only by reference to subjective notions of comparable worth will most courts be able to determine whether an asserted difference between two jobs is merely a pretext for discrimination.¹⁰

Two points are worth noting. First, the statutory requirement of equal pay for equal work would have little force if employers could circumvent it by creating trivial variations in job conditions, responsibilities, and the like. Few jobs are identical in all respects; a requirement of absolute identity could result in an Equal Pay Act with no bite. For these reasons, courts have reasonably refused to limit Equal Pay Act claims to cases involving identical jobs.¹¹ With a standard short of absolute identity, courts are able to consider whether the purported justification is a pretext, an inquiry that should consider whether there is evidence of discriminatory intent apart from the pay differential.

Second, courts do not in fact rely exclusively on comparable-worth arguments in deciding Equal Pay Act cases. Freed and Polsby cite decided cases¹² in a way that suggests that the courts were persuaded by the comparable-worth arguments alone. In each case, however, other facts were also considered relevant by the courts; there was, in each case, if not a smoking gun, at least a smoldering background.

⁸ Freed & Polsby, *supra* note 2, at 1085-92.

⁹ *Id.* at 1079-80.

¹⁰ *Id.* at 1085.

¹¹ See, e.g., *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 285 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Shultz v. American Can Co.—Dixie Prods.*, 424 F.2d 356, 360 (8th Cir. 1970); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

Not all courts have adopted the "substantial equality" test cited by Freed and Polsby, but most courts have adopted standards more or less comparable to it. See, e.g., B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 447 n.49 (1983) (comparing *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972) (per curiam) (rejecting "comparable work" standard), with *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973) (standard must be higher than mere comparability yet lower than absolute identity)).

¹² See Freed & Polsby, *supra* note 2, at 1088-89 & nn.16 & 18 (citing *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Shultz v. American Can Co.—Dixie Prods.*, 424 F.2d 356 (8th Cir. 1970); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970)).

In *Shultz v. Wheaton Glass Co.*,¹³ for example, the employer had employed only men until a labor shortage forced it to hire women. The women were assigned to a new job category called "female selector-packers" and were paid \$2.14 per hour. Only men filled the old job, now called "male selector-packers"; they were paid \$2.35 per hour. These two jobs, the court found, were identical.¹⁴ Occasionally, however, at least some male packers were required to perform the job of "snap-up boys," which paid \$2.16 per hour. The court saw "no rational explanation" that could justify paying all male packers, some of whom occasionally performed work paying two cents per hour more than female packers, twenty-one cents more per hour than the women.¹⁵ Against this factual background, the court saw not merely a discriminatory effect but also a discriminatory motive.¹⁶

Whether a purported justification for a pay differential is a pretext for intentional discrimination on the basis of sex is ultimately a question of fact about motivation. The credibility of an employer's purported justification, however valid in one case, may be undermined in another by facts, like those in *Wheaton Glass*, that suggest intentional discrimination.¹⁷

¹³ 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970).

¹⁴ *Id.* at 263.

¹⁵ *Id.* The court found the company's asserted justification for the \$.21 pay differential—that the male packer job required the additional "flexibility" of occasionally assuming the job of snap-up boy—to be wholly unconvincing, partly because it was never proven that all male packers did in fact perform as snap-up boys. *Id.* at 263-64.

¹⁶ *Id.* at 264. The other two cases cited by Freed and Polsby for reliance on a comparable-worth analysis are *Shultz v. American Can Co.*—*Dixie Prods.*, 424 F.2d 356 (8th Cir. 1970), and *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975). *American Can* is factually quite similar to *Wheaton Glass*. There too, male and female employees performed virtually identical basic jobs, but the men also occasionally performed another task, not in addition to their work load but as a substitute for their basic work. Although the combination job had been opened to women in 1965, and although some women had requested assignment to it, the court found that, as of 1970, only men held the combination job, and they were paid \$.20 per hour more than the women. 420 F.2d at 358-59. In the third case, *Prince William Hospital*, male orderlies' wages were raised above those of female aides only when the hospital had difficulty attracting men to the job. And the only different task, routine catheterizations, was performed only once or twice weekly—not per orderly but in toto. 503 F.2d at 290.

¹⁷ It is not generally accepted law that the mere fact that job *B* pays less than job *A* precludes an employer from paying more for combined job *A-B* than for job *A* alone. See 1 A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION* § 29.40, at 7-25 (1983) (discussing cases that suggest a "caveat against applying too mechanically" the rule in *American Can*). Freed and Polsby attempt to strengthen this analysis by reporting that an employer's justifications for paying a premium for a combination job may be regarded as unconvincing unless each holder of the *A-B* job spends time on tasks *A* and *B* in the same ratio. Thus, according to Freed and Polsby, the law regards straight salaries as unreasonable, and employers must, in effect, pay on a piecework basis. Freed & Polsby, *supra* note 2, at 1089. The

Freed and Polsby are on firmer ground in arguing that, when evaluating the reasonableness of the employer's decision to compensate differently two jobs that an Equal Pay Act plaintiff claims are substantially similar, it will not be possible for a court to avoid evaluating the justification for the magnitude of the pay differential. Here they cite language from *Hodgson v. Brookhaven General Hospital*,¹⁸ in which the Fifth Circuit appears to have adopted a standard requiring that the additional tasks of the more highly compensated position be "of an economic value commensurate with the pay differential."¹⁹ Even without any accepted standard of relative job valuation, however, some jobs may be so similar, but carry wages so disparate, that the difference in pay cannot credibly be justified by the minor differences between the jobs. At least in the extreme case, common sense provides an adequate standard for a conclusion that the purported reason is a pretext. Further, it is by no means clear that the Fifth Circuit would be willing to adopt a more intrusive standard.²⁰

I am not arguing that, in evaluating Equal Pay Act claims, courts are never affected by comparable-worth arguments. In *Wheaton Glass*, for example, the persuasive force of the smoldering background was strengthened by the fact that the employer's purported justification for paying the male holders of combination job A-B twenty-one cents more than the female holders of job A seemed rather weak, since holders of job B were paid only two cents more than the women. My quarrel is with Freed and Polsby's implication that comparable-worth arguments, standing alone, rou-

two cases Freed and Polsby cite for this point, *Wheaton Glass* and *American Can*, are "smoldering background" cases. See *supra* notes 13-16 and accompanying text. Their language, cited out of context, is not a statement of any accepted Equal Pay Act rule. Further, in *Wheaton Glass*, the court stated that there was no finding that all the male holders of the A-B combination job did any job B tasks, though they all received 10% more in pay than the female holders of job A. 421 F.2d at 263.

¹⁸ 436 F.2d 719 (5th Cir. 1970). See Freed & Polsby, *supra* note 2, at 1089-90.

¹⁹ 436 F.2d at 725.

²⁰ In *Brookhaven*, the court reversed a judgment for the plaintiff and remanded for more evidence on whether the jobs at issue required "equal effort." 436 F.2d at 727. The language quoted by Freed and Polsby was not relevant to anything at issue in the case; indeed, the Fifth Circuit did not even mention the amount of the wage disparity found by the district court. The quotation is part of a rather glib statement of applicable law, made in the course of reversing a judgment for the plaintiff and supported by the Fifth Circuit's citations to *American Can* and *Wheaton Glass*, the two smoldering-background cases discussed *supra* note 16.

In addition, the specific examples given by the Fifth Circuit (appearing in the opinion after the language quoted by Freed and Polsby) may be "restrictive of that language." C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* § 10.7, at 619 (1980).

tinely dispose of Equal Pay Act cases. Courts have not widely rejected employers' justifications solely on the basis of comparable-worth notions. In the three cases cited by Freed and Polsby, the courts certainly did not do so; in each case there was evidence of discrimination apart from the pay disparity.

II. THE RELEVANCE OF JOB SEGREGATION

Freed and Polsby make a second major point: courts may too readily tend to find jobs "equal" for Equal Pay Act purposes where jobs that are only "similar" are segregated according to sex.²¹ According to Freed and Polsby, courts deciding Equal Pay Act cases should ignore such segregation because Title VII is available to handle it.²² I agree that courts seem more likely to find jobs equal when some element of job segregation is present. But it is not true that Title VII provides an adequate remedy for all cases of job segregation.

Job segregation is often legal under Title VII because sex may be a "bona fide occupational qualification."²³ In such cases, the only possible remedy for sex discrimination is under the Equal Pay Act.²⁴ Even where job segregation is illegal under Title VII, however, there may be no effective relief under that statute. For example, it might be difficult for a woman to show that, absent discrimination, she would have been given a job when, because the employer advertised only for men, she did not in fact apply for it.²⁵

²¹ Freed & Polsby, *supra* note 2, at 1091-92.

²² See Freed & Polsby, *supra* note 2, at 1092.

²³ Civil Rights Act of 1964, tit. VII, § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1982). For a discussion of the scope of the "bona fide occupational qualification" exception, see C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 20, § 2.4.

²⁴ Freed and Polsby concede that in a world without Title VII, judges would be reluctant to characterize work as unequal when jobs are quite similar and women are confined to the lower-paying job. Freed & Polsby, *supra* note 2, at 1091-92. Since there is a Title VII, however, judges who are reluctant to find jobs unequal when women are segregated into a lower-paying but substantially equivalent job are "quarreling with the legislative decision to prohibit employers only from paying unequal wages for equal work and, in effect, to permit broader classes of sex-discriminatory employment practices." *Id.* But in enacting the "bona fide occupational qualification" defense, Congress chose not to prohibit certain forms of sex discrimination in job placement only because other interests, such as nursing home patients' privacy concerns, outweighed the interest in banning all discrimination. See 110 CONG. REC. 2718 (1964) (statement of Rep. Goodell). It does not follow that Congress also meant to allow a nursing home to use gender as the ground for paying aides less than orderlies. The problems in remedying the job segregation Congress did prohibit, discussed *infra* text accompanying note 25, are additional reasons why courts should not ignore job segregation in considering Equal Pay Act claims.

²⁵ For example, in *Peltier v. City of Fargo*, 533 F.2d 374 (8th Cir. 1976), one of the cases cited by Freed and Polsby, the police department advertised for men only. *Id.* at 376.

Finally, the Title VII remedy for past job segregation is slow. A woman awarded relief will be entitled to the higher-paying job only when there is an opening.²⁶

Given the problems with remedying job segregation under Title VII, one must decide whether a trier of fact should ignore job segregation when considering allegations that an employer's purported explanation for a pay differential is a pretext for discrimination. I see no reason why a trier of fact should always consider segregation irrelevant. Job segregation, with women limited to the lower-paying job, as in *Wheaton Glass*, may bolster other evidence suggesting that the real cause of the pay disparity is not the purported difference between the jobs but rather the sex of the incumbents.²⁷ This point is made in many of the cases. In *Wheaton Glass*, for example, the court stressed that the classification of selector-packers into two job categories originated when women were first hired by the employer.²⁸

III. DEFENSES

Freed and Polsby maintain that any reason offered by an employer in defense of pay differentials may be seen either as further evidence of discrimination or as irrelevant when males and females hold equivalent positions and receive unequal pay. Thus, an explanation based on subjective measures of productivity may be perceived as evidence of discrimination, and an explanation based on prior education and experience may be seen as irrelevant if the man and woman hold substantially equal jobs. Freed and Polsby do note that not every court would react in the way that they have described.²⁹ I submit that few courts would react this way and that many of the cases cited by Freed and Polsby support the propositions for which they are cited but little³⁰ or not at all.³¹ Further, I

Women may not have applied in response to such advertisements.

²⁶ Some courts do award "front pay" in this kind of situation, but "front pay" is not routinely awarded. See B. SCHLEI & P. GROSSMAN, *supra* note 11, at 434-36.

²⁷ The relevance of job segregation has been explained by other commentators:

The basic notion . . . is . . . that, given two sex-segregated jobs which are roughly comparable, one might doubt that the purported job differences are the real motive for differences in pay if members of the disfavored sex could do the different work but are denied the opportunity. The more likely inference is that it is not jobs but gender which explains the wage difference.

C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 20, § 10.7, at 621.

²⁸ *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 264 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); see *supra* text accompanying notes 13-16.

²⁹ Freed & Polsby, *supra* note 2, at 1094.

³⁰ For example, Freed and Polsby cite four cases for the proposition that "[n]umerous

suggest that those decisions that are accurately cited³² are simply wrong and unusual,³³ unless the judgment for the plaintiff could be said to have rested on other evidence of discrimination.³⁴

courts appear to take the position that differences in education, experience, and other 'human capital' qualifications of particular employees are immaterial if the employer is hiring for jobs that are 'substantially equal.' Freed & Polsby, *supra* note 2, at 1095 & n.35.

None of the four cited cases indicates, however, even in dicta, that human-capital qualifications are immaterial. See, e.g., *Wirtz v. Basic Inc.*, 256 F. Supp. 786, 790 n.4 (D. Nev. 1966) (human-capital differences must be pleaded by employer as a merit-system defense). In the other three cases, the courts merely held that experience and training are immaterial if they are irrelevant to the job actually performed and are not needed to afford flexibility. See *United States v. City of Milwaukee*, 441 F. Supp. 1371, 1375 (E.D. Wis. 1977) ("The training which jailers receive as patrol officers is not utilized . . . at the jail, nor are they assigned with any frequency to duties outside the jail. In effect, the assignment to the jail is a permanent assignment."); *Peltier v. City of Fargo*, 533 F.2d 374, 377-79 (8th Cir. 1976) (similar); *Di Salvo v. Chamber of Commerce*, 416 F. Supp. 844, 853 (W.D. Mo. 1976) (similar), *aff'd in part, modified in part on other grounds*, 568 F.2d 593 (8th Cir. 1978).

³¹ See, e.g., *Grove v. Frostburg Nat'l Bank*, 549 F. Supp. 922 (D. Md. 1982); Freed & Polsby, *supra* note 2, at 1096 & nn.40, 41. *Grove* was a disparate-treatment case under Title VII as well as an Equal Pay Act case. The plaintiffs won on the Title VII disparate-treatment claim involving intentional discrimination in job placement. Freed and Polsby cite *Grove* for the proposition that employers might not be permitted to show, in defending Equal Pay Act suits, that differences in pay were due to differences in productivity. Freed & Polsby, *supra* note 2, at 1096. But not all positions have equal potential for productivity. In *Grove*, the court found intentional discrimination, not happenstance, to be the cause of the differences in job placement.

³² It is difficult to find an important case that Freed and Polsby report with complete accuracy. *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896 (5th Cir. 1974), may be as close as any. It is cited in support of the proposition that an employer's subjective evaluation of job performance may be rejected by the courts because it reflects "the sort of invidious discrimination that the Act is intended to eradicate." Freed & Polsby, *supra* note 2, at 1096 & n.39. In *Victoria Bank*, the court's own comparison of the education and experience of male and female employees, however, indicated that the employer's asserted subjective impressions were contrary to fact. 493 F.2d at 902. The *Victoria Bank* court did accept a defense based on a merit system, even though its application required subjective judgments. See *infra* note 54.

³³ See, e.g., *United States v. City of Milwaukee*, 441 F. Supp. 1371 (E.D. Wis. 1977) (discussed *infra* notes 36-38 and accompanying text).

³⁴ See *Peltier v. City of Fargo*, 533 F.2d 374 (8th Cir. 1976) (only men allowed on police force; when women took over ticketing cars as "car markers," salary reduced by 50%); *Di Salvo v. Chamber of Commerce*, 416 F. Supp. 844, 848-49 (W.D. Mo. 1976) (after plaintiff quit, defendant increased salary when male applicant turned down job because of salary; three women applicants had previously done so without same effect), *aff'd in part, modified in part on other grounds*, 568 F.2d 593 (8th Cir. 1978); *Wirtz v. Basic Inc.*, 256 F. Supp. 786, 787 (D. Nev. 1966) (several indications of intentional discrimination—e.g., statement made by defendant's manager when Congress was about to pass the Equal Pay Act that "Congress would never pass such a foolish law as that").

Even when there is no evidence of discrimination apart from salary differentials, some defenses, though relevant as a matter of law, may fail credibly to explain the differentials. See, e.g., *EEOC v. First Citizens Bank*, 31 Empl. Prac. Dec. (CCH) ¶ 33,508, at 29,347 (D. Mont. 1983) (cited by Freed & Polsby, *supra* note 2, at 1096 & n.39) (rejecting as illusory employer's creation of an "executive trainee" category for male employee when there was no real training program, formal or informal).

The Equal Pay Act is hardly unique in inspiring some dead-wrong decisions. But the fact that there are some wrongly decided Equal Pay Act cases does not support Freed and Polsby's implication that comparable worth would therefore be a bad idea or that the Equal Pay Act should be more controversial. Indeed, factors such as training and experience are generally considered relevant to comparable-worth evaluations. If ever there were a significant number of Equal Pay Act cases holding otherwise, it might be a good thing to amend the statute to clarify the original congressional intent.³⁵

IV. THREE REAL-LIFE PROBLEMS

Freed and Polsby's next criticism of current antidiscrimination law, which again by implication is a criticism of comparable worth, consists of a discussion of three cases. The authors spend three pages on *United States v. City of Milwaukee*,³⁶ a decision from the Eastern District of Wisconsin with, I hope, little precedential weight. I am somewhat puzzled by their extended presentation of one outrageous district court opinion, with which they obviously disagree, as if it were generally accepted and typical.³⁷ I fail

³⁵ For examples of cases recognizing the validity of wage differentials based on relevant training and experience, see *Knight v. City of Bogalusa*, 717 F.2d 249 (5th Cir. 1983) (meter maids replaced by higher-paid police officers with more training and experience; held: no discrimination); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) (Congress intended that employers continue to be able to vary pay with training and experience even though such factors may reflect opportunities denied to women in the past); *Craft v. Metromedia, Inc.*, 572 F. Supp. 868 (W.D. Mo. 1983) (evidence demonstrated that the difference in pay between female plaintiff and male employee was attributable to several factors other than sex, particularly education and experience).

³⁶ 441 F. Supp. 1371 (E.D. Wis. 1977); see Freed & Polsby, *supra* note 2, at 1100-02.

³⁷ For examples of the many cases that, contrary to *City of Milwaukee*, recognize the validity of differentials based on training and experience, see cases cited *supra* note 35.

Freed and Polsby agree that *City of Milwaukee* is "silly" but claim that "it is perfectly consistent with the approach of the numerous leading Equal Pay Act cases upon which the . . . court relied." Freed & Polsby, *supra* note 2, at 1102. Actually, the court cited only two cases in its substantive analysis. In considering whether the jailers' and matrons' jobs were equivalent in terms of responsibility and effort—the aspect of the case most troubling to Freed and Polsby—the court did not cite a single case. 441 F. Supp. at 1375-76. In holding that the jobs were equivalent because real and substantial differences in responsibility were irrelevant, *City of Milwaukee* is quite unusual. Compare *City of Milwaukee* with *EEOC v. First Citizens Bank*, 31 Empl. Prac. Dec. (CCH) ¶ 33,508 (D. Mont. 1983) (although assistant vice-presidents had the same title, the male and female vice-presidents had different responsibilities, and a pay differential was therefore not a violation of the Equal Pay Act). For a discussion of the rule that human-capital differences can justify pay differentials only when relevant to job performance, see *supra* note 30.

Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), is a case directly opposed to *City of Milwaukee*. There, the Ninth Circuit held that because matrons guarded

to see its relevance to anything other than the fact that inevitably, under any statute, one will find the odd court doing odd things. The case fails to support any inference about the dangers of comparable worth, since it would have been wrong even under a comparable-worth standard.³⁸

Freed and Polsby also discuss *Winkes v. Brown University*³⁹ and *Melani v. Board of Higher Education*.⁴⁰ In discussing *Melani*, they raise important and troubling comparable-worth issues, though it should be noted that *Melani* was brought under Title VII and section 1983, not under the Equal Pay Act. Freed and Polsby's discussion of *Winkes* suggests that their basic objection may be to antidiscrimination legislation as such and not to the Equal Pay Act alone.

A. *Winkes*

Winkes v. Brown University is a simple, straightforward Equal Pay Act case. In September 1977, Brown University entered into a consent decree committing the University to increase the number of tenured women on its faculty. Zerner, a woman, and Winkes, a man, were both tenured professors of art history, and Winkes was paid somewhat more than Zerner. In 1978, Northwestern University offered Zerner a job at a sixty-four percent salary increase. Brown matched Northwestern's offer, and Zerner stayed at Brown. The chairman of the art department recommended to the university's provost that Winkes's salary be increased to match Zerner's since there were no significant differences in their qualifications or work. Some adjustments were made over the next few years in Winkes's salary, but Winkes was paid substantially less than Zerner throughout this period. Although the art department often increased salaries in response to outside offers, the district court found that the response to Zerner's outside offer was unique

fewer prisoners and spent more time doing clerical work than jailers, matrons' and jailers' jobs were not equal for Equal Pay Act purposes. The plaintiffs successfully sought certiorari in the Supreme Court on another issue but did not contest further the relevance of the differences in responsibilities. See *County of Washington v. Gunther*, 452 U.S. 161, 165 (1981) (if the county intentionally paid matrons less because of sex rather than because of difference in responsibility, Title VII would be violated).

³⁸ The fact that one job is more demanding than another is a relevant factor even under a comparable-worth theory.

³⁹ 32 Fair Empl. Prac. Cas. (BNA) 1041 (D.R.I. 1983). As this article went to press, *Winkes* was reversed by a divided panel of the First Circuit. *Winkes v. Brown Univ.*, No. 83-1649 (1st Cir. Oct. 26, 1984). For a discussion of the First Circuit's opinion, see *infra* note 59.

⁴⁰ 561 F. Supp. 769 (S.D.N.Y. 1983).

in being a dollar-for-dollar match and an "anomalously high" increase compared with similar responses.⁴¹

I would agree with the district court's holding that Brown violated the Equal Pay Act. None of the employer's defenses should prevail. Brown's "merit system" argument looks like something pulled out of a hat after getting a lawyer involved. For at least two reasons, the fact that Brown only offered Zerner what was necessary to retain her services should not be a valid defense. First, the court found that the same counteroffer would not have been made to a man. Second, the Equal Pay Act was designed to correct market forces perceived as operating to value employees differentially by sex. It is no secret that there is a shortage of women in some departments of some universities. It seems likely that Northwestern's generous offer and Brown's counteroffer reflected that shortage rather than any valuation of art historians independent of sex.

The *Winkes* court was also correct in holding that the university's affirmative-action plan, as embodied in the consent decree, did not shield Brown from liability for the sex-based differential in pay. That plan covered hiring, contract renewal, promotion, and tenure. The "overall thrust" of the plan was "to ensure that hiring and promotional decisions at Brown will be based on merit and achievement, not on gender."⁴²

Brown's affirmative-action plan does appear to be valid because it is consistent with the legislative history of the 1972 extension of Title VII to academic employment.⁴³ As the House Committee Report indicates, Congress was concerned about the exclusion of women from the status system governing academic appointments. Appointments are based on prestige, and women are perceived, according to the authorities cited by the Report, as having no prestige, regardless of their merit.⁴⁴ The Brown affirmative-

⁴¹ *Winkes*, 32 Fair Empl. Prac. Cas. at 1044.

⁴² *Id.* at 1049.

⁴³ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-1 (1982)). In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Supreme Court upheld an affirmative-action plan because of its consistency with congressional intent in enacting Title VII.

⁴⁴ The House Committee on Education and Labor noted the following in its report: When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In a study conducted by Theodore Kaplow and Reece J. McGee, it was found that the primary factors determining the hiring of male faculty members were prestige and compatibility, but that women were generally considered to be outside of the prestige system altogether.

action plan, designed to ensure equal treatment of women on the basis of merit, compensates for this possibly unconscious bias against women academics. Although the Brown affirmative-action plan was valid, however, it did not authorize paying women more than men on the basis of sex. And although the scope of allowable affirmative-action plans is far from clear,⁴⁵ it is at least doubtful that an employer could offer higher salaries to women or minorities as part of any affirmative-action plan.⁴⁶

Freed and Polsby raise two objections to *Winkes*: the court's "rejecti[on] [of] labor-market explanations for pay disparities" and the court's rejection of Brown's merit-system arguments, as a matter of law, on the ground that Brown had no objective or systematic method of evaluating merit.⁴⁷

By criticizing *Winkes*'s rejection of market valuations, Freed and Polsby imply that the market valuation was based on factors other than sex. I suspect that the premium was offered because antidiscrimination regulations have varied market values and have done so in such a way as to cause differentials based on sex. Of course, premiums based on sex are inconsistent with the express mandates of Title VII⁴⁸ and the Equal Pay Act,⁴⁹ but Brown University may nevertheless have been motivated by Zerner's sex and by current antidiscrimination legislation in offering her the premium; without her, they would be more vulnerable to liability under the consent decree as well as more vulnerable to other lawsuits under Title VII⁵⁰ and Title IX of the Education Amendments of 1972.⁵¹ Brown may also have been responding to other pres-

HOUSE COMM. ON EDUCATION AND LABOR, EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, H.R. REP. NO. 238, 92d Cong., 1st Sess. 18 (1971) (citing T. CAPLOW & R. MCGEE, *THE ACADEMIC MARKETPLACE* 111 (1958)), reprinted in *LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972*, at 61, 80 (1972).

⁴⁵ See Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 459-65 (1980).

⁴⁶ In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Supreme Court upheld an affirmative-action plan designed as a temporary measure to eliminate a manifest racial imbalance by giving blacks a preference for admission to a training program. Blacks were not, however, otherwise treated differently as trainees or employees. Rather, the plan was designed to eliminate the present effects of past societal discrimination that had tended to exclude them from skilled jobs. Paying a higher salary to retain a skilled minority member, whether a black craftsman or a female art historian, is a quite different form of affirmative action. This would do more than compensate for an obstacle, past or present, to that minority member's entry into, and equal treatment within, a certain type of job.

⁴⁷ Freed & Polsby, *supra* note 2, at 1102-03.

⁴⁸ Civil Rights Act of 1964, tit. VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a) (1982).

⁴⁹ 29 U.S.C. § 206(d)(1) (1982).

⁵⁰ Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

⁵¹ 20 U.S.C. §§ 1681-1686 (1982).

tures, such as pressure from students, but these pressures may also have been linked to Zerner's sex. Given the facts of life today, one cannot simply conclude that the premium to Zerner was solely the result of labor-market forces, nor that it was independent of sex.

At any rate, the *Winkes* court, by finding that the premium would not have been offered to a man, expressly found that the premium was *not* a labor-market premium for skill or merit or any other factor independent of sex. Indeed, this conclusion seems almost unavoidable, given the testimony of the chairman of the art department that Winkes and Zerner were of equal value apart from sex. The holding in *Winkes* does not go beyond the idea of equal pay for equal work regardless of sex.

Freed and Polsby concede that the *Winkes* decision can be explained by the finding that the premium would not have been offered to a man. Yet they also criticize the court for rejecting, as a matter of law, the university's defense that the differential was explainable as the result of a merit system, and they especially note the court's skepticism about "non-objective" and "unsystematic" merit explanations.⁵² The court did hold that, because the university had no systematic method of evaluating merit, the merit-system defense could not prevail. There are, however, two glaring inaccuracies in Freed and Polsby's presentation of the *Winkes* decision on this point.

In the portion of the opinion to which Freed and Polsby refer, the court was only considering whether Brown had established a "merit system" defense, one of three specific affirmative defenses under the Equal Pay Act.⁵³ Obviously, a merit "system" requires a system, and a system requires identified criteria applied in an identified manner. A supervisor's testimony at trial concerning the relative merit of employees is not a merit system, though a merit system can include subjective evaluations if based on identified criteria applied in a systematic manner.⁵⁴ The *Winkes* court only

⁵² Freed & Polsby, *supra* note 2, at 1102-04.

⁵³ The Equal Pay Act requires equal pay for equal work, regardless of sex, "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." 29 U.S.C. § 206(d)(1) (1982).

⁵⁴ In explaining the standard for a valid merit system under the Equal Pay Act, the *Winkes* court noted that such a system is "an organized and structured procedure whereby employees are evaluated systematically according to pre-determined criteria . . . Further, an unwritten merit system must meet two additional requirements: the employees must be aware of it; and it must not be based upon sex." 32 Fair Empl. Prac. Cas. at 1046 (citations

held that a merit system must be a system. Further, the court did not hold that a merit differential is legal *only* if based on a merit system. A merit differential might be due to a "factor other than sex"—another Equal Pay Act affirmative defense⁵⁵—even though an employer has no merit system. Indeed, the court in *Winkes* went on to consider two other merit-related arguments, neither of which was rejected on the ground that the university did not have an objective merit system.

First, the university argued that the differential was the result of a merit rating in the academic market, that is, that Northwestern's offer was evidence of Zerner's value. This defense was not rejected as insufficient as a matter of law. The court merely held that the university could not prevail on this defense simply by introducing evidence of one outside offer. The university had to introduce evidence showing that "the salaries at issue are genuinely tied to the demands of the academic market-place."⁵⁶ Since the Equal Pay Act was enacted to eliminate market discrimination based on sex, an employer should not be able to justify paying a man and woman differentially simply on the ground that a single competing employer would pay one more than the other. Under *Winkes*, the employer can introduce evidence indicating that a market offer does justify a subsequent pay differential where the offer is based on market valuation independent of sex, such as a

omitted).

The *Winkes* court did state that "[t]he subjective evaluations of the employer cannot stand alone as a basis for salary discrimination based on sex." *Id.* (quoting *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974)). This does not mean that the *Winkes* court would have objected to *any* merit system the application of which required subjective judgments. Equal Pay Act cases often use the word "objective" to include application of identified criteria in a prescribed manner, though subjective judgments may be involved.

Indeed, the *Winkes* court repeatedly indicated that Brown would have had a valid merit system had it implemented a procedure, formal or informal, under which identified criteria were systematically applied to faculty. 32 Fair Empl. Prac. Cas. at 1046-47. Obviously, no truly objective proxies are available to measure academic merit, and subjective judgments would have been made under such a system. In quoting from *Victoria Bank*, the *Winkes* court indicated that trial testimony of subjective impressions, unsubstantiated by evidence of differences between employees and not arrived at systematically, cannot alone justify a wage differential between men and women. This is the holding of *Victoria Bank*. See *supra* note 32. In *Victoria Bank*, the court upheld salary differentials based on application of a formal merit system under which the managers of departments graded employees "on their knowledge of the job, their ability in their present job, their ability to meet the public, and other general characteristics." 493 F.2d at 901. Subjective judgments would, of course, be necessary in applying such a system.

⁵⁵ See *supra* note 53.

⁵⁶ *Winkes*, 32 Fair Empl. Prac. Cas. at 1047.

shortage of art historians with a particular specialization or the fact that one art historian has greater expertise or skill than another. In *Winkes*, the university simply failed to present such evidence; indeed, the chairman of the art department testified that only Zerner's sex made her more valuable than Winkes.⁵⁷

Second, the university argued that the pay differential was the result of the university's sex-neutral policy of responding to outside offers. Again, this argument was not rejected as a matter of law. Instead, the court found the argument implausible given the facts of the case. The court pointed particularly to the consent decree, the fact that Zerner was the only tenured woman in the art department, the department chairman's statement that Zerner and Winkes had equal value apart from sex, and the exceptional dollar-for-dollar response to Northwestern's offer.

Freed and Polsby conclude that it would be difficult, if not impossible, for an employer ever to justify paying a man more than a woman in an attempt to retain his services in the face of a higher outside offer.⁵⁸ It is true that the mere fact that the man had received a higher outside offer would not justify a subsequent pay differential. The Equal Pay Act, after all, was enacted to eliminate market differentials that, it was thought, might be sex-based. If the employer introduced credible evidence that the market differential was not sex-based, however, *Winkes* would not support a rejection of the defense.⁵⁹

⁵⁷ *Id.* at 1048.

⁵⁸ Freed & Polsby, *supra* note 2, at 1104. Indeed, they state that if it were a man who were paid more, the case for an Equal Pay Act violation would be even stronger. *Id.* n.69. This ignores the fact that the Brown consent decree was part of the smoldering background in the case; the decree would not have been relevant if a man were paid more in response to an outside offer.

⁵⁹ The First Circuit recently reversed the district court's decision in *Winkes*. *Winkes v. Brown Univ.*, No. 83-1649 (1st Cir. Oct. 26, 1984). In its opinion, the court noted that a university has a legitimate "concern with respect to gender, as well as any ethnic or other class underrepresentation." *Id.*, slip op. at 11. The court considered even more "room to maneuver" appropriate in dealing with "the difficult subject of gender" when a university is subject to an affirmative-action consent decree. *Id.* at 15. Thus, the court came close to holding that "reasonable decisions" to discriminate in favor of women by universities are permissible, especially if the university is subject to a consent decree. *See id.* Such discrimination would apparently be permissible in the form of pay premiums for women, even though Brown's consent decree did not have any provisions "authorizing" such action, because Brown was committed to increasing the number of women on its faculty.

Without committing itself to this analysis, the First Circuit reversed on the facts, holding that, on the basis of all the evidence in the record, the district court's conclusion—that the university had offered the premium because of Zerner's sex—was clearly erroneous. To the extent that the reversal was on the facts, my analysis is unaffected; whether or not Brown violated the Equal Pay Act turns on whether Zerner would have been offered the

Perhaps Freed and Polsby's real objection is to the idea of equal pay itself. The Equal Pay Act *will* operate to decrease employee mobility when a premium cannot credibly be explained apart from sex, and it may encourage women who are in high demand because of their sex to take their premium in other forms, such as leisure. An employer could not, however, give a woman who is in high demand (solely because of her sex) a premium in any form, including leisure, without violating Title VII.⁶⁰ Admittedly, if employers cannot offer her any premium, she may not end up working for the employer who values her most, but this "problem" is the inevitable result of equality. To the extent that a statute mandating equal treatment of men and women is effective, it will preclude the market from efficiently allocating labor on the basis of sex.

I do not see any distinction between Title VII and the Equal Pay Act in this respect; if Freed and Polsby disagree with the antidiscrimination policy in one law, they must also disagree with it in the other. Perhaps Freed and Polsby would agree that it is fine to outlaw discrimination on the basis of sex or race but argue that when we outlaw discrimination in pay, comparable-worth issues inevitably arise, and that is bad. The implication of Freed and Polsby's analysis is that the Equal Pay Act should therefore be repealed and that Title VII should be limited to non-wage discrimination in employment.

Comparable-worth issues are not unique to Equal Pay Act cases. In any action alleging intentional discrimination on an impermissible basis, there may be comparable-worth issues.⁶¹ For ex-

premium had she been a man. Further, to the extent that the court held that a university can discriminate in pay to retain women, at least when there is a consent decree in the background, I stand by my analysis. I think that the First Circuit, like Freed and Polsby, would abandon the policy of equal pay for equal work, but for different reasons. The First Circuit would abandon this policy, when unequal pay favors women, to rescue employers from being forced to choose between "the devil and the deep blue sea." *Id.* Freed and Polsby would abandon the policy because they think that employers should be able to value employees differentially on the basis of sex, regardless of whether the differential favors or disfavors women.

When an employer pays women, but not men, premiums to retain their services, it violates both Title VII and the Equal Pay Act. The fact that, in settling another lawsuit, it agreed to try to increase the number of women on its faculty should be irrelevant unless a pay differential is a legitimate form of affirmative action. I question whether it should be. See *supra* note 46.

⁶⁰ Title VII provides that an employer cannot discriminate in "compensation, terms, conditions, or privileges of employment, because of . . . sex." Civil Rights Act of 1964, tit. VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982).

⁶¹ My remarks are limited to cases other than those in which there has been express

ample, in a challenge to a promotion or hiring decision, a court will consider whether the differences in the training and experience of *M* and *F* explain why *M* was promoted over *F*. Indeed, depending on how an employer attempts to explain a challenged employment decision, any suit alleging impermissible discrimination may end up turning on the issues Freed and Polsby have identified as comparable-worth issues: the relative value of various forms of training and job experience, the relevance of such factors to the challenged decision, the need for flexibility in job assignments, and the relevance and probative value of evaluations of applicants' past performance and of their future potential, including productivity measures and estimates of applicants' personal qualities.

Moreover, if Freed and Polsby object to the Equal Pay Act's disruption of market allocations on the basis of sex, they must also object to the disruptions caused by Title VII. Title VII rejects the market's use of race, sex, religion, national origin, and color in employment decisions, despite the fact that—indeed because—the market would take these characteristics into account. If the Equal Pay Act's interference with the market is bad, why should we interfere when the market responds on the basis of race, color, religion, or national origin? Freed and Polsby's discussion of *Winkes* suggests more than a claim that there are comparable-worth problems in Equal Pay Act cases. It suggests that the authors may disagree with the policy decision represented by the Equal Pay Act and, apparently, by Title VII.

B. *Melani*

Freed and Polsby next discuss problems of proof in antidiscrimination cases. They focus on *Melani v. Board of Higher Education*,⁶² in which plaintiffs alleged discrimination in women's wages at the City University of New York under Title VII and section 1983.⁶³ In *Melani*, the district court allowed plaintiffs to establish a *prima facie* case of discrimination by showing disparities between the salaries of men and women through the use of multi-

discrimination on an impermissible basis. Today, of course, express-discrimination cases are rather rare except where there is uncertainty as to whether Title VII covers a particular form of discrimination. See, e.g., *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492 (1983) (Title VII bars employers from offering employees a choice of pension benefits, all of which pay lower benefits to women than to men); *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (Title VII prohibits requiring female employees to contribute more to pension fund than males).

⁶² 561 F. Supp. 769 (S.D.N.Y. 1983).

⁶³ 42 U.S.C. § 1983 (1982).

ple regression analysis of questionable validity.⁶⁴

Freed and Polsby have identified a major problem area in antidiscrimination litigation: the use of multiple regression data to prove intentional discrimination by showing disparities in pay or other disparities, such as disparities in job placement.⁶⁵ As some courts and commentators have noted, lawyers and judges often accept these numbers as reflections of reality without any appreciation of the problems, especially the many subjective judgments, present in such an analysis.⁶⁶

Freed and Polsby discuss two specific problems with proving discrimination through multiple regression data.⁶⁷ The first is whether subjective measures of productivity should be admissible to explain disparities. In *Melani*, the court held that the plaintiffs had established a prima facie case without including subjective productivity measures in their regression model.⁶⁸ Freed and Polsby conclude that because the defendant might have been able

⁶⁴ *Melani*, 561 F. Supp. at 773-81.

⁶⁵ A multiple regression analysis using wages as the dependent variable and sex as one of the independent variables could be used to test the validity of the proposition that the employer does not discriminate on the basis of sex in setting wages. Such an analysis would be an accurate test of this proposition only if all valid reasons for pay differentials were accurately identified and quantified as independent variables. The use of multiple regression analysis to establish discrimination should not be confused with the use of simpler statistics to establish a case of disparate impact under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under *Griggs*, a plaintiff can challenge the use of some test or other objective criterion that has an adverse disparate impact on a minority group. The adverse disparate impact can be shown by introducing simple so-called binomial statistics showing the disparity (for example, that 96% of whites pass the test but only 60% of the minority group pass). Once this disparity is established, the employer must show that the test is a meaningful measure of skills needed for the job in question.

In disparate-impact cases, statistics can be evaluated with relative ease. If 96% of whites pass the test, compared with only 60% of the minority group, even a nonexpert can be fairly confident that there is a difference in the performance of the two groups.

⁶⁶ See, for example, the concern expressed by Judge Higginbotham in *Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 224, 394 (N.D. Tex. 1980), *modified in part*, 521 F. Supp. 656 (N.D. Tex. 1981), *vacated*, 723 F.2d 1195 (5th Cir. 1984):

This opinion has been written and rewritten, or equally accurate, has been calculated and recalculated, over the past year . . . [I]t has to judicial eyes a surrealistic cast, mirroring the techniques used in its trial. Excursions into the new and sometimes arcane corners of different disciplines [are] familiar [to] American trial lawyers and . . . generalist judges. But more is afoot here, and this court is uncomfortable with its implications. This concern has grown with the realization that the esoterics of econometrics and statistics which both parties have required this court to judge have a centripetal dynamic of their own. . . . [T]he precision-like mesh of numbers tends to make fits of social problems when I intuitively doubt such fits. I remain wary of the siren call of the numerical display and hope that here the resistance was adequate; that the ultimate findings are the product of judgment, not calculation.

⁶⁷ Freed & Polsby, *supra* note 2, at 1106-10.

⁶⁸ *Melani v. Board of Higher Educ.*, 561 F. Supp. 769, 778-79, 781 (S.D.N.Y. 1983).

to introduce evidence showing that differences in treatment could be explained by differences in productivity, the decision in *Melani* may not be unreasonable.⁶⁹ In *Melani*, however, the court indicated that it would not allow the use of a productivity variable where productivity might be significantly affected by the employer's own discriminatory actions.⁷⁰ A subjective measure of productivity offered by the employer would be expected to reflect any discriminatory animus on the employer's part.

The court's position may at first seem reasonable. After all, in *Melani* the defendant's own expert conceded that "a regression analysis seeking to determine the existence of sex-based discrimination should not include as independent variables productivity factors which may be affected significantly by the employer's actions."⁷¹ From a statistician's perspective, such a principle is valid; subjective measures of productivity can mask discrimination, with the result that the multiple regression analysis could fail to reveal discrimination that in fact was present.

Nevertheless, there is a problem with adopting this principle as a rule of law in discrimination cases. In the absence of adequate objective measures of productivity, such a rule will result in findings of discrimination whenever there are differences between the performances of men and women. Meaningful objective productivity measures are difficult to find for many sorts of jobs. In most instances—and certainly for faculty at a university—there are no strong objective proxies for productivity. If men and women do differ in productivity in the absence of discrimination,⁷² a rule of law that subjective proxies are inadmissible may be equivalent to a rule that plaintiffs prevail.

Since even innocent employers may well be found to have discriminated if only objective proxies for productivity are used in

⁶⁹ Freed & Polsby, *supra* note 2, at 1107.

⁷⁰ 561 F. Supp. at 778.

⁷¹ *Id.*

⁷² Evidence from the social sciences indicates that discrete groups—not only men and women but also, for example, redheads and blondes—are likely to vary from each other in more than one characteristic. Some variation in performance or productivity between men and women is therefore not unlikely (even absent discrimination). One would expect men to do better at some tasks than women, and vice versa. See Meier, Sacks & Zabell, *What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule*, 1984 AM. B. FOUND. RESEARCH J. 139, 158-59 (discussing the significance of correlated characteristics). The point here is that, even absent discrimination, men and women cannot be expected to be equally productive in every job. If employers are not permitted to introduce any evidence on productivity, they are likely to be found to have discriminated when they have not in fact done so.

multiple regression analysis, courts should allow reasonable subjective measures. In cases challenging individual employment decisions without evidence in the form of multiple regression analysis, courts routinely allow such evidence (for example, supervisors' appraisals) to rebut the inference of discrimination raised by the plaintiff's *prima facie* case.⁷³ Arguments for admitting subjective evaluations are at least as compelling when the inference of discrimination is created by multiple regression evidence,⁷⁴ which itself reflects many subjective judgments by experts. These "expert" judgments are difficult for courts to perceive, much less to evaluate.

The second problem identified by Freed and Polsby is the *Melani* court's willingness to find a *prima facie* case on the basis of disparities between the salary performance and job placement of men and women on a university-wide basis. Freed and Polsby's discussion of this issue is, I believe, right on target. There are two reasons why the court should not have found that the plaintiff had established a *prima facie* case of discrimination. First, as Freed and Polsby point out, the evidence was simply too weak to provide a basis for an inference of discrimination.⁷⁵ Second, as Freed and Polsby also point out, *Melani* is hard to distinguish from a comparable-worth case.

I would like to add a little to Freed and Polsby's argument on this last point. Courts allowing *Melani*-type actions—and *Melani* is not unique—seem not to realize that such decisions are inconsistent with congressional rejection of a comparable-worth standard and with cases rejecting challenges based directly on comparable-worth arguments. The legislative history of the Equal Pay Act reveals that Congress considered and rejected a comparable-worth standard.⁷⁶ Further, the legislative history of Title VII suggests

⁷³ See, e.g., *Hodgson v. First Victoria Nat'l Bank*, 63 Lab. Cas. (CCH) ¶ 32,378 (S.D. Tex. 1970), *aff'd*, 446 F.2d 47 (5th Cir. 1971).

⁷⁴ Perhaps not all subjective measures should be entitled to the same weight. But that notion goes to the persuasiveness of the evidence, not its admissibility.

⁷⁵ For a case refusing to recognize a *prima facie* case on the basis of such evidence, see *Wilkins v. University of Houston*, 654 F.2d 388, 401-02 (5th Cir. 1981), *vacated*, 459 U.S. 809 (1982).

⁷⁶ The Kennedy Administration endorsed a comparable-worth standard. See *Equal Pay for Equal Work: Hearings on H.R. 8898, H.R. 10226 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 2d Sess. 16, 26-27 (1962) (testimony of Secretary of Labor Arthur Goldberg and Assistant Secretary of Labor Esther Peterson). Such a bill was reported out of the House Committee. See 108 CONG. REC. 14,767 (1962) (remarks of Rep. St. George concerning the undesirability of the "comparable worth" language in the bill). When the legislation was finally enacted the following year, it contained an equal-work standard; the debates reveal a clear rejection of the comparable-worth

that Congress did not change its mind a year later.⁷⁷ To date, courts have dismissed direct comparable-worth challenges, that is, cases in which the plaintiff's challenge is based on gross disparities between sex-segregated jobs that have comparable worth according to the plaintiff's standard.⁷⁸

Thus, if the jobs in *Melani* had been segregated by sex, the *Melani* court would presumably have followed other courts in refusing to allow women in the lower-paying (and different) jobs to challenge pay disparities by attempting to show that sex was the only variable that could explain the disparity. Yet, simply because the jobs, though quite different, were not segregated, the *Melani* court allowed the plaintiffs to establish a prima facie case by introducing evidence of disparities in pay not limited to substantially equal or substantially identical jobs.

Of course, Congress did enact Title VII and the Equal Pay Act, and, as discussed above, actions under these statutes inevitably raise comparable-worth issues.⁷⁹ Yet Congress decided not to enact legislation allowing claims based solely on notions of comparable worth. The question therefore becomes: on which side of the legislative compromise does a case based on university-wide evidence of disparities in pay, such as *Melani*, fall?

I agree with Freed and Polsby: to allow such challenges on the basis of differences in pay between admittedly different jobs opens too wide a back door to comparable-worth actions. Such holdings are inconsistent with congressional intent and with the many Equal Pay Act cases allowing challenges to disparities in pay only for substantially identical or substantially equal jobs. For this reason, and because of the need for a prima facie case of some probative value, courts should refuse to recognize prima facie cases of discrimination on the basis of general disparities between the pay of men and of women unless the disparities exist between jobs that are substantially identical or substantially equal.

Freed and Polsby's discussion of three real-life cases, *City of Milwaukee*, *Winkes*, and *Melani*, is perhaps the most intriguing part of their paper. They criticize examples of comparable-worth reasoning in current case law, and they make insightful comments

standard. See, e.g., 109 CONG. REC. 9197-98 (1963) (cosponsor explaining that change in language from "comparable" to "equal" narrowed the scope of the bill).

⁷⁷ See, e.g., 110 CONG. REC. 7217 (1964) (floor manager of bill: "The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.").

⁷⁸ See B. SCHLEI & P. GROSSMAN, *supra* note 11, at 477-78.

⁷⁹ See *supra* text accompanying note 61.

on issues arising when proof includes multiple regression analysis. As in their earlier sections, however, Freed and Polsby have overstated the extent of the problems in Equal Pay Act cases (though in their discussion of *Melani*, there is at least some awareness of the fact that these problems can arise under Title VII as well). The *Winkes* discussion is especially intriguing, since it suggests that Freed and Polsby may actually disagree with the underlying policy of antidiscrimination legislation. If they do, that might explain their otherwise puzzling hostility to the treatment of job segregation as relevant to Equal Pay Act disputes.

CONCLUSION

Freed and Polsby make important contributions. Courts should be sensitive to comparable-worth issues in current cases and should refuse to enter judgments for plaintiffs solely on the basis of comparable-worth arguments. In assessing the strength of a case based on multiple regression analysis, courts should be especially careful to ensure that evidence of disparities involves substantially equal or substantially identical jobs.

Nevertheless, I am puzzled by this paper. I do not understand why Freed and Polsby spend so much time criticizing cases that do not state generally accepted law. Nor do I understand why, if their real objection is to the idea of equal pay for equal work or to antidiscrimination legislation as such, they make so indirect an attack.

Freed and Polsby suggest, at least by implication, that the Equal Pay Act should be more controversial given the problems created by the comparable-worth issues raised by Equal Pay Act cases and by the controversy surrounding comparable worth. I do not agree. Comparable-worth issues will inevitably arise in the implementation of any antidiscrimination legislation; the cost of eliminating such issues is the repeal of all such legislation. In any event, the "problems" are not so severe: courts have not been as incompetent in dealing with comparable-worth issues, under either Title VII or the Equal Pay Act, as Freed and Polsby suggest.

Moreover, the range of comparable-worth issues that can be brought under current antidiscrimination legislation is narrow compared with those that would arise under a broad comparable-worth standard. There may be questions about whether orderlies' jobs and aides' jobs are comparable or about whether minor non-sex-based differences between jobs or employees can credibly explain a pay differential. But these questions are far easier than whether a pay differential between janitors and secretaries, or be-

tween truck drivers and nurses, is reasonable.

To say that a court's job would be more difficult under a comparable-worth standard, however, is not to say that Freed and Polsby have succeeded in making a compelling case for its rejection. They have not directly addressed the problems in implementing such a standard, and their indirect attack cannot survive close scrutiny.