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EQUAL WORK

STEPHANIE BORNSTEIN*

Most Americans have heard of the gender pay gap and the statistic that, today, women earn on average eighty cents to every dollar men earn. Far less discussed, there is an even greater racial pay gap. Black and Latino men average only seventy-one cents to the dollar of white men. Compounding these gaps is the “polluting” impact of status characteristics on pay: as women and racial minorities enter occupations formerly dominated by white men, the pay for those occupations goes down. Improvement in the gender pay gap has been stalled for nearly two decades; the racial pay gap is actually worse than it was thirty-five years ago. Both pay gaps exacerbate growing income inequality in the United States. While demographic differences contribute to pay disparities (in women’s hours worked and time off for childbearing, and in minority workers’ education and experience levels), economists now find that fully one-third to one-half of both pay gaps is caused by two other factors: occupational segregation—meaning the unequal distribution of women and racial minorities across job fields—and discrimination. To what extent are these factors due to stereotypes about the value of women and racial minorities’ work, and what, if anything, can antidiscrimination law do to respond?

Existing federal law prohibits sex and race discrimination in pay, but requires an employee to provide proof of an employer’s intent to discriminate or a nearly identical “comparator” of a different sex or race performing “equal work” who is paid more. Current proposals for reform focus on narrowing an employer’s defenses in a lawsuit alleging unequal pay. This approach, while likely to improve plaintiffs’ successes in court, misses the forest for

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the trees. Leaving the definition of “equal work” untouched in threshold requirements for legal protection fails to account for the workforce segregation and gender and racial stereotyping at the root of much of the current pay gaps.

This Article explores how the limitations of existing law allow the gender and racial pay gaps to persist and analyzes proposals for improvement. To do so, the Article contrasts current reform efforts with alternatives, including the historical movement in the 1980s for “comparable worth” legislation and its echo in recently enacted laws in three states requiring equal pay for “substantially similar” or “comparable work.” Given the difficulty of enacting legislative change at the federal level, the Article then proposes a reframing of the concept of “equal work” in existing law by drawing on examples of broader definitions used to set pay in some union, government, and private sector employment contexts. Debunking the outdated criticism that strong equal pay laws force employers to “compare apples and oranges” and framing the comparison of “equal work” more broadly are essential to overcoming the impacts of occupational segregation and stereotyping on pay, and to closing the pay gaps.

INTRODUCTION

In 1950, most biologists were men, as were most designers, ticket agents, and recreation workers (park rangers, camp leaders, and the like).¹ By 2000, most workers in each of those occupations were women—and their median hourly wages, in real dollars adjusted for inflation, had decreased by 18% (biologists), 34% (designers), 43% (ticket agents), and 57% (recreation workers).² Meanwhile, the job of computer programmer, a position largely held by women in 1950, evolved from glorified typist to prestigious professional—with a corresponding increase in real median wages—as more men entered the field.³

Most jobs in the U.S. economy are “gendered,” meaning they are performed overwhelmingly by members of one sex and, thereby, associated with that gender.⁴ Most nurses, teachers, and administrative assistants are women;

1. See Asaf Levanon et al., *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950–2000 U.S. Census Data*, 88 SOC. FORCES 865, 875–87 (2009); Claire Cain Miller, *As Women Take Over a Male-Dominated Field, the Pay Drops*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html>.

2. Miller, *supra* note 1.

3. *Id.*

4. See *infra* Part I.B.

most engineers, firefighters, and truck drivers are men.⁵ Researchers have documented steep gender segregation in the U.S. workforce: nearly half of all women (or of all men) would have to change jobs in order to achieve gender parity.⁶ Among jobs that require the same education and experience, jobs gendered masculine pay more than jobs gendered feminine.⁷ Of the thirty highest paid jobs in the U.S. economy, twenty-six are held mostly by men, while twenty-three of the thirty lowest paid jobs are held mostly by women.⁸ And, as the earnings of biologists, designers, ticket agents, and recreation workers over time demonstrate, the entry of women into occupations previously held by men has a “polluting” effect⁹ on wages: when the proportion of women performing a previously male-dominated job increases, wages for that job decrease.¹⁰

While the gender pay gap may vary by what is measured and compared, economic data consistently shows that there is a gender pay gap, even after controlling for all relevant variables—the question is just how large a gap.¹¹

5. *Traditional and Nontraditional Occupations*, WOMEN’S BUREAU, U.S. DEP’T OF LABOR, https://www.dol.gov/wb/stats/nontra_traditional_occupations.htm (last visited Mar. 12, 2018).

6. See *infra* note 88 and accompanying text.

7. See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 27 (Nat’l Bureau of Econ. Research, Working Paper No. 21913, 2016), <http://www.nber.org/papers/w21913> (“A sizable literature indicates that female occupations pay less than male occupations for workers with similar measured characteristics.” (citing Levanon et al., *supra* note 1)); see also *infra* Part I.B.

8. See EMILY LINER, THIRD WAY, A DOLLAR SHORT: WHAT’S HOLDING WOMEN BACK FROM EQUAL PAY? (2017), <http://www.thirdway.org/report/a-dollar-short-whats-holding-women-back-from-equal-pay>.

9. Fifteen years ago, economist Claudia Goldin identified a “pollution theory” to explain workplace sex discrimination, whereby men’s discriminatory actions toward women entering their field could be viewed “as the consequence of a desire by men to maintain their occupational status or prestige.” Goldin wrote:

[P]restige can be “polluted” by the entry of an individual who belongs to a group whose members are judged on the basis of the group’s average and not by their individual merits. Men in an all-male occupation might be hostile to allowing a woman to enter their occupation even if the woman meets the qualifications for entry . . . [because] those in the wider society . . . [might] view her entry as signaling that the occupation had been altered. She will be seen as “polluting” the occupation.

Claudia Goldin, *A Pollution Theory of Discrimination: Male and Female Differences in Occupations and Earnings* 2 (Nat’l Bureau of Econ. Research, Working Paper No. 8985, 2002), <http://www.nber.org/papers/w8985>. Goldin continued: “The pollution theory . . . posits that male employees discriminate against prospective female employees as a way of protecting their prestige in an asymmetric information context. *Id.* at 4. Here, I adopt Goldin’s language and theory to argue that, when women and racial minorities enter occupations previously dominated by white men, there is a similar “polluting” effect that results in lower wages.

10. See Lisa Catanzarite, *Race-Gender Composition and Occupational Pay Degradation*, 50 SOC. PROBS. 14, 14–18, 30–31 (2003) (describing this phenomenon as pay “erosion” or “degradation”); Levanon et al., *supra* note 1, at 868; Miller, *supra* note 1.

11. See ELISE GOULD ET AL., ECON. POLICY INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? THE COMPLETE GUIDE TO HOW WOMEN ARE PAID LESS THAN MEN AND WHY IT CAN’T

Statistics that aggregate unadjusted data show the biggest gap. In the most recent analyses, when comparing the median earnings of all U.S. women and men working full-time, women earn \$0.80 annually and \$0.83 hourly to every dollar earned by men.¹² As data is adjusted to account for variables such as education, work experience, hours worked, and geographic region, the gender pay gap becomes smaller.¹³ Yet, even among employees performing the same job with the same education and experience level, there is a documented pay gap between men and women.¹⁴

Much less known and discussed, there is an even greater racial pay gap in the U.S. workforce. Recent studies of unadjusted data comparing median earnings for all men show that African American and Latino men earn just \$0.71 on the dollar to white men.¹⁵ When adjusted to control for variables like education, experience level, and geographic region, black and Latino men's earnings relative to white men's rise to between \$0.78 and \$0.82 on the dollar.¹⁶ Women of color bear the brunt of both gender and racial pay gaps. In recent data, black women earned between \$0.63 and \$0.70 on the dollar to white men, and \$0.81 to \$0.88 on the dollar to white women, depending on adjustments.¹⁷ The unadjusted median average earnings of Latina women were as low as \$0.54 on the dollar to white men.¹⁸ While occupational segregation by race is harder to track than by gender, it is still a significant feature of the U.S. labor market. A recent study documented that black men are represented in proportion to their presence in the labor market in a mere 13% of all occupations, and are overrepresented in nearly 40% of lower-earning jobs and underrepresented in nearly 50% of higher-earning jobs.¹⁹

Economists who study the gender and racial pay gaps in the U.S. workforce attribute these disparities to a number of causes. At least half of both gaps are attributable to real demographic differences that affect employment

BE EXPLAINED AWAY 1 (2016), <http://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/> (“The presence of alternative ways to measure the gap can create a misconception that data on the gender wage gap are unreliable. However, the data on the gender wage gap are remarkably clear and (unfortunately) consistent about the scale of the gap. In simple terms, no matter how you measure it, there is a gap.”).

12. See *infra* notes 47–48 and accompanying text.

13. See *infra* notes 60–61 and accompanying text.

14. See *infra* notes 60–61 and accompanying text.

15. See *infra* text accompanying notes 67–68.

16. See *infra* text accompanying note 63.

17. See *infra* notes 69–73 and accompanying text.

18. See *infra* text accompanying note 69.

19. See DARRICK HAMILTON ET AL., ECON. POLICY INST., *WHITER JOBS, HIGHER WAGES: OCCUPATIONAL SEGREGATION AND THE LOWER WAGES OF BLACK MEN* 3–4 (2011), http://www.epi.org/publication/whiter_jobs_higher_wages/; see also Derek Thompson, *The Workforce Is Even More Divided by Race Than You Think*, ATLANTIC (Nov. 6, 2013), <https://www.theatlantic.com/business/archive/2013/11/the-workforce-is-even-more-divided-by-race-than-you-think/281175/>.

and earnings.²⁰ For the racial pay gap, the primary demographic difference is in human capital factors: workers who are racial minorities have, on average, lower levels of education and work experience than white workers, which leads to lower-paying jobs.²¹ For the gender pay gap, human capital factors no longer represent a significant difference between female and male workers due to increases in women's levels of education and experience since the 1950s.²² Instead, the primary demographic difference contributing to the gender pay gap is in hours worked: on average, women work fewer hours than men and must take more unpaid time off from work for childbearing and rearing.²³ To reduce the portion of both pay gaps attributable to real workforce demographic differences requires sustained policy interventions around access to education and training, affordable child care, paid family and medical leave, and more—all of which have been explored by other scholars²⁴ and are beyond the scope of this Article.

Yet after accounting for the part of the gender and racial pay gaps that is due to actual differences in workers' qualifications or work hours, the part that is *not* the product of these differences remains. Economists now estimate that between one-third and one-half of both current pay gaps is attributable to two factors on which this Article focuses: (1) occupational segregation by gender and race, and (2) stereotyping and discrimination.

Since the mid-1960s, two federal laws, and state versions of them in all but two states, have explicitly prohibited pay discrimination—Title VII of the Civil Rights Act of 1964 (“Title VII”)²⁵ and the Equal Pay Act of 1963.²⁶ Title VII prohibits discrimination in compensation because of sex or race; yet, for a plaintiff to prove that they have experienced pay discrimination, they must provide evidence of a similarly situated “comparator” outside of their race who was paid more.²⁷ The Equal Pay Act also prohibits sex discrimination in compensation and requires employers to provide equal pay for

20. See *infra* text accompanying note 75.

21. See *infra* notes 74–75 and accompanying text.

22. See *infra* text accompanying note 55.

23. See *infra* text accompanying notes 77–78.

24. See, e.g., RONALD F. FERGUSON, TOWARD EXCELLENCE WITH EQUITY: AN EMERGING VISION FOR CLOSING THE ACHIEVEMENT GAP 1–7 (2007); ALYSSA DAVIS & ELISE GOULD, ECON. POLICY INST., CLOSING THE PAY GAP AND BEYOND: A COMPREHENSIVE STRATEGY FOR IMPROVING ECONOMIC SECURITY FOR WOMEN AND FAMILIES (2015), <http://www.epi.org/publication/closing-the-pay-gap-and-beyond/>; Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 711 (2000); Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U. L. REV. 893, 901 (2014).

25. 42 U.S.C. §§ 2000e-2–e-17 (2012).

26. 29 U.S.C. § 206(d) (2012). The two states with no laws are Alabama and Mississippi. See *infra* Part II.C.

27. See 42 U.S.C. § 2000e-2–e-17; see also *infra* Part II.A.

“equal work” that “requires equal skill, effort, and responsibility.”²⁸ For a female plaintiff to prove a violation of the Equal Pay Act, she must, likewise, be able to compare herself to a male comparator performing a nearly identical job who received higher pay.²⁹ As interpreted by most federal courts, both statutes define the comparisons required to prove a violation narrowly.³⁰ Such narrow interpretations, this Article argues, have unnecessarily limited antidiscrimination law from reaching occupational segregation and stereotyping in pay-setting that contribute to the pay gaps.

While the existence of gender and racial pay gaps is nothing new, recent data on both the persistence and the causes of such gaps sheds new light on the issue, with two modern implications. First, current legal approaches to closing the pay gap are not enough. Gender and racial pay gaps have been stubbornly persistent for now more than fifty years since federal law first prohibited sex and race discrimination in pay. After shrinking consistently since the 1950s, improvement in the gender pay gap stalled around the year 2000, resulting in no meaningful narrowing of the gender pay gap in nearly twenty years.³¹ The racial pay gap has proven even more intractable: there has been no measureable improvement in the racial pay gap today as compared to the same gap in 1979, nearly forty years ago.³² For the up to one-half of these pay disparities that are the product of workforce segregation and discrimination, existing antidiscrimination laws have failed to live up to their promise of equal treatment and opportunity in employment regardless of sex or race.³³

Second, income inequality in the United States, a topic of recent intense political focus, cannot be addressed without also addressing the gender and racial pay gaps. Both pay gaps are key contributors to the increasing distance between those at the top and the bottom of the U.S. income spectrum.³⁴ As women and racial minorities continue to receive less pay, the differences in

28. 29 U.S.C. § 206(d); *see infra* Part II.B.

29. *See* 29 U.S.C. § 206(d); *infra* Part II.B.

30. *See infra* Parts II.A. & II.B.

31. *See infra* text accompanying note 49.

32. *See infra* text accompanying note 64.

33. Over two decades ago, Yale Law Professor Vicki Schultz identified and examined the persistence of sex and race segregation in the U.S. workforce despite the requirements of antidiscrimination law. For her germinal work on this issue, responding to the idea that workforce segregation reflected women’s choices, see generally Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) [hereinafter Schultz, *Telling Stories*]; Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992). *See also* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENVER U. L. REV. 995, 996, 1048–65 (2015) [hereinafter Schultz, *Taking Sex Discrimination Seriously*].

34. *See infra* Part I.C.

economic status between high- and low-wage earners compound exponentially.³⁵ Workforce segregation and discrimination are unfairly depressing wages—an economically inefficient trend with costs borne by the entire U.S. economy.

This Article takes a fresh look at the problem of unequal pay and theorizes a new legal framework under existing law to redress it. To what extent are current pay gaps due to stereotypes about the value of women and racial minorities' work, and how can antidiscrimination laws respond? The Article proceeds in four Parts. Part I provides the most up-to-date data on current gender and racial pay gaps in the United States to define the scope of the problem. It also provides related information on occupational segregation and income inequality key to understanding both the causes and the impacts of persistent unequal pay. Part II provides a comprehensive discussion of existing law prohibiting pay discrimination by sex and race, examining the limitations of current interpretations of the law that fail to redress persistent gaps. Part III identifies and analyzes key efforts to strengthen antidiscrimination protections designed to close the pay gaps, first by looking to the historical movement in the 1980s to interpret federal law as requiring equal pay for “comparable worth.” It then addresses current law reform efforts to expand equal pay protections at both federal and state levels, with a focus on three just-enacted state laws in California, Massachusetts, and Oregon that go the furthest toward requiring equal pay for “substantially similar” or “comparable work.”

Lastly, given that legislative change is difficult to achieve, Part IV proposes a reinterpretation of existing antidiscrimination statutes to allow a broader framing of comparisons when defining what constitutes “equal work.” It does so by looking to examples in which union, government, and even some private sector employers have, themselves, set equal pay across a wide array of positions, helping correct unfair pay differences due to occupational segregation. This Part pushes back on the perennial criticism levied against attempts to broaden protections for equal pay that employers should not be required to “compare apples and oranges,”³⁶ by showing that not every difference between jobs need be wage-determinative. Many employers are

35. *See id.*

36. For over thirty years, this has been a perennial criticism of equal pay initiatives. Compare S. ANNA KONDRATAS & ELEANOR SMEAL, HERITAGE FOUND., COMPARABLE WORTH: PAY EQUITY OR SOCIAL ENGINEERING? (1986), <http://www.heritage.org/jobs-and-labor/report/comparable-worth-pay-equity-or-social-engineering> (a debate in which a Heritage Foundation Senior Policy Analyst discounted a supporter of comparable worth's attempt to prove that you can “compare apples and oranges”), with Laura Bassett, *Conservatives Push Back Against Equal Pay Efforts*, HUFFINGTON POST (Apr. 8, 2014), http://www.huffingtonpost.com/2014/04/07/republicans-equal-pay_n_5106329.html (in which the executive director of the conservative Independent Women's Forum noted that “comparing men's and women's wages is like ‘comparing apples to oranges’”).

already making broader comparisons successfully to help create pay equity in their own ranks.

Debates over the size of the gender and racial pay gaps have obscured an underlying, and fixable, problem in the limitations of current antidiscrimination law. Regardless of how large or small the gaps, economists now agree that up to one-half of both gender and racial pay gaps are caused by occupational segregation and discrimination.³⁷ Court interpretations of existing antidiscrimination laws have drawn the lines around what jobs may be compared so narrowly that the law has been unable to reach its full potential to redress the problem.³⁸ The time has come to revisit equal pay protections, to modernize legal interpretations so as to effectively correct for the operation of unlawful bias in pay-setting, and to restart the long-stalled progress toward closing the pay gaps.

I. DATA AND EXPLANATIONS

Over nearly half a century, researchers have developed a significant body of data on pay gaps.³⁹ Today, economists and social scientists have documented both gender and racial pay gaps using a wide array of measures, from the most general and aggregated to the most precise and granular. Critics of policy interventions to reduce pay gaps often focus on undercutting the accuracy of these measurements.⁴⁰ Yet an overwhelming consensus of reliable data now shows that, even after controlling for virtually all relevant variables, gender and racial pay gaps remain. This Part provides an overview of the most recent data on U.S. pay gaps by gender and race, as well as related data on income inequality and workforce segregation.

A. *Measuring the Pay Gaps*

The rate of women's workforce participation has grown dramatically over the past half-century. In 1948, 32.7% of all women participated in the U.S. workforce; by 2016, that number rose to 56.8%, with a high of 60% in 1999.⁴¹ The proportion of the U.S. labor force composed of women rose from

37. See *infra* text accompanying notes 83–86, 106–111.

38. See *infra* Part III.A. & B.

39. See, e.g., Doris Weichselbaumer & Rudolf Winter-Ebmer, *A Meta-Analysis of the International Gender Wage Gap*, 19 J. ECON. SURVEYS 479, 479 (July 2005) (citing research “since the early 1970s”).

40. See, e.g., STEVEN HORWITZ, FOUND. FOR ECON. EDUC., TRUTH AND MYTH ON THE GENDER PAY GAP (2017), <https://fee.org/articles/truth-and-myth-on-the-gender-pay-gap/>; Christina Hoff Sommers, *6 Feminist Myths That Will Not Die*, TIME, <http://time.com/3222543/wage-pay-gap-myth-feminism/> (last updated June 17, 2016, 3:20 PM).

41. WOMEN'S BUREAU, U.S. DEP'T OF LAB., LABOR FORCE PARTICIPATION RATE BY SEX, RACE AND HISPANIC ETHNICITY, 1948–2016 ANNUAL AVERAGES,

28.6% in 1948 to 46.8% in 2016.⁴² Yet despite women's near equal participation in the paid workforce today, a persistent gender pay gap remains.

While the size of the gender pay gap varies depending on what you measure, three key principles are consistent across the data. First, at every level of the economy and no matter how many variables for which you control, there is still a pay gap between men and women—it is just a question of a relatively larger or smaller gap.⁴³ Second, improvement in the pay gap has been stalled for nearly twenty years.⁴⁴ Third, when more women are present in a field, the average pay is lower.⁴⁵ There is no female-dominated profession that, when compared to a male-dominated profession requiring the same education and experience, is more highly paid. As more women enter a profession, the average pay for that position decreases.⁴⁶

The most oft-cited statistic for the gender pay gap aggregates and compares the median pay of all women and men working full time. Recent data shows that, when comparing those engaged in full-time year-round work, women earn \$0.80 for every dollar earned by men annually.⁴⁷ When hourly wages are compared, allowing part-time workers to be included and adjusting for the fact that men may work more hours in a year, women earn on average \$0.83 to every dollar men earn per hour.⁴⁸

After narrowing from the late 1970s through the 1990s, improvements in the gender wage gap stalled, and the current 75% to 80% figure has remained relatively stagnant for nearly two decades.⁴⁹ What gains were made by women during this time period were due, in part, to women's increasing levels of education and work experience, and, in part, to stagnation in men's wages. In fact, the real value of men's wages have decreased by 6.7% since 1979, meaning that nearly one-third of women's gains in narrowing the gender pay gap came from a decline in men's wages.⁵⁰ At the current rate of

https://www.dol.gov/wb/stats/NEWSTATS/facts/lf_prate_sex_race_hisp_2016_txt.htm (last visited Mar. 12, 2018).

42. WOMEN'S BUREAU, U.S. DEP'T OF LAB., CIVILIAN LABOR FORCE BY SEX, 1948–2016 ANNUAL AVERAGES, https://www.dol.gov/wb/stats/NEWSTATS/facts/civilian_lf_sex_2016_txt.htm (last visited Mar. 12, 2018).

43. See *infra* notes 53–61 and accompanying text.

44. See *infra* text accompanying notes 49–51.

45. See *infra* notes 92–96.

46. See *infra* notes 97–100 and accompanying text.

47. See AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 4 (2d ed. 2017), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth [hereinafter AAUW]; GOULD ET AL., *supra* note 11, at 1, 5.

48. See GOULD ET AL., *supra* note 11, at 1, 6.

49. See AAUW, *supra* note 47, at 4; GOULD ET AL., *supra* note 11, at 8.

50. See GOULD ET AL., *supra* note 11, at 9.

progress, experts estimate that it will take somewhere between 41 and 101 years for all U.S. women to achieve equal pay with men.⁵¹

Using the most aggregated statistics to measure the gender pay gap may be subject to the criticism that comparing all women to all men masks rational, nondiscriminatory reasons for disparate pay, such as differences in experience, qualifications, or work hours.⁵² Yet no matter how you slice the data, a pay gap remains.⁵³ For example, the pay gap widens as women reach prime childbearing years, but it exists long before then, too. Full-time working women ages twenty to twenty-four make \$0.96 on the dollar to men; those ages twenty-five to fifty-four drop to earning between \$0.78 and \$0.89 on the dollar to men. The gap increases further, to between \$0.74 and \$0.82 to each dollar men earn until age fifty-five, after which the gap remains at around \$0.74.⁵⁴ Likewise, while education level generally increases pay, when only women and men who have achieved the same level of education are compared, the pay gap becomes even greater, likely because the average female worker has *more* education than the average male worker.⁵⁵ Women with a high school degree earn 78% of what men with a high school degree earn; women with a bachelor's degree earn only 74% of what men with a bachelor's degree earn, as do women with an advanced degree compared to similarly educated men.⁵⁶ When female and male college graduates' earnings are compared just one year out of college, the female graduates earned only \$0.82 to the dollar of their equally situated male classmates.⁵⁷ While disaggregating data and controlling for a variety of variables allow a narrow comparison

51. See AAUW, *supra* note 47, at 4 (estimating that equal pay will not happen until 2059 at the earliest or 2119 if current conditions persist).

52. See, e.g., Emily Moore, *5 Things We Still Get Wrong About the Gender Pay Gap*, GLASSDOOR (Mar. 1, 2017), <https://www.glassdoor.com/blog/5-things-wrong-gender-wage-gap/>; Jason Richwine, *The Radicalism of 'Equal Pay Day'*, NAT'L REV. (Apr. 9, 2017, 10:40 PM), <http://www.nationalreview.com/article/446585/equal-pay-day-gender-wage-gap-advocates-radicalism>; Sommers, *supra* note 40.

53. See GOULD ET AL., *supra* note 11, at 1.

54. See AAUW, *supra* note 47, at 11–12 (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY ANNUAL AVERAGE DATA TABLES, at tbls.2 & 39 (2017)); see also GOULD ET AL., *supra* note 11, at 13.

55. See GOULD ET AL., *supra* note 11, at 6–7.

56. See AAUW, *supra* note 47, at 14 fig.6 (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MEDIAN WEEKLY EARNINGS, BY LEVEL OF EDUCATION AND GENDER IN 2016 (2017)); GOULD ET AL., *supra* note 11, at 19.

57. See AAUW, *supra* note 47, at 13 (citing CHRISTINE CORBETT & CATHERINE HILL, AM. ASS'N OF UNIV. WOMEN, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION (2012)).

of the most similarly situated men and women, doing so also ignores differences in opportunities and workplace norms that make it harder for women to reach that level of similarity in the first place.⁵⁸

Even after controlling for nearly all possible quantifiable variables, there remains some portion of the gender wage gap that cannot be explained, leading researchers to infer discrimination. One group of economists found a 13.5% difference when industry, occupation, and work hours were controlled to model “a man and woman with identical education and years of experience working side-by-side in cubicles.”⁵⁹ In another study, researchers controlled for “college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status,” and still found a gender wage gap of 7% one year after college graduation and 12% ten years later.⁶⁰ In yet a third study, researchers found a remaining disparity of 8.4% after controlling for not only education, industry, occupation, experience level, and geography, but also race, ethnicity, and metropolitan region.⁶¹

The U.S. economy is also marked by a steep racial pay gap that, while less commonly documented than the gender pay gap, is similarly consistent. One recent study of pay data from 2015 showed that all black men’s average hourly wages were 31% lower than all white men’s.⁶² After controlling for education, experience, and geography, black men earned \$0.78 on the dollar to white men (a 22% wage gap).⁶³ Most disturbingly, the research showed that, except for a brief narrowing in the late 1990s, the racial pay gap between

58. See GOULD ET AL., *supra* note 11, at 2 (“[B]ecause gender wage gaps that *are* ‘adjusted’ for workers’ characteristics (through multivariate regression) are often smaller than unadjusted measures, people commonly infer that gender discrimination is a smaller problem in the American economy than thought.”). But using adjusted rates only “misses all of the potential differences in opportunities for men and women that affect and constrain the choices they make before they ever bargain with an employer over a wage.” *Id.* Thus:

switching to a fully adjusted model of the gender wage gap actually can radically understate the effect of gender discrimination on women’s earnings . . . because gender discrimination doesn’t happen only in the pay-setting practices of employers making wage offers to nearly identical workers of different genders. Instead, it can potentially happen at every stage of a woman’s life, from girlhood to moving through the labor market.

Id. at 7.

59. See GOULD ET AL., *supra* note 11, at 7 & 36 n.9.

60. See AAUW, *supra* note 47, at 20 (first citing CORBETT & HILL, *supra* note 57; and then citing J. G. DEY & C. HILL, AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., BEHIND THE PAY GAP (2007)).

61. GOULD ET AL., *supra* note 11, at 7 & 36 n.10 (citing Blau & Kahn, *supra* note 7, at 5).

62. See VALERIE WILSON & WILLIAM M. RODGERS III, ECON. POLICY INST., BLACK-WHITE WAGE GAPS EXPAND WITH RISING WAGE INEQUALITY 1, 3 (2016), <http://www.epi.org/publication/black-white-wage-gaps-expand-with-rising-wage-inequality/>.

63. See *id.* at 1.

black and white workers has remained stable or increased *for nearly forty years*.⁶⁴ For black men with at least a college degree in their first ten years on the job market, a 10% pay penalty as compared to similar white men in the 1980s *increased* to 20% in 2014.⁶⁵ Another study confirmed this lack of progress in closing the racial pay gap for black men, who “earned the same 73%” of white men’s earnings in both 1980 and 2015.⁶⁶ Latino men’s hourly earnings as compared to white men’s actually decreased from 71% in 1980 to 69% in 2015.⁶⁷ When comparing only college educated workers, black and Latino men earn 20% less than similarly-situated white men.⁶⁸

Not surprisingly, women of color fare the worst of all U.S. workers, experiencing both gender and racial pay gaps. According to recent aggregated data, Latina women earn only \$0.54 annually, \$0.58 hourly and African American women only \$0.63 annually, \$0.65 hourly to each dollar earned by white men.⁶⁹ Yet even after controlling for education, experience, and geography, women of color’s pay gap remains nearly unchanged. One study controlling for such factors showed that black women still suffer a 34% pay gap when compared with similarly situated white men⁷⁰; another showed a 30% gap in the hourly wages of black and Latina women with a college degree as compared to those of “similarly educated white men.”⁷¹ Black women are also at a disadvantage in earnings as compared to white *women*. One study reported that all black women’s average hourly wages were 19% lower than white women’s,⁷² and another, with adjusted data, that black women experienced a 12% pay gap when compared to similarly situated white women.⁷³ Even using these most adjusted data, women of color earn, on average, only

64. *See id.*

65. *See id.*

66. Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RES. CTR. (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>; Kirsten Salyer, *The Racial Wage Gap Has Not Changed in 35 Years*, TIME (July 1, 2016), <http://time.com/4390212/race-wage-gap-pew-analysis/>.

67. Patten, *supra* note 66.

68. *See id.* Asian men now earn, on average, more than white men, with a median hourly wage of \$24 to white men’s \$21. *Id.* For this reason, Asian men’s earnings are not discussed.

69. AAUW, *supra* note 47, at 11 (providing annual figures from 2016); GOULD ET AL., *supra* note 11, at 13 (providing hourly figures from 2015). Asian women now earn, on average, more than white women, with a median hourly wage of \$18 to white women’s \$17. Patten, *supra* note 66. For this reason, Asian women’s earnings are not discussed separately as they relate to the racial pay gap, but are included in the discussion of the overall gender pay gap between women and men.

70. WILSON & RODGERS, *supra* note 62, at 1, 3–4.

71. Patten, *supra* note 66.

72. WILSON & RODGERS, *supra* note 62, at 1. This statistic is all the more disturbing given that the gap between white and black women’s earnings was only 6% in 1979—meaning that this gap more than tripled in the past four decades. *Id.* at 3.

73. *Id.* at 4.

\$0.66 to \$0.70 on the dollar of their white male peers and \$0.88 on the dollar of their white female peers.

To be sure, a significant portion of the racial pay gap can be explained by actual demographic differences in workforce characteristics between white and minority workers, including “human capital” factors like education and experience levels. One recent study quantified that one-third of the unadjusted racial pay gap was due to “[d]ifferences in . . . education and experience levels” attained between black and white workers and their resulting job opportunities and outcomes.⁷⁴ Another study, focused on public sector workers, estimated that “individual attributes such as human capital” and “education and workforce experience” accounted for just over half of the observed racial pay gap.⁷⁵

Real demographic differences also contribute to the gender pay gap, primarily in differences between men and women’s working time; today, education and experience represent little of the overall gender pay gap for white women, although a greater portion for women of color.⁷⁶ Women are more likely to work fewer hours than men: twice as many women work part-time as men (one-eighth of men, one-quarter of women), often involuntarily.⁷⁷ Women are also more likely to be out of the workforce without pay for some period of childbirth, childrearing, or other family caregiving.⁷⁸ Notably, over 85% of American women have children by age forty-four.⁷⁹ Fewer hours or months of work impact women’s experience levels, which compounds their relative pay disadvantage.⁸⁰ Women are also more likely to need occupations that allow for what Harvard economist Claudia Goldin calls “temporal flexibility,” which tend to pay less; the highest paying jobs in the U.S. economy

74. *Id.* at 3; *see also* Patten, *supra* note 66 (reporting that a significant portion of the racial pay gap is caused by “differences in education [and] labor force experience”).

75. Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC. REV. 542, 562 (2001); *see also* Patten, *supra* note 66.

76. *See* Patten, *supra* note 66 (noting that the narrowing in the pay gap for all women from 1980 to 2015 was attributed to increased human capital—“a significant increase in the education levels and workforce experience of women over time,” although black (\$0.09 improvement) and Latina (\$0.05 improvement) women still lagged far behind white women (\$0.22 improvement) on this measure).

77. *See* GOULD ET AL., *supra* note 11, at 16 (citing LONNIE GOLDEN, ECON. POLICY INST., STILL FALLING SHORT ON HOURS AND PAY: PART-TIME WORK BECOMING NEW NORMAL (2016), <http://www.epi.org/publication/still-falling-short-on-hours-and-pay-part-time-work-becoming-new-normal/>).

78. *See* GOULD ET AL., *supra* note 11, at 15–17.

79. Claire Cain Miller, *The U.S. Fertility Rate Is Down, Yet More Women Are Mothers*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/upshot/the-us-fertility-rate-is-down-yet-more-women-are-mothers.html>.

80. *See* GOULD ET AL., *supra* note 11, at 14–17.

often demand specific and very long hours.⁸¹ All of these factors contribute to a “motherhood wage penalty,” whereby women who are mothers earn less than women without children and all men.⁸²

The portion of both pay gaps that is due to actual demographic differences in human capital or working hours is beyond the reach of existing antidiscrimination law and requires greater policy interventions. What remains of the gender and racial pay gaps, however, has been attributed to two major causes this Article seeks to address: occupational segregation and discrimination.

B. Segregation and Stereotyping in the U.S. Workforce

Gender workforce segregation accounts for a significant, and increasing, portion of the current gender pay gap.⁸³ In a 2016 study, Cornell economists Francine Blau and Lawrence Kahn estimated that industry and occupational factors now account for 49% of the gender pay gap, responsible for nearly twice as much of the pay gap as thirty years ago.⁸⁴ In contrast, in a 2014 study, Harvard economist Claudia Goldin documented that the pay gap *within* occupations was greater than the pay gap *between* occupations, leading her to conclude that changes to hours requirements and flexibility were more important to closing the pay gap than gender workforce integration.⁸⁵ Yet, even while suggesting that “what is going on within occupations . . . is

81. See Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 1091, 1117 (2014); GOULD ET AL., *supra* note 11, at 16.

82. GOULD ET AL., *supra* note 11, at 14. This portion of the gender wage gap is often attributed to women’s “choices” to go into certain fields or to trade flexibility and fewer work hours for money. This characterization ignores the fact that, while women may wish to balance work and caregiving, they do not “choose” to be economically penalized for doing so. See, e.g., *id.* at 3, 7, 21–22; JOAN C. WILLIAMS ET AL., “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 36 (2006), <http://worklifelaw.org/pubs/OptOutPushedOut.pdf>. Regardless, this bundle of issues—hours, inflexible work schedules, and the deterrent effect of both on the fields and industries women pursue—contributes a significant portion of the wage gap. See, e.g., Goldin, *supra* note 81, at 1116–17. Other legal scholars have sought to address these issues, which require significant and well-documented legal reforms, including pregnancy accommodation, paid family and medical leave, part-time parity, workplace flexibility, and reducing stigma to men for family care—a discussion that is beyond this Article’s focus on antidiscrimination law. See, e.g., Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1215 (2010); Selmi, *supra* note 24, at 711; Travis, *supra* note 24, at 901.

83. See ARIANE HEGEWISCH & HEIDI HARTMANN, INST. FOR WOMEN’S POLICY RES., OCCUPATIONAL SEGREGATION AND THE GENDER WAGE GAP: A JOB HALF DONE 16 (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C419.pdf>; Catanzarite, *supra* note 10, at 14.

84. Blau & Kahn, *supra* note 7, at 26 (“[W]hile the share of the gender wage gap due to human capital (education and experience) has declined noticeably, the share accounted for by locational factors like occupation and industry actually increased from 27% of the 1980 gap to 49% of the much smaller 2010 gap.”).

85. See generally Goldin, *supra* note 81.

far more important to the gender gap in earnings than is the distribution of men and women by occupations,” Goldin still attributed 32–42% of the gender pay gap among college graduates working full-time year-round to the gap *between* occupations.⁸⁶ As both studies show, greater policy changes around working hours and flexibility may be essential to closing the gender pay gap entirely; in the meantime, however, a focus on reducing discrimination and occupational segregation offers the potential to cut it nearly in half.

While, like the pay gap itself, gender workforce segregation lessened from the 1970s through the 1990s, it, too, has stalled since 2000.⁸⁷ Segregation today among jobs and industries by sex appears as intractable as ever: recent studies identified that roughly half of all women would have to change jobs for the U.S. workforce to be fully integrated by gender.⁸⁸ In 2012, over 40% of women and only 5% of men worked in fields in which more than 75% of the workers were female; over 44% of men and only 6% of women worked in fields in which more than 75% were male.⁸⁹ While the proportion of women in professional occupations like managers, lawyers, and doctors has grown from less than one-sixth (4%–15%) to more than one-third (32%–38%) today, many of the most common occupations for men or for women have had “remarkably little change” in terms of gender integration over the past four decades.⁹⁰

This stall has contributed to the persistence of the gender pay gap. Research suggests that increased integration contributed significantly to the gains women made in closing the pay gap between the 1970s and 2000: as occupational segregation went down, the gap between women and men’s pay narrowed; as integration slowed and then stalled in the 2000s, so too did improvement in the gender pay gap. Indeed, one study estimated that 40% to 60% of the growth of real wages experienced by women and by black men between 1960 and 2008 was due to increases in occupational integration by gender and race.⁹¹

When occupations are segregated by gender, women get the short end of the stick. Throughout the U.S. economy, occupations that are female dominated pay less than those that are male dominated that require the same levels

86. *Id.* at 1098; see also GOULD, ET AL., *supra* note 11, at 20–21.

87. See AAUW, *supra* note 47, at 17 (citing HEGEWISCH & HARTMANN, *supra* note 83).

88. See CECILIA L. RIDGEWAY, FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD 5 (2011); Blau & Kahn, *supra* note 7, at 27 (51% in 2009, down from 64.5% in 1970); Youngjoo Cha, *Overwork and the Persistence of Gender Segregation in Occupations*, 27 GENDER & SOC’Y 158, 159 (2013).

89. See HEGEWISCH & HARTMANN, *supra* note 83, at 1.

90. See *id.* at 2, 4.

91. See Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth* 42 (Nat’l Bureau of Econ. Research, Working Paper No. 18693, 2013), <http://www.nber.org/papers/w18693>.

of education and experience.⁹² Data comparing gender-segregated occupations mirrors the wage gap itself: on average, the median weekly pay for both men and women working in female-dominated occupations, where women compose more than half of those in that occupation, is \$0.83 on the dollar to the average median weekly pay for both men and women working in male-dominated occupations.⁹³ Even when controlling for required skills and education level, occupations with a greater proportion of female workers usually pay less than those with fewer female workers.⁹⁴ Looking at the gender distribution among occupations that make up the top and the bottom of the earnings in the U.S. workforce brings the data disturbingly to life. Of the thirty jobs in the U.S. economy with the highest pay, twenty-six are held mostly by men; only pharmacists, nurse practitioners, physician assistants, and physical therapists both have more than a 50% female workforce and earn in the top decile of wages.⁹⁵ On the other hand, twenty-three of the thirty lowest paid occupations are held mostly by women; only dishwashers and cooks, car cleaners, parking lot attendants, and grounds and agricultural workers are both male-dominated fields and in the lowest decile of earnings.⁹⁶

Compounding this disparity, data shows that when more women enter a particular field or occupation, the pay decreases.⁹⁷ In a fifty-year longitudinal study of U.S. Census data from 1950 to 2000, Stanford sociologists Asaf Levanon, Paula England, and their colleagues set out “to assess whether or not there is a causal effect in either direction between sex composition and pay,” and found “substantial evidence” that lower pay among female-dominated occupations was due to “devaluation of work done by women.”⁹⁸ As the researchers explained, the theory of “devaluation” posits “that decisions of employers about the relative pay of ‘male’ and ‘female’ occupations are affected by gender bias”: because “[e]mployers ascribe a lower value for the work done in occupations with a high share of females,” they “consequently set lower wage levels” for those occupations.⁹⁹ After conducting a long-term

92. See AAUW, *supra* note 47, at 17–18; LINER, *supra* note 8.

93. LINER, *supra* note 8.

94. See Levanon et al., *supra* note 1, at 865 (first citing Philip N. Cohen & Matt L. Huffman, *Individuals, Jobs, and Labor Markets: The Devaluation of Women’s Work*, 68 AM. SOC. REV. 443 (2003); then citing David A. Cotter et al., *All Women Benefit: The Macro-Level Effect of Occupational Integration on Gender Earnings Equality*, 62 AM. SOC. REV. 714 (1997); and then citing PAULA ENGLAND, *COMPARABLE WORTH: THEORIES AND EVIDENCE* (1992)).

95. LINER, *supra* note 8.

96. *Id.*

97. See Goldin, *supra* note 81 and accompanying text (describing the “pollution theory” of workplace sex discrimination); Levanon et al., *supra* note 1, at 886; Miller, *supra* note 1, at 2.

98. Levanon et al., *supra* note 1, at 865, 870.

99. *Id.* at 866.

analysis of median hourly wages for full-time workers by occupation—in which they controlled for education, experience, race, and geographic region, and changes in skills demanded by jobs—the researchers “found substantial support” of a consistent trend over time “that increased feminization of occupations diminishes their relative pay.”¹⁰⁰

Beyond occupational segregation, even among the same field and *even the very same job*, women earn less on average than men and universally experience a pay gap.¹⁰¹ In similar types of occupations, for example, car and equipment cleaners (90% of whom are male) earn 14% more than housecleaners (85% of whom are female).¹⁰² Within the same occupation, female truck drivers earn 80% of male truck drivers’ pay; female software developers 83% of male software developers; female financial managers 69% of male financial managers.¹⁰³ Strikingly, even in traditionally feminine fields, women earn less than men. In 2014, female elementary and middle school teachers’ median weekly earnings were 87% of what male teachers earned (\$140 less), female registered nurses 90% of what male registered nurses earned (\$114 less per week), and female administrative assistants 85% of male counterparts (\$126 less per week), despite the fact that women greatly outnumbered men in those positions, holding 80% to 95% of those jobs.¹⁰⁴ In fact, as one study documented, out of 120 occupations analyzed, including female-dominated occupations, men earned more than women in 116; the exceptions were non-farm product buyers, data entry workers, general office clerks, and police patrol officers, all jobs in which women earned the same as men.¹⁰⁵

Racial minorities also suffer economic consequences due to occupational segregation by race. As with gender, setting aside the portion of the

100. *Id.* at 886. In their research, Asaf Levanon et al. explain that they:

...found some evidence for the devaluation view—an effect of earlier female proportion on occupations’ later wage rates, even in the presence of controls for experience and educational requirements. When we divided our data into four periods, we saw no diminution of the devaluation effect over time; if anything, it increased (in the 1980s). This argues against the neoclassical equalizing differences view, which predicts no net effect of sex composition with adequate controls.

Id. at 885.

101. See GOULD ET AL., *supra* note 11, at 20–21; AAUW, *supra* note 47, at 18.

102. LINER, *supra* note 8.

103. AAUW, *supra* note 47, at 18 (citing BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, CURRENT POPULATION SURVEY ANNUAL AVERAGE DATA TABLES tbl.9 (2017)).

104. *Traditional Occupations*, BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR <https://www.dol.gov/wb/stats/TraditionalOccupations.pdf> (last visited Mar. 12, 2018) (describing the 2014 annual averages of “traditional (female-dominated) detailed occupations by women’s share of employment and median weekly earnings”); see also AAUW, *supra* note 47, at 18.

105. LINER, *supra* note 8 (citing BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2015, REPORT tbl.2 (2016), <https://www.bls.gov/opub/reports/womens-earnings/2015/home.htm>).

racial pay gap attributable to human capital and workforce characteristics, up to one half remains. Studies of the causes of the remaining racial pay gap attribute it to income inequality and labor market tightening,¹⁰⁶ discrimination,¹⁰⁷ and racial workforce segregation.¹⁰⁸ One study identified that one-third of the pay gap between black and white workers could be attributed to race discrimination.¹⁰⁹ Another study found that, as compared to their presence in the labor market, black men are disproportionately over-represented in 38% of occupations that pay lower wages and disproportionately under-represented in nearly half of occupations that offer higher pay.¹¹⁰ Still another study quantified this impact, documenting that, depending on the degree of experience required for the job, racial workforce segregation was responsible for 28% to 41% of the increase in the black-white pay gap between 1979 and 1985 and 11% to 25% of the increase in the black-white pay gap among women between 2000 and 2015.¹¹¹

Like gender-based “devaluation,” in a study of both gender and racial pay gap trends, researchers documented the phenomenon of “pay erosion” over time in occupations that became increasingly dominated by female and minority workers, which they attributed to the fact that such workers tend to follow white men into occupations.¹¹² In jobs such as clerks, bank tellers, bartenders, real estate agents, and advertising agents that were once predominantly filled by white men, pay drops indicated “declining desirability,” which was then compounded by “greater visibility” of women and minorities in those positions.¹¹³ This creates what the researchers describe as the “insidious problem” that “pay deteriorates precisely where subordinate groups are concentrated.”¹¹⁴

Reflecting upon the body of research on the causes of pay gaps, the impact of workforce segregation and stereotyping becomes clear. First,

106. See WILSON & RODGERS, *supra* note 62, at 1, 4–5; Tanzina Vega, *Wage Gap Between Blacks and Whites Is Worst in Nearly 40 Years*, CNN MONEY (Sept. 20, 2016), <http://money.cnn.com/2016/09/20/news/economy/black-white-wage-gap/index.html>.

107. See Roland G. Fryer, Jr. et al., *Racial Disparities in Job Finding and Offered Wages*, 56 J.L. & ECON. 633, 633–37 (2013); see also Patten, *supra* note 66; WILSON & RODGERS, *supra* note 62, at 1, 3–4.

108. See WILSON & RODGERS, *supra* note 62, at 49–51 & 49 n.21.

109. See Fryer, Jr. et al., *supra* note 107, at 635; see also Patten, *supra* note 66; WILSON & RODGERS, *supra* note 62, at 1, 3–4.

110. HAMILTON ET AL., *supra* note 19, at 3; see also Thompson, *supra* note 19 (“Blacks, who make up just 11 percent of the workforce, account for more than a third of home health aides and about 25 percent of both security guards and bus drivers—rather low paying jobs.”).

111. WILSON & RODGERS, *supra* note 62, at 49–51 & 62 n.21; see also Patten, *supra* note 66.

112. Catanzarite, *supra* note 10, at 28; see also Goldin, *supra* note 81 (describing the “pollution theory” of sex discrimination).

113. Catanzarite, *supra* note 10, at 29.

114. *Id.* at 30.

“women’s” work and the work performed by racial minorities is valued less than the work performed by white men—and paid accordingly. Second, when women do “men’s” work and when racial minorities do work previously performed by white workers, *they* are valued less, despite doing the same work.

C. Relationship to Income Inequality

The issue of income inequality—the wide and widening gap in the wealth and standard of living between those at the top and bottom of the U.S. income spectrum—has garnered much political attention in recent years.¹¹⁵ Both gender and racial pay gaps contribute to the existence of income inequality in the United States and, left unchecked, stand to magnify its impact.

In one example of this relationship, research shows that women have higher rates of poverty than men due, in part, to the gender wage gap.¹¹⁶ One study estimated that, if the gender pay gap was eliminated, the rate of poverty among all women would be cut in half.¹¹⁷ The cumulative economic disadvantage to women due to the gender pay gap is, itself, quite shocking. Over the course of a lifetime, an average working woman will lose over half a million dollars, and the average woman with a college degree \$800,000, due to the gender pay gap.¹¹⁸ The pay gap also impacts women’s economic security in retirement as they receive less than men from Social Security and other retirement income tied to wages earned while working.¹¹⁹

Today, a greater proportion of family earnings come from women, and single mothers head more families; thus the gender pay gap hurts not just women but all families’ economic security.¹²⁰ Nearly 70% of all women with

115. See, e.g., Will Drabold, *Read Bernie Sanders’ Speech at the Democratic Convention*, TIME (July 26, 2016), <http://time.com/4421574/democratic-convention-bernie-sanders-speech-transcript/> (“This election is about ending the grotesque level of income and wealth inequality that we currently experience, the worst it has been since 1928.”).

116. See, e.g., AAUW, *supra* note 47, at 4 (citing JESSICA L. SEMEGA ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016 (2017) (reporting that, depending on age, 11%-13% of women live below the federal poverty line as compared to 8%-10% of men)).

117. See HEIDI HARTMANN ET AL., INST. FOR WOMEN’S POLICY RES., HOW EQUAL PAY FOR WORKING WOMEN WOULD REDUCE POVERTY AND GROW THE AMERICAN ECONOMY 1 (2014), <https://iwpr.org/publications/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy/>.

118. GOULD ET AL., *supra* note 11, at 7 (citing INST. FOR WOMEN’S POLICY RES., STATUS OF WOMEN IN THE STATES 50 (2015)). See generally SUSAN BISOM-RAPP & MALCOLM SARGEANT, LIFETIME DISADVANTAGE, DISCRIMINATION AND THE GENDERED WORKFORCE 115–30 (2016) (describing the impact of unequal pay over a woman’s lifetime).

119. See AAUW, *supra* note 47, at 5 (citing JOCELYN FISCHER & JEFF HAYES, INST. FOR WOMEN’S POLICY RES., THE IMPORTANCE OF SOCIAL SECURITY IN THE INCOMES OF OLDER AMERICANS: DIFFERENCES BY GENDER, AGE, RACE/ETHNICITY, AND MARITAL STATUS (2013)).

120. *Id.* (“Today, 42 percent of mothers with children under the age of 18 are their families’ primary or sole breadwinners. . . . [F]amilies increasingly rely on women’s wages to make ends

children under 18 and over 75% of single mothers with children under 18 now work.¹²¹ Mothers' income is crucial to family economic support: almost two-thirds of women bring in at least one-quarter of a family's income,¹²² and 42% of women with minor children are the primary or the only earner in the family.¹²³ If working single mothers received equal pay, one study estimates that two-thirds would receive an increase in their pay, and their "very high poverty rate" would also be cut in half, from 28.7% to 15%.¹²⁴ This exacts societal costs, too, as families in poverty depend on government-supported aid like Temporary Assistance to Needy Families ("TANF"). Another study estimated that, if women achieved pay equity, their earnings would amount to nearly fifteen times state and federal government expenditures on TANF in 2012.¹²⁵

Interestingly, the gender pay gap is actually worse among higher-earning women, although they have also experienced greater improvements in narrowing the wage gap over time.¹²⁶ In 2015, women who earned wages in the tenth percentile of earnings earned \$0.92 on the dollar to men, while women in the ninety-fifth percentile earned only \$0.74.¹²⁷ Yet the fact that the floor of the minimum wage keeps lower-paid women's pay on more equal footing with men is likely of little consolation to those at the tenth percentile, who earned less than approximately \$19,000 in 2015¹²⁸—an income level at which \$0.08 on the dollar is sorely missed. As one study showed, removing the gender pay differential for women who perform lower-skilled occupations would increase their annual pay by about \$6000 to \$7000—as the re-

meet." (citing SARAH JANE GLYNN, BREADWINNING MOTHERS ARE INCREASINGLY THE U.S. NORM, CTR. AM. PROGRESS (2016), <https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/>)).

121. A SNAPSHOT OF WORKING MOTHERS, NAT'L WOMEN'S LAW CTR. 1 (2017), <https://nwlc.org/wp-content/uploads/2017/04/A-Snapshot-of-Working-Mothers.pdf>.

122. AAUW, *supra* note 47, at 5 (63% in 2012).

123. *Id.* (citing Glynn, *supra* note 120).

124. HARTMANN ET AL., *supra* note 117, at 1.

125. *See id.* Another concern is the ability to repay student debt: because women earn roughly three-quarters of what men earn with their same level of education, women's ability to repay student debt is correspondingly lessened, and women remained saddled with student debt for longer periods of time. For example, in one study of 2007–2008 college graduates, men had paid off 44% of their student debt five years later, while white women had paid off only 33%—African American and Hispanic women paid off less than 9%. *See* AAUW, *supra* note 47, at 16 fig.8 (citing AAUW data analysis from U.S. DEP'T OF EDUC., BACCALAUREATE AND BEYOND LONGITUDINAL STUDY 2008/12 (2015)).

126. *See* GOULD ET AL., *supra* note 11, at 10–11; HEGEWISCH & HARTMANN, *supra* note 83, at 14–15.

127. GOULD ET AL., *supra* note 11, at 10–11.

128. Elka Torpey, *Business Careers with High Pay*, U.S. BUREAU OF LABOR STAT. (Aug. 2016), <https://www.bls.gov/careeroutlook/2016/article/mobile/high-paying-business-careers.htm>.

searchers note, pay differences “of [a] magnitude...enough to make the difference between above-poverty and below-poverty family living standards.”¹²⁹ Where there has been improvement in narrowing the wage gap over time, it has been felt more strongly by women at higher income levels. As one study showed, between 1979 and 2015, women in the ninetieth percentile of earnings (earning over \$92,000 in 2015)¹³⁰ gained \$0.11 on the dollar to similarly earning men (from \$0.63 in 1979 to \$0.738 in 2015 on the dollar), while women in the tenth percentile gained only \$0.05 during the same time period (from \$0.869 to \$0.92 on the dollar).¹³¹

The racial pay gap is also exacerbating the problem of income inequality by race. One study documented the shocking statistic that the average African-American household has a mere 6%, and Latino household 8%, of the wealth of the average white family.¹³² While median annual incomes are closer—white families average \$50,400 as compared to \$32,038 for black and \$36,840 for Latino families annually—the wide disparity in overall wealth is attributed in large part to labor market differences.¹³³ Because families of color are paid less on the dollar, their relative wealth is always less. As one of the study’s authors explained: “If you are facing a wealth gap of 80 cents for every dollar a white family makes, that makes you 20% less able to put that dollar into savings, because you may need all of those dollars to fill your consumption needs.”¹³⁴ If racial wage gaps were eliminated, the researchers estimated, “median Black wealth would grow \$11,488” and “[m]edian Latino wealth would grow \$8,765,” shrinking the wealth gap relative to white families by 11% (Black) and 9% (Latino).¹³⁵ Further, if the return on that income were made equal—meaning the ability to save or invest at similar rates, rather than having to spend more to cover the same basic needs—“median Black wealth would grow \$44,963 and median Latino wealth would grow \$51,552,” closing the wealth gap with white families by 43% (Black) and 50% (Latino).¹³⁶

129. See HEGEWISCH & HARTMANN, *supra* note 83, at 19.

130. Torpey, *supra* note 128.

131. GOULD ET AL., *supra* note 11, at 10–11.

132. See LAURA SULLIVAN ET AL., THE RACIAL WEALTH GAP: WHY POLICY MATTERS 7 (2015), http://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf; see also Laura Shin, *The Racial Wealth Gap: Why a Typical White Household Has 16 Times the Wealth of a Black One*, FORBES (Mar. 26, 2015), <https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#307ffa5f1f45>.

133. SULLIVAN ET AL., *supra* note 132, at 1–6, 24–31. The other major causes of the wealth disparity are differences in homeownership rates and education levels. *Id.*

134. Shin, *supra* note 132.

135. SULLIVAN ET AL., *supra* note 132, at 3.

136. *Id.*

To the extent that law and policymakers wish to remedy income inequality, the gender and racial pay gaps are an essential cause of, and exacerbating factor to, the problem.

II. EXISTING LAW AND ITS LIMITATIONS

For over fifty years, federal law has prohibited pay discrimination through both civil rights (Title VII of the Civil Rights Act of 1964)¹³⁷ and wage and hour (the Equal Pay Act of 1963)¹³⁸ approaches. Since then, all but two states (Alabama and Mississippi) have enacted their own versions of both laws, either mirroring federal protections or going further to enact more stringent requirements.¹³⁹ Despite major advances in equal opportunity and increased earnings for women and racial minorities, five decades of legal protection have yet to close the gender and racial pay gaps. This Part provides an overview of existing protections against pay discrimination under federal and state law and identifies the limitations that have hampered efforts to achieve pay equity.

A. *Title VII of the Civil Rights Act of 1964*

The main federal antidiscrimination law prohibiting discrimination in employment, Title VII of the Civil Rights Act of 1964 (“Title VII”), includes specific protections against pay discrimination.¹⁴⁰ Title VII prohibits discrimination on the basis of race, color, national origin, sex or religion in hiring, firing, terms and conditions of employment, and “compensation.”¹⁴¹ Under Title VII, “compensation” includes not only wages but also benefits, commissions, and other financial incentives and rewards attached to employment.¹⁴²

137. 42 U.S.C. §§ 2000e-2–e-17 (2012).

138. 29 U.S.C. § 206(d) (2012).

139. *See infra* Part II.C.

140. *See* 42 U.S.C. § 2000e-2(a)(1).

141. *See* 42 U.S.C. § 2000e-2.

142. U.S. EQUAL EMP. OPPORTUNITY COMM’N COMPLIANCE MANUAL, SECTION 10: COMPENSATION DISCRIMINATION n.13 (2000), https://www.eeoc.gov/policy/docs/compensation.html#N_13 (“‘Compensation’ [under Title VII] has the same meaning as ‘wages’ under the EPA” and includes “wages, salary, overtime pay; bonuses; vacation and holiday pay; cleaning or gasoline allowances; hotel accommodations; use of company car; medical, hospital, accident, life insurance; retirement benefits; stock options, profit sharing, or bonus plans; reimbursement for travel expenses, expense account, [or other] benefits.”); *see also* 29 C.F.R. § 1620.12(a) (“The term wage ‘rate,’ as used in the EPA . . . is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis.”).

An individual who believes they were paid less than their coworkers “because of” sex or race can bring a Title VII claim under an individual disparate treatment theory of liability.¹⁴³ Under the proof structure articulated by the Supreme Court in early case law interpreting Title VII, the employee must make out a prima facie case of discrimination by alleging that they were qualified and performing satisfactorily at the job and experienced an adverse employment action (here, being paid too little) under circumstances giving rise to an inference of discrimination.¹⁴⁴

Two parts of this prima facie case pose challenges for individuals alleging race or sex discrimination in pay. First, because employees rarely discuss their pay with each other and are often actively discouraged from doing so, it may be hard for individuals to discover, let alone prove, that they are being paid less than male or white coworkers.¹⁴⁵ In response to this problem, in 2009 Congress and President Obama enacted the Lilly Ledbetter Fair Pay Act,¹⁴⁶ which made clear that the usually short statute of limitations for filing a Title VII claim would restart every time a paycheck that was infected with prior discrimination was received, so that an employee could sue for pay discrimination at any point at which she discovers it.¹⁴⁷ Lilly Ledbetter did not discover that she was being paid 25% to 40% less than her similarly-situated male coworkers until nearly twenty years after her pay was set, when someone left her an anonymous note tipping her off.¹⁴⁸ As discussed in Part III below, current state and federal legislative proposals would add a requirement of “pay transparency” to existing laws, requiring employers to provide information on firm-wide pay.¹⁴⁹ This could have the effect of both strengthening employees’ ability to enforce existing law and forcing employers to, themselves, track and voluntarily correct unfair pay in their organizations.¹⁵⁰ Without these advancements, however, most workers may never discover their own pay disparities.

143. See 42 U.S.C. § 2000e-2(a)(1) (2012) (“It shall be an unlawful employment practice for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”).

144. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

145. See, e.g., Sarah Lyons, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 373–77 (2013).

146. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

147. *Id.* at 5–6.

148. See Heidi Brown, *Equal Payback for Lilly Ledbetter*, FORBES (Apr. 28, 2009), <https://www.forbes.com/2009/04/28/equal-pay-discrimination-forbes-woman-leadership-wages.html>.

149. See *infra* Parts III.B. & III.C.

150. See *infra* Parts III.B. & III.C.

Second, to create an inference of discrimination to establish a prima facie case under Title VII, most courts require a plaintiff employee to provide evidence of a similarly-situated “comparator” outside of their protected class (for example a male employee for a sex claim, a white employee for a race claim) who was paid more than the plaintiff.¹⁵¹ The statutory text of Title VII makes no mention of this evidence, what has been called the “comparator requirement.”¹⁵² In early case law interpreting Title VII, the Supreme Court suggested that evidence of a comparator would be “[e]specially relevant” in creating an inference of discrimination.¹⁵³ As scholars have noted, many lower courts have consistently misinterpreted this dicta as *requiring* comparator proof,¹⁵⁴ and in the context of pay discrimination claims, a nearly identical comparator who was paid more than the plaintiff.¹⁵⁵ As a result, an employee alleging pay discrimination who cannot point to someone in the same exact position with the same exact credentials will have a difficult time succeeding in a Title VII case at the prima facie stage.¹⁵⁶

Moreover, should the plaintiff succeed in making out a prima facie case to create a presumption of pay discrimination, the defendant employer can respond by providing a legitimate nondiscriminatory reason for the pay disparity to rebut the presumption of discrimination.¹⁵⁷ Here, too, the law provides a chance for the employer to explain away any pay differential by highlighting any differences in the plaintiff’s background, credentials, experience, or job duties or responsibilities, no matter how small. The plaintiff has a chance to respond that the employer’s justification is merely a pretext for the real reason behind the pay disparity, sex or race discrimination.¹⁵⁸ But unless the plaintiff can prove that the employer’s explanation is either inaccurate or far too insignificant to justify the pay differential, the employer will likely prevail.

151. See Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 944–45 (2016).

152. *Id.* at 944–45.

153. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

154. See, e.g., Bornstein, *supra* note 151, at 944–45; Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745 (2011); Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839 (2002). But see Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 203 (2009) (addressing that at least one court has rejected comparator proof as necessary, but still noting the relevance of comparators).

155. See Bornstein, *supra* note 151, at 944–45.

156. See *id.*

157. See *McDonnell Douglas Corp.*, 411 U.S. at 801 (noting in a failure to rehire case, employee’s participation in unlawful conduct sufficed as employer’s legitimate non-discriminatory reason).

158. *Id.* at 804.

Case law applying Title VII's individual disparate treatment proof structure to pay discrimination claims demonstrates the limitations of the law: to prevail, a plaintiff must either have some sort of "smoking gun" proof of intent to pay the plaintiff less or a nearly identical comparator who is paid more. For example, the United States Court of Appeals for the Tenth Circuit held that a female accountant who served as the County Fiscal Officer on an interim basis could not use as a Title VII comparator the male employee hired for the position permanently, despite their significant overlap in duties and educational background.¹⁵⁹ In another case, the Tenth Circuit held that a female jewelry department market analyst who performed similar duties as male assistant product managers in the furniture and electronics departments could not use them as comparators because the departments "[did] not contribute equally to [the employer's] revenues."¹⁶⁰ Indeed, federal courts have held that a variety of employer explanations are legitimate nondiscriminatory reasons for pay disparities to defeat plaintiffs' Title VII claims, including explanations that arguably perpetuate stereotyping or past discrimination. For example, under Title VII, courts have excused pay differentials based in part on employees' prior salaries¹⁶¹—which could, in effect, excuse an employer who pays a black worker less than a white worker with the same credentials performing the same job because the black worker earned less at their last job.¹⁶²

In addition to individual claims, Title VII allows employees to allege pay discrimination on a group-wide basis either as a "pattern or practice" claim of disparate treatment—meaning that an employer paid a group of employees discriminatorily less—or as a disparate impact claim¹⁶³—meaning some seemingly neutral employer practice or policy results in a disproportionately lower pay to one group by sex or race, despite no intent on behalf of the employer.¹⁶⁴ In both claims, plaintiffs must use statistics and anecdotal

159. See *Johnson v. Weld Cty.*, 594 F.3d 1202 (10th Cir. 2010). The court focused on his additional years of experience and some additional duties. *Id.* at 1215.

160. *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997) (quoting *Sprague v. Thorn Ams., Inc.*, No. 93-1478-PFK, 1995 U.S. Dist. LEXIS 19403, at *6 (D. Kan. Dec. 18, 1995)). In part because the departments of her comparators (electronics and furniture/appliances) brought in 45% and 50% of store revenue, while her department (jewelry) only 4%, this was a "legitimate basis for the difference in pay" to defeat the plaintiff's prima facie case of Title VII pay discrimination. *Id.*

161. See, e.g., *Noel v. Medtronic Electromedics, Inc.*, 973 F. Supp. 1206, 1213 (D. Colo. 1997) (noting, as part of the employer's legitimate, nondiscriminatory reason for a pay disparity, that the male comparators "were paid in accordance with what they had been paid in the past and they each maintained part of their previous positions").

162. See *id.* Prior salary has also been held to justify pay differentials under the Equal Pay Act, a practice scholars have identified as perpetuating past discrimination. See *infra* notes 190–191.

163. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 310 (1977).

164. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

evidence to prove a prima facie case of a statistically significant disparity in pay that, again, creates an inference of discrimination.¹⁶⁵ Should the plaintiffs succeed in doing so, the defendant employer then raises its defense. In a pattern or practice claim, the employer would either rebut the statistical disparity to defeat the plaintiffs' proof or offer a legitimate nondiscriminatory reason for the disparity, similar to the defense in an individual claim.¹⁶⁶ In a disparate impact case, the employer has a different burden; it must prove that the practice or policy that the plaintiffs allege is creating a disparate impact in pay is justified as job-related and consistent with business necessity.¹⁶⁷

As in individual disparate treatment claims, in class actions, courts have also upheld employer pay policies that may be infected with stereotyping or perpetuate past discrimination. For example, courts have held that setting wages according to what the labor market will allow constitutes neither a pattern or practice nor a disparate impact claim of pay discrimination under Title VII¹⁶⁸—which could, in effect, excuse an employer who pays female workers less than male workers with the same credentials performing the same job solely because the female workers were willing to accept less pay.¹⁶⁹

There is no doubt that, in the five decades since its passage, Title VII has helped to root out clear pay disparities among nearly identical employees and to strike down obviously discriminatory pay policies.¹⁷⁰ Beyond that, however, the ability of Title VII to redress the gender or racial pay gap has been stunted by overly narrow court interpretations of proof requirements as applied to pay discrimination. The very high bar for proof required to create an inference of pay discrimination, combined with the very wide berth given to employer justifications for any disparities has severely limited Title VII's ability to reach the more complex and structural causes of the gender and racial pay gaps.

165. See *Teamsters*, 431 U.S. at 339; *Hazelwood*, 433 U.S. at 313 (Brennan, J., concurring); *Griggs*, 401 U.S. at 432.

166. See *Teamsters*, 431 U.S. at 342 n.24; *Hazelwood*, 433 U.S. at 312.

167. See *Griggs*, 401 U.S. at 435–36.

168. See, e.g., *Am. Fed'n of State, Cty., & Mun. Emps. v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985) (excusing pay differential based on “prevailing market rates”).

169. See *id.* This so-called “market defense” has also been held to justify pay differentials under the Equal Pay Act, a practice scholars have identified as perpetuating past discrimination. See *infra* notes 192–193.

170. See, e.g., *Barrett v. Forest Labs., Inc.*, 39 F. Supp. 3d 407 (S.D.N.Y. 2014) (holding for Title VII plaintiffs where pharmaceutical company set base pay lower for female than for male employees and refused to pay bonuses to anyone who took six weeks of leave, which had a disparate impact on employees needing maternity leave); *Sharpe v. Global Sec. Int'l*, 766 F. Supp. 2d 1272, 1272 (S.D. Ala. 2011) (holding that employer failed to offer a legitimate, non-race based reason for paying a white coworker more than the black plaintiff).

B. Equal Pay Act of 1963

In addition to Title VII, a second federal law prohibits sex—but not race—discrimination in pay, the Equal Pay Act of 1963 (“EPA”).¹⁷¹ Passed the year before Title VII, the EPA targeted only sex discrimination in pay using a different approach. While Title VII is codified as a general antidiscrimination law that, for the most part, requires an employee to prove an employer’s intent to discriminate,¹⁷² the EPA was codified as a wage and hour statute with which employers must comply. This means that, should a plaintiff meet the statutory text of the EPA, the employer will be held liable for the violation, regardless of the employer’s intent, unless it can prove an affirmative defense.¹⁷³ As such, the EPA provides a potentially powerful second tool in federal law with which employees can challenge sex discrimination in pay.

Yet, like Title VII, excessively narrow court interpretation of the text of the EPA has limited its ability to reach beyond the most egregious cases of unequal pay. To prevail in an EPA case, an individual plaintiff must make out a prima facie case that they meet the statutory definition of being paid unequal wages for “equal work” as defined.¹⁷⁴ Should the plaintiff succeed, the burden of persuasion shifts to the employer defendant to raise one of several possible affirmative defenses that would excuse the wage differential from constituting sex discrimination.¹⁷⁵ Collective actions can be brought by groups of plaintiffs under the EPA, too; the proof structure largely mirrors the individual EPA claim.¹⁷⁶

Two pieces of the EPA present hurdles to plaintiffs. First, the statute defines sex discrimination in pay as paying women and men “within any establishment” different wages “for equal work on jobs the performance of

171. 29 U.S.C. § 206(d)(1) (2012).

172. *See, e.g.,* *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 525 (7th Cir. 1994) (“What must be shown [under Title VII] is quite specific There must be an *intent* to discriminate, and the intent must encompass an actual desire to *pay* women less than men because they are women.”). Cases alleging disparate impact under Title VII do not require proof of discriminatory “intent,” but require plaintiffs to make out a prima facie case of statistically significant discrimination before the employer will be required to raise a defense. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

173. 29 U.S.C. § 206(d); *see* *Lenihan v. Boeing Co.*, 994 F. Supp. 776, 797–98 (S.D. Tex. 1998) (“Unlike an EPA claim . . . to prevail on a wage discrimination claim under Title VII, the plaintiff must prove that the employer acted with discriminatory intent,” and, unlike a Title VII claim, “if the plaintiff succeeds in establishing a *prima facie* case [under the EPA], the burdens of production and persuasion shift to the employer to demonstrate as an affirmative defense that the difference in wages is justified by one of the exceptions specified under the Act.”).

174. *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000).

175. *See id.* at 107–08.

176. *See* 29 U.S.C. § 216(b) (2012); *Corning Glass Works v. Brennan*, 417 U.S. 188, 194–96 (1974) (describing burdens in collective actions).

which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”¹⁷⁷ In regulations and cases further defining these terms, to be in the same “establishment” means the same “distinct physical place of business rather than [the] entire business or ‘enterprise’”—that is, “each physically separate place of business is ordinarily considered a separate establishment.”¹⁷⁸ Such interpretation may exclude all but the narrowest focus on pay to workers in the same office of even a large, national employer. Also, to perform under “similar working conditions” means in the same “surroundings” and with the same “hazards,” including physical hazards that are “regularly encountered” in “frequency,” and “severity” of potential injuries, but excludes hours worked and the notion of “shift differentials.”¹⁷⁹ Most directly tied to gender wage gap data, while one federal court held that a woman doing the exact same job as a man, just on a part-time basis, should be paid a proportionate salary based on the same hourly wage,¹⁸⁰ another court disagreed,¹⁸¹ interpreting the law in a way that amplifies the cost to women for caregiving, a known significant contributing factor to the gender wage gap.

But it is the definition of “equal work” that, perhaps, most limits the statute’s ability to close the gender wage gap.¹⁸² As interpreted in the EPA’s regulations, to constitute “equal work” in a given case “does not require that compared jobs be identical, only that they be substantially equal.”¹⁸³ Yet being “substantially equal” has been interpreted by most federal courts to be something more than substantially similar or comparable.¹⁸⁴ Indeed, several federal courts have described this standard as requiring that, while not identical, jobs must be “virtually identical” to meet the standard of “equal work.”¹⁸⁵ Thus courts applying the “equal work” standard have held that, for

177. 29 U.S.C. § 206(d)(1).

178. 29 C.F.R. § 1620.9(a) (2012); *see, e.g., Lenihan*, 994 F. Supp. at 797 (analyzing how to interpret “establishment” in the EPA).

179. 29 C.F.R. § 1620.18(a) (2012); *see Corning Glass Works*, 417 U.S. at 204 (holding that shift differentials do not themselves violate the EPA).

180. *See Lovell v. BBNT Sols., LLC*, 295 F. Supp. 2d 611, 620–21 (E.D. Va. 2003).

181. *See Equal Emp’t Opportunity Comm’n v. Altmeyer’s Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987).

182. *See generally* Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17 (2010) (surveying EPA case decisions) [hereinafter Eisenberg, *Shattering*].

183. 29 C.F.R. § 1620.13(a) (2017).

184. *Compare id.*, with state law standards discussed *infra* Parts II.C. & III.C.

185. *E.g., Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973) (“When Congress enacted the Equal Pay Act, it substituted the word ‘equal’ for ‘comparable’ to show that ‘the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.’ The restrictions in the Act were meant ‘to apply only to jobs that are substantially identical or equal.’” (footnote omitted) (quoting 109 CONG. REC. 9, 197 (1963))); *Cohens v. Md. Dep’t of Human Res.*, 933 F. Supp. 2d 735, 747 (D. Md. 2013) (“To establish a prima facie case

example, a county's female Director and Deputy Director of the Emergency Services Department could not compare themselves to the male directors and deputy directors of other county departments who earned on average 20% more because of differences between the departments—despite the fact that all performed similar managerial tasks.¹⁸⁶ Likewise, a female employee who earned \$11.50 per hour as a lead person/service writer for a trucking company was not performing “equal work” to a male lead person who earned \$16 per hour because of his greater experience, despite the fact that she sometimes covered his shifts.¹⁸⁷ As a consequence, the EPA as currently interpreted has virtually no ability to reach the issue of occupational segregation that drives much of today's gender pay gap.

The second piece of the EPA that greatly limits its efficacy is the broad language providing an employer's affirmative defense to liability. Under the statute, an employer's wage differential is excused where the employer can show that it was “based on any factor other than sex.”¹⁸⁸ Thus even if a plaintiff can succeed in making out a prima facie case that she meets the narrow statutory definition of “equal work” codified in the statute's threshold requirements, an employer may still defeat her claim by proving another justification for the pay differential.¹⁸⁹ This defense functions in much the same way as the legitimate nondiscriminatory reason phase of Title VII disparate treatment. In fact, Congress specifically passed the Bennett Amendment¹⁹⁰ to align the two statutes by clarifying that anything lawful under the EPA was also lawful under Title VII.¹⁹¹ Cases interpreting this defense have taken a similarly deferential stance to permitting employer justifications, even if they are correlated with sex or perpetuate sex discrimination. For example, federal courts have held that the “market value” of the job, an employee's prior salary, and “management potential” could all constitute “factors other than sex” under the EPA,¹⁹² despite the fact that each of these justifications may

under the EPA . . . the plaintiff must show that the jobs in question were ‘virtually identical.’” (quoting *Galarraga v. Marriot Emps. Fed. Credit Union*, No. JFM-94-1986, 1996 WL 376408, at *3 (D. Md. Apr. 24, 1996)).

186. See *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 332 (4th Cir. 2004).

187. See *Parada v. Great Plains Int'l of Sioux City, Inc.*, 483 F. Supp. 2d 777 (N.D. Iowa 2007).

188. 29 U.S.C. § 206(d)(1)(iv) (2012).

189. See *Stanziale v. Jargowsky*, 200 F.3d 101, 107–08 (3d Cir. 2000).

190. Bennett Amendment, Pub. L. 88-352, tit. VII, § 703(h), 78 Stat. 257 (1964).

191. *Id.*

192. See *Brickey v. Emp'rs Reassurance Corp.*, 293 F. Supp. 2d 1227, 1233 (D. Kan. 2003) (citing *Varley v. Superior Chevrolet Auto. Co.*, 1997 WL 161942, at *11 (D.Kan. Mar.21,1997), *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 726 (4th Cir.1980); *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir.1980)). *But see* *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (suggesting that “prior salary alone cannot justify [a] pay disparity” without other differences).

be sex-linked.¹⁹³ This enormous defense limits the ability of the EPA to reach the portion of the pay gap created by gender stereotyping and implicit bias, including where courts fail to recognize the gender bias built into many factors an employer may argue are “other than sex.”

As currently interpreted by federal courts, then, the Equal Pay Act, like Title VII, usually reaches only the most overt and narrow forms of gender pay discrimination. Where the EPA’s strict liability approach offers plaintiffs the advantage over Title VII of not having to prove an employer’s discriminatory intent, the language of the Act itself and, more importantly, the narrowness of courts’ interpretation of it, has hamstrung the EPA from living up to its promise of prohibiting unequal pay.

C. State Law

Beyond federal law, all but a handful of states have enacted their own versions of federal laws prohibiting race or sex discrimination in compensation.¹⁹⁴ While some state civil rights laws are broader than Title VII in terms of their coverage (for example by applying to smaller employers or including additional protected classes),¹⁹⁵ courts applying state laws generally mirror the proof structure of Title VII for proving sex or race discrimination in compensation.¹⁹⁶ Thus, the limitations of Title VII to reach issues causing the current pay gap described previously apply similarly to state antidiscrimination laws.

193. See Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867, 870, 870 n.9 (2016) (describing how, regarding this “fourth affirmative defense” in the EPA, “scholars have questioned the assumption that the market is in fact free from bias,” and have “made an empirical case that using market-based factors like prior salaries and competing offers is infected with the bias that existed when those prior salaries were set or those competing offers were formulated.”); Deborah Brake, *Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889, 908–12 (2016). See generally Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159 (2011); Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951 (2011) [hereinafter Eisenberg, *Money, Sex, and Sunshine*]; Sharon Rabin-Marglioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807 (2010); Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579 (2001).

194. See *State Equal Pay Laws*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 23, 2016), <http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx> (last visited Mar. 12, 2018); *State Employment-Related Discrimination Statutes*, NAT’L CONF. OF ST. LEGISLATURES (July 2015), <http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf>.

195. See, e.g., CAL. GOV’T CODE § 12900 (West 2011); HAW. REV. STAT. ANN. §§ 378-1–2 (LexisNexis 2016).

196. See, e.g., *Reno v. Baird*, 957 P.2d 1333, 1337 (Cal. 1998) (“Because the antidiscrimination objectives and relevant wording of... Title VII. . . are similar to those of the FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA.” (citation omitted) (quoting *Janken V. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 66 (1996))).

Likewise, about half (twenty-four) of the states' equal pay laws use the same language as the federal EPA, both in defining "equal work" and establishing an employer defense of "any factor other than sex."¹⁹⁷ In these states, and two that have no state equal pay law (Alabama and Mississippi), because the text is the same as the Equal Pay Act itself, courts apply similar definitions and case law.¹⁹⁸ Thus, the limitations of the EPA discussed previously also apply to these states' laws.¹⁹⁹

In contrast, as detailed in the Table, below, in the other near half (twenty-four) of states, state versions of equal pay laws differ in some material way that allow the possibility for broader reach than the federal EPA.²⁰⁰ Of those states' laws, eight have unique language defining the nature of the comparison that must be made. Instead of "equal work" requiring "equal skill, effort, and responsibility," these states require "the same quantity and quality of the same classification of work" (Arizona, Missouri),²⁰¹ "the same or substantially similar work" (Illinois, Louisiana),²⁰² or men and women to be "similarly employed" (Michigan, Washington).²⁰³ In addition, two states have laws applying to public sector workers only that require "equivalent service" or "the same amount or class of work" (Montana) or "the same kind, grade, and quantity of service" (Texas).²⁰⁴ In those eight states, courts in two

197. State law data as of February 2018, compiled by the author's original research using Westlaw and Lexis and by reference to *State Equal Pay Laws*, *supra* note 194.

198. *See supra* note 197.

199. *See supra* Part II.B.

200. This Part and the Table include information on all fifty states' equal pay acts that apply to private sector workers, as well as three state statutes (in Iowa, Texas, and Montana) that provide broader protections for public sector workers. Note, however, that this discussion does not include efforts, beginning in the 1980s, in several states to undertake comparable worth studies in the public sector, or to adopt comparable worth pay scale plans for public sector workers. *See, e.g.*, MINN. STAT. § 43A.01 (2016); Ronald G. Ehrenberg & Robert S. Smith, *Comparable Worth in the Public Sector*, in PUBLIC SECTOR PAYROLLS 243–90 (David A. Wise, ed. 1987), <http://www.nber.org/chapters/c7156>. A discussion of state public sector comparable worth studies or pay scale plans is beyond the scope of this Article's focus on judicial interpretation of statutes creating private rights of action.

201. ARIZ. REV. STAT. ANN. §§ 23-340, 341 (2012); MO. ANN. STAT. § 290.410 (West 2005).

202. 820 ILL. COMP. STAT. ANN. § 110/1, 112/10 (West 2008); LA. STAT. ANN. § 23:664 (2017).

203. MICH. COMP. LAWS ANN. § 750.556 (West 2004); WASH. REV. CODE ANN. § 49.12.175 (West 2008).

204. MONT. CODE ANN. § 39-3-104 (2015); TEX. LAB. CODE ANN. § 659.001 (West 2015).

(Arizona, Texas) overlooked differences in statutory language and interpreted their statutes as following the same standards as the federal EPA.²⁰⁵ Courts in five others did not expressly define their statutory text.²⁰⁶

Notably, however, Washington state law remains open to broader interpretation. In an early case, the Washington Supreme Court explained, “The federal [Equal Pay A]ct may impose a heavier burden than the state act due to its threshold requirement of ‘equal’ work compared with the state act’s threshold requirement of ‘similar’ work[,]” which the Court held was satisfied by the parties’ stipulation that the plaintiff and her comparator “performed substantially similar work.”²⁰⁷ Fifteen years later, relying on the state high court’s decision, the United States Court of Appeals for the Ninth Circuit reiterated that the federal EPA was “more stringent” because “under the Washington State Equal Pay Act, a plaintiff need only prove that the employer paid different wages to men and women who performed *similar* work.”²⁰⁸

Beyond the language of “similarity,” state laws in fourteen other states require that women and men be paid the same for “comparable” work, which opens the door to even greater breadth of worker comparison. Thirteen of these laws require that men and women be paid for “work of comparable character”²⁰⁹ or for “comparable work” requiring “comparable” skills or requirements.²¹⁰ Notably one state, Iowa, goes further to prohibit pay discrimination, in public sector employment only, “for work of comparable *worth* between jobs held predominantly by women and jobs held predominantly by

205. See *Isom v. JDA Software Inc.*, No. CV-12-02649-PHX-JAT, 2015 U.S. Dist. LEXIS 84845, at *35 (D. Ariz. June 29, 2015) (describing the Arizona equal pay law); *Attieh v. Univ. of Tex.*, No. 03-04-00450-CV, 2005 WL 1412124, at *7 (Tex. App. June 16, 2005) (holding “that a prima facie case under the Texas [public sector] statute requires the same showing as federal law”).

206. As of February 2018, an original survey of case law conducted by the author using Westlaw and Lexis found no reported cases directly addressing definitions of relevant statutory text in Illinois, Louisiana, Michigan, Missouri, and Montana.

207. *Adams v. Univ. of Wash.*, 722 P.2d 74, 77 (Wash. 1986). But see *Hudon v. W. Valley Sch. Dist.*, 97 P.3d 39, 43 (Wash. Ct. App. 2004) (noting more generally that “Washington’s equal pay act . . . is virtually identical to its federal counterpart, 29 U.S.C. § 206(d),” so that “[d]ecisions interpreting the federal act may then be helpful” in a state law case (first citing *Oliver v. Pac. Nw. Bell Tel. Co.*, 724 P.2d 1003 (1986); and then citing *Adams*, 722 P.2d at 74)).

208. *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1190–91 (9th Cir. 2002) (emphasis added) (citing *Adams*, 722 P.2d at 76–78).

209. See ALASKA STAT. ANN. § 18.80.220(a)(5) (West 2016); MD. CODE ANN., LAB. & EMPL. § 3-304(b)(1)(i) (LexisNexis 2016); OR. REV. STAT. § 652.220(1)(a) (2015); W. VA. CODE, § 21-5E-1(c) (LexisNexis 2013) (utilizing “work of comparable character” language).

210. See ARK. CODE ANN. § 11-4-601(a) (LexisNexis 2012) (requiring “equal compensation for equal services”); IDAHO CODE § 44-1702(1) (1969); KY. REV. STAT. ANN. § 337.423(1) (West 2011); ME. REV. STAT. ANN. tit. 26, § 628 (1964); NEB. REV. STAT. § 48-1221 (2010) (referring to “equal work” rather than “comparable work”); N.D. CENT. CODE § 34-06.1-01 (2014); OKLA. STAT. § 40-198.1 (2014); S.D. CODIFIED LAWS § 60-12-15 (2015); TENN. CODE ANN. § 50-2-202(a) (2014) (utilizing the term “comparable work”).

men,” which the statute further defines as “the value of work as measured by the composite of the skill, effort, responsibility, and working conditions normally required.”²¹¹

As described in Part III.A, the language of “comparability” in state laws stemmed from the “comparable worth” movement of advocates and legal scholars in the 1980s to strengthen the ability of equal pay laws to redress the gender pay gap.²¹² Yet, with one exception, state courts have failed to so hold. Courts in five of the fourteen states made no mention of the difference between “comparable” and “equal” work, instead interpreting their state statutes to be consistent with the federal EPA.²¹³ Courts in eight other states did not expressly define their statutory text, including the state of Iowa, in which the potential reach of “comparable worth” for public sector workers remains untested.²¹⁴ This leaves the door open for courts to interpret law in these eight states in ways that meet the full promise of what their statutory text allows.

Lastly, as detailed in Part III.C, below, in response to the persistence of the gender pay gap, California, Massachusetts, and Oregon have passed recent amendments to their existing state equal pay laws that go even further.²¹⁵

211. IOWA CODE § 70A.18 (2016) (emphasis added). Notably, for private sector workers, Iowa’s statute uses the traditional Equal Pay Act language requiring equal wages for “equal work on jobs...requir[ing] equal skill, effort, and responsibility,...performed under similar working conditions,” but it applies to pay differences based on the protected classes of “age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability,” IOWA CODE ANN. § 216.6A(2)(a) (2010), making it broader than other state laws. *See supra* notes 304–305, 312–313 (discussing new California and Oregon state laws’ reach to more protected classes).

212. *See infra* Part III.A.

213. These states are Alaska, Kentucky, Maryland, Tennessee, and West Virginia. *See Alaska St. Comm’n for Human Rights v. Alaska*, 796 P.2d 458, 461–62 (Alaska 1990) (“[T]he history of [the state statute] convinces us that the proper interpretation of the phrase ‘comparable character’ is as an equal pay for *substantially* equal work provision.”); *Brown v. Wood*, 575 P.2d 760, 768 (Alaska 1978) (following the federal Equal Pay Act in burdens of proof); *Wiseman v. Wayne Supply Co.*, 359 F. Supp. 2d 579, 589 (W.D. Ky. 2004) (“‘Equal work’ does not require that the jobs be identical, but only that there exist ‘substantial equality of skill, effort, responsibility and working conditions.’” (quoting *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981))); *Cohens v. Md. Dep’t of Human Res.*, 933 F. Supp. 2d 735, 747 (D. Md. 2013); *Nixon v. State*, 625 A.2d 404, 407, 409 (Md. Ct. Spec. App. 1993) (interpreting the state definition as same as the federal Equal Pay Act definition); *Tolliver v. Children’s Home-Chambliss Shelter*, 784 F. Supp. 2d 893, 903–04 (E.D. Tenn. 2011) (following the federal Equal Pay Act in burdens of proof); *Largent v. W. Va. Div. of Health*, 452 S.E.2d 42, 46 (W. Va. 1994) (describing the state statute as an “‘Equal Pay for Equal Work’ statute”).

214. As of February 2018, an original survey of case law conducted by the author using Westlaw and Lexis found no reported cases directly addressing definitions of relevant statutory text in Arkansas, Idaho, Iowa, Maine, Nebraska, North Dakota, Oklahoma, and South Dakota. *But see Hammer v. Branstad*, 463 N.W.2d 86, 87 (Iowa 1990) (holding that Governor’s action undoing wage adjustments did not violate comparable worth statute).

215. *See infra* Part III.C; MASS. GEN. LAWS ch.149, § 105A (West eff. Jan. 1, 2018); CAL. LAB. CODE § 1197.5 (West 2017); OR. REV. STAT. § 252 (effective Jan. 1, 2019).

These new statutes, effective in 2017, 2018, and 2019 respectively, offer the greatest potential yet for using antidiscrimination law to redress workforce segregation and stereotyping that contribute to the gender pay gap.²¹⁶

In sum, out of twenty-four states that use different comparisons for state equal pay laws than “equal work,” only seven have indicated that they follow federal Equal Pay Act precedent on the threshold question of how closely work must be compared to be actionable. That leaves thirteen states whose state equal pay acts could be interpreted to reach a broader comparison,²¹⁷ as well as four states (California, Massachusetts, Oregon, and Washington) whose state laws already do.²¹⁸

216. See *infra* Part III.C; AAUW, *supra* note 47, at 26–27 (noting that “a handful of states have particularly robust laws governing equal pay” and describing features of laws in California, Maryland, Massachusetts, and Tennessee).

217. See *supra* text accompanying notes 213–214.

218. See *supra* text accompanying note 215.

STATE EQUAL PAY ACTS AND THE POSSIBILITY FOR BROADER INTERPRETATIONS UNDER STATE LAW:

33 STATES FOLLOW FEDERAL LAW	
No state equal pay law (2 + D.C.)	Alabama, Mississippi [+ District of Columbia]
State law with same language as federal EPA (24)	Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Kansas, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Wisconsin, Wyoming [+ Iowa, "equal work" for private sector workers; also prohibits unequal pay by race or other protected class]
State law with broader language, but that state courts have interpreted to follow EPA (7)	Alaska, Arizona, Kentucky, Maryland, Tennessee, Texas*, West Virginia [*protections for public sector workers only]

17 STATES OPEN TO BROADER INTERPRETATION	
State law with broader language and no court interpretation (13)	"Comparable worth": Iowa* "Comparable work": Arkansas, Idaho, Maine, Nebraska, North Dakota, Oklahoma, South Dakota "Same or substantially similar work": Illinois, Louisiana "Similarly employed": Michigan "Same quantity and quality of the same classification of work": Missouri "Equivalent service or the same amount or class of work": Montana* [*protections for public sector workers only]
State law with broader language and broader intent or court interpretation (4)	"Substantially similar work": California* "Work of like or comparable character": Massachusetts "Work of comparable character": Oregon** "Similarly employed": Washington [*also prohibits unequal pay by race] [**also prohibits unequal pay by race or other protected class]

III. LAW REFORM EFFORTS

Since the late 1970s, equal pay advocates and legal scholars have worked to improve existing law and expand its ability to redress the gender

pay gap. To date, these efforts have focused primarily on improving pay equity for women; yet the most far-reaching current efforts include a focus on racial pay equity as well. This Part provides an overview of past and current efforts to reform equal pay laws at both the federal and state levels.

A. *1980s Comparable Worth Movement*

Recent efforts at the state level to strengthen equal pay laws in response to the stubborn persistence of the gender pay gap echo an earlier, more sweeping attempt to remedy the problem: the comparable worth movement of the 1980s. In the 1970s, due to concern that the passage of Title VII and the Equal Pay Act had not closed the gender pay gap, and to overcome the challenge of a sex-segregated workforce, pay equity advocates began to argue for the recognition of a theory of “comparable worth.”²¹⁹ Under comparable worth theory, “sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal *value* to the employer, though otherwise *dissimilar*.”²²⁰

Employers would be required to pay equal wages for different jobs that are “comparable in value or worth” but “filled predominantly by women and men respectively.”²²¹ While requiring comparable worth seemed beyond the reach of the EPA’s statutory language prohibiting unequal pay for “equal work,” Title VII’s broader language prohibiting pay discrimination “on the basis of sex” provided an opening for such an argument.²²² The concept of comparable worth was buoyed by the head of the Equal Employment Opportunity Commission (“EEOC”) during the Carter Administration, Eleanor Holmes Norton, but later renounced by President Reagan, who called it a “cockamamie idea,” and rejected by Reagan’s EEOC chair, Clarence Thomas.²²³

In the courts, the potential for comparable worth law was shaped by three important cases decided between 1981 and 1985. First, in 1981 in *County of Washington v. Gunther*,²²⁴ the Supreme Court opened up the pos-

219. See Nancy Levit & Joan Mahoney, *The Future of Comparable Worth Theory*, 56 U. COLO. L. REV. 99, 100 (1984); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1728–29 (1986). See generally Schultz, *Taking Sex Discrimination Seriously*, *supra* note 33.

220. *Am. Fed’n of State, Cty., & Mun. Emps. v. Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985) (emphasis added).

221. Weiler, *supra* note 219, at 1728.

222. Levit & Mahoney, *supra* note 219, at 100, 104.

223. Weiler, *supra* note 219, at 1729.

224. 452 U.S. 161 (1981).

sibility of comparable worth arguments by holding that Title VII's prohibitions against sex discrimination in pay could be read more broadly than the Equal Pay Act, thus reviving a pay discrimination complaint filed by female prison guards paid less than their male peers.²²⁵ As mentioned previously, when Title VII was passed in 1964, it included what was known as the Bennett Amendment, to comport Title VII with the EPA that had been passed the year prior.²²⁶ The Amendment required that each of the affirmative defenses available to an employer under the EPA—for pay differentials based on a seniority or merit system, a pay system based on “quantity or quality of production,” or “any other factor other than sex”—were also defenses to Title VII claims of pay discrimination.²²⁷ In *Gunther*, the Court held that allowing such defenses did not also require a female Title VII plaintiff to prove she was performing “equal work,” so long as she could create an inference of pay discrimination because of sex.²²⁸ Indeed, over a dissent by Justice Rehnquist, the Court's majority noted that it was not directly addressing “the controversial concept of ‘comparable worth’” in the *Gunther* case, leaving the door open for its further development.²²⁹

Yet any such hope for the adoption of a comparable worth approach failed to materialize in *Gunther*'s wake.²³⁰ Two years later, in *Spaulding v. University of Washington*,²³¹ the Ninth Circuit rejected a claim brought by University of Washington's School of Nursing faculty that they were underpaid relative to other faculty departments.²³² In doing so, the court held clearly—in accord with similar cases in the Eighth and Tenth Circuits—that plaintiffs could not make out a Title VII disparate impact claim using comparable worth theory.²³³ Then, in 1985, the Ninth Circuit dealt comparable worth another blow in *American Federation of State, County, and Municipal Employees (AFSCME) v. Washington*,²³⁴ when it held that a class of 15,500 state employees who worked in female-dominated job categories (women composed over 70% of the positions) could allege neither disparate impact

225. *Id.* at 189.

226. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (June 10, 1963); Bennett Amendment, Pub. L. No. 88-352, 78 Stat. 257 (1964).

227. 29 U.S.C. § 206(d)(1) (1964); 42 U.S.C. § 2000e-2(h) (1964).

228. *Gunther*, 452 U.S. at 180.

229. *Id.* at 166. *But see Gunther*, 452 U.S. 183–84 (Rehnquist, J., dissenting) (arguing that Title VII and the Equal Pay Act explicitly rejected the notion of “comparable worth”).

230. *See* Judith Olans Brown et al., *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127, 127 (1986); Norman Vieira, *Comparable Worth and the Gunther Case: The New Drive for Equal Pay*, 18 U.C. DAVIS L. REV. 449, 459 (1985).

231. 740 F.2d 686 (9th Cir. 1983).

232. *Id.* at 705–07.

233. *Id.*

234. 770 F.2d 1401 (9th Cir. 1985).

nor disparate treatment under Title VII using a comparable worth argument.²³⁵ Moreover, the court robustly supported a “market defense,” holding that, even where the employer conducted a pay equity study that exposed disparities by gender, setting pay using “prevailing market rates” did not constitute intentional discrimination under Title VII:

Neither law nor logic deems the free market system a suspect enterprise. . . . We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market. While the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so, Title VII does not obligate it to eliminate an economic inequality that it did not create.²³⁶

Despite the fact that the United States Supreme Court never weighed in on the debate, as a result of the *Spaulding* and *AFSCME* cases, legal scholars noted that the likelihood of achieving comparable worth through the courts was essentially foreclosed, and that advocates should instead turn their focus to legislative change and advances through collective bargaining.²³⁷

At the state level, in the wake of the comparable worth movement, at least one third of state legislatures enacted state equal pay laws that explicitly went further than equal pay for “equal” work, to include concepts of similarity or comparability.²³⁸ At the federal level, since the late 1980s, the idea of comparable worth all but vanished from the agenda of those seeking to protect against sex discrimination; they instead turned their focus to issues of sexual harassment, promotion and the glass ceiling, and pregnancy and family medical leave.²³⁹ In more recent years, concepts of equivalence or comparability have reappeared in legislative proposals to amend the Equal Pay

235. *Id.* at 1406–07.

236. *Id.* at 1407 (citations omitted) (first citing *Lemons v. Denver*, 620 F.2d 228, 229 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); and then citing *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977)).

237. See, e.g., Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207 (1988); *Comparable Worth Claims Under Title VII: Does the Evidence Support an Inference of Discriminatory Intent?*—American Federation of State, County, and Municipal Employees v. Washington, 61 WASH. L. REV. 781 (1986); Jean C. Kissane, Comment, *The Status of Comparable Worth: Spaulding v. University of Washington*, 10 DEL. J. CORP. L. 119 (1985); Tina L. Speiser, *The Future of Comparable Worth: Looking in New Directions*, 37 SYRACUSE L. REV. 1189 (1987). But see Nancy E. Dowd, *The Metamorphosis of Comparable Worth*, 20 SUFFOLK U.L. REV. 833, 865 (1986).

238. See *supra* Part II.C.

239. See, e.g., Schultz, *Taking Sex Discrimination Seriously*, *supra* note 33, at 1001, n.14, 1077 n.444 (citing scholarship during this time period); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (Mar. 19, 1990), <https://www.eeoc.gov/policy/docs/currentissues.html>; DEP’T OF LABOR, A FACT-FINDING REPORT

Act in the Fair Pay Act introduced in legislative sessions since the mid-1990s by Eleanor Holmes Norton, now a District of Columbia Congressperson.²⁴⁰

Importantly, however, efforts to expand comparisons in equal pay statutes use the terms equivalent, similar, or comparable “work,” not “worth.” Even in states that enacted statutes adopting a comparability approach, all private sector laws use the term “comparable work.”²⁴¹ As Deborah Thompson Eisenberg has noted, this is a key difference: a comparable “work” statute “still require[s] proof” that there are “common similarities between the jobs,” which is “a factual question about the nature of the work, not a value question about the intrinsic ‘worth’ of the job.”²⁴² Today, “comparable worth” concepts have largely been replaced by a more pragmatic, middle-ground approach to go beyond “equal work.”

B. Current Federal Reform Efforts

In the wake of the challenges faced by comparable worth advocates in the 1980s, gender equality advocates shifted their focus: equal pay law was not forgotten, but it was overshadowed by other legislative efforts to improve women’s access to higher paying jobs.²⁴³ Starting in the mid-1990s, two federal legislative strategies around equal pay re-emerged, attracting greater attention in the past decade, due to the seemingly intractable persistence of the gender pay gap despite women’s advancement otherwise. At the federal level, the most popular reform efforts now focus not on broadening the concept of “equal work” but, instead, on narrowing employer defenses under the Equal Pay Act and encouraging employer compliance.

OF THE FEDERAL GLASS CEILING COMMISSION 3 (1995), <https://www.dol.gov/oasam/programs/history/reich/reports/ceiling.pdf> (“The Federal Glass Ceiling Commission systematically gathered information on barriers, opportunities, policies, perceptions, and practices as they affect ... groups that historically have been underrepresented in private sector top-level management [including] women of all races and ethnicities.”); DEP’T OF LABOR, NEED TIME? THE EMPLOYEE’S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 2 (2015), <https://www.dol.gov/whd/fmla/employeeguide.pdf> (explaining the details of taking FMLA leave).

240. See Rhonda Jennings Blackburn, Note, *Comparable Worth and the Fair Pay Act of 1994*, 84 KY. L.J. 1277, 1291 (1996); *Compare* Fair Pay Act of 1993, H.R.4803, 103rd Cong. (1993), and Fair Pay Act of 2017, H.R.2095, 115th Cong. (2017)

241. See *supra* Part II.C. Only one statute, the Iowa statute applying to public sector workers, uses the term “comparable “worth.” See text accompanying *supra* note 211; IOWA CODE § 70A.18 (2016).

242. See Eisenberg, *Shattering*, *supra* note 182, at 48. Eisenberg argues that while “comparable worth can be a powerful political mobilizing force to raise consciousness about pay inequities,” a “comparable worth model is not the best approach for a statutory remedy for pay discrimination.” *Id.* at 49.

243. See *supra* note 239.

1. Amending the Equal Pay Act

Since the mid-1990s, some federal legislators have engaged in efforts to remedy the gender pay gap by acknowledging the limitations of and working to amend the existing Equal Pay Act.²⁴⁴ Two parallel efforts have emerged. One, the Fair Pay Act, sponsored by Representative Eleanor Holmes Norton, would directly expand the Act's focus on "equal work," to require equal pay "for work on equivalent jobs" in any "job that is dominated by employees of a particular sex, race, or national origin."²⁴⁵ Under the bill, "equivalent jobs" is further defined as "jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions."²⁴⁶ This approach would directly address both gender and racial workforce segregation and discrimination, making it likely to help reduce the pay gaps. Yet, despite being introduced in each of the last thirteen legislative sessions, the bill has never made it out of committee, and Congressional co-sponsorship has waned, particularly as interest has shifted to a second approach.²⁴⁷

The second federal legislative effort, the Paycheck Fairness Act ("PFA"), leaves unchanged the statute's definition of "equal work," instead focusing on its affirmative defenses and damages, once an employee plaintiff has met that threshold requirement.²⁴⁸ Introduced for the first time several years after the Fair Pay Act, the PFA has been raised in each of the last eleven sessions, also with no success to date.²⁴⁹ Yet the PFA has attracted more interest and more co-sponsorship in recent years, now overtaking the Fair Pay

244. See Brake, *supra* note 193, at 890–91; Fair Pay Act of 1993, H.R. 4803, 103rd Cong. (1993); Paycheck Fairness Act 1997, H.R. 2023, 105th Cong. (1997).

245. H.R. 2095, 115th Cong. (2017).

246. *Id.*

247. See H.R. 2095, 115th Cong. (2017) (listing 16 Congressional co-sponsors); H.R. 1787, 114th Cong. (2015) (1 co-sponsor); H.R. 438, 113th Cong. (2013) (0 co-sponsors); H.R. 1493, 112th Cong. (2011) (1 co-sponsor); H.R. 2151, 111th Cong. (2009) (0 co-sponsors); H.R. 2019, 110th Cong. (2007) (10 co-sponsors); H.R. 1697, 109th Cong. (2005) (21 co-sponsors); H.R. 1695, 108th Cong. (2003) (20 co-sponsors); H.R. 1362, 107th Cong. (2001) (19 co-sponsors); H.R. 1271, 106th Cong. (1999) (79 co-sponsors); H.R. 1302, 105th Cong. (1997) (64 cosponsors); H.R. 1507, 104th Cong. (1995) (52 co-sponsors); H.R. 4803, 103rd Cong. (1993) (36 co-sponsors).

248. See S. 819, 115th Cong. (2017); H.R. 1869, 115th Cong. (2017).

249. H.R.1869, 115th Cong. (2017-2018) (listing 198 Congressional co-sponsors); H.R.1619, 114th Cong. (2015-2016) (193 co-sponsors); H.R.377, 113th Cong. (2013) (208 co-sponsors); H.R.1519, 112th Cong. (2011) (197 co-sponsors); H.R.12, 111th Cong. (2009) (200 co-sponsors); H.R.1338, 110th Cong. (2007) (230 co-sponsors); H.R.1687, 109th Cong. (2005) (111 co-sponsors); H.R.1688, 108th Cong. (2003) (116 co-sponsors); H.R.781, 107th Cong. (2001) (196 co-sponsors); H.R.2397, 106th Cong. (1999) (170 co-sponsors); H.R.541, 106th Cong. (1999) (122 co-sponsors); H.R.2023, 105th Cong. (1997) (95 co-sponsors).

Act as the frontrunner in federal legislative efforts to redress the gender pay gap.²⁵⁰

In its current form,²⁵¹ the PFA focuses on three main changes to strengthen existing protections under the Equal Pay Act. First, it would significantly narrow the employer's affirmative defense that a demonstrated pay disparity is due to a "factor other than sex."²⁵² Under the bill, the defense is narrowed to only "a bona fide factor other than sex, such as education, training, or experience," which is met only upon an employer's ability to demonstrate that the factor "accounts for the differential in compensation," is both "job-related" and "consistent with business necessity," and is "not based upon or derived from a sex-based differential in compensation."²⁵³ This would be an influential change, holding the employer strictly liable for unexplained disparate outcomes and importing language from the disparate impact context of Title VII.²⁵⁴ The burden on the employer to justify a pay disparity in this manner could expose unexamined stereotypes and limit justifications that are correlated with sex or infected with bias—for example, setting pay based on employees' prior salaries.²⁵⁵

Second, the bill would strengthen anti-retaliation protections for employees penalized for discussing or seeking to discover information about firm-wide pay for the purposes of ensuring pay equity.²⁵⁶ Scholars and advocates have noted the importance of "pay transparency" in exposing the problem of gender pay disparities so that employees have the information they need to enforce existing law.²⁵⁷ Third, the PFA would also encourage

250. *See supra* note 249. Companion bills have been introduced in the Senate. The Fair Pay Act was introduced in the Senate in nine of its thirteen sessions, each year from 1995 to 2013, with between eight and sixteen Senate co-sponsors. *See, e.g.*, S. 168, 113th Cong. (2013) (listing 10 Senate co-sponsors); S. 1650, 104th Cong. (1995) (8 co-sponsors). The Paycheck Fairness Act was introduced in the Senate in each of its eleven sessions, with between eighteen and fifty-six Senate co-sponsors. *See, e.g.*, S. 819, 115th Cong. (2017) (listing 48 Senate co-sponsors); S. 71, 105th Cong. (1997) (23 co-sponsors).

251. *See* S. 819, 115th Cong. (2017); H.R. 1869, 115th Cong. (2017).

252. *See* S. 819, § 3; H.R. 1869, § 3.

253. S. 819, § 3; H.R. 1869, § 3.

254. *See* Brake, *supra* note 193, at 890–93.

255. *See id.* at 911 ("Enabling the doctrine to expose the weaknesses behind these rationales would reveal the implicit gender bias in discretionary pay systems that results in paying women less for substantially equal work.").

256. *See* S. 819, § 8; H.R. 1869, § 8.

257. *See, e.g.*, Eisenberg, Money, Sex, and Sunshine, *supra* note 193, at 963 (2011) ("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."); Gowri Ramachandran, Pay Transparency, 116 Penn. St. L. Rev. 1043, 1043 (2012) (arguing pay transparency may "help prevent, root out, and correct the discrimination in the first place"); Cynthia Estlund, Extending the Case for Workplace Transparency to Information About Pay, U.C. Irvine L. Rev. 781, 783 (2014) ("[M]andatory disclosure of meaningful salary information would

private enforcement by increasing the potential damages available to plaintiffs who sue to allow possible compensatory and punitive damages not currently available under the EPA.²⁵⁸

The PFA as currently drafted stands to significantly improve the ability of employees to prevail should they bring a lawsuit under the EPA. Moreover, by limiting defenses and placing the burden on employers to justify pay disparities they claim are not due to sex, the PFA could also help redress the portion of the gender pay gap due to stereotyping and discrimination. Yet to be sure, it is difficult to pass federal legislation expanding civil rights remedies, a task made all the more unlikely given that Republicans, who generally oppose such an expansion, will likely control the legislature and the presidency until at least 2020.²⁵⁹

More importantly, however, even if the PFA were to pass and become law, its approach does little to redress the challenge to pay equity posed by steep occupational segregation and the significant portion of the pay gap it causes.²⁶⁰ The PFA as currently drafted leaves the requirement of “equal work” entirely untouched, doing nothing to expand enforcement for the vast majority of women who cannot point to a virtually identical comparator to meet the threshold prong of proving an EPA violation.²⁶¹ While the PFA’s limitation on affirmative defenses may help narrow the portion of the gender wage gap caused by discrimination, it misses the key structural problem of gender workforce segregation.

2. *Employer Reporting and Compliance*

While legislators work toward amending the EPA, efforts put in place by the executive branch during the Obama Administration—but put on hold by the Trump Administration—suggest a way to strengthen enforcement of the EPA in its current form. Shortly after taking office in 2009, in addition

tend to produce less discrimination, less favoritism, and probably somewhat lower disparities overall.”).

258. S. 819, § 3; H.R. 1869, § 3; see 29 U.S.C. § 206(d) (2012).

259. See Mattie Kahn, *So, How Do GOP Lawmakers Defend Opposition to Equal Pay?*, ELLE (Apr. 12, 2016), <https://www.elle.com/culture/career-politics/a35547/gop-congressmen-oppose-equal-pay/> (noting that “Congressional Republicans have blocked the Paycheck Fairness Act in 2010, 2012, and 2014, despite overwhelming Democratic support”); Danielle Paquette, *The Trump Administration Just Halted This Obama-Era Rule to Shrink the Gender Wage Gap*, WASH. POST (Aug. 30, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/30/the-trump-administration-just-halted-this-obama-era-rule-to-shrink-the-gender-wage-gap/?utm_term=.bd16f257b9e4.

260. See *supra* Part I.B.

261. S. 819, § 3; H.R. 1869, § 3; see 29 U.S.C. § 206(d) (2012). The PFA does broaden the requirement that comparators work in the “same establishment” to all of the employer’s workplaces within a county, which would broaden very slightly the geographic region from which a virtually identical comparator could be drawn. S. 819, § 3; H.R. 1869.

to making the Lilly Ledbetter Fair Pay Act his first enacted legislation,²⁶² President Obama established the National Equal Pay Enforcement Task Force to provide policy recommendations on how to close the gender wage gap.²⁶³ As recommended by the Task Force, the administration worked toward requiring larger employers to provide pay data as part of their reporting requirements under federal law.²⁶⁴

Federal law requires private employers of 100 or more employees to provide certain data about their workforces to the federal government by completing what is known as the EEO-1 form on an annual basis.²⁶⁵ On February 1, 2016, the EEOC issued a notice of proposed changes to the EEO-1 form to require employers to disclose “aggregate data on pay ranges and hours worked” by their workforce.²⁶⁶ The rule was finalized in September 2016, with requirements to collect new data going into effect in 2017 and included in the first report due March 31, 2018.²⁶⁷ The new rule would have required private employers with 100 or more employees to report “summary pay data” and “aggregate hours worked data,” which would have included identifying part-time and full-time employees in each of twelve salary bands within ten job categories by sex and race, and the hours worked by all employees in each band.²⁶⁸ The goal of the enhanced reporting requirements was to facilitate greater pay transparency, both to help enforcement agencies spot trends in pay disparities among industries for targeted enforcement, and to facilitate greater voluntary employer compliance with equal pay laws.²⁶⁹ Yet the potential positive impact of requiring pay transparency from large

262. See Brown, *supra* note 148.

263. *National Equal Pay Enforcement Task Force*, WHITE HOUSE, https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf (last visited Mar. 12, 2018).

264. *Id.*

265. See *About the EEO-1 Survey*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eo1survey/about.cfm> (last visited Mar. 12, 2018); *Filing Procedures*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eo1survey/2007instructions.cfm> (last visited Mar. 12, 2018).

266. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports (Jan. 29, 2016), [hereinafter Press Release] (<https://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm>); Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113 (Feb. 1, 2016).

267. Kevin McGowan, *EEOC Finalizes Employer Pay Data Requirement*, BLOOMBERG BNA (Sept. 30, 2016), <https://www.bna.com/eeoc-finalizes-employer-n57982077780/>.

268. See EQUAL EMP'T OPPORTUNITY COMM'N, SAMPLE REVISED EEO-1 FORM, <http://src.bna.com/i1A> (last visited Mar. 12, 2018); McGowan, *supra* note 267; Press Release, *supra* note 266.

269. See Julie Hirschfeld Davis, *Obama Moves to Expand Rules Aimed at Closing Gender Pay Gap*, N.Y. TIMES (Jan. 29, 2016), <https://www.nytimes.com/2016/01/29/us/politics/obama-moves-to-expand-rules-aimed-at-closing-gender-pay-gap.html>; Press Release, *supra* note 266.

employers will not be realized anytime soon: in August 2017, the Trump Administration announced that it was abandoning the new reporting requirements.²⁷⁰

In a separate effort, inspired by the work of private company Salesforce.com and its CEO Marc Benioff to equalize pay within that company,²⁷¹ the Obama White House launched an initiative to get private employers to sign a pledge to work towards correcting their own pay disparities.²⁷² Employer signatories to the pledge commit to, among other things, “conducting an annual company-wide gender pay analysis across occupations” and “embedding equal pay efforts into broader enterprise-wide equity initiatives.”²⁷³ As of the time President Obama left office in December 2016, over 100 private companies and organizations had signed the pledge, including eBay, Apple, AT&T, MasterCard, Staples, Dow Chemical, and PepsiCo.²⁷⁴

While laudable, reporting requirements and voluntary efforts can only go so far to close the gender pay gap. To the extent that these federal reform efforts increase pay transparency and encourage voluntary employer compliance with existing equal pay laws, the net result will, of course, be a positive impact on helping to reduce the gender wage gap, even if only slightly. And, as discussed in Part IV, below, voluntary employer efforts stand to provide another advantage: the more employers who successfully work to create pay equity among their own ranks, the more examples plaintiffs have to argue that jobs need not be identical in order to compare pay—that it is possible to take a firm-wide view of “equal work.”²⁷⁵

C. Current State Reform Efforts

While federal legislative efforts have stalled, state policymakers have taken an active role in working to amend and strengthen their own state equal

270. See Claire Cain Miller, *One Effort to Close the Gender Pay Gap Won't Get a Try Under Trump*, N.Y. TIMES (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/upshot/one-effort-to-close-the-gender-pay-gap-wont-get-a-try.html>; Paquette, *supra* note 259.

271. See AAUW, *supra* note 47, at 22 (noting that “Salesforce’s actions . . . inspire[d] the Obama administration to announce the White House’s Equal Pay Pledge”); Lauren Weber, *Why Employers Are Making Pay Equity a Reality*, WALL ST. J. (Sept. 26, 2016), <https://www.wsj.com/articles/why-employers-are-making-pay-equity-a-reality-1474882202>.

272. *White House Equal Pay Pledge*, OBAMA WHITE HOUSE, <https://obamawhitehouse.archives.gov/webform/white-house-equal-pay-pledge> (last visited Mar. 12, 2018) [hereinafter *Equal Pay Pledge*]; *Fact Sheet: White House Announces New Commitments to the Equal Pay Pledge*, OBAMA WHITE HOUSE (Dec. 7, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/07/fact-sheet-white-house-announces-new-commitments-equal-pay-pledge> [hereinafter *Fact Sheet*]; AAUW, *supra* note 47, at 22.

273. *Equal Pay Pledge*, *supra* note 272.

274. See *Fact Sheet*, *supra* note 272; Weber, *supra* note 271.

275. See *infra* Part IV.A.2.

pay protections. In the past two legislative sessions, legislators in over forty states have introduced bills to add to existing state equal pay protections, proposing a variety of ideas and approaches.²⁷⁶ Three states in particular, California, Massachusetts, and Oregon, have succeeded in enacting the most far-reaching legislation to date that promises to offer new solutions to remedy both gender and racial pay gaps.²⁷⁷

1. *Massachusetts Law, Effective 2018*

In 2016, the Massachusetts legislature enacted amendments to strengthen the state's equal pay act that took effect January 1, 2018.²⁷⁸ Massachusetts was one of the states to have already enacted a state law with broader statutory language than federal law,²⁷⁹ under which it required equal pay “for work of like or comparable character or work on like or comparable operations.”²⁸⁰ And, as in Washington, Massachusetts courts had interpreted the state law to go further than the federal EPA.²⁸¹ Yet, existing state law did not define “comparable”; as amended, the state equal pay act now arguably broadens its own required comparisons.²⁸² Under the revised act, employers will be required to provide equal pay for “comparable work,” which it defines as “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions.”²⁸³

The revised act also specifically prohibits an employer from “seek[ing] the salary history of any prospective employee from any current or former employer,”²⁸⁴ making it the first state in the nation to do so.²⁸⁵ Existing state law did not provide for an employer's “‘factor other than sex’ affirmative defense”—only for an affirmative defense based on seniority—so no amend-

276. *See infra* text accompanying notes 315–316.

277. *See infra* notes 278–314.

278. An Act to Establish Pay Equity, S. 2119 § 105A, 189th Gen. Court (Mass. 2016) (enacted).

279. *See supra* Part II.C.

280. Mark Esposito, *Massachusetts Pay Equity and Its Limits*, 87 B.U. L. REV. 911, 916 (2007).

281. *See, e.g.*, *Mullenix v. Forsyth Dental Infirmary for Children*, 965 F. Supp. 120 (D. Mass. 1996); *Jancey v. Sch. Comm. of Everett*, 695 N.E. 2d 194 (Mass. 1998); *see also* Esposito, *supra* note 280, at 916–17.

282. *See* Lisa Stephanian Burton & Douglas T. Schwarz, *Massachusetts Legislature Passes Sweeping Equal Pay Amendments*, NAT'L L. REV. (July 29, 2016), <https://www.natlawreview.com/article/massachusetts-legislature-passes-sweeping-equal-pay-amendments>.

283. MASS. GEN. LAWS ch. 149, § 105A (2018).

284. *Id.*

285. Jena McGregor, *What a New Equal Pay Law in Massachusetts Could Do for Everyone, Not Just Women*, WASH. POST (Aug. 4, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/08/04/what-a-new-equal-pay-law-in-massachusetts-could-do-for-everyone-not-just-women/?utm_term=.fce60f470c56.

ment to such a provision was required, as it would be in other states and federal law.²⁸⁶ But the first-of-its-kind provision barring reliance on prior salary specifically excludes a common factor that is often infected with sex stereotypes. As a result, it serves as a model for other states seeking to rein in sex-linked “factors other than sex,” by clearly prohibiting a particularly troubling defense, without requiring evidence from the plaintiff that prior salary information is impermissibly “sex-based.”²⁸⁷

Moreover, without adding specific protections for race-based unequal pay, this provision could have the effect of equalizing salaries based on race, too, if employers stop entirely the practice of asking all employees about prior salaries.²⁸⁸

2. California Law, Effective 2017 and 2018

California went even further than Massachusetts when, also in 2016, the legislature significantly strengthened state law.²⁸⁹ Effective January 1, 2017, California’s state version of the EPA requires employers to provide equal pay for “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”²⁹⁰ Prior versions of the law mirrored the federal requirement for “equal work” on jobs requiring “equal skill, effort, and responsibility . . . performed under similar working conditions.”²⁹¹ The amendment makes clear the legislature’s intent to broaden the comparison of workers beyond only near-identical jobs.²⁹²

Indeed, an original draft of the amendment used the term “comparable work,” but was stricken and replaced with “substantially similar” work, likely as a compromise in response to concerns from the California Chamber of Commerce that “determining ‘comparable’ work for different job duties can

286. Esposito, *supra* note 280, at 933–34.

287. Compare Mass. S. 2119, with S. 1063, 2016 Leg. (Cal. 2016) (enacted) and S. 862, 114th Cong. (2015). The California and federal approaches are not as explicit about excluding prior salary but are generally more restrictive on the “any factor other than sex” defense. Note, however, in 2017, California passed a separate law related to salary history. See *infra* notes 301–304 and accompanying text.

288. See McGregor, *supra* note 285.

289. Cal. S. 1063; see Patrick McGreevy & Chris Megerian, *California Now Has One of the Toughest Equal Pay Laws in the Country*, L.A. TIMES (Oct. 6, 2015), <http://www.latimes.com/local/political/la-me-pc-gov-brown-equal-pay-bill-20151006-story.html>.

290. CAL. LAB. CODE § 1197.5(a).

291. 1937 Cal. Stat. 185; 1972 Cal. Stat. 2152; see also *Conditions of Employment: Gender Wage Differential: Hearing on S.B. 358 Before the S. Comm. on Lab. & Indust. Rel.*, 2015 Leg., Reg. Sess. 4 (Cal. 2015) [hereinafter *Conditions of Employment*] (“California enacted the California Equal Pay Act in 1949 with ‘equal pay for equal work’ language, similar to the federal Equal Pay Act of 1963.”).

292. See *Conditions of Employment*, *supra* note 291.

be extremely subjective, leading to different interpretations and, thus the potential for litigation.”²⁹³ Yet legislative analysis of the bill demonstrates that the legislators were aware California was lagging behind other states that had gone beyond “equal work” to require equal pay for “work of a substantially similar or comparable character.”²⁹⁴ The goal in revising the statutory text, then—even without using the term “comparable work”—was to go further, “to eliminate the gender wage gap by prohibiting pay differentials between men and women for substantially similar work,” and to clarify the scope of comparison.²⁹⁵ As explained in the Senate Judiciary Committee analysis of the bill:

Existing case law has developed in such a way as to make it unclear whether “equal work” means exactly the same job or substantially similar job . . . [Under the act as amended,] a plaintiff . . . would *not* have to prove that the jobs were equal in order to be paid the same wages; rather, the plaintiff’s burden would be to show that the man and woman should be paid the same wages because, when viewed as a composite of skill, effort, and responsibility, they were performing substantially similar jobs.²⁹⁶

Beyond expanding threshold requirements for coverage, the new California law narrows the “factor other than sex” defense in ways similar to those proposed in the federal Paycheck Fairness Act.²⁹⁷ The employer may defend based on a “bona fide factor other than sex, such as education, training, or experience,” and “only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation.”²⁹⁸ In addition, any bona fide factor other than sex must also be “job related” and “consistent with a business necessity,” defined by the statute as constituting “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.”²⁹⁹

Likewise, the statute strengthens anti-retaliation protections for those seeking to enforce the act, and explicitly forbids employers from “prohibit[ing] an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this

293. *Id.* at 5. The hearing also highlights, as of April 25, 2015, “*This Bill* prohibits an employer from paying any employee at wage rates less than the rates paid to employees of the opposite sex for work of a comparable character on jobs the performance of which requires *comparable skills, effort, and responsibility.*” *Id.* at 2.

294. *Id.* at 4.

295. See *Conditions of Employment*, *supra* note 291.

296. *Id.* at 6 (emphasis added).

297. See *supra* Part III.B.1.

298. CAL. LAB. CODE § 1197.5 (West 2017).

299. *Id.*

section.”³⁰⁰ And, in a separate bill enacted in the 2017 legislative session, California added prohibitions on prior salary information like those that had been enacted in Massachusetts.³⁰¹ Starting in 2018, California employers are prohibited from “orally or in writing, personally or through an agent, seek[ing] salary history information . . . about an applicant for employment.”³⁰² Moreover, the new section requires that “upon reasonable request,” an employer must “provide the pay scale for a position to an applicant applying for employment.”³⁰³ It also reinforces that, as enacted in its 2016 amendments to the state’s equal pay law, “prior salary, by itself, [shall not] justify any disparity in compensation.”³⁰⁴ These prohibitions in concert—narrowing affirmative defenses to the statute in 2016 and prohibiting prior salary information in 2017—stand to root out rationales for setting pay that are infected by bias and stereotyping, even if not “sex based.”

Yet perhaps most radically, California’s new law was one of the first in the nation to add “race and ethnicity” as protected groups under the state’s equal pay act; while all states include “race” in state versions of Title VII, California is among the first to include it in a state version of the federal Equal Pay Act (which, itself, applies only to sex discrimination in pay).³⁰⁵ This requires—as a strict labor code statute that applies without proof of any discriminatory intent—that employers provide equal compensation “to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”³⁰⁶ California has provided the model for another legal tool to directly confront the racial pay gap—now treating racial pay disparities like gender pay disparities have been treated since the passage of the EPA in 1963.

300. *Id.*

301. Act of Oct. 12, 2017, Ch. 688 (A.B. 168) sec. 1 (codified as amended at CAL. LAB. CODE § 432.3 (West effective Jan. 1, 2018)).

302. CAL. LAB. CODE § 432.3 (b) (West effective Jan. 1, 2018).

303. CAL. LAB. CODE § 432.3 (c) (West effective Jan. 1, 2018).

304. CAL. LAB. CODE § 432.3 (i) (West effective Jan. 1, 2018).

305. Mollie Reilly, *California Expands Equal Pay Law to Include Protections for Race and Ethnicity*, HUFFINGTON POST (Sept. 30, 2016), http://www.huffingtonpost.com/entry/california-equal-pay-race_us_57c07edbe4b085c1ff2937f3; Allison Waterfield, *California Forges Ahead with Equal Pay Protections*, BLOOMBERG BNA (Oct. 26, 2016), <https://www.bna.com/california-forges-ahead-b57982079183>. Iowa’s private sector statute requiring equal pay for “equal work” also applies to protected classes beyond sex, including, among other bases, race and national origin. *See supra* note 210; IOWA CODE ANN. § 216.6A (2)(a) (2010).

306. CAL. LAB. CODE § 1197.5 (West 2017).

3. Oregon Law, Effective 2019

Most recently, the Oregon legislature followed suit, expanding its equal pay act in ways that combine elements of both Massachusetts and California approaches for what is now arguably the most comprehensive state equal pay act to date. Enacted in 2017 and effective January 2019, Oregon law now requires equal pay for “work of comparable character,” which it defines as “work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title”³⁰⁷—a definition similar to that of Massachusetts.³⁰⁸ Also like Massachusetts, Oregon was one of the states whose equal pay statute used broader language of “comparable work” than the federal EPA requirement of “equal work” prior to current amendments, but left comparability undefined by statute. Oregon court precedent has long held that “comparable work” in state law was broader than “equal work” in federal law. In two separate cases from the mid-1980s, the Oregon Court of Appeals held that Oregon’s statute went further than federal law. In one, the Court noted that “[w]ork of ‘comparable character’ is broader than ‘equal work’” and that “[c]omparable’ does not require equality but that two items have important common characteristics.”³⁰⁹ In the other, the Court highlighted that a “difference between [state and federal equal pay acts] is that the federal act refers to ‘equal’ work, whereas the state act refers to ‘comparable’ work, which is a more inclusive term.”³¹⁰

In addition to a more expansive definition of the threshold requirement for comparisons, the new Oregon law—like the California law—limits affirmative defenses available to employers to only “bona fide factor[s] that [are] related to the position in question,” which it defines as one of eight possible factors, with no catch-all for a “factor other than sex.”³¹¹ The Oregon law also prohibits, as do new California and Massachusetts laws, an employer

307. OR. REV. STAT. § 652.210(12) (West effective Jan. 1, 2019).

308. See MASS. GEN. LAWS ch. 149 § 105A (effective Jan. 1, 2018).

309. Bureau of Lab. & Indus. v. City of Roseburg, 706 P.2d 956, 959 & n.2 (Or. App. 1985) (holding also that because “‘substantially similar work’ is a stricter test than ‘comparable work,’” plaintiff’s “[p]roof of a violation of the stricter ‘substantially similar’ test necessarily proves a violation of [the statute]”).

310. Smith v. Bull Run Sch. Dist., 722 P.2d 27, 29 (Or. App. 1986).

311. OR. REV. STAT. § 652.220(2) (West effective Jan. 1, 2019) (listing factors of: “(a) A seniority system; (b) A merit system; (c) A system that measures earnings by quantity or quality of production, including piece-rate work; (d) Workplace locations; (e) Travel, if travel is necessary and regular for the employee; (f) Education; (g) Training; (h) Experience; or (i) Any combination of the factors described in this subsection, if the combination of factors accounts for the entire compensation differential.”)

from “[d]etermin[ing] compensation for a position based on current or past compensation of a prospective employee.”³¹²

Lastly, and again most strikingly, Oregon’s new equal pay statute prohibits compensation discrimination based on *any* “protected class” as defined by the statute, including not only sex (as all state equal pay statutes do) and race (as California’s new equal pay statute does), but also “color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.”³¹³ Indeed, as with all other state versions of Title VII, Oregon’s existing antidiscrimination laws prohibit employment discrimination on the basis of these protected classes,³¹⁴ but such a lawsuit typically requires the employee to bear the burden of proving an employer’s intentional discrimination. By adding all protected classes to the state’s separate equal pay statute, the Oregon legislature has placed the burden of persuasion on the *employer* to justify disparate pay among employees performing comparable work where the disparity is not just between men and women, but between members of any protected class.

By building upon existing statutory text and precedent with amendments that now define “work of comparable character,” include statutory protections for pay differentials based on *any* protected class status, and limit affirmative defenses to only those bona fide and excluding prior salary, the Oregon state equal pay act now offers the most comprehensive model for closing both gender and racial pay gaps at work.

Notably, while Massachusetts, California, and Oregon have passed the most wide-reaching new state equal pay laws, many other states are considering their own amendments to state law. In the 2017 legislative session alone, legislators in forty-two states introduced at least one bill with the purpose of narrowing the wage gap, and more modest amendments (for example, banning consideration of prior salary in pay-setting) were passed in Colorado, Delaware, and Nevada.³¹⁵ As of publication in March 2018, legislators in New Jersey had passed a broad-based amendment to their state equal pay law that, if enacted by the Governor, would prohibit unequal pay based on any protected class for “substantially similar” work—similar to Oregon’s approach.³¹⁶

312. OR. REV. STAT. § 652.220(1)(d) (West effective Jan. 1, 2019).

313. OR. REV. STAT. § 652.210 (5); 652.220(1)(a) (West effective Jan. 1, 2019).

314. See OR. REV. STAT. § 659a.001 (2015); OR. REV. STAT. § 174.100 (2015).

315. See Kate Nielson, *States Notch Multiple Equal Pay Victories in 2017*, AM. ASS’N OF UNIV. WOMEN (Oct. 13, 2017), <https://www.aauw.org/2017/10/13/state-equal-pay-victories-in-2017>.

316. See Christian Hetrick, *New Jersey Lawmakers Overwhelmingly Pass Pay Equity Bill*, OBSERVER (Mar. 26, 2018), <http://observer.com/2018/03/new-jersey-lawmakers-overwhelmingly-pass-pay-equity-bill/>; A1/S104, 218th Leg. (N.J. 2018).

It is clear that the issue of equal pay and the inability of existing law to redress the gender pay gap has become a key legislative priority at the state level. To date, however, only four states have passed significant recent reforms to their equal pay statutes, and thirteen others have room for interpretation of their statutory language that allows for broader-based comparisons in pay discrimination cases that go beyond federal law's threshold requirement of comparing "equal work." Reform at the federal level is a near impossibility for the immediate future due to the Republican control of Congress and the White House. Yet even without widespread legislative change, advances in the law of sex stereotyping under Title VII and examples of employers who are, themselves, instituting comparable work efforts provide an opportunity to reframe and reinterpret existing law.

IV. REDEFINING EQUAL WORK

Gender and racial pay gaps have been stubbornly persistent, and improvement in these measures stalled for decades. Such gaps reflect a serious shortcoming in policy efforts to advance social justice; they also exacerbate the current problem of income inequality. Given the nascent state of legislative reform efforts (and the current political climate at the federal level), this Part offers doctrinal and theoretical suggestions to reframe and reinterpret existing law prohibiting pay discrimination. The goal is to push back on the federal courts' unnecessarily crabbed interpretations of a "comparator" under Title VII and of "equal work" under the Equal Pay Act. To do so, this Part draws on both advances in the legal theory of sex stereotyping under Title VII and examples from employment practices in the union, government, and private sectors to show how current precedent opens the door to broader comparisons of equivalent work in pay discrimination cases.

This Part also seeks to debunk the outdated and inaccurate critique that interpreting the law in a way that can reach the disadvantages caused by labor market forces or workforce segregation is somehow requiring employers to compare and pay equal wages for "apples and oranges."³¹⁷ Both broader interpretations of "equal work" under the Equal Pay Act and broader state statutory requirements of equal pay for "substantially similar" or "comparable" work³¹⁸ seek, rather, to compare different kinds of apples—for example, red apples and green apples. By maintaining a focus on equivalent job criteria and requirements within one employer's business operations, the law can take a reasonable and incremental step forward to account for discrimination

317. *See supra* note 36 and accompanying text.

318. Here I refer to comparable "work," not "worth." *See supra* note 241–242 and accompanying text.

and segregation in the labor market rather than throwing up its hands in deference to what employers have done in the past. This Part then concludes by considering counterarguments.

A. *A New Framework for What Constitutes Equal Work*

While, to date, most judicial precedent has interpreted federal and state equal pay act requirements of equal pay for “equal work” narrowly, over the past decade, advances in the legal theory of sex stereotyping under Title VII and voluntary efforts by employers provide an opportunity to reexamine existing interpretations.

1. *Advances in Stereotype Theory under Title VII*

As described previously, in the 1980s, federal courts were unreceptive to arguments about comparable worth under Title VII. Yet advances in the legal theory of sex stereotyping since then provide cause for reconsideration. Notably, the *Spaulding* and *AFSCME* cases were decided by the Ninth Circuit prior to another influential case, the United States Supreme Court’s decision in *Price Waterhouse v. Hopkins*.³¹⁹ In *Price Waterhouse*, the Court held that, when highly successful accountant Ann Hopkins was denied a promotion to partnership because she did not conform to a feminine gender stereotype, she could allege sex discrimination under Title VII.³²⁰ Hopkins was told that, “to improve her chances for partnership,” she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”³²¹ This, the Court held, could constitute sex discrimination because, “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”³²² In the nearly two decades since the *Price Waterhouse* decision, the sex stereotype theory has grown dramatically in development and application—so much so that, in recent years, it has been applied by some federal courts to prohibit sex discrimination against male caregivers and to hold that discrimination based on transgender status is sex discrimination per se.³²³

The development of the *Price Waterhouse* sex stereotyping theory offers two doctrinal advances that may be applied to strengthen equal pay

319. 490 U.S. 228 (1989).

320. *Id.* at 258.

321. *Id.* at 235 (quoting *Price Waterhouse v. Hopkins*, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff’d*, 825 F.2d 458 (D.C. Cir. 1987)).

322. *Id.* at 251 (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

323. See Bornstein, *supra* note 151, at 919; Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297 (2012).

claims even under existing law. First, for pay discrimination claims alleged under Title VII, courts in stereotyping cases have held that a plaintiff successfully created an inference of discrimination even without being able to point to a direct comparator.³²⁴ For example, when a school psychologist, Elana Back, was denied tenure because her supervisors believed the fact that she was a mother of two young children was incompatible with her job, the United States Court of Appeals for the Second Circuit held that she could create an inference of discrimination even without pointing to “similarly situated men” that had been treated better.³²⁵ According to the Court, the decisionmakers’ “stereotypical remarks about the incompatibility of motherhood and employment” were enough for Back to meet her burden of proof: “stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”³²⁶ This was an important holding because of the fact that Back worked in a predominantly female occupation: 85% of the school’s teachers were women and 71% were mothers.³²⁷

Federal courts deciding pay discrimination claims alleged under Title VII should hold similarly. If there is evidence that a plaintiff’s pay was infected by sex discrimination or sex stereotypes about the plaintiff or the position, to be consistent with the post-*Price Waterhouse* line of cases, a plaintiff should be able to successfully create an inference of discrimination under Title VII, even without being able to point to a near identical comparator.

Second, for pay discrimination claims alleged under the Equal Pay Act, the knowledge gained in nearly two decades of sex stereotyping jurisprudence under Title VII can and should be applied where applicable to EPA claims as well. In the context of meeting the first threshold for EPA claims—that the plaintiff is performing “equal work”—where relevant, plaintiffs should identify and challenge any sex stereotyping that affected the employer’s perception of whether the jobs are “equal.”

In addition, sex stereotype theory as applied in Title VII can and should be used to challenge an employer’s defense that a pay differential is based on a “factor other than sex” when that factor is impermissibly tied to sex stereotyping.³²⁸ Certain cases decided under the existing EPA have recognized and applied this approach. For example, a federal court recognized stereotyping and reinstated an EPA claim by a group of mostly female nurse practitioners who were paid less than mostly male physician assistants for doing “fungible” and “interchangeable” work, despite the fact that wages were set

324. See Bornstein, *supra* note 151, at 945–54; Goldberg, *supra* note 154, at 794.

325. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004); Bornstein, *supra* note 151, at 947.

326. *Back*, 365 F.3d at 122; Bornstein, *supra* note 151, at 947.

327. See *Back*, 365 F.3d at 122; Bornstein, *supra* note 151, at 947.

328. See *supra* note 193 and accompanying text.

according to a Veteran's Affairs pay scale that treated the positions differently.³²⁹ Similarly, while prior salaries and prevailing labor market rates are generally acceptable defenses, several cases have held that, without some additional reason, such as a difficult negotiation and crucial need for recruiting, defending pay disparities based on those reasons alone or leaving disparities in place after the recruitment may violate the EPA.³³⁰ And, in recent cases, federal courts have held that a male employee's ability to negotiate a higher salary may not constitute a "factor other than sex,"³³¹ which comports with social science data showing that women may be disadvantaged by sex stereotypes around assertiveness and negotiation.³³²

These types of stereotype-associated factors could affect the racial pay gap as well. A vast literature documents that when pay setting involves negotiation, women are disadvantaged;³³³ studies show that racial minorities may be disadvantaged similarly, so that "the context of the job negotiation itself is partly responsible for the salary gap."³³⁴ Researchers in one study attributed this disadvantage to the process of "racial socialization," whereby "Black employees, relative to other racial and ethnic groups, are more likely to be taught at an early age that life is unfair" and taught "the importance of

329. See *Beck-Wilson v. Principi*, 441 F.3d 353, 360, 363 (6th Cir. 2006).

330. See, e.g., *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 473 (7th Cir. 2012); *Leatherwood v. Anna's Linens Co.*, 384 Fed. App'x 853, 860 (11th Cir. 2010); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586 (11th Cir. 1994); *Futran v. Ring Radio Co.*, 501 F. Supp. 734 (N.D. Ga. 1980).

331. See *Thibodeaux-Woody v. Houst. Cmty. Coll.*, 593 Fed. App'x 280, 283–85 (5th Cir. 2014); *Dreves v. Hudson Grp. Retail, LLC*, 2013 WL 2634429, at *8 (D. Vt. 2013).

332. See generally LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE* (2007); Lisa A. Barron, *Ask and You Shall Receive? Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUMAN RELATIONS 635 (2003); Laura J. Kray et al., *Reversing the Gender Gap in Negotiations: An Exploration of Stereotype Regeneration*, 87 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 386 (2002); Laura J. Kray et al., *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY 942 (2001); Alice F. Stuhlmacher & Amy E. Walters, *Gender Differences in Negotiation Outcome: A Meta-analysis*, 52 PERSONNEL PSYCHOLOGY 653 (1999).

333. See, e.g., *supra* note 332.

334. Morela Hernandez & Derek R. Avery, *Getting the Short End of the Stick: Racial Bias in Salary Negotiations*, MIT SLOAN MANAGEMENT REVIEW (June 15, 2016), <http://sloanreview.mit.edu/article/getting-the-short-end-of-the-stick-racial-bias-in-salary-negotiations/> (citing studies including Derek R. Avery, *Racial Differences in Perceptions of Starting Salaries: How Failing to Discriminate Can Perpetuate Discrimination*, 17 JOURNAL OF BUSINESS & PSYCHOLOGY 439 (2003); Jeff Dominitz & Charles F. Manski, *Perceptions of Economic Insecurity: Evidence From the Survey of Economic Expectations*, 61 PUBLIC OPINION QUARTERLY 261 (1997); Michael Gasser et al., *Reward Expectations: The Influence of Race, Gender and Type of Job*, 15 JOURNAL OF BUSINESS & PSYCHOLOGY 321 (2000); Marc-David L. Seidel et al., *Friends in High Places: The Effects of Social Networks on Discrimination in Salary Negotiations*, 45 ADMINISTRATIVE SCIENCE QUARTERLY 1 (2000)).

racial identity [to] prepare them for bias that it may provoke.”³³⁵ Thus, black employees are disadvantaged by “misalignment” of perceptions when negotiating salaries.³³⁶

To be consistent with existing precedent under Title VII, if an employer defends an EPA violation by claiming “unequal work” or a “factor other than sex,” and that comparison or factor involves sex stereotyping, the factor should, itself, be “evidence of an impermissible, sex-based motive”³³⁷—in the words of the Supreme Court in *Price Waterhouse*, impermissible “disparate treatment of men and women resulting from sex stereotypes.”³³⁸ Likewise, where pay-setting can be shown to be infected with racial stereotyping, that constitutes unlawful race discrimination in compensation under Title VII.

2. *New Models for Comparators*

Perhaps the greatest challenge to overcoming the portion of the pay gap due to workforce segregation is the need to provide a near identical comparator who is paid more for doing “equal work” under Title VII or the EPA.³³⁹ Yet, employers in a variety of employment contexts provide examples of the ability to set similar pay for different jobs that require similar background credentials, effort, and responsibility. Employers in union, government, and even private sectors provide examples upon which a plaintiff alleging pay discrimination should be able to draw to meet the legal test of “equal work” under the EPA or a “comparator” under Title VII.

a. *Union Sector*

The union sector provides many models for achieving pay equity despite varied jobs within an organization. Because the goal of union representation is to protect the interests of all workers equally, the process for setting pay is more routinized, with a focus on objective criteria applied consistently across

335. Hernandez & Avery, *supra* note 334 (citing Diane Hughes, *Correlates of African American and Latino Parents' Messages to Children About Ethnicity and Race: A Comparative Study of Racial Socialization*, 31 AM. J. COMM. PSYCHOL. 15 (2003); and then citing Jean S. Phinney & Victor Chavira, *Parental Ethnic Socialization and Adolescent Coping with Problems Related to Ethnicity*, 5 J. RES. ADOLESCENCE 31 (1995)).

336. *Id.*

337. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004).

338. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

339. *See supra* Parts II.A. & II.B.

workers and positions within a bargaining unit.³⁴⁰ In addition, having an expectation of equality and a bargaining process brings information about wages and how they are set “into the open,” increasing pay transparency as a matter of course in the union context³⁴¹—a key focus of some current pay equity reform efforts.³⁴²

For example, the American Federation of State, County, and Municipal Employees (“AFSCME”), the major union representing public sector employees in the United States (and the plaintiff in an early comparable worth case), has identified how to improve pay equity within an organization by seeking a “job evaluation study” of positions within an organization that keeps an eye out for sex segregation.³⁴³ If that proves too burdensome for the employer, AFSCME suggests enforcing any past pay studies conducted by the employer or modifying a similar study from a different “jurisdiction” to fit the needs of a workplace.³⁴⁴ As AFSCME describes it, a job evaluation study should “compare jobs or job classifications within one employer, not with those of other employers” and should “look[] at job classifications,” “the qualifications required to do the job,” and “the duties and responsibilities that are assigned to a job,” not “at how well or poorly an employee performs these duties” or “at the qualifications that an individual employee who is currently performing a job may have.”³⁴⁵ According to AFSCME, the most common method for evaluating jobs is the “point-factor method,” which assigns points to various “compensable factors,” including skill (“the experience, training, education and ability required to do a job”), effort (“the physical or mental exertion needed to perform a job”), responsibility (“the extent to which employees are accountable for the work they do”), and working conditions (“the physical surroundings and hazards of a job”).³⁴⁶ Factors can be weighted and

340. See JULIE ANDERSON ET AL., INST. FOR WOMEN’S POLICY RES., THE STATUS OF WOMEN IN THE STATES: THE UNION ADVANTAGE FOR WOMEN 4 (2015), [https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/\(R409\)%20Union%20Advantage.pdf](https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/(R409)%20Union%20Advantage.pdf).

341. *Id.*

342. See *supra* text accompanying notes 148–150.

343. See *What is Pay Equity?*, AM. FED’N STATE, CTY., & MUN. EMPS., <http://www.afscme.org/news/publications/working-for-government/were-worth-it-an-afscme-guide-to-understanding-and-implementing-pay-equity/what-is-pay-equity> (last visited Mar. 12, 2018); see also *supra* notes 220, 235, 236 and accompanying text (describing *Am. Fed’n State, Cty., & Mun. Emps. v. Washington*, 770 F.2d 1401 (9th Cir. 1985)).

344. See *What is Pay Equity?*, *supra* note 343.

345. *How is a Pay Equity Study Conducted?*, AM. FED’N STATE, CTY. & MUN. EMPS., <http://www.afscme.org/news/publications/working-for-government/were-worth-it-an-afscme-guide-to-understanding-and-implementing-pay-equity/how-is-a-pay-equity-study-conducted> (last visited Mar. 12, 2018).

346. *Id.*

assigned different steps or levels, all of which are converted into a point system; pay is then set by points.³⁴⁷

Such a system allows an employer to compare and set the same pay for different jobs that have the same number of points. For example, in one AFSCME collective bargaining agreement for state workers in Iowa, the pay grade was the same for, among other positions, Accountant 2, Audiologist, Boiler Inspector, and Clinical Dietician.³⁴⁸ In another, for city workers in Detroit the same pay rate was assigned to Electronic Equipment Repair Worker, First Aid Station Nurse, Social Counselor, and Pharmacy Technician.³⁴⁹ As AFSCME notes, a job evaluation study need not be an additional burden to an employer as “[m]ost mid- and large-sized employers already use a job evaluation system for many human resource functions.”³⁵⁰ While critics may argue that such a point system seems to imply assessments of comparable *worth*, the focus here is still on an objective measure of job duties, skills, and requirements, and not on any general sense of the job’s intrinsic “value” to the employer.³⁵¹

In part as a result of these and other union practices that track and set pay across employees, the gender and racial pay gaps among unionized workers are far smaller than those of the entire U.S. workforce. One study documented that full-time working women who are union members earn, on average, 31% more than women whose jobs are not unionized.³⁵² This translates into a significantly smaller gender pay gap: women who are members of a union earn nearly \$0.88 on the dollar to men,³⁵³ which slashes the

347. *See id.*

348. 2005–2007 COLLECTIVE BARGAINING AGREEMENT BETWEEN STATE OF IOWA AND AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 61 AFL-CIO 107–09 (2005), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2422&context=blscontracts> (last visited Mar. 12, 2018).

349. 1998–2001 MASTER AGREEMENT: CITY OF DETROIT/AFSCME, MICHIGAN COUNCIL 25, at 139–44 (1998), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2448&context=blscontracts> (last visited Mar. 12, 2018).

350. *How is a Pay Equity Study Conducted?*, *supra* note 345.

351. *See Eisenberg, Shattering*, *supra* note 182, at 55; *supra* notes 241–242 and accompanying text (discussing difference between comparable “worth” and comparable “work”).

352. ANDERSON ET AL., *supra* note 340, at 4–5 (citing JANELLE JONES ET AL., WOMEN, WORKING FAMILIES, AND UNIONS (2014)).

353. *Id.* at 4–5, tbl.2 (citing BUREAU LABOR STAT., U.S. DEP’T OF LABOR, MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY UNION AFFILIATION AND SELECTED CHARACTERISTICS, <http://www.bls.gov/news.release/union2.t02.htm> (last visited Mar. 12, 2018)).

current average pay gap of all women (\$0.80 on the dollar) by 40%.³⁵⁴ Another study estimated that unionized women's gender pay gap was half that of non-unionized women.³⁵⁵

Unionized employees also see improvement in the racial pay gap: the median weekly pay for unionized Latino workers is about 40% higher than those who are not unionized; for African Americans, about 30% higher.³⁵⁶ For women of color, this translates into a significant narrowing in their pay gap—a gain of between \$0.07 and \$0.14 on the dollar, according to one study.³⁵⁷

Of course, union membership is at an all-time low: in 2016, just 6.4% of private sector workers and 10.7% of the U.S. workforce overall (including public sector workers) belonged to a union³⁵⁸—a massive decline from the mid-1950s rate of 35%.³⁵⁹ This means that any direct improvement in the pay gaps created by union practices will have a very limited impact on the pay gaps of the U.S. workforce overall. Also, creating pay bands is not a cure-all: the discretion to set pay higher or lower *within* a set pay range may still be infected by gender or racial stereotypes or implicit biases such that, even among jobs assigned the same pay range, those jobs predominantly performed by women or racial minorities may be paid on the lower end of that range.³⁶⁰

Nevertheless, the ability of unionized employers to take a broader comparative view when setting pay rates is a starting point that has helped reduce

354. See *supra* note 47 (regarding overall gender pay gap of \$.80 on the dollar). An improvement of \$0.08 on the dollar closes the \$0.20 gap by 40%.

355. KATHERINE GALLAGHER ROBBINS & ANDREA JOHNSON, UNION MEMBERSHIP IS CRITICAL FOR EQUAL PAY, NAT'L WOMEN'S L. CTR. 1 (2016), <https://nwlc.org/wp-content/uploads/2015/02/Union-Membership-is-Critical-for-Equal-Pay.pdf> (estimating an 11% improvement over the \$0.20 wage gap for median weekly wages of unionized to nonunionized women).

356. See ANDERSON ET AL., *supra* note 340, at 4–5, tbl.2 (Hispanic women 42.1%, Hispanic men 40.6%, Black women 33.6%, Black men 28.5% (citing BUREAU LABOR STAT., U.S. DEP'T OF LABOR, MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY UNION AFFILIATION AND SELECTED CHARACTERISTICS, <http://www.bls.gov/news.release/union2.t02.htm> (last visited Mar. 12, 2018))).

357. ROBBINS & JOHNSON, *supra* note 355, at 1 (explaining the gap between unionized and nonunionized workers narrows from a \$0.34 to \$0.27 gap between African American women and white men, \$0.40 to \$0.26 gap between Latina women and white men).

358. See *News Release: Union Members—2016*, U.S. BUREAU LABOR STAT. (Jan. 26, 2017), <https://www.bls.gov/news.release/pdf/union2.pdf>.

359. See Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2011/01/22/business/22union.html>.

360. See, e.g., *Guild to WSJ: Yes, There Is a Wage Gap*, THE NEWSGUILD-COMMUNICATION WORKERS OF AMERICA (July 12, 2017), <http://www.newsguild.org/mediaguild3/guild-to-wsj-yes-there-is-a-wage-gap/>; see also Ramachandran, *supra* note 257, at 1066 n.89 (2012) (explaining that, “if a very large range of salaries is permitted for a particular pay grade, so that pay need not be uniform, then disclosing the pay scale [alone] would be insufficient to [notify] employees of unfair compensation decisions occurring within those ranges”).

the gender and racial pay gaps among unionized workers. It also provides examples for non-unionized employees challenging existing legal definitions of “equal work” or similarly situated “comparators” in lawsuits alleging unequal pay. While a pay discrimination claim looks at only the pay practices of the employer against whom the claim has been made, evidence that other employers within the same industry with the same job categories have taken a broader view of what jobs deserve equal pay ranges may help a plaintiff create an inference of stereotyping or discrimination within the firm.

b. Federal Government Sector

As with the example of some unionized jobs, federal government jobs rely on job classifications that assign points based on job requirements and criteria; the points are then translated into a pay grade. Each job in the federal government is assigned a “General Service” or “GS” grade number between 1 and 15, and within each GS rating there are 10 steps of pay until the job is bumped up to the next group.³⁶¹ As the U.S. Office of Personnel Management explains it:

Agencies establish (classify) the grade of each job based on the level of difficulty, responsibility, and qualifications required. Individuals with a high school diploma and no additional experience typically qualify for GS-2 positions; those with a Bachelor’s degree for GS-5 positions; and those with a Master’s degree for GS-9 positions.³⁶²

In 2018, pay for Grade 1 ranged from \$18,785 (Step 1) to \$23,502 (Step 10); for Grade 15, it ranged from \$105,123 (Step 1) to \$136,659 (Step 10).³⁶³ This provides another example of a system that allows an employer to compare non-identical jobs—jobs that may be mostly held in the U.S. economy by members of one sex—and, nevertheless, set pay similarly. For example, a recent search of postings on the federal jobs listing website USAJobs sought applications for a variety of positions all paid at the GS-10 level, including

361. *See Pay & Leave Systems: General Schedule Classification and Pay*, U.S. OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule> (last visited Mar. 12, 2018) [hereinafter *Pay & Leave*]. High-level executive and researcher positions with the government may exceed GS-15 as part of the “Senior Level Service.” *See also Senior Executive Service: Scientific & Senior Level Positions*, U.S. OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/senior-executive-service/scientific-senior-level-positions> (last visited Mar. 12, 2018).

362. *See Pay & Leave*, *supra* note 361.

363. *Salary Table 2018-GS, Annual Rates by Grade and Step*, U.S. OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/18Tables/html/GS.aspx> (last visited Mar. 12, 2018).

Legal Assistant, Clinical Nurse, Engineering Technician, and Physical Security Specialist.³⁶⁴

As with union members, the gender pay gap among federal sector workers is far smaller than those of the entire U.S. workforce. According to one study, in 2012, GS-ranked female workers earned \$0.89 to the dollar of all men³⁶⁵—similar to the gap for unionized women (\$0.88 on the dollar),³⁶⁶ and nearly half the gap for all women (\$0.80 on the dollar).³⁶⁷ Again as with union employers, establishing pay grades is not a magic bullet: setting pay from a possible range for jobs assigned to the same pay grade may continue to be affected by stereotyping and bias, but it provides a starting point.³⁶⁸ Yet federal sector pay grades also provide another set of potential “comparators” by analogy for private sector workers: if the federal government can compare different occupations requiring the same level of qualifications and work duties, private employers that provide similar services with similar job categories can do so, too.

c. Private Sector

The most compelling examples for the argument that private employers can and should be held to broader comparisons of “equal work” under the EPA are those of private employers who have done so themselves. The most notable and successful example is Salesforce.com, the company whose voluntary efforts led to the Obama White House Equal Pay Pledge.³⁶⁹ Despite being “initially skeptical” of any pay disparity at the company, Salesforce

364. Original search conducted by the author in February 2018, of USAJobs.com using pay grade filter for GS-10, <https://www.usajobs.gov/Search/?g=10&k=GS-10&gs=true&p=1&smin=54803&smax=71247>.

365. U.S. OFFICE OF PERSONNEL MGMT., GOVERNMENTWIDE STRATEGY ON ADVANCING PAY EQUALITY IN THE FEDERAL GOVERNMENT 12 (2014) <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/reports/governmentwide-strategy-on-advancing-pay-equality-in-the-federal-government.pdf>.

366. *See supra* notes 353–355 and accompanying text.

367. *See supra* note 47 and accompanying text.

368. *See supra* note 360 and accompanying text. *See, e.g.*, U.S. OFFICE OF PERSONNEL MGMT., GOVERNMENTWIDE STRATEGY ON ADVANCING PAY EQUALITY IN THE FEDERAL GOVERNMENT 2 (2014), <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/reports/Governmentwide-Strategy-on-Advancing-Pay-Equality-in-the-Federal-Government.pdf> (reporting the finding that, “[f]or GS employees, a discretionary authority to set pay for new hires above the step 1 minimum rate was used more frequently . . . for males than females in all 3 study years . . . [and] that these actions are most heavily used in three occupational categories that are male-dominated”); Alexia Fernandez Campbell, *One Way to Ensure Equal Pay for Men and Women*, ATLANTIC (Nov. 1, 2016), <https://www.theatlantic.com/business/archive/2016/11/how-the-government-mostly-closed-its-gender-pay-gap/506084/>.

369. *See supra* notes 271–274 and accompanying text.

CEO Marc Benioff undertook this effort after two female employees suggested that women were being paid less than men.³⁷⁰ Starting in August 2015, Salesforce conducted a voluntary audit of its more than 17,000 employees, to, according to the company, “determine if men and women were paid equally for comparable work.”³⁷¹ To do so, the company “put employees in comparable roles into groups and analyzed salaries of those groups to determine whether there were statistically significant wage differences between women and men.”³⁷² The company “based [its] analysis on objective factors that determine pay, such as job function, level and location[,]” then corrected “unexplained differences” by adjusting salaries for a group of both male and female employees alike.³⁷³

Because some of the pay adjustments the company made raised the pay of men, one commentator suggested that one could “assume there [were] equity increases embedded in that number that impact diverse male employees,” in a workforce composed of 70% men and 30% women, only 8% of whom were Hispanic, black, or mixed race.³⁷⁴ As a result, Salesforce adjusted the salaries of 6% of its workforce to achieve gender pay equity, investing almost \$3 million to do so.³⁷⁵

The Salesforce example shows not that the law should require affirmative and costly measures, but, instead, that the law can and should recognize the ability of private sector employers to make comparisons among and between different occupations that require similar credentials and skills. According to Benioff, “look[ing] at if [the company is] paying men and women the same” is “something every single CEO can do today . . . [w]e all have modern human resource management systems.”³⁷⁶ Far from requiring a complicated and unattainable comparison between apples and oranges, the Salesforce examples prove that comparing occupations is more akin to comparing different types of apples—and entirely possible for a private sector employer to do. Other companies, including SAP, have undertaken similar

370. Bourree Lam, *One Tech Company Just Erased Its Gender Pay Gap*, ATLANTIC (Nov. 10, 2015), <https://www.theatlantic.com/business/archive/2015/11/salesforce-equal-pay-gender-gap/415050/>.

371. Cindy Robbins, *Equality at Salesforce: The Equal Pay Assessment Update*, SALESFORCE BLOG (Mar. 8, 2016), <https://www.salesforce.com/blog/2016/03/equality-at-salesforce-equal-pay.html>.

372. *Id.*

373. *Id.*

374. Kris Dunn, *The Salesforce Pitch for Equity Equality*, WORKFORCE MAG. (Jan. 21, 2017), <https://www.workforce.com/2017/01/21/salesforce-pitch-equity-equality/>.

375. *See* Robbins, *supra* note 371.

376. Claire Zillman, *Salesforce's Marc Benioff Urges His Fellow CEOs to Close the Gender Pay Gap*, FORTUNE (Jan. 18, 2017), <http://fortune.com/2017/01/18/salesforce-ceo-marc-benioff-gender-pay-gap/>.

efforts to compare pay across jobs in a more equitable manner.³⁷⁷ These companies provide evidence that, just because two employees do not perform the same job, they can still be performing “equal work” for which they are paid equally.

As examples from union, federal government, and some private sector employers now show, by applying some simple objective parameters, employers—and courts—can and should take a broader view of “equal work” or an appropriate “comparator” than currently recognized under existing federal antidiscrimination law. An employee alleging pay discrimination under Title VII or the Equal Pay Act should be able to make similar within-employer comparisons.

B. The Argument for Substantially Similar or Comparable Work

Developments in the law of stereotyping and new examples of employers’ efforts provide the opportunity to push current interpretations of existing federal and state laws requiring “equal work” further. Yet seventeen state equal pay statutes now require equal pay for “comparable,” “substantially similar,” or something else broader than “equal” work,³⁷⁸ and legislators in many more states may move in that direction in the near future.³⁷⁹ This provides the opportunity for recognizing a wider range of allowable comparisons in equal pay claims.

Given what we now know about stereotyping and implicit bias, and the continued prevalence of gender workforce segregation, a more modern and reasonable reframing of equal pay law is long overdue. Title VII and the EPA have failed to close the gender pay gap, and improvement has been stalled for nearly two decades. Developing tools to overcome this problem is essential. Recognizing the impact of implicit bias and stereotyping on our ability to make comparisons in law is not a new phenomenon, and has been raised in a variety of legal contexts, including jury selection, criminal sentencing, employment discrimination, and more.³⁸⁰ The chief argument against strengthening equal pay laws to close the pay gap is that employers should not be required to make comparisons among different types of jobs. But law is entirely a field of comparisons: lawyers argue cases by applying

377. See, e.g., Vanessa Fuhrmans, *SAP Goes After the Gender Pay Gap*, WALL ST. J. (Aug. 13, 2017), <https://www.wsj.com/articles/sap-goes-after-the-gender-pay-gap-1502676120>.

378. See *supra* Part II.C.

379. See *supra* Part III.C.

380. See, e.g., CHERYL STAATS, ET AL., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW, KIRWIN INST., OHIO ST. UNIV. (4th ed. 2016), <http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf> (summarizing recent research); PROJECT IMPLICIT, “Publications,” <http://projectimplicit.net/papers.html> (last visited Mar. 12, 2018) (providing list of the project researchers’ many publications).

precedent to their new facts; businesses know how to approach new business settings by analogy to how the law applies to existing situations.

Interpreting Title VII and the EPA to require plaintiffs to demonstrate “virtually identical” jobs or comparators in any claim of unequal pay is an outdated and unnecessarily limited vision of antidiscrimination law. A survey of published federal court decisions in Equal Pay Act cases in which the court directly addressed the threshold requirement of whether men and women performed “equal work” reveals significant room for improvement and increased doctrinal consistency. Out of seventy-nine published decisions in which a federal district court, circuit court of appeal, or the United States Supreme Court directly considered the issue, just over one-quarter of plaintiffs (twenty-one) were found to be performing “equal work” to their comparators—meaning that nearly three-quarters of these plaintiffs never made it out of the starting gate with their legal claims.³⁸¹ Of those found to be “equal,” most were performing identical jobs to their male comparators—for example, male and female computer technical writers,³⁸² health spa chain managers paid different commissions,³⁸³ female employees who filled vacancies for male school maintenance workers,³⁸⁴ business school professors within the same department at a private university,³⁸⁵ and a male attorney who replaced his female predecessor in the exact same position (and was paid 20% more).³⁸⁶ Other successful plaintiffs were performing nearly identical jobs, but with different job titles that impacted employer pay setting—for example, airline stewardesses (female) and pursers (male),³⁸⁷ sewing machine operators (female) and bookbinders (male),³⁸⁸ nurse’s aides (female) and hospital orderlies (male),³⁸⁹ and housekeepers (female) and custodians (male).³⁹⁰ Because these cases are consistent with even the narrowest interpretation of “equal work” in existing law, these results are to be expected.

381. Original survey of caselaw conducted by the author in November 2017 of all federal court cases under the Equal Pay Act that discussed the definition of “equal work.” Because many EPA cases are decided without addressing this issue, the survey is not intended to be reliably quantitative, but rather to provide some context and qualitative examples of federal courts’ application of the “equal work” test.

382. *See* *MEEKS v. Comput. Assocs. Int’l*, 15 F.3d 1013 (11th Cir. 1994).

383. *See* *Bence v. Detroit Health Corp.*, 712 F.2d 1024 (6th Cir. 1983).

384. *See* *Marshall v. Bldg. Maint. Corp.*, 587 F.2d 567 (2d Cir. 1978).

385. *See* *Klein v. New York University*, 786 F. Supp. 2d 830 (S.D.N.Y. 2011).

386. *See* *Dubowsky v. Stern, Lavinthal, Norgaard & Daly*, 922 F. Supp. 985 (D.N.J. 1996).

387. *See, e.g., Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984).

388. *See* *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982).

389. *See, e.g., Odomes v. Nucare, Inc.*, 653 F.2d 246 (6th Cir. 1981); *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282 (4th Cir. 1974); *Hodgson v. Maison Miramon, Inc.*, 344 F. Supp. 843 (E.D. La. 1972).

390. *See, e.g., Hodgson v. Montana State Bd. of Ed.*, 336 F. Supp. 524 (D. Mont. 1972).

In a handful of cases, courts even read the “equal work” requirement slightly more generously to reach the greater potential of existing law under the EPA. For example, despite being in different college departments, when the actual factors used to set pay were compared, the United States Court of Appeals for the Second Circuit held that a female criminal justice professor was performing “equal work” (with equal “skill, effort, responsibility”) as a male psychology professor, despite their difference in fields.³⁹¹ Likewise, the District Court of Minnesota held that a female higher education and research officer was performing “equal work” to a male innovation and business officer when looking at their job descriptions and duties, which required similar relationship-building skills, levels of expertise, and effort.³⁹² As these two cases demonstrate, there is, indeed, room even under existing law for federal courts to compare different types of jobs that require similar hiring criteria and equivalent skills, duties, and responsibilities.

Yet these decisions were the very limited exception to the general rule: federal courts take a circumscribed view of “equal work” under the EPA that allows differences between *employees holding* equivalent jobs to justify pay disparities between equivalent *jobs*.³⁹³ Among the fifty-eight cases in which federal courts found that plaintiffs and their comparators were *not* performing “equal work” were those in which jobs with equivalent duties were found unequal because: male and female employees had their pay set through different processes and performed a few different tasks³⁹⁴; male employees performing the same job duties had additional training, though the duties performed did not require it³⁹⁵; employees performed the same job in different offices or locations³⁹⁶; or because, while some male employees performing the same job duties were paid more than female employees, other male employees were not.³⁹⁷ Under existing law, such results are also to be expected. Requiring comparators to work “in the same establishment” and to be “equal” creates a narrow perspective that allows courts to use any difference in the

391. See *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476 (2d Cir. 2001).

392. See *Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871 (D. Minn. 2014).

393. See also *What is Pay Equity?*, *supra* note 336; Eisenberg, *Shattering*, *supra* note 182, at 48-49.

394. See, e.g., *Goodrich v. Int'l Bhd. of Elec. Workers*, 815 F.2d 1519 (1987).

395. See, e.g., *Foco v. Freudenberg-Nok Gen. P'ship*, 549 F. App'x 340, 343 (6th Cir. 2013) (“The [district] court noted that under applicable regulations ‘skill’ includes factors such as ‘experience, training, education, and ability’ [and] Plaintiff could not establish that she performed work equal to the male comparators because they had more experience and, in some cases, possessed credentials that Plaintiff did not have.”); *Johnson v. FedEx*, 604 F. App'x 183 (3d Cir. 2015).

396. See, e.g., *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453 (9th Cir. 1985); *Renstrom v. Nash Finch Co.*, 787 F. Supp. 2d 961 (D. Minn. 2011).

397. See, e.g., *Moccio v. Cornell University*, 889 F. Supp. 2d 539 (S.D.N.Y. 2012); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373 (10th Cir. 1994).

comparators to dismiss a plaintiff's EPA case before ever asking the employer to justify the disparity. The inquiry then becomes backward-looking: just because the employees holding the positions now have differences does not mean that the jobs, themselves, require unequal skill, effort, and responsibility.

Under a "substantially similar" or "comparable" work standard, the threshold inquiry to make out a prima facie case of unequal pay focuses more properly on whether the job duties of plaintiffs and their comparators should be compared due to similarities in the jobs, themselves. It removes potentially irrelevant characteristics like geographic location and additional training from the threshold inquiry of whether the positions are, in the first place, substantially similar, and reserves those inquiries for the employer's affirmative defenses. Indeed, all three amended state laws in Massachusetts, California, and Oregon do just that, considering the substantial similarity of jobs across an employer's operations, without reference to "in the same establishment," but then allowing an employer's affirmative defense to a pay disparity to include geographic location, where bona fide.³⁹⁸ An employer may well be justified in paying a male employee in its city office more than it pays a female employee who performs the same job in its rural office—for example, due to a legitimate difference in the local cost of living or bona fide differences in the offices' operations. But this is an inquiry better undertaken as a matter of an employer's defense; not every office location requires disparate pay, and the employee should get a chance to question whether such differences are warranted.

Likewise, each of the new laws in Massachusetts, California, and Oregon makes clear that the experience, education, and training level of an employee performing a given job does not determine whether the jobs are substantially similar. Instead, those inquiries are, again, properly considered as the employer's affirmative defenses if bona fide and related to the job, not in assessing whether the jobs themselves are comparable.³⁹⁹ This means that any pay differences for additional training, education, and experience that are truly related to the job and of value to the employer may be excused, while simply using the fact that one employee has additional criteria not required by the job to explain an unwarranted disparity will not.

398. See CAL. LAB. CODE § 1197.5 (West 2018); MASS. GEN. LAWS ch. 149, § 105A (2018); OR. REV. STAT. § 652.220(2)(b) (2017). Note that geographic location and "working conditions" are conceptually distinct. Removing geographic location from the threshold inquiry does not necessarily remove the threshold requirement of comparable or substantially similar "working conditions," like hours, schedule, physical surroundings, or potential hazards. See, e.g., OR. REV. STAT. § 652.210(11) (2017).

399. See CAL. LAB. CODE § 1197.5 (West 2018); MASS. GEN. LAWS ch. 149, § 105A (2018); OR. REV. STAT. § 652.220(2)(2017).

Clearly, then, even under a “substantially similar” or “comparable” work threshold standard, many plaintiffs’ claims of unequal pay will—and should—still fail. Plaintiffs whose comparators perform job duties that are more complex or require greater responsibility, or whose employers value and pay more for additional job-related education or experience, or who fail to provide evidence to meet their *prima facie* proof of comparability will not be helped by this legal change. The move from “equal” to a “comparable” or “substantially similar” work standard is an incremental advance that does not open Pandora’s Box to equalizing pay between all men and women. Instead, it refocuses the inquiry on comparing job duties themselves *ex ante*, rather than comparing the people who hold the jobs and justifying potentially bias-infected pay *ex post*—to stop the pay-gap-magnifying trend of allowing any difference between comparators to justify disparate pay despite similarities between their jobs.

A final and, perhaps, the most significant advantage of a move to a standard of equal pay for “substantially similar” or “comparable” rather than “equal” work is the impact it stands to have on employer efforts to resolve unequal pay voluntarily. As critics of a move toward a comparability standard may argue, a change in the law would allow more plaintiffs to succeed at the *prima facie* stage of an equal pay claim, creating additional litigation. Yet the prospect of more lawsuits may, likewise, incentivize employers to examine their existing pay structures more closely. This could, in turn, ultimately reduce litigation, given the robust affirmative defenses still available to employers who tie pay-setting to job-related factors. In fact, new laws in both Massachusetts and Oregon create explicit incentives for employers to remedy their own pay disparities by providing partial defenses against state equal pay claims for such efforts. Oregon law limits compensatory and punitive damages for employers who have conducted a reasonable, good-faith, and effective “equal-pay analysis” within three years prior to the filing of the relevant lawsuit.⁴⁰⁰ In Massachusetts, an employer’s similar “self-evaluation of its pay practices,” also conducted in good faith, in the prior three years, resulting in “reasonable progress” toward improvement can raise an affirmative defense to liability under the statute.⁴⁰¹

Ultimately, a move to a threshold standard of “substantially similar” or “comparable” work allows courts to apply equal pay law—and employers to set pay—more consistently, fairly, and effectively, by focusing on job duties rather than job holders and on legitimate job-related differences rather than just any differences to justify pay disparities.

400. OR. REV. STAT. § 652.210(4) (2017).

401. MASS. GEN. LAWS ch. 149, § 105A(d) (2018).

C. Counterarguments and Considerations

Arguments against broadening the reach of equal pay laws mirror skepticism about the existence of gender and racial pay gaps in general. The most common argument against the need to remedy the gender pay gap is that the gap reflects women's own "choices."⁴⁰² Women prioritize shorter hours and flexibility to allow for family caregiving, the argument goes, so they choose to enter lower paid professions that demand fewer hours. This, such critics suggest, is beyond the province of antidiscrimination law, and employers should not bear the financial burden for women's choices: if occupational segregation is the problem, women choose to enter female-dominated occupations.

While it may be demographically accurate that women prefer to work fewer hours or seek out flexibility due to family obligations, women do not "choose" the economic disadvantage or professional marginalization that comes with working reduced hours.⁴⁰³ Were antidiscrimination law to force employers to look closely at comparable work, it is possible that the absolute correlation between high-hours demanding jobs and high pay may start to dissipate. Moreover, taking a comparable work approach does not require pay parity for employees who work fewer hours; instead it seeks to correct underpayment of traditionally female jobs that are performed at the same level for the same hours. While that means it will not completely close the pay gap, it may narrow it.

Another powerful narrative against equal pay reforms is the market defense,⁴⁰⁴ which holds particular sway in a legal framework that already affords great deference to employers about how to run their businesses. This argument claims that employers should not have to pay more to fill a position than the market requires. In highly skilled positions, offering a higher salary is often the only way to recruit top talent. If a woman agrees to take the same position at less pay, such critics suggest, the employer is not to blame.

402. See, e.g., Christina Hoff Sommers, *The Wage Gap Myth Exposed—by Feminists*, HUFFPOST (Jan 23, 2014), https://www.huffingtonpost.com/christina-hoff-sommers/wage-gap_b_2073804.html; Lisa Annese, *Dispelling the Myths: Why the Gender Pay Gap does not Reflect the 'Choices' Women Make*, GUARDIAN (Nov. 7, 2016), <https://www.theguardian.com/sustainable-business/2016/nov/08/dispelling-the-myths-why-the-gender-pay-gap-does-not-reflect-the-choices-women-make>.

403. See, e.g., GOULD ET AL., *supra* note 11, at 3, 7, 21–22; JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, CTR. FOR WORKLIFE L., "OPT OUT" OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT (2006), <http://worklifelaw.org/pubs/OptOut-PushedOut.pdf>. See generally Schultz, *Telling Stories*, *supra* note 33 (examining choice arguments in response to workforce segregation under Title VII); Schultz & Petterson, *supra* note 33 (same); Schultz, *Taking Sex Discrimination Seriously*, *supra* note 33 (same).

404. See, e.g., Horwitz, *supra* note 40; Rabin-Margalioth, *supra* note 193, at 810.

The strongest response to this argument is that it is unfair and economically inefficient for employers to profit off of discrimination. The whole point of antidiscrimination law is to correct for discrimination that the free market fails to redress.⁴⁰⁵ Pushing existing law to question bias-infected decisions is exactly the type of incremental advancement that antidiscrimination law is designed to effect. An incremental move to comparable work is not a radical departure from existing market principles: it still allows employers to recruit as they wish, they must just equalize pay going forward, so as to break the cycle of perpetual underpayment to women and racial minorities for equivalent work.

A third counterargument is that, while closing pay gaps is a laudable ideal, it is unfair to employers to mandate anything more in law. Where an employer can afford to equalize pay, it will do so voluntarily; forcing employers to do so otherwise is asking the business sector to pay for “societal” discrimination it did not create.⁴⁰⁶ Of course, voluntary efforts are warranted and encouraged, but they are clearly insufficient. The gender and racial pay gaps have been stalled for nearly two and four decades respectively⁴⁰⁷; it is long overdue for equal pay law to be revived, to accomplish what it was intended to do. Moreover, given the decline in union density,⁴⁰⁸ only those with the most human capital and bargaining power will benefit when employers choose to correct pay gaps voluntarily. This ignores the greatest potential benefit in closing the gender and racial pay gaps: improvements in income inequality for those at the bottom of the income spectrum.

Certainly, a comparable work approach is not a panacea. It cannot, alone, close the pay gaps. It does not go as far as comparable *worth*, so it can only incrementally improve on the portion of the pay gaps due to occupational segregation. This approach keeps comparisons within the employer and between similarly-difficult jobs. It also does nothing to address the half or more of the pay gap that is due to demographic differences between women and men (temporal inflexibility, working hours) and between white and minority workers (differing access to education and work experience). Despite all of these caveats, however, it is time that the law moves beyond the outdated and myopic view that nothing can be done to improve pay equity unless the jobs in question are virtually identical. Reframing “comparators”

405. See, e.g., CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 151–66 (1997); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22 (1991).

406. See Claire Suddath, *Why Can't Your Company Just Fix the Gender Wage Gap?*, BLOOMBERG BUSINESSWEEK (June 21, 2017, 5:00 AM), <https://www.bloomberg.com/news/features/2017-06-21/why-can-t-your-company-just-fix-the-gender-wage-gap> (“Companies that are motivated to make these kinds of changes, or at least talk about the problem, are the exception.”).

407. See *supra* notes 49, 64 and accompanying text.

408. See *supra* notes 358–359 and accompanying text.

and “equal work” in current law and moving toward a standard of “substantially similar” or “comparable work” in state law provides a commonsense and incrementally reasonable approach to push antidiscrimination law to do better to correct an economic injustice.

V. CONCLUSION

Recent economic research supports the conclusion that, no matter how finely you slice the data, there is a gender pay gap that remains,⁴⁰⁹ and that there is an even greater racial pay gap.⁴¹⁰ Improvement in both pay gaps has been stalled for decades,⁴¹¹ and both pay gaps contribute to—and exacerbate—steep economic inequality in the United States.⁴¹² As the most recent data shows, up to one-half of both pay gaps are now due to discrimination, stereotyping, and occupational segregation,⁴¹³ to which antidiscrimination law—not any expensive new social program or major new legislation—is properly addressed.

Existing antidiscrimination law has failed to close the pay gaps and, left untouched to continue under existing court interpretations, may never do so. Both the antidiscrimination approach of federal Title VII⁴¹⁴ and the labor code approach of the federal Equal Pay Act⁴¹⁵ leave significant holes in the protections they offer to employees who experience pay discrimination. As currently interpreted by federal courts, both Title VII’s “legitimate nondiscriminatory reason” defense and the Equal Pay Act’s “any factor other than sex” defense excuse employer justifications for pay disparities that may be infected with bias, like prior salaries and the “market defense.”⁴¹⁶ But an even more significant limitation of both statutes is the requirement that an employee alleging pay disparity be able to point to a nearly identical comparator who is paid more. Courts have interpreted the “comparator requirement” in Title VII and the definition of “equal work” in the Equal Pay Act in unnecessarily narrow ways, circumscribing the reach of broader statutory language that offers the potential to create greater pay equity.⁴¹⁷

To move closer to closing the gender and racial pay gaps, existing law can and should be reinterpreted to reach and root out stereotypes about the value of the work performed by women and racial minorities. Advances in

409. *See supra* notes 47–61 and accompanying text.

410. *See supra* notes 62–73 and accompanying text.

411. *See supra* notes 49, 64 and accompanying text.

412. *See supra* Part I.C.

413. *See supra* notes 83–86, 106–111 and accompanying text.

414. *See supra* Part II.A.

415. *See supra* Part II.B.

416. *See supra* notes 161–162, 168–169, 192–193 and accompanying text.

417. *See supra* Part II.

the law of stereotype theory⁴¹⁸ and examples of employers who have voluntarily taken a wider view of what work should be paid equally⁴¹⁹ provide new arguments for defining “equal work” under existing law more fairly.

At the state level, existing law in seventeen states—and proposed legislation in others—provide the opportunity for more far-reaching reform by requiring equal pay for men and women performing “similar” or “comparable,” rather than “equal,” work.⁴²⁰ These statutes offer a chance to address more directly the challenge to pay equity posed by a U.S. workforce marked by steep occupational segregation by gender and race.⁴²¹

For decades, opponents of efforts to strengthen equal pay protections have argued that men’s and women’s jobs, like apples and oranges, cannot be compared,⁴²² and the law has done little to correct this misperception. But not every job is singular and unique; not every possible difference in positions need be pay-determinative. Examples from the efforts of unionized workplaces, the federal government, and even equity-minded private employers to equalize pay⁴²³ make what is possible clear. Antidiscrimination law can and should challenge unexamined stereotypes and biases that get mixed into legitimate bases for pay-setting, to provide a way to reach workforce segregation and close the gender and racial pay gaps once and for all.

418. *See supra* Part IV.A.1.

419. *See supra* Part IV.A.2.

420. *See supra* Parts II.C. & III.C.

421. *See supra* Part III.C.

422. *See supra* note 36 and accompanying text.

423. *See supra* Part IV.A.2.