

MONEY, SEX, AND SUNSHINE: A Market-Based Approach to Pay Discrimination

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The Equal Pay Act had a distinct market purpose. Congress made a policy choice to modify the existing compensation market so that employees who perform jobs requiring substantially “equal skill, effort, and responsibility” earn equal wages, regardless of sex. The Act aimed not simply to promote individual fairness, but to foster a more efficient, equitable wage market on a systemic level. Congress recognized that paying lower wages to women constituted “an unfair method of competition,” burdened “commerce and the free flow of good in commerce,” and prevented the “maximum utilization of available labor resources.” Over time, however, the “market” in equal pay cases has been transformed from the fundamental reason for the Act to an acceptable business defense for paying women less. At the same time, pay discrimination is conceptualized today in the rhetoric of “fairness,” which overshadows the core market purpose of the Act.

This Article contends that equal pay laws have failed in their market purpose and will continue to fail so long as reform is centered solely on a litigation-enforcement model. The Article reframes pay discrimination as a market failure caused by insufficient and asymmetric information about the value of work, rather than an individual fairness concern. It explores lessons that can be learned from executive compensation scholarship, which offers more sophisticated

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analyses of the causes of abusive pay practices. Executive pay scholars have exposed: (1) the human dynamics and conditions that cause compensation markets to fail; (2) the ineffectiveness of litigation to fully address abusive pay because of court reluctance to interfere with “business judgments” about compensation; and (3) the crucial role of transparency as a market-based tool to reform abusive pay practices.

Applying these lessons in modified form, the Article examines how pay secrecy distorts compensation markets and permits pay discrimination to flourish, even in the absence of intentional sex discrimination. Given the increasing ineffectiveness of equal pay litigation, it analyzes how pay disclosure and transparency can be used to promote a more efficient compensation market in which employees are appropriately valued and rewarded without the taint of discriminatory factors.

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I. INTRODUCTION

Two different types of compensation abuses have dominated the news and public policy debates recently. First, the Lilly Ledbetter case,¹ the national gender discrimination class action against Wal-Mart,² and reports about the persistent gender pay gap—even after controlling for work-life choices that may explain some of the gap³—have highlighted continuing pay discrimination against women. Second, disclosures of excessive executive pay packages at failing companies have outraged the public and led to calls for reform.⁴ To date, however, conversations about pay discrimination and executive compensation have proceeded on parallel, completely unrelated tracks in the media, in legal scholarship, and in legislative debates.

The issue of pay discrimination is typically framed in the rhetoric of fairness. The remedy is limited to litigation under the Equal Pay Act (EPA),⁵ Title VII of the Civil Rights Act,⁶ or similar state laws. The pay

1. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (holding that the time for filing a charge of discrimination in a disparate-treatment pay case begins at the time of the pay-setting decision and that each paycheck does not start a new charging period). Under the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e-5(e)(3)(A)), the limitations period now begins at the time a discriminatory compensation decision is adopted, when the person becomes subject to the discriminatory decision, or when a person is affected by the decision.

2. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (holding that case filed on behalf of more than one million women who alleged sex discrimination in pay and promotions was improperly certified as class action under FED. R. CIV. P. 23(b)(2)). Six years before the case was filed, Wal-Mart's own counsel found that women employees "earned less than men in numerous job categories, with men in salaried jobs earning 19 percent more than women." Steven Greenhouse, *Report Warned Wal-Mart of Risks Before Bias Suit*, N.Y. TIMES, June 4, 2010, at B1, available at <http://www.nytimes.com/2010/06/04/business/04lawsuit.html>.

3. See *infra* Part II.B.

4. See, e.g., Kenneth R. Davis, *Taking Stock—Salary and Options Too: The Looting of Corporate America*, 69 MD. L. REV. 419, 437 (2010) ("Workers who live from paycheck to paycheck cannot fathom how Richard Grasso finagled a \$187 million seven-year compensation package working for a not-for-profit organization or why Michael Ovitz received \$130 million for failing at Disney."); Harwell Wells, "No Man Can Be Worth \$1,000,000 a Year": *The Fight over Executive Compensation in 1930s America*, 44 U. RICH. L. REV. 689 (2010) (providing historical account of public outrage over large executive pay packages); Thomas Frank, Op-Ed., *The Tilting Yard: Wall Street Bonuses Are an Outrage*, WALL ST. J., Feb. 4, 2009, at A11 (stating that Wall Street firms paid \$18.4 billion in bonuses in 2008, outraging the public); Deborah Solomon & Laura Meckler, *Strict Executive-Pay Caps Planned: Latest Salvo from Obama Administration Aims to Rein in Firms Receiving Federal Aid*, WALL ST. J., Feb. 4, 2009, at A3 (reporting that President "Obama called it 'shameful' that Wall Street firms awarded \$20 billion worth of bonuses as taxpayers were bailing them out . . .").

5. 29 U.S.C. § 206(d) (2006). The EPA requires equal pay for equal work. The plaintiff establishes a prima facie case by showing that she is paid less than a man for a job "the performance of which requires equal skill, effort, and responsibility, and which are performed

violation is portrayed as an individual wrong and the employee who is harmed must muster up the temerity and courage to sue her employer for damages. Two recent bills aimed at pay discrimination—the Fair Pay Act⁷ and the Paycheck Fairness Act⁸—incorporate fairness into their titles and propose enhanced litigation remedies as the means of achieving that fairness. In this “fairness through litigation” model, the “market” is often portrayed as undermining fair pay.⁹ Modern courts are reluctant, however, to reject otherwise neutral market defenses.¹⁰ Consequently, most plaintiffs now lose equal pay cases.¹¹

under similar working conditions” *Id.* If shown, discrimination is presumed and the burden shifts to the employer to prove that the differential was “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.” *Id.* For a primer on the EPA, see Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17 (2010).

6. 42 U.S.C. §§ 2000e to 2000e-17 (2006). Title VII prohibits employment discrimination, including pay discrimination, on the basis of race, color, national origin, sex, and religion. Establishing a prima facie case is easier under Title VII because the plaintiff only needs to be “similarly situated” to a higher paid male comparator. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981). Unlike the EPA, however, the burden of proof remains on the plaintiff to prove that the wage disparity resulted from intentional sex discrimination. *See Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 344 (4th Cir. 1994) (explaining the differences in the burdens of proof for Title VII and the EPA).

7. Fair Pay Act of 2009, S. 904, 111th Cong. (2009). The Fair Pay Act would codify a comparable worth approach, prohibiting pay disparities in the same establishment for jobs dominated by one sex, as compared to jobs dominated by the opposite sex, “for work on equivalent jobs.” *Id.* § 3.

8. The Paycheck Fairness Act prohibits employers from taking adverse action against employees who discuss wages, requires that the “factor other than sex” defense be job-related and consistent with business necessity, and allows compensatory and punitive damages under the EPA. Paycheck Fairness Act, H.R. 1519, 112th Cong. § 3 (2011). The Act has been introduced by Rep. Rosa DeLauro every year since 1997. It passed the House in 2010, but failed to survive a cloture vote in the Senate, 58-41. News Release, De Lauro: Senate Republicans Block Equal Pay for Women, 2010 WLNR 22975907 (Nov. 17, 2010).

9. *See Eisenberg, supra* note 5, at 57 (“Courts that accept vague, unsupported claims that the market caused a pay differential are not properly scrutinizing the employer’s affirmative defense as required by the EPA.”); Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 162 (2011) (describing “market excuses as a significant cause of current pay inequities” and arguing “that the EPA should preclude use of such excuses”); Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 808 (2010) (discussing use of market defenses in equal pay cases and arguing that “usually, market justifications for pay disparity in equal-pay-for-equal-work litigation should be rejected”). For an overview of how courts treat market defenses in equal pay cases, see *infra* Part II.A.

10. *See* sources cited *supra* note 9; *see also infra* Part II.A.

11. *See Eisenberg, supra* note 5, at 33 (showing that the employee success rate in EPA cases has declined to 35% in the recent decade from 2000 to 2009).

Aside from the litigation approach, a “comparable worth” approach seeks to reform the market so that female-dominated work is valued as highly as male-dominated work.¹² Comparable worth theory aims to restructure the market through the use of job evaluation studies to assign higher intrinsic worth to historically undervalued female-dominated positions (such as secretarial work) to ensure pay equity with historically male-dominated positions (such as truck drivers).¹³ Courts have consistently rejected comparable worth arguments in pay discrimination litigation.¹⁴

Equal pay laws have undoubtedly increased women’s earning power and forced many employers to take pay equity seriously. Yet, persistent examples of compensation inequities between men and women performing similar jobs continue to abound. The debate about the causes of the pay gap is typically heated and split into “discrimination” or “choice” explanations. In one corner, advocates for employees and women describe the disparities as evidence of either blatant bias or embedded structural or societal discrimination against working women.¹⁵ In another corner, law and economics proponents explain the imbalance as the inevitable result of impartial market forces and personal worker choices.¹⁶

12. See, e.g., Carin Ann Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REFORM 7 (1986); Mary Cornish, *Closing the Global Gender Pay Gap: Securing Justice for Women’s Work*, 28 COMP. LAB. L. & POL’Y J. 219 (2007); Mayer G. Freed & Daniel D. Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078 (1984); Gail C. Kaplan, *Pay Equity or Pay Up: The Inevitable Evolution of Comparable Worth into Employer Liability Under Title VII*, 21 LOY. L.A. L. REV. 305 (1987); Sacha E. de Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women’s Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315 (2007); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986); Daniel N. Kuperstein, Note, *Finding Worth in the New Workplace: The Implications of Comparable Worth’s Reemergence in the Global Economy*, 24 HOFSTRA LAB. & EMP. L.J. 363 (2007); Sandra J. Libeson, Comment, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358 (1995).

13. See *Washington v. Gunther*, 452 U.S. 161, 166 n.6 (1981) (describing comparable worth).

14. See, e.g., *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007) (citing cases that have rejected comparable worth); *Am. Nurses Ass’n v. Illinois*, 783 F.2d 716, 720 (7th Cir. 1986) (rejecting comparable worth); *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977) (same).

15. See *infra* Part II.B. See also Hilary Lips, *Beware Those Who Blame Gender Pay Gap on Women’s Choices*, FORBES, Apr. 12, 2011, available at <http://blogs.forbes.com/womensmedia/2011/04/12/beware-those-who-blame-womens-choices-for-gender-pay-gap/> (“The investments, such as education, type of occupation and hours worked, that women make in paid employment still do not reap the same rewards for them as men’s investments do”); Porter & Vartanian, *supra* note 9, at 183–92 (2011) (explaining how social and cognitive gender schemas can cause pay discrimination against women).

16. See, e.g., Carrie Lukas, *There Is No Male-Female Wage Gap*, WALL ST. J., Apr. 12, 2011, available at <http://online.wsj.com/article/SB100014240527487044151045762506725047>

This Article explores gender pay inequities from a new perspective. It embraces a market framework to explain the causes of, and propose solutions for, pay discrimination. It proposes that there is another market-based way (aside from either “comparable worth” or “impartial market” theories) to conceptualize pay discrimination against women and promote fair pay. This new approach draws basic lessons from a narrow slice of the compensation market—executive pay—which has been thoroughly examined by economists, business scholars, and regulators.

Scholarly analysis of executive compensation has advanced beyond popular fairness concepts to a more sophisticated examination of the market flaws and human dynamics in the pay-setting process that facilitate unreasonable compensation packages.¹⁷ Although not in complete theoretical agreement, this work offers various non-litigation proposals to make executive compensation markets more efficient and responsive to performance metrics.¹⁸ Executive pay abuses have been conceptualized as market failures that can be repaired by improving market conditions or internal corporate governance in the firm.¹⁹ The regulatory approach to executive pay has focused, in part, on using mandatory disclosure to provide better market information and deter abusive pay practices.²⁰ With

07048.html (arguing that women’s personal choices explain differences in average pay between men and women); 8 *Reasons Why the “Gender Pay Gap” Is a Total Sham*, BUSINESS INSIDER WAR ROOM, <http://www.businessinsider.com/actually-the-gender-pay-gap-is-just-a-myth-2011-3#1-men-are-far-more-likely-to-choose-careers-that-are-more-dangerous-so-they-naturally-pay-more-1>.

17. See, e.g., LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE PAY* (2004) (setting forth managerial power theory of executive compensation and recommending greater transparency and corporate governance reforms). See also articles discussed *infra* Part III.

18. For an overview of the differing theoretical views in executive compensation scholarship, see William W. Bratton, *The Academic Tournament over Executive Compensation*, 93 CAL. L. REV. 1557 (2005) (reviewing BEBCHUK & FRIED, *supra* note 17) (explaining theoretical differences among leading executive compensation scholars); Davis, *supra* note 4 (explaining various approaches to control executive compensation and proposing the establishment of shareholder compensation committees as another approach); and Michael B. Dorff, *Softening the Pharaoh’s Heart: Harnessing Altruistic Theory and Behavioral Law and Economics to Rein in Executive Salaries*, 51 BUFF. L. REV. 811, 815 (2003) (explaining that regulatory approaches to executive pay “contend that governance problems stem from market failures that must be corrected by regulation” and proposing an “altruistic theory” aiming to instill altruism in directors so they will bargain more forcefully with executives over their pay). See also *infra* Part III.

19. See Michael B. Dorff, *Does One Hand Wash the Other? Testing the Managerial Power and Optimal Contracting Theories of Executive Compensation*, 30 J. CORP. L. 255, 255 (2005) (explaining that the managerial power theory of executive compensation describes a “market failure that requires regulatory intervention” and recommending corporate governance reform to address the problem).

20. See *infra* Part III.C.

“sunshine” as a disinfectant,²¹ boards are encouraged to develop sound compensation structures and award compensation consistent with job requirements and executive performance. Failing that, transparency also gives all stakeholders and the public a more powerful voice in monitoring the activities of management.

This Article argues that, as with executive compensation abuse, gender pay discrimination should be viewed as a market failure caused, in part, by pay secrecy and information asymmetries about market wages. When combined with excessively discretionary pay schemes, these information deficiencies frequently skew wage negotiation results against women.²² In addition, the workplace norm of pay secrecy facilitates and conceals pay discrimination against women. Without transparency, employees lack the information they need to value their own labor and to negotiate fair wages in the first place. Employees are also denied a direct, internal voice in the development and monitoring of fair compensation systems.

The positive impact of wage transparency on the workforce has been examined in the fields of psychology and organizational management.²³ In the information age, the workplace norm of pay secrecy may be changing. The popular press and many blogs advocate for greater wage transparency.²⁴

21. As Louis Brandeis famously proclaimed, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1932).

22. See *infra* Part III.A.2. This Article focuses on gender discrimination for two reasons. First, the EPA covers only sex-based wage discrimination. Second, women constitute half of the workforce and consistently earn less than men.

23. See *infra* Part IV.A.

24. See, e.g., Susan Reed, Op-Ed., *Show Us the Money*, N.Y. TIMES, June 4, 2007, available at <http://www.nytimes.com/2007/06/04/opinion/04reed.html> (“Requiring companies to post salaries would give employers and employees a chance to begin discussing wages as responsible adults instead of as king and supplicant, or owner and beggar. It would help employees to better understand what their jobs are worth, and it would encourage their bosses to see how much more loyalty and productivity they could get from their workers in the absence of secret salary negotiations.”); Lisa Belkin, *Psst! Your Salary Is Showing*, N.Y. TIMES, Aug. 21, 2008, at G2, available at http://www.nytimes.com/2008/08/21/fashion/21Work.html?_r=2&oref=slogin (noting trend towards greater wage transparency); Penelope Trunk, *Figure Out How Much You Should Be Paid (and Three Cheers for Transparent Salaries)*, BRAZEN CAREERIST (July 11, 2008), <http://blog.penelopetrunk.com/2008/07/11/how-to-figure-out-how-much-you-should-be-paid/> (advising employees to work for a “company that has out-in-the-open salaries, because that means you have more out-in-the-open managers—mangers that have so much self-confidence in their ability to value accurately a business contribution that they can set airtight salaries and stand by them”); Alexander Kjerulf, *Why Secret Salaries Are a Baaaaaad Idea*, CHIEF HAPPINESS OFFICER (Aug. 8, 2006, 9:02 AM), <http://positivesharing.com/2006/08/why-secret-salaries-are-a-baaaaaad-idea/> (arguing that making salaries open will make salaries more fair, increase retention of the best employees, and increase productivity because people with higher salaries will feel pressured to earn their keep).

Others defend the benefits of a confidential approach²⁵ or worry that pay transparency would cause too many employee conflicts and human resources problems.²⁶

Most legal scholars have avoided the issue of wage transparency for the larger workforce, given the well-established “social norm” of pay secrecy and the complex, controversial nature of the topic. Cynthia Estlund makes a basic case for workplace transparency, arguing that “the public has a legitimate interest in knowing far more about workplace policies and conditions than employers currently choose to reveal, and that compelling disclosure of that information can help to make markets more efficient, mandates more effective, and reputations more reliable.”²⁷ She excludes a discussion of public disclosure of salary information given the unique complexities of the topic.²⁸ Gowri Ramachandran has proposed that pay transparency be an affirmative defense to pay discrimination claims.²⁹

25. See, e.g., Ann Bares, *Pay Transparency: (Not) the Solution to Pay Discrimination*, COMPENSATION FORCE (Jan. 30, 2009, 9:52 AM), http://compforce.typepad.com/compensation_force/2009/01/pay-transparency-not-the-solution-to-pay-discrimination.html (arguing that potential benefits of pay transparency are not outweighed by the potential negatives of “bad feelings, bad blood and bad karma” (quoting John Hollon, *When It Comes to Pay, Don't Ask and Don't Tell*, WORKFORCE MANAGEMENT (Jan. 29, 2009), http://workforce.com/wpmu/bizmgmt/2009/01/29/dont_ask_and_dont_tell/)); Ann Bares, *Pay Transparency: It's the How and the Why, Not the What*, COMPENSATION FORCE (Aug. 6, 2008, 7:21 AM), http://compforce.typepad.com/compensation_force/2008/08/pay-transparenc.html (arguing that data about pay amounts earned should be kept confidential, but companies should be transparent about the mechanics of the pay system (how jobs are valued), the organization's pay strategy, and the objectives and rationale of the pay system); Brian McCullough, *On Salary Transparency*, THEJOBBORED (Aug. 20, 2008), http://www.thejobbored.com/on-salary-transparency_747/ (noting that salary secrecy is fact of business life and will not change, but employees should try to discover what co-workers make).

26. See, e.g., Kris Dunn, *Pay Transparency—the CEO Parable...*, THE HR CAPITALIST (Feb. 20, 2009), <http://www.hrcapitalist.com/2009/02/pay-transparency-the-ceo-parable.html> (arguing that pay transparency would cause “employee fallout” and “[n]o company has strong enough managers to withstand the pressure and stand tall on how they value talent”).

27. Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 403 (2011).

28. *Id.* at 365. Several students have published notes examining the issue of wage transparency. See Brian P. O'Neill, Comment, *Pay Confidentiality: A Remaining Obstacle to Equal Pay After Ledbetter*, 40 SETON HALL L. REV. 1217 (2010) (examining pay secrecy policies and the National Labor Relations Act and arguing that pay secrecy rules should be outlawed); Jessi Leigh Swenson, Note, *Realizing Ledbetter's Dream with DIY Sensibility*, 21 HASTINGS WOMEN'S L.J. 357 (2010) (arguing that women should use “do-it-yourself” solutions, such as blogging and narrative sharing to correct information asymmetries on their own and raise consciousness).

29. Gowri Ramachandran, *Pay Transparency*, PENN. ST. L. REV. (forthcoming 2012).

Leonard Bierman and Rafael Gely examine the social norm of pay secrecy against the policy of the National Labor Relations Act (“NLRA”),³⁰ which prohibits employers from retaliating against workers who discuss wages and benefits.³¹ Bierman and Gely argue that laws prohibiting pay secrecy are ill-advised because they conflict with existing social norms favoring confidentiality. Instead, Bierman and Gely suggest that employees be advised of their right to discuss wages under the NLRA through posters in the workplace.³² In a reply essay to Bierman and Gely, Matthew Edwards explores the need for greater clarity about social norms in the discussion of pay secrecy rules.³³ He argues that “future treatments of the regulation of salary secrecy would benefit greatly from the adoption of an explicitly normative theory to judge and analyze the social practice of pay secrecy.”³⁴

This Article posits that the workplace norm of pay secrecy conflicts with the well-established public policy of equal pay for equal work. In the modern economy, in which employees are more likely to be “free agents,” wages are increasingly the product of individual negotiation rather than established lock-step pay scales.³⁵ Instead of basing pay on required job duties and worker qualifications, many employers pay wildly divergent rates to employees who have comparable skill sets and are performing similar tasks. Scholars have noted the trend towards a “winner-take-all” society in which the best negotiators—not necessarily the best or most qualified workers—achieve the highest salaries.³⁶ Over time, this trend has harmed internal equity among employees within the same firm.³⁷ Although

30. Section 7 of the NLRA gives workers the right to engage in “concerted activities” for their “mutual aid or protection.” 29 U.S.C. § 157 (2006). Employers commit unfair labor practices if they “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” by Section 7. *Id.* § 158. The National Labor Relations Board and federal courts have found that rules that prohibit wage discussions in the workplace violate employees’ Section 7 rights. *See, e.g.,* NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531 (6th Cir. 2000) (holding that oral pay confidentiality rule violated Section 7); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502 (8th Cir. 1993) (holding that employer violated Section 7 by prohibiting wage discussions); *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976) (holding that unqualified, unwritten pay confidentiality rule violated Section 7).

31. Leonard Bierman & Rafael Gely, “*Love, Sex and Politics? Sure. Salary? No Way*”: *Workplace Social Norms and the Law*, 25 *BERKELEY J. EMP. & LAB. L.* 167 (2004).

32. These would be similar to the postings required under remedial labor statutes, such as the Fair Labor Standards Act and Title VII. *See, e.g.,* 29 C.F.R. § 516.4 (2009) (requiring the posting of minimum wage laws).

33. Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 *BERKELEY J. EMP. & LAB. L.* 41 (2005).

34. *Id.* at 62–63.

35. *See infra* Part III.A.2.

36. *Id.*

37. *Id.*

the overall gender pay gap has decreased over time, amorphous and opaque pay schema have increased pay inequities within certain firms and industries, especially for workers at higher occupational levels for whom wages are the product of more subjective negotiation processes.³⁸

The Article proceeds as follows. Part II describes how the EPA has failed in its market purpose and will continue to fail so long as reform is centered exclusively on a litigation-enforcement model. It examines the transmogrification of the market in equal pay cases from a reason for courts to scrutinize wage rates into an acceptable defense for paying women lower amounts. It then reviews evidence regarding the status of women's wages in today's compensation market and dissects common explanations for the gender pay gap.

Part III sets forth three basic lessons that can be learned from the regulatory approach to executive pay and applies them to the pay discrimination context. First, executive compensation scholars, particularly Lucian Bebchuk and Jesse Fried, have debunked the myth that employers are mere "wage-takers" who accept wage levels as set by impartial market forces. They have shown that executive pay rates are not the product of optimal contracting and market forces, but managerial power and a host of cognitive, situational, and social factors that can work to unjustifiably increase executive pay. Likewise, pay secrecy, informational asymmetries about compensation rates, and cognitive, situational, and psychological factors can prevent optimal contracting for women and unjustifiably depress their wages as compared to their similarly-situated male co-workers. Compensation decisions are rarely the result of sophisticated market analysis. Rather, pay typically is set haphazardly through informal negotiations between a supervisor and an employee, with asymmetric knowledge about wage rates and without any guiding principles or corporate oversight. The Article uses psychological scholarship about negotiation norms and expectations to show how flaws in the negotiation process—when combined with pay secrecy—systematically lower women's pay, even in the absence of intentional sex discrimination.

Lesson number two from the executive pay realm is that litigation alone cannot solve and deter abusive pay practices because courts are reluctant to interfere with business judgments regarding compensation. Given the ineffectiveness of a litigation approach, Congress and the Securities Exchange Commission have used pay transparency to promote a more market-based model of reform. In addition to supporting better corporate governance, this approach involves shareholders and the public in the

38. See *infra* Part II.B.

monitoring and correcting of executive pay abuses. Although employment law scholars have recognized the need for a more structural approach to anti-discrimination mandates,³⁹ Congress continues to focus on a “fairness through litigation” solution to employment discrimination. In the complex area of pay discrimination in particular, a supplementary framework that targets the problem where it typically starts—at the pay-setting stage—would better facilitate institutional reform.

Third, given the failure of litigation at achieving systemic reform, mandatory disclosure has been used as a market-based tool to regulate executive pay. Transparency gives shareholders a more active role in monitoring corporate actions. Transparency provides an “outrage constraint” that forces firms to be more thoughtful and deliberate about the goals of their executive compensation plans. Of course, as headlines continue to remind us, transparency has not completely solved the problem of executive pay abuses and the gap between the richest and the poorest workers continues to widen.⁴⁰ But rather than being pushed into secrecy, transparency allows these issues to remain front and center in the public dialogue. Business scholarship has also shown that even though the absolute level of executive pay has increased over time, companies have improved their compensation practices and tied executive pay more closely to performance metrics.⁴¹

Requiring greater transparency about compensation more generally would encourage companies to structure pay that is justifiable given a position’s requirements and the unique skills and performance brought to

39. See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1899 (2009) (describing how aggressive legal strategies may be counterproductive at eliminating implicit bias in the workplace); Susan Strum, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–61 (2001) (noting limitations of litigation in addressing structural features in the workplace that permit discrimination).

40. See, e.g., Sarah Anderson & Sam Pizzigati, *Reining in Executive Pay*, L.A. TIMES, Sept. 9, 2010, available at <http://articles.latimes.com/2010/sep/09/opinion/la-oe-anderson-ceopay-20100908> (“At America’s top 50 companies, CEO pay—after adjusting for inflation—is running at quadruple the 1980s average and eight times the average in the mid-20th century.”); Rana Foroohar, *Stuffing Their Pockets: For CEOs, a Lucrative Recession*, NEWSWEEK, Sept. 4, 2010, at 20, available at <http://www.thedailybeast.com/newsweek/2010/09/04/why-do-ceos-make-so-much-money.html> (arguing that “publishing pay numbers is a good one” because “it could be the starting point of a conversation in which America’s business leaders explain, to their shareholders and to the wider public, exactly why they need so much money to get the job done”); Hope Yen, *Census Finds Record Gap Between Rich and Poor*, ASSOCIATED PRESS, Sept. 28, 2010 (reporting that “[t]he top-earning 20 percent of Americans—those making more than \$100,000 each year—received 49.4 percent of the income generated in the United States, compared with the 3.4 percent earned by those below the poverty line”).

41. See *infra* Part III.C.

the task by its workers. On a systemic level, this would promote a compensation market with more accurate information about the value and pricing of jobs. Wage negotiations would result in more appropriate, equitable wage rates given the “skill, effort, and responsibility” required for the job.⁴² Rather than forcing individual women to enforce these market mandates through piecemeal, typically unsuccessful litigation, all stakeholders—management, employees, and the public—would play a role in enforcing the market promise of the EPA.

Part IV considers various models of pay transparency and the potential benefits and drawbacks of such a system. The benefit of transparency lies not simply in the final wage results, but in the very process of developing a compensation system with clearly understood goals, performance standards, and auditing controls. Transparency would be an effective way to involve employees in the self-regulation of the firm’s pay practices. Employees are analogous, in this respect, to shareholders, but have an even more direct stake in ensuring that the firm’s pay practices are fair and non-discriminatory.⁴³ Using transparency to eliminate unjustified pay disparities would be consistent with a structural approach to anti-discrimination law, which can be more effective than adversarial litigation at solving the “more subtle and complex forms of workplace inequity.”⁴⁴ At the same time, such “open book management” and continual compensation dialogue between employers and employees invests workers in the financial management of the firm, increases employee trust in and loyalty towards the employer, reduces wage gossip, misperceptions, and suspicions of unfairness that can harm morale, and increases worker productivity and performance.

Part IV also raises some potential objections to pay transparency, such as: employee privacy, employee disgruntlement and conflict, the risk of

42. This is the standard for a prima facie case under the EPA. *See* 29 U.S.C. § 206(d) (2006).

43. Paul Weiler long ago made an analogy between employees and shareholders and the “latent effect” of employment law, which is “the allocation of authority for making and implementing policies.” *See* PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 4 (1990) (“[L]abor and employment law both controls and empowers workers and employers (and the administrative apparatus of the state) in a manner analogous to the way in which corporate and securities law functions for suppliers of capital to the firm.”).

44. Strum, *supra* note 39, at 467–69 (proposing a structural regulatory approach to “second generation employment discrimination” which can be in the form of cognitive bias, “patterns of interaction, informal norms, networking, mentoring, and evaluation”). *See also* Cynthia Estlund, *Corporate Self-Regulation and the Future of Workplace Governance*, 84 CHI.-KENT L. REV. 617, 622–23 (2009) (describing “New Governance” approach to employment regulation, in which companies get the benefit of a more self-regulatory structure in exchange for employee voice and participation in workplace governance).

increased litigation, and proprietary concerns. The Article also points out the limits of transparency in the context of pay discrimination, including potential collective action problems.

Part V concludes by encouraging greater dialogue across academic disciplines—and among management and employees—to better understand and address the subtle, complex, and profound nature of modern pay discrimination.

II. THE “MARKET” AND WOMEN’S WAGES

A. The Market Purpose of the Equal Pay Act

Congress passed the EPA with a distinct market purpose. In 1963, many employers blatantly paid women lower rates than men simply because they were women.⁴⁵ In the legislative debates about the EPA, many employers defended their right to pay women less, arguing that women cost more to employ.⁴⁶ In other words, employers argued that they must pay women less simply because that was what the market required or permitted.

Supporters of the EPA “saw wage discrimination as a result of imperfect markets and premised the necessity of the EPA on this economic condition.”⁴⁷ The Assistant Secretary of Labor Esther Peterson “noted that women were discouraged from entering the workforce because employers undervalued their work, and consequently, this pay disparity resulted in the underutilization of a valuable and abundant source of labor.”⁴⁸

With the EPA, Congress made a policy choice to modify the existing compensation market so that employees who performed jobs requiring

45. In one study in 1961, 33% of employers “said they had a double standard pay scale for men and women officeworkers.” 109 CONG. REC. 9199 (1963) (statement of Rep. Green). “For example, a job for an order clerk in a machine manufacturing industry would pay a male worker \$100 a week, but a woman worker only \$56 to \$60 a week.” *Id.* See also AMERICAN WOMEN: THE REPORT OF THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION 46 (Margaret Mead & Frances Balgley Kaplan eds., 1965) (reporting that many studies confirmed “[t]he existence of differentials in pay between men and women for the same kind of work”).

46. See, e.g., *Equal Pay Act of 1963: Hearings on H.R. 3861 Before the H. Special Subcomm. on Lab. of the Comm. of Educ. & Lab.*, 88th Cong. 96 (1963) (statement of W. Boyd Owen, Vice President, Personnel Admin. of Owens-Illinois Glass Co.) (arguing that women cost more to employ due to higher turnover rates and health and welfare costs). In response, one representative pointed out that Owen claimed that women cost him an additional thirty cents per hour, but the company paid them seventy-four cents less per hour. *Id.* at 104–05.

47. Juliene James, Note, *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y.U. L. REV. 1873, 1879 (2004) (discussing legislative history of EPA).

48. *Id.* at 1878.

substantially equal skill, effort, and responsibility would be paid equal wages, regardless of sex.⁴⁹ The EPA's declaration of purpose conceptualizes the goal of the EPA in market-related terms.⁵⁰ Congress recognized that paying lower rates based on sex burdened "commerce and the free flow of goods in commerce,"⁵¹ prevented "the maximum utilization of the available labor resources,"⁵² constituted "an unfair method of competition,"⁵³ caused "labor disputes, thereby burdening, affecting, and obstructing commerce,"⁵⁴ and depressed "wages and living standards for employees necessary for their health and efficiency."⁵⁵ Thus, the EPA's purpose was not simply to protect individual workers and promote fairness, but also to foster a better-functioning wage market on a systemic level.

Given this market purpose, early EPA cases flatly rejected "market forces" defenses asserted by employers because they perpetuated the very discrimination that Congress sought to alleviate.⁵⁶ Courts noted that the EPA aimed to cure imbalances in the compensation market based on gender. As the Supreme Court stated in *Corning Glass Works v. Brennan*:

The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, *but also as a matter of market economics*, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition."⁵⁷

49. 29 U.S.C. § 206(d) (2006).

50. Equal Pay Act of 1963, Pub. L. No. 88-38, § 2, 77 Stat. 56, 56. The EPA's declaration of purpose is found in the original law, but is not reprinted in the United States Code.

51. *Id.* § 2(a)(4).

52. *Id.* § 2(a)(2).

53. *Id.* § 2(a)(5).

54. *Id.* § 2(a)(3).

55. *Id.* § 2(a)(1).

56. *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974) ("[U]se of the 'market force' theory, i.e. a woman will work for less than a man, is not a valid consideration under the Act."); *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 286 (4th Cir. 1974) (finding "the availability of women at lower wages than men" to be "precisely the criterion for setting wages that the Act prohibits"); *Hodgson v. Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973) (noting that Congress passed the EPA "[r]ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor"); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973) (stating that there is "no excuse" for hiring female workers at a lower rate "simply because the market will bear it"); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970) (finding that an employer's greater bargaining power with women "is not the kind of factor [other than sex] Congress had in mind" in enacting the EPA).

57. 417 U.S. 188, 207 (1974) (quoting § 2(a)(5), 77 Stat. at 56) (emphasis added).

Market defenses in modern equal pay cases, however, are more attractive to courts because they are couched in otherwise neutral terms.⁵⁸ Employers argue that paying unequal wages for otherwise substantially equal work is the “outcome of market forces, not sex discrimination.”⁵⁹ Scholars have noted that new market defenses are more problematic for pay discrimination cases because it is more difficult for plaintiffs to prove a causal link between lower pay and intentional discrimination based on sex.⁶⁰ Although intent is irrelevant under the proof structure of the EPA, employers frequently defeat equal pay claims by asserting market-based reasons under the factor other than sex affirmative defense.⁶¹ Plaintiffs may also sue for pay discrimination under Title VII, which incorporates the EPA’s affirmative defenses⁶² and also requires that plaintiffs prove that the wage differential was “because of” intentional sex-based animus.⁶³ Under Title VII, it is nearly impossible for plaintiffs to prove that they received lower pay “because of” sex if the employer points to otherwise neutral “market” factors that caused the pay disparity.⁶⁴

A common market defense relies on employees’ prior salaries.⁶⁵ If a man earned more in a prior position, and a woman earned less, they will be paid

58. Rabin-Margalioth, *supra* note 9, at 813.

59. *Id.* at 807.

60. *Id.* at 813 (“The strength of these new versions of the market defense is that they purport to sanction neutral criteria that regrettably resulted in an individual female employee being paid less than a male co-worker, rather than being offered as a justification for an intentionally sex-based compensation decision.”); Thomas H. McCarthy, Jr., Note, “Market Value” as a Factor “Other than Sex” in Sex-Based Wage Discrimination Claims, 1985 U. ILL. L. REV. 1027, 1037 (noting that “market value” defense is more attractive because it “more strongly reflects a defendant’s prudent business judgment”).

61. See Eisenberg, *supra* note 5, at 57–61.

62. See *Cnty. of Washington v. Gunther*, 452 U.S. 161, 168–71 (1981) (holding that the EPA’s affirmative defenses apply to Title VII claims for compensation discrimination).

63. Some plaintiffs prevail on EPA claims but lose on Title VII claims due to insufficient evidence of intent. See, e.g., *Brewster v. Barnes*, 788 F.2d 985, 987 (4th Cir. 1986) (holding defendant liable for pay discrimination under EPA but not under Title VII).

64. See, e.g., *Wernsing v. Dept. of Human Servs.*, 427 F.3d 466 (7th Cir. 2005); *Cullen v. Ind. Bd. of Trs.*, 338 F.3d 693 (7th Cir. 2003); *Int’l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Michigan*, 886 F.2d 766 (6th Cir. 1989).

65. See, e.g., *Wernsing*, 427 F.3d at 469 (granting summary judgment to employer using prior salary as defense and stating that “markets are impersonal and have no intent”); *Sparrock v. NYP Holdings, Inc.*, No. 06 Civ. 1776 (SHS), 2008 WL 744733, at *15 (S.D.N.Y. Mar. 4, 2008) (“[M]atching an employee’s former salary has been found to be a factor other than sex justifying wage differential.”); *Engelmann v. Nat’l Broad. Co., Inc.*, No. 94 CIV. 5616 (MBM), 1996 WL 76107, at *10 (S.D.N.Y. Feb. 22, 1996) (finding that payment of higher salary to match an incoming employee’s previous earnings is a valid reason for wage differences). See also Porter & Vartanian, *supra* note 9, at 176–78 (discussing cases involving prior salaries and competing offers); Jeanne M. Hamburg, Note, *When Prior Pay Isn’t Equal Pay: A Proposed*

based on their prior salaries, regardless of whether they are now performing substantially equal jobs and have comparable qualifications. Market defenses also rely on negotiation outcomes: the male employee simply negotiated a higher salary, and the woman either failed to ask for more pay, or was prohibited from negotiating a higher rate.⁶⁶

Market defenses also manifest themselves as employers' subjective judgments about what the market value is for individual employee skill sets.⁶⁷ These employer judgments are not typically based on professional market surveys, but on a supervisor's own subjective belief about the value or worth of the employee in the market. In some cases, employers defend

Standard for the Identification of 'Factors Other than Sex' Under the Equal Pay Act, 89 COLUM. L. REV. 1085, 1108 (1989) (urging greater scrutiny of prior salary defenses).

66. See, e.g., *Balmer v. HCA, Inc.*, 423 F.3d 606, 615 (6th Cir. 2005), *abrogated by Fox v. Vice*, 131 S. Ct. 2005, 2212 (2011) (finding no EPA violation where male comparator negotiated higher salary and female employee was not permitted to negotiate starting salary); *Reznick v. Associated Orthopedics & Sports Med., P.A.*, 104 F. App'x 387, 391–92 (5th Cir. 2004) (finding no EPA violation where a male surgeon negotiated higher compensation level in his initial employment contract than the plaintiff); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (finding no EPA violation where a male comparator negotiated a higher salary); *EEOC v. Home Depot U.S.A., Inc.*, No. 4:07CV0143, 2009 WL 395835, at *10–16 (N.D. Ohio Feb. 17, 2009) (finding a valid factor other than sex where male employees were able to negotiate higher starting salaries than the plaintiff); *Hardwick v. Blackwell Sanders Peper Martin, L.P.*, No. 05-859-CV-W-FJG, 2006 WL 2644997, at *3–4 (W.D. Mo. Sept. 14, 2006) (holding an EPA claim untimely and noting that even if it were timely, the male comparator had negotiated a higher salary and the plaintiff did not negotiate). *But see Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 596 (11th Cir. 1994) (rejecting the employer's defense that wage disparities resulted from negotiations surrounding the purchases of comparators' businesses); *Glodek v. Jersey Shore State Bank*, No. 4:07-CV-2237, 2009 WL 2778286, at *9 (M.D. Pa. Aug. 28, 2009) (rejecting negotiation defense and stating “[t]hrough salary demands are not entirely irrelevant, it would be inequitable to permit defendant to shelter itself from liability by stating that one individual received greater compensation than another simply because he or she requested it”); *Day v. Bethlehem Ctr. Sch. Dist.*, No. 07-159, 2008 WL 2036903, at *9 (W.D. Pa. May 9, 2008) (rejecting the school district's defense at the summary judgment stage that male comparators negotiated salaries that were higher than the standard salary scale); *Klaus v. Hilb, Rogal & Hamilton Co. of Ohio*, 437 F. Supp. 2d 706, 723–24 (S.D. Ohio 2006) (denying summary judgment where the employer defended a \$36,000 wage disparity based on the male comparator's negotiation of higher salary).

67. See, e.g., *Merrilat v. Metal Spinners*, 470 F.3d 685, 697–98 (7th Cir. 2006) (granting summary judgment where employer argued that pay differential based on male employee's education, experience and “the market forces at the time of his hire”); *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 (8th Cir. 2001) (affirming grant of summary judgment to employer who asserted that it paid higher wages to male tool makers because of “job market demands”); *Int'l Union v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989) (“An employer must be allowed to pay the wages necessary for it to compete in the marketplace for qualified applicants. Without more, discriminatory intent may not be inferred from defendant's failure to depart from free market parameters in determining job classifications and wages, even if the market can be shown to contain minor flaws.”).

disparities based on the market, yet pay certain male employees *above* market rates, and comparable female employees *below* market rates.⁶⁸

The Equal Employment Opportunity Commission (“EEOC”), which enforces the EPA and Title VII, offers equivocal guidance about whether the “market” may be used as a legitimate factor other than sex to excuse unequal pay for equal work.⁶⁹ The EEOC states that “[m]arket value qualifies as a factor other than sex only if the employer proves that it assessed the marketplace value of the particular individual’s job-related qualifications, and that any compensation disparity is not based on sex.”⁷⁰ It continues that “[p]rior salary cannot, by itself, justify a compensation disparity . . . [because] permitting prior salary alone as a justification for a compensation disparity ‘would swallow up the rule and inequality in compensation among genders would be perpetuated.’”⁷¹ Then, undermining its statement that reliance on prior salaries may foster discrimination, the EEOC circles back to say “if the employer can prove that sex was not a factor in its consideration of prior salary, and that other factors were also considered, then the justification can succeed.”⁷² In other words, the EEOC suggests that so long as the employer uses a similar bargaining process for men and women, and women simply end up with lower compensation as a result of that negotiation process, no relief is available under federal equal pay laws.⁷³

Federal courts have conflicting interpretations about the acceptability of market defenses in pay discrimination cases. Some courts continue to reject market defenses outright, finding that the EPA prohibits them.⁷⁴ Other

68. *See, e.g.*, *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (reversing a grant of summary judgment where market data showed that the male comparator’s salary was consistent with the market rate for his position, but the plaintiff’s salary was significantly lower than the market rate for her position). For examples of cases in which women were paid below the firm’s established salary guidelines, see *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 659 (2007) (Ginsburg, J., dissenting); *Wheatley v. Wicomico Cnty.*, 390 F.3d 328, 331 (4th Cir. 2004); and *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 686 n.5 (7th Cir. 1998).

69. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIRECTIVES TRANSMITTAL NO. 915.003, COMPLIANCE MANUAL § 10 (2000), *available at* <http://www.eeoc.gov/policy/docs/compensation.html>.

70. *Id.* § 10-IV(F)(2)(g).

71. *Id.* (quoting *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995)).

72. *Id.*

73. *Id.*

74. *See, e.g.*, *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1313–14 (10th Cir. 2006) (denying summary judgment to employer where disputed issues of fact existed as to whether “market factors” and “salary history” warranted pay disparity); *Siler-Khor v. Univ. of Tex. Health Sci. Ctr.*, 261 F.3d 542, 549 (5th Cir. 2001) (rejecting market forces argument because it “simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the

courts readily accept an employer's invocation of market defenses and proclaim that courts should not interfere with business judgments about compensation.⁷⁵ When plaintiffs argue that the wage market as a whole systemically discriminates against women, courts unsympathetically put the burden on them to prove such systemic *intentional* discrimination.⁷⁶ Some courts take a hybrid approach, finding that market defenses are acceptable under the EPA, but requiring the employer to prove the market data on which it relied and "rationally explain the use of market information."⁷⁷

EPA"); *Gibbs v. Pierce Cnty. Law Enforcement Support Agency*, 785 F.2d 1396, 1402 n.8 (9th Cir. 1986) (rejecting market defense where male supervisors earned 24.5% above the mean market salary rate and female supervisors earned only 0.2% above the mean market rate); *Glodek v. Jersey Shore State Bank*, No. 4:07-CV-2237, 2009 WL 2778286, at *9 (M.D. Pa. Aug. 28, 2009) ("[I]t would be inequitable to permit defendant to shelter itself from liability by stating that one individual received greater compensation than another simply because he or she requested it."); *Faust v. Hilton Hotels Corp.*, No. CIV. A. No. 88-2640, 1990 WL 120615, at *5 n.12 (E.D. La. Aug. 13, 1990) (rejecting prior salary defense because it "is similar to the market force theory long ago rejected").

75. *Merrilat v. Metal Spinners*, 470 F.3d 685, 697–98 (7th Cir. 2006) (granting summary judgment where employer argued that pay differential was based on male employee's education, experience and "the market forces at the time of his hire"); *Wernsing v. Dep't Human Servs.*, 427 F.3d 466, 469–70 (7th Cir. 2005) (granting summary judgment to employer using prior salary as defense and stating that "markets are impersonal and have no intent"); *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 (8th Cir. 2001) (affirming grant of summary judgment to employer who defended based on "job market demands"); *Smallwood v. Jefferson Cnty.*, No. 95-5686, 1996 WL 490353, at *4 (6th Cir. Aug. 27, 1996) (finding no EPA violation where employer argued salary differential was needed to meet market conditions and hire a well-qualified candidate); *Int'l Union v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989) ("Without more, discriminatory intent may not be inferred from defendant's failure to depart from free market parameters in determining job classifications and wages, even if the market can be shown to contain minor flaws."); *Weber v. Infinity Broad. Corp.*, No. 02-74602, 2005 WL 3726303, at *5 (E.D. Mich. 2005) (finding that individual negotiation of salary is a factor other than gender); *Brune v. BASF Corp.*, 41 F. Supp. 2d 768, 778 (S.D. Ohio 1999), *partially rev'd and aff'g*, No. 99-3194, at *1, *5 (6th Cir. 2000) (granting summary judgment where male employee "was hired away from a competitor and received a starting salary at the market rate," which was higher than plaintiff's salary); *Engelmann v. Nat'l Broad. Co.*, No. 94 CIV. 5616 (MBM), 1996 WL 76107, at *10 (S.D.N.Y. Feb. 22, 1996) (finding that payment of higher salary to match an incoming employee's previous earnings is a valid defense); *Bartges v. Univ. of N.C. at Charlotte*, 908 F. Supp. 1312, 1328 (W.D.N.C. 1995) (finding no violation where women coaches were willing to work for lower salaries).

76. *See Wernsing*, 427 F.3d at 470 (recognizing that "[w]age patterns in some lines of work could be discriminatory, but this is something to be proved rather than assumed").

77. *Dubowsky v. Stern, Lavinthal, Norgaard & Daly*, 922 F. Supp. 985, 993–94 (D.N.J. 1996) (denying employer's motion for summary judgment where it advanced a "market forces" argument to explain pay disparity between attorneys); *see also Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (reversing a grant of summary judgment where the market data showed that the male comparator's salary was consistent with the market rate for his position, but the plaintiff's salary was significantly lower than the market rate for her position); *Wildi v. Alle-Kiski Med. Ctr.*, 659 F. Supp. 2d 640, 662–63 (W.D. Pa. 2009) (stating that salary differentials based upon market conditions are not prohibited by the EPA, but denying summary

The Paycheck Fairness Act, which has failed in previous Congresses and has been reintroduced once again, would amend the EPA to require that the “factor other than sex” affirmative defense be job-related and consistent with business necessity.⁷⁸ Although this change would reduce the success of market defenses in many equal pay cases, it would not address the problem of gender pay discrimination on a broader economic level. If employers and judges believe that wages are the product of impartial market forces, a legal remedy that forces them to *ignore* market forces is unlikely to be effective. Instead of eliminating pay disparities, some firms may be more likely to put their energies into pay secrecy policies to hide pay inequities and avoid litigation.⁷⁹ Some firms may not take action until sued. More importantly, litigation does not solve pay disparities where they are most likely to happen: at the initial wage negotiation stage. Litigation is reactive. Even if women discover disparities, they typically learn about them after working for the employer for years or decades.⁸⁰

Certainly, women have obtained relief for pay discrimination under equal pay laws and the EPA is an essential expression of our nation’s

judgment to employer because of factual issues with respect to market-based defense); *McManama v. Gannett Co.*, No. 2:07-cv-479-ID, 2008 WL 4951357, at *4–5 (M.D. Ala. Nov. 18, 2008) (denying summary judgment where employer claimed its policy was to offer whatever salary it felt “necessary to attract the candidate to the relevant market” where employer “consistently violated its own policies in order to pay [plaintiff] at or below the minimum salary established for her job”); *EEOC v. EGS Elec. Group, LLC*, No. H-05-2945, 2007 WL 869529, at *5 (S.D. Tex. Mar. 21, 2007) (denying summary judgment to employer where it defended disparity based on two outside job offers that male employee used as leverage to secure raises where plaintiffs paid well below market levels for their positions); *Young v. Meystel, Inc.*, No. 95 C 2548, 1996 WL 385339, at *2–3 (N.D. Ill. July 3, 1996) (denying summary judgment because disputed factual issues undermined employer’s assertion that male employee paid higher salary because of past experience, prior salary level, and market conditions); *Catelain v. United Air Lines, Inc.*, No. 88 C 9222, 1989 WL 153342, at *2 (N.D. Ill. Nov. 20, 1989) (denying summary judgment where employer did not conclusively show “that a market demand existed which forced [the employer] to pay [male employee] a higher salary than [plaintiff]”).

78. Paycheck Fairness Act, H.R. 1519, 112th Cong. § 3(a) (2011). For a summary of this provision and how it would alter market defenses in pay discrimination cases, see Rabin-Margalioth, *supra* note 9, at Part IV.E, and Porter & Vartanian, *supra* note 9, at 197–202.

79. Scholars have noted that liability regimes can sometimes be counterproductive because they may discourage reporting or increase secrecy to hide violations. *See, e.g.*, Estlund, *supra* note 44, at 625 (noting that liability regimes may cause firms to “suppress internal reporting or hide evidence of wrongdoing”) (citing Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 707–09 (1997)).

80. Lilly Ledbetter, for example, did not discover disparities until she was retiring after nineteen years as a supervisor for Goodyear. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007).

commitment to fair pay.⁸¹ But is it enough? Most modern plaintiffs are likely to lose equal pay claims at the summary judgment stage, either because of the strict “equal work” prima facie standard or the “factor other than sex” defense.⁸² Women who work in managerial positions and non-standardized jobs—which are increasingly common in the modern economy—are not able to establish that their positions are sufficiently “equal” to that of their male comparators, which is an insurmountable bar to an equal pay claim.⁸³ Given the enormous professional and psychological toll that litigation can have on plaintiffs, and the low likelihood for success, many women who discover inequities do not sue their employers.⁸⁴

In addition to the decreasing effectiveness of the EPA in the modern economy, the wage statistics described in the next section likewise suggest that equal pay laws have failed in their market purpose. Such laws will continue to fall short of their economic mission so long as the remedy is conceptualized solely as an *individual* injustice vindicated through litigation. A supplemental, more structural approach that helps to alleviate unjustified wage disparities at the initial wage-setting stage is also required. Before explaining how that would work, the next section provides an overview of women’s wages in the current compensation market.

B. The Status of Women’s Pay in Today’s Compensation Market

Discussions of the “gender wage gap” tend to be heated and polarizing. Some decry that the gender wage gap is a “factually corrupt myth,” and that feminists simply have a grand conspiracy to victimize women and distort

81. Most of these awards come in the form of settlements rather than litigation victories. For example, female sales representatives for Novartis Pharmaceuticals Corporation recently settled a nationwide class action alleging systemic sex bias in pay, promotions, and pregnancy leave for \$175 million. *Novartis, Female Sales Reps to Settle Sex Bias Class Action for \$175 Million*, 8 WORKPLACE L. REP. (BNA) 1108 (July 23, 2010). A week later, Sanofi-Aventis SA settled a case alleging gender bias in pay and promotions for \$15.36 million. *OK Sought for Sanofi \$15.6 Mln Gender Bias Accord*, REUTERS, July 21, 2010, at ¶ 3, <http://www.reuters.com/article/idUSN2112613020100721>.

82. See Eisenberg *supra* note 5, at 32–34. An empirical analysis of all reported federal EPA claims revealed that, in the decade 2000–2009, courts of appeal affirmed trial court grants of summary judgment to the employer 92% of the time. *Id.* at 34. During the same decade, federal district courts granted employer motions for summary judgment 72% of the time. *Id.*

83. *Id.* at 37–46 (explaining the “strict” and “pragmatic” interpretations of the equal work prima facie standard in all reported federal cases involving EPA claims).

84. See Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1196 (1988) (discussing the substantial “costs of litigation, both in personal and financial terms”).

wage statistics to ensure continued funding for their organizations.⁸⁵ On the other hand, women advocates point to the aggregate, raw gender wage gap statistics as evidence of pervasive pay discrimination.⁸⁶ At this level of the debate, both sides tend to overstate their cases for dramatic effect. The reality is much more complex.

An overview of the data regarding women's wages is helpful to put the problem in broader market context and show that gender pay imbalances are a systemic economic issue, not simply an isolated harm. The data also helps to identify the segments of the market in which the most dramatic gender pay disparities remain.

The Department of Labor's latest statistics show that women who were full-time wage and salary workers had median weekly earnings of \$657, or about 80% of the \$819 median income for their male counterparts.⁸⁷ Of course, these broad aggregate statistics do not control for many individual factors that may explain some of the difference, and this Article does not contend that the entire gap results from discrimination, intentional or unconscious. Yet, substantial evidence exists that pay discrimination against women remains widespread, persistent, and systemic,⁸⁸ even after controlling for factors—such as education, years of work experience, age, hours worked, occupational field, and jobs held—that may explain some of the disparity.⁸⁹ In a recent on-line poll, “seven in ten Americans (69%)

85. See, e.g., DIANA FURCHTGOFF-ROTH & CHRISTINE STOLBA, *THE FEMINIST DILEMMA: WHEN SUCCESS IS NOT ENOUGH* 4–5 (2001) (“[F]eminist groups have a financial stake in continuing to claim that women are second-class citizens and that the struggle for women's rights is never won. Without the banner of victimhood to rally around, feminist coffers would run dry.”); DIANA FURCHTGOFF-ROTH & CHRISTINE STOLBA, *WOMEN'S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA* 80 (1999) (stating “many groups have an investment in maintaining myths such as the wage gap and the glass ceiling,” both of which “are rhetorically useful but factually corrupt catch phrases”).

86. For example, the National Committee on Pay Equity sets April 12 as “Equal Pay Day” because it “symbolizes how far into 2011 women must work to earn what men earned in 2010.” The organization also has a “23% off” coupon on its website, noting that “[I]f we didn't have a wage gap, we wouldn't need this coupon!” See NAT'L COMMITTEE ON PAY EQUITY, <http://www.pay-equity.org/day.html> (last visited Sept. 9, 2011).

87. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *HIGHLIGHTS OF WOMEN'S EARNINGS IN 2009*, at 7–8 tbl.1 (2010), available at <http://www.bls.gov/cps/cpswom2009.pdf> [hereinafter 2009 HIGHLIGHTS].

88. Lucian Bebchuk and Jesse Fried have likewise argued that flawed executive compensation arrangements are not limited to a few “bad apples,” but are “widespread, persistent, and systemic.” Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 17 J. APPLIED CORP. FIN. 8, 9 (2005).

89. See, e.g., DANIEL H. WEINBERG, U.S. DEP'T OF COMMERCE, *CENSUS 2000 SPECIAL REPORTS, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN* 21 (2004), available at <http://www.census.gov/prod/2004pubs/censr-15.pdf> (“There is a substantial gap in median earnings between men and women that is unexplained,

[said] that women do not receive the same pay as men for doing the exactly the same job.”⁹⁰ Closer scrutiny of economic statistics and research data challenges some of the commonly-invoked explanations for pay disparities.

First, many seek to explain pay disparities based on worker qualifications, such as education and experience.⁹¹ Yet, women with higher education levels experience a greater pay gap than women who have less educational attainment. Women who earn a bachelor’s degree and higher earn 73.1% as much as their male colleagues, whereas those with less than a high school diploma earn 76.4%, and those with a high school diploma, 75.7%.⁹²

Women today are better educated than men, and have been for more than two decades.⁹³ Women have been earning more bachelor’s degrees than men since 1982 and more master’s degrees than men since 1981.⁹⁴ Over the decade from 1997–1998 to 2007–2008, the percentage of associate’s degrees earned by women fluctuated between 60% and 62%, bachelor’s degrees between 56% to 58%, and master’s degrees between 57% to 61%.⁹⁵

even after controlling for work experience . . . education, and occupation.”); U.S. GEN. ACCT. OFFICE, GAO-04-35, WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS 2 (2003), *available at* <http://www.gao.gov/new.items/d0435.pdf> (concluding based on nationally representative longitudinal data set that women in 2000 earned only 80% of what men earned after accounting for education, occupation, hours worked, and time away from the workplace because of family responsibilities); STEPHEN J. ROSE & HEIDI I. HARTMANN, INST. FOR WOMEN’S POL’Y RES., STILL A MAN’S LABOR MARKET: THE LONG-TERM EARNINGS GAP 9–12 (2004), *available at* <http://www.aecf.org/upload/publicationfiles/fes3622h767.pdf> (finding that differences in men’s and women’s labor force attachment do not explain the gap); Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. ECON. PERSP. 75, 83 (2000) (finding unexplained residual of 10-15% of total wages, after controlling for other factors that may explain gender wage gap).

90. Regina Corso, *Three in Five Americans Say U.S. Has Long Way to Go to Reach Gender Equality*, THE HARRIS POLL, Aug. 16, 2010, at 1, *available at* <http://www.harrisinteractive.com/vault/HI-Harris-Poll-Gender-Equality-2010-08-16.pdf>.

91. See Christina Hoff Sommers, Op-Ed., *Fair Pay Isn’t Always Equal Pay*, N.Y. TIMES, Sept. 21, 2010, at A25, *available at* <http://www.nytimes.com/2010/09/22/opinion/22Sommers.html> (pointing to differences in “education, experience and job tenure” as reasons for wage gap).

92. 2009 HIGHLIGHTS, *supra* note 87, at 8 tbl.1.

93. See *Fast Facts*, NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., <http://nces.ed.gov/fastfacts/display.asp?id=72> (last visited Sept. 9, 2011).

94. NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2003, at 313 tbl.249 (2004), *available at* <http://nces.ed.gov/pubs2005/2005025.pdf>.

95. NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2009, at 393 tbl.268 (2010), *available at* <http://nces.ed.gov/pubs2010/2010013.pdf>.

Women now earn almost half of all professional degrees and have surpassed men in achieving doctoral degrees.⁹⁶

Despite women's higher educational status, the wage gap exists for women in every age group.⁹⁷ Even younger women who have similar educational qualifications and enter the same occupational fields earn less than their male peers. A study by the American Association of University Women (AAUW) found that just one year out of college, women graduates working full-time earned only 80% as much as their male peers.⁹⁸ Some of the pay gap can be explained by gender segregation by occupation, with more women choosing lower-paying fields such as education or administrative jobs.⁹⁹ The pay gap varies considerably depending on the occupational field. The AAUW found that, for starting pay, female historians made more than male historians and parity in pay existed among engineers and medical professionals.¹⁰⁰ But, wide disparities still existed in service (75%) and business (81%) occupations.¹⁰¹ After a regression analysis that controlled for choice factors that could affect pay, one-quarter of the gap (or 5%) remained for recent college graduates.¹⁰² Ten years after graduation, multiple regression analysis that controlled for variables that may affect earnings revealed a higher unexplained pay gap of 12%.¹⁰³

A recent study by a market research firm, Reach Advisors, was touted as evidence that the gender wage gap no longer exists.¹⁰⁴ Reach Advisors was hired by a private client to investigate why single women in certain urban

96. *Id.* (In 2008, the most recent year tabulated, women earned more PhDs than men, 32,497 compared to 31,215, but fewer first professional degrees, 45,393 compared to 45,916). *See also* COUNCIL OF GRADUATE SCHOOLS, GRADUATE ENROLLMENT AND DEGREES: 1999 TO 2009, at 17 (2010), available at http://www.cgsnet.org/portals/0/pdf/R_ED2009.pdf (reporting that women earned 50.4% of all doctorates in academic year 2008–2009, the first year women ever earned the majority of doctoral degree awards).

97. 2009 HIGHLIGHTS, *supra* note 87, at 8 tbl.1. Women 20 to 24 years old earn 92.9%, 25 to 34 years old earn 88.7%, 35 to 44 years old earn 77.4%, 45 to 54 years old earn 73.6%, and 55 to 64 years old earn 75.3% as much as their male counterparts.

98. JUDY GOLDBERG DEY & CATHERINE HILL, AAUW EDUC. FOUND., BEHIND THE PAY GAP 10 (2007), available at <http://www.aauw.org/learn/research/upload/behindPayGap.pdf> (“If the pay gap is going to disappear naturally over time, we would expect that pay differences among full-time female and male workers after college would be small or even nonexistent. . . . Yet, one year after college, female graduates working full time earn only about 80 percent as much as male graduates earn.”).

99. *Id.* at 13–14.

100. *Id.*

101. *Id.* at 13.

102. *Id.* at 17–18.

103. *Id.* at 26–27.

104. *See* Belinda Luscombe, *Workplace Salaries: At Last, Women on Top*, TIME, Sept. 1, 2010, available at <http://www.time.com/time/business/article/0,8599,2015274,00.html>; Sommers, *supra* note 91, at A25.

areas purchased 25–40% of homes.¹⁰⁵ Reach Advisors crunched census data and found that young, childless women in certain cities earned more than men of the same age.¹⁰⁶ The study, however, is not publicly available. According to Reach Advisors, the research “was never designed as a study to prove or disprove wage discrimination in the workplace.”¹⁰⁷ The study may also portend a reason for concern about job opportunities for certain urban young men¹⁰⁸ than a success story for women’s wages.

Contrary to the notion that more education and experience will decrease the wage gap, the earnings difference *increases* for women who achieve the highest levels of education and professional achievement, such as lawyers (female lawyers earn 74.9% as much as their male peers),¹⁰⁹ physicians and surgeons (64.2%),¹¹⁰ securities and commodities brokers (64.5%),¹¹¹ accountants and auditors (75.8%),¹¹² and managers (72.4%).¹¹³ One study of female managers in top corporate jobs at United States companies from 2001–2007 found that, after controlling for “personal, occupational, firm and industry characteristics,” the 18.9% pay gap between male and female executives fell but remained “significant at 7.0 percent.”¹¹⁴ The authors

105. E-mail from Reach Advisors to Deborah T. Eisenberg (Sept. 20, 2010) (on file with author).

106. For example, the study reported that in Atlanta and Memphis, young women made 20% more than men in their age group; in New York, they made 17% more, Los Angeles 12% more, and San Diego, 15% more. Luscombe, *supra* note 104.

107. E-mail from Reach Advisors to Deborah T. Eisenberg (Sept. 20, 2010) (on file with author).

108. See Joanne Cleaver, *The Truth Behind the Rumor that Young Women Have Beat the Wage Gap*, CBS BNET (Sept. 10, 2010), <http://www.bnet.com/blog/women-business/the-truth-behind-the-rumor-that-young-women-have-beat-the-wage-gap/742>. See also URBAN INST. PRESS, *BLACK MALES LEFT BEHIND*, at ix (Ronald B. Mincy ed., 2006) (analyzing how and why the economic boom of the 1990s eluded young black men).

109. 2009 HIGHLIGHTS, *supra* note 87, at 14 tbl.2.

110. *Id.* at 16 tbl.2.

111. *Id.* at 20 tbl.2.

112. *Id.* at 12 tbl.2.

113. *Id.* at 10 tbl.2. Within the “management occupations” category, the earnings gap was the largest for financial managers (66.6%) and the smallest for lodging managers (84.6%). *Id.* Chief executives also fall in the managers’ category, with female chief executives earning 74.5% as much as male chief executives. *Id.*

114. B. Burcin Yurtoglu & Christine Zulehner, *Equity-Based Compensation and the Gender Pay Gap in Top Corporate Jobs* 5 (Univ. of Vienna Econ. Research, Working Paper Series, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474738. The raw data included “22,845 top executives from a total of 4,611 companies.” *Id.* at 2. See also LINDA A. BELL, INST. FOR THE STUDY OF LABOR, DISCUSSION PAPER NO. 1689, *WOMEN-LED FIRMS AND THE GENDER GAP IN TOP EXECUTIVE JOBS* 8 (2005), available at <http://ftp.iza.org/dp1689.pdf> (finding significant gender pay gap of 7.8% among U.S. executives after controlling for firm size and other characteristics); but see Marianne Bertrand & Kevin F. Hallock, *The Gender Gap in Top Corporate Jobs*, 55 INDUS. & LAB. REL. REV. 3, 3 (2001)

found that the gap is especially pronounced for equity-based compensation, for which, after controls, there was a 10% gap between male and female executives.¹¹⁵

In the medical profession, the wage gap may have *increased* over time. A recent study of the starting salaries of men and women leaving residency programs in New York during the time period from 1999–2008 found that male physicians in 2008 made on average \$16,819 more than newly trained female physicians. This was greater than the \$3,600 difference in 1999. The regression models in the study controlled for ten variables that could potentially affect wages, including specialty choice, practice setting, work hours, geographic location, and other characteristics.¹¹⁶ According to the author, “We honestly tried everything we could to make it go away, but it wouldn’t.”¹¹⁷

In contrast, for lower wage women who are more likely to be paid based on established hourly rates, the earnings difference is much smaller than the general average. For example, female fast food workers make 97.2% as much as their male counterparts,¹¹⁸ personal and home care aides, 95.8%,¹¹⁹ and stock clerks and order fillers, 98.8%.¹²⁰ This data suggests that the more subjective the pay-setting process and negotiable the wage rate, the greater the gender wage gap.

Curiously, in professions in which women have long dominated—such as education and nursing—men still earn more than women, although the earnings gap is smaller than the general average. One would expect that a gender pay gap would not exist in fields in which women greatly outnumber men and have accumulated greater experience and leadership levels for decades. But, women elementary and middle school teachers earn 85.7%¹²¹ and secondary school teachers 91.4%¹²² as much as their male peers. Female registered nurses earn 95% of the wages of male nurses.¹²³ Female social workers earn 89.6% of male social worker earnings.¹²⁴ Even female

(finding insignificant gender pay gap of four percent after controlling for firm size and other characteristics).

115. Yurtoglu & Zulehner, *supra* note 114, at 5.

116. Anthony T. LoSasso et al., *The \$16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women*, 30 HEALTH AFF. 193, 193–94 (2011).

117. *Id.* at 201.

118. 2009 HIGHLIGHTS, *supra* note 87, at 18 tbl.2.

119. *Id.* at 20 tbl.2.

120. *Id.* at 22 tbl.2.

121. *Id.* at 14 tbl.2.

122. *Id.*

123. *Id.* at 16 tbl.2.

124. *Id.* at 14 tbl.2.

secretaries and administrative assistants earn less than their male counterparts.¹²⁵

Some say that the gender pay gap can be explained because men work more hours than women. But the women who work the greatest number of hours experience the highest pay gap. Women who usually work fewer than thirty-five hours earn 95.9% as much as their male peers but women who typically work forty hours per week earn 85.7% as much as their male co-workers. Women who toil for sixty or more hours per week earn only 84.1% of the pay of their male workaholic peers.¹²⁶

Another common presumption is that the gender pay gap can be explained because more women work part-time than men. It is true that more women work part-time than men: 26% of women worked part-time in 2009, while only 13% of men worked part-time.¹²⁷ However, the government's 80% gender pay gap figure includes only women who work full-time.¹²⁸ In fact, women who work part-time earn slightly *more* than men who work part-time.¹²⁹ Female part-timers likely earn more because "male part-timers are more concentrated in the youngest age groups, which typically have low earnings."¹³⁰

Of course, the elephant in the room during any discussion of the gender pay gap is the impact of children on women's careers. If privileged with parental leave time, many women take time off after the birth to recover physically and bond with the baby. Most employers in the United States, however, do not offer long family leave periods.¹³¹ The maximum that most women can take for maternity leave is twelve weeks of unpaid leave under the Family Medical Leave Act, which applies only to women who have worked at least twelve months at a workplace that has more than fifty employees.¹³² It can hardly be asserted that taking three to twelve weeks off

125. *Id.* at 21–22 tbl.2.

126. *Id.* at 40 tbl.5.

127. *Id.* at 2 (defining part-time as fewer than 35 hours per week).

128. *Id.* at 1 & tbl.2 (reporting median usual weekly earnings of "*full-time* wage and salary workers") (emphasis added).

129. *Id.* at 39–40 tbl.5 (\$234 median weekly earnings for female part-time workers, compared with \$222 for men).

130. *Id.* at 2 ("Forty-three percent of male part-timers were 16 to 24 years old, compared with 29 percent of female part-timers.").

131. The Institute for Women's Policy Research analyzed the leave policies of the one hundred companies selected as the most "family friendly" by *Working Mother* magazine. The study found nearly one-quarter provided four or fewer weeks of paid maternity leave and half provided six weeks or less. INST. FOR WOMEN'S POL'Y RES., FACT SHEET, MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG THE BEST U.S. EMPLOYERS 1 (2007), available at http://www.genderprinciples.org/resource_files/Maternity_Leave_in_the_United_States_Fact_Sheet.pdf.

132. 29 U.S.C. §§ 2611–2612 (2006 & Supp. II 2009).

of work during the course of an entire career can have such a dramatic impact on women's earnings.

Of greater import, of course, are the extensive time demands of childrearing itself. Many scholars have analyzed the impact that family responsibilities have on the careers of women and gender-nonconforming men.¹³³ Some women chose to drop out of the workforce altogether to become household CEOs,¹³⁴ but most mothers continue to work after having children. A recent study found that, except for low-income women, a huge majority of mothers work forty or more hours per week.¹³⁵ Between 2007 and 2009, “[t]he share of mothers working or actively searching for work increased from 71.0 percent to 71.4 percent”¹³⁶ About half of all mothers work full-time, dropping from 51.3% in 2007 to 48.3% during the great recession in 2009.¹³⁷ Two-thirds of the 21.7 million working mothers are part of a dual-earner family, but one-third—or 7.5 million mothers—“were the sole job-holders in their family, either because their spouse was unemployed or out of the labor force, or because they were heads of household.”¹³⁸ During the recession, “families where the mother was the only job-holder rose 2.5 percentage points from 4.9 percent of married-couple families to 7.4 percent.”¹³⁹ As a recent Congressional report concluded, “[m]ore than ever, families depend on mothers’ work.”¹⁴⁰

133. See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 247 (2000); Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313, 313 (2007); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1089 (1994); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 728–29 (2000).

134. The “opt-out” trend has been noted among highly educated, higher income women. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 42 (“Why don’t women run the world? . . . [B]ecause they don’t want to.”). But see Kessler, *supra* note 133, at 321 (“To be sure, it could be that some very privileged women have enough economic clout to fashion a more balanced work and family life. However, national labor force data suggest we should be skeptical about claims of a revolution.”).

135. JOAN C. WILLIAMS, CTR. FOR WORKLIFE LAW & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 36 (2010), available at <http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf>.

136. CAROLYN B. MALONEY, U.S. CONGRESS JOINT ECON. COMM., UNDERSTANDING THE ECONOMY: WORKING MOTHERS IN THE GREAT RECESSION 1 (2010), available at http://jec.senate.gov/public/?a=Files.Serve&File_id=82216270-c7f0-46bf-a54f-6ab221ac586f. The report defines “mother” as “a woman with her own children under the age of 18.” *Id.* at 5 n.6.

137. *Id.* at 1.

138. *Id.* at 2.

139. *Id.* at 3.

140. *Id.*

Interestingly, the Department of Labor found that the existence of children under age eighteen did not significantly impact the earnings of married workers of either gender. “Among married workers of either sex, the earnings of those with children under age 18 were little different from those without children.”¹⁴¹ Unmarried women without children, however, “earned 14 percent more than those with children.”¹⁴² Unmarried men with children earned eight percent more than those with no children.¹⁴³

Although some women prefer to work full-time in the home, many women are forced out of the workplace after they have children because of overt sex discrimination or inflexible work structures based on masculine norms. Studies show that working women who have children experience a “motherhood penalty” that cannot be explained by human capital or occupational factors.¹⁴⁴ In one study, participants evaluated application materials for a pair of same-gender, equally qualified job candidates who differed only on parental status.¹⁴⁵ The study found that “mothers were judged as significantly less competent and committed than women without children.”¹⁴⁶ In addition, “[t]he recommended starting salary for mothers was \$11,000 (7.4%) less than that offered to nonmothers, a significant difference.”¹⁴⁷ In contrast, men benefited from being a father. “For example, applicants who were fathers were rated significantly more committed to their job than nonfathers. Fathers were allowed to be late to work significantly more times than nonfathers. Finally, they were offered significantly higher salaries than nonfathers.”¹⁴⁸

Likewise, in a recent peer-reviewed management study, researchers studied 178 employees of a transportation company.¹⁴⁹ Supervisors characterized women as experiencing greater family-work conflict than men—regardless of women’s actual caregiving duties—which caused

141. 2009 HIGHLIGHTS, *supra* note 87, at 2.

142. *Id.*

143. *Id.*

144. See Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 273–76 (2003) (finding motherhood wage penalty of approximately five percent for one child and seven percent for two or more children); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219–20 (2001) (finding that interruptions from work, working part-time, and decreased seniority/experience collectively explain no more than about one-third of the motherhood penalty of approximately seven percent per child).

145. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1297 (2007).

146. *Id.* at 1316.

147. *Id.*

148. *Id.* at 1317.

149. Jenny M. Hoobler et al., *Bosses’ Perceptions of Family-Work Conflict and Women’s Promotability: Glass Ceiling Effects*, 52 ACAD. MGMT. J. 939, 944 (2009).

supervisors to take a more negative view of female employees' job fit, performance, and promotional opportunities.¹⁵⁰ The female employees in the study, however, actually reported less family-work conflict than their male counterparts.¹⁵¹ Nevertheless, "their managers still perceived them as having greater family-work conflict, a perception that had significant implications for women's organizational advancement."¹⁵²

These findings are consistent with the experience of many working women who report being treated less favorably after they reveal their pregnancies to their employers or have children.¹⁵³ The number of lawsuits alleging discrimination against workers based on family responsibilities increased almost 400% during the past decade.¹⁵⁴

Although overt bias against working mothers forces some women to leave the workforce, in other cases women leave the workplace because of inflexible work structures, lack of promotional opportunities and rewards, or disrespectful environments in which they do not feel valued.¹⁵⁵ Many women opt out of the workforce because they do not feel appropriately recognized for their accomplishments.¹⁵⁶ Studies show that women who are promoted are less likely to resign than promoted men.¹⁵⁷ "The lack of advancement prospects for women may in fact be a stronger predictor of women's turnover than the ticking of their biological clocks and the demands placed on them by their children."¹⁵⁸ Women who believe they

150. *Id.* at 939.

151. *Id.* at 951.

152. *Id.*

153. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90–91 (2003).

154. CYNTHIA THOMAS CALVERT, CTR. FOR WORKLIFE LAW, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010, at 2 (2010), available at <http://www.worklifelaw.org/pubs/FRDupdate.pdf>.

155. LISA A. MAINIERO & SHERRY E. SULLIVAN, THE OPT-OUT REVOLT: WHY PEOPLE ARE LEAVING COMPANIES TO CREATE KALEIDOSCOPE CAREERS 38–44 (2006). See also JOAN C. WILLIAMS ET AL., "OPT OUT" OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT – THE UNTOLD STORY OF WHY WOMEN LEAVE THE WORKFORCE 3 (2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>; Marilyn Gardner, *The Truth Behind Women "Opting Out,"* CHRISTIAN SCI. MONITOR, Oct. 30, 2006, <http://www.csmonitor.com/2006/1030/p13s02-wmgn.html> (reporting that weak labor market and inflexible work policies are main reasons women are leaving the workplace).

156. See Claudia H. Deutsch, *Behind the Exodus of Executive Women: Boredom*, N.Y. TIMES, May 1, 2005, <http://www.nytimes.com/2005/05/01/business/yourmoney/01women.html>.

157. K.S. Lyness & M.K. Judiesch, *Are Female Managers Quitters? The Relationships of Gender, Promotions, and Family Leaves of Absence to Voluntary Turnover*, 86 J. APPLIED PSYCHOL. 1167, 1167 (2001).

158. MAINIERO & SULLIVAN, *supra* note 155, at 41. See also Linda K. Stroh et al., *Family Structure, Glass Ceiling, and Traditional Explanations for the Differential Rate of Turnover of*

have no advancement opportunities are more likely to leave. As one woman attorney who left her firm explained: “There I was, working all these hours, and I started to realize the brass ring was just that—all brass and no gold.”¹⁵⁹

In *The Opt-Out Revolt*, Lisa Mainiero and Sherry Sullivan describe that modern employees—both men and women—are more likely to consider themselves as free agents, weaving in and out of different jobs and building “kaleidoscope careers” to seek authenticity, balance, and challenge at different stages of their lives.¹⁶⁰ To capture the increasingly fluid nature of careers for workers of both genders, management scholars have introduced the metaphor of the protean career, based on the mythological Greek god Proteus who could alter his form at will.¹⁶¹ Employees today are “working to live” rather than living to work.¹⁶²

No doubt, parenting is a time-intensive undertaking and most childrearing and household duties have traditionally fallen to women. But this is changing. The number of stay-at-home mothers has decreased and the number of stay-at-home or work-at-home fathers has increased.¹⁶³ Indeed, men who are part of Generation X¹⁶⁴ and Generation Y or Millennial¹⁶⁵ generations (about ages forty-six and younger) are more likely

Female and Male Managers, 49 J. VOCATIONAL BEHAV. 99, 115 (1996) (finding that women left jobs for the same reasons male managers have traditionally left: lack of career opportunities, job dissatisfaction, and low organizational commitment).

159. MAINIERO & SULLIVAN, *supra* note 155, at 42 (story of Tina Heinzmann).

160. *Id.* at 50–54.

161. Douglas T. Hall & Jonathan E. Moss, *The New Protean Career Contract: Helping Organizations and Employees Adapt*, 26 ORGANIZATIONAL DYNAMICS 22, 25 (1998).

162. MAINIERO & SULLIVAN, *supra* note 155, at 2.

163. News Release, Bureau of Lab. Stat., U.S. Dep’t of Lab., Employment Characteristics of Families – 2009, at 2 (May 27, 2010), http://www.bls.gov/news.release/archives/famee_05272010.pdf (“Married-couple families in which only the wife worked accounted for 8.4 percent of all married-couple families in 2009, compared with 6.9 percent in 2008. The husband was the only employed member in 19.6 percent of married-couple families in 2009, essentially unchanged from a year earlier.”).

164. “Generation X” is the generation born from about 1965 to 1976. See Diane Thielholdt & Devon Scheef, *Generation X and the Millennials: What You Need to Know About Mentoring the New Generations*, LAW PRACTICE TODAY (Aug. 2004), <http://www.abanet.org/lpm/lpt/articles/mgt08044.html>. See also DOUGLAS COUPLAND, *GENERATION X: TALES FOR AN ACCELERATED CULTURE* (1991) (describing young adults during the late 1980s and their lifestyles).

165. Generation Y and the Millennials are considered the same group. Debra Baker, *Move Over, Baby Boomers*, 85 A.B.A. J. 22, 22 (1999). Their birthdates range from the late-1970s to the early 2000s. See *id.* (“Depending on whom you ask, youths in this new generation were born between 1978 and 1995 or between 1982 and 2000.”); Thielholdt & Scheef, *supra* note 164 (stating that Generation Y was born between 1977 and 1998). See also CAROLYN A. MARTIN & BRUCE TULGAN, *MANAGING GENERATION Y: GLOBAL CITIZENS BORN IN THE LATE SEVENTIES AND EARLY EIGHTIES* (2001); Stephanie Armour, *Generation Y: They’ve Arrived at Work with a*

to place a higher value on family time than on work success than their Baby Boomer parents.¹⁶⁶ A survey by the Families and Work Institute found that Generation X and Millennial respondents of both genders valued family more than work.¹⁶⁷ In addition, women in the Millennial generation (under twenty-nine years old) are just as likely as men to want jobs with greater responsibility,¹⁶⁸ and this ambition is not affected by children.¹⁶⁹

In sum, actual conflicts between work structures and caregiving responsibilities, and explicit or unconscious biases against working mothers, may affect women's career opportunities and compensation levels. But traditional "choice" explanations for the gender wage gap are less salient today, especially for workers under age fifty and for women in professional and leadership positions.

With this market snapshot as background, the next section uses a modified conceptual framework that has been used in the executive compensation realm to dissect other common causes of gender pay disparities: the economic realities of modern compensation-setting process and the workplace norm of pay secrecy, which operate in concert to disproportionately lower women's pay.

III. THE USE OF TRANSPARENCY TO PROMOTE EFFICIENT, EQUITABLE WAGE MARKETS: LESSONS FROM EXECUTIVE COMPENSATION REGULATION

Given the continued gender imbalances in the compensation market, and the increasing ineffectiveness of a litigation approach to redress pay discrimination, this Part explores a supplemental regime, applying lessons from efforts to reform abusive executive compensation through transparency. Of course, the executive and more general labor markets differ in meaningful ways. For example, the market for chief executive talent is thinner,¹⁷⁰ and the compensation packages therefore tend to be

New Attitude, USA TODAY, Nov. 6, 2005, http://www.usatoday.com/money/workplace/2005-11-06-gen-y_x.htm.

166. RADCLIFFE PUB. POL'Y CTR., LIFE'S WORK: GENERATIONAL ATTITUDES TOWARD WORK & LIFE INTEGRATION (2000).

167. ELLEN GALINSKY ET AL., FAMILIES AND WORK INSTITUTE, TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND AT HOME 9–10 (2009), *available at* http://www.familiesandwork.org/site/research/reports/Times_Are_Changing.pdf.

168. *Id.* at 1.

169. *Id.* at 2.

170. "Thinner" in the sense that fewer people are considered qualified for the job. As Jeffrey Gordon has explained, "The market for executives, especially CEOs, is 'thin' (not many buyers and sellers at a given moment), 'lumpy' (CEO services are not divisible and they are attached to a long career built by substantial human capital investments), and relational

more lucrative and complex. Unlike compensation for the larger workforce, the regulation of executive pay is also aimed at protecting a third-party—shareholders—against an executive’s natural self-interest in maximizing her or his own wealth.

But the compensation markets for executives and employees are similar in two fundamental respects. First, in both realms, pay secrecy, combined with the lack of compensation-setting processes, encourages inefficient wage decisions that improperly value employees. In the case of executives, a lack of transparency and public information can lead to pay packages that are abusively high. In the case of women workers, a lack of transparency and inadequate information can lead to wages that are abusively low as compared to men in similar jobs. Second, in both the executive pay and pay discrimination contexts, litigation and court review are inadequate checks to control unlawful or abusive compensation arrangements. In the executive compensation field, the failure of a litigation-based approach has led scholars and policy-makers to craft other tools for reform. In contrast, policy-makers continue to tinker with remedial anti-discrimination statutes in the hopes that women will have more power in the courts. Nevertheless, the judiciary remains reluctant to interfere with compensation decisions. The next section considers the conditions in compensation markets that cause abusive pay practices. It also examines lessons from the arena of executive compensation reform that may be instructive to better understand and prevent pay discrimination against women.

A. Lesson One: Debunking the “Wage-Taker” and “Market Forces” Myths

1. Managerial power and executive pay

Executive compensation scholars have debunked the myth of an impartial executive wage market. They have explained that compensation results from pay-setting processes that are infected by unconscious biases and social factors, and that the “invisible hand” of the market—if left to its own devices—cannot regulate these deeply embedded market flaws when these processes remain opaque.¹⁷¹ Just as managerial power and other unconscious cognitive dynamics can allow executive compensation abuses

(consisting of an extended course of performance whose objectives and measures will vary over time).” Jeffrey N. Gordon, *Executive Compensation: If There’s a Problem, What’s the Remedy? The Case for Compensation Discussion and Analysis*, 30 J. CORP. L. 675, 677 (2005).

171. BEBCHUK & FRIED, *supra* note 17, at 2–6.

if permitted to occur out of public view, subjective and ill-defined compensation systems can disadvantage women when hidden by a veil of secrecy.

The goal of securities regulation, according to many scholars, is “to attain efficient financial markets and thereby improve the allocation of resources in the economy.”¹⁷² Securities law aims to accomplish this goal through mandatory disclosure of information. In the realm of executive compensation, specifically, the goal is not only to inform investors, but also to deter abusive practices by corporate leaders. The Securities Exchange Commission first required firms to disclose executive compensation in 1938.¹⁷³ Felix Frankfurter, one of the architects of the early securities laws, explained that transparency operated as a restraint on unreasonable pay arrangements: “There is a shrinking quality to such transactions; to force knowledge of them into the open is largely to restrain their happening.”¹⁷⁴

Over time, securities law has required more transparency and clearer reporting of executive compensation levels, in the form of both narrative justifications and tables showing the total monetary value of compensation for the five most highly paid executives in the firm.¹⁷⁵ According to one scholar, “the United States currently has a surprisingly sensible set of disclosure rules. The SEC has spent over 70 years fine-tuning the policies, and it is now difficult to find any major flaws that should be rectified.”¹⁷⁶

The seminal work of Lucian Bebchuk and Jesse Fried has generated a move towards more transparency about executive pay levels.¹⁷⁷ Bebchuk and Fried have shown that the “official” arm’s length bargaining or “optimal contracting” view of executive compensation negotiation is false. Under the official view of executive compensation used by financial

172. Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 713 (2006). See also Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 802 (1985) (“[T]he law should select rules promoting the efficiency of financial markets relative to the optimal information set.”).

173. Amended Proxy Rules, Exchange Act Release No. 34-1823, 3 Fed. Reg. 1991–92 (Aug. 13, 1938).

174. Felix Frankfurter, *Securities Act—Social Consequences*, FORTUNE, Aug. 1933, at 55.

175. For a description of the history of the laws requiring disclosure of executive compensation, see Ian Dew-Becker, *How Much Sunlight Does it Take to Disinfect a Boardroom? A Short History of Executive Compensation Regulation* (CESifo Working Paper No. 2379, 2008) (presented at CESIFO Venice Summer Institute 2008, Workshop on Executive Pay); Michael Greenstone, Paul Oyer & Annette Vissing-Jorgensen, *Mandated Disclosure, Stock Returns, and the 1964 Securities Acts*, 121 Q.J. ECON. 399 (2006). Both the Securities Act and the Securities Exchange Act of 1934 set forth broad requirements for disclosing executive and director compensation. See 15 U.S.C. §§ 78a–78nn (2006).

176. Dew-Becker, *supra* note 175, at 1.

177. See, e.g., BEBCHUK & FRIED, *supra* note 17.

economists, corporate boards operate at arm's length from the executives whose pay arrangements they negotiate. Under the traditional view, board members presumably design compensation that will provide incentives for executives to increase shareholder value.¹⁷⁸

Bebchuk and Fried argue that this arm's length bargaining model does not comport with the realities of the executive pay-setting process. They set forth a managerial power perspective, showing that various social and psychological factors prevent board members from adequately controlling unreasonable executive pay.¹⁷⁹ Directors want to be reelected to the Board and have an interest in their own compensation, which CEOs may be able to influence.¹⁸⁰ Directors may have social connections or be friends with the CEO or other senior executives.¹⁸¹ Members of the compensation committee may feel pressure to be collegial and avoid conflict and confrontation about CEO pay.¹⁸² Compensation committee members tend to be active or former executives, which may cause "cognitive dissonance:" a belief that generous and favorable executive pay "arrangements are desirable and serve shareholders."¹⁸³ At the same time that economic incentives, and psychological and social factors may cause directors to favor CEOs and rubber-stamp generous pay packages, there are few potential costs to directors if they favor executives.¹⁸⁴ As a result of these forces, Bebchuk and Fried show that executives have substantial power and influence over their own pay, which have enabled them to obtain "rents"—"benefits greater than those obtainable under true arm's length bargaining."¹⁸⁵

Whereas human dynamics, unconscious biases, and social factors skew the negotiation process and in some cases improperly increase executive pay, the next section explains how existing market imbalances and pay secrecy skew the wage negotiation process and often improperly lower women's pay. Whereas some executives receive unjustified "rents," many women receive unfair "fines" in the form of the accumulation of pay disadvantage. Pay secrecy compounds and conceals the problem.

178. *Id.* at 15–18.

179. *Id.* at 23–44.

180. *Id.* at 25–31.

181. *Id.* at 31.

182. *Id.* at 32.

183. *Id.* at 33.

184. *Id.* at 34–36.

185. *Id.* at 5.

2. Pay secrecy and its distortion of the compensation market

a. The official market view of wages

The official view of the compensation market today is that employers and employees negotiate at arm's length to determine the appropriate wage level for a job and that the invisible hand of the market produces efficient arrangements.¹⁸⁶ According to this view, employers are merely wage takers, paying women the value of their skills sets and job duties as dictated by an impartial "market."¹⁸⁷ As Judge Posner stated in an equal pay case: "Our society leaves such decisions [about appropriate pay levels for jobs] to the market, to the forces of supply and demand, because there are no good answers to the normative question, or at least no good answers that are within the competence of judges to give."¹⁸⁸ So long as employers use a similar process to set wages for all employees—regardless of how subjective, ambiguous, or ill-defined that process may be—the results will be presumptively rational, non-discriminatory market decisions.¹⁸⁹ Indeed, the more subjective the pay-setting system, and the higher the occupational status of the worker, the less willing courts are to scrutinize compensation decisions and find them unlawful.¹⁹⁰ Proponents of market wages believe that "efficient labor markets will gradually eliminate any irrational or animus-based discrimination."¹⁹¹

But that is not happening. As shown in Part II.B, women's wages continue to lag substantially behind men who are performing similar work, even after controlling for "choice" and occupational factors. This may be partly because of animus and sex-based stereotypes, particularly against working mothers. But this Article proceeds from the premise that most employers do not *intend* to discriminate against women *because of* their sex. Instead, gender pay disparities result from flaws and inefficiencies in the compensation market itself. The workplace norm of pay secrecy allows employers to set salaries based on ill-defined, subjective, and ambiguous factors. The more opaque and secret the process, the more likely significant gender pay disparities will occur and the less likely they will ever be discovered by the employee or corrected by the employer.

Compensation decisions in the modern economy are likely to be the result of negotiation between individual employees and employers.

186. See *supra* notes 75–76 and accompanying text.

187. See Rabin-Margalioth, *supra* note 9.

188. *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007).

189. See *supra* notes 66–73 and accompanying text.

190. See Eisenberg, *supra* note 5, at 52–53.

191. Rabin-Margalioth, *supra* note 9, at 810.

Employees today are less likely to be represented by unions.¹⁹² Careers are less likely to be linear paths within one company, but more fluid or protean.¹⁹³ Many companies have experienced success experimenting with the concept of a “workforce of one,” in which jobs are individually tailored to the employee’s needs, rather than molding the employee to fit a rigid job structure.¹⁹⁴

Although these changes may promote more flexible workplaces for employees, the lack of standardized compensation systems presents unique challenges to the principle of “equal pay for equal work.” Rather than basing pay upon “internal institutional wage-setting factors” like seniority or standardized performance plans, modern employers tend to use “compensation systems that peg salaries and wages to market rates.”¹⁹⁵ Many companies also use incentive pay schemes that reward employees with bonuses and stock awards. These awards are typically made in the sole discretion of a manager, without any oversight over the potential disparities they cause among workers in similar positions. As Katherine Stone explains, “in today’s workplace it is not uncommon for workers doing identical tasks to have different pay.”¹⁹⁶

Wage inequality within firms is also more common today because of “the talent wars to obtain superstars.”¹⁹⁷ Economists Robert Frank and Philip Cook have described that many occupations have become “winner-take-all markets” in which companies pay a disproportionately high price for employees who are perceived to be top performers.¹⁹⁸ This also

192. In 2009, only 12.3% of wage and salary workers were represented by a union. Among private sector industries, the union membership rate was substantially lower, 7.2%. News Release, Union Membership, Bureau of Labor Statistics, U.S. Dep’t of Labor (Jan. 22, 2010), <http://www.bls.gov/news.release/union2.toc.htm>. As one scholar wrote: “This data demonstrates that nine out of ten workers are not represented with relation to compensation decisions. Rather, they are either negotiating individually the terms and conditions of their employment or are unilaterally offered employment contracts with no formal or informal bargaining.” Rabin-Margalioth, *supra* note 9, at 807 n.2.

193. See MAINIERO & SULLIVAN, *supra* note 155, at 38–44. Some scholars call this “the boundaryless career.” See Michael B. Arthur, *The Boundaryless Career: A New Perspective for Organizational Inquiry*, 15 J. ORGANIZATIONAL BEHAV. 295 (1994); KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 92–94 (2004).

194. SUSAN M. CANTRELL & DAVID SMITH, WORKFORCE OF ONE: REVOLUTIONIZING TALENT MANAGEMENT THROUGH CUSTOMIZATION 2 (2010) (“In an era such as ours, when you can customize everything from your own postage stamp to medicines to your own iTunes playlist, it makes sense that organizations would figure out how to customize offerings for their most important resource—their people.”).

195. STONE, *supra* note 193, at 112.

196. *Id.* at 113.

197. *Id.* at 267.

198. ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY 1 (1995).

contributes to unequal pay for equal work. The payment of off-scale wages and generous incentives “lead to vast disparities between employees at the same level, as similarly situated employees are differentially rewarded.”¹⁹⁹

b. Informational asymmetries and market failure

Wage negotiations between employers and employees are typically conducted under conditions of secrecy, with asymmetric information. Classic welfare economics recognizes information asymmetries as a basic source of market failure.²⁰⁰ Under the traditional “efficient market hypothesis,” it is presumed that “financial markets always generate the correct prices, taking into account all of the available information.”²⁰¹ If information is lacking, hidden, or asymmetric, however, market forces may not produce accurate or similar pricing for similar goods or labor.²⁰² Improving the disclosure of relevant information can overcome market failures and lead to more efficient, optimal results.²⁰³ In other words, information is a crucial prerequisite for market performance. Information is “like air: its adequate provision is a precondition for other things to happen.”²⁰⁴ As shown above, Bebchuk and Fried have applied these basic economic principles to executive compensation, arguing that greater transparency and public information about executive pay policies and practices will reduce abusive executive pay rates and force companies to more appropriately value executive performance.²⁰⁵

As with any market, pay negotiations will be more efficient and better reflect an employee’s economic value if both the employer and the

199. STONE, *supra* note 193, at 268.

200. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 45 (1st ed. 1988) (setting forth the classically recognized sources of market failures in welfare economics, including: (1) producer monopoly, (2) externalities, (3) public goods, and (4) information asymmetries).

201. JOHN CASSIDY, *HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES* 88 (2010).

202. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (describing how hidden or asymmetric information can distort market pricing and using the market for used cars as an example); George J. Stigler, *Information in the Labor Market*, 70 J. POL. ECON. 94 (1962) (explaining how wage dispersion exists for similar jobs because of imperfect information employees have about wage rates and the high search costs involved in finding adequate information).

203. See COOTER & ULEN, *supra* note 200 (listing information asymmetries as classically recognized source of market failure); Joseph Stiglitz, *The Private Uses of Public Interests: Incentives and Institutions*, J. ECON. PERSP., Spring 1998, at 3, 3 (“[I]t has been shown that in the presence of imperfect information or incomplete markets, the economy will not be Pareto efficient . . .”).

204. CASSIDY, *supra* note 201, at 163 (describing Stiglitz’s economic theories about how information asymmetries cause different types of market failure).

205. See *supra* notes 178–186 and accompanying text.

employee are armed with adequate information.²⁰⁶ But such information is rarely accessible because of the workplace norm of pay secrecy.²⁰⁷ The National Labor Relations Act prohibits employers from terminating workers who discuss their wages and benefits.²⁰⁸ Yet, most employers keep pay information under tight security and discourage workers from sharing information about their wages.²⁰⁹ Even in the absence of pay secrecy policies, discussions about money—especially wages—are often considered crass or arrogant in the workplace.²¹⁰

The Paycheck Fairness Act²¹¹ would prohibit employers from firing workers who reveal pay rates. Six states already have such protections.²¹² Even if workers are protected when they gossip about wages, however, employers and employees will continue to have asymmetric information about existing wage rates in the absence of pay transparency. The law should go beyond anti-retaliation protections to require meaningful disclosure by employers about their compensation structures and pay rates. The idea that wages are the result of rational arm's length bargaining and “market forces” is wrong for several reasons.

206. The power of information disclosure to foster efficient markets and more accurately reflect value has been recognized by scholars in many fields, including negotiation theory, securities law, and intellectual property. *See, e.g.*, Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 770–72 (1985) (explaining how information affects pricing under efficient market hypothesis); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 475–76 (2008) (describing how disclosure of information can facilitate value creation); Emily Nation, *Geographical Indications: The International Debate Over Intellectual Property*, 82 U. COLO. L. REV. 959, 1005 (2011) (“[B]ecause markets are more efficient when consumers have more information, a labeling scheme that can succeed in truly informing consumers of what they are buying should result in lower prices and better products.”).

207. Bierman & Gely, *supra* note 31, at 168 (arguing that workplace norm of pay secrecy makes “both practical and economic sense” and should not be disturbed, but employees should be informed of their right to collectively discuss wages under the NLRA).

208. Rafael Gely, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121, 123 n.5, 124–25 (2003). This prohibition does not apply to supervisory or managerial employees, who are exempt from the NLRA’s coverage.

209. *Id.* at 125 (citing survey in which one-third of private sector employers admitted to having specific rules prohibiting employees from discussing pay with co-workers).

210. Edwards, *supra* note 33, at 41–42 (“‘Money talk’ is the last conversational taboo.”).

211. Paycheck Fairness Act, H.R. 1519, 112th Cong. (2011).

212. The six states that prohibit employers from firing workers who reveal pay rates are: California, CAL. LAB. CODE §§ 232, 232.5 (West 2003), Colorado, COLO. REV. STAT. ANN. § 24-34-402(1)(i) (West Supp. 2009), Illinois, 820 ILL. COMP. STAT. ANN. 112/10(b) (West 2008), Maine, ME. REV. STAT. ANN. tit. 26, § 628 (Supp. 2009), Michigan, MICH. COMP. LAWS ANN. § 408.483a(13a)(1) (West 1999), and Vermont, VT. STAT. ANN. tit. 21, § 495(a)(8)(B)(i)-(iii) (2009).

Preliminarily, because of pay secrecy, a “market” rate of pay is a false concept. Most companies do not have access to full market information about wage rates. If a corporation wants to evaluate market wages for a particular job, it may pay to join professional compensation survey databases.²¹³ The most reputable surveys are extremely expensive.²¹⁴ Those organizations that can afford to participate in professional compensation surveys must hire compensation consultants to make sense of them. This process is expensive and time-consuming. In addition, compensation consultants want to retain the business of the company for which they have been hired. They often follow the instructions of their clients about whether to assign extra “points” to certain positions, resulting in increased pay for those jobs because of employer preference, not the dictates of the market. These subjective decisions may work to lower the pay of positions filled by women, and increase the pay of positions filled by men.²¹⁵ Thus, even if companies use market data and hire a professional compensation consultant, pay decisions are the result of many human agency factors and employer choice. The employer does not simply “take” a wage from the market; it molds and manipulates the market to justify the rate it desires.²¹⁶ In the absence of a professional compensation survey, analyzed by a professional compensation consultant, “market” wages are simply an employer’s hunch about what the position is worth. Even with a compensation consultant, however, studies in the executive compensation context have shown that

213. The pitfalls and expense of professional compensation surveys have been analyzed in the executive compensation context but literature examining the issue for the larger workforce is lacking. The problems, however, are analogous. See, e.g., Mary-Hunter Morris, *The Price of Advice*, U. DET. MERCY L. REV. 153, 155 (2009) (arguing that the “sweeping amount of authority” given to third-party compensation consultants “has been both a contributing factor to the current problem of excessive executive compensation and a continuing frustration of our efforts to combat the problem”).

214. Interview with Alan W. Smith, Jr. (Jul. 9, 2009) (notes on file with author) (professional compensation consultant who is the former CEO of Watson Wyatt Worldwide, a global human resources consulting firm).

215. See ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA* (1999) (showing how market data on which employers relied in four prominent pay cases actually revealed a pattern of discrimination against women employees).

216. Cf. Lucian A. Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 790 (2002) (“[T]he process through which pay consultants are retained – and some evidence regarding their use – suggest that managers use compensation consultants primarily to justify executive pay, rather than to optimize it.”); Randall S. Thomas, *Explaining the International CEO Pay Gap: Board Capture or Market Driven?*, 57 VAND. L. REV. 1171, 1264 (2004) (noting “pernicious effects” of captive consultants and flawed pay surveys).

market compensation surveys are typically skewed to satisfy the ends desired by the corporate client.²¹⁷

To make matters worse, employers have a monopoly on the information about market wages—however piecemeal. Employees must scrounge for information about wage levels through informal networks or internet sources. Websites such as salary.com and Glassdoor.com collect anonymous information about compensation and benefits from employees, but this information is incomplete and often inaccurate. Many women lack the informal social networks to which many men have access to gather wage information, particularly for upper-level jobs in which women are under-represented.²¹⁸

In other words, the compensation market is deeply flawed and allows divergent rates for similar work because it lacks one of the key components of a properly functioning market: full information. When wage processes are ill-defined and based on wholly discretionary assessments by supervisors, wage rates are not the product of rational market forces that magically work to weed out discrimination and accurately price the value of labor. Rather, wages are typically set in secret, with both the employer and employee lacking information about the larger market value of the particular job and without the employee knowing what the employer pays other workers in comparable positions. Under such conditions of hidden and asymmetric information, unconscious biases and other social and psychological factors skew compensation results against women. Without

217. See, e.g., Chris Armstrong et al., *Economic Characteristics, Corporate Governance, and the Influence of Compensation Consultants on Executive Pay Levels* (Rock Ctr. for Corp. Governance, Working Paper No. 15, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1145548&rec=1&srcabs=1103682 (finding that CEO pay is generally higher in clients of consulting firms and concluding that study's "results are consistent with claims that compensation consultants provide a mechanism for CEOs of companies with weak governance to extract and justify excess pay"); John Bizjak et al., *Are All CEO's Above Average? An Empirical Analysis of Compensation Peer Groups and Pay Design* (Aug. 14, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1364775 (finding that firms tend to pick peers in a manner that biases CEO pay upward and that increased disclosure rules reduced biases in peer group choice over time); Eric M. Fogel & Andrew M. Geier, *Strangers in the House: Rethinking Sarbanes-Oxley and the Independent Board of Directors*, 32 DEL. J. CORP. L. 33, 63–64 (2007) ("[M]anagers use the compensation consultants as 'camouflage' to extract premium rents from the compensation committee."); Kevin J. Murphy & Tatiana Sandino, *Executive Pay and "Independent" Compensation Consultants* (Marshall Sch. of Bus., Working Paper No. FBE 10-09, 2009), available at <http://ssrn.com/abstract=1148991> (finding that executive pay is higher in companies where the consulting firm also provides other services).

218. See Cindy A. Schipani, *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL'Y 89, 102 (2009) (describing importance of informal networks to career success and discussing barriers that women face).

pay transparency and the moderating influence of adequate information, an efficient wage “market” simply cannot exist and the accurate pricing of wages cannot be presumed.

Of course, the market deficiency of asymmetric wage information applies to employees of both genders, but it affects women more harshly for two reasons.²¹⁹ First, because there is a lack of full information about market wages to use as a baseline for negotiation, employers typically use information about an employee’s previous salary to set starting pay. Because of systemic imbalances in the pay between men and women, as described above in Part II.B., existing market inequities are adopted and perpetuated. In fact, some women have gone so far as to lie about their prior salaries to avoid this phenomenon.²²⁰

Consider the following example from a recent equal pay case.²²¹ Like many companies, the employer had no formal job descriptions or compensation system. The supervisors of each department negotiated and set individual salary amounts upon hiring. In one department, a female vice president was hired months earlier than two other male vice presidents. All three were hired to do substantially the same work. All had comparable qualifications for the job. The executive vice president who hired them admitted that the female vice president had equally if not better performance and was even appointed a “player lead” to train her male colleagues. She received a base salary of \$165,000 and a \$50,000 relocation package. In contrast, one of her male peers (whom the supervisor said was

219. One study of data across eleven countries, including the United States, found that incomplete information about what firms paid led “workers to receive on average about 30–35% less pay than they otherwise would have earned” given their skills and education, with women being affected more greatly by pay secrecy. Solomon W. Polachek & Jun (Jeff) Xiang, *The Effects of Incomplete Employee Wage Information: A Cross-Country Analysis* 22 (IZA Discussion Paper No. 1735, 2005), available at <ftp://ftp.iza.org/RePEc/Discussionpaper/dp1735.pdf>.

220. Amanda Steinberg, *Salary Negotiation Post—Retraction*, DAILY WORTH (June 15, 2010), <http://www.dailyworth.com/blog/456-salary-negotiation-retraction> (describing one writer’s experience telling a “little white salary lie” that helped her negotiate a higher starting salary and the controversy that it caused).

221. *Ventura v. Bill Me Later, Inc.*, Am. Arbitration Ass’n, Case No. 16 166 00549 07 (Interim Award) (on file with author). The plaintiff Chief Technology Officer was one of the only executives with an advanced business degree, had outstanding performance, and led one of the core business functions of the company. She nevertheless received one-half the bonuses and one-half to one-quarter the cumulative stock option grants received by her executive male peers. She won her case in arbitration under the Maryland Equal Pay Act and Title VII, but lost the federal EPA claim. After the arbitration, the EEOC continued to investigate pay disparities for other women and found that pay violations were “widespread” through five different departments and on the executive team. EEOC Determination on EEOC Charge Nos. 531-2007-02306 and 531-2007-02044 (June 27, 2010) (on file with author) [hereinafter EEOC Determination on EEOC Charge].

the worst performer of the three) received a base salary of \$180,000, a relocation package of \$63,000, and a hiring bonus of \$40,000—for a total starting pay disparity of \$68,000.²²² The other male peer made \$10,000 more than her base salary. When asked why he paid his female player-lead less than two men doing the same job, the supervisor defended the disparity based on the employees' prior salaries and their wage negotiations with him.²²³ He stated that the female vice president's "base salary where she was coming from [sic] was significantly lower than the others"²²⁴

When asked why he failed to pay similarly qualified vice presidents equal pay for equal work, the supervisor responded:

Because I didn't need to. I mean at the end of the day it was, at the end of the day [sic] – first of all they, they didn't need to see what each other's salaries were. They weren't – it wasn't like we post it on your name tag. So there was no demotivation. [The female vice president] was somewhat aware what the other people were making, so it was, you know, I didn't want to demotivate her, but, *you know, at the end of the day you're paying people, you know, the market rate, you're not necessarily paying them for a job. You know, you're saying what's it take?*²²⁵

As seen in this example, prior salaries have become a heuristic for an employee's value. The "market" on which the supervisor relied was nothing more than a haphazard situational accident, not a fair reflection of the job duties, skill sets, and performance of the employees. The employer paid the worst performer the highest salary simply because he negotiated that rate based on his previous salary. The female player-lead who trained her male peers received the lowest salary, simply because her salary at a previous job was lower than that of her male counterparts. The law requires equal pay for equal work, but pay secrecy encouraged an inequity based on the happenstance of prior salaries—not the skill, responsibility, and effort required for the job—to continue uncorrected.

c. The gendered result of wage negotiations

The problem of asymmetric wage information is compounded by psychological and social differences in negotiation norms and expectations

222. EEOC Determination on EEOC Charge, *supra* note 221.

223. Deposition Transcript at 32–35, 75–80 (Mar. 6, 2008) (on file with author).

224. *Id.* at 77.

225. *Id.* at 79–80 (emphasis added).

for men and women.²²⁶ Field research on job negotiations at the hiring stages has found that male managers and professionals tend to negotiate higher starting compensation than their female peers.²²⁷ As described by many scholars, women are less likely to negotiate and more likely to feel social pressure to agree to employers' wage offers.²²⁸ Other researchers have found no differences in the propensity of women to negotiate salary and attribute lower wages to gender differences in the negotiation performance of women.²²⁹

Many studies have found that, in the absence of information to guide salary demands, women are likely to report lower pay aspirations than men entering negotiations and, as a result, negotiate less assertively.²³⁰ Field and experimental research has also shown that employers tend to offer more money to men than women, "presumably in anticipation that women will be willing to settle for less."²³¹ In a survey of more than 1,500 managers, compensation administrators, and union officials, more than 44% "rated women's willingness to work for less money than men to be a 'very' or 'extremely' important cause of the gender pay gap."²³²

Those women who do negotiate for higher pay are often penalized because they violate the social norm of women being friendly and agreeable.²³³ They are viewed as too "aggressive" and not a team player. Some are even threatened with termination. In experiment after experiment, "evaluators were significantly less inclined to work with a woman who initiated compensation negotiations as compared to one who did not because they found her overly demanding and lacking in niceness."²³⁴ As

226. See Porter & Vartanian, *supra* note 9, at 183–95 (summarizing social science literature that shows that compensation market is not neutral because of gender schemas that influence the valuation of women workers and impact wage negotiations).

227. Hannah Riley Bowles & Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393, 395 (2008), available at <http://www.hbs.edu/research/pdf/08-095.pdf>.

228. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK 1 (2003); Deborah A. Small et al., *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600 (2007).

229. See, e.g., Lisa Barron, *Ask and You Shall Receive?: Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. REL. 635 (2003); B. Gerhart & S. Rynes, *Determinants and Consequences of Salary Negotiation by Male and Female MBA Graduates*, 76 J. APPLIED PSYCHOL. 256 (1991).

230. Bowles & McGinn, *supra* note 227, at 399 (citing multiple studies).

231. *Id.* (citing multiple studies).

232. *Id.*

233. LINDA BABCOCK & SARA LASCHEVER, ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT 256 (2009).

234. Bowles & McGinn, *supra* note 227, at 398 (discussing and citing Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity*

negotiation scholars have found, “[a]ttempting to negotiate for higher compensation is socially risky for women because it violates prescriptive sex stereotypes.”²³⁵ In contrast, men are not penalized for negotiating aggressively. “Research shows that men can be influential and effective even if people don’t like them. They can be persuasive and get what they want as long as they’re perceived as competent.”²³⁶

As the wage data described above in Part II.B show, the more discretionary and subjective the compensation system—which tends to be the case for management and professional occupations—the greater the gender pay gap. A large body of social science research demonstrates that sex-stereotyping and unconscious cognitive biases influence personnel and compensation decisions that are based on subjective, arbitrary, or discretionary assessments.²³⁷ For example, in one study 238 academic psychologists rated the *curriculum vitae* of real psychologists, some of whom were in their early career and others in their late career. Both male and female participants considered male applicants more qualified and were more likely to hire men over women. Participants were also four times more likely to write concerns in the margins for female tenure candidates than for male tenure candidates.²³⁸

In another experiment, study volunteers received precisely the same description about a manager, with only the name changed. Some were told “Subordinates have often described Andrea as someone who is tough, yet outgoing and personable. She is known to reward individual contributions and has worked hard to maximize her employees’ creativity.” Others received an identical account about “James.” Three-quarters of the study participants rated James as more likeable than Andrea and four in five preferred to have James as a boss. Although depicted in exactly the same

to Initiate Negotiations: Sometimes It Does Hurt to Ask, 103 *ORG. BEHAV. & HUM. DECISION PROCESSES* 84 (2007)).

235. Hannah Riley Bowles & Linda Babcock, *Are Outside Offers an Answer to the Compensation Negotiation Dilemma for Women?*, 2009 *ACAD. MGMT. PROC.* (2009).

236. BABCOCK & LASCHEVER, *supra* note 233, at 256. *See also* Linda L. Carli, *Gender, Language and Influence*, 59 *J. PERSONALITY & SOC. PSYCHOL.* 941 (1990); Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 *PSYCHOL. WOMEN Q.* 65 (2001).

237. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1191–1209 (1995) (reviewing cognitive psychology scholarship regarding the nature of human inference and the roles played by cognition and motivation in decisionmaking).

238. Rhea E. Steinpres et al., *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 *SEX ROLES* 509, 523 (1999).

way, the female manager was also rated as more interpersonally hostile and less competent.²³⁹

The experience of transgendered people also offers insights into how male and female employees are perceived, because, with only their gender changed, they can be their own control groups.²⁴⁰ Sociological studies involving transgendered people show that an individual who changes only his or her gender (keeping, of course, educational background, professional qualifications, and work history constant) experiences profound changes in his or her pay. One study that analyzed the salaries of 43 transgendered people after they made their gender transitions found that earnings of women who became men increased slightly, whereas men who became women experienced a decline in their pay of nearly 1/3.²⁴¹

Studies show that significant gender differences in salaries will occur in “high ambiguity” industries—those in which employees are not well informed about the appropriate amount to request during salary negotiations.²⁴² A study of MBA students “found no significant gender differences in negotiation outcomes in low-ambiguity industries but significant gender differences in salaries accepted in high-ambiguity industries.”²⁴³ Women who entered industries in which salaries were more ambiguous “accepted salaries that were 10 percent lower on average than did the men.”²⁴⁴

Negotiation experts explain that unconscious gender-stereotypes are more likely to skew results against women when compensation decisions are informal and unguided:

[I]n the absence of clear standards for agreement, parties search mental schema, past experience, and the negotiating context for cues for how to enact the negotiation. If negotiators carry gendered associations (e.g., sex stereotypes) to the table or if the

239. Madeline E. Heilman & Tyler G. Okimoto, *Why Are Women Penalized for Success at Male Tasks? The Implied Communitativity Deficit*, 92 J. APPLIED PSYCHOL. 81, 83–85 (2007).

240. SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* 98–99 (2010).

241. Kristen Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, B.E. J. ECON. ANALYSIS & POL’Y, Sept. 11, 2008, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1862&context=bejeap>. See also VEDANTAM, *supra* note 240, at 88–111 (describing Schilt’s work and providing personal stories of transgendered individuals who reported more favorable workplace experiences after becoming men, and less favorable employment experiences after becoming women).

242. Bowles & McGinn, *supra* note 227, at 396; Hannah Riley Bowles, Linda Babcock & Kathleen McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951 (2005).

243. Bowles & McGinn, *supra* note 227, at 396.

244. *Id.*

context of the negotiation is gendered (e.g., a male-dominated organization), then greater ambiguity allows more potential for those gendered associations or the gendered context to influence negotiation performance.²⁴⁵

In other words, an ambiguous, secret pay process “opens the door for the kinds of mental schema and situational factors than can trigger gender effects.”²⁴⁶

Studies show that if pay processes are more transparent and women have adequate information during the negotiation process, gender pay disparities may be reduced or eliminated altogether.²⁴⁷ But women must tread carefully with their demands. “Attempting to negotiate for higher compensation is socially risky for women because it violates prescriptive sex stereotypes.”²⁴⁸ Women must package their demands in communal or relational terms, rather than as confrontational threats. As Linda Babcock writes, myriad psychological studies “tell us that when women go into a negotiation, in addition to arming themselves with information, ideas, and resolve, they must also bring along an arsenal of ‘friendly,’ nonthreatening social mannerisms; they must be prepared to be cooperative and interested in the needs of others; and they must avoid being confrontational.”²⁴⁹ In short, as Bowles has explained, “This isn’t about fixing the women . . . [i]t isn’t about telling women, ‘You need self-confidence or training.’ They are responding to incentives within the social environment.”²⁵⁰

Aside from harming market equilibrium to the disadvantage of women, pay secrecy allows pay discrimination to continue and multiply, undetected and undeterred. As Justice Ginsburg wrote in *Ledbetter*, most pay discrimination is “hidden from sight.”²⁵¹ Indeed, Lilly Ledbetter was unaware of the significant pay disparities between her and her male co-

245. *Id.* at 396–97.

246. *Id.* at 397.

247. BABCOCK & LASCHEVER, *supra* note 228, at 65 (“[K]nowledge of what the market will pay for their skills and time can help override women’s inaccurate sense of self-worth.”).

248. Bowles & Babcock, *supra* note 235, at 1.

249. BABCOCK & LASCHEVER, *supra* note 228, at 106.

250. Shankar Vedantam, *Salary, Gender and the Social Cost of Hagglng*, WASH. POST, July 30, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/29/AR2007072900827.html>.

251. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649–50 (2007) (Ginsburg, J., dissenting) (citing *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1008–09 (10th Cir. 2002) (“[P]laintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, seven years after her starting salary was set lower than her co-workers’ salaries.”); *McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (“[P]laintiff worked for employer for years before learning of salary disparity published in a newspaper.”)).

workers until she received an anonymous letter on the eve of her retirement after decades of work.²⁵² Scholars have explained this “accumulation of disadvantage,”²⁵³ under which disparities start small and snowball over time.²⁵⁴

Given the complex psychological, situational, and economic realities of the compensation negotiation process, regulating the cumulative problem of pay discrimination through an individualized litigation approach will continue to fail in its mission of market reform. Under both the EPA and Title VII, courts are likely to accept employer defenses that the inequitable pay resulted from negotiation processes applied neutrally to men and women. Amendments to the EPA may help some plaintiffs defeat some market defenses, but courts are likely to remain reluctant to interfere with compensation decisions. As described in the next section, the limitations of a litigation framework for addressing improper compensation practices has long been recognized in the executive pay realm, and it is a lesson worth heeding.

B. Lesson Two: Litigation Alone Will Not Reform Abusive Compensation Practices

Litigation has failed to be an adequate check on abusive executive compensation arrangements.²⁵⁵ Shareholders may file lawsuits alleging that excessive or inefficient executive compensation packages violate directors’ and officers’ fiduciary duties and constitute corporate waste.²⁵⁶ After several unsuccessful challenges to executive pay in the wake of the Great Depression, Cornell law professor George Washington noted that some claimed that “‘no man can be worth \$1,000,000 a year.’ Perhaps that is true. Perhaps not. In any event, it is hardly a matter for courts and lawyers to

252. *Ledbetter*, 550 U.S. at 649–50.

253. *See, e.g., VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 3–6 (1999).

254. *BABCOCK & LASCHEVER, supra* note 228, at 5 (estimating that an initial pay disparity of \$5,000 between two employees will grow to a \$360,000 disparity at retirement age).

255. *Id.* at 45–48. *See also* *Davis, supra* note 4, at 451–62 (explaining how business judgment rule has “stymied challenges to excessive executive compensation” in litigation).

256. *See* *Rogers v. Hill*, 289 U.S. 582, 591 (1933) (recognizing that executive compensation may become so excessive as to constitute waste, but setting no formula for that determination). *See also* John W. Murrey, III, *Excessive Compensation in Publicly Held Corporations: Is the Doctrine of Waste Still Applicable?*, 108 W. VA. L. REV. 433 (2005) (discussing corporate waste and executive pay litigation).

settle.”²⁵⁷ Professor Washington described that courts refused to assess the appropriateness of executive pay levels:

In effect, they put aside the problem of “reasonableness;” and simply ask: “Is this corporation being honestly and fairly run by its directors, with observance of the formal requirements of the law?” If the answer is in the affirmative, the judgment of the directors as to the amount of compensation which should be paid to the executives will be allowed to control.²⁵⁸

The same is true today. Procedural barriers to stating a claim and judicial reluctance to scrutinize compensation decisions typically make such suits unsuccessful.²⁵⁹ As one scholar noted, “courts simply do not have ability, or desire, to review executive compensation levels to determine whether they are excessive and will generally defer to the board of director’s discretion on such matters.”²⁶⁰ In a recent executive compensation case, shareholders challenged a severance payment of \$130 million to Michael Ovitz after he was fired by the Walt Disney Company after only fourteen months on the job.²⁶¹ The Delaware Supreme Court refused to find it unlawful, stating: “The size and structure of executive compensation are inherently matters of judgment” and courts must give them “great deference.”²⁶² Courts frequently apply the business judgment rule, under which “courts defer to and refuse to review the substantive merits of board decisions as long as these decisions satisfy certain process requirements.”²⁶³ As Bebchuk and Fried explain, courts are simply “ill-equipped” or unwilling to evaluate the legality of compensation packages.²⁶⁴

The narratives in equal pay cases echo the great deference that courts give to “business judgments” in executive compensation cases. Courts refuse to be “super-personnel” officers in employment discrimination cases,²⁶⁵ and are most reluctant to interfere with compensation decisions. As

257. George T. Washington, *The Corporation Executive’s Living Wage*, 54 HARV. L. REV. 733, 759 (1941).

258. *Id.* at 758–59.

259. BEBCHUK & FRIED, *supra* note 17, at 45–48.

260. Jerry W. Markham, *Regulating Excessive Executive Compensation—Why Bother?*, 2 J. BUS. & TECH. L. 277, 284 (2007).

261. *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

262. *Id.* at 263.

263. BEBCHUK & FRIED, *supra* note 17, at 46.

264. *Id.* at 45.

265. *See, e.g., DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (“[T]his Court ‘does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination’” (quoting *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997))); *Shealy*

one federal judge expressed in a case involving a female senior executive: “In cases such as these, no judge or jury should be allowed to second guess the complex remuneration decisions of businesses that necessarily involve a unique assessment of experience, training, ability, education, interpersonal skills, market forces, performance, tenure, etc.”²⁶⁶ The ineffectiveness of a current equal pay remedies has been explored in prior scholarship.²⁶⁷ An empirical analysis of all federal reported equal pay cases since the EPA’s passage found, for example:

- Employees are less likely to prevail on equal pay claims today than at any other time. From 2000-09, employees prevailed on their equal pay claims 35% of the time. This is a substantial decrease from previous decades: plaintiffs prevailed 55% of the time from 1990-99, 52% from 1980-89, and 59% from 1970-79.²⁶⁸
- Although evaluation of equal pay claims is supposed to be fact-intensive,²⁶⁹ modern courts increasingly reject cases at the summary judgment stage rather than permitting the claims to proceed to trial.²⁷⁰ From 1999-2009, federal district courts granted summary judgment to the employer 72% of the time.²⁷¹ District courts found disputed factual issues that precluded summary judgment on equal pay claims only 28% of the time.²⁷²

v. City of Albany, 89 F.3d 804, 807 n.6 (11th Cir. 1996) (“The district judge does not sit as sort of ‘super personnel officer’” of the employer).

266. *Georgen-Saad v. Tex. Mut. Ins. Co.*, 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002). See also *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 469 (7th Cir. 2005) (“The Equal Pay Act forbids sex discrimination, an intentional wrong, while markets are impersonal and have no intent.”); *Wheatley v. Wicomico Cnty.*, 390 F.3d 328, 334 (4th Cir. 2004) (holding that finding that department head jobs were equal under the EPA “would deprive compensation structures of all flexibility and deny employers the chance to create pay differentiations that reflect differing tasks and talents.”).

267. See Eisenberg, *supra* note 5; Porter & Vartanian, *supra* note 9. For a critique of the effectiveness of Title VII as system for claiming nondiscrimination rights, see Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008).

268. Eisenberg, *supra* note 5, at 33.

269. *Brobst v. Columbus Servs. Int’l*, 761 F.2d 148, 156 (3d Cir. 1985) (“Given the fact intensive nature of the [Equal Pay Act] inquiry, summary judgment will often be inappropriate [in EPA cases].”).

270. Eisenberg, *supra* note 5, at 33.

271. *Id.* at 34.

272. *Id.* The author is conducting an updated and expanded empirical analysis of summary judgment decisions in federal pay discrimination cases which will be presented and published in conjunction with a symposium about the use of summary judgment in employment cases at New York Law School in April 2012.

- From 2000 to 2009, federal courts of appeal affirmed grants of summary judgment for the employer on equal pay claims 92% of the time.²⁷³

In short, courts resist interfering with any type of compensation decision—whether in the form an unreasonably high pay package to an executive or unequal pay to a woman. Given the ineffectiveness of litigation to achieve market reform, executive compensation scholars and regulators have used disclosure and transparency as a mechanism of market control. Similarly, wage transparency should be used as a market-based reform to improve negotiation results for women, encourage the development of less ambiguous compensation systems, and provide a means to prevent or correct unfair pay disparities well before they grow into fodder for litigation.

C. Lesson Three: Transparency Promotes More Efficient Compensation Markets

To overcome the realities that permit abusive executive compensation, scholars have argued in favor of greater pay transparency.²⁷⁴ Professors Bebchuk and Fried show that various types of “camouflage” and “stealth compensation” in executive pay reporting give rise to compensation packages that are insensitive to performance and overly favorable to executives at the expense of shareholders.²⁷⁵ The idea is that if shareholders and the public are armed with better information through executive pay disclosures, companies will ensure that the compensation paid to top executives is justifiable. Executives likewise will be more reasonable in their requests because they will fear damage to their own reputations. Shareholders, the press, and the public will expose unreasonable pay rates and this “outrage constraint” will keep excessive executive compensation in check.²⁷⁶

Although the idea of pay transparency for the larger workforce sounds radical, it has become an accepted principle in the executive pay arena. Bebchuk and Fried describe the need for transparency about the amount and structure of executive pay “a ‘no-brainer,’ one for which [they] see no reasonable basis for opposition.”²⁷⁷ Although scholars disagree with many aspects of Bebchuk’s and Fried’s managerial power theory and some of

273. *Id.*

274. BEBCHUK & FRIED, *supra* note 17, at 192–94.

275. *Id.* at 67–68, 112–17.

276. *Id.* at 64–70.

277. Bebchuk & Fried, *supra* note 88, at 19.

their proposals for reform, the idea of mandatory disclosure and transparency is generally supported.²⁷⁸ Leading executive compensation scholars Michael Jensen and Kevin Murphy often oppose Bebchuk and Fried's theories,²⁷⁹ but do not argue "for the elimination of salary disclosure."²⁸⁰ In a review of *Pay Without Performance*, John Core, Wayne Guay, and Randall Thomas critique Bebchuk's and Fried's theories, but "agree that better disclosure on the value of executive pensions and the exercise and sale of options and shares would be beneficial."²⁸¹ Professor Jeffrey Gordon has expressed disagreement with the managerial power theory, but agrees with a regulatory approach that requires both disclosure and a narrative justifying the amounts awarded. Gordon recommended that public companies also include in the proxy statement a "compensation discussion and analysis" to explain in detail why the amount awarded was warranted.²⁸² The Securities Exchange Commission adopted this recommendation in its 2006 disclosure amendments.²⁸³

278. Articles supporting the mandatory disclosure regime or advocating for greater disclosure include, for example, Bernard S. Black, *Disclosure Not Censorship: The Case for Proxy Reform*, 17 J. CORP. L. 49 (1991); John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999); Michael D. Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 FLA. ST. U. L. REV. 123 (2004); Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1 (1983); Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331 (1996).

279. For a description of the theoretical differences between Bebchuk and Fried's work on the one hand, and Kevin Murphy's work on the other, see William W. Bratton, *The Academic Tournament over Executive Compensation*, 93 CAL. L. REV. 1557 (2005). Professor Bratton explains how the work of these scholars is more consistent than conflicting, concluding: "The closer one looks at the debate over executive pay, the smaller the substantive stakes appear." *Id.* at 1583.

280. Michael C. Jensen & Kevin J. Murphy, *CEO Incentives—It's Not How Much You Pay, But How*, HARV. BUS. REV., May–June 1990, at 138, 145. Instead, they argue that compensation committees stand up "to outside criticism" because "[t]he costs of negative publicity and political criticism are less severe than the costs to shareholder wealth created by misguided compensation systems." *Id.*

281. John E. Core et al., *Is CEO Compensation Inefficient Pay Without Performance?*, 103 MICH. L. REV. 1142, 1181–82 (2005) (book review).

282. Jeffrey N. Gordon, *Executive Compensation: If There's a Problem, What's the Remedy? The Case for "Compensation Discussion and Analysis,"* 30 J. CORP. L. 675, 695 (2005). The CD&A should:

(1) explain the firm's philosophy of executive compensation; (2) collect, itemize, and summarize the elements of the compensation packages received by the five most highly compensated officers; (3) provide a justification for the compensation paid; and (4) be signed by the members of the committee (or the independent directors, as the case may be). *Id.*

283. See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158, 53,163–69 (Sept. 8, 2006) (codified at 17 C.F.R. pts. 228, 229, 232, 239, 240, 245, 249, 274)

Some argue that disclosure requirements have failed in their mission, pointing to increases in the absolute level of executive pay over time.²⁸⁴ Some researchers have found a “keeping up with the Joneses” effect, in which executive pay has risen because CEOs and CFOs have greater access to information about the compensation paid to executives at other firms, and use those statistics to argue for outrageous increases for themselves.²⁸⁵ In the case of female employees who have been unfairly underpaid, a “keeping up with the Joneses” effect could help to equalize their pay with their male peers. On the other hand, it could simply provide ammunition for employees who are already benefiting from the current system of pay secrecy to demand even more compensation. Alternatively, a transparent system that elevates internal equity concerns over external market pressures could result in the depression of wages for all employees, or, for some employers who want to avoid the hassle of justifying pay rates, have the unintended consequence of harming the promotion of women and minorities to higher paying positions.

All of these concerns are valid. As described below in Part IV.A, however, those companies that have already moved to more transparent, “open book management” regimes have experienced positive results in terms of employee productivity, loyalty, and job satisfaction. In addition, substantial evidence shows that mandatory disclosure laws in the executive realm have encouraged corporate boards of directors and compensation committees to think carefully about their compensation programs and develop “some metric and quantitative basis for arriving at a decision on pay.”²⁸⁶ Disclosure requirements have caused companies to define their

(explaining the requirements for the “Compensation Discussion and Analysis”). *See also* Leigh Johnson et al., *Preparing Proxy Statements under the SEC’s New Rules Regarding Executive and Director Compensation Disclosures*, 7 U.C. DAVIS BUS. L.J. 373 (2007) (describing compensation disclosure requirements for proxy statements).

284. *See* Paolo Cioppa, *Executive Compensation: The Fallacy of Disclosure*, 6 GLOBAL JURIST TOPICS 1, 9 (2006) (arguing that public knowledge of executive “salaries has created a sort of ‘race to the bottom’ in which companies have to be willing to pay unjustifiable amounts of money to retain good management”); Jerry W. Markham, *Regulating Excessive Executive Compensation—Why Bother?*, 2 J. BUS. & TECH. L. 277, 286 (2007) (“The SEC’s disclosure regulations did not curb executive compensation packages. Rather, they only encouraged competition for ever larger packages, and disclosure actually made legitimate the most excessive payments, *i.e.*, because it was disclosed, there was no wrongdoing.”).

285. *See, e.g.*, Davis, *supra* note 4, at 447 (arguing that “[i]nflated executive egos demand inflated executive pay, especially when benchmarked to the compensation of rival executives”).

286. Laurie Winslow, *Pay Transparency Trend “Irreversible,”* TULSA WORLD, June 13, 2010 (quoting compensation consultant Morey Villareal), *available at* http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20100613_46_A1_Whatsh490493.

compensation goals and develop compensation structures.²⁸⁷ One industry group has urged companies to review their executive compensation plans to ensure that they comply with three guiding principles: pay transparency, clearly defined and understandable pay schemes, and centralized oversight.²⁸⁸ It advises that responses such as “[e]veryone else does it” or “[i]t is market practice” are not adequate excuses for controversial pay practices.²⁸⁹ Application of these principles to the larger workforce would help to eliminate unjustified pay disparities against women.

Researchers have found that disclosure requirements have had a positive impact on tying pay to performance. One study examined CEO compensation of 461 listed Canadian companies over three fiscal years prior to mandatory disclosure of executive pay levels and five years after Canada adopted disclosure requirements similar to those of the United States.²⁹⁰ The researchers found “that the link between CEO wealth and shareholder value substantially increased after the disclosure regulation was enacted.”²⁹¹ Using comparable U.S. firms as a control group, the study found that, “before disclosure, the pay-performance sensitivity for Canadian CEOs was only a small fraction of that for U.S. CEOs” and that pay-performance “sensitivity increased dramatically” after the disclosure requirements were passed.²⁹² The researchers concluded: “With disclosure, the informational asymmetry in managerial pay between shareholders and the board of directors is removed; shareholders become aware of how much and, to a certain extent, how management is paid. This provides a monitoring scheme that disciplines the behavior of the board’s compensation committee.”²⁹³ Disclosure may not increase or reduce

287. See, e.g., Press Release, Genzyme, Genzyme Adopts New Incentive Compensation Plans for Senior Executives (Jan. 28, 2010), http://www.businesswire.com/portal/site/genzyme/index.jsp?ndmViewId=news_view&ndmConfigId=1019673&newsId=20100128005796&newsLang=en (announcing incentive plans that will “provide shareholders with more transparency into executive compensation decisions, and will encourage senior executives to make decisions that drive growth and shareholder value”).

288. See THE CONFERENCE BOARD, THE CONFERENCE BOARD TASK FORCE ON EXECUTIVE COMPENSATION (2009), available at http://www.conference-board.org/pdf_free/execcompensation2009.pdf. The Conference Board is a global non-profit, nonpartisan independent membership organization of business executives that “creates and disseminates knowledge about management and the marketplace to help businesses strengthen their performance and better serve society.” *Id.* at 2.

289. *Id.* at 20.

290. Peter L. Swan & Xianming Zhou, Does Executive Compensation Disclosure Alter Pay at the Expense of Incentives? 5 (June 21, 2006) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910865.

291. *Id.* at 3.

292. *Id.*

293. *Id.* at 5.

absolute compensation levels, “but disclosure improves pay-performance sensitivity.”²⁹⁴

Another study revealed that noncompliance with the SEC’s 2006 disclosure requirements was positively associated with excessive CEO compensation.²⁹⁵ The study found that public disclosure by the SEC of defects in mandated compensation disclosures reduced subsequent excess CEO compensation.²⁹⁶ Similarly, Kin Lo found that disclosure rules had substantial positive economic consequences for producers and consumers of the information.²⁹⁷ Lo found that companies that lobbied most strongly against the disclosure rules had operating performance that was on average lower before the disclosure regulations, and that their performance improved after the disclosure regulation.²⁹⁸ These studies demonstrate that the companies that have the most to hide are typically the ones that oppose mandated disclosure.

In sum, the regulation of executive compensation teaches us that wage transparency—although not a panacea—can be used to make companies more deliberate and thoughtful about their compensation schemes. Rather than setting pay based on the accident of prior salaries and “anything goes” discretionary regimes that can disadvantage women’s wages, transparency will focus attention on the need to pay based on performance and the “skill, responsibility and effort” required for the job. Failing that, transparency allows employees to better monitor non-compliant companies and demand corrective action. As Bebchuk and Fried observed in the executive pay context: “This is an area in which the very recognition of problems may help to alleviate them. Managers’ ability to influence pay structures depends on the extent to which the resulting distortions are not too apparent to market participants.”²⁹⁹

Likewise, increased dialogue about the harms of pay secrecy, and how it impedes an efficient compensation market and permits pay discrimination, may help to reduce unjustifiable pay disparities against women. Greater transparency about compensation systems is required to improve wage negotiation outcomes for women and allow an “outrage constraint”—short of litigation—to prevent pay discrimination. As Bruce Tulgan, author of

294. *Id.* at 4.

295. John R. Robinson et al., *Mandated Compensation Disclosures and CEO Pay* (July 16, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1439313.

296. *Id.* at 4–5.

297. Kin Lo, *Economic Consequences of Regulated Changes in Disclosure: The Case of Executive Compensation*, 35 J. ACCT. & ECON. 285, 312 (2003).

298. *Id.* at 303.

299. BEBCHUK & FRIED, *supra* note 17, at 12.

Winning the Talent Wars, has stated: “Without wage transparency, market pressures cannot work their true magic and ensure that compensation reflects real value.”³⁰⁰

But what would compensation transparency for the larger workforce look like and how would it work? An exact blueprint is not described here and should be explored in future work. To start the conversation, however, the next Part considers various models of transparency and the benefits and drawbacks of having greater wage disclosure.

IV. MODELS OF TRANSPARENCY

Wage transparency does not mean simply transplanting the executive pay disclosure rules onto the larger workforce. Such a requirement probably would not be helpful to most employees because it is likely to be overwhelming and obfuscated by legal language. The goal is to change opaque pay systems that flout the established public policy of “equal pay for equal work” into more transparent systems under which pay rates are justified by the skill, responsibility, and effort required for the position and the performance of the employee.

It may be that there is no cookbook way of accomplishing transparency. For example, pay data could be submitted in conjunction with other annual corporate reporting—perhaps simply adding gender and job title to required employee tax reporting. The data could then be aggregated, synthesized based on various demographics (such as company size, job category, geography, gender and race), and posted in a format to help companies and employees, with or without identifying specific firms. Alternatively, data could be posted at the firm level, available for employees only.³⁰¹

To be most effective, transparency should offer meaningful information to employees and job applicants, and should allow enough flexibility to fit within the culture of an organization. Most importantly, it is the very process of developing such a system—and the constant dialogue between employers and employees required to implement and refine such a system—that would be most helpful in eliminating discriminatory wage practices and empowering women. The goal is to change corporate culture about compensation from a “what’s it take” pay philosophy that violates the internal equity mandates of federal equal pay laws, into a “*how* should we

300. John Case, *When Salaries Aren’t Secret*, HARV. BUS. REV., May 2001, at 37, 49.

301. A firm-only approach would help to reduce employee privacy concerns but would deprive other companies of data that could be helpful in the development of effective pay systems. It would also deny researchers valuable data that could be used for more sophisticated analysis of the gender wage gap.

value” compensation plan that defines the factors to consider in establishing pay and explains how pay fits within the overall mission of the company.

In exchange for the development of a transparent pay system that facilitates employee voice and eliminates unfair pay disparities, employers could receive a *quid-pro-quo* legal or reputational benefit. For example, a special compensation certification system could be developed that identifies companies that have developed equitable pay practices, which could attract the most talented workers.³⁰² Alternatively, employers could get the benefit of a market-based defense in equal pay litigation only if they develop transparent pay systems that provide employees with adequate information about the system’s goals and standards and have a procedure under which employees may safely raise concerns about pay equity.³⁰³ This would be analogous to the *Faragher-Ellerth* defense in sexual harassment claims.³⁰⁴

Pay transparency is not without its limitations. One significant issue is the very problem addressed in this article: will women really speak up to challenge disparities under a transparent system? The psychological studies described in Part III.A.2 indicate that less ambiguity and more transparency will help women to more appropriately value their work and achieve better negotiation results in the first place, which will help to reduce disparities without the need to complain. Failing that, it is likely that the companies that use ambiguous pay schema have created gender inequities for many women, not just one individual worker. If such women join forces as a group, employers are more likely to correct the problem and less likely to retaliate. Still, the collective action problems inherent in self-regulatory regimes would need to be addressed.³⁰⁵ As Cynthia Estlund has written, employee participation is an essential ingredient for any self-regulatory concessions.³⁰⁶ As she effectively puts it: “[N]o employer self-regulation without employee representation.”³⁰⁷

302. I thank David Super for this idea.

303. See Ramachandran, *supra* note 29 (proposing pay transparency as affirmative defense in pay discrimination cases).

304. The Supreme Court created the *Faragher-Ellerth* defense in a pair of Title VII sexual harassment cases. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). Under this doctrine, an employer has a complete defense for a supervisor’s sexually harassing conduct toward a subordinate if the employer proves: (1) that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior”; and (2) “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Ellerth*, 524 U.S. at 745.

305. Other scholars have noted this problem. See Estlund, *supra* note 44, at 627–28.

306. *Id.* at 628.

307. *Id.*

At the very least, policy makers need to think beyond the current failed approach of pay secrecy and litigation, under which gender pay inequality within firms continues to thrive. Additional research needs to be conducted about the ramifications of transparency on pay equity, as well as on the morale and productivity of the larger workforce. Existing scholarship in non-legal fields, however, suggests many benefits for both employees and employers.

A. Benefits of Pay Transparency

The current pay secrecy model encourages employers to focus their energies on maintaining pay secrecy to avoid litigation. Indeed, mention the idea of compensation transparency to human resources personnel who know what people in the company are getting paid, and they are likely to think of many instances of pay that they would prefer to keep confidential, either because employees are getting paid too low as compared to their peers, or too high. Well-known compensation consultant Ira Kay has recognized that companies resist transparency because internal equity (i.e., equal pay for equal work) “usually clashes with paying people their external market value.”³⁰⁸ He explains: “[I]nternal equity has given way in most companies to the need to recruit and retain sufficient numbers of the right people. In such a situation, you simply can’t have an open-book salary policy.”³⁰⁹

But wage transparency has measurable benefits, including the promotion of more accurate market wages; more productive dialogue between employers and employees, which can foster loyalty and trust that often cannot be procured simply with higher pay amounts; an “outrage constraint” on unfair inequities, which allows companies to fix the problem before they become embroiled in expensive litigation; and a measurable positive impact on employee productivity and performance.

1. More accurate “market” wages

Wage transparency will promote more accurate market wages that compensate for the true value of a job, rather than the happenstance of “winner-take-all” negotiation dynamics and unconscious biases that can creep into opaque processes. The true benefits of transparency reside not so much in the post-hoc publication of wage information itself, but in the extra

308. Case, *supra* note 300, at 48 (comments of Ira Kay on John Case’s case study on pay disclosure).

309. *Id.*

time and thought that employers will put into the development of sound pay systems and justifiable pay awards. Kin Lo has recognized that the requirement that compensation committees prepare reports describing their executive compensation systems has encouraged “more careful consideration of pay packages, even if the report itself were not particularly informative.”³¹⁰ Similarly, “[a]s discussed in textbooks on managerial accounting, the benefits of budgeting derive partly from the process (rather than the budget itself) by stimulating communication and analysis of the business.”³¹¹

Better processes will help both employees and employers. Employees will be armed with better information about the value of their skills sets to the employer, which can improve and equalize negotiation results for women. Rather than being trapped by the demands of an ever ratcheting-up market that has no relation to the “skill, effort and responsibility” required for the job in question, the development of more transparent systems will allow employers to more accurately assess the value of their workers.

Some scholars have argued that the disclosure regime has not reigned in executive pay, and that disclosure is too diluted in long, verbose language in proxy statements for shareholders to make sense of them, much less react to them.³¹² For transparency to work, employers must give employees a direct role in the development and monitoring of the compensation systems under which they work. Employees are likely to be more active participants in the oversight of their organizations’ compensation systems than scattered shareholders are in reigning in executive pay. Employees who receive paychecks on a regular basis are more likely to demand that information be provided in meaningful ways and to question unfair disparities.

2. Dialogue, loyalty and trust

Transparency can help employees understand the financial complexities of their own compensation. Some business strategists have encouraged “open book management,” under which firms educate employees about the company’s financial information. “Open-book management is a way of running a company that gets everyone focused on helping the business

310. Lo, *supra* note 297, at 288 n.6.

311. *Id.*

312. The Securities Exchange Commission now requires “plain English disclosure.” Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158, 53,160 (Sept. 8, 2006). Companies must, for example: avoid legalistic, overly complex and “boilerplate” disclosures; use clear, concise sections, paragraphs and short sentences; and use definite, everyday words and active voice. *Id.* at 53,209.

make money. Nothing more, nothing less.”³¹³ Under open book management every employee “sees—and learns to understand—the company’s financials, along with all the other numbers that are critical to tracking the business’s performance.”³¹⁴ Entrusting employees with critical financial information and explaining how employees can help to improve those numbers has encouraged employees to think like owners and feel more responsible for the company’s success.³¹⁵ As explained by business strategist John Case: “open-book management teaches people to quit thinking of themselves as hired hands (with all that implies) and to start realizing that they are businesspeople (with all *that* implies). Their financial security depends on their joint success in the marketplace. Period.”³¹⁶ In short, “[e]mployees have a direct stake in the company’s success.”³¹⁷

Companies that practice open book management do not always include salary data as part of the financial information shared with employees. As Case explains, many companies worry about sharing salary data and ask him: “Does opening the books mean that everybody knows everybody else’s salary?”³¹⁸ He responds:

I know some open-book practitioners who absolutely insist that, yup, it means just that, and if you’re not ready for it, buster, you’re not ready for open-book management. I’m sympathetic to that stance; everybody gossips about everybody else’s salary anyway, so there’s something to be said for getting the information out on the table. Also, getting it out there forces the issue of fairness, which is what lies behind most of the gossip. In an ideal world, we’d all know how much each other was paid and wouldn’t really care, because it would all seem fair and equitable.³¹⁹

Some companies have experienced success with fully transparent pay systems. WholeFoods, for example, shares pay data with its employees and boasts that it has a work culture of “open books, open doors, and open people.”³²⁰ Any employee who wants to know how his or her “pay relates to that of others can simply open the binder that exists in every store and see

313. JOHN CASE, *OPEN-BOOK MANAGEMENT: THE COMING BUSINESS REVOLUTION* 37 (1995).

314. *Id.*

315. *Id.*

316. *Id.* at 38. For a description of the successes that many companies have had using open-book management, see JOHN CASE, *THE OPEN-BOOK EXPERIENCE* (1998).

317. CASE, *supra* note 313, at 38.

318. CASE, *supra* note 316, at 16.

319. *Id.*

320. *Our Mission and Culture*, WHOLE FOODS, <http://www.wholefoodsmarket.com/careers/workhere2.php> (last visited Sept. 21, 2011).

who got paid what in the previous year, from [CEO] John Mackey on down.”³²¹ This openness has bred strong employee trust, loyalty, and job satisfaction. WholeFoods’ employees have chosen the company as “one of *Fortune* magazine’s ‘100 Best Companies to Work For’ for the last thirteen years.”³²²

Likewise, consider the story of Ann Price. Early in Price’s career, she experienced pay discrimination while working as a consultant for General Electric.³²³ “[S]he was the only woman on her team and never knew what her male colleagues earned.”³²⁴ She worked hard and received a promotion. After her promotion, one of her employees asked her for a raise, at which time he revealed that his salary—which she did not previously know—was significantly higher than her own.³²⁵ Price said, “I outperformed him. . . got a promotion [and] became his boss, all the while making less than him.”³²⁶ Price did not sue over the disparity, and eventually went on to become Chief Executive Officer of a successful software company called Motek. At Motek, all employee salaries are public knowledge, which fosters a sense of responsibility and ownership in the company.³²⁷ Price taught every employee how to read a balance sheet and explained the business goals behind the financial numbers. Price believes that wage disclosure “actually dispelled employee anxieties about pay.”³²⁸ She said: “People became much more respectful of each other knowing each other’s salaries. . . [a]nd far less disillusioned about whether they were being fairly dealt with. It’s the unknown that creates infighting.”³²⁹ Rather than breeding resentment, educating employees about the financials and salary information made them feel more responsible for the company’s bottom line. Motek’s employees even deferred bonuses several times until the company was performing better.³³⁰

Business scholar Edward Lawler has shown that pay secrecy can cause misperceptions about co-worker and manager pay that can breed resentment

321. Diane Durkin, *How to Gain the “Loyalty Advantage,”* ENTERPRISE ENGAGEMENT ALLIANCE, available at <http://www.enterpriseengagement.org/articles/content/500200/how-to-gain-the-loyalty-advantage> (last visited Sept. 21, 2011).

322. *Our Mission and Culture*, *supra* note 320.

323. Christina Boufis, *A Case For Salary Transparency: Is an End to Confidentiality the Key to Closing the Pay Gap?*, PINK, <http://www.littlepinkbook.com/resources/my-career/development/closing-the-pay-gap> (last visited Sept. 21, 2011).

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

and lower productivity. He has argued that pay transparency reduces pay dissatisfaction among employees.³³¹ His experiments revealed that managers employed by firms with secret pay plans tend to overestimate the pay of managers at their own level and one level below them, and they underestimate the pay of managers who are one level above them.³³² Such perceptions may make managers more dissatisfied with their own pay as well as less productive and less motivated to work.³³³

Other human resources experts argue that pay transparency fits a high-performance culture, fosters trust, and reduces employee turnover.³³⁴ A report by the Corporate Executive Board found that organizations that use pay transparency can increase employee “intent to stay” by thirty-four percent, and improve worker effort by fifteen percent.³³⁵

Even if companies do not wish to disclose exact salary amounts, compensation experts recommend that companies at the very least establish pay grades or “bands” of jobs and salary ranges for each grade, and involve employees in the development of the system. As Victor Sim, Vice President of Total Compensation at Prudential Insurance Company of America, once advised in the *Harvard Business Review*:

Without that openness, people end up comparing themselves against the salaries, real or imagined, of other individuals. This raises all kinds of emotional issues. And you’re never going to convince everyone that they’re being treated fairly in a one-to-one comparison unless you are willing to unearth the nitty-gritty details of each salary decision and air the dirty laundry of every employee.³³⁶

Rather than involving employees in the development and monitoring of compensation systems, most human resources departments tend to shut employees out of the process, keep compensation information under lock

331. Edward E. Lawler, *The Mythology of Management Compensation*, CAL. MGMT. REV., Fall 1966, at 11, 17–20.

332. Edward Lawler, *Managers’ Perceptions of Their Subordinates’ Pay and of Their Superiors’ Pay*, 18 PERSONNEL PSYCHOL. 413 (1965); see also Liz Wolgemuth, *Why Do You Keep Your Salary Secret?*, U.S. NEWS & WORLD REP., June 19, 2008, <http://images.usnews.com/money/careers/articles/2008/06/19/why-do-you-keep-your-salary-secret.html> (interview with Lawler).

333. *Id.*

334. SUSAN E. JACKSON ET AL., *MANAGING HUMAN RESOURCES* 358 (10th ed. 2009).

335. Harvey Meyer, *Full Disclosure (Pay Transparency – Opening the Books on Corporate-wide Salary Approaches, Processes and, in Some Cases, Figures – Is Making Increasing Sense to Payroll Experts and Is Starting to Catch on Among Employers Too)*, HUM. RES. EXECUTIVE ONLINE (June 16, 2010), <http://www.hreonline.com/HRE/story.jsp?storyId=456550026>.

336. Case, *supra* note 300, at 44.

and key, and discourage questions about pay. To eliminate the adversarial dynamic over pay, AES Corporation, a \$6.7 billion global electricity company, has eliminated its human resources department in favor of “team-based” decision-making. Its CEO, Dennis Bakke, believes that “compensation should be in the hands of the employees themselves and their leaders, not some staff group.”³³⁷ At AES, managers set compensation of their direct reports by other managers within their group and across the company and consult with the employee whose compensation is being determined. The company believes that this promotes “consistency and fairness across and within groups.”³³⁸ Company management says that salary openness “is more difficult for managers,” but it “leads to a healthier work environment. You should indeed have a reason for the salary you set for each individual employee – and be willing and able to justify the differences.”³³⁹

3. “Outrage constraint” on unfair inequities

As seen in the examples described above, wage transparency does not simply mean publishing everyone’s name, title and salary in the newspaper tomorrow. Given the internal inequities that have been bred under the current system of pay secrecy, companies will need time to define the goals of their compensation systems, develop pay standards, and eliminate unjustified inequities. With well-defined performance criteria, consistent application, and centralized oversight, companies can ensure that their compensation systems are paying for performance and not irrational or discriminatory factors. Disparities that result from unconscious biases and negotiation inequities can be exposed and corrected. Like the “outrage constraint” that helps to address non-compliant companies in the executive pay arena, greater wage transparency will expose problems before they are allowed to fester for years or decades. Under such a system, transparency would increase employee trust and avoid litigation. The sooner such mistakes are corrected, the less likely the employee will feel betrayed, and willing to sue, her employer.

Some companies are already taking proactive steps to ensure fairness and consistency in their compensation systems. For example, “IBM conducts annual audits of the base pay of women and minorities.”³⁴⁰ If the company finds one standard deviation of difference among similarly-situated

337. *Id.* at 46.

338. *Id.*

339. *Id.*

340. MAINIERO & SULLIVAN, *supra* note 155, at 286.

employees, the manager must either implement a raise or provide “a written explanation of why the raise should not be given.”³⁴¹ Greater wage transparency would provide an impetus for employers to conduct self-audits, involving employees as full participants and enforcers of fair compensation systems.

4. Productivity and performance

Transparent pay systems can also improve employee work effort and productivity. Many “experimental studies have shown that an individual’s behavior is not only driven by selfish and profit-maximizing goals but as well by other-regarding preferences like reciprocity, fairness or inequity aversion.”³⁴² Employees who have a better understanding of the goals of the company’s compensation system and how they fit into that scheme are likely to perform better. Research from the global human resources firm Watson Wyatt has shown that companies with a relatively transparent salary structure have higher returns to shareholders because they are typically more innovative and entrepreneurial.³⁴³

Formal research about the effects of transparent pay systems is lacking, most likely because of the norm of pay secrecy. One study of salesmen found that an open pay system was “an effective motivating tool by which a salesman’s performance can be improved.”³⁴⁴ The researchers empirically tested Lawler’s conclusions that lack of pay information may have a negative influence on an employee’s performance and pay satisfaction. The “study involved 508 pharmaceutical salesmen in a ‘before-after with control group’ experimental design.”³⁴⁵ The experimental group changed to an open pay system in which the salesmen were informed of the “individual low, overall average, and individual high merit raise amounts for the previous year.”³⁴⁶ Raises and salary levels were also broken down based on district and region and the salesmen’s years with the company.³⁴⁷ Specific salary information by name was not discussed, but could be obtained from the

341. *Id.*

342. Petra Hagemann, On the Impact of Transparent Wage Distributions and Horizontal Inequity Aversion in an Experimental Labor Market 1 (Sept. 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026207.

343. Case, *supra* note 300, at 48.

344. Charles M. Futrell & Omer C. Jenkins, *Pay Secrecy Versus Pay Disclosure for Salesmen: A Longitudinal Study*, 15 J. MKTG. RES. 214, 218 (1978). All of the research subjects were men.

345. *Id.* at 215.

346. *Id.*

347. *Id.*

supervisor.³⁴⁸ The control group did not have an open pay system and salaries were kept confidential.

Overall, the study found that the open pay system had “a positive impact on the salesmen’s job performance and their satisfaction with pay, company promotional policies, and work.”³⁴⁹ Salesmen in the experimental group with the open pay system “tended to be higher performers and to be more satisfied with their pay . . . promotion policies . . . and work”³⁵⁰ The salesmen with the open pay system became less satisfied with their direct supervisors, indicating that the “performance evaluation ratings used by the organization were not sufficiently tied to concrete job behavior.”³⁵¹ The company’s higher management became convinced that the open pay system was “an effective motivating tool by which a salesman’s performance can be improved,” and planned to develop a “performance instrument” and continue the open pay system.³⁵²

Of course, wage transparency is not without its drawbacks. The next section considers potential objections to compensation transparency that should also be considered.

B. Potential Objections to Pay Transparency

1. Employee privacy

One of the primary concerns about pay transparency is employee privacy. The publication of individual employee names and their salaries—similar to the detail provided in proxy statements for executives—is likely to be considered an invasion of privacy for many employees. As compensation expert Ira Kay has stated: “Employees should be treated like adults, with access to as much company information as possible. But some information is just too personal to disclose.”³⁵³

One answer to individual employee privacy concerns, at least for larger companies, is to group jobs into different categories or bands and publish those compensation ranges. Many professional compensation consultants recommend this approach. As one compensation expert has advised:

348. *Id.*

349. *Id.* at 218.

350. *Id.*

351. *Id.*

352. *Id.*

353. Case, *supra* note 300, at 48 (comments of Ira Kay, who directed the compensation consulting practice at Watson Wyatt Worldwide).

Publishing salary bands lets people know how their pay compares with others' in the same job and what their jobs are worth relative to others in the company. It lets them know the upside potential of their current job and their career opportunities within the company . . . without telling them what everyone else makes.³⁵⁴

Publishing different compensation bands could provide employees with information about how the company values various positions. This would be analogous to the various "GS" categories for federal government workers.³⁵⁵ "Each band will have enough variation to absorb most labor market or individual performance differences."³⁵⁶ Aggregate information about discretionary awards—such as bonuses and other monetary benefits on top of salary—should also be published because, as described above, unjustified discrimination tends to creep into these subjective awards.

The publication of salary band information would help to balance employee privacy concerns with the need for transparency. Once again, the benefit arises not so much in the nitty-gritty details about every employee, but in the process that companies must go through to ensure that their compensation systems are guided by clearly defined performance goals and metrics, rather than amorphous, subjective beliefs of individual supervisors. The more defined and less ambiguous the overall compensation scheme, the more likely employers will deliberate more carefully about pay decisions and the less likely women will be disadvantaged by unconscious biases and discriminatory social factors.

As in the study about salesmen described above, however, companies should share information, upon request, about what employees in similar positions are getting paid, and be prepared to justify any differential. The goal of transparency is to improve communication between employers and employees about the mission and performance of the company, how the compensation system ties into that mission, and what each individual employee needs to do to improve performance and earn more. Transparency should not be so filtered and diluted by the employer that it loses its utility as a check on the flaws in the compensation process that can unfairly lower women's pay.

354. *Id.*

355. This does not mean that private sector workers should be paid like federal government workers. Rather, however a company decides to structure its pay system, it should be explained to employees so they know where they fall in the compensation system and what they need to do to improve their position.

356. Case, *supra* note 300, at 48.

2. Employee disgruntlement and litigation

Another common objection to pay transparency is the risk of “hurt feelings.” For compensation systems that are not guided by pay-for-performance and clearly defined evaluation criteria, employee conflict will certainly happen if the differences cannot be explained by the employer. The unwillingness of the workforce to accept unexplainable disparities is precisely the reason that pay transparency would be so effective. Without such disgruntlement and conflict, inequities will not be exposed, and markets cannot eliminate unjustified discrimination.

As one management consultant has advised, the concern that transparent pay systems will cause hurt feelings is “archaic and paternalistic. Employees must be sophisticated enough to understand their manager’s reasoning, to negotiate on their own behalf, and to make decisions about the relative fairness of salaries.”³⁵⁷ Furthermore, “most employees won’t resent compensation differentials based on ongoing transparent pay-for-performance negotiations.”³⁵⁸

Granted, the concern goes beyond mere hurt feelings. Some employees simply will not be able to objectively evaluate their own skills and performance as compared to their co-workers. Even if the employer has legitimate explanations for a pay disparity, the employee may not be willing or able to accept it. For these types of employees, however, it behooves employers to have these disputes outside of a litigation realm. Employees are more likely to accept pay differences if the employer has shown a good faith effort to define the criteria that will be used to set pay and has explained how it arrived at the employee’s pay. Although an employee may disagree with the decision, having an open process by which the employee can raise questions fosters more trust in the system itself.

Studies show that employees are motivated not simply by monetary rewards, but by feelings of fairness. “[E]mployees are most likely to feel their workplace is fair if they feel that the procedures for determining different treatment are fair; if they understand how and why decisions are made; and if the explanation is given in a sensitive, respectful manner.”³⁵⁹ As discussed above, transparent pay systems can make workers feel more invested in the success of the business, foster loyalty and trust, and increase productivity.

Of course, compensation transparency will be a higher maintenance system. Employers will need to invest more time and care in their pay

357. *Id.* at 49 (comments of Bruce Tulgan).

358. *Id.*

359. CANTRELL & SMITH, *supra* note 194, at 191.

decisions and be responsive to their employees. But that is precisely the point. As one management expert has advised: “[I]f you want high productivity, you have to accept high maintenance.”³⁶⁰ Likewise, to fulfill the promise of “equal pay for equal work,” silence and secrecy should be replaced by wage transparency and constant dialogue.

Related to the concern about discontent, employers may worry that they will be subjected to increased litigation if they move to more transparent compensation models. But the risk of litigation is greater under the current realm of pay secrecy. Under opaque pay systems, large, unjustified pay disparities have been allowed to take root and multiply. Women who are surprised by inequities, after working hard for an employer for years or decades, are likely to feel betrayed and humiliated, and may be more likely to strike back with litigation.

If pay transparency is mandated, employers will need time to involve employees in the development of pay-for-performance compensation systems. If employers work with employees on an ongoing basis to explain their pay systems and address unjustified inequities, employees are not likely to sue. Even if they do, the thoughtful deliberation that employers invest in the development of more transparent, equitable compensation schemes—if done in good faith and without discriminatory animus—will help them defeat cases that lack merit. In addition, a presumption similar to the *Faragher/Ellerth* doctrine would provide an incentive for employers to create and implement more transparent pay schemes.³⁶¹

3. Proprietary concerns

Employers may also object to pay transparency on the grounds that their pay rates are confidential company information that must be shielded from competitors. If the system is transparent, they fear poaching of talent and the demise of their business.³⁶²

Such concerns are overblown in the context of compensation. Even under the regime of pay secrecy, competitors who want to lure away top talent can simply ask the prospective hires what they are being paid. In addition, employees who feel they are being paid unfairly are less likely to remain loyal to their employer and resist recruitment efforts.³⁶³

360. Case, *supra* note 300, at 49.

361. See *supra* note 304 and accompanying text.

362. See Case, *supra* note 300, at 44 (“Having the compensation of all employees disclosed in the marketplace makes the company more vulnerable to poaching. Competitors can target individuals, knowing what kinds of salaries they need to offer.”) (comments of Victor Sim).

363. See MAINIERO & SULLIVAN, *supra* note 155, at 38–44.

In another context, one study investigated CEO pay at firms that sent letters to the Securities Exchange Commission claiming that they could not disclose pay information due to proprietary costs.³⁶⁴ The study found that proprietary costs are not higher for firms claiming proprietary costs, undermining the validity of this excuse for non-compliance with the disclosure rules.³⁶⁵

In addition, as two executive compensation scholars have written in response to objections to their recommendation that companies must disclose company projections to capital markets: “If your strategy is based on your competitor not knowing what you are doing, as opposed to not being able to do what you can do, you cannot be successful in the long run no matter who knows what.”³⁶⁶

V. CONCLUSION

The issue of pay equity typically divides scholars into silos that rarely converse with each other. In one corner, market proponents argue that pay disparities are the result of choice factors and that employers simply follow the dictates of a non-discriminatory compensation market. In another corner, feminists and employment law scholars point to study after study that confirm that a significant wage gap exists even after controlling for choice factors. Many feminist and employment law scholars reject the market justification as a mere pretext for discrimination and argue for the strengthening of litigation remedies to ensure that market excuses will not have power in equal pay litigation. Alternatively, some advocate a complete restructuring of the market through comparable worth to raise the intrinsic valuation of “women’s work.”

In comparison to the rich array of executive compensation scholarship, consideration of the market conditions and human dynamics that cause pay discrimination, and potential non-litigious solutions to improve flaws in the market that lower women’s pay, is under-theorized in legal scholarship.³⁶⁷ This Article attempts to fill that gap. It shows that pay discrimination is a subtle, complex phenomenon that results, in part, from pay secrecy, a

364. John R. Robinson et al., *supra* note 295.

365. *Id.* at 27–32.

366. Joseph Fuller & Michael C. Jensen, *Just Say No to Wall Street: Putting a Stop to the Earnings Game*, 14 J. APPLIED CORP. FIN. 41, 45 (2002).

367. Rabin-Margalioth, *supra* note 9, at 810 (stating that the “EPA jurisprudence is under-theorized”). As mentioned earlier, however, many employment law scholars have urged the need for structural responses to discrimination more generally. *See supra* notes 39 & 44 and accompanying text.

flawed market of asymmetric information, the happenstance of negotiation, and supervisor whims—all working in concert without any guiding principles or oversight.

To address market flaws that facilitate unjustified pay disparities, we should move beyond litigation remedies, which courts are likely to continue to resist, and the failed notion of comparable worth, which is easily brushed off as too radical or unworkable. Instead of flatly rejecting market concepts or arguing for a complete restructuring of the market, the regulation of executive compensation offers valuable lessons that, in modified form, may be imported to the larger compensation market to reduce pay discrimination. In particular, it teaches that wage transparency may foster efficient markets that more accurately value performance and worth, while creating stronger incentives for employers—in concert with their employees—to develop compensation practices that promote fair pay.

In sum, to fully address the widespread, persistent, and complex problem of pay discrimination, more productive dialogue across academic disciplines—and better communication among employers and employees—is required. This Article is a first step towards starting that conversation.