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# **Knowledge Pays: Reversing Information Flows & The Future of Pay Equity**

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KNOWLEDGE PAYS:  
REVERSING INFORMATION FLOWS & THE FUTURE  
OF PAY EQUITY

*Orly Lobel\**

ABSTRACT

*After years of stagnation, pay equity law is gaining spectacular momentum. In the past three years, over a dozen states have passed important new legislation with numerous other bills pending before the federal, state, and local legislatures and a rising number of class actions underway. This article, the first to study the emerging ecology of pay equity law, argues that the underlying logic of these reforms is to structurally change the ways in which salaries are negotiated, determined, and, subsequently, detected and contested. Moreover, a central innovation of the new laws is to reverse information flows in the wage market. Efforts to eradicate wage discrimination have failed in large part because of information asymmetries and difficulties in identifying and proving discrimination. The new path of pay equity is to correct knowledge disparities in three key ways: 1) inducing more information about salaries, including protecting the exchange of*

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\* Don Weckstein Professor of Employment and Labor Law, University of San Diego. For thoughtful comments and conversations, I thank On Amir, Rachel Arnow-Richman, Jordan Barry, Deborah Brake, Laurie Claus, Don Dripps, Deborah Eisenberg, Tristin Green, George Howard, Rick Hasen, Carrie Menkel-Meadow, Elizabeth Pollman, Leticia Saucedo, Michelle Travis, Camille Rich, Usha Rodriguez, and Jeff Schwartz and the participants at workshops at UC Irvine, George Washington, ACS, National Lawyers Club and University of San Diego. For excellent research assistance, I thank Robert Bitman, Laurel Carothers, Michelle Dinh-Tran, Leehee Falek, Julia Kapchinskiy, and Ashley Reddy. Sasha Orman and Elizabeth Parker provided superb library support and smart suggestions.

*information among employees; 2) reducing information that reflects existing biases by preventing employers from relying on, or even asking about, salary histories of new hires; and 3) requiring broader explanatory information from employers about pay disparities by broadening the comparisons from “equal” work to “substantially similar” or “comparable” work, shifting the burden to employers to produce reasons for disparities that exist in their salary structures. The article explains how these developments move beyond the substantive prohibition of pay discrimination to focus on process, with the potential to shift discrimination policy from the litigation framework of traditional discrimination law to a governance approach that encourages dynamic, ongoing, and proactive efforts by private organizations and stakeholders. The significance of these reforms is dramatic because the new laws alter and shape the numbers and signals that circulate in the job market, including both intra- and inter-firm speech. Still, the article argues that the reforms are piecemeal, primarily at the state level, they are heavily contested, and some of the most promising initiatives for systematic wage transparency have been halted.*

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## INTRODUCTION

After years of stagnation, pay equity law is gaining spectacular momentum. Over a dozen states have passed important new legislation in the past three years, with numerous other bills pending before the federal, state, and local legislatures. Over four decades ago, Congress addressed the gender pay gap by passing the Equal Pay Act of 1963, mandating “equal pay for equal work.” The following year, Congress again addressed pay discrimination by passing Title VII of the Civil Rights Act of 1964. Soon after, most states followed suit and enacted equal pay laws. Despite decades of federal and state legislation prohibiting pay discrimination, the gender pay gap has persisted into the twenty-first century. The past several years, however, have brought a series of key reforms: legislative, administrative, judicial, and private efforts. This paper argues that the underlying logic behind the new wave of pay equity initiatives is to structurally change the ways in which salaries are negotiated, determined, and, subsequently, detected and contested. Moreover, a central innovation of the new laws is to reverse information flows in the wage market. Efforts to eradicate wage discrimination have failed in large part due to information asymmetries and difficulties in identifying and proving discrimination. The new path of pay equity is to correct knowledge disparities in three key ways: (1) inducing more information about salaries, including protecting the exchange of information among employees; (2) reducing information that reflects existing biases by preventing employers from relying on, or even asking about, salary histories of new hires; and (3) requiring broader explanatory information from employers about pay disparities by broadening the comparisons from “equal” work to “substantially similar” or “comparable” work, shifting the burden to employers to produce reasons for disparities that exist in their salary structures.

These developments hold important promise. They move beyond the substantive prohibition of pay discrimination to focus on process. They also have the potential to move beyond the litigation framework of traditional discrimination law to a governance approach that encourages dynamic, ongoing, and proactive efforts by private organizations and stakeholders. The new laws target what happens at all stages of the Coasian deal: pre-employment, during employment, and post-employment in the repeat game of job mobility tournaments. The significance of these reforms is dramatic because the new laws alter and shape the numbers and signals that circulate

in the job market, including both intra- and inter-firm speech. Still, this article argues that the reforms are piecemeal, primarily at the state level, heavily contested, and that some of the most promising initiatives for systematic wage transparency have been halted. In particular, a major initiative of the Obama administration which required regular reporting on pay structures has been stayed by the new administration.

This article introduces the current reforms as they relate to information flows and to correcting and detecting discriminatory pay. The goal is to analyze the promise as well as the limits of the contemporary multifaceted pay equity reforms and to suggest directions for the future of pay equity law. The most visible and highly contested new legislative reforms, which primarily take effect in 2019 and subsequent years, prohibit employers from asking prospective employees about their previous salaries. Beyond salary history *inquiry*, salary history *reliance* for determining a new offer or justifying gender disparity is also a heavily contested issue. The federal courts are currently strongly split on whether employers can use salary history as a reason “other than sex” to defend against a gender pay inequity claim. An April 2018 en banc Ninth Circuit Court of Appeals decision, interpreting the federal pay equity law, prohibits employers from justifying disparity based on salary histories, thereby overturning its previous precedent and diverging from several other circuits.

Flipping transparency on its head, the same legislative initiatives that disallow information on salary history to flow to employers are also promoting more information sharing among co-workers. As this article explains, the new laws are anchored in a longstanding right of employees to engage in concerted activity and discuss the terms and conditions of their jobs. At the same time, a rising number of employers demand secrecy and contractual confidentiality, and the legislative reforms must be understood in relation to these realities.

A third set of legislative reforms adopt a fresh lens on pay disparities by rethinking salary comparisons and shifting the burden of justifying disparity to employers. Several state laws and court decisions are changing the ways in which employees are compared to one another. For example, the new laws in California, Massachusetts, New York, and several other states move from “equal work” for equal pay to “substantially equal” or “comparable work.” Maryland has taken the lead in going further and prohibiting “mommy tracks,” which create gender pay disparities by tailoring positions that limit career opportunities for women. A federal bill, the Paycheck Fairness Act, includes a similar reform revising the Equal Pay Act.

Together these developments represent a new era for pay equity law. This article is the first to comprehensively analyze the layers of the momentous wave of pay equity law reform as a paradigm shift in the market

for wages. The article explains the great promise of the current reforms while uncovering their limits and challenges on the road ahead. Unsurprisingly, major class actions have already been filed, leveraging the momentum and testing the waters of the new legislation. More importantly, new patterns of private sector action are being triggered. Many companies are changing the processes by which salaries are set and are responding proactively to pay disparities in their workforce. These private market efforts are supported by the rise of digital platforms and software tools that help both companies and employees in the efforts to eradicate pay inequities. Taken together, the legislative and private developments adopt a comprehensive strategy to eradicate long-persisting gender pay discrimination and are interconnected with the momentum of the #MeToo gender equality efforts.

The study of pay equity law is the study of the interactions between substantive prohibitions and the surrounding forces that create barriers to implementation. Transparency done right is a universal challenge for law and policy. The goal of perfecting markets through information while also understanding the demands for secrecy and proprietary knowledge pervades every regulatory field. In this article, I draw on the robust research, including my original studies, on behavioral law and human capital law, to understand how information is exchanged, understood, and used in the market for wages. The bans on salary history inquiry and reliance are novel and controversial. They are designed to close the gender pay gap by preventing lower wages from following women from job to job. Bloomberg called this emerging type of legislation a “gag rule that won’t help women advance,”<sup>1</sup> and industry groups have challenged these new rules in court on constitutional grounds. This article responds to these claims and explains the dual goal of information flow reversal: to break cycles of pay discrimination, which pervade the wage market and grow over time, and to correct for gender biases as well as negotiation differences during the hiring process. At every stage of employment—search, offer, promotion, and exit—ongoing disparities impede the closing of the pay equity gap. Therefore, while policies that reverse information flows at the hiring stage are important, policies for continuous direct pay transparency through reporting and pay scale provision are likely to have an even greater systematic impact. The article offers the lens of new governance – a shift from a command-and-control approach to ongoing private-public collaborative efforts – which can better ensure continuous checks and safeguards and incentivize employers to self-audit, assess, and establish beyond compliance practices. The recent state laws have

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<sup>1</sup> *A Gag Rule Won’t Help Women Advance*, BLOOMBERG: OPINION (Apr. 11, 2017, 6:00 AM) <https://www.bloomberg.com/view/articles/2017-04-11/a-gag-rule-won-t-help-women-advance>.



begun moving toward new governance reforms by enacting safe havens for companies that voluntarily conduct audits and take active steps to correct inequities. Some reforms also require the provision of pay scales to prospective employees upon request. Moreover, private sector initiatives, including the use of digital platforms to create networks of employees who share salary information and the use of software tools to identify internal pay gaps, are creating alternatives to mandated transparency laws. While these initiatives are promising, the article also draws on the research on new governance and compliance to analyze their limits.

This article proceeds as follows. Section I presents the most recent evidence on the persisting wage gap in our contemporary job markets. The section analyzes the empirical studies that provide insight into the multiple reasons for ongoing pay discrimination including direct bias, gender differences in negotiation, job mobility, secrecy, occupational segregation, and private choices. Unpacking the factors that contribute to the persistent gender pay gap is key to understanding the need for multilayered reforms that target the different causes and stages of unequal compensation. Section II provides a brief history of pay equity law and introduces the wave of recent initiatives in the context of the #MeToo movement and efforts to expose and eradicate gender inequality more broadly. Section III explains the logic, controversy, and behavioral economics of salary history inquiry and reliance bans. The section analyzes the bans in relation to insights on rational and irrational compensation markets, including executive pay, and empirical evidence on gender differences in negotiations, which I term the *negotiation deficit*, the *negotiation penalty*, and the *negative inference* processes at the hiring stage. The section also relates the salary inquiry ban to the earlier effort to ban criminal record history inquiry, and provides insights from recent empirical evidence on the effects of these bans. Section IV focuses on the goal of enhancing the information available to employees, including the ability to share salary information with co-workers and to compare pay across comparable, even if formally different, job categories. The section further considers the effects of clauses that impede information sharing, including non-disclosure agreements, which I have researched extensively in relation to talent mobility and innovation. Building on that research, I propose a notice requirement in employment contracts about the ability to discuss pay, analogous to a requirement adopted by Congress in the 2016 Defend Trade Secrets Act with regard to whistleblowing. Section V turns to federal transparency requirements, which were stayed in 2017 by the new administration, and provides a comparative view of similar reforms recently adopted in Europe, particularly in the United Kingdom and Iceland. The section then explains how gender pay equity is best understood within a new

governance paradigm and offers a framework for enhancing the rise in private efforts toward a sustainable and robust pay equity regime.

## I. BETWEEN GAP AND DISCRIMINATION: UNDERSTANDING EMPIRICAL EVIDENCE ON WAGE DISPARITIES

*The simplicity of equal pay often gets lost in jargon and statistics.*  
– *The New Yorker*, 2018

### 1. A Sticky Gap

Pay inequity continues to plague the United States. For decades, the story of the pay gap has been one of stagnation. In 2018, the pay gap remains wide and has hardly narrowed in over a decade. According to the latest report from the U.S. Census Bureau, American women still earn an average of 80 to 83 cents for every dollar earned by their male counterparts.<sup>2</sup> As a 2018 *New Yorker* article put it, American women effectively work from January 1st until March 15th without getting paid.<sup>3</sup> While the pay gap between men and women has lessened in the last fifty years, momentum has languished in

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<sup>2</sup> The range of 80 to 83 cents on the dollar stems from variations of methods in measuring the gap. Yet, using alternative ways of measuring and different sets of data, the results remain remarkably consistent on the scale of the wage gap. The gap is measured for full-time employment. The reasons for the variation in results is attributable to the use of different data sets though the studies are quite consistent in the range of the gap. Elise Gould, et al., *What is the Gender Pay Gap and is it Real?*, ECONOMIC POLICY INST. (Oct. 20, 2016), <http://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/> (“In simple terms, no matter how you measure it, there is a gap.”). The U.S. Census Bureau cites 80 cents on the dollar (2018). U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (CPS) ANNUAL SOCIAL AND ECONOMIC (ASEC) at Table PINC-05, <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.2015.html> (last visited Aug. 21, 2018). In 2016, the Pew Research Center released a study noting the persistence of a gender pay gap between men and women. The study finds the gap is 83%. Eileen Patten, *Racial, Gender Wage Gaps Persists in U.S. Despite Some Progress*, PEW RESEARCH CENTER: FACT TANK (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>; Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 797–800 (2017) (citing a ratio of 82 percent on the dollar as the average gap).

<sup>3</sup> Lauren Collins, *How the BBC Women Are Working Toward Equal Pay*, NEW YORKER (July 23, 2018), <https://www.newyorker.com/magazine/2018/07/23/how-the-bbc-women-are-working-toward-equal-pay>.

recent decades and the gap remains persistently large.<sup>4</sup> When projecting at the rate the pay gap has narrowed since the 1960s, it is predicted that the gap could close by 2059. However, when projecting solely on the rates of progress between 2001 and 2015, pay equity is not expected to be achieved until nearly one hundred years later in 2152.<sup>5</sup> The Institute for Women's Policy Research estimates that closing the gap would amount to \$512 billion in additional wage and salary income and would reduce poverty by 50% among women.<sup>6</sup>

For minority women, the pay gap is even greater. According to a recent congressional report, African American women only earn 60 cents for every dollar earned by white men, while Hispanic women earn an even smaller 55 cents on the dollar.<sup>7</sup> Indeed, some of the new reforms importantly include an expansion of pay equity laws to protect against not only gender discrimination, but also racial and ethnic discrimination.<sup>8</sup> The size of the gap also varies greatly from state to state, from Wyoming at the bottom of the pay equity scale with a 36-cent differential, to Delaware and New York which tied for the top states on the scale with an 11-cent differential.<sup>9</sup> As for age, the gender wage gap widens over time as women advance in their careers.<sup>10</sup>

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<sup>4</sup> Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RESEARCH CENTER: FACT TANK (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>. In 1980 women earned 60 cents for every dollar earned by a white man, in 2015 women earned 82 cents per dollar earned by a white man.

<sup>5</sup> Anna Brown & Eileen Patten, *The Narrowing, But Persistent, Gender Gap in Pay*, PEW RESEARCH CENTER (Apr. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/04/03/gender-pay-gap-facts/>.

<sup>6</sup> Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy*, INST. FOR WOMEN'S POL'Y RES. (Apr. 5, 2017), <https://iwpr.org/publications/impact-equal-pay-poverty-economy/>.

<sup>7</sup> JOINT ECONOMIC COMMITTEE, DEMOCRATIC STAFF, 114<sup>TH</sup> CONG., GENDER PAY INEQUALITY CONSEQUENCES FOR WOMEN, FAMILIES AND THE ECONOMY (2016), [https://www.jec.senate.gov/public/\\_cache/files/0779dc2f-4a4e-4386-b847-9ae919735acc/gender-pay-inequality---us-congress-joint-economic-committee.pdf](https://www.jec.senate.gov/public/_cache/files/0779dc2f-4a4e-4386-b847-9ae919735acc/gender-pay-inequality---us-congress-joint-economic-committee.pdf)

<sup>8</sup> The California Pay Equity Act was amended in 2016: Senate Bill 1063 ("SB 1063") amends CAL. LAB. CODE § 1197.5 to prohibit not just gender pay discrimination, but also discrimination based on race or ethnicity.

<sup>9</sup> Nat'l P'ship for Women and Families, *America's Women and the Wage Gap*, (Oct. 2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>.

<sup>10</sup> JOINT ECON. COMM., *supra* note 7 ("[W]omen face an income gap of 44% in retirement, a difference that is more than twice the overall gender pay gap."); Kara Stiles, *The Unsettling Truth About Women and Retirement*, FORBES (Dec. 7, 2017, 4:21 PM), <https://www.forbes.com/sites/karastiles/2017/12/07/the-unsettling-truth-about-women-and-retirement/>.

Evidence of the pay gap is strong and abundant. Systematic reviews of empirical studies on the wage gap confirm that there are multiple reasons for the pay gap.<sup>11</sup> These include occupational sorting or segregation—men and women typically occupying different positions and industries—and the disparity between men and women in holding senior roles.<sup>12</sup> Women workers on average hold lower-paying positions and occupy lower-earning occupations.<sup>13</sup> Full-time male workers also work longer hours than full-time female workers: male workers average 43.4 hours per week while female workers average 40.8.<sup>14</sup> Of all groups, mothers experience the biggest pay gap, again a finding explained by multiple causes, including that women often take, or are channeled into, a different track. Yet even on the same track in the same job category, discrimination against mothers is well-documented.<sup>15</sup> And although the wage gap for younger workers and unmarried workers without children is smaller, there is still a significant gender gap among those demographics.<sup>16</sup>

Economists studying the pay gap agree that while a portion of the gap can be explained by seemingly private choices—a contested category in itself including segregation into stereotypically gendered careers and hours, education levels, and years in the job market—there is a component of the gap that simply cannot be explained away, evidencing direct discrimination.<sup>17</sup> Even after accounting for skill, experience, occupation, industry, job description, and factors such as evaluation and performance, which have a degree of subjectivity, a significant portion of the gap persists. As one 2016 congressional report stated, “[n]o widely accepted methodology is able to attribute the entirety of the wage gap to observable characteristics. . . . [E]ven among rigorous studies, no widely accepted methodology has been able to

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<sup>11</sup> Sebawit G. Bishu & Mohamad G. Alkadry, *A Systematic Review of the Gender Pay Gap and Factors That Predict It*, 49 ADMIN. & SOC’Y, Oct. 2016, at 65 (a meta-analysis of 98 peer-reviewed journal articles that empirically investigate the presence of the gender pay); Blau & Kahn, *supra* note 2, at 809–23, 825–36; CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN (1992).

<sup>12</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-35, WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS (2003).

<sup>13</sup> Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33 (1985).

<sup>14</sup> U.S. BUREAU OF LABOR STATISTICS, REPORT 1058: HIGHLIGHTS OF WOMEN’S EARNINGS IN 2014, at 28, Table 5 (2015), <http://www.bls.gov/opub/reports/womens-earnings/archive/highlights-of-womens-earnings-in-2014.pdf>.

<sup>15</sup> Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1215 (2010).

<sup>16</sup> U.S. BUREAU OF LABOR STATISTICS, *supra* note 14.

<sup>17</sup> See *infra* Notes 20-25 and corresponding text.

attribute the entirety of the pay gap to factors other than the sex of the worker.”<sup>18</sup> Or, as put by the Council of Economic Advisors in 2016, “[w]hen holding education, experience, occupation, industry, and job title constant, a pay gap remains.”<sup>19</sup> After controlling for all measurable variables, economists infer discrimination as the missing piece of the puzzle that explains the remainder of the gap.

One study suggests that even when the pay gap is adjusted for education, experience, age, location, job title, industry, and company, a gender wage gap of 94.6 cents to the dollar still exists.<sup>20</sup> In another study controlling for industry, occupation, and work hours to model “a man and woman with identical education and years of experience working side-by-side in cubicles,” a 13.5% gap still persisted.<sup>21</sup> Yet another study 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.<sup>22</sup> The study shows a remaining gender wage gap of 7% one year after college graduation and 12% ten years later. In another study, controlling for education, occupation, experience level, and geography, as well as race and ethnicity, a disparity of 8.4% remained.<sup>23</sup> A consensus among researchers emerges: even when the data is adjusted for control variables, a significant unaccounted-for gender wage gap remains.<sup>24</sup> Estimates of this unexplained gap range from 5 cents to 10, accounting for a quarter to half of the gender pay gap.<sup>25</sup>

As the Institute for Women’s Policy Research explains, the component of the gap which cannot be explained by anything easily measured is understood as the proxy for discrimination. The pay gap grows over time in a woman’s career and deepens when she becomes a mother. The

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<sup>18</sup> JODY FEDER & BENJAMIN COLLINS, CONG. RESEARCH SERV., RL31867, PAY EQUITY: LEGISLATIVE AND LEGAL DEVELOPMENTS 1-2 (2016), <https://fas.org/sgp/crs/misc/RL31867.pdf>.

<sup>19</sup> COUNCIL OF ECONOMIC ADVISERS, ISSUE BRIEF NO. 38, THE GENDER PAY GAP ON THE ANNIVERSARY OF THE LILLY LEDBETTER FAIR PAY ACT 5 (2016).

<sup>20</sup> Robert Hohman, *This is the Biggest Myth about the Gender Wage Gap*, FORTUNE (Apr. 12, 2016), <http://fortune.com/2016/04/12/myth-gender-wage-gap/>.

<sup>21</sup> GOULD ET AL., *supra* note 2, at 1.

<sup>22</sup> C. CORBETT & C. HILL, AM. ASS’N OF UNIV. WOMEN, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION (2012).

<sup>23</sup> GOULD ET AL., *supra* note 2.

<sup>24</sup> KATIE MEARA, FRANCESCO PASTORE & ALLAN WEBSTER, INST. OF LAB. ECON., DP NO. 10673, IS THE GENDER PAY GAP IN THE US JUST THE RESULT OF GENDER SEGREGATION AT WORK? (2017).

<sup>25</sup> Current research on the wage gap by ILR School professors published in the *Journal of Economic Literature* found an 8% gender wage gap that is unaccounted for which they believe is caused by gender discrimination in the workplace.

Census Bureau finds that the gender gap between like-earning spouses doubles immediately after they have a child. The mother's earnings never recover, while the father's earnings grow. The literature has named these parenting effects "the motherhood penalty" and the "fatherhood bonus."<sup>26</sup> The parenting effects go beyond changes in work hours and career tracks. A woman who has children is often perceived as low in competence, though high in warmth, whereas a childless woman is considered a "career woman" and is perceived as high in competence, but low in warmth.<sup>27</sup> In practice, a father is given extra work to help his family while a woman is sent home early.<sup>28</sup>

Related to the work-family challenges and motherhood, gender pay gaps may increase over time in part because of market friction in mobility. The number of noncompete agreements has increased in recent years and is likely to have a disparate impact on job mobility. As I recently wrote in an opinion article in the *New York Times*, "while noncompete restrictions impose hardships on every worker, for women these restrictions tend to be compounded with other mobility constraints, including the need to coordinate dual careers, family geographical ties and job market re-entry after family leave."<sup>29</sup> The gender pay gap creates a vicious circle in this regard: as the spouse with the lower income, wives and mothers are more likely to leave without another job offer, move for their spouse's career, or take unpaid time off to perform unpaid care work.<sup>30</sup>

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<sup>26</sup> ALINE BÜTIKOFER, SISSEL JENSEN & KJELL G. SALVANES, DEP'T OF ECON., INST. FOR COMPANY ECON., NORWAY TECH. AND NAT. SCI. UNIV., DP No. DP13044, *THE ROLE OF PARENTHOOD ON THE GENDER GAP AMONG TOP EARNERS* (2018); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007).

<sup>27</sup> Amy J.C. Cuddy, Susan T. Fiske, and Peter Glick, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004).

<sup>28</sup> *But see e.g.*, the Seventh Circuit on why motherhood gap is not discrimination: "Wages rise with experience as well as with other aspects of human capital. That many women spend more years in child-rearing than do men thus implies that women's market wages will be lower on average, but such a difference does not show discrimination." *Wernsing v. Dep't. of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005). Also note the findings about Uber gender gap in Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017).

<sup>29</sup> Orly Lobel, Opinion, *Companies Compete but Won't Let Their Workers Do the Same*, N.Y. TIMES (May 4, 2017) <https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html>; *see also* ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* (2013).

<sup>30</sup> Claire Cain Miller, *The Gender Pay Gap is Largely Because of Motherhood*, N.Y. TIMES: UPSHOT (May 13, 2017), <https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html>.

## 2. Evidence of Direct Bias Affecting the Pay Gap

The multiple factors contributing to the wage gap problem provide an opportunity to examine the interrelationship between the causes themselves and the policy assumptions we make when parsing these contributing factors into categories of “private” v. “public” and what is deemed discriminatory. This opportunity is at the heart of much of the current reform effort – attacking multiple sources of inequity, stages of the employment relationship, and persisting frontiers of gender disparity.

Take, for example, the “top ten list” of reasons for the gender wage gap suggested by the National Committee on Pay Equity:<sup>31</sup>

- (1) Wage Secrecy;
- (2) Impracticability of Lawsuits as a Remedy;
- (3) Effects of Raising Children;
- (4) Differences in Pay Between “Women’s” and “Men’s” Types of Jobs;
- (5) Continuing Bias;
- (6) Intangibility of Discrimination;
- (7) Lasting Stereotypes;
- (8) Difficulty for Women to Break into Male-Dominated Jobs;
- (9) Employers Failing to Address Issues
- (10) Weakness of Current Laws.<sup>32</sup>

As discussed in the next sections, recent law reforms can be understood to address reason number ten: current laws are weak and focus on substantive prohibition of discrimination without attention to form and dynamic processes of inequity. Most of the other listed reasons can be bundled and viewed as overlapping effects of weak laws, and the contemporary efforts to reform pay equity law should be understood as efforts to address these challenges. Reason number one, wage secrecy, underscores the importance of understanding the information asymmetries that pervade the wage market. Reason two regards the difficulty of prevailing in a lawsuit and relates to attempts to proactively reform pay, rather than merely focusing on after-the-fact recovery. Reasons five, six, and seven are all elements of gender bias and the persistence of direct discrimination. Finally, reason nine, the failure of employers to address these issues, is the very core of why policy must

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<sup>31</sup> Nat’l Comm. on Pay Equity, *Top 10 Reasons for the Wage Gap*, PAY-EQUITY.ORG, <https://www.pay-equity.org/info-top10.html> (last visited Aug. 10, 2018).

<sup>32</sup> *Id.*

creatively intervene – both directly and indirectly by encouraging internal pro-active compliance. As we shall see below, many of the new efforts bypass the complaint-litigation logic of earlier wage discrimination laws, the traditional core focus of Equal Pay Act and Title VII. Importantly, the remaining factors—effects of motherhood, occupational segregation, and the glass ceiling—must also be understood as subjects of new policy efforts. Once a more comprehensive approach to address knowledge flows and ongoing biases is implemented, even those factors at the outer edges of what is considered discrimination under a litigation rubric can be addressed.

At the same time, it is illuminating to note evidence of the direct type of discrimination—the kind that is squarely illegal under the traditional litigation framework—to better understand the need for immediate corrective measures in the wage market at all stages of the employment process: hiring, promoting, evaluating, and continuing mobility throughout one’s career. A set of empirical and experimental findings point to persistent patterns of pervasive direct discrimination in our contemporary job markets.<sup>33</sup> One striking example is a lesser-known finding of the now famous resume studies that have been replicated and varied over recent years. In 2012, a team of researchers at Yale University and Skidmore College created fictional resumes for a lab manager position.<sup>34</sup> Half the resumes were assigned a male name (“John”) and half a female name (“Jennifer”). The researchers asked over 100 faculty members nationwide to assess the resume they received. “John” was rated as significantly more competent and worthier of hiring than

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<sup>33</sup> Interestingly, one vantage point examining transgender people in the workforce reveals that “earnings for male-to-female transgender workers fell by nearly one-third after their gender transitions, but earnings for female-to-male transgender workers increased slightly.” The researchers suggest that this finding supports that “the gender pay gap may be due more to discrimination than to how children are socialized or how much women invest in their careers versus their families.” Catherine Rampell, *Before That Sex Change, Think About Your Next Paycheck*, N.Y. TIMES: ECONOMIX (Sept. 25, 2008, 1:54 PM), <https://economix.blogs.nytimes.com/2008/09/25/before-that-sex-change-think-about-your-next-paycheck/>. The sports industry further illustrates the gender gap for comparable work. In 2017, the U.S. women’s hockey team advocated for equal pay and won the battle for a signed contract with U.S.A. hockey that compensated them equally to their male counterparts. *‘We Need to be Brave Enough to Stand Up’: U.S. Women’s Hockey Players on their Fight for Equal Pay*, SPORT’S ILLUSTRATED: NHL (Mar. 29, 2017), <https://www.si.com/nhl/2017/03/29/money-usa-womens-hockey-duggan-knight-lamoureux>. Similar efforts have been undertaken by the U.S. women’s soccer team who have also fought for equal pay. Louisa Thomas, *Equal Pay for Equal Play: The Case for the Women’s Soccer Team*, NEW YORKER: CULTURAL COMMENT (May 27, 2016), <https://www.newyorker.com/culture/cultural-comment/the-case-for-equal-pay-in-womens-sports>.

<sup>34</sup> Corinne A. Moss-Racusin et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 PNAS 16474 (2012), <http://www.pnas.org/content/pnas/109/41/16474.full.pdf>.



“Jennifer.” The resume studies are known for showing the lesser employability of minorities and women, but the less known effect is the disparity in salary offers. When “Jennifer” was offered a job, she was offered a lower salary than “John”—an average of \$4,000 less annually. Strikingly, this effect was consistent regardless of whether the hiring faculty was a man or a woman. As for salary increases, a recent field study of a private employer with 20,000 employees found performance-reward bias showing that different salary increases were granted for observationally equivalent employees, with the same supervisor and same human capital and position, even though they received the same performance evaluation scores.<sup>35</sup>

Empirical studies further show that women are not only offered lower salaries and raises, but that women actually ask for less. In their seminal work, economist Linda Babcock and journalist Sara Laschever asked why “Women Don’t Ask.” They found that women are less likely than men to negotiate for higher salaries and other benefits. For example, in one study at Carnegie Mellon University, 93% of female M.B.A. students accepted an initial salary offer, while only 43% of men did.<sup>36</sup> In another study, female participants simulating salary negotiations asked for an average of \$7,000 less than their male participants.<sup>37</sup> At the same time, in a large scale field experiment, economists Andreas Leibbrandt and John List found that while women are much less likely to negotiate with employers over salary, this difference disappears and mitigates the pay gap when all job seekers are explicitly told that pay is negotiable.<sup>38</sup>

Other studies show that women are treated differently when they attempt to negotiate their salary. Historically, women have been universally viewed as the weaker negotiators compared to their male counterparts. In a series of experiments, participants evaluated written accounts of candidates who did or did not initiate negotiations for higher salary. The results in each experiment showed that participants penalized female candidates more than male candidates for initiating negotiations, deeming women who asked for

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<sup>35</sup> Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479, 1481, 1484-45 (2008).

<sup>36</sup> Linda Babcock et al., *Nice Girls Don’t Ask*, HARV. BUS. REV., Oct. 2003, at 14.

<sup>37</sup> Emily T. Amanatullah & Michael W. Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating are Mediated by Women’s Fear of Backlash and Attenuated when Negotiating on Behalf of Others*, 98 J. PERSONALITY & SOC. PSYCHOL. 256 (2010), <https://www.ncbi.nlm.nih.gov/pubmed/20085399>.

<sup>38</sup> Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment* (Nat’l Bureau of Econ. Research, Working Paper No. 18511, 2012), <http://www.nber.org/papers/w18511>.

more not “nice” or too “demanding.”<sup>39</sup> While qualities such as “assertiveness, strength, and competition” culturally benefit male negotiators, women who display such characteristics are often considered too aggressive.<sup>40</sup> Too often, women “fall into feminine stereotype traps and settle for lower wages, compounding a vicious cycle of gender pay discrimination.”<sup>41</sup>

An important finding in the research on gender disparities in negotiated salaries is that when ambiguities over the range of salary and norms of negotiation are high, the gender differences are far larger.<sup>42</sup> As will be further analyzed in the sections below, pay transparency can help reduce the ambiguity of negotiating situations. Bans on salary inquiry, along with mandatory presentation of a pay scale by the employer, can further reduce the social penalties some women face for initiating negotiations. Finally, governance solutions have the potential to address the biases that exist in wage-setting processes by including provisions for negotiation training, education about pay equity, and the aid of digital platform tools for employers and employees.

## II. *The Contemporary Momentum*

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<sup>39</sup> LINDA BABCOCK & SARA LASCHEVER, WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003) (women are socialized to refrain from asking for what they want); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1603-05 (1991); See also experimental studies on gender differences in workplace behavior, in which women acted less as homo economicus and more as other-looking social enforcers. Yuval Feldman & Orly Lobel, *Behavioral Versus Institutional Antecedents of Decentralized Enforcement: An Experimental Approach*, 2 REG. & GOVERNANCE 165-192 (2008); Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151 (2010).

<sup>40</sup> L.J. Kray & M.J. Gelfand, *Relief Versus Regret: The Effect of Gender and negotiating Norm Ambiguity on Reactions to Having One’s First Offer Accepted*, 27 SOCIAL COGNITION 418-436 (2009).

<sup>41</sup> Erin Coghlan & Sara Hinkley, *State Policy Strategies for Narrowing the Gender Wage Gap*, U.C. BERKELEY INST. FOR RESEARCH ON LABOR & EMP’T, Apr. 8, 2018, at A1, <http://irle.berkeley.edu/state-policy-strategies-for-narrowing-the-gender-wage-gap/>.

<sup>42</sup> Dina W. Pradel, Hannah Riley Bowles & Kathleen L. McGinn, *When Gender Changes the Negotiation*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Feb. 13, 2006), <https://hbswk.hbs.edu/item/when-gender-changes-the-negotiation> (women received about \$10,000 less than similarly-qualified men in high-ambiguity situations).

*It brings tears to my eyes to know women are working so hard and being paid less...it makes me emotional when I hear that... I get angry, I get outraged and I get volcanic. -- Senator Mikulski*

## 1. A Long Winding Road

It's been a long road towards pay equity. In 1869, a woman wrote a letter to the editor of the *New York Times* asking why female government employees were paid less than their male counterparts for equal work.<sup>43</sup> At the time the letter was written, female employees were earning half of what their male counterparts earned. The following year, Congress passed a resolution that government employees would receive equal pay regardless of gender.<sup>44</sup> Fourteen years later, in 1883, the workers of the Western Union Telegraph Company went on strike to fight for "equal pay for equal work."<sup>45</sup> The strike did not result in equal pay, but it did capture the nation's attention as communications across the country were halted. During the World Wars, with American men leaving the country *en masse*, women began to fill jobs once thought to be only for men. This not only created space for women in the workforce, but also led the National Labor Board to proclaim that "[i]f it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work."<sup>46</sup> In fact, the initiative to equalize pay during the war was championed by unions and male workers, who worried that if women were paid less for the same work, management would lower male workers' wages after they returned from the war.

The initiative lost its force post-war, and the next milestone in the struggle for equal pay didn't come until the first central federal legislation for equal pay in 1963 when President John F. Kennedy signed the Equal Pay Act (EPA), which amended the Fair Labor Standards Act and required that men and women be paid equally for equal work. In passing the EPA, Congress set to correct "a serious and endemic problem of employment discrimination in

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<sup>43</sup> Charlotte Alter, *Here's the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2015), <http://time.com/3774661/equal-pay-history/>.

<sup>44</sup> H.R. 974, 41st Cong. (1870); *An Appropriations Amendment Prohibiting Gender Discrimination*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Historical-Highlights/1851-1900/An-Appropriations-Amendment-Prohibiting-Gender-Discrimination/> (last visited Sept. 19, 2018).

<sup>45</sup> See Alter, *supra* note 43.

<sup>46</sup> *Id.* See also Richard B. Gregg, *The National War Labor Board*, 33 HARV. L. REV. 39, 43 (1919).

private industry.”<sup>47</sup> The purpose of the EPA was for women to “find equality in their pay envelopes.”<sup>48</sup> President Kennedy signed the Act into law to eradicate “the unconscionable practice of paying female employees less wages than male employees for the same job.”<sup>49</sup> The next year Congress passed the Civil Rights Act of 1964, which prohibits discrimination based on race, origin, color, religion, or sex. For more than fifty years, these two seminal laws, the EPA and Title VII of the Civil Rights Act, have prohibited pay discrimination. Equal pay laws have similarly been enacted in the vast majority of states.<sup>50</sup>

Since 1964, action has centered in the courtroom. However, as we near the third decade of the twenty-first century, legislative reforms are quickly moving forward. Since 2016, a growing number of states and localities have passed a first-of-its-kind “ban the box” prohibition on employers asking for the prior salary history of prospective employees. Other reforms are also underway and, as a recent survey shows, equal pay at work is a primary concern for working Americans.<sup>51</sup>

## 2. Pay Us More, Touch Us Less: The #MeToo Moment for Equal Pay

This is an optimistic year for scholars, attorneys, and policymakers working to promote gender equality. The #MeToo movement has energized public discourse and legislative efforts to create better work environments for all. At the same time, the focus on sexual harassment has been a point of debate among those working in the field of gender equality. By focusing on

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<sup>47</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

<sup>48</sup> Remarks Upon Signing the Equal Pay Act, PUB. PAPERS 233 (June 10, 1963).

<sup>49</sup> *Id.*

<sup>50</sup> *State Equal Pay Laws*, NAT’L CONFERENCE OF STATE LEGISLATURE, <http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx> (last visited Sept. 25, 2018).

<sup>51</sup> Andrew Brenton, *Overcoming the Equal Pay Act and Title VII: Why Federal Sex-Based Employment Discrimination Laws Should Be Replaced with a System for Accrediting Employers for Their Antidiscriminatory Employment Practices*, 26 WIS. J.L. GENDER & SOC’Y 349, 350-51 (2011); Jocelyn Frye, *Next Steps for Progress on Equal Pay*. CENTER FOR AMERICAN PROGRESS (Apr. 12, 2016), <https://www.americanprogress.org/issues/women/reports/2016/04/12/135267/next-steps-for-progress-on-equal-pay/>; Andy Knauer, *Taking the Lead on Equal Pay: 7 Companies that Pay Women Fairly*, FORBES (Apr. 4, 2017), <https://www.forbes.com/sites/justcapital/2017/04/04/taking-the-lead-on-equal-pay-seven-companies-that-pay-women-fairly>.

sexual harassment, some scholars, including myself, have urged not losing sight of some of the most important aspects of employment discrimination – those which are seemingly less *sexy*, literally and figuratively.<sup>52</sup> In reality, working women are keeping their sights set on pay equity. In a recent survey conducted by the AFL-CIO, women named equal pay as the single most important workplace issue.<sup>53</sup>

The connection between gender pay discrimination and sexual harassment is pervasive: “[u]nderpaid persons are often undervalued in the workplace and vice versa, making them more vulnerable to harassment and discrimination and less likely to report abuse or be believed when they do report.”<sup>54</sup> When probing a claim of sexual harassment, investigators often find evidence of wage discrimination, which would likely have gone undetected without the harassment trigger.<sup>55</sup> Indeed, based on interviews I have conducted with plaintiff-side attorneys litigating in the field of gender discrimination, pay equity claims are often only brought by women when something else such as an adverse action, failure to promote, or harassment occurs.<sup>56</sup> Moreover, plaintiffs in gender pay equity cases describe the experience of salary discrimination as equivalent to working in a hostile work environment. For example, BBC presenter Samira Ahmed wrote,

*“I can only describe the feeling of being kept on much lower pay than male colleagues doing the same jobs for years as feeling as though bosses had naked pictures of you in their office and laughed every*

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<sup>52</sup> Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85 (2018); Rachel Arnow-Richman, *#MeToo: Why we must separate sex from sexual harassment*, S.F. CHRON. (Jan. 26, 2018), <https://www.sfchronicle.com/opinion/article/MeToo-Why-we-must-separate-sex-from-sexual-12526498.php>; Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J.F. 152 (2018); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (June 2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/>; Orly Lobel, *Reflections on Equality, Adjudication, and the Regulation of Sexuality at Work*, 43 SAN DIEGO L. REV. 899 (2006); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2122 (2003).

<sup>53</sup> AFL-CIO, OUR VOICES: A SNAPSHOT OF WORKING WOMEN. RESULTS FROM A NATIONAL OF NEARLY 25,000 WORKING WOMEN 7 (Mar. 2016).

<sup>54</sup> Joi Chaney, *#PayUsMoreTouchUsLess*, EQUALPAYTODAY.ORG (Feb. 12, 2018), <http://www.equalpaytoday.org/news/2018/2/12/3yigug6hdgva7d8gu0ayrb7snfjyk4>.

<sup>55</sup> Jennifer Calfas, *Inside Sexual Harassment’s Hidden Toll on Equal Pay*, TIME (Apr. 9, 2018), <http://time.com/5227742/sexual-harassment-equal-pay-wage-gap/>; Nat’l P’ship for Women and Families, *Sexual Harassment and the Gender Wage Gap* (Apr. 2018), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/sexual-harassment-and-the-gender-wage-gap.pdf>.

<sup>56</sup> E.g., conversations with Jill Sanford; Susan Swan; Qualcomm, Nike, Google, law firm class actions.

*time they saw you. It is the humiliation and shame of feeling that they regarded you as second class, because that is what the pay gap means.”*<sup>57</sup>

Another broadcasting personality, Carrie Gracie, described finding out about her own pay disparity as deeply personal and “as undermining to her sense of shared reality—as learning about an infidelity.”<sup>58</sup>

Over time, when women are forced out of positions or jobs where they experience harassment, a direct connection between harassment and pay inequity results. According to a recent report, women who are harassed are 6.5 times more likely to change jobs, even if that means losing lucrative opportunities for advancement and promotion.<sup>59</sup> Harassment may also pattern career choices more broadly for women who seek to avoid positions which increase their risk of harassment.<sup>60</sup> In other words, the pervasive existence of sexual harassment in our markets chills behaviors that promote pay equity.

The recent move to strengthen pay discrimination laws, while gaining momentum within the social cry of #TimesUp, precedes #MeToo. In 2009, President Barack Obama ceremoniously signed his first piece of legislation, the Lilly Ledbetter Fair Pay Act, which expanded the statute of limitations for employees based on each individual violation.<sup>61</sup> The Act overturned the Supreme Court decision – a decision the New York Times aptly titled “Injustice 5, Justice 4” – restricting the time period within which an employee is permitted to file a discrimination lawsuit regarding the employee’s compensation.<sup>62</sup> The Ledbetter Act amended Title VII to clarify that the time limit for suing an employer for pay discrimination restarts each time a paycheck is issued, rather than running solely from the original discriminatory action of the salary decision. The change was applied not only to Title VII, but also to the Age Discrimination in Employment Act and the Americans with Disabilities Act.

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<sup>57</sup> Collins, *supra* note 3.

<sup>58</sup> *Id.*

<sup>59</sup> Chaney, *supra* note 54.

<sup>60</sup> *Id.*

<sup>61</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, EQUAL PAY ACT OF 1963 AND LILLY LEDBETTER FAIR PAY ACT OF 2009, <https://www.eeoc.gov/eeoc/publications/upload/EPA-Ledbetter-brochure-8-20-2013-OLC.pdf>.

<sup>62</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642–43 (2007), *overturned by* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009); Editorial Board, *Injustice 5, Justice 4*, N.Y. TIMES (May 31, 2007), <https://www.nytimes.com/2007/05/31/opinion/31thu1.html>.

The Obama administration took several additional steps toward pay equity reform. It created a National Equal Pay Enforcement Task Force and increased funding for employment regulatory agencies, including the EEOC.<sup>63</sup> In 2014, President Obama issued two executive actions, both concerning pay transparency: one prohibiting government contractors from retaliating against employees who discuss their salaries, and the other requiring large employers to annually report data about the gender pay gap to the EEOC.<sup>64</sup> President Obama also urged Congress to pass the Paycheck Fairness Act, a federal bill which would have adopted many of the current reforms now being passed at the state level.<sup>65</sup>

With the new Trump administration dissipating the focus on pay equity, states are taking the lead in attacking the problem.<sup>66</sup> The landscape is moving toward a more localized fight against pay disparities. Over a dozen states have recently enacted laws designed to strengthen the enforcement, compliance, and breadth of pay equity law.<sup>67</sup> These developments reflect the idea that changes introduced to the hiring process and dissemination of information in the job market can have a real impact in the effort to close the pay gap. The reforms focus on common patterns — restricting inquiries into, and in some cases reliance upon, past salaries, prohibiting difference in pay for similar work despite different job titles and work sites, and allowing employees to openly discuss their salaries with their co-workers.

### III. *Flipping Transparency on Its Head: Secrecy and Transparency in Perfecting the Wage Market*

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<sup>63</sup> Press Release, Office of the Press Secretary, FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act (Jan. 29, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>.

<sup>64</sup> Melanie Garunay, *Taking Action to Advance Equal Pay*, WHITEHOUSE.GOV: BLOG (Jan. 29, 2016, 9:43 AM), <https://obamawhitehouse.archives.gov/blog/2016/01/29/taking-action-advance-equal-pay>.

<sup>65</sup> Office of the Press Secretary, *supra* note 63. *See also* Deborah L. Brake, *Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889 (2016).

<sup>66</sup> Martha Burk, *With No Hope Under Trump, Gender Pay Gap Action Goes Local*, HUFF. POST (Dec. 19, 2016), [http://www.huffingtonpost.com/martha-burk/with-no-hope-under-trump\\_b\\_13730364.html](http://www.huffingtonpost.com/martha-burk/with-no-hope-under-trump_b_13730364.html).

<sup>67</sup> *See, e.g.*, Lisa Nagele-Piazza, *Employers Should Plan for Stronger Pay Equity Laws*, SHRM.ORG (June 19, 2018), <https://www.shrm.org/hr-today/news/hr-news/conference-today/pages/2018/employers-should-plan-for-stronger-pay-equity-laws.aspx>.

*“Imperfect information can create an impediment to mutually productive bargains.” -- Joseph Stiglitz<sup>68</sup>*

### 1. Don’t Ask: Banning the Salary Box

In 2016, Massachusetts became the first state to pass a law prohibiting employers from asking job candidates about their salary history.<sup>69</sup> Since then, a wave of states and cities, including California, Delaware, New York, New Jersey, Hawaii, Maryland, Oregon, Vermont, New Orleans, Puerto Rico, Connecticut, New York City, Philadelphia, Pittsburgh, Chicago, Louisville, and San Francisco, have followed suit and many other jurisdictions are considering similar law reforms.<sup>70</sup> Salary history bans are under consideration in at least twenty states and the District of Columbia.<sup>71</sup> Similar efforts are ongoing at the federal level, with the introduction of the Pay Equity

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<sup>68</sup> Joseph Stiglitz, *The Private Uses of Public Interests: Incentives and Institutions*, 12 J. ECON. PERSP. 3, 13 (Spring 1998).

<sup>69</sup> MASS. GEN. LAWS ch. 149, § 105A (2016); Stacey Cowley, *Illegal in Massachusetts: Asking Your Salary in a Job Interview*, N.Y. TIMES: DEALBOOK (Aug. 2, 2016).

<sup>70</sup> CAL. LAB. CODE § 1197.5(b)(3) (West Supp. 2017); DEL. CODE ANN. tit. 19, § 709B (2017); P.R. LEYES AN. tit. 29, § 254 (2017); Oregon Equal Pay Act of 2017; N.Y.C., N.Y., ADMIN. CODE § 8-107(25) (2017); PHILA., PA., CODE § 9-1131(2) (2017); Joon Hwang On, *Delaware Enacts Law to Address Gender Pay Gap By Prohibiting Employers From Requesting Compensation History of Job Applicants*, LITTLER.COM (Jun. 19, 2017) <https://www.littler.com/publication-press/publication/delaware-enacts-law-address-gender-pay-gap-prohibiting-employers>; William J. Simmons et al., *Hawaii Joins Salary History Ban Trend*, LITTLER.COM (July 6, 2018) <https://www.littler.com/publication-press/publication/hawaii-joins-salary-history-ban-trend>; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., *New Orleans Mayor Signs Executive Order Prohibiting Wage History Inquiries*, JDSUPRA (Feb. 3, 2017) <https://www.jdsupra.com/legalnews/new-orleans-mayor-signs-executive-order-70985/>. New York City’s ban began on October 31, 2017. See N.Y.C., N.Y., ADMIN. CODE § 8-107(25). Massachusetts’ ban became effective July 1, 2018. See MASS. GEN. LAWS ch. 149, § 105A. The Oregon Equal Pay Act of 2017 takes full effect on January 1, 2024. See Oregon Equal Pay Act of 2017 sec. 13. Christopher Neary & Sharon Bowler, *Connecticut Has a New Pay Equity Law*, SRHM.ORG (May 30, 2018) <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/connecticut-has-a-new-pay-equity-law.aspx>; Joseph Lazazzero, *Vermont Enacts Salary History Inquiry Law*, LITTLER.COM (May 15, 2018) <https://www.littler.com/publication-press/publication/vermont-enacts-salary-history-inquiry-law>. Among the states and localities currently considering such a ban are New York, Rhode Island, Texas, the District of Columbia and Virginia.

<sup>71</sup> Yuki Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, NPR (May 30, 2017, 11:09 AM), <http://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history> [<https://perma.cc/K634-L2ZX>].



for All Act of 2017 that would amend the Fair Labor Standards Act to prohibit employers from “request[ing] or requir[ing] . . . that a prospective employee disclose previous wages or salary histories.”<sup>72</sup> The bill explains that,

*“Even though many employers may not intentionally discriminate against applicants or employees based on gender, race or ethnicity, setting wages based on salary history can reinforce the wage gap. Members of historically disadvantaged groups often start out their careers with unfair and artificially low wages compared to their white male counterparts, and the disparities are compounded from job to job throughout their careers.”<sup>73</sup>*

The exact content of the salary inquiry ban varies from act to act. The new Massachusetts law requires that employers wait until they have extended a formal offer to a candidate, which includes compensation amount, before asking about the candidate’s salary history. Only when the applicant gives written permission can the employer contact previous employers to verify past salary rates. The law also prohibits employers from requiring that the potential hire’s wage or salary history meet certain criteria.<sup>74</sup> However, Massachusetts permits applicants to voluntarily offer salary information. The New York City law prohibiting prior salary and benefits inquiry during the interview process allows the employer to use prior salary to set the new employee’s salary if the employee “*voluntarily and without prompting* provides salary history.”<sup>75</sup>

Other states and localities, such as Delaware, similarly prohibit employers from screening applicants based on their compensation histories. New York City’s salary history ban goes even further in prohibiting employers from conducting online searches or examining publicly available

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<sup>72</sup> H.R. 2418, 115th Cong. § 8(1) (2017-2018). *See also* Letter from American Association of University Women to the U.S. House of Representatives (May 24, 2017), <http://www.aauw.org/files/2017/01/Pay-Equity-for-All-Act-Sign-On-nsa-1.pdf> [<https://perma.cc/6VVC-38PF>].

<sup>73</sup> 162 CONG. REC. E1269-70 (daily ed. Sept. 14, 2016) (introduction of the Pay Equity for All Act of 2016), <https://www.congress.gov/congressional-record/2016/09/14/extensions-of-remarks-section/article/E1269-3>.

<sup>74</sup> An Act to Establish Pay Equity, 2016 Mass. Acts ch. 177.

<sup>75</sup> María Cáceres-Boneau, Jean Schmidt & David M. Wirtz, *New York City Set to Ban Inquiries About Salary History*, LITTLER MENDELSON P.C. (Apr. 14, 2017), <https://www.littler.com/publication-press/publication/new-york-city-set-ban-inquiries-about-salary-history>.

records to obtain an applicant's salary history.<sup>76</sup> San Francisco's law explicitly prohibits former employers from providing salary history information of a current or former employee to any prospective employer without written authorization from the employee.<sup>77</sup> Most of the new bans allow employers and prospective employees to communicate expectations about compensation without inquiring about salary history.<sup>78</sup> In New York City, for example, employers and job candidates may discuss salary expectations, including asking whether an applicant will have to forfeit unvested equity if the applicant leaves a current position.<sup>79</sup>

In response to the wildfire of legislative reforms banning salary history inquiry, a few states have passed preventative legislation to block any such efforts. Michigan and Wisconsin have signed laws essentially banning the bans.<sup>80</sup> In March 2018, Michigan passed a bill which states that no local governmental body shall adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or potential employee. The new law specifically excludes criminal background checks from the ban on bans. That same month, Wisconsin lawmakers passed legislation similarly prohibiting salary inquiry bans. Unsuccessful efforts to ban the bans have also been made albeit in Minnesota, Washington, and Mississippi.<sup>81</sup> Some bans have been vetoed by state governors, and Philadelphia's salary history ban has been the subject of a lawsuit filed by the Chamber of Commerce asserting that bans unlawfully impede speech and make the locality less competitive.<sup>82</sup>

## 2. Against Anchoring

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<sup>76</sup> N.Y.C. LOCAL LAW No. 67 (2017).

<sup>77</sup> [San Francisco Ordinance 142-17](#) (2017).

<sup>78</sup> N.Y.C. LOCAL LAW No. 67 (2017).

<sup>79</sup> The law applies to: (1) headhunters, search firms, and other agents working on behalf of employers and/or applicants; and (2) independent contractors.

<sup>80</sup> Genevieve Douglas, *States Begin to Reject Salary History Bans; Will Others Follow?*, BNA (Apr. 3, 2018), <https://www.bna.com/states-begin-reject-n57982090893/>.

<sup>81</sup> Jeffrey Fritz, *Banning the Bans: Michigan and Wisconsin Buck the Salary History Ban Trend*, FISHER PHILLIPS: PAY EQUITY MATTERS (Apr. 4, 2018), <https://www.fisherphillips.com/pay-equity-blog/banning-the-bans-michigan-and-wisconsin-buck>.

<sup>82</sup> Chamber of Commerce for Greater Phila. v. City of Phila., 319 F. Supp. 3d 773 (E.D. Pa. 2018).

Barring employers from asking prospective job candidates about their salary history consists of two goals: (1) breaking the vicious pay gap cycle, and (2) addressing gender differences in the negotiation process.

The salary history bans take the market as it is: imperfect, with a longstanding and stagnant gender gap. The reforms target the fact that using salary history to determine compensation perpetuates the wage gap. Put simply, if a woman currently earns less than a man, she could be harming her salary trajectory, both in the applied-for position and for the rest of her career each time she discloses her current salary to a potential employer.<sup>83</sup> In fact, these gaps are likely to grow with each move and promotion as recruitment efforts and promotions are often offered as a percentile increase in relation to current base salary.

Anchoring bias contributes to this dynamic effect. Even if employers are aware of a gender pay gap and are prohibited from relying on salary history to explain the gap within their workforce, merely stating the figure of an applicant's previous salary can impede rational decision-making. Behavioral studies on anchoring show that people are disproportionately, and often irrationally, impacted by the presentation of a number, even in cases where the number has nothing to do with the question at hand.<sup>84</sup> Anchoring is also related to a status quo bias.<sup>85</sup> Individuals tend to stick with what they had previously determined to be the appropriate salary even in the face of new facts. For example, in a study of California engineering jobs, employers admitted to changing job and skill descriptions, rather than adjusting salaries, when market surveys showed they were paying higher or lower salaries for a particular job.<sup>86</sup> A third related behavioral effect is confirmation bias – when recruiters receive information about a female applicant's lower baseline salary, they may view other pieces of information in ways that confirm biases and stereotypes and justify that lower baseline salary.<sup>87</sup> These behavioral insights are further supported by studies that show that compensation markets

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<sup>83</sup> NAT'L WOMEN'S LAW CENTER, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB 1 (June 9, 2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/06/Asking-for-Salary-History-Perpetuates-Discrimination.pdf> (“Employers’ requests for an applicant’s salary history in the hiring process, and reliance on that information to determine compensation, forces women and, especially women of color, to carry lower earnings and pay discrimination with them from job to job.”).

<sup>84</sup> See e.g., On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098 (2008).

<sup>85</sup> Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165 (2008).

<sup>86</sup> Marlene Kim, *Employers’ Estimates of Market Wages: Implications for Wage Discrimination in the U.S.*, 6 FEM. ECON. 97, 105-10 (2000).

<sup>87</sup> Feldman & Lobel, *supra* note 83.

are far from rational. For example, in their book *Pay Without Performance*, Lucian Bebchuk and Jesse Fried describe how determination of executive compensation is often not based on merit or logical calculations and predictions about the executive's talent and promise, but rather upon flawed processes of internal influence and corporate norms.<sup>88</sup>

Of course, there can be economic logic in using salary history to determine an applicant's willingness to accept a new offer and to determine market value of the candidate. And yet, when these figures are plagued by gender disparity, this practice of reliance can perpetuate and further exacerbate existing market disparities. As the Supreme Court stated in *Griggs v. Duke Power Co.*, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."<sup>89</sup> Rather than relying on biased figures, bans on salary history inquiry can instead induce employers to consider other nondiscriminatory characteristics when determining pay – namely, experience, training, education, skill, and past performance records. Removing the anchored numerical figure encourages employers to proactively assess pay based on the company's needs and the candidate's fit. The new laws rely on the assumption that employers should be able to price the job by the skill set needed and the value of the position. Indeed, when understood in this way, salary bans can be understood as supporting rational and productive business processes rather than impeding them.

The second reason for banning salary history inquiry is to address well-established negotiation differences between men and women. As discussed above, studies have repeatedly shown that women on average negotiate less – and when women do negotiate for higher pay, employers react negatively.<sup>90</sup> The first negotiation difference, which I call the *negotiation deficit*, is that women negotiate less frequently and ask for less when they do. This deficit can be mitigated, though not erased, with a salary inquiry ban. The salary inquiry ban has the potential to positively shift the process from letting job applicants lead with a starting point figure to employers implementing a practice of more actively suggesting a fair salary.

Salary inquiry bans can also counteract the negative assumptions employers may make when women refuse to reveal their prior salary in a regime that allows salary inquiry. This is a separate effect, which I call the *negative inference* - when employers assume women who refuse to disclose

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<sup>88</sup> LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004).

<sup>89</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

<sup>90</sup> Hannah Riley Bowles, *Why Women Don't Negotiate Their Job Offers*, HARV. BUS. REV. (Jun. 19, 2014) <https://hbr.org/2014/06/why-women-dont-negotiate-their-job-offers>.

their pay earn less. This could be either a rational conscious bias, given the well-documented existence of a gender pay gap in every industry, or an unconscious bias about what women and men should make in the market. Payscale, one of a growing number of compensation data and software companies, conducted a survey asking over 15,000 job seekers whether they disclosed their pay at previous jobs during interview processes.<sup>91</sup> The survey found that a woman who was asked about her salary history and refused to disclose was offered 1.8% *less* than a woman who was asked and disclosed. By contrast, if a man refused to disclose when asked about salary history, he received an offer that was 1.2% higher than a man who did disclose.<sup>92</sup> These findings of negative inferences are red flags for the new laws, which ban salary inquiry but allow voluntary disclosure by the job applicant as a means for employers to set wages, because prohibiting salary inquiry might not be as effective as the laws intend. To prevent employers from making assumptions about female employees who do not disclose their salaries, the bans on salary history inquiry might either remove the voluntary-disclosure exception or prohibit employers from using voluntarily disclosed salary histories, as Oregon has done.<sup>93</sup> The prohibition on salary history reliance, which will be discussed below, is also a strong measure to disincentivize employers from filling in the blanks and assuming women make less.

A third negotiation difference, beyond the behavioral gender difference of the applicant and beyond the negative inference of not disclosing past pay, is what I term *the negotiation penalty* – the well-documented finding that women face a social penalty that men do not when they initiate wage negotiation, regardless of the gender of the person with whom they are negotiating.<sup>94</sup> The negotiation penalty may be mitigated, but is unlikely to be fully corrected, by a salary inquiry ban. Setting salaries continues to be negotiation-based even when salary history is removed, and employers are permitted to ask about a candidate's minimum threshold salary expectation. The gender differences that occur at the negotiation and hiring process and that continue during employment – for example, at the stage of promotion, retention and raise negotiation – suggest that a salary inquiry ban

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<sup>91</sup> *The State of the Gender Pay Gap 2018*, Payscale, <https://www.payscale.com/data/gender-pay-gap> (last visited Aug. 22, 2018).

<sup>92</sup> Lydia Frank, *Why Banning Questions About Salary History May Not Improve Pay Equity*, HARV. BUS. REV. (Sept. 5, 2017), <https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity>.

<sup>93</sup> 2017 Or. Laws ch. 197, H.B. 2005 (to be codified in scattered sections of Or. Rev. Stat.)

<sup>94</sup> Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (2007), <https://www.sciencedirect.com/science/article/pii/S0749597806000884>.

alone will not eradicate gender pay discrimination, and yet it should be understood as a promising path within a multifaceted reform strategy.

Unsurprisingly, because bans on salary history inquiries require employers to change common hiring practices, they have been met with opposition. Employer associations argue that employers need to know salary history to assess how likely a candidate is to accept an offer. They describe prior salary as useful information for saving time, organizing, and better negotiating for both the employer and employee.<sup>95</sup> In 2015, when the California legislature first passed a bill to prohibit asking job applicants about prior salaries, the Governor vetoed the bill, expressing concern about broadly prohibiting employers from obtaining relevant information “with little evidence that this would assure more equitable wages.”<sup>96</sup> Undeterred, proponents repackaged the bill which was then passed and signed into law in 2017. California’s new law prohibits employers from inquiring about an employee’s prior pay, but allows questions about “salary expectations.” It also allows prospective employees to ask for the pay scale of the applied-for position.<sup>97</sup>

In 2017, when Philadelphia became the first city to adopt a salary history ban, the Philadelphia Chamber of Commerce filed a lawsuit claiming that the ordinance was “a broad impediment to businesses seeking to grow their workforce.”<sup>98</sup> According to the lawsuit, the “ordinance contains

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<sup>95</sup>Sylvia Francis & Katie Donovan, *Should HR Ask for Job Candidates’ Salary Histories?*, HR MAGAZINE (Apr. 2016), <https://www.shrm.org/hr-today/news/hr-magazine/0416/pages/should-hr-ask-for-job-candidates-salary-histories.aspx>.

<sup>96</sup> A.B. 1017, 2015-2016 Reg. Sess. (Cal. 2015).

<sup>97</sup> A.B. 168, 2017-2018 Reg. Sess. (Cal. 2017); A.B. 2282, 2017-2018 Reg. Sess. (Cal. 2018); James Nelson, *Calif. Considers ‘Don’t Ask, Must Tell’ Pay History Bill*, LAW 360 (June 20, 2017, 12:46 PM), <https://www.law360.com/articles/936231/calif-considers-don-t-ask-must-tell-pay-history-bill>; *See also* Bruce J. Sarchet, *New California Law Prohibits Salary History Inquiries*, LITTLER MENDELSON P.C. (Oct. 13, 2017), <https://www.littler.com/publication-press/publication/new-california-law-prohibits-salary-history-inquiries>. An employer may ask an applicant about her or his “salary expectations” for the position being applied for. If an applicant self-discloses prior salary history, without prompting, the employer may consider the salary history in determining the salary to offer the applicant.

<sup>98</sup> Pennsylvania lawmakers also, in response to the city ban, proposed an amendment to the Equal Pay Law that could overturn Philadelphia’s local ordinance. The Act goes further in providing that an employer may not “rely on the wage history of a prospective employee...in determining the wages for such individual at any stage of the employment process.” Phila., Pa., Bill No. 160840 (Dec. 12, 2016); Rachel Dovey, *Philly Bans Employers From Asking About Wage History*, NEXTCITY (Jan. 24, 2017), <https://nextcity.org/daily/entry/philadelphia-equal-wage-ordinance-salary-history>; Leslie A. Pappas, *State Bill Would Kill Philly Law on Pay History*, DAILY LAB. REP. NO. 26 (BNA),

numerous obstacles for businesses operating in the City, such as the exclusion of important information from the hiring process, no consideration for varying business needs, and potential civil and criminal penalties.” The Chamber of Commerce argued that the ordinance makes searching for and recruiting top talent difficult and therefore impedes Philadelphia’s competitiveness. Wage history, according to the lawsuit, allows an employer to determine whether it can afford a job applicant, to set a competitive market-based salary for the positions offered, and to assist in evaluating an applicant’s prior responsibilities and achievements. Without it, the lawsuit asserts, employers are essentially left without a litmus test to measure the market. The Chamber framed the ban as a prohibition on employers from communicating the message, “I think your prior salary would help us understand if we are a good fit for each other. Please tell it to me,” a message that, the Chamber claimed, is fully protected by the First Amendment.<sup>99</sup> In its argument that the ban unlawfully restricts commercial speech, the Chamber concluded that the ordinance is unconstitutional and will not advance gender wage equality.<sup>100</sup> Rather, the Chamber argued, the city relied purely on speculation and conjecture to demonstrate that the inquiry ban would alleviate the harms it purported to alleviate.<sup>101</sup>

A federal district court agreed with the Chamber of Commerce, analyzing the inquiry ban through the lens of the First Amendment as restricting lawful commercial speech.<sup>102</sup> The court agreed that the governmental interest of promoting gender equality is substantial. The core of the analysis, however, rested on the third prong of the First Amendment inquiry: whether the regulation directly advances the governmental interest asserted, and whether it is more extensive than is necessary to serve that interest.<sup>103</sup>

The court stated that the city had the burden of showing that the law directly advanced a substantial interest, and to meet that burden, it had to

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Feb. 9, 2017,

[https://www.bloomberglaw.com/product/labor/document/X8JDAFRS000000?search32=.](https://www.bloomberglaw.com/product/labor/document/X8JDAFRS000000?search32=)

<sup>99</sup> Brief of Amici Curiae at 5, Chamber of Commerce for Greater Phila. v. City of Phila., 319 F. Supp. 3d 773 (E.D. Pa. Apr. 30, 2018) (June 7, 2017).

<sup>100</sup> Dan Packel, *Pay Inquiry Bans to Get Crucial First Test in Philly*, LAW 360 (Apr. 10, 2017), <https://www.law360.com/employment/articles/911609/pay-inquiry-bans-to-get-crucial-first-test-in-philly>.

<sup>101</sup> Chamber of Commerce for Greater Phila. v. City of Phila., F. Supp. 3d 773, 788 (E.D. Pa. 2018).

<sup>102</sup> *Id.* at \*1.

<sup>103</sup> *Id.* (Applying Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980).)

“establish that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”<sup>104</sup> The judge reviewed testimony from multiple professionals, conclusions of a labor economics expert, academic articles, and anecdotes from women who had been asked about their wage history during the hiring process.<sup>105</sup> According to the judge, the “critical problem” with this evidence was that it was all “unsubstantiated conclusions.”<sup>106</sup> The judge decided that no evidence was shown that prior wage history contributes to a discriminatory wage gap.<sup>107</sup> The judge concluded that “[w]hile the conclusions that a discriminatory wage gap could be affected by prohibiting wage history inquiries was characterized by respected professionals as a logical, common sense outcome, more is needed.”<sup>108</sup> The city filed an appeal on May 30, 2018, which is still pending.<sup>109</sup>

The move to ban salary history questions echoes the earlier “ban the box” move in many states that postpones an employer’s ability to conduct a criminal background check.<sup>110</sup> Essentially, these bans prevent employers from requiring applicants to disclose their criminal history by removing the criminal record box that applicants need to check in their applications.<sup>111</sup> In the past decade, a total of 32 states and over 150 cities and counties have adopted the ban, removing conviction history from job applications and delaying background checks until later in the hiring process.<sup>112</sup> The goal of fair-chance hiring policies is to postpone criminal record questions until after a conditional offer of employment to facilitate re-entry into the job market. Moreover, the movement for banning the criminal record box has been closely tied to preventing racial discrimination in hiring, as minorities in the United States are disproportionately more likely to have a criminal record. Opponents, however, have decried the bans as hindering an efficient hiring

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<sup>104</sup> *Id.* at \*9 (citing to *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

<sup>105</sup> *Id.* at \*9-13.

<sup>106</sup> *Id.* at \*17.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Lakshmi Singh, *Ban The Box: What This New Law Means For Potential Employees With A Criminal Record*, NPR (Oct. 21, 2017), <https://www.npr.org/2017/10/21/559278020/ban-the-box-what-this-law-means-for-potential-employees-with-a-criminal-record>.

<sup>111</sup> *Id.*

<sup>112</sup> Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMP’T L. PROJECT (Aug. 15, 2018), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.



process, adding costs and uncertainty to the screening process, and possibly, perversely, deepening hiring biases against people of color.<sup>113</sup>

It would have been easier to assess these polar arguments if the empirical studies on the effects of the ban-the-box reforms all pointed to the same conclusion. Instead, the findings are mixed and reach polar opposite conclusions about the success of the bans. One recent study examining the effect of criminal background ban the box policies in cities that have adopted them finds that cities with high crime rates saw a 3.5% increase in employment compared to cities with high crime rates that did not implement the new law.<sup>114</sup> In particular, the policies were correlated with a 3% increase in the employment rate for African-American males. The study also finds that there was a significant increase of 1.5% in the number of job openings requiring a college degree and a 2% increase in job openings that wanted prior experience, indicating that employers find alternative screening factors when they are prohibited from using a common one.<sup>115</sup> By contrast, several studies suggest that the well-intentioned policies to remove information about racially-imbalanced characteristics from job applications can do more harm than good for minority job-seekers. One study of ban-the-box policies found that the probability of being employed decreased by 5.1% for young low-skilled black men and by 2.9% Hispanic men.<sup>116</sup> In an experimental study, 1,500 fictitious resumes were submitted to low-skill job openings before and after New Jersey and New York adopted the criminal background box ban. The study found that, for applicants receiving a call for an interview, the racial gap of 7% before the ban increased to 43% after the ban, thus supporting “the concern that BTB (ban-the-box) policies encourage statistical discrimination on the basis of race.”<sup>117</sup> Another 2017 study compares individuals with criminal records in Seattle, where ban-the-box was implemented, with people in other parts of the state, where it was not, and

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<sup>113</sup> Amy Cheng & James Post, *State Debates “Ban the Box”*, YALE DAILY NEWS (Apr. 19, 2016, 1:58 AM), <https://yaledailynews.com/blog/2016/04/19/state-debates-ban-the-box/>.

<sup>114</sup> Ivonne Acevedo, *To Ban the Box, or Not to Ban the Box? How Policy Change Can Affect Hiring and Employment*, CHI. POL’Y REV. (Apr. 27, 2016), <http://chicagopolicyreview.org/2016/04/27/to-ban-the-box-or-not-to-ban-the-box-how-policy-change-can-affect-hiring-and-employment/>.

<sup>115</sup> *Id.*

<sup>116</sup> Jennifer L. Doleac & Benjamin Hansen, *Does “Ban the Box” Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* (NBER Working Paper No. 22469, July 2016), <http://www.nber.org/papers/w22469.pdf>, [<http://perma.cc/J9QF-L8YB>].

<sup>117</sup> Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: a Field Experiment* (U. Mich. L. & Econ. Research Paper No. 16-012, 2016), <https://ssrn.com/abstract=2795795>.

finds that the policy had no effect on employment for people with records.<sup>118</sup> A fourth 2017 study compares people with criminal records in Massachusetts at the time ban-the-box was implemented with people who did not have records yet but would be convicted later and finds that ban-the-box reduced employment for people with criminal records in Massachusetts by about 5%, and thus has a negative effect on ex-offenders' employment.<sup>119</sup> Yet another experimental study compared food-service job openings in Chicago, which bans the box, and Dallas, which does not, using a fictitious ex-offender applicant profile and finds higher callback rates in Chicago. One-third of the applications in each city used a black-sounding name, one-third used a Latino-sounding name, and the final third used a white-sounding name. The results of this study showed applicants were 27% more likely to receive a callback in Chicago than in Dallas. All three applicants had higher callback rates in Chicago where the box was banned, with the black applicant experiencing the largest increase.<sup>120</sup>

The resistance to the salary history inquiry ban, the questions about its effectiveness, and the concerns about potential counterproductive effects underscore the fact that although these reforms have corrective potential, their ability to close the gender gap remains limited. The highly mixed findings of the recent empirical and experimental studies on the implementation of ban-the-box criminal background reforms suggest uncertainty about the potential for banning information at the interview stage to completely correct for pervasive biases. The recent ban-the-box history also further highlights the need for ongoing data collection, as well as for public and private research and experimentation with different reform strategies.

Any meaningful reform that considers gender differences in negotiations, as well as gender biases that continue to plague salary structures, must do more than merely ban salary inquiries. We can imagine a practice developing in states that ban salary inquiry but allow reliance on salary history and voluntary disclosure when unprompted by an employer, where every applicant feels pressured to disclose prior pay. The exception of permitting employees to voluntarily reveal their salary is further concerning

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<sup>118</sup> Evan K. Rose, *Does Banning the Box Help Ex-Offenders Get Jobs? Evaluating the Effects of a Prominent Example.*, (Univ. of Cal., Berkeley, July 18, 2018), [https://ekrose.github.io/files/btb\\_seattle\\_0418.pdf](https://ekrose.github.io/files/btb_seattle_0418.pdf).

<sup>119</sup> Osborne Jackson & Bo Zhao, *The Effect of Changing Employers' Access to Criminal Histories on Ex-Offenders' Labor Market Outcomes: Evidence from the 2010–2012 Massachusetts Cori Reform*, (FRB of Boston Working Paper No. 16-30, Mar. 28, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2942005##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942005##).

<sup>120</sup> Dallan Flake, *Do Ban-the-Box-Laws Really Work?* 104 IOWA L. REV. (forthcoming 2019).

because discovering what happens at the negotiation table and whether disclosure was truly voluntary is nearly impossible. Moreover, the applicant may worry that, in her reluctance to differentiate herself by volunteering information, she may be signaling herself as a lemon among a pool of highly priced male cherries.<sup>121</sup> Beyond voluntary disclosure, most state bans allow recruiters to ask employees about salary *expectations*, which can similarly normalize as the new proxy for salary history, superficially shifting the anchored figure from a rubric of “history” to that of “expectation.”<sup>122</sup> Indeed, permitting an employer to ask about salary expectations could potentially reinforce the negotiation deficit discussed above. It encourages the female applicant to suggest a salary, against which the employer could then negotiate. This is one of the most time-honored negotiation tactics: always seek to have your counterpart in a negotiation make the first offer—it may be lower than you think.<sup>123</sup> This last prediction raises the question of whether employers could not only know about, but also rely upon, history or expectation differences to determine, and later justify, gender pay disparities.

### 3. Don’t Use: Banning Salary History Reliance

Beyond banning the *question* about prior pay, some of the recent state reforms have extended the prohibition to *reliance* on prior salary to justify gender disparity. For example, California’s new law states that an employer’s reliance on salary information from an employee’s previous job is not a sufficient justification to explain the wage gap and that any other asserted explanation must justify the entirety of the gap.<sup>124</sup> Such a ban is potentially far more significant for the closing of gender pay gap than banning the inquiry of prior pay. The reliance ban affects everyone in the workforce, including anyone who has already accepted a lower salary, without a new move to a competitor. The ban on reliance is not simply about structuring the initial negotiation of the deal, it also helps define acceptable results of the negotiation. Unsurprisingly, a ban on salary history reliance is no less controversial than a ban on inquiry, and the question of whether employers can justify existing gaps by pointing to prior salary histories is at the center

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<sup>121</sup> George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

<sup>122</sup> Kandace Miller, *How Will the Laws Banning Salary History Affect Your Recruitment Team*, FORBES: COMMUNITY VOICE (July 28, 2017, 8:00 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2017/07/28/how-will-the-laws-banning-salary-history-affect-your-recruitment-team/#7052a69964e0>.

<sup>123</sup> I thank George Howard for pressing this point.

<sup>124</sup> CAL. LAB. CODE § 1197.5(a)(3).

of many lawsuits, leading to a strong split among the federal circuits when interpreting the Equal Pay Act. The EPA grants four affirmative defenses for employers to justify a gender gap: seniority, merit, quality/quantity of production, and – the controversial catchall defense – “any factor other than sex.” Whether any factor other than sex can include salary history is the subject of an ongoing federal circuit split, leading experts to predict a Supreme Court review of the issue.<sup>125</sup>

Most recently, in 2018, the Ninth Circuit Court of Appeals sitting *en banc* reversed its own precedent when it upheld the ruling in *Rizo v. Yovino* – holding that “prior salary alone or in combination with other factors cannot justify a wage differential.”<sup>126</sup> The *Rizo* court emphasized, that unlike Title VII, the EPA “creates a type of strict liability; no intent to discriminate need be shown.”<sup>127</sup> The court found that if prior salary constitutes as a “reason other than sex,” it would defeat the very purpose of the EPA:

*“It’s inconceivable that Congress meant for the ‘factor other than sex’ exception to include salary history because Congress meant for the act to correct the ‘serious and endemic problem’ of women being paid less than men for the same work, it can’t have meant to let businesses justify new gaps based on existing gaps.”<sup>128</sup>*

The *Rizo* district court reasoned that a pay structure based on prior wages is “so inherently fraught with the risk — indeed, here, the virtual certainty — that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose.”<sup>129</sup> The district court concluded:

*“To say that an otherwise unjustified pay differential between women and men performing equal work is based on a factor other than sex*

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<sup>125</sup> *9th Circuit: Employers May Not Use Pay History as Defense to Equal Pay Act Claims*, MCGUIREWOODS LLP: LEGAL ALERTS (Apr. 12, 2018), <https://www.mcguirewoods.com/Client-Resources/Alerts/2018/4/9th-Circuit-Employers-Pay-History-Defense-Equal-Pay-Act-Claims.aspx>.

<sup>126</sup> *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018). Petition for Cert filed to the U.S. Supreme Court Aug 30 2018, 18-272.

<sup>127</sup> *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986).

<sup>128</sup> Braden Campbell, *Salary History Can’t Shield Equal Pay Claims*, 9<sup>th</sup> Circ. Says, LAW360 (April 9, 2018), <https://www.law360.com/articles/1031325/salary-history-can-t-shield-equal-pay-claims-9th-circ-says>.

<sup>129</sup> *Rizo v. Yovino*, No. 1:14-CV-0423-MJS, 2015 WL 9260587, at \*9 (E.D.Cal. Dec. 18, 2015) (district court, citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 210-11 (1974)).

*because it reflects historical market forces which value the equal work of one sex over the other perpetuates the market's sex-based subjective assumptions and stereotyped misconceptions Congress passed the Equal Pay Act to eradicate.*"<sup>130</sup>

In arriving at its interpretation of the EPA, the Ninth Circuit considered the language, the legislative history, and the purpose of the statute, and concluded that “any other factor other than sex’ is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance,” and that salary history is not job-related.<sup>131</sup> Recall that the court’s reasoning echoes the argument presented by the City of Philadelphia in defending its salary inquiry ban ordinance: that there is no evidence that salary history is a rational business proxy for job qualifications.

Prior to *Rizo*, in *Kouba v. Allstate Insurance Co.*, the Ninth Circuit held that past salary was a factor other than sex, and justified a pay disparity under the EPA so long as “prior salary was reasonable and effectuated some business policy.”<sup>132</sup> The *Kouba* court interpreted the EPA as allowing the use of prior salary to justify disparities, though it recognized that an employer may “manipulate its use of prior salary to underpay female employees.”<sup>133</sup> The Ninth Circuit’s newly adopted position in *Rizo* is close to rulings held by the Second, Sixth, Tenth, and Eleventh Circuits, but is currently the most restrictive of the circuits that restrict prior salary reliance.<sup>134</sup> These Circuits allow the use of a previous salary to prove that a wage gap is justified within the limitations of the EPA, but not as the sole factor.<sup>135</sup>

In *Glenn v. General Motors Corp.*, the Eleventh Circuit held that “the ‘factor other than sex’ exception applies when the disparity results from unique characteristics of the same job; from an individual’s experience, training, or ability; or from *special exigent circumstances* connected with the

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<sup>130</sup> *Id.*

<sup>131</sup> *Rizo*, 887 F.3d 453, at 460.

<sup>132</sup> *Id.* (citing *Kouba v. Allstate Insurance Co.*, 691 F.2d 873, 876–78 (9th Cir. 1982)).

<sup>133</sup> *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982).

<sup>134</sup> Richard R. Meneghello, Miranda Watkins & Megan C. Winter, *Appeals Court Says Salary History Can’t Block Equal Pay Act Claims*, FISHER PHILLIPS: LEGAL ALERT (Apr. 9, 2018), <https://www.fisherphillips.com/resources-alerts-appeals-court-says-salary-history-cant-block>.

<sup>135</sup> See, e.g., *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358 (11th Cir. 2018); *Perkins v. Rock-Tenn Servs., Inc.*, 700 F. App’x 452 (6th Cir. 2017); *Angove v. Williams-Sonoma*, 70 F. App’x 500, 508 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995); *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988).

business.” But prior salary alone cannot justify a pay disparity.<sup>136</sup> Similarly, the Eleventh Circuit held in *Irby v. Bittick* that the employer could not defend a showing of discrimination with the “factor other than sex” affirmative defense solely on the basis of prior pay, but could use a “mixed-motive, such as prior pay and more experience.”<sup>137,138</sup> In *Riser v. QEP Energy*, the Tenth Circuit held that “the EPA ‘precludes an employer from relying solely upon a prior salary to justify pay disparity.’”<sup>139</sup>

In *Rizo*, the Ninth Circuit rejected salary reliance even if it is part of other justifications, such as experience and skill. At the other end of the spectrum are the Seventh and Eighth Circuits, which allow reliance on salary history alone as a factor other than sex.<sup>140</sup> Even more restrictive is the Federal Circuit’s rule which requires a specific showing that the reason for that difference in pay is due to sex. In September 2018, the Federal Circuit ruled against two women physician plaintiffs in *Gordon v. United States* who claimed that the raises given to their male physician counterparts violated the Equal Pay Act.<sup>141</sup> Judge Reyna, who wrote the opinion, described the court’s decision as being tied by precedent established in *Yant v. United States*,<sup>142</sup> and called for the precedent to be revisited and overturned, essentially inviting an en banc sitting of the court. The court explained that the precedent is at odds with the “broadly remedial nature” of the Equal Pay Act:

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<sup>136</sup> Glenn, 841 F.2d 1567 (1988). *See also* Wernsing v. Dep’t. of Human Servs., 427 F.3d 466, 469 (7th Cir. 2005) (holding that prior pay is an acceptable factor other than sex because any factor not based on race, sex, age, or religion is approved by the statute); Angove, 70 F. App’x at 508 (holding that prior pay on its own violates the EPA but that prior pay in conjunction with other factors is acceptable); *Irby*, 44 F.3d at 955–957 (holding that prior pay on its own violates the EPA but that prior pay in conjunction with other factors is acceptable).

<sup>137</sup> *Irby*, 44 F.3d at 955. The court ultimately found the employer proved that it had relied on the experience of the male employees. The female employee was paid a comparable salary to other male employees who had similar experience as her and less experience than the male employees at issue in the case. *Id.* at 956. The Eleventh Circuit took the strongest stance in *Glenn v. Motors Corporation* when it rejected an argument from GM that prior salary can serve as a factor other than sex. Glenn, 841 F.2d at 1570–71.

<sup>138</sup> *Irby*, 44 F.3d at 953–54, n. 3 (“*Irby* earned \$15,757.00 in 1989. . . . [Her two male coworkers] were hired in 1989 at \$23,987.50. . . . *Irby* earned \$18,519.80 in 1993; [Her two male coworkers] each earned \$27,868.10.”).h

<sup>139</sup> *Riser v. QEP Energy*, 776 F.3d 1191, 1198–99 (10th Cir. 2015) (quoting Angove, F. App’x at 508).

<sup>140</sup> *Lauderdale v. Ill. Dep’t of Human Servs.*, 876 F.3d 904 (7th Cir. 2017); Wernsing, 427 F.3d at 469.

<sup>141</sup> *Gordon v. U.S.*, 903 F.3d 1248 (2018).

<sup>142</sup> *Yant v. U.S.*, 588 F.3d 1369 (Fed. Cir. 2009).

*“The Yant requirement that a plaintiff bringing suit additionally show that the complained-of difference in pay is presently or historically based on sex improperly shifts the burden from the employer to disprove discrimination to the plaintiff to prove discrimination. Such a shift is improper under the statute and at odds with Supreme Court precedent and the law of other circuits.”<sup>143</sup>*

The Equal Employment Opportunity Commission (EEOC) has released a statement that sides with the Circuits that allow prior salary to be considered as part of a mix of factors but not as a justification by itself.<sup>144</sup> The Ninth Circuit’s new decision is thus the most restrictive in comparison with other Circuit Courts and the EEOC’s approach – signifying that a Supreme Court review is likely.<sup>145</sup> A federal bill, the Paycheck Fairness Act, would strike “any factor other than sex” in the EPA and insert a bona fide defense that lists education, training, or experience.<sup>146</sup>

#### 4. Breaking the Cycle

The logic of banning reliance on salary history is disallowing a past wrong from generating future wrongs. If a job mobility tournament continuously carries over a discriminatory wage, pay discrimination will deepen. Still, reliance on salary history can make economic sense. In *Rizo*, the employer listed four reasons for relying exclusively on prior salary: it is a uniform and objective measure, prevents favoritism, saves money due to its simplicity, and attracts the best employees. The last factor, attracting the best employees, is often referred to as the market forces theory - an employer must

<sup>143</sup> Gordon v. U.S., 903 F.3d 1248, 1254 (Fed. Cir. 2018) (Reyna, J., additional views).

<sup>144</sup> Brief for EEOC as Amicus Curiae Supporting Plaintiff-Appellee, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018).

<sup>145</sup> Petition to grant cert distributed for Conference of 2/15/2019

<https://www.scotusblog.com/case-files/cases/yovino-v-rizo/> ; *The Ninth Circuit Gives Support to Equal Pay Day*, DUANE MORRIS LLP: ALERTS & UPDATES (Apr. 12, 2018), [https://www.duanemorris.com/alerts/ninth\\_circuit\\_gives\\_support\\_equal\\_pay\\_day\\_0418.html](https://www.duanemorris.com/alerts/ninth_circuit_gives_support_equal_pay_day_0418.html); Kelly Woodruff, *On Appeals: Can ‘Rizo’ Help Eliminate Gender Pay Gap in the Legal Profession?*, THE RECORDER (May 8, 2018, 3:55 PM), <https://www.law.com/therecorder/2018/05/08/on-appeals-can-rizo-help-eliminate-gender-pay-gap-in-the-legal-profession/>. The *Rizo* decision has already been cited and followed by the Fifth Circuit District Court case *Duncan v. Tex. HHS Comm’n*. No. AU-17-CA-00023-SS, 2018 U.S. Dist. LEXIS 64279 (W.D. Tex. Apr. 17, 2018).

<sup>146</sup> See Deborah L. Brake, *Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889 (2016); Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559 (2017).

offer more money to higher paid applicants because they will not accept less.<sup>147</sup> The market forces proponents argue that external forces, like the going market compensation rate for new hires, require an employer to pay employees differently. Moreover, those who would allow reliance on past salary view it as a way to tie compensation to work quality, productivity, and experience as embodied.<sup>148</sup> In response to the market forces theory rationale, the EEOC wrote in amicus in *Rizo*,

*“While it may make economic sense to pay a woman like Rizo less than her otherwise identically situated male counterparts based on her lower prior salary, an employer can do so only because she is willing to work for less. Yet that “is exactly the kind of evil that the [EPA] was designed to eliminate.”*<sup>149</sup>

The *Rizo* court reasoned that, rather than using “a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception.”<sup>150</sup>

The same question about using salary history is unsettled even among states that have recently passed salary inquiry bans. At the state level, several new laws address the same issue by eliminating the catchall defense that the wage disparity was based on any factor other than sex.<sup>151</sup> For example, the New York Pay Equity Law changes the state law from “any other factor” to a demonstration that the wage difference is based on “a bona fide factor other than sex, such as education, training, or experience.”<sup>152</sup> Oregon’s new law explicitly states that employers may not “determine compensation for a

<sup>147</sup> Glenn v. General Motors Corp., 841 F.2d 1567, 1570-71 (11th Cir. 1988); see also Siler-Khodr v. Univ. of Tex. Health Sci. Ctr., 261 F.3d 542, 549 (5th Cir. 2001) (market forces argument “is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA”).

<sup>148</sup> Paul H. Kehoe, *Paycheck Fairness Act Would Have Drastic Consequences*, LAW 360 (Apr. 21, 2014, 4:20 PM), <https://www.law360.com/articles/529153/paycheck-fairness-act-would-have-drastic-consequences>; Memorandum from Kirsten Kukowski, RNC Nat’l Press Sec. et al., GOP, to Interested Parties (Apr. 5, 2014), <https://gop.com/misleading-paycheck-fairness-act/>.

<sup>149</sup> *Rizo* EEOC amicus citing Comp. Man. §10-IV.F.2.g (citation omitted); see *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974) (Congress intended to prohibit practice of paying women less because they will accept less).

<sup>150</sup> *Rizo v. Yovino*, 887 F.3d 453, 467 (9th Cir. 2018).

<sup>151</sup> See Tony Oncidi & Nayirie Kuyumjian, *Ninth Circuit Changes Federal Pay Equity Rules*, PROSKAUER (Apr. 13, 2018), <https://calemploymentlawupdate.proskauer.com/2018/04/ninth-circuit-changes-federal-pay-equity-rules/>.

<sup>152</sup> *Id.*



position based on current or past compensation.” California’s new law prohibits employers from justifying pay inequality with prior pay.<sup>153</sup> At the same time, California allows employers to rely on prior pay to set a future salary when the information is publicly available or when the applicant voluntarily discloses it.<sup>154</sup> Inevitably, this is a recipe for upcoming tensions that will need to be resolved.

Banning salary history reliance, as with salary history inquiry, has the logic of addressing the dual effects of pervasive longstanding gender pay gap and the gender negotiation disparities. In 2010, Professor Deborah Brake testified before Congress, lamenting the interpretation of the Equal Pay Act that allows reliance on salary history as a justification of pay disparity.<sup>155</sup> Brake stated that “men and women tend to differ in their approach to salary negotiations, and employers respond differently to them,” yet “courts blithely accept negotiation as a factor other than sex, even in cases where women were told their pay was nonnegotiable.”<sup>156</sup> One of the uncertainties of the *Rizo* decision is the role of using prior pay for negotiation purposes. The Ninth Circuit court made it clear that it was not deciding this question,<sup>157</sup> but the decision nonetheless is likely to signal to employers, even those in states that have not banned salary history inquiry, to be cautious and avoid using prior pay when establishing a salary.<sup>158</sup> The concurrence in *Rizo* noted that a total ban on salary history inquiries could actually work against women who want to leverage their prior salary when negotiating wages with a new employer.<sup>159</sup> In her concurring opinion, Judge Margaret McKeown cites to my recent book, *Talent Wants to be Free*, to emphasize that employee mobility between competitors promotes innovation and job growth concluding that “the Equal Pay Act should not be an impediment for

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<sup>153</sup> James McDonald, Jr., *An Old-School Approach to Equal Pay at 9th Circ.*, LAW 360 (May 27, 2017, 12:27 PM), <https://www.law360.com/articles/928889>.

<sup>154</sup> Bruce J. Sarchet, *New California Law Prohibits Salary History Inquiries*, LITTLER MENDELSON P.C. (Oct. 13, 2017), <https://www.littler.com/publication-press/publication/new-california-law-prohibits-salary-history-inquiries>. CAL. LAB. CODE §432.3(e) exempts publicly available salary history information, (h) exempts salary history information the applicant voluntarily gives to the employer.

<sup>155</sup> *A Fair Share For All: Pay Equity in the New American Workplace: Hearing on S. 182 and S. 904 Before the Comm. on Health, Educ., Labor, & Pensions*, 111<sup>th</sup> Cong. 51 (2010) (statement of Deborah L. Brake, Professor of Law, University of Pittsburgh).

<sup>156</sup> *Id.*

<sup>157</sup> See Pay Equity Practice Grp., *Rizo v. Yovino: En Banc Ninth Circuit Holds That Salary History Is Not a Justification for Gender Wage Gap*, PAUL HASTINGS (Apr. 12, 2018), <http://www.paulhastings.com/docs/default-source/PDFs/stay-current-rizo-v--yovino-en-banc-ninth-circuit-holds-that-salary-hist.pdf>.

<sup>158</sup> See Meneghello et al., *supra* note 132.

<sup>159</sup> Erin Mulvaney, *Prior Salary Can't Justify Gender Wage Gap*, 31 L. J. NEWSLETTERS 5, 7 (May 1, 2018).

employees seeking a brighter future and a higher salary at a new job.”<sup>160</sup> As I have argued, talent mobility impediments, including non-competes and other post-employment restrictive covenants, may have a disproportionate effect on women’s upward mobility because women are statistically more likely to be geographically bound and to experience family or work challenges that lead to career detours. At the same time, reliance on prior salary to justify gender disparities can further deepen these dynamics. What is needed is a job market in which women can become aware of the value of their talents and the disparities they experience. The next set of reforms is therefore better tailored to address the concerns of the concurrence to ensure a more mobile and empowered job market.

#### IV. *Breaking the Code of Silence*

*“Light thinks it travels faster than anything but it is wrong. No matter how fast light travels, it finds the darkness has always got there first, and is waiting for it.”*  
— Terry Pratchett

*“One of the best ways to be a male ally in the equal-pay effort is to tell your female peers what you make.”* – *The New Yorker*, 2018

##### 1. Do Tell

The Lilly Ledbetter case, which led to President Obama’s first piece of legislation, centered on the application of the statute of limitations for bringing pay discrimination claims. In her passionate dissent, successfully calling on Congress to overturn the majority’s ruling, Justice Ginsburg got to the heart of the matter — asymmetric information:

*“The problem of concealed pay discrimination is particularly acute where the disparity arises . . . because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern*

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<sup>160</sup> *Rizo v. Yovino*, 887 F.3d 453, 471-72 (9th Cir. 2018) (McKeown, J., concurring) (citing *ORLY LOBEL, TALENT WANTS TO BE FREE* 49–75 (2013)).

*at once that she has experienced an adverse employment decision.*"<sup>161</sup>

The formula for pay equity is simple enough. If we want parity, we must move away from insularity, correct for information asymmetry, and move toward more transparency. Yet women everywhere, reinvigorated by Twitter accounts, media support, and #MeToo hashtags, are discovering that "isolation is not only a consequence of inequality but also a root cause."<sup>162</sup> A key to closing the pay gap is allowing for a more open wage dialogue between employees. Not only before starting a new job, but throughout the duration of employment. Women can negotiate better salaries when they are made aware of where they stand relative to their co-workers.

Even before the recent wave of reforms, employers could not lawfully bar employees from disclosing their salaries to third parties. The National Labor Relations Act (NLRA), enacted in 1935, grants all workers, including non-unionized employees, the right to "engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection.'"<sup>163</sup> The National Labor Relations Board (NLRB) has consistently held that prohibiting employees from discussing their salaries violates their right to engage in concerted activity for mutual aid. Even if employees or employers are unaware of the law and employee speech rights, the firing of an employee for discussing salary issues is still unlawful.<sup>164</sup> Moreover, protection persists even where an employee has signed a nondisclosure agreement with his or her employer. The NLRB holds confidentiality agreements invalid when they contain provisions that "prohibit employees from disclosing certain personnel information unless authorized by the Company."<sup>165</sup> The EEOC has also begun to proactively question employment policies, practices and agreements that "discourage or prohibit individuals from exercising their

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<sup>161</sup> Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 650 (2007) (Ginsburg, J., dissenting), *abrogated by* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

<sup>162</sup> Collins, *supra* note 3.

<sup>163</sup> National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935).

<sup>164</sup> *Board Finds Houston Engineering Firm Unlawfully Fired Employee for Discussing Salaries with Coworkers*, NAT'L LABOR RELATIONS BOARD (Feb. 15, 2013), <https://www.nlr.gov/news-outreach/news-story/board-finds-houston-engineering-firm-unlawfully-fired-employee-discussing>.

<sup>165</sup> Debbie Berman, Andrew Vail & Licyau Wong, *Employment Agreements: Employers Need to Pay Attention to Growing Government Activism*, IP WATCHDOG (Jan. 22, 2017), <http://www.ipwatchdog.com/2017/01/22/employment-agreements-employers-government-activism/>.

rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts" including non-disclosure agreements.<sup>166</sup>

Still, pay equity legislation reveals the space between law and practice in multiple ways—and pay secrecy is no exception, developing as an extra-legal or even illegal norm, backed by contract and culture. Employers have continued throughout the decades to prohibit their employees from discussing salaries, and many of the current reforms attempt to directly change this reality.<sup>167</sup> The U.S. Department of Labor website notes that the inability to combat the pay gap is due to “many companies discouraging or outright banning employees from discussing or asking about their wages.”<sup>168</sup> The sharing of salary information is not merely discouraged by employers through covenants, policies, and corporate culture; it has long been taboo in American society.<sup>169</sup> The code of secrecy is so embedded that “the news that Jennifer Lawrence was given less for ‘American Hustle’—seven per cent of profits to her male co-stars’ nine per cent—constituted one of the major revelations of the Sony Pictures email hack.”<sup>170</sup>

Sharing salary information among co-workers has been a significant aspect of mobilization toward pay equity reforms. When, for example, British women working at the BBC became motivated to expose the organization as having a pervasive gender pay gap, they formed a transparency group. As part of their efforts, they banded together to meet with the employer wearing lapel badges emblazoned with their salaries.<sup>171</sup>

In 2014, President Obama signed an executive order banning federal contractors from retaliating against employees for discussing their compensation.<sup>172</sup> Under the order, companies face greater penalties for violation of pay secrecy rules, one of which includes losing the federal

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<sup>166</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2017-2021 (2016).

<sup>167</sup> According to one study, 23.1% of private sector workers are explicitly banned from sharing information about wages; 38.1% are strongly discouraged from doing so. Institute for Women's Policy Research, 2011.

<sup>168</sup> *Equal Pay for Equal Work in Maryland*, U.S. DEP'T OF LABOR: BLOG (July 4, 2016), <https://blog.dol.gov/2016/07/04/equal-pay-for-equal-work-in-maryland>.

<sup>169</sup> Leonard Bierman & Rafael Gely, *Love, Sex and Politics - Sure - Salary - No Way: Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167 (2004); Rebecca Greenfield, *Employers Are Finally Ready to Talk About How Much They Pay*, BLOOMBERG: BUSINESS (July 2, 2018, 6:38 AM), <https://www.bloomberg.com/news/articles/2018-07-02/employers-are-finally-ready-to-talk-about-how-much-they-pay>.

<sup>170</sup> Collins, *supra* note 3.

<sup>171</sup> *Id.*

<sup>172</sup> Exec. Order No. 13,665, 79 Fed. Reg. 20,749 (Apr. 11, 2014).

contract. More recently, state law reforms make it illegal for any employer to prohibit pay discussions among employees. The Massachusetts Equal Pay Act, for example, prohibits employers from requiring employees to refrain from inquiring about, discussing, or disclosing information about the employee's own wages, or any other employee's wages. California's new equal pay act prohibits employers from disallowing employees' disclosure or discussion of their own wages or the wages of others, including aiding or encouraging other employees to exercise their rights under the law. Colorado law prohibits employers from, among other things, discharging, disciplining, or discriminating against an employee because the employee has shared or discussed his or her wages.<sup>173</sup> Employers in Colorado are also prohibited from requiring an employee to sign a waiver or other documentation which would deny the employee the right to disclose his or her wage information. Connecticut's new Pay Equity and Fairness Act similarly makes it unlawful for an employer to prohibit an employee from discussing or disclosing wages, or asking an employee to sign a waiver of the right to discuss or inquire about her wages.<sup>174</sup> Several other states including Oregon,<sup>175</sup> New Hampshire,<sup>176</sup> and Maryland<sup>177</sup> have recently passed similar laws. Other states have pending bills to protect wage discussions.<sup>178</sup>

Taken together, the salary history inquiry *ban* and salary co-worker inquiry *protection* also correct a long-existing non-gender specific, double standard – employers often demand secrecy from their employees and usually do not reveal the pay scale of their employees when they interview but demand salary history. Efforts to signal, protect, and educate employees about their right to share information about their earnings flip this asymmetry on its head. California's new law even requires an employer, upon reasonable request by an applicant, to provide the pay scale for a position.<sup>179</sup> These efforts to change the playing field and rules of engagement still fall short of more systematic transparency, but they have the potential to mobilize workers, increase awareness, and change social norms.

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<sup>173</sup> Repeal Prohibition of Wage Sharing Information, ch. 290, 2017 Colo. Sess. Laws 1608.

<sup>174</sup> An Act Concerning Pay Equity and Fairness, No. 15-196, 2015 Conn. Pub. Acts 790).

<sup>175</sup> Act of June 10, 2015, ch. 307, 2015 Or. Laws 756 (relating to disclosure of wage information; creating new provisions; and amending ORS 659A.885).

<sup>176</sup> N.H. REV. STAT. ANN. § 275:41-b (LexisNexis, LEXIS through Chapter 1 of the 2017 Regular Session).

<sup>177</sup> MD. CODE ANN., LAB. & EMPL. § 3-304 (West).

<sup>178</sup> H.B. 1506, 65th Leg., 2016 Reg. Sess. (Wash. 2017) (LEXIS) (Introduced, Jan. 23, 2017)

<sup>179</sup> The new California law somewhat addresses pay transparency by extending—from two years to three—an employer's obligation to maintain records of wages and pay rates, job classifications, and other terms of employment though the records are kept confidential unless they are ordered in discovery.

Social norms have also been changing rapidly with the rise of online connectivity. Digital platforms including LinkedIn, Glassdoor, Salary.com, and SalaryExpert provide crowdsourced salary information and are becoming the launchpad for people on the job hunt.<sup>180</sup> As one scholar wrote in a recent article in the *Compensation & Benefits Review*, “pay confidentiality has been eroding for years . . . Millennials share every thought it seems.”<sup>181</sup> Job search websites serve employees by providing advice and information when asking for a raise or preparing for an interview. Because the digital platforms rely on crowdsourced data, more information is likely to be available on larger employers.<sup>182</sup> For example, Glassdoor provides a pay data tool called *Know Your Worth*.<sup>183</sup> *Know Your Worth* provides users with a customized personal market value based on the user’s job title, company, location, and experience. It also dynamically analyzes trends and recalculates the figures weekly. According to Glassdoor, its salary estimator can calculate the market value for 55-60% of the U.S. workforce within an approximate 12% median margin of error rate. As with other digital platforms, the algorithm improves as more data is introduced and the machine learns over time.<sup>184</sup> Companies already conduct robust market analyses of competitive salaries. For employees, this access to information offers knowledge about underpayment, which in turn makes an employee more likely to ask for a raise or seek opportunities elsewhere. The information provided by platforms can embolden employees to negotiate higher salaries before accepting job offers, even while continuing to work for their current employer. Thus, salary sharing platforms put pressure on employers to close the gender pay gap.

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<sup>180</sup> Benjamin Arendt, *Glassdoor? Google? LinkedIn? Any Which Way, the Future of Recruiting Is Transparency*, TALENT DAILY (June 6, 2018, 4:16 PM), <https://www.cebglobal.com/talentedaily/glassdoor-google-linkedin-any-which-way-the-future-of-recruiting-is-transparency/>.

<sup>181</sup> Howard Risher, *Pay Transparency is Coming*, 46 COMPENSATION & BENEFITS REVIEW 3 (2014).

<sup>182</sup> Glassdoor claims to remove comments when they have reason to believe that employees were “compensated or coerced,” but that is a hard policy to enforce. See Lizzie Widdicombe, *Improving Workplace Culture One Review at a Time*, NEW YORKER (Jan. 22, 2018), <https://www.newyorker.com/magazine/2018/01/22/improving-workplace-culture-one-review-at-a-time>.

<sup>183</sup> See generally Queenie Wong, *Are You Getting Paid Enough? LinkedIn Launches Salary Tool*, MERCURY NEWS (last updated Nov. 3, 2016, 6:27 AM), <https://www.mercurynews.com/2016/11/02/are-you-getting-paid-enough-linkedin-launches-salary-tool/>; Susan Adams, *How Companies Are Coping With The Rise of Employee-Review Site Glassdoor*, FORBES (Feb. 24, 2016, 3:49 PM), <https://www.forbes.com/sites/susanadams/2016/02/24/how-companies-are-coping-with-the-rise-of-employee-review-site-glassdoor/>.

<sup>184</sup> See Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016).

Economist Gary Becker provided the theoretical foundations that help explain the persistence of the gender wage gap under conditions of secrecy.<sup>185</sup> Under perfect market conditions, with perfect information and perfect competition, if a group of workers is treated differently by a small proportion of employers, discrimination should be eradicated by the forces of competition. Pay secrecy allows discriminating employers to maintain an unfair pay gap because employees may not be aware that they are receiving a lower salary. Secrecy prevents employees from efficiently seeking jobs elsewhere. When the number of firms with pay secrecy is large enough, discrimination will persist. The market for wages in general is imperfect. Economists estimate billions in lost wages due to imperfect information.<sup>186</sup> From a gender perspective, transparency not only informs women about a possible gap between their salary and the salaries of their male colleagues; it also creates more certainty and mitigates risk aversion, which itself is gendered.<sup>187</sup> In other words, as long as a gender pay gap is pervasive, and pay secrecy is the norm, women's job mobility itself is chilled and may further deepen the gender pay gap: a continuing vicious cycle. Research on the effects of anti-retaliation laws that prohibit employers from disallowing co-worker salary discussions is limited. The research that does exist, however, suggests positive effects on closing the gender pay gap. One study using differences-in-differences comparisons examines how the gender wage gap has changed in the private sector in states that adopted anti-secrecy laws, compared to states that didn't pass such laws. The study focuses on four states which implemented anti-secrecy laws in the early 2000s — California, Colorado, Illinois, and Maine — and finds a positive causal effect of adopting anti-secrecy pay laws on increases in gender wage equality.<sup>188</sup> Another study similarly using differences-in-differences wage regressions finds that women, especially educated women, who live in states that outlawed pay secrecy have higher earnings and the pay gap is smaller.<sup>189</sup> Other studies

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<sup>185</sup> GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1971).

<sup>186</sup> See Richard A. Hofler & Kevin J. Murphy, *Underpaid and Overworked: Measuring the Effect of Imperfect Information on Wages*, 30 *ECON. INQUIRY* 511 (1992); Alexandre Mas, *Does Transparency Lead to Pay Compression?* (Nat'l Bureau of Econ. Research, Working Paper No. 20558, 2014), <http://www.nber.org/papers/w20558>; Yannis M. Ioannides & Linda Datcher Loury, *Job Information Networks, Neighborhood Effects, and Inequality*, 42 *J. ECON. LITERATURE* 1056 (2004).

<sup>187</sup> Rachel Croson & Uri Gneezy, *Gender Differences in Preferences*, 47 *J. ECON. LITERATURE* 1 (2009).

<sup>188</sup> Olga Fetisova-Canas, *Effects of Anti-Secrecy Pay Laws on the Gender Wage Gap* (May 2014) (undergraduate honors thesis, University of Maryland), [http://econ-server.umd.edu/~edinger/undergraduate/Fetisova\\_Honors\\_Thesis2014.pdf](http://econ-server.umd.edu/~edinger/undergraduate/Fetisova_Honors_Thesis2014.pdf).

<sup>189</sup> Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, 54 *INDUS. REL.* 648 (2015), <https://doi.org/10.1111/irel.12109>.

indicate that pay transparency, and more broadly employers' financial transparency, may improve wages for all workers.<sup>190</sup> A British study finds that employees who have employers who disclose workplace financial data earn more than otherwise similar workers not privy to such information. Controlling for profit, productivity levels, and other workplace and worker characteristics, the study finds that financial transparency results in significantly higher wages for workers.<sup>191</sup> The researchers conclude that "disclosure is a key resource that reduces information asymmetries, thereby providing legitimacy to workers' claims in wage bargaining."<sup>192</sup>

Like salary history inquiries, pay secrecy can have economic logic. Employers often want to differentiate between employees and boost those who are most valuable, without discouraging others who are paid less.<sup>193</sup> Yet while the research is somewhat mixed on pay transparency and employee performance and happiness, most studies find a positive correlation. In an early study, economist Edward Lawler found that pay secrecy leads to employee dissatisfaction and to employee's overestimation of their co-workers' compensation. A more recent field experiment finds that telling employees about their co-workers' wages resulted in *more* labor effort and worker productivity. Another study examining a shift of companies from pay secrecy to open information finds similar increases in productivity.<sup>194</sup>

In recent years, secrecy about employment terms and work conditions has moved beyond a market norm to a standard requirement in employment clauses.<sup>195</sup> New state and federal efforts have been made in reaction to the many stories of companies, as well as public figures, who for years have been shielding themselves from public scrutiny by demanding nondisclosure from

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<sup>190</sup> David Card et al., *Inequality at Work: The Effect of Peer Salaries on Job Satisfaction*, 102 AMERICAN ECONOMIC REVIEW 2981 (2012).

<sup>191</sup> Jake Rosenfeld & Patrick Denice, *The Power of Transparency: Evidence from a British Workplace Survey*, 80 AM. SOC. REV. 1045 (2015).

<sup>192</sup> *Id.*

<sup>193</sup> David Card et al., Am. Econ. Ass'n, *Inequality at Work: The Effect of Peer Salaries on Job Satisfaction*, 102 AM. ECON. REV. 2981-3003 (2012) (study that disclosed to workers their comparative salaries "workers with salaries below the median for their pay unit and occupation report lower pay and job satisfaction, while those earning above the median report no higher satisfaction.")

<sup>194</sup> Jordi Blanes i Vidal & Mareike Nossol, *Tournaments without Prizes: Evidence from Personnel Records*, 57 MGMT. SCI. 1721 (2011).

<sup>195</sup> Rochelle Dreyfuss & Orly Lobel, *Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security*, 20 LEWIS & CLARK L. REV. 419 (2016); Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change>; Orly Lobel, *The DTSA and the New Secrecy Ecology*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 369 (2017); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015).



their employees, in both standard employee contract and in dispute settlements. In California, in the aftermath of the first #MeToo revelations, a new law prohibits confidentiality in settlement agreements pertaining to sexual harassment, assault, and discrimination based on sex.<sup>196</sup> The bill is far reaching, in covering all discrimination-related claims, and is designed to increase transparency and prevent habitual offenders from cyclically harassing or disparately treating their employees. In April 2018, New York passed amendments to its laws prohibiting confidentiality in sexual harassment settlements. The New York amendments are narrower than the new California law and do not including gender-based discrimination other than harassment.<sup>197</sup> In June 2018, the State of Washington passed a law which prohibits employers from making employees sign NDAs pertaining to sexual assault and harassment in the workplace. A federal bill, the “Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act” (EMPOWER Act), would prohibit nondisclosure clauses regarding workplace harassment and establish a confidential tip-line for reporting systematic workplace harassment.<sup>198</sup> These efforts are related to the efforts to address the culture and norms of corporate salary secrecy. They signal to employees that sharing information about misconduct and unlawful work conditions is not only allowed but is also crucial to prevent a workplace prisoner’s dilemma, in which each employee has too much to lose by being the single David against the Goliath.<sup>199</sup>

The ability to reveal one’s salary to co-workers and other employees in her industry is particularly significant in light of recent revelations about unlawful collusions between employers agreeing to not hire one another’s employees or to fix wages.<sup>200</sup> The rise in post-employment restrictive covenants reduced opportunities for employees to leave their employers for a competitor and to negotiate a competitive salary. This in turn depresses

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<sup>196</sup> S.B. 820, 2017-2018 Reg. Sess. (Cal. 2018) signed 9/30/2018 and went into effect January 1, 2019.

<sup>197</sup> April 12, 2018. N.Y. C.P.L.R. § 7515 (CONSOL. 2018); N.Y. Gen. Oblig. Law § 5-336 (2018); N.Y. C.P.L.R. § 5003-b (CONSOL. 2018).

<sup>198</sup> See also, *on a creative proposal to balancing secrecy with transparency*, Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. 76 (2018), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Ayres-1.pdf>.

<sup>199</sup> Orly Lobel, *The Prisoner’s Dilemma in Airing Fox’s Corporate Culture*, FORTUNE (June 28, 2016), <http://fortune.com/2016/07/28/fox-corporate-culture-roger-ayres-gretchen-carlson/>.

<sup>200</sup> Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015); U.S. Dep’t of Justice and F.T.C. Antitrust Guidance for Human Resource Professionals (Oct. 2018), <https://www.justice.gov/atr/file/903511/download>.

wages not only for those employees bound by restrictive covenants but for employees working in that industry in general.<sup>201</sup> At the same time, the rise in restrictive clauses in employment contracts points to the limitations of merely passing laws that prohibit sharing salary information with co-workers. Efforts to encourage wage discussions should include legislation that declares contractual agreements and corporate policies that attempt to prevent wage discussions to be unlawful. As discussed above, such agreements and policies are already unlawful under the federal NLRA. A more impactful measure could be legislation that requires positive notice in employment contracts that wages are exempted from confidentiality clauses. This would be an analogous provision to the whistleblower immunity clause, developed by Professor Peter Menell, passed by Congress and signed into law by President Obama in 2016 as part of the Defend Trade Secrets Act.<sup>202</sup> The Act requires notice of immunity when blowing the whistle, even if that involves revealing trade secrets, in all employment contracts. Since 2016, all employers are required to provide a notice-of-immunity to employees and contractors “in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.” A similar requirement could be adopted in future pay equity reforms in the context of the rights of employees to discuss compensation with co-workers and others in the job market.

## 2. Do Compare (and Explain): Equity Across Job Categories

*“The wage structure of many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.” -- Corning Glass Works v. Brennan<sup>203</sup>*

In addition to banning salary inquiries and encouraging sharing, a third category of the new wave of pay equity reforms concerns the very definition of equity, further challenging the traditional substantive line between gap and discrimination. Several states have new laws that move

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<sup>201</sup> Brian Fung, *What the Apple Wage Collusion Case Says about Silicon Valley's Labor Economy*, WASH. POST (Apr. 23, 2014) <https://www.washingtonpost.com/news/the-switch/wp/2014/04/23/what-the-apple-wage-collusion-case-says-about-silicon-valleys-labor-economy/>.

<sup>202</sup> Peter S. Menell, *Misconstruing Whistleblower Immunity Under the Defend Trade Secrets Act*; Orly Lobel, *The DTSA and the New Secrecy Ecology*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 369 (2017).

<sup>203</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

away from the term “equal work,” and instead toward the notion of equal pay for “comparable” or “substantially similar” work.<sup>204</sup> These shifts represent a hybrid effort between substantive change and structural reforms of information flows: employers now have to examine disparities beyond formal job titles or positions, and articulate reasons for gender disparities in relation to information they possess. Expanding the definition of equal pay addresses the difficulty employees face in piercing the veil of different job categories or positions when it is the employer who defines these jobs. The 2016 Massachusetts Equal Pay Act expressly states that “a job title or job description alone shall not determine comparability.”<sup>205</sup> Moreover, several states now allow comparison between employees across geographic locations even if they do not work at the same establishment.<sup>206</sup>

As a federal bill, the Fair Pay Act seeks to amend the Equal Pay Act to expand the span of equal pay.<sup>207</sup> The Equal Pay Act adopted the standards of “equal skill, effort, and responsibility,” which are “performed under similar working conditions.”<sup>208</sup> When Congress adopted the EPA’s equal pay standard, it expressly considered and rejected the term “comparable work.”<sup>209</sup> The “equal work” standard, as the EPA currently stands, reflects a middle ground between a formal requirement of two jobs that are identical and expansion into job comparability. The goal of this narrower category was to maintain an employer’s right to classify jobs validly.<sup>210</sup> The Supreme Court has adopted a test that requires that the job performed be substantially of the same skill, effort, and responsibility.<sup>211</sup> In determining what constitutes equal

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<sup>204</sup> Very similar to the California reform, the New York Achieve Pay Equality Act was signed on October 21, 2015 and went into effect January 19, 2016. The Act is an amendment to New York’s equal pay law (S.1/A.6075) and amends Labor Law Section 194. Kristen Smith, *Stronger New York Pay Equity Law to Take Effect in January 2016*, BOND, SCHOENECK & KING PLLC: N.Y. LABOR & EMP. L. REP. (Oct. 29, 2015), <https://www.bsk.com/new-york-labor-and-employment-law-report/stronger-new-york-pay-equity-law-to-take-effect-in-january-2016>. Massachusetts’ Act defines “comparable work” as “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine comparability.” An Act to Restore Pay Equity, S.B. 2119, 189<sup>th</sup> Gen. Ct. 2015-2016. (Mass. 2016). *See also*, Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018).

<sup>205</sup> MASS. GEN. LAWS ch. 149, § 105A(b) (2016).

<sup>206</sup> *See, e.g.*, MD. LAB. & EMPL. LAW § 3-304 (West 2016); N.Y. LAB. LAW § 194 (McKinney 2016).

<sup>207</sup> Fair Pay Act of 2017, H.R. 2095, 115th Cong. (2017).

<sup>208</sup> 29 U.S.C. §206(d)(1) (LEXIS through Pub. L. No. 115-231).

<sup>209</sup> *See e.g.*, Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1174-75 (3d Cir. 1977).

<sup>210</sup> *See* Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

<sup>211</sup> EEOC v. Madison Cmty. United Sch. Dist., 818 F.2d 577 (7th Cir. 1987) (“equal work” requires a substantial identity rather than an absolute identity).

work, the courts have required not that the jobs be identical, but only that they be substantially equal.<sup>212</sup> In determining whether two jobs are “substantially equal,” the crucial inquiry is “whether the jobs to be compared have a ‘common core’ of tasks, i.e., whether a significant portion of the two jobs is identical.”<sup>213</sup> In other words, to prevent employers from simply naming the same position differently for men and women, the EPA measures similarity of substance rather than form.<sup>214</sup>

In recent years, the courts’ interpretation of the EPA’s “equal work” standard has yielded mixed results.<sup>215</sup> In *Laffey v. Northwest Airlines Inc.*, the court held that the positions of purser and stewardess were substantially equal because the differences between the jobs largely ended with the names of the job titles.<sup>216</sup> Similarly, in *Odomes v. Nucare, Inc.*, the court found that a female nurse aide’s work was equal to that of a male orderly who was being paid more, because they both cared for patients, bathed patients, distributed food trays, fed patients, took temperatures, and changed clothes and bed linens, and thus should have been compensated with equal pay.<sup>217</sup> Some circuits however have construed the substantially equal formulation more narrowly.<sup>218</sup> For example, in *Howard v. Lear Corp.*, the Eleventh Circuit viewed an HR manager position as substantially different from an HR coordinator position because the work environment of the former required more skill and complexity.<sup>219</sup> Similarly, in *Sims-Fingers v. City of Indianapolis*, the Seventh Circuit found that, since the men were in charge of larger parks with additional amenities, the work of a female municipal system

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<sup>212</sup> Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995); 29 C.F.R. § 1620.13(a).

<sup>213</sup> Merillat v. Metal Spinners, Inc., 470 F.3d 685, 695 (7th Cir. 2006); Cullen v. Indiana University Bd. of Trustees, 338 F.3d 693, 698 (7th Cir. 2003); Kob v. County of Marin, 425 F. App’x 634 (9th Cir. 2011) (plaintiff’s position of “mediation services manager” was not substantially equal to comparator’s position of “administrative services manager” when job descriptions reflected that positions involved different core tasks).

<sup>214</sup> EQUAL EMP. OPPORTUNITY COMMISSION, FACT SHEET: EQUAL PAY AND COMPENSATION DISCRIMINATION (last updated Apr. 1, 2010), <https://www.eeoc.gov/eeoc/publications/upload/fs-epa.pdf>.

<sup>215</sup> See *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238-39 (5th Cir. 1973) (stating that although the standard of equality is clearly meant to be taken as higher than mere comparability, and as lower than absolutely identical, there still remains an area of equality under the EPA which is ambiguous, especially in relation to “equal skill, effort, and responsibility”).

<sup>216</sup> *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

<sup>217</sup> *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981).

<sup>218</sup> *Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F.3d 1146 (10th Cir. 2002).

<sup>219</sup> *Howard v. Lear Corp. Eeds & Interiors*, 234 F.3d 1002 (7th Cir. 2000).

manager was not equal to the work of the male municipal park system managers.<sup>220</sup>

Deborah Eisenberg has shown that courts have increasingly adopted a more restrictive interpretation of “equal” work, and argues that this strict standard “has rendered the EPA ineffective for a large segment of the modern workforce and has imposed a wage glass ceiling for women in upper-level or supervisory positions.”<sup>221</sup> The more difficult it is for employees to compare across positions under the current EPA, the less the law aids professional women who uncover disparities in their workplace.<sup>222</sup>

The broader language of the new state reforms allows expansive comparison among workers both in the most vulnerable low-skilled industries and at the top. One of the most-cited comparisons in the legislative efforts has been between female maids and male janitors.<sup>223</sup> But the wave of reforms has also motivated a rise in lawsuits by women attorneys, programmers, and corporate executives.<sup>224</sup> Maryland’s Equal Pay Work Act, signed into law in 2017, provides one of the broadest expansions. It creates a cause of action when an employer provides “less favorable employment opportunities.”<sup>225</sup> In other words, Maryland’s law prohibits “mommy tracking” — the practice of funneling female employees into less desirable career paths or failing to inform women of advancement or promotional opportunities altogether.<sup>226</sup> The Maryland law demonstrates the

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<sup>220</sup> *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768 (7th Cir. 2007); In a 2017 case, *Chiaromonte v. Animal Medical Center*, the Second Circuit found that the work of a female veterinarian was not substantially equal to the work performed by her male colleagues performed substantially equal work. Female veterinarian, similar to her male colleagues, was a department heads, but her work could be easily performed by lower qualified personnel, whereas her male colleagues practiced in specialized areas of veterinary. *Chiaromonte v. Animal Med. Ctr.*, 677 F. App’x 689 (2d Cir. 2017).

<sup>221</sup> Deborah Thompson Eisenberg, *Shattering the EPA’s Glass Ceiling*, 63 S.M.U. L. REV. 17, 39 (2010).

<sup>222</sup> *Id.*

<sup>223</sup> Ann Bookman, *Testimony on the Equal Pay Act [H. 1733/S. 983]*, CTR. FOR WOMEN IN POL. & PUB. POL’Y No. 38 (July 21, 2015),

[https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1039&context=cwppp\\_pubs](https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1039&context=cwppp_pubs)

<sup>224</sup> See, e.g., Christine Simmons, *Chadbourne Settles Sex Bias Case that Shined Light on Big Law Pay Gap*, N.Y. L.J. (Mar. 14, 2018, 1:01 PM), <https://www.law.com/newyorklawjournal/2018/03/14/chadbourne-settles-sex-bias-case-that-shined-light-on-big-law-pay-gap/> (containing a link to the court paper accepting the settlement as well).

<sup>225</sup> MD. LAB. & EMPL. LAW § 3-304(a); § 3-304.1 (West, Westlaw through all legislation from the 2016 Regular Session of the General Assembly).

<sup>226</sup> Brian W. Steinbach, *Maryland Expands State Equal Pay Act and Broadens Employees’ Right to Discuss Wages*, EPSTEIN BECKER GREEN: TECH. EMPL. LAW (May 23, 2016), <https://www.technologyemploymentlaw.com/wage-and-hour/maryland-expands-state-equal-pay-act-and-broadens-employees-right-to-discuss-wages/>. Maryland’s new Equal

substantive/information-inducing dual purpose of this category of reforms: the law expands what is prohibited, but perhaps more importantly, it further induces employers to inform employees about opportunities and to correct the disparities created by its internal processes and information asymmetries.

V. *The Governance of Pay Equity*

*Transparency alone will not solve this problem but it is an important and necessary first step. – British Prime Minister Theresa May*

*To grant equal rights in the absence of equal opportunity is to strengthen the strong and weaken the weak. — Lenore Weitzman<sup>227</sup>*

1. Hidden Figures and Mandatory Reporting

The new waves of legislative reform along with central recent court decisions have the underlying logic of advancing pay equity by reversing the flow of information: state laws are increasingly banning inquiry and reliance on salary history by employers, while preventing employers from banning employee speech about their salaries. These efforts are promising, and change is underway. Many leading American companies are correcting gender-pay inequalities,<sup>228</sup> and more employees than ever before are taking action against their employers that have failed to make that effort.<sup>229</sup> Still, the current reforms fall short of systemic efforts to educate both employees and employers about pay equity, to encourage employees to learn about pay disparities and to negotiate for equality. Reforms must also incentivize employers to self-assess, monitor, and actively take steps to close the pay gap. The current solutions are focused around the edges – at the beginning of the hiring process and at the litigation end. More impactful solutions would

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Pay for Equal Work Act moreover expands the protected identity to include “sex or gender identity.”

<sup>227</sup> LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 213 (1985).

<sup>228</sup> Lauren Weber, *Why Employers Are Making Pay Equity a Reality*, WALL ST. J. (Sept. 26, 2016, 5:30 AM ET), <http://www.wsj.com/articles/why-employers-are-making-pay-equity-a-reality-1474882202> (“Since then, large employers such as Apple Inc., Staples Inc., eBay Inc., Wall Street Journal owner Dow Jones, a unit of News Corp, and others have declared their commitment to rooting out gender-pay disparities—albeit sometimes under pressure.”).

<sup>229</sup> Lieff Cabraser, *Kelly Dermody Discusses Trend Toward More Pay Equity Lawsuits By Professional Women with NY Law Journal*, LIEFF CABRASER HEIMANN & BERNSTEIN LLP: CIVIL JUSTICE BLOG (Oct. 26, 2016), <https://www.lieffcabraser.com/2016/10/kelly-dermody-discusses-trend-toward-more-pay-equity-lawsuits-by-professional-women/>.

examine the entirety of the workforce internally, dynamically, repeatedly, and proactively.

The recent reforms focus on bans and prohibitions: banning distorted information from prospective employers, prohibiting the silencing of co-workers, and expanding the definitions of the fundamental prohibitions of pay discrimination. What is missing from these reforms is an initiative to expose and correct ongoing disparities through deeper transparency and collaborative public-private approaches. Justice Brandeis famously guided us that sunlight is the best of disinfectants; electric light the most efficient policeman. In 2014, President Barack Obama issued an executive order set to cover more than 63 million employees, requiring companies with over 100 employees to report their employee pay, broken down by gender, race and ethnicity, to the EEOC.<sup>230</sup> The initiative was set to take effect in March 2018.<sup>231</sup> The EEOC already collects information from companies regarding to employees by gender, race and other protected identities. The new regulations would require employers to provide summary pay data and aggregate hours-worked data, broken down by job categories and protected identities.<sup>232</sup> In 2017, the Trump administration issued an immediate stay of Obama's initiative. The stay asserted that the collection of information lacked practical utility, was unnecessarily burdensome, and did not adequately address privacy and confidentiality issues.<sup>233</sup> Also in 2017, then-Governor

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<sup>230</sup> Office of the Press Secretary, *supra* note 63; Lydia Dishman, *Obama Aims to Close the Wage Gap With A New Proposal For Salary Transparency*, FAST COMPANY: THE FUTURE OF WORK (Jan. 29, 2016), <https://www.fastcompany.com/3056117/obama-aims-to-close-the-wage-gap-with-a-new-proposal-for-salary-transpare>.

<sup>231</sup> U.S. Equal Emp. Opportunity Comm'n, *Questions and Answers: The 2017 EEO-1 Report*, <https://www.eeoc.gov/employers/eo1survey/2017-qanda.cfm> (last visited Sept. 26, 2018).

<sup>232</sup> Christopher J. DeGroff, Matthew Gagnon & Gerald Maatman, Jr., *EEOC Shakeup? Top Ways Trump Presidency Could Impact The EEOC*, WORKPLACE CLASS ACTION BLOG (Nov. 10, 2016), <http://www.workplaceclassaction.com/2016/11/eoc-shakeup-top-ways-trump-presidency-could-impact-the-eeoc/>.

<sup>233</sup> 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/>; Memorandum from Equal Employment Opportunity Commission to Office of Information and Regulatory Affairs (Aug. 29, 2017), [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf); Senators Lamar Alexander, Pat Roberts, and Johnny Isakson requested that the White House's Office of Management and Budget "disapprove of the EEOC's recently revised rule to change employer information reports." The letter stated that the survey was contrary to the Paperwork Reduction Act, cited a NAS Study which discouraged the EEOC from "using pay bands to collect data," stated their concerns of the EEOC "pursuing high profile lawsuits without complaints," and stated the current backlog of EEOC cases, which will

Jerry Brown vetoed a California bill that would have similarly required detailed reporting by larger employers of salary information broken down by gender and ethnicity.<sup>234</sup>

The purpose of mandatory reporting is threefold. First, it allows administrative agencies to better engage in compliance, investigation of complaints, and enforcement. Second, it allows employees to know where they stand and assess different employers. Third, and most important from a governance perspective, it incentivizes employers to examine their own practices. For both employers and employees, better information about jobs and positions leads to smarter and faster job matches. Pay transparency, therefore, helps both the law and the market.<sup>235</sup> In 1962, Nobel Laureate in Economics George Stigler described what he believed was the insurmountable problem of imperfect information in the labor market:

*“The young person entering the labor market for the first time has an immense number of potential employers, scarce as they may seem the first day. If he is an unskilled or a semiskilled worker, the number of potential employers is strictly in the millions. Even if he has a specialized training, the number of potential employers will be in the thousands: the young Ph.D. in economics, for example, has scores of colleges and universities, dozens of governmental agencies, hundreds of business firms, and the Ford Foundation as potential employers.*

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only grow now that it will have to look through the collection of data. Letter from Lamar Alexander, Chairman HELP Senate Committee, Johnny Isakson, Chairman Subcommittee on Employment and Workplace Safety & Senate HELP Committee, & Pat Roberts, U.S. Senator, to Joseph B. Nye, Policy Analyst, Office of Information and Regulatory Affairs (Aug. 15, 2016), <https://dlbjbzgk95t.cloudfront.net/0830000/830526/senate%20letter.pdf>.

Interestingly, the member of the Trump administration who chose to speak out on the policy-ending choice was President Trump’s daughter, Ivanka. Her statement on the matter read as follows, “Ultimately, while I believe the intention was good and agree that pay transparency is important, the proposed policy would not yield the intended results.” Betsy Klein, *Ivanka Trump Supports Ending Obama Era Equal Pay Data Collection Rule*, CNN POLITICS (last updated Sept. 1, 2017, 5:56 AM ET), <https://www.cnn.com/2017/08/31/politics/white-house-ivanka-trump-equal-pay-data/index.html>.

<sup>234</sup> A.B. 1209, 2017-2018 Reg. Sess. (Cal. 2017); S.B. 1284, 2017-2018 Reg. Sess. (Cal. 2018). [AB 1209 vetoed by Governor Brown vetoed; SB 1284 was subsequently amended and submitted].

<sup>235</sup> Gowri Ramachandran, *Pay Transparency*, 116 PENN. ST. L. REV. 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) (“Mandatory disclosure of meaningful salary information would tend to produce less discrimination, less favoritism, and probably somewhat lower disparities overall.”); Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, ARIZ. ST. L.J. 951 (2011).



*As the worker becomes older the number of potential employers may shrink more often than it grows, but the number will seldom fall to even a thousand. No worker, unless his degree of specialization is pathological, will ever be able to become informed on the prospective earnings which would be obtained from every one of these potential employers at any given time, let alone keep this information up to date. He faces the problem of how to acquire information on the wage rates, stability of employment, conditions of employment, and other determinants of job choice, and how to keep this information current.”<sup>236</sup>*

Times have changed. Digital connectivity, shifting social norms, and new laws are operating together to change the wage information markets. While the initiative to expand pay transparency in the United States has been halted by the current administration, since 2017 the U.K. requires employers with more than 250 employees to annually report their gender pay gap. Specifically, it requires a breakdown of a company’s gender pay gap in terms of hourly pay, bonus pay, percentage of men and women receiving bonuses, and proportion of men and women in each quartile of the pay scale.<sup>237</sup> In 2017, Germany also began requiring large firms with 500 or more employees to investigate and report any gender pay gap.<sup>238</sup> The overall global response to these reforms has been positive, but like in the United States, some opponents have raised concerns of efficacy, time given for preparation and transition, feasibility, how to measure impact, and whether figures were actually fair when compared.<sup>239</sup>

When the first reports came in, British media spent weeks covering the newly available information.<sup>240</sup> In April 2018, the month the reports were published, British Prime Minister Theresa May wrote an opinion piece in the *Sunday Times* stating that “we expected the results to make for uncomfortable reading and they do.”<sup>241</sup> One important revelation in the figures — perhaps

<sup>236</sup> George J. Stigler, *Information in the Labor Market*, 70 J. POL. ECON. 94 (Oct. 1962).

<sup>237</sup> *How to Narrow Britain’s Gender-Pay Gap*, THE ECONOMIST: LEADERS (Apr. 7, 2018), <https://www.economist.com/leaders/2018/04/07/how-to-narrow-britains-gender-pay-gap>.

<sup>238</sup> *German Coalition Agrees to Redraft Equal Pay Legislation*, DW.COM (July 10, 2016), <https://p.dw.com/p/2QzK7>.

<sup>239</sup> Emily Peck, *The Main Reason Women Make Less Money Than Men*, HUFF. POST: BUSINESS, [http://www.huffingtonpost.com/entry/women-paid-less-men\\_us\\_56f16a22e4b03a640a6bbdc6](http://www.huffingtonpost.com/entry/women-paid-less-men_us_56f16a22e4b03a640a6bbdc6) (last updated Mar. 24, 2016).

<sup>240</sup> Liz Alderman, *Britain Aims to Close Gender Pay Gap with Transparency and Shame*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/business/britain-gender-pay-gap.html>.

<sup>241</sup> Theresa May, Opinion, *Gender Pay Gap: Fathers Can Help by Sharing Care Role, Says Theresa May*, SUNDAY TIMES (Apr. 8, 2018, 12:01 AM),

predictable when you think about— is a bonus gap that is “startlingly high,” and, as Prime Minister May wrote, “unseen until now.” Most of the figures about gender pay gaps around the world study base salaries, but gender pay discrimination encompasses all forms of compensation, and Britain is opening up the books to see these hidden figures. Notably, “compensation” under American pay equity laws also includes not only wages but also benefits, commissions, and other financial incentives and rewards attached to employment.<sup>242</sup> Yet most of the studies on the gender gap do not include data on how compensation beyond base salary figures into gender pay equity, because these other forms of compensation are usually even more confidential and hidden than base salary. Pay transparency pushes the agenda in opening the conversation. It often means that employers need to defend the indefensible: “Management characterized many of the fattest deals as ‘anomalies,’ but the anomalies appear to have been awarded consistently to men.”<sup>243</sup> And while figures can be manipulated, “the simplicity and specificity of the reporting requirements give employers fewer places to hide unflattering data.”<sup>244</sup> The result in Britain has been increasing public scrutiny, with some CEOs even reacting by taking a voluntary pay cut at the top.<sup>245</sup>

Iceland, despite, or precisely because of, being the world’s most gender-equal country according to the World Economic Forum, also recently stepped up its approach with an ever more aggressive initiative to close the gender pay gap. Iceland’s new law mandates daily fines for any workplace of more than 25 people that does not obtain an equal-pay certification from the

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<https://www.thetimes.co.uk/article/gender-pay-gap-fathers-can-help-by-sharing-care-role-says-theresa-may-dl9hgn0rs>.

<sup>242</sup> “Compensation” [under Title VII] has the same meaning as ‘wages’ under the EPA. The terms include (but are not limited to) payments whether paid periodically or at a later date, and whether called 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, benefits, or some other name.” 42 U.S.C. § 2000e-2(a)(1) (2012). *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. The term includes the rate at which overtime compensation or other special remuneration is paid as well as the rate at which straight time compensation for ordinary work is paid. It further includes the rate at which a draw, advance, or guarantee is paid against a commission settlement.”).

<sup>243</sup> Collins, *supra* note 3.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* (“EasyJet’s newly appointed C.E.O., . . . announced that he was taking a voluntary pay cut of thirty-four thousand pounds, to put his salary in line with that of his female predecessor.”)

government in the next four years. The law is innovative because it requires that all employers actively audit and justify their pay structure instead of relying on regulators to seek out violations. Iceland's legislature is one of the most gender equal in the world and, as the chair of Iceland's equality unit explained in passing the new requirement, "the gender gap won't close itself." Iceland hopes to entirely close the gender gap by 2022.<sup>246</sup>

## 2. Do Incentivize: Toward Sustainable Private-Public Pay Equity Partnerships

Legal reforms push the best actors to go beyond compliance. Indeed, the field of anti-discrimination law is best understood from a governance perspective, examining the ways private actors can move forward and form sustainable best practices. In earlier work, I have described the concept "new governance" as a regulatory shift from adversarial command-and-control, which focuses on ex-post fines and lawsuits, to a more proactive and collaborative private-public framework.<sup>247</sup>

*"The new governance model supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals. The adoption of governance-based policies redefines state-society interactions and encourages multiple stakeholders to share traditional roles of governance. Highlighting the increasing significance of norm-generating nongovernmental actors, the model promotes a movement downward and outward, transferring responsibilities to states, localities, and the private sector--including private businesses and nonprofit organizations."*<sup>248</sup>

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<sup>246</sup> Andy Knauer, JUST Capital, *Taking the Lead on Equal Pay: 7 Companies that Pay Women Fairly*, FORBES (Apr. 4, 2017, 1:39 PM), <https://www.forbes.com/sites/justcapital/2017/04/04/taking-the-lead-on-equal-pay-seven-companies-that-pay-women-fairly/>. Iceland also requires companies with 50 or more employees to have at least 40% women directors.

<sup>247</sup> See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

<sup>248</sup> *Id.* at 344. See also Orly Lobel, *New Governance as Regulatory Governance* in THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Four, ed., 2012); Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004).

A new governance approach to pay equity would allow the “reorientation of the workplace equality project toward redressing problems rooted in complex organizational dynamics.”<sup>249</sup> A useful analogy of what the literature has come to refer to as second generation anti-discrimination law is that of a public health problem rather than a single bad actor tort.<sup>250</sup> The challenge of equality is therefore better solved “not in the traditional manner of assigning individual responsibility and blame.”<sup>251</sup>

In 2016, one hundred leading American companies signed the White House Equal Pay Pledge. Under this pledge, companies agreed to conduct analyses and review pay policies in an effort to close the wage gap. Companies that announced their intentions to analyze their gender pay data and take corrective measures include Adobe, MasterCard, AT&T, Microsoft, Symantec, Colgate-Palmolive, Accenture, Intel, Apple, Starbucks, Nike, Citigroup and eBay.<sup>252</sup> Adobe, for example, promised in 2016 that it would be closing the gender wage gap within its company. Just a year and a half later, Adobe accomplished its goal.<sup>253</sup> Unsurprisingly, there is a business case for equal pay – a critical mass of research providing evidence that equal pay

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<sup>249</sup> Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 567 (2001).

<sup>250</sup> *Id.*

<sup>251</sup> See Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 101 (2010). At the same time, the litigation model remains a viable one. Some of the recent reforms also include stronger penalties. The new NY law also contains dramatically higher penalties than other state employment discrimination and wage/hour laws. Employers who are found to have willfully violated the law are subject to liquidated damages in the amount of 300% of the wages owed. If an employer is found to violate the law, an employee is entitled to wages and interest, plus an equal amount as liquidated damages, and reasonable attorneys’ fees. The California Pay Equity Act, if an employer is found to violate the law, an employee is entitled to wages and interest, plus an equal amount as liquidated damages, and reasonable attorneys’ fees.

<sup>252</sup> By the end of 2016, over 100 businesses signed on to the Equal Pay Pledge, with 44 employers joining in the last months of the year. Emma Hinchliffe, *44 Companies Join the White House’s Pledge for Equal Pay*, MASHABLE (Dec. 7, 2016), <http://mashable.com/2016/12/07/equal-pay-white-house-december/>. See also Diana Doukas, *Over 100 Companies Sign the Equal Pay Pledge*, THE WHITEHOUSE.GOV: BLOG (Dec. 7, 2016), <https://obamawhitehouse.archives.gov/blog/2016/12/07/over-100-companies-sign-equal-pay-pledge>. Just recently, however, four former female Nike employees filed a class action lawsuit alleging that Nike violated the Equal Pay Act and demanding a court-monitored reform of the company’s hiring and compensation practices. Alexia Fernández Campbell, *Why the Gender Discrimination Lawsuit Against Nike is So Significant*, VOX.COM (Aug. 15, 2018, 8:30 AM EDT), <https://www.vox.com/2018/8/15/17683484/nike-women-gender-pay-discrimination-lawsuit>.

<sup>253</sup> Claire Zillman, *Adobe Found and Closed a Gender Wage Gap Among Its Employees*, FORTUNE (Dec. 7, 2017), <http://fortune.com/2017/12/07/adobe-equal-pay-gender-pay-gap/>.

leads to better risk management, higher profit margins and stock prices, and more innovation. Indeed, the EPA in 1963 passed in part because some proponents of the Act focused on how a wage gap between women and men led to inefficient underutilization of labor.

Private efforts to go beyond compliance create a domino effect – a positive game theory of business leadership – where, when best practices are set by visible companies, others follow. In the past two years, over 3,700 companies have added an equal pay pledge to their company profile.<sup>254</sup> Boston launched a public-private partnership to train thousands of women in salary negotiation and brought dozens of leading businesses on board to express their commitment to actively closing their pay gaps.<sup>255</sup> Many employers are adopting nationwide practices to follow the most stringent state law reforms, even for employees outside of those states. In a recent WorldatWork survey, 37% of employers have implemented a policy prohibiting hiring managers and recruiters from asking about a job candidate’s salary history in all locations within the United States, regardless of whether a law exists requiring such practice.<sup>256</sup>

Some of the recent state law reforms leverage the power of law to trigger self-monitoring. These reforms include either a requirement that companies conduct self-audits on salary pay structure or incentives to do so.<sup>257</sup> Audits can help organizations embrace change by seeing internally where pay gaps exist, and by encouraging employers to make self-adjustments to avoid potential litigation. The Massachusetts Equal Pay Act provides a “self-evaluation” defense for employers.<sup>258</sup> Under the new law, employers who complete a good faith self-evaluation of their pay practices within three years of a claim and can demonstrate that “reasonable progress has been made towards eliminating compensation differentials based on

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<sup>254</sup> *Id.*

<sup>255</sup> Anna Louie Sussman, *How Boston is Trying to Close the Gender Pay Gap*, N.Y. TIMES (May 26, 2018), <https://www.nytimes.com/2018/05/26/business/gender-pay-gap-boston.html>.

<sup>256</sup> *Workplace Trends*, 25 NO. 3 MISS. EMPL. L. LETTER (M. Lee Smith Pub. & Printers, Brentwood, Tenn.), June 2018, at A1.

<sup>257</sup> Salt Lake City signed a new gender pay equity policy for city employees. The policy, which requires Salt Lake City's human resources department to conduct regular audits on gender pay equity, went into effect upon the mayor's signature — which was met with applause from dozens of female employees at City Hall. Katie McKellar, ‘*Equal Pay for Equal Work*’: Salt Lake Enacts Gender Pay Equity Policy for City Employees, DESERET NEWS: POLITICS (last updated Mar. 1, 2018, 2:47 PM), <https://www.deseretnews.com/article/900011749/equal-pay-for-equal-work-salt-lake-enacts-new-gender-pay-equity-policy-for-city-employees.html>.

<sup>258</sup> MASS. ANN. LAWS ch. 149 § 105A(d) (LexisNexis, Lexis Advance through Act 217 of the 2018 Legislative Session) (effective July 1, 2018).

gender,”<sup>259</sup> have an affirmative defense to shield them from liability. The employer may design the self-evaluation, so long as it is reasonable in scope and detail or consistent with standard forms issued by the Attorney General.<sup>260</sup> Other states similarly encourage employers to examine their own practices through self-assessments and proactive corrective measures. Oregon’s new act contains a safe harbor provision if an employer has completed an “equal-pay analysis” — an internal audit, essentially — within three years before the complaint, eliminates the pay differential for the plaintiff, and makes “substantial progress toward eliminating wage differentials for the protected class.”<sup>261</sup> Missouri has issued guidelines for employers to conduct self-audits to discover and correct gender pay inequality.<sup>262</sup> Montana’s new law lists a series of best practices for government contractors, which include posting salary ranges in employment listings, certifying that the contractor will not ask about wage history in employee interviews, and certifying that the contractor will not retaliate or discriminate against employees who discuss or disclose their wages in the workplace.<sup>263</sup> The state also established a pay equality hotline.<sup>264</sup>

Technology reduces employers’ claims that addressing equity concern issues is too cost-prohibitive, disruptive of operations, or resource-intensive. Companies like Syndio Solutions offer software as a service for organizations of any size to find pay equity concerns, address them, and stay in compliance over time.<sup>265</sup> The software makes it easy for employers to upload data, review results instantly, and address concerns in real-time. Democratizing access to analytics puts compliance within reach and eliminates the problems that make data analysis and review challenging.

Syndio founder Zev Eigen describes the software technology, focused on ensuring that people are paid equitably from even before they are hired, as “the future of pay equity.”<sup>266</sup> Eigen explains that the software ensures that employees are hired in an equitable way, continue to be paid fairly, and are promoted based on objective unbiased standards:

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<sup>259</sup> An Act to Establish Equal Pay Equity, S. 2119, 189th Gen. Court (Mass. 2016).

<sup>260</sup> § 105A(d).

<sup>261</sup> Oregon Equal Pay Act of 2017, H.B. 2005, ch. 197 (to be codified in scattered sections of Or. Rev. Stat.).

<sup>262</sup> Pay Equity Best Practices Guidelines, Governor Jay Nixon’s Executive Order No. 15-09.

<sup>263</sup> EQUAL PAY FOR EQUAL WORK MONTANA TASK FORCE, <http://www.equalpay.mt.gov/> (last visited Sept. 26, 2018).

<sup>264</sup> *Id.*

<sup>265</sup> SYNDIO, [www.synd.io](http://www.synd.io) (last visited Sept. 26, 2018).

<sup>266</sup> Interview with Zev Eigen.

*“The whole ecosystem of compensation should be established and maintained in a way that is fair and ultimately more transparent than it is now. You could even imagine a world in which people are promoted and given pay increases based on a gamified “leveling up” system derived from data and data science, putting gender pay inequity in our collective rear-view mirror.”*<sup>267</sup>

One of the insights of new governance is that many regulatory requirements can benefit businesses – that standards of ethics, equality, and fairness are good market practices. Boston’s initiative over the past two years has been leading the way in new governance approaches to closing the gender pay gap and companies are learning that equality is not a burden but a bedrock of market success. The Boston Women’s Workforce Council, a public-private partnership, partners with businesses and organizations, including Morgan Stanley, Zipcar and the Massachusetts Institute of Technology, to regularly share best practices and provide insights on how to close the gap. The city has already trained over 7,000 women in salary negotiation and expects to train ten times more in the next three years.<sup>268</sup> The Paycheck Fairness Act, introduced annually in Congress since 1997 and supported by the Obama administration, would add programs for training, including negotiation skills training for women through a grant program, research, better data collection by the EEOC, technical assistance, and pay equity employer recognition awards – the National Award for Pay Equity.<sup>269</sup>

A comprehensive pay equity governance regime can also have positive effects beyond gender equality. Pay transparency not only generally increases enforcement of wage and hour laws, regardless of discrimination, but it can also increase procedural fairness, and even tolerance to disparity in income,

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<sup>267</sup> *Id.*

<sup>268</sup> Sussman, *supra* note 252.

<sup>269</sup> Paycheck Fairness Act, S. 819, 115th Cong. § 3–5 (2017-2018). The text of the act includes a requirement that the Secretary of Labor engage in research, education, and outreach (*Id.* at § 6), a National Award for Pay Equity (*Id.* at § 7), a system to collect pay information by the EEOC (*Id.* at § 8), and reinstatement of pay equity and data collection programs (*Id.* at § 9). *See also* Lydia Wheeler, *Dems Press for Paycheck Fairness Bill on Equal Pay Day*, THEHILL.COM (Apr. 4, 2017, 2:01 PM EDT), <http://thehill.com/regulation/finance/327225-dems-press-for-paycheck-fairness-bill-on-equal-pay-day>. Joint Economic Committee Democratic Staff, *Gender Pay Inequality: Consequences for Women, Families, and the Economy*, Joint Economic Committee, United States Congress 26 (Apr. 2016). For the importance of including a mandate of research for a government agency in a legislative act, *see e.g.*, Katherine M. Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 MO. L. REV. 963, 964 (2006) (“By including research mandates in the new law, Congress articulated an empirical research agenda about bankruptcy for the federal government.”).

by reducing the perception of secrecy and uncertainty.<sup>270</sup> Equality at work affects well-being and happiness, going beyond the fact of distributional income loss.<sup>271</sup> Pay transparency also improves the job search and can impact relocation decisions.<sup>272</sup> In a seminal article, John McCall argued that increasing the availability and accuracy of job information would reduce workforce dropouts at least as efficiently as, and without the costs of, worker training programs.<sup>273</sup> Moreover, as I have argued in my work on post-employment covenants and job mobility, taking professional detours and time out of the job market is gendered. Economists have long argued that job search intermediaries, including the rise of the Internet, would increase the efficiency of matching and shorten unemployment periods.<sup>274</sup> The governance of pay equity thus weaves into the greater efforts of efficiency and fairness in the labor market. In this way, pay equity is no longer a stand-alone anti-discrimination cause of action, it is part of a web of policies and partnerships that govern equitable dynamic markets. The web of interests and relationships that can advance the project of pay equity point to the organizing principles of new governance which include the integration of policy domains toward an interrelated goal and continuous learning. In turn, the new governance model reveals the “false dilemma between centralized regulation and deregulatory devolution.”<sup>275</sup> The momentous number of legislative reforms currently underway incentivize private ordering and, in turn, private efforts point to next steps that can be adopted into the pay equity law.

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<sup>270</sup> Adrienne Colella et al., *Exposing Pay Secrecy*, 32 ACAD. MGMT. REV. 55 (2007).

<sup>271</sup> Erzo F.P. Luttmer, *Neighbors as Negatives: Relative Earnings and Well-Being*, 120 Q.J. ECON. 963, 989–90 (2005).

<sup>272</sup> Tara Vishwanath, *Information Flow, Job Search, and Migration*, 36 J. DEV. ECON. 313 (1991).

<sup>273</sup> John J McCall, *Economics of Information and Job Search*, 84 Q. J. ECON. 113 (1970). See also Edward E. Lawler III, *Secrecy about Management Compensation: Are There Hidden Costs?*, 2 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 182 (1967); Emiliano Huet-Vaughn, *The Unexpected Benefit of Telling People What their Coworkers Make*, ATLANTIC MONTHLY (Apr. 8, 2014), <https://www.theatlantic.com/business/archive/2014/04/the-unexpected-benefit-of-telling-people-what-their-coworkers-make/360301/>; Emiliano Huet-Vaughn, *Do Social Comparisons Motivate Workers? A Field Experiment on Relative Earnings, Labor Supply and the Inhibitory Effect of Pay Inequality* (August 2015), <https://sites.google.com/site/ehuetvaughn/DoSocialComparisonsMotivateWorkers.pdf>.

<sup>274</sup> David H. Autor, *Wiring the Labor Market*, 15 J. ECON. PERSP., Winter 2001, at 25.

<sup>275</sup> Lobel, *The Renew Deal*, *supra* note 244, at 343.



## CONCLUSION

We should not and cannot wait until 2059 – or worse, 2152 - to close the gender pay gap. In the past few years, pay equity reforms have been the purview of the states. The logic underlying recent laws is to increase awareness of and visibility to wage disparities, narrowing the scope of employer justifications, and providing a broader spectrum of employee-to-employee pay comparison. Most importantly, current reforms address disparities in information and knowledge flows in a way that can shift the focus from litigation to the ongoing governance of equity. The path to gender-equal pay must address the ways in which inequities can track throughout a career, not only a single job, and must correct for disparities at each stage of the employment contract. This article has shown that pay discrimination is the result of a complex array of market dynamics. Until recently, the solutions to this complex dynamic have been rather flat and the field relatively undertheorized. The future of equal pay law lies in structural reforms that empower the multiple stakeholders – first and foremost employees themselves, but also employers – to share information, identify disparities, negotiate corrective action, and work together toward a more equal and fair market.

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