

ARTICLE

BEYOND THE PAYCHECK FAIRNESS ACT: MANDATORY WAGE DISCLOSURE LAWS— A NECESSARY TOOL FOR CLOSING THE RESIDUAL GENDER WAGE GAP

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Despite the presence of three federal statutes outlawing gender discrimination in wages, United States women continue to earn only 77 cents to the male dollar. One reason that many identify for part of the remaining gap is that wage discrimination often goes undetected by its victims because salaries of comparably employed males are usually private information. Therefore, some suggest that mandatory wage disclosure laws are necessary to completely close the gap. This Article makes the case for adoption of such a statute.

I. INTRODUCTION

Despite the presence of three federal statutes outlawing gender discrimination in wages,¹ United States women continue to earn only about 77 cents to the male dollar.² The significance of this discrepancy becomes even more

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¹ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2006 & Supp. V 2011)); Civil Rights Act of 1964, Tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C. (2006 & Supp. V 2011)).

² Although this figure varies with industry, age, geographic region, level of education, and position held, this is the 2010 U.S. Census median figure for full-time, year-round workers age fifteen and over, of all races, throughout the United States. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, tbl.P-40 (2011), available at <http://www.census.gov/hhes/www/income/data/historical/people>. Income measurements are obtained by asking each person age fifteen and older the amount of income he or she received in the preceding calendar year from each of eighteen potential income sources (e.g., earnings, social security, interest, alimony, etc.). See CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, at 7 tbl.1, App'x A (2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf>. See also *Wage Gap Statistically Unchanged and Still Stagnant*, NAT'L COMMITTEE ON PAY EQUITY, <http://www.pay-equity.org> (last visited Feb. 8, 2013) ("The wage gap remained statistically unchanged in the last year. Women's earnings were 77.0 percent of men's in 2011, compared to 77.4 percent in 2010, according to Census statistics released September 12, 2012 based on the median earnings of all full-time, year-round workers. Both men's and women's earnings showed slight increases from 2009 to 2010 with men's at \$47,715 and women's at \$36,931, a difference of \$10,784. Fifty years ago women earned 61 percent of what men earned, a Census official noted in releasing the data."); *24 Cents Short: Women Still Lag Behind Men in Earning Power*, NAT'L ASS'N FOR FEMALE EXECUTIVES (Nov. 29, 2005), www.nafe.com/web?service=direct/1/ViewArticlePage/dlinkFullTopArticle3&sp=365&sp=275 [hereinafter *24 Cents Short*] ("[W]omen continue to earn less than men—only about 76 cents for every dollar . . ."); JUDY GOLDBERG DEY

apparent when one looks at the impact of the gap over an entire working lifetime. A woman who makes 77 cents on the male dollar loses a total of \$1.2 million dollars over the course of her working life.³ What is more, progress toward closing this gap has stalled,⁴ recent legislative efforts to strengthen existing wage discrimination laws have failed,⁵ and there is little reason to believe that gender wage parity will occur without some additional proactive steps.⁶

To determine what new steps would be most effective, it is necessary to understand the reasons for the persistent gap. Many of the factors originally contributing to the wage gap have been substantially ameliorated.⁷ Yet a gap remains. Why? One reason for the remaining gap unaddressed by current initiatives is that wage discrimination often goes undetected by its victims because salaries of comparably employed males are usually private information.⁸ Hence, the legislative tools available to remedy wage discrimination are underutilized due to a lack of awareness of claims.

& CATHERINE HILL, AM. ASSOC. UNIV. WOMEN EDUC. FOUND., *BEHIND THE PAY GAP* (2007), available at <http://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf> (examining the gender wage gap for college graduates); Laura Fitzpatrick, *Why Do Women Still Earn Less Than Men?*, TIME, Apr. 20, 2010, available at <http://www.time.com/time/nation/article/0,8599,1983185,00.html>; DEP'T FOR PROF'L EMP'S. AM. FED'N OF LABOR AND CONG. INDUS. ORGS., *FACT SHEET 2010: PROFESSIONAL WOMEN: VITAL STATISTICS 2* (2010), available at www.pay-equity.org/PDFs/ProfWomen.pdf [hereinafter *FACT SHEET 2010*] (citing 2007 Center for American Progress study).

³ EVELYN F. MURPHY & E.J. GRAFF, *GETTING EVEN: WHY WOMEN DON'T GET PAID LIKE MEN—AND WHAT TO DO ABOUT IT* 26 (2005). The total varies by level of education; this figure is for a college graduate. A high school graduate will lose \$700,000. A professional school graduate will lose \$2 million. *Id.*

⁴ *Id.* at 3–5 (discussing the slow progress toward closing the gap as well as the times of reversal of that progress); see also WHITE HOUSE, *EQUAL PAY TASK FORCE ACCOMPLISHMENTS: FIGHTING FOR FAIR PAY IN THE WORKPLACE* (2012), available at http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf.

⁵ Consider, for example, the recent failure of the Paycheck Fairness Act, S. 3220, 112th Cong. (2012). See *infra* note 232 and accompanying text.

⁶ MURPHY & GRAFF, *supra* note 3, at 7 (explaining why the gap will not inevitably close on its own); see also Press Release, Inst. for Women's Policy Research, *Pay Secrecy and Paycheck Fairness: New Data Shows Pay Transparency Needed* (Nov. 15, 2010), available at www.iwpr.org/press-room/press-releases/pay-secrecy-and-paycheck-fairness-new-data-shows-pay-transparency-needed [hereinafter *Pay Secrecy and Paycheck Fairness*] (explaining why the Paycheck Fairness Act is insufficient).

⁷ These reasons include underlying gender gaps in education, skills, and experience, as well as occupational segregation and career breaks or curtailment for motherhood. See DEY & HILL, *supra* note 2, at 3; J. RALPH LINDGREN ET AL., *THE LAW OF SEX DISCRIMINATION* 166–72 (4th ed. 2011) (discussing education, experience, and occupational segregation); MURPHY & GRAFF, *supra* note 3, at 194–213 (discussing the “Mommy Penalty”). See *infra* Section II.B for a detailed discussion of which of these factors remain and which have been mitigated or eliminated.

⁸ Peter Coy & Elizabeth Dwoskin, *Shorthanded*, BUS. WK., June 21, 2012, <http://www.businessweek.com/articles/2012-06-21/equal-pay-plaintiffs-burden-of-proof> (“Pay discrimination is a silent offense.”). This conundrum is illustrated well by the plaintiff in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623–24 (2007), which held that Ledbetter could not proceed with her claim because, although she filed suit within 180 days of when she first learned that she was getting paid less than comparable male employees, she had failed to file within 180 days of when “the alleged unlawful employment practice occurred.” While the

Mandatory wage disclosure laws may be a solution to this part of the wage gap.⁹ Limited salary disclosure laws do exist in the United States.¹⁰ These are primarily for public employees and most were not passed with the goal of eliminating gender wage discrimination.¹¹ Nonetheless, these laws can impact wage discrimination by providing women with the necessary information to bring a claim. Have they had this effect? If so, is a broader adoption of wage disclosure laws desirable? This Article will address these questions.

Part II examines the history of the gender wage gap, the various explanations that have been proffered for it, and recent data/studies that indicate which of these explanations are obsolete and which remain valid. Part III reviews attempted and suggested gap closing techniques—both cultural and legal—and demonstrates that even the most promising of these fall short of eliminating wage discrimination. Part IV assesses the effectiveness of wage disclosure—both legislatively required and voluntary—in narrowing the gap. Part V proposes the adoption of mandatory wage disclosure legislation as a necessary additional tool in closing the remaining gender wage gap: Congress needs to pass not only the Paycheck Fairness Act but also an amendment to it requiring wage disclosure.

II. HISTORY: HOW DID WE GET HERE AND WHY ARE WE STUCK?

The history of the gender wage gap informs any discussion of effective solutions to the residual gap because some of the cultural assumptions underlying the original gap may continue to undermine women's progress toward pay parity today.¹² It is also vital to critically examine early explanations for the wage gap so as to discern which of these are now outdated (and so, if used, mere excuses) and which ones, in contrast, still at least partially explain the gap and, therefore, need to be addressed.

Lily Ledbetter Act solved for future plaintiffs the dilemma of delayed awareness of a claim, it does not provide a vehicle for acquiring that awareness. See Pay Secrecy and Paycheck Fairness, *supra* note 6. See *infra* Section III.B.2 for a more thorough discussion of this issue.

⁹ Pay Secrecy and Paycheck Fairness, *supra* note 6; Margaret Littman, *The Silent Treatment*, WORKING WOMAN, Aug. 2001, at 76. See also Coy & Dwoskin, *supra* note 8, at 6 (“[W]omen often don’t know when they’re getting paid less than men.”).

¹⁰ See *infra* notes 214, 238.

¹¹ An exception to this is Minnesota, where the pay equity law was for this purpose, but was coupled with comparable worth measures. See MINN. STAT. §§ 471.992–.999 (2012); see also *infra* note 247 and accompanying text.

¹² See MURPHY & GRAFF, *supra* note 3, at 194–213 (demonstrating that much of the extra wage gap experienced by mothers is based on stereotypes and assumptions that employers make about what hours mothers will be willing to work rather than on women’s choices to curtail hours or go to part-time status).

A. *The Gap: Where Did It Begin and Where Is It Now?*

The original wage gap was premised on the notion that women's work was less valuable than men's work. Colonial America was a very Christian society and the Bible supported the general notion that women were less valuable than men¹³:

The Lord said to Moses, "Say to the people of Israel, when a man makes a special vow of persons to the Lord at your valuation, then your valuation of the male from twenty years old up to sixty years old shall be 50 shekels of the sanctuary. If a person is a female, your valuation shall be thirty shekels."¹⁴

In addition, the types of work that women did for wages in colonial and revolutionary America—household tasks of sewing, cleaning, and caring for children and the sick—were viewed as unskilled labor that required no particular education or training and, therefore, were worth less than men's work.¹⁵

Beyond a low valuation of both the worker and the work produced, it was widely believed that women did not need to earn as much as men because they were not supporting a family as men were: women's wages were supplementary income or pocket money, not vital earnings necessary to put bread on the table.¹⁶ In a patriarchal society, it was culturally acceptable for an employer to determine wages as much based on the financial needs of the

¹³ See SYMON PATRICK, A COMMENTARY UPON THE HISTORICAL BOOKS OF THE OLD TESTAMENT 533 (5th ed. 1738) ("Ver. 4. And if it be a female, then thy estimation shall be thirty shekels. Women could not be so serviceable as Men, and therefore were valued at a less rate: For all that they could do was to spin, or weave, or make Garments, or wash for the Priests . . .").

¹⁴ *Leviticus* 27:1–4.

¹⁵ LINDGREN ET AL., *supra* note 7, at 172 ("The first [explanation of the wage gap] was that women workers, as a group, possess a different and less valuable set of employment skills than do men workers as a group.").

¹⁶ See *Women and Minorities in Management*, REFERENCE FOR BUS., 2d ed., <http://www.referenceforbusiness.com/management/Tr-Z/Women-and-Minorities-in-Management.html> (last visited Feb. 23, 2013) (stating that "Tradition has held that men were expected to be the primary wage earners of the family, while women were expected to make the home."). These assumptions are dramatically illustrated by women's wages during the two World Wars: when women became the temporary primary bread earners for their families and were doing "men's work," they were paid wages more comparable to men's:

During World War I, women were first guaranteed pay equity in the form of regulations enforced by the War Labor Board of 1918. The Board's equal pay policy required manufacturers, who put women on the payroll while male employees were serving in the military, to pay those women the same wages that were paid to the men. During World War II, a large number of American women took jobs (most for the first time) outside the home. Many of these women worked in the war industries, and in 1942 the National War Labor Board urged employers to make "adjustments which [would] equalize wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations."

worker as on the value of the work produced.¹⁷ Indeed, women rarely worked for wages in colonial and revolutionary America because men typically took care of women's financial needs.¹⁸ When women did work in these eras, their wages were turned over to their father or husband since they were not legally allowed to own property.¹⁹ Women typically worked, if at all, in the brief period between adolescence and marriage.²⁰ Once a woman married and began a family, she rarely continued to work outside the home on a full-time basis.²¹ In situations of financial need, a mother might do part-time work in the form of mending, caring for the children of others, or housecleaning.²² These jobs were acceptable because they were seen as natural extensions of the woman's role as mother, housekeeper, and comforter.²³ In 1839 states began to pass a series of Married Women's Property Acts.²⁴

A Brief History of the Wage Gap, Pay Inequity, and the Equal Pay Act, AM. ASS'N OF UNIV. WOMEN, <http://www.aauw.org/what-we-do/legal-resources/online-resource-library/equal-pay-act> (last visited July 19, 2012) (citations omitted).

¹⁷ See *A Brief History of the Wage Gap, Pay Inequity, and the Equal Pay Act*, *supra* note 16 ("Until the early 1960s, advertisements for job listings were separated by sex. Almost all of the higher level jobs were for men, and some ads for the exact same job would offer different pay for men and women."). Indeed single men were paid less than husbands and childless men were paid less than fathers. See, e.g., *Singled Out: Are Unmarried People Discriminated Against?*, DAILY BEAST, Feb. 6, 2012, <http://www.thedailybeast.com/articles/2012/02/06/singled-out-are-america-s-unmarried-discriminated-against.html>; see also Yinon Cohen & Titchak Haberfeld, *Why Do Married Men Earn More than Unmarried Men?*, 20 SOC. SCI. RES. 29, 30 (1991); Martha S. Hill, *The Wage Effects of Marital Status and Children*, 14 J. HUM. RESOURCES 579 (1979).

¹⁸ See LINDGREN ET AL., *supra* note 7, at 2–4 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES).

¹⁹ *Id.*

²⁰ *Id.* at 2; Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *POLITICS OF LAW* 339–40 (David Kairys ed., 1998).

²¹ *Closing the Gap*, ECONOMIST: SPECIAL REPORT ON WOMEN & WORK, Nov. 26, 2011, at 4. An exception to this was immigrant garment workers in New York City and these not until turn of the century. A CENTURY OF WOMEN 8 (Alan Covey ed. 1994) (based on a documentary script by Jacoba Atlas with Heidi Schulman and Kyra Thompson); see also Taub & Schneider, *supra* note 20, at 339–40 (discussing mill workers; however, these jobs, too, only became prevalent in the 1800s).

²² A CENTURY OF WOMEN, *supra* note 21, at 8; see also Taub & Schneider, *supra* note 20, at 339–40.

²³ Taub & Schneider, *supra* note 20, at 339–40 (noting that in the colonial and revolutionary periods of U.S. history, women and men dominated separate arenas of life (men public and women private) and that work was therefore considered a public male task); Barbara Welter, *Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151, 152 (1966) (noting that in 1820–1860 there were four cardinal virtues for a woman (piety, purity, submissiveness, and domesticity) and four acceptable roles (mother, daughter, sister, wife)).

²⁴ Linda E. Speth, *The Married Women's Property Act: 1839-1865*, in *WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE* 69–91 (D. Kelly Weisberg, ed. 1982). These acts were part of a broader women's rights movement. At the first women's rights convention in Seneca Falls, New York in 1848 (organized by Elizabeth Cady Stanton and Lucretia Mott and attended by approximately 300 women and men, including Frederick Douglass), attendees ratified a document paralleling the Declaration of Independence. See Elizabeth Cady Stanton, *Declaration of Sentiments* (July 1848). The Declaration of Sentiments is widely regarded as the most famous document in the history of feminism. Although there was some statutory movement toward granting women property rights as early as 1839, the Declaration accelerated this movement by launching a campaign to abolish all the common law rules of coverture,

These statutes allowed women to own property, both real and monetary, and by 1895 every state had passed some version of such a statute.²⁵ As women began to have a right to their own bank accounts, they could retain the wages that they earned. Nonetheless, cultural assumptions persisted that women's wages were merely supplementary to men's wages,²⁶ and that husbands would hold marital assets.²⁷ In fact, a series of court decisions reaffirmed that laws could treat women differently from men in the workplace for their own protection.²⁸ This protectionist rationale²⁹ provided a powerful defense against equal protection challenges to gender-biased work laws and rein-

including those that limited married women's ability to own property. See LINDGREN ET AL., *supra* note 7, at 10, 12. There were also other reasons for these laws. "In some states, the acts were limited in scope, shaped primarily to serve the interests of fathers wishing to protect their estates from sons-in-law and husbands seeking to shield their own property from creditors. Typical of this pattern was America's first Married Women's Property Act, passed in Mississippi in 1839. This law (most of which dealt specifically with slaveholdings) guaranteed the right of married women to receive income from their property and protected it against being seized for their husbands' debts, but the law left husbands in sole charge of buying, selling, or managing the property. In other states, especially post-1848 where women's rights movements took a leading role in the campaigns, more ambitious property reform laws were passed, usually during the decade before the Civil War. In New York in 1860, for instance, the lobbying of women's rights advocates helped win passage of one of the nation's most comprehensive Married Women's Property Acts. This law guaranteed wives' right to own, buy, and sell property, to sign contracts, to sue and be sued, to keep their own wages, and to be joint guardians of their children. By the mid-1870s, almost all the states in the North had passed Married Women's Property Acts, and by the end of the century, the southern states had as well. Although the scope of these laws varied widely from state to state, taken together they represented a sweeping transfer of property rights and a historic improvement in the status of American married women." *Married Women's Property Acts*, Houghton Mifflin Companion to US History, *The Reader's Companion to American History* (Eric Foner and John A. Garraty, eds., 1991) available at <http://www.answers.com/topic/married-women-s-property-acts#ixzz2QBJCnr9t> (last visited on Apr. 11, 2013). See also Wilma Mankiller et al., eds., *The Reader's Companion to U.S. Women's History* (NY: Houghton Mifflin, 1998), 285, available at <http://books.google.com/books?id=D9lhBw8t410C&pg=PA285&#v=onepage&q&f=false> (last visited on Apr. 11, 2013); READER'S COMPANION TO U.S. WOMEN'S HISTORY 285, 358-59 (Wilma Mankiller et al. eds., 1999).

²⁵ See KATHRYN KISH SKLAR, *SOCIAL JUSTICE FEMINISTS IN THE UNITED STATES AND GERMANY* 149 n.39 (1998).

²⁶ See discussion *supra* note 16. Also, women were routinely not given benefits, such as health insurance, on the assumption that they were covered by their husband or spouse. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (finally banning military assumption that spouses of male soldiers were automatically dependents but requiring female soldiers to prove their husbands' actual financial dependence).

²⁷ As late as the 1970s most marital assets were still held in the husband's name. See, e.g., *Orr v. Orr*, 440 U.S. 268, 270 n.1 (1979) (challenging an Alabama statute that contained the assumption (as late as 1979) that alimony should only be paid by men because they held all marital assets and earning power).

²⁸ E.g., *Goesart v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan law that permitted women to work as barmaids only if they were the wife or daughter of the male bar owner); *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) (upholding an Oregon law that restricted the number of hours that women could work while not restricting hours for men).

²⁹ LINDGREN ET AL., *supra* note 7, at 21-29.

forced the notion that a woman's first priority ought to be being a good wife and mother.³⁰ These notions continued well into the twentieth century.³¹

The early cultural norms surrounding women's work played out for many subsequent generations. The first women to enter the full-time work force at the turn of the twentieth century were predominantly immigrants whose husbands' unskilled labor did not produce sufficient income to support the family.³² Jobs open to these women were extensions of the genteel part-time work done by earlier generations of mothers: factory work involving sewing machines (textile mills), domestic work in wealthier women's homes, daycare, and elementary school teaching.³³ Because these jobs were still considered unskilled and because only women (who were still presumed to be at least partially supported by a father or spouse) did them, low pay continued to be the norm.³⁴

Between 1950 and 1990 the United States experienced an unprecedented feminization of the workplace. In 1950 only 28% of adult women worked outside the home, and half of these worked part-time.³⁵ Women had jobs, not careers, and the concept of wage equity was an alien one.³⁶ By 1990 over 57% of adult women worked outside the home with over 70% of these working full-time.³⁷ It was during this period that the gender wage gap was first documented, publicly challenged, and legally addressed.³⁸ In 1950-1960 women earned fifty-nine to sixty-four cents for every dollar earned by their male counterparts.³⁹ Women began to speak out about this injustice.

³⁰ LINDGREN ET AL., *supra* note 7, at 21-29; *see also* Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605, at *22 (1908) (pointing out that long hours could hurt a woman's reproductive system).

³¹ *See, e.g.*, Glover v. Glover, 314 N.Y.S.2d 873, 877 (N.Y. Fam. Ct. 1970) (punishing divorcee with no alimony for not being a supportive wife). A notable exception to this was during the two World Wars when women assumed men's jobs. *Id.*; *see also* A CENTURY OF WOMEN, *supra* note 21, at 34-35. However, at the end of both wars, women surrendered these jobs back to men. *Id.* at 40.

³² A CENTURY OF WOMEN, *supra* note 21, at 8.

³³ Taub & Schneider, *supra* note 20, at 339-40.

³⁴ LINDGREN ET AL., *supra* note 7, at 77.

³⁵ *Id.* at 77.

³⁶ A CENTURY OF WOMEN, *supra* note 21, at 42 (quoting Marjorie Sutton, a 1950s homemaker: "There was no such thing in those days as a career, per se. There were women out there working, but I didn't know about them.")

³⁷ LINDGREN ET AL., *supra* note 7, at 77; *see also* FACT SHEET 2010, *supra* note 2, at 1 ("[A]lmost 60%" of women worked between 1997 and 2008). By way of context, men's labor participation rate in 1999 was 74.7%. *Changing Work Behavior of Married Women*, NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org/digest/nov05/w11230.html> (last visited Feb. 9, 2013).

³⁸ *See, e.g.*, *Women Pushed Down Job, Pay Ladder*, MILWAUKEE J., Dec. 16, 1964, at 9 (in which the head of the U.S. Labor Department's Women's Bureau is quoted as saying that, although 49 percent of women between 18 and 64 hold jobs, the wage gap between men and women "has been widening over the past 24 years in every major industry"). Note that two of the three federal statutes outlawing gender wage discrimination were passed in the 1960s: The Equal Pay Act and Title VII of the Civil Rights Act of 1964.

³⁹ *See* MURPHY & GRAFF, *supra* note 3, at 4 (59 cents); Borgna Brunner, *The Wage Gap: A History of Pay Inequality and the Equal Pay Act*, INFORMATION PLEASE, <http://www.info please.com/spot/equalpayact1.html> (last visited Apr. 3, 2013); *see also* J. RALPH LINDGREN ET

President Kennedy listened and signed into law The Equal Pay Act of 1963, making it illegal for the first time to pay women less than men for the same work.⁴⁰ The phrase “equal pay for equal work” was coined and many believed that the discrepancies would now be remedied. Initially the legal tool seemed effective. By 1971 back wages totaling more than \$26 million were paid to 71,000 women.⁴¹ However, during this same period the wage gap actually broadened and women in 1971 were earning only 59.5 cents on the male dollar.⁴²

After a low of 56.6 in 1973,⁴³ progress ensued in the 1980s with women’s wages climbing to nearly 72 cents of the male dollar by 1990.⁴⁴ However, this progress slowed throughout the 1990s, with women earning 74 cents to the male dollar by 2000—a gain of only 2 cents in a decade.⁴⁵ In 2010 the gap stood at 77.4 cents.⁴⁶ This represents virtually no change since 2005.⁴⁷ These figures beg a number of questions. Why is progress toward wage parity so slow? Why has the limited progress flattened? What needs to be done to eliminate the remaining gap? To address these questions, one must first examine the traditional explanations given for the modern gender wage gap.

B. *Reasons for the Modern Gap: Explanations or Excuses?*

Although the Equal Pay Act of 1963 made it illegal to set wages based on gender or financial need, the two hundred year history of women in the United States workplace set the stage for the wage gap that women contin-

AL., THE LAW OF SEX DISCRIMINATION 225 (2d ed. 1993) (showing August 1992 census report, citing figures for 1955 of 64.5 and for 1960 of 60.7). This downward trend in women’s wages may be explained by the growing number of women entering the workforce since the initial influx of female workers was primarily comprised of relatively inexperienced workers and in lower paying fields. See June O’Neill, *The Trend in the Male-Female Wage Gap in the United States*, 3 J. LABOR ECON. S91, S114 (1985). Methods of income calculation for 1960 can be found at U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS: CONSUMER INCOME: INCOME OF FAMILIES AND PERSONS IN THE UNITED STATES: 1960, at 19–20 (1962), available at <http://www2.census.gov/prod2/popscan/p60-037.pdf>. See also *id.* at 2 (reporting average income of women as \$3300 and of men as \$5400, for a figure of 61 cents).

⁴⁰ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2006 & Supp. V 2011)).

⁴¹ See Brunner, *supra* note 39.

⁴² U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, *supra* note 2, at tbl.P-40. Again, this downward trend may be attributable to more women entering the workforce since the first waves of women were relatively inexperienced and entered lower paying fields. See O’Neill, *supra* note 39, at S93–S94 (noting this trend began in the 1950s).

⁴³ See O’Neill, *supra* note 39.

⁴⁴ U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, *supra* note 2, at tbl.P-40.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Coy & Dvoskin, *supra* note 8 (noting that the gap “has narrowed only 4¢ since 1994 and less than 1¢ since 2005”); David Leonhardt, *Scant Progress on Closing Gap in Women’s Pay*, N.Y. TIMES, Dec. 24, 2006, at 1; *24 Cents Short*, *supra* note 2 (“In recent years, virtually no progress has been made in narrowing the gender wage gap.”); *The Cashier and the Carpenter*, ECONOMIST: SPECIAL REPORT ON WOMEN AND WORK, Nov. 26, 2011, at 5.

ued to encounter in the 1960s when they entered the full-time workforce in record numbers. As detailed in the prior section, patterns of women's work established in colonial and revolutionary America—in terms of both the type of work available to women and the value placed on that work—persisted well into the mid-twentieth century. In addition, as late as 1955 women still rarely headed households⁴⁸ and so employers continued to favor married men and fathers in their pay schemes and commonly excluded female employees from any modern benefits such as medical insurance or retirement plans on the assumption that females were taken care of in these ways by their father or husband.⁴⁹

This is not to say that all gender wage differences encountered by women in the 1960s were the result of intentional discrimination. That was only one piece of the puzzle. The gap that persisted for the remainder of the twentieth century traditionally has been explained in the following ways:

1. Women are less educated and trained than men.
2. Women are less experienced and have less seniority than men.
3. Women are occupationally segregated into lower paying jobs.
4. Women are not attaining the highest paying jobs in their fields.
5. Employers continue to engage in wage discrimination.⁵⁰

The first four of these explanations allows employers to legally pay women less than men under the Equal Pay Act.⁵¹ To what extent do each of these continue to explain the persistent wage gap? As detailed below, the first explanation, while somewhat legitimate in the 1960s and 1970s, is simply no longer valid. The second explanation is no longer true in its original formulation but retains some validity in the context of the impact of reduced hours and career breaks for parenthood. The third and fourth explanations, while still partially accurate, are significantly less true today than when first advanced and, like motherhood, fail to completely account for the remaining twenty-three cent wage gap. Unless some other explanation has been overlooked, this leads to the inevitable conclusion that some illegal wage dis-

⁴⁸ In 1960 one in ten households was maintained by a woman. By 1991 this figure was eighteen percent, or almost one in five. LINDGREN ET AL. (2d ed.), *supra* note 39, at 224; *see also* MAJORITY STAFF OF U.S. CONG. J. ECON. COMM., 111TH CONG., WOMEN AND THE ECONOMY 2010: 25 YEARS OF PROGRESS BUT CHALLENGES REMAIN 9 (2010), *available at* http://www.jec.senate.gov/public/?a=Files.Serve&File_id=8be22cb0-8ed0-4a1a-841b-aa91dc55fa81 (“In 1983, 20 percent of all families with children (or 6.6 million families) were female-headed households. By 2009, 25 percent of all families with children (9.8 million families) were female-headed households.”).

⁴⁹ *See supra* text accompanying notes 16 (men presumed to need benefits but not women), 17 (fathers and husbands paid more than single or childless men), and 18 (women presumed to be financially supported by husband).

⁵⁰ *See, e.g.*, MURPHY & GRAFF, *supra* note 3, at 9; LINDGREN ET AL., *supra* note 7, at 166–67, 172 (discussing education, experience, and occupational segregation).

⁵¹ 29 U.S.C. § 206(d) (2006 & Supp. V 2011). The law provides affirmative defenses for wage differences based on seniority systems, merit systems, quantifiable production differences, and factors other than sex. *See* 29 U.S.C. § 206(d)(1).

crimination continues to exist and is not being adequately addressed by current laws.⁵²

1. *Women are Less Educated and Trained Than Men*

In colonial America girls were not educated. In the period from the American Revolution to the Civil War, girls were given a basic education and first became teachers in significant numbers. From the end of the Civil War to the Depression, women began to go to college, largely in single-sex institutions designed to make them more appropriate wives for educated men.⁵³ Then came the Depression, followed by World War II, both of which disrupted women's educational progress.⁵⁴ When this progress resumed in the post-war era, women began to go to college in more significant numbers and more institutions of higher education became coeducational.⁵⁵ Still, when the Equal Pay Act of 1963 was passed, more men than women had graduated from both college and graduate schools,⁵⁶ justifying employers' claims that men were more educated than women and thus entitled to higher pay as more qualified job applicants.

⁵² See Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSPECTIVES, FEB. 2007, at 7, 10–12 (concluding that, after accounting for all other factors, forty-one percent of the gap remains unexplained “and [is] potentially due to discrimination”).

⁵³ Nona P. Lyons, *Women's Education*, in ENCYCLOPEDIA OF EDUCATIONAL RESEARCH 1522–24 (6th ed. 1992).

⁵⁴ *Id.* But see *Closing the Gap*, *supra* note 21, at 4 (noting that, from the 1930s onward, more women went to high school and college).

⁵⁵ Lyons, *supra* note 53, at 1523.

⁵⁶ Between 4.5% and 5.7% of males had bachelor's degrees, while between 3.6% and 4.8% of females had them. For graduate education, 3.6% to 5.2% of men had some, while only 1.4% to 2.1% of women did. These estimates are based on census data from 1960 and 1970. See generally U.S. CENSUS BUREAU, YEARS OF SCHOOL COMPLETED BY PERSONS 14 YEARS OLD AND OVER, BY AGE, COLOR, AND SEX, FOR THE UNITED STATES 1960 AND 1950 tbl.173 (1960), available at <http://www.census.gov/hhes/socdemo/education/data/cps/1960/cp60pcs1-37/tab-173.pdf>; U.S. CENSUS BUREAU, YEARS OF SCHOOL COMPLETED BY PERSONS 14 YEARS OLD AND OVER, BY RACE, SEX, AND AGE: 1970 tbl.199 (1970), available at <http://www.census.gov/hhes/socdemo/education/data/cps/1970/tab-199.pdf>. The 1960 table indicates that 4.5% of male population had bachelor's degrees and 3.6% had post-graduate education. U.S. CENSUS BUREAU (1960), *supra*, at 2. In contrast, 3.6% of the female population had bachelor's degrees and 1.4% had post graduate education. *Id.* at 3. By 1970, the next time this data was collected, these figures were 5.7% male bachelor's degrees, 5.2% male graduate education; 4.8% female bachelor's, 2.1% female graduate education. U.S. CENSUS BUREAU (1970), *supra*, at 1. Hence one can assume that in 1963 the numbers were somewhere between the 1960 census numbers and the 1970 census numbers. The latest tables combine bachelor's and graduate degrees so that the relevant ranges would be male 9.7–13.5%; women 5.8–8.1%. In 1960 9.7% of men over twenty-five had a bachelor's degree or higher, while only 5.8% of women did so. U.S. CENSUS BUREAU, A HALF CENTURY OF LEARNING: HISTORICAL STATISTICS ON EDUCATIONAL ATTAINMENT IN THE UNITED STATES, 1940–2000 tbl.2 (2000), <http://www.census.gov/hhes/socdemo/education/data/census/half-century/tables.html>. In 1970, 13.5% of men had a bachelor's or higher, while only 8.1% of women did. *Id.*

Title IX was passed in 1972, banning gender discrimination in education.⁵⁷ This broad legislation impacted United States education at every level. For example, Title IX's impact on athletics alone profoundly changed United States culture. Equal access to athletics and athletic experience has, in turn, improved women's ability to compete in the workplace.⁵⁸ Most directly relevant to this discussion, Title IX removed myriad barriers to access to higher education. It required gender equity in everything from admissions and financial aid to housing and career counseling.⁵⁹ While Title IX permitted private colleges to remain single-sex, it required equal gender access to public colleges, vocational schools, professional schools, and graduate schools.⁶⁰ This federal legislation brought about sweeping changes in United States higher education: by 2000, more young women than men were attaining college and graduate degrees.⁶¹ In 2009 the contrast was quite marked, with 35% of women between twenty-five and thirty-four holding a bachelor's degree, compared to 27% of men in the same age range.⁶²

Despite this educational parity, the same U.S. Census document announcing these figures also reports:

⁵⁷ Education Amendments of 1972, Tit. IX, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. § 1681 (2006 & Supp. V 2011)).

⁵⁸ See Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, 92 REV. ECON. & STAT. 284, 299–300 (2010); see also Keith O'Brien, *She Shoots She Scores! What Sports Actually Do for Girls—and for All of Us*, BOSTON GLOBE, Aug. 1, 2010, http://www.boston.com/bostonglobe/ideas/articles/2010/08/01/she_shoots_she_scores.

⁵⁹ 20 U.S.C. §§ 1681(a), 1687(2) (2006 & Supp. V 2011).

⁶⁰ 20 U.S.C. § 1681(a)(1) (2006 & Supp. V 2011).

⁶¹ See U.S. CENSUS BUREAU, A HALF CENTURY OF LEARNING: HISTORICAL STATISTICS ON EDUCATIONAL ATTAINMENT IN THE UNITED STATES, 1940–2000, *supra* note 56. In 2000, 29.7% of women aged twenty-five to twenty-nine had bachelor's degrees or more, while 24.7% of men in the same age group had the same. *Id.* Of course, if you compare the entire adult male and female population, men still have a slight edge (26.1% versus 22.9%) but this is due to the remaining discrepancies among older Americans (e.g., of those aged seventy-five or over, 17.7% of men have bachelor's degrees or higher, while only 10.7% of women have the same). *See id.*

⁶² See CAMILLE L. RYAN & JULIE SIEBENS, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2009 1 (2012), available at <http://www.census.gov/prod/2012pubs/p20-566.pdf>. The report also states:

A larger proportion of women than men had completed high school or more education. A larger proportion of men had received at least a bachelor's degree. However, because women 25 years old and over outnumber men aged 25 and over, the number of women with bachelor's degrees is larger than the number of men with these degrees. [Most notably, among people aged 25 to 34, the percentage of women with a bachelor's degree or higher was 35 percent compared with 27 percent of men.

Id. Notably, only 10.7% of population over age twenty-five held bachelor's degrees in 1970, in contrast to 24.4% in 2000, but the relevant figures are the relative percentages of these degrees held by men and women. See KURT J. BAUMAN & NIKKI L. GRAF, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT: 2000, at 4 fig.3 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-24.pdf>. Tables from 2012 provide additional figures. *See generally* RYAN & JULIE SIEBENS, *supra* note 62.

Among all workers, women earned less than men (about \$28,000 and \$39,000, respectively). This was also true at each level of educational attainment. Women with a high school diploma earned about \$21,000 a year. This was less than men without a high school diploma or GED, who earned about \$22,000. At the high end of educational attainment, women with an advanced degree earned about \$52,000 a year, which was less than the \$58,000 that men with a bachelor's degree earned. Working full-time, year-round was associated with higher earnings for both men and women, but there was still an \$11,000 gender difference in annual median earnings (about \$48,000 for men and \$37,000 for women). Women who worked full-time, year-round earned less than men in the all-worker population⁶³

The final sentence means that even when you include all men (part-time and those not working year round), women working full-time and year-round still earned less. The report continues, noting that full-time, year-round female workers also:

earned less than full-time, year-round male workers at each educational attainment level. The female-to-male earnings ratio in the total worker population was 0.71, while the ratio for full-time, year-round workers was 0.77. . . . [W]omen earned 71 percent of what men earned overall, and earned 77 percent of what men earned when working full-time, year-round. At the bachelor's level and below, women who worked full-time earned 73 to 74 percent of what men earned at the same level of education. The earnings of women who worked full-time with advanced degrees were 69 percent of men's earnings.⁶⁴

In other words, women with higher levels of education are actually experiencing a larger wage gap with men (sixty-nine cents to the male dollar) than are their less educated sisters (seventy-seven cents to the male dollar). This data powerfully rebuts the notion that women are experiencing a wage gap due to having less education.

2. *Women Are Less Experienced and Have Less Seniority Than Men*

This is the corollary to the education explanation discussed above and forms the second leg of the "merit gap" explanation.⁶⁵ The idea here is two-fold. First and most basic is the notion that women, compared to men, have not been in the employment pipeline long enough to gain the necessary ex-

⁶³ RYAN & JULIE SIEBENS, *supra* note 62, at 14. See also *id.* at 15–16 for information on data sources and accuracy.

⁶⁴ *Id.*

⁶⁵ MURPHY & GRAFF, *supra* note 3, at 4.

perience to attain raises or higher-paying jobs.⁶⁶ The second, more modern formulation of this explanation is that women accumulate less experience than men during an equivalent number of years on the job due to curtailed hours and/or leaves due to family responsibilities.⁶⁷

The more traditional experience argument made some sense in the years just after the passage of Title IX. In that era, when substantial numbers of women were first entering the professional workforce with college and advanced degrees, it seemed intuitive that these young graduates were at a disadvantage when competing with men who had been on the job longer. This was particularly convincing in fields that required post-graduate degrees since women had attained these in such small numbers prior to Title IX.⁶⁸

Today this logic no longer holds. For example, women have entered the fields of medicine, law, and business in large numbers since 1980.⁶⁹ These women have had decades to move up through the ranks of their respective professions, garnering the necessary experience and training to achieve the top positions and salaries in their fields. Yet pay equity has remained elusive for these experienced and skilled female professionals. In medicine, the top paid specialties remain dominated by men.⁷⁰ Even for those women who find their way into the highest paying jobs, their salaries remain less than men in the same jobs.⁷¹ Parallel wage gaps—caused both by glass ceilings and gender wage disparity at the partner and CEO level—occur in law and business, often within the same firm.⁷²

⁶⁶ *Id.*

⁶⁷ *Id.* at 194–213.

⁶⁸ In 1970, 2.1% of females had five or more years of post-secondary education. U.S. CENSUS BUREAU, YEARS OF SCHOOL COMPLETED BY PERSONS 14 YEARS OLD AND OVER BY RACE, SEX, AND AGE: 1970 tbl.199, <http://www.census.gov/hhes/socdemo/education/data/cps/1970/tab-199.pdf> (last visited Apr. 3, 2013).

⁶⁹ ARIANE HEGEWISCH ET AL., INST. FOR WOMEN'S POLICY RESEARCH, SEPARATE AND NOT EQUAL? GENDER SEGREGATION IN THE LABOR MARKET AND THE GENDER WAGE GAP 4, *available at* http://www.iwpr.org/publications/pubs/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap/at_download/file (tracking the increasing number of female lawyers from 1972–2009); *Statistical Overview of Women in the Workplace*, CATALYST (Oct. 17 2012), http://www.catalyst.org/file/672/qt_statistical_overview_of_women_in_the_workplace.pdf (providing data on the percentage of women in certain professional roles, including “Fortune 500 Leadership” positions); *A Profile and History of Women in Medicine*, AM. MED. ASS'N (July 2012), <http://www.ama-assn.org/resources/doc/wpc/wimtimeline.pdf>; *Women in Medicine: An AMA Timeline*, AM. MED. ASS'N, <http://www.ama-assn.org/resources/doc/wpc/wimtimeline.pdf> (last visited Apr. 3, 2013) (noting that “the percentage of medical graduates who were women nearly tripled between 1970–1980”).

⁷⁰ David Leonhardt, *Scant Progress on Closing Wage Gap in Women's Pay*, N.Y. TIMES, Dec. 24, 2006, at 16.

⁷¹ See, e.g., 24 *Cents Short*, *supra* note 2; Suzanne Riss, *Salary Survey 2005: How Can We Close the Gender Pay Gap?*, NAFE MAG., Winter 2005, at 18, 22–23 (breaking out positions within each industry).

⁷² AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2011 5 (2011), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_2011.authcheckdam.pdf; *The Vicious Cycle of the Gender Pay Gap*, KNOWLEDGE@WHARTON (June 6, 2012), <http://knowledge.wharton.upenn>

The basic assertion that women are paid less because they are less experienced and have less seniority is best tested within a specific industry. Using private law firms as an example, there was a time when many fewer women were qualified to practice at the top private law firms.⁷³ Today, however, men and women graduate from even the best law schools in equivalent numbers.⁷⁴ Private law firms hire men and women into entry-level positions in equivalent numbers.⁷⁵ Male and female junior associates at private law firms plug along the same track toward partnership. Yet, dramatically fewer women attain promotion to partnership and with it the highest paying positions in the firm.⁷⁶ Whatever the factors are that keep women lawyers from these top-paying positions, the old excuse of women lacking the necessary training and experience for top pay no longer holds here. In addition, when women do become partners, their compensation remains lower than their male counterparts: women equity partners in the 200 largest firms in the U.S. earn only 86% of the compensation earned by their male peers.⁷⁷ This is certainly not due to lack of experience or training.

Data from private law firms dramatically illustrate the glass ceiling that so many women experience in their efforts to break through to the top levels of responsibility and salary in their respective fields.⁷⁸ This is a complex issue that will be discussed further in Section II.B.3. below. For the purposes of this Section, the point is simply that women along the way up the ladder to that ceiling are now numerous so the explanation that women are being paid less because they are not as far up the ladder no longer holds. The wage

edu/createpdf.cfm?articleid=3016 (discussing how women in the same firms as men get assigned lesser accounts leading inevitably to lower pay).

⁷³ *First Year and Total J.D. Enrollment by Gender: 1947-2010*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/1947_2010_enrollment_by_gender.authcheckdam.pdf (last visited Apr. 3, 2013).

⁷⁴ See AM. BAR ASSOC. COMM'N ON WOMEN IN THE PROFESSION, *supra* note 72, at 3.

⁷⁵ *Id.* at 1.

⁷⁶ *Id.*; see also Sacha Pfeiffer, *Many Female Lawyers Dropping off Path to Partnership*, BOSTON GLOBE, May 2, 2007, at A1.

⁷⁷ BARBARA M. FLOM & STEPHANIE A. SCHARF, NAT'L ASS'N OF WOMEN LAWYERS, REPORT OF THE SIXTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (2011), available at [http://nawl.timberlakepublishing.com/files/NAWL%202011%20Annual%20Survey%20Report%20FINAL%20Publication-ready%2011-14-11\(1\).pdf](http://nawl.timberlakepublishing.com/files/NAWL%202011%20Annual%20Survey%20Report%20FINAL%20Publication-ready%2011-14-11(1).pdf); See also JOAN C. WILLIAMS & VETA T. RICHARDSON, PROJECT FOR ATTORNEY RETENTION, NEW MILLENNIUM, SAME GLASS CEILING: THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN 3 (2010), available at <http://www.attorneyretention.org/Publications/SameGlassCeiling.pdf> (showing that women law partners are paid significantly less than male partners and that pay gap is greater for partners than for associates).

⁷⁸ The "glass ceiling" is a term coined for the invisible but impenetrable barrier on the corporate ladder that keeps women from climbing to the top positions. See *Glass Ceiling Definition*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/glass%20ceiling> (last visited Apr. 3, 2013). While some women step off this ladder by choice, there are now sufficient numbers of women on the ladder that attrition alone cannot explain the dramatically low numbers of women in top positions.

gap exists long before women hit the glass ceiling⁷⁹ and continues even when they break through it.⁸⁰

The second generation of the “experience” explanation is a more challenging one to unravel. This explains the wage gap by differentials in work experience caused by women limiting their hours and/or interrupting their careers for motherhood.⁸¹ Hence, a man and a woman might begin their careers simultaneously but the man is much more likely to plug along continuously while the woman is much more likely to go to part-time work and/or to take a career break of five to ten years.⁸² When the woman then reenters the full-time workforce, her total experience on the job is less than that of the comparable male who began the same day that she did years earlier. This experience differential, which has been called the “Mommy Penalty,”⁸³ is impacting some women’s wages but this does not necessarily mean that it explains the wage gap.

There does appear to be an additional wage penalty for many mothers beyond that experienced by their childless sisters.⁸⁴ Much of this may be caused more by employers’ fallacious assumptions about how many hours mothers are willing to work rather than on mothers’ actual choices to curtail their hours since even mothers who do not reduce their hours seem impacted by the “penalty.”⁸⁵ For mothers who are experiencing the “Mommy Penalty,” there are steps that mothers can take to avoid or to minimize it.⁸⁶ In addition, legislating a more family-friendly workplace might improve these women’s situation,⁸⁷ as would a cultural shift toward more equal parental responsibility between mothers and fathers.⁸⁸ However, this problem lies

⁷⁹ See, e.g., *24 Cents Short*, *supra* note 2; Riss, *supra* note 71, at 22–23 (breaking out positions within each industry).

⁸⁰ See, e.g., WILLIAMS & RICHARDSON, *supra* note 77, at 3.

⁸¹ DEY & HILL, *supra* note 2, at 2, 20–22; *Baby Blues*, ECONOMIST: SPECIAL REPORT ON WOMEN & WORK, Nov. 26, 2011, at 9–10; *Here’s to the Next Half Century*, ECONOMIST: SPECIAL REPORT ON WOMEN & WORK, Nov. 26, 2011, at 16, 19.

⁸² CAROL FISHMAN COHEN & VIVIAN STEIR RABIN, *BACK ON THE CAREER TRACK: A GUIDE FOR STAY-AT-HOME MOMS WHO WANT TO RETURN TO WORK 201–03* (2008); MURPHY & GRAFF, *supra* note 3, at 9.

⁸³ MURPHY & GRAFF, *supra* note 3, at 9, 194–213; see also *Baby Blues*, *supra* note 81, at 10; *24 Cents Short*, *supra* note 2.

⁸⁴ *The Wage Gap Between Moms, Other Working Women*, NAT’L PUB. RADIO (Feb. 7, 2012), <http://www.npr.org/2012/02/07/146522483/the-wage-gap-between-moms-other-working-women>.

⁸⁵ MURPHY & GRAFF, *supra* note 3, at 194–213 (demonstrating that much of the “Mommy Penalty” is based on stereotypes and assumptions that employers make about what hours mothers will be willing to work rather than on women’s choices to curtail hours or go to part-time status).

⁸⁶ See *The Wage Gap Between Moms*, *supra* note 84; Catherine Rampell, *The “Mommy Penalty,” Around the World*, N.Y. TIMES ECONOMIX BLOG (Dec. 17, 2012), <http://economix.blogs.nytimes.com/2012/12/17/the-mommy-penalty-around-the-world>.

⁸⁷ See generally Marianne DelPo Kulow, *Legislating a Family Friendly Workplace*, 7 Nw. J. L. & SOC. POL’Y 88 (2012).

⁸⁸ A CENTURY OF WOMEN, *supra* note 21, at 58 (“Men need to change. Men need to begin to understand that work and family are responsibilities of both sexes. Men need to value parenthood as much as they say they value motherhood.” (quoting Ruth Bader Ginsburg));

largely outside the reach of this Article since it is a bit of a red herring when discussing the gender wage gap because childless women still experience a gender wage gap.

Women without children still experience a wage gap: even when childless women and men are compared, full-time working women earn only 82% as much as full-time working men.⁸⁹ Losing eighteen cents per dollar is clearly better than losing twenty-three cents per dollar, but as with other alleged wage gap explanations, removing motherhood does not remove the entire gap. Hence, even when we compare men with women who have no children to detract from their amount of work experience, we still see a wage gap. Therefore, even in its more modern formulation, the explanation of the gap by differences in experience does not tell the whole story.⁹⁰

3. *Women Are Not Attaining the Highest Paying Jobs in Their Fields*

This is a true statement but it does not explain the persistent wage gap because the gap exists even when comparing only women and men at the same levels of their careers. As mentioned above, women continue to encounter a glass ceiling on their climb up the professional ladder to the top positions in their field. This phenomenon itself has engendered discussion about underlying reasons ranging from discrepancies in education and experience to a lack of female interest in the top paying positions. As discussed in Section II.B.1. above, the education argument no longer holds water since women today are as educated as (or more educated than) men. As discussed in Section II.B.2. above, the experience argument today only offers a partial explanation for the lack of women's advancement, and then only for women who have interrupted their full-time careers. Furthermore, while these women—usually mothers—might be expected to experience a delay in reaching the top positions since it will take them longer to acquire the requisite experience than those who remain full-time from the start, they should eventually achieve the top positions when they return to full-time work and accumulate the missing experience. Thus the absence of women from top positions cannot be attributed to lack of experience now that enough time

DEY & HILL, *supra* note 2, at 3 (noting that fatherhood appears to offer a “wage premium,” with fathers spending more time in the office upon becoming a parent, while mothers spend less time at the office).

⁸⁹ CHAIRMAN'S STAFF OF U.S. CONG. JOINT ECON. COMM., 112TH CONG., MOTHER'S DAY REPORT: PAYCHECK FAIRNESS HELPS FAMILIES, NOT JUST WOMEN 1 (2012), available at http://www.jec.senate.gov/public/?a=Files.Serve&File_id=F11e726b-135b-4e1d-8334-2903491d9691. Some estimates are better. See, e.g., Rampell, *supra* note 86 (stating that in the United States, the median childless, full-time-working woman of reproductive age earns seven percent less than the median male full-time worker).

⁹⁰ See *24 Cents Short*, *supra* note 2 (breaking out positions within each industry); DEY & HILL, *supra* note 2, at 3 (“The pay gap . . . cannot be fully accounted for by factors known to affect wages, such as experience (including work hours) . . .”).

has passed for even women who took the slow route to have arrived.⁹¹ As for a lack of female interest in top paying positions, women do continue to be segregated into lower paying jobs⁹² but this is not the same as the glass ceiling. When we look within any particular industry we simply see fewer women at the top than men.⁹³ When we see educated and experienced women in the pipeline for high-paying jobs, there appears to be no logical explanation why so many fall short of achieving them. Some women opt out of these high-stress, long-hours jobs due to family responsibilities or other values, but this does not account for the entire phenomenon.⁹⁴

The glass ceiling does negatively impact women's professional advancement and, when wages of all male workers are compared to wages of all female workers, it also aggravates the wage gap because the high-paying jobs above the ceiling skew the male average wage upward. However, the glass ceiling does not tell the whole story about gender wage differences: when we remove the top paying jobs from the comparison the gap still exists; the gap exists at all levels of employment; and even when we compare only workers at the highest levels of their professions, women make less than men.⁹⁵

4. *Women Are Occupationally Segregated Into Lower Paying Jobs*

As discussed in Section II.A above, for many generations women were simply not welcome in many high-paying jobs because such jobs were considered inappropriate, too dangerous, or too difficult for women.⁹⁶ Over time

⁹¹ *Here's to the Next Half Century*, *supra* note 81, at 19.

⁹² See discussion *infra* Section II.B.4.

⁹³ *Glass Ceilings: The Status of Women as Officials and Managers in the Private Sector*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/reports/glass-ceiling/index.html> (last modified Mar. 4, 2004) ("Women represent 48 percent of all EEO-1 employment, but represent only 36.4 percent of officials and managers.").

⁹⁴ *Here's to the Next Half Century*, *supra* note 81, at 19 (women are more likely than men to go to part-time or quit); MURPHY & GRAFF, *supra* note 3, at 225–26 (men are not all ambitious and twenty-four million single, separated, divorced, or widowed women working full-time may be very motivated to earn as much as possible); see generally SYLVIA ANN HEWLETT, *ON RAMPS OFF RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS* (2007) (see chapters starting on pages 25 and 57).

⁹⁵ See, e.g., WILLIAMS & RICHARDSON, *supra* note 77 (showing that women law partners are paid significantly less than male partners and that pay gap is greater for partners than for associates); Mary Ellen Egan, *Top-Paid Female Chief Executives*, FORBES (Apr. 28, 2010), http://www.forbes.com/2010/04/27/ceo-salaries-bonuses-global-companies-forbes-woman-leadership-boss-10-top-paid-female-chief-executives.html?feed=rss_home (demonstrating by illustration that most women CEOs make substantially less than their male counterparts); see also *24 Cents Short*, *supra* note 2 (comparing salaries of men and women at particular job levels); *America's Gender Wage Gap*, ECONOMIST (Apr. 17, 2012), <http://www.economist.com/blogs/graphicdetail/2012/04/focus-3> ("The gender wage gap (women's earnings as a percentage of men's) was most pronounced amongst CEOs and financial managers.").

⁹⁶ See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (illustrating laws that sought to protect women from jobs that were considered inappropriate and dangerous (bartending)); *Muller v. Oregon*, 208 U.S. 412 (1908) (illustrating laws that sought to protect women from jobs that were considered dangerous (long hours) and difficult (long hours)).

this has changed both culturally and legally. Women demonstrated their ability to do “male” jobs during both World Wars, particularly World War II.⁹⁷ Women increasingly went to college and became qualified for “male” jobs.⁹⁸ The cultural revolution of the 1960s gave women a voice to complain about “the problem that had no name”—the widespread discontent of housewives in the 1950s and 1960s despite material comforts, happy marriages, and healthy children—and led many women to seek fulfillment outside the home and in a variety of workplaces.⁹⁹ Economic realities caused a shift from the one-breadwinner model of the 1970s to a dominant model of the two-earner family with both parents working full time today.¹⁰⁰ The advent of no-fault divorce in the 1970s resulted in an increase in the number of divorced women supporting themselves and their children.¹⁰¹ In addition, Title VII of the Civil Rights Act of 1964¹⁰² opened workplace doors by outlawing gender workplace discrimination.¹⁰³ Women now work in substantial numbers in many fields once closed to them.

The changing gender patterns of American labor have been dramatic since the passage of Title VII. In 1972, 2% of dentists were female compared to 30% in 2009.¹⁰⁴ The percentage of total lawyers who are female has increased from 4% to 32%.¹⁰⁵ The number of mail carriers who are female has grown from 6.7% to 34.9%.¹⁰⁶ Still, occupational segregation persists. A number of occupations that require less than a four-year college degree are still dominated by women. For example, 97.9% of all dental assistants were female in 1972, compared with 97.6% in 2009. Similarly, 91.2% of all hairdressers, hairstylists and cosmetologists were female in 1972, compared with 90.4% in 2009. With respect to occupations requiring at least a four-year college degree: 96.8% of all prekindergarten and kindergarten teachers were female in 1972, compared with 97.8% in 2009; 82.7% of all librarians were female in 1972, compared with 81.6% in 2009; and 97.6% of “registered nurses” were female in 1972 compared with 92% in 2009.¹⁰⁷ In a number of reasonably well-paid male-dominated occupations, changes have also been minimal. In 1972 women constituted 0.5% of machinists, 0.6% of electri-

⁹⁷ See A CENTURY OF WOMEN, *supra* note 21, at 34–35.

⁹⁸ See discussion *supra* Section II.B.1.

⁹⁹ See A CENTURY OF WOMEN, *supra* note 21, at 39–45.

¹⁰⁰ *The Cashier and the Carpenter*, *supra* note 47, at 2.

¹⁰¹ W. Bradford Wilcox, *The Evolution of Divorce*, 1 NAT'L AFFAIRS 81, 81 (2009), available at http://www.nationalaffairs.com/doclib/20091229_Wilcox_Fall09.pdf (stating that from 1960–1980, the U.S. divorce rate more than doubled).

¹⁰² Civil Rights Act of 1964, Tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2013)).

¹⁰³ Although the inclusion of “sex” in Title VII was unexpected, see A CENTURY OF WOMEN, *supra* note 21, at 52 (describing Senator Howard W. Smith’s (D-Va.) attempt to block passage of the civil rights bill by inserting the word “sex”), the impact of the statute on women was as great or greater than on any of the other groups protected by the statute.

¹⁰⁴ HEGEWISCH ET AL., *supra* note 69, at 2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

cians and 0.5% of carpenters, and in 2009 only 5.4% of all machinists, 2.2% of all electricians, and 1.6% of all carpenters were female.¹⁰⁸ This segregation matters because a major study by the Institute for Women's Policy Research confirms that average earnings tend to be lower the higher the percentage of female workers in an occupation, and that this relationship is strongest for the most highly skilled occupations.¹⁰⁹ It is unclear whether this negative correlation is a result of discrimination, a cause of discrimination, both, or due to some other factors. However, the study authors do recommend, to correct this inequity, both that women be encouraged to enter "non-traditional" jobs and that equal pay laws be better enforced.¹¹⁰

Why does occupational segregation continue in so many jobs despite Title VII and cultural changes? The American Association of University Women Educational Foundation ("AAUW") has asked this question in the context of its recent wage gap study entitled *Behind the Pay Gap*.¹¹¹ The study concludes that school-age girls need encouragement to study science, technology, engineering, and mathematics ("STEM") subjects that lead to higher paying jobs,¹¹² and young women are choosing to major in college subjects that lead to lower paying jobs.¹¹³ Women continue to be concentrated in fields associated with lower earnings, such as education, health, and psychology while male students dominate in the higher-paying fields, such as engineering, mathematics, and physical sciences.¹¹⁴ Even those women who choose majors with the potential for high-paying jobs often then choose a lower paying job. For example, a mathematician who chooses to teach will earn much less than a mathematician who goes into business or computer science.¹¹⁵ Hence, self-imposed occupational segregation remains a partial

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.* at 10–13 (discussing the statistically significant negative relationship between the percentage of female workers and the level of earnings at each skill level studied, noting that the negative relationship is "clearly most pronounced among high-skilled occupations"); see also *id.* at 8 (defining "high skill" occupations based on the 2010 U.S. Bureau of Labor Statistics occupation classifications which, in turn define "high skill" occupations as those requiring at least a bachelor's degree).

¹¹⁰ *Id.* at 13.

¹¹¹ DEY & HILL, *supra* note 2, at iii.

¹¹² *Id.* at 30 (discussing the need for more programs in the elementary and high school years to encourage female interest in STEM fields and emphasizing the importance of encouraging girls in high school to take math so as to increase the likelihood of girls choosing a math or science major in college). The ongoing lack of female interest and achievement in STEM subjects has also been the impetus behind many current experiments with single-sex education. See, e.g., James Vaznis, *In Detroit, a Lesson in Same-Sex Schools*, BOSTON GLOBE, Jan. 2, 2009; Akilah Johnson, *Separating Genders Shows Promise at Roxbury School*, BOSTON GLOBE, Jan. 13, 2012, at A1. Cf., *Separated by Sex: Title IX and Single-Sex Education*, AM. ASS'N OF UNIV. WOMEN (2010) (summarizing studies that show benefits of single-sex education, including the AAUW's prior study demonstrating how girls are being shortchanged in co-ed public elementary school classrooms in math and science education).

¹¹³ DEY & HILL, *supra* note 2, at 2.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (also stating that women working in computer science earn over 37% more than those who go into education or administrative jobs and that women who choose to work in the

explanation for the gender wage gap¹¹⁶ and it is important to develop new strategies to address this modern version of the phenomenon. The AAUW, for example, endorses encouraging girls and young women to make different school and job choices.¹¹⁷

Still, the AAUW's regression analyses conclude that this modern form of occupational segregation impacts women's wages in lower paying jobs more than it does men's wages in those same jobs.¹¹⁸ In other words, men who enter traditionally female jobs are disadvantaged by the predominance of women in those jobs, which drives the wages down, but not as much as are women in these jobs, who are twice disadvantaged—first by being in a “female” field and second by being a woman in that field, since men make more than women even in “female” fields. This indicates that the entire wage gap cannot be explained by occupational segregation since even within traditionally lower paying jobs, men still make more than women:¹¹⁹ in education, nursing, and coaching, women earn less than their male counterparts.¹²⁰

5. *Employers Continue to Engage in Wage Discrimination*

All four other proffered explanations for the gender wage gap do not completely explain the phenomenon. Thus one can reasonably conclude that some wage discrimination continues to exist. To recap, the wage gap exists even among the youngest generation of adults within which educational parity has been achieved. Educational differences cannot explain this gap. Experience differences also have been largely eradicated. Although the “Mommy Penalty” continues to plague some working mothers, experience differences cannot explain the wage gap that exists between men and childless women. Occupational segregation is not what it once was. Societal barriers to women's access to many high-paying occupations have been removed. Women do continue to self-segregate into lower paying fields, specialties, and positions, but within any given field, specialty, or position the

non-profit and local government sectors earn less than those in the for-profit and federal government sectors).

¹¹⁶ It is unclear exactly why young women continue to self-segregate but the AAUW study authors identify a few factors. *Id.* at 30. First, many young women choose not to major in STEM subjects because they perceive these as uninteresting, but when told of the societal benefits of these subjects the women's interest in them increases. *Id.* High school math is critical as well: increasing girls' high school math exposure by as little as one course appears to double the likelihood that the girl will pursue math or science at college. *Id.* Finally, self-assessment appears vital since the higher students assess their abilities in a subject the more likely they are to take classes in that subject or choose it as their major. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ ARIANE HEGEWISCH & HANNAH LIEPMANN, INST. FOR WOMEN'S POLICY RESEARCH, FACT SHEET: THE GENDER WAGE GAP BY OCCUPATION 3 (2010), available at <http://www.iwpr.org/publications/pubs/free-download-button.png> (also stating that women earn less than men in almost all occupations, and illustrating this with tables).

¹²⁰ *Id.*

gap still exists, so occupational segregation does not explain the full gap. The glass ceiling does prevent many women from attaining the highest paying positions in their fields, but does not explain why women CEOs make less than their male counterparts.

Work remains to discover ways to shatter the glass ceiling, to address the challenges facing working mothers, and to encourage girls and young women to consider fields of study and particular occupations where the highest income is available. However, all of these corrections will not completely address the residual wage gap. If this were true, when we correct for these factors in the current data we would find no gap. This is not the case and thus absent some alternative explanation, we must conclude that some wage discrimination continues to exist.

To address the questions raised at the outset of this Section, the gap began when women first started to work for wages, was first quantified in the 1950s at fifty-nine cents on the male dollar, and today stands stagnant at seventy-seven cents on the male dollar. Progress toward gender wage parity has been slow because the “merit gap” does not tell the whole story. In fact, progress has flattened because the “merit gap” has been mostly closed. This leaves us with a situation where the remaining gap within an industry, comparing full-time workers at the same level of their careers, with comparable education and experience, can only reasonably be explained by wage discrimination.¹²¹ A number of authorities reach this conclusion,¹²² including the National Equal Pay Task Force, a group commissioned by President Obama to crack down on violations of the Equal Pay Act and consisting of professionals at the Equal Employment Opportunity Commission (“EEOC”), the Department of Justice (“DOJ”), the Department of Labor (“DOL”), and the Office of Personnel Management (“OPM”). A 2012 White House report of this Task Force’s work states: “Decades of research shows that no matter how you evaluate the data, there remains a pay gap—even after factoring in the kind of work people do, or qualifications such as education and experience. Those same studies consistently conclude that discrimination is the best explanation for the difference.”¹²³

In addition, the AAUW study of college graduates recently concluded:

[T]he portion of the pay gap that remains unexplained after all other factors are taken into account is 5 percent one year after graduation and 12 percent 10 years after graduation. These unex-

¹²¹ See, e.g., MURPHY & GRAFF, *supra* note 3, at 72–81 (detailing examples of jury awards and settlements of discriminatory unequal pay claims).

¹²² See, e.g., NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, *THE FACTS ARE CLEAR: THE WAGE GAP IS HARMING WOMEN AND FAMILIES 1* (2012), available at http://www.nationalpartnership.org/site/DocServer/The_Facts_Are_Clear_Wage_Gap.pdf?docID=10501 (“Studies have found that even when all relevant education, career and family attributes are taken into account, there is still a significant, unexplained gap between the wages paid to women and men in the United States.”).

¹²³ WHITE HOUSE, *supra* note 4, at 1.

plained gaps are evidence of discrimination, which remains a serious problem for women in the work force.¹²⁴

A follow up AAUW study by different researchers looked at college graduates just one year after graduation. This study controls for experience, motherhood, and glass ceiling as possible factors, as well as gender differences in negotiation skills¹²⁵ since entry-level salaries in the current economy are rarely negotiable. The study found that a mere one year after graduation women are earning eighty-two cents to the male dollar, even when the researchers controlled for occupation chosen and hours worked. The authors stated that these findings demonstrate that “there are solid reasons to conclude that gender discrimination is a problem in the workplace.”¹²⁶ Given the widely supported conclusion that at least some part of the wage gap is attributable to illegal wage discrimination, any cogent strategy to completely eliminate the remaining gap must include a mechanism to eradicate wage discrimination. We have three federal laws that attempt to achieve this, but clearly their effectiveness has been limited.¹²⁷

III. SOLUTIONS: ATTEMPTED AND SUGGESTED

Suggestions for how to close the gender wage gap include both cultural and legal approaches. Since the 1960s each of the proposed solutions discussed below has been effective in narrowing the gap to some degree but, to date, all techniques attempted have fallen short of eliminating the gap. Wage transparency would enhance the effectiveness of each approach.

A. Cultural Solutions

Cultural solutions to the gender wage gap include two attempts to improve women’s work-related interpersonal skills and one acknowledgement

¹²⁴ DEY & HILL, *supra* note 2, at 3.

¹²⁵ Some commentators consider women’s inferior negotiating skills to be a sixth possible explanation for the gender wage gap. See, e.g., *One Reason for Pay Gap: Women Don’t Speak Up*, NBC NEWS, May 7, 2007, <http://www.nbcnews.com/id/18418454>. While a gender gap in negotiating skills has been demonstrated, see discussion *infra* Section III.A.2 and notes 141–42, and improving women’s negotiating skills is an important cultural tool in narrowing the wage gap, see discussion *infra* Section III.A.2 and note 145, characterizing these skills as part of the cause for the gap implies that employers set wages and raises entirely as a reaction to their employees’ negotiating, irrespective of the fairness of those wage decisions. This view relieves the employer of responsibility for ensuring fair wages, as required under the Equal Pay Act and Title VII, see discussion *infra* Section III.B.2. and notes 180, 193, and places undue responsibility on the female employee to not only be adequately qualified and experienced, but also to privately enforce the equal pay laws.

¹²⁶ CORBETT & HILL, AM. ASS’N U. WOMEN, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 3 (2012), available at <http://www.aauw.org/GraduatetoaPayGap/upload/AAUWGraduatingtoaPayGapReport.pdf>.

¹²⁷ *But see* WHITE HOUSE, *supra* note 4, at 3–6 (detailing efforts to improve enforcement of existing statutes, including litigation but also efforts to inform workers about unequal pay and rights).

that attitudes about what work women can do need to change. The first two of these—more competitive sports and better negotiating skills—put the responsibility on women to become more competitive and assertive. These are both effective strategies that have shown some results but leave women unable to advocate for equal pay when they are unaware of illegal gender differences in compensation. The third cultural approach—patience and generational change—puts little responsibility on those who cling to obsolete assumptions about women and work but, rather, suggests that these attitudes will simply die out over time. This process, far from proven to be inevitable, can only be expedited by making people more aware of unjustified wage disparities.

1. *More Competitive Sports*

As discussed in Section II.B.1 above, Title IX dramatically impacted female participation in sports.¹²⁸ In the decades immediately following the statute's 1972 passage, much was written about the health benefits of female participation in school sports.¹²⁹ As the culture changed from begrudging acceptance of female athletes to active support for girls' participation in athletics, the health benefits of sports became more widely popularized.¹³⁰ Now researchers are also examining the professional impact of sports participation by girls and young women. A recent well-respected research study has illustrated for the first time a measurable benefit in employment to girls who play sports.¹³¹ The study found that up to 40% of the overall rise in employment of young women in recent decades can be attributed to the increased opportunity to play sports.¹³² This study quantified what many had instinctively understood for decades: the skills learned in sports have important

¹²⁸ As noted by ESPN:

In 1971, the year before Title IX became law, fewer than 300,000 girls participated in high school sports, about one in 27 [while 30 years later, in 2002] the number approach[ed] 3 million, or approximately one in 2½ The number of women participating in intercollegiate sports in that same span [went] from about 30,000 to more than 150,000. In the [years 1992-2002] alone, the number of women's college teams nearly doubled.

Greg Garber, *Landmark Law Faces New Challenges Even Now*, ESPN, June 22, 2002, <http://espn.go.com/gen/womenandsports/020619title9.html>.

¹²⁹ See generally JEAN ZIMMERMAN & GIL REAVILL, *RAISING OUR ATHLETIC DAUGHTERS* (1998); see also Ian Janssen & Allana G. LeBlanc, *Systematic Review of the Health Benefits of Physical Activity and Fitness in School-Aged Children and Youth*, 7 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 40 (2010).

¹³⁰ See, e.g., *If You Let Me Play*, NIKE, http://www.youtube.com/watch?v=AQ_XSHpIbZE (last visited Apr. 3, 2013) (presenting a Nike advertisement summarizing benefits of sports for women).

¹³¹ See generally Stevenson, *supra* note 58; see also Betsey Stevenson & Justin Wolfers, *Equal Opportunity in Sports Makes Both Sexes Richer*, BLOOMBERG, June 18, 2012, <http://www.bloomberg.com/news/2012-06-18/equal-opportunity-in-sports-makes-both-sexes-richer.html>.

¹³² Stevenson, *supra* note 58, at 294.

applications in the workplace. Skills that can impact a person's professional success include teamwork, handling both winning and losing, and learning to put off short-term gratification for long-term rewards.¹³³ Encouraging more girls and young women to participate in competitive sports is one strategy for closing the wage gap. To break down occupational segregation and break through glass ceilings, women need confidence, patience, resilience, and persistence—all traits honed in competitive sports. Nonetheless, employers bent on paying discriminatory wages will not be stopped entirely by women maximizing their competitive skills.

2. *Better Negotiation Skills for Women*

In 1982 Carol Gilligan first documented that there are gender differences in both psychological and moral development.¹³⁴ Among Gilligan's many paradigm-shifting findings were data illustrating that while American men traditionally find their identity in their work, women tend to define themselves by their relationships rather than their material successes.¹³⁵ Gilligan found that these differences can impact women negatively when they are evaluated by male criteria.¹³⁶ Deborah Tannen researched how these differences in turn lead to differences in how men and women use language. She brought awareness of these differences to a mass audience in 1990 with her best-selling book *You Just Don't Understand: Women and Men in Conversation*.¹³⁷ A few years later Tannen put this into the context of the workplace with *Talking from 9 to 5: Women and Men at Work*.¹³⁸ These works paint a picture of how women use language to connect and to establish relationships, while men use language to collect information and to solve problems. These cross-purposes can put women at a disadvantage when they are being evaluated by male supervisors. For example, if a male supervisor is looking for a succinct, quantitative report and a female employee provides a longwinded, qualitative explanation of a project, the supervisor may undervalue the employee's work or value it less than that of a male who provides reports in a style more like the supervisor's own. Gender communication

¹³³ O'Brien, *supra* note 58.

¹³⁴ See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

¹³⁵ *Id.* at 173; see also Leonhardt, *supra* note 47, at 16 (“[T]he other view is that women consider money a top priority less often than men do. Many may relish the chance to care for children or parents and prefer jobs, like those in the nonprofit sector, that offer more opportunity to influence other people's lives.”). This could be a partial explanation for the lack of women in high-paying but highly time-consuming CEO-type jobs.

¹³⁶ GILLIGAN, *supra* note 134, at 173 (“My research suggests that men and women may speak different languages that they assume are the same [T]hese languages . . . contain a propensity for systematic mistranslation, creating misunderstandings which impede communication”).

¹³⁷ See generally DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990).

¹³⁸ See generally DEBORAH TANNEN, *TALKING FROM 9 TO 5: WOMEN AND MEN AT WORK* (1994).

style differences also impact both the ways in which and the comfort with which men and women negotiate.

American men are encouraged from an early age to self-promote—whether it be in a pick-up basketball game or in the classroom. In contrast, women traditionally have been taught to be humble, polite, and self-deprecating.¹³⁹ They raise their hands, wait their turns, mind their manners, and don't argue. While these traits may be less gender specific today than they were a generation ago, they still lead to a gender difference both in negotiations and in how women who try to negotiate like men are perceived.¹⁴⁰ Studies repeatedly illustrate that women are much less likely than men to ask for promotions, raises, or plum assignments.¹⁴¹ When women do negotiate they tend to be less successful, perhaps because they are less practiced at it and less socially comfortable doing it.¹⁴²

Other recent studies illustrate that there may also be a legitimate reason for women's hesitation to negotiate. One found that women who negotiate are subtly penalized by their superiors, though more so by male managers than by female managers.¹⁴³ Study subjects were less willing to work with women who negotiated than with those who did not, finding the negotiators "less nice." In contrast, people were equally or more willing to work with men who negotiated. Hence, it is not only women who need to be trained to be better negotiators. Men (and women) also need to "unlearn" the social assumptions about women who do negotiate.¹⁴⁴

Many experts in the field of wage inequity endorse programs to train girls and women how to negotiate well.¹⁴⁵ This certainly appears to be an

¹³⁹ Laurie Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629, 629 (1998) (research shows that women are viewed negatively when they behave confidently and assertively and rewarded when they behave in a self-effacing manner).

¹⁴⁰ *Id.*; Shankar Vedantam, *Salary, Gender and the Cost of Hagglng*, WASH. POST, July 30, 2007, at A7; DEY & HILL, *supra* note 2, at 30.

¹⁴¹ Vedantam, *supra* note 140, at A7 (noting a Carnegie Mellon University anecdote in which no women grad students would ask to teach while men would); LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 2-10* (2003) (describing numerous studies showing that men are many times more likely to negotiate than women); *Here's to the Next Half Century*, *supra* note 81, at 19 (quoting Iris Bohnet, professor at Harvard Kennedy School, as saying that women are less likely than men to negotiate for themselves).

¹⁴² BABCOCK & LASCHEVER, *supra* note 141, at 46, 62.

¹⁴³ Vedantam, *supra* note 140, at A7 (discussing Hannah Riley Bowles et al., *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) (showing that women who negotiated were perceived as "less nice" and others chose to work with non-negotiators over negotiators)); *see also* DEY & HILL, *supra* note 2, at 31.

¹⁴⁴ Vedantam, *supra* note 140, at A7 (quoting Hannah Riley Bowles: "This isn't about fixing the women . . . They are responding to incentives within the social environment.").

¹⁴⁵ *See, e.g.*, MURPHY & GRAFF, *supra* note 3, at 266-83; DEY & HILL, *supra* note 2 (recommending that, among other actions, we should encourage women to negotiate for better quality jobs and pay); WHITE HOUSE, *supra* note 4 (listing initiatives to close gap, including funding for negotiation workshops for girls and women); *Wage: Women Are Getting Even*, WAGE PROJECT, <http://www.wageproject.org> (last visited Feb. 16, 2013) (offering workshops

important piece of the solution to gender wage inequity: if women do not ask for fair pay then employers can continue to fail to give it unless successfully sued. However, negotiating from a level playing field is different than negotiating from a deficit. Women can be taught to negotiate effectively but can only use these skills to remedy a problem if they are aware that one exists.¹⁴⁶ If one discovers that one is being underpaid compared to one's peers, then one is motivated to approach one's employer, demand an explanation, and negotiate a solution.¹⁴⁷ If one is unaware of any gender wage discrepancy then even the best negotiator will only be asking for a fair raise based on one's current salary. Therefore, improved negotiation skills as a solution to unjustified gender wage differences hinges on an assumption that women know what their male counterparts are being paid so that they can ask for an appropriate wage and not, instead, a lower amount that merely reflects a generous raise from their current salary. Ignorance of this information undermines the entire negotiation, as it would for a man who was being underpaid.¹⁴⁸

3. *Patience or Generational Change*

Some say that the gap is stuck,¹⁴⁹ that expecting further patience is not reasonable when wage discrimination has been illegal for nearly fifty years,¹⁵⁰ and that the gap will not inevitably lessen without dramatic intervention.¹⁵¹ Others say that time will close the wage gap. To some extent this has been true and may continue. Certainly much progress has been made in the sixty-three years since 1950 when women made fifty-nine cents to the

in conjunction with AAUW). *See also* Thomas Menino, Mayor, City of Boston, State of the City Address (Jan. 29, 2013), available at <http://www.wbur.org/2013/01/29/full-text-menino-state-of-the-city-2013> (promising to make Boston the "premier city for working women" and to accomplish this, in part, by being "the very first municipality to help young women negotiate for fair pay").

¹⁴⁶ Blaming women's poor negotiating skills for the problem itself is a bit of a chicken-and-egg argument. As discussed *supra* note 125, such a view relieves employers from their legal responsibilities to pay fairly and places an undue burden on female workers to privately enforce the fair pay laws through negotiation. Surely once workers identify an inequitable wage situation, good negotiation skills may allow those workers to remedy the problem short of litigation, but the inequity itself should not be entirely blamed on the workers for not proactively ensuring that they are paid fairly.

¹⁴⁷ Claire Gordon, *If You Knew Your Boss' Salary, Would the World Be More Fair?*, AOL JOBS (June 5, 2012), <http://jobs.aol.com/articles/2012/06/05/if-you-knew-your-bosss-salary-would-the-world-be-fairer> (stating that with wage transparency "women can better assess if they're underpaid"). *See also* Coy & Dwoskin, *supra* note 8, at 6 ("Pay discrimination is a silent offense.").

¹⁴⁸ *See* ROGER FISHER & WILLIAM URY, *GETTING TO YES* 84–91, 109–10 (1981). This work by Fisher and Ury is an internationally-respected treatise on successful negotiation skills, and illustrates that one must be well prepared to negotiate effectively. *See also* MURPHY & GRAFF, *supra* note 3, at 271–73 (discussing the importance of learning all you can about what comparable men are earning before entering a negotiation to adjust an unfairly low salary).

¹⁴⁹ *See, e.g.*, MURPHY & GRAFF, *supra* note 3, at 3; Leonhardt, *supra* note 47, at 1.

¹⁵⁰ *See, e.g.*, MURPHY & GRAFF, *supra* note 3, at 3–6.

¹⁵¹ *See, e.g., id.* at 221–22.

male dollar. Perhaps the remaining gap will close over the course of the next sixty-three years. After all, the next generation of working Americans grew up in a country where men and women go to college in equal numbers, where women have equal opportunities with men to play competitive scholastic sports, where social norms about assertive women have waned, and where girls are increasingly encouraged to study STEM subjects, choose college majors that lead to high-paying jobs, and pursue the highest paying jobs that those majors will yield. One can therefore hope that occupational segregation will diminish, that the glass ceiling will finally shatter, and that women will become ever more confident, competitive, and willing to negotiate on their own behalf. Certainly these are among the hopes behind the recommendations of the AAUW study *Behind the Pay Gap*.¹⁵²

However, even studies and experts who acknowledge that some further progress can be made in these ways are quick to point out that there will still be a few nagging percentage points that cannot be eradicated because they are due to plain and simple wage discrimination.¹⁵³ Studies continue to demonstrate that gender discrimination persists. A compelling study of “blind auditions” by symphony orchestras—in which a screen was used to conceal the identity of the candidate—explained 25% of the increase in the number of women in top U.S. symphony orchestras.¹⁵⁴ Studies in which identical resumes were reviewed with only the gender of the applicant changed have revealed that similar gender biases still exist in the workplace.¹⁵⁵ More recently, a 2008 study examined the wage trajectories of people who underwent a sex change. Men who transitioned to women earned an average of 32% less after the surgery whereas women who became men earned 1.5% more.¹⁵⁶ Therefore, to completely close the gender wage gap any attempts at cultural solutions must be paired with legal initiatives that financially penalize gender wage discrimination.

¹⁵² DEY & HILL, *supra* note 2, at 30. The researchers recommend the following actions among others to help close the pay gap: (1) Promote careers in STEM in ways that appeal to girls and women; (2) Encourage girls to take advanced courses in mathematics; and (3) Encourage women to negotiate for better quality jobs and pay. *Id.*

¹⁵³ *Id.* at 33–34.

This report finds that the pay gap between female and male college graduates cannot be fully accounted for by factors known to affect wages. An extensive body of research also finds that some gap in pay between women and men is unexplained. While researchers disagree about the portion of the pay gap that is unaccounted for, many have attributed the unexplained portion to gender discrimination.

Id. at 33.

¹⁵⁴ Claudia Goldin & Cecelia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 738 (2000).

¹⁵⁵ CARYL RIVERS, SELLING ANXIETY: HOW THE NEWS MEDIA SCARE WOMEN 123–24 (2007) (discussing a study that placed male and female names on otherwise identical resumes, producing results that pointed to discrimination in professor hiring); VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 127–28 (1999) (discussing a similar study).

¹⁵⁶ Kristen Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E. J. OF ECON. ANALYSIS & POL’Y, Sept. 2008, at 13.

B. Legal Solutions

Legal initiatives that attempt to close the gender wage gap fall into three categories. First, there are two legal theories that were novel when set forth in the 1960s. These theories, comparable worth and affirmative action, both showed promise but have since fallen into disfavor. There may be a role for each moving forward but, even if there was a public appetite for these approaches, their impact would be limited. Comparable worth could increase the lower pay that is associated with certain jobs due to occupational segregation. Affirmative action could help crack the glass ceiling. However, as was discussed in detail in Sections II.B.3 and II.B.4 *supra*, eliminating occupational segregation and the glass ceiling, while certainly desirable, would not eliminate the gender wage gap.

The second category of legal initiatives that seek to close the gap includes three federal statutes. These have met with some success. Nonetheless, all three statutes suffer from a common limitation. They each place the burden of implementing the legal tool on the victim of wage discrimination. Many such victims, however, remain unaware that they are victims due to wage secrecy. The final legal approach to eradicating the gender wage gap is to mandate wage transparency. This holds much promise as a means of equipping victims with the necessary information to negotiate or to litigate for fair pay.

1. Comparable Worth and Affirmative Action

In the early years of gender wage gap awareness, two legal strategies emerged to address the particular problem of occupational segregation. The first of these was comparable worth.¹⁵⁷ The concept was that women whose jobs are different than those performed by male employees should nonetheless be compensated on a comparable basis with those male employees if the women's jobs were of comparable value to their employer.¹⁵⁸ By the early 1980s this concept had gained much popularity. By late 1987, twenty-eight states had begun the process of conducting job evaluation studies, twenty states had moved to budgeting and implementation of comparable worth policy, and 167 local jurisdictions had adopted comparable worth policies.¹⁵⁹ These policies attempted to quantify the "worth" of jobs, often by utilizing what was known as the "point method" whereby each job would be rated on a number of factors (such as skill, effort, responsibility, and working conditions) and the total score for each job would be used to compare it to other

¹⁵⁷ LINDGREN ET AL., *supra* note 39, at 242.

¹⁵⁸ See WOMEN, WORK, & WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 91-96 (Donald J. Treiman & Heidi I. Hartmann eds., 1981).

¹⁵⁹ SARA M. EVANS & BARBARA J. NELSON, WAGE JUSTICE: COMPARABLE WORTH AND THE PARADOX OF TECHNOCRATIC REFORM 41 (1989).

jobs with similar scores to ensure equivalent pay for jobs with equivalent “worth scores.”¹⁶⁰

The idea of comparable worth was controversial on a number of fronts. Some questioned whether it is possible to make valid and detailed comparisons of the relative worth of different jobs, even when those jobs are within the same firm.¹⁶¹ Indeed the job evaluation techniques employed were often both crude and labor-intensive.¹⁶² In the courts, the debate about comparable worth centered on the question of whether an employer truly violates federal law by failing to give equal pay to employees who perform jobs of comparable value to the employer. Some argued that when these discrepancies result in lower pay to those jobs that are predominantly held by women, such a discrepancy by an employer indeed violates Title VII. However, the courts disagreed. In an opinion authored by then Judge, now Justice, Anthony Kennedy, the Ninth Circuit rejected the comparable worth approach as a viable method of establishing a violation of Title VII.¹⁶³ In that case, the court viewed comparable worth analysis as a dangerous invitation to serious governmental intervention into “the free market” (whereby businesses and the public place value on jobs based on their relative value to the company and/or to the public) and refused to embrace the policy.¹⁶⁴ As a result, the tremendous momentum of comparable worth policy of the early 1980s dissipated.¹⁶⁵ Nonetheless, Minnesota (1982) and Ontario, Canada (1988), proceeded to implement pay equity plans based on comparable worth models and each met with great success.¹⁶⁶ These are still held out as examples of pay adjustments that can and should be made to address the leftover impacts of generations of gender occupational segregation.¹⁶⁷ There may be a renewed appetite for such measures in light of recent studies illustrating remaining occupational segregation some twenty-five to thirty years later.¹⁶⁸ Still, even if we were to embrace these types of pay adjustments we would fail to address the gender wage gap that continues to exist within each job category.¹⁶⁹

¹⁶⁰ WOMEN, WORK, & WAGES, *supra* note 158, at 71–82 (detailing and critiquing job evaluation techniques).

¹⁶¹ See generally MICHAEL EVAN GOLD, A DIALOGUE ON OUR COMPARABLE WORTH (1983).

¹⁶² WOMEN, WORK, & WAGES, *supra* note 158, at 71–82 (detailing and critiquing job evaluation techniques).

¹⁶³ Am. Fed’n of State, Cnty., & Mun. Emp. v. Washington, 770 F.2d 1401 (9th Cir. 1985).

¹⁶⁴ *Id.* at 1407.

¹⁶⁵ EVANS & NELSON, *supra* note 159, at 41.

¹⁶⁶ See generally *Two Progressive Models on Pay Equity: Minnesota and Ontario*, NAT’L COMM. ON PAY EQUITY, <http://www.pay-equity.org/PDFs/ProgressiveModels.pdf> (last visited July 19, 2012).

¹⁶⁷ *Id.*

¹⁶⁸ See *id.*

¹⁶⁹ HEGEWISCH & LIEPMANN, *supra* note 119, at 3–4 (illustrating that women earn less than men in almost all occupations).

The second legal strategy that has been utilized to attempt to address gender occupational segregation is affirmative action. Although affirmative action was not created for this purpose, it holds the potential to address the “pink ghetto.”¹⁷⁰ The concept of affirmative action is simple. By taking extra steps to identify and to recruit qualified members of an absent protected group, an employer can improve the representation of qualified members of that protected group in its employ.¹⁷¹ When Title VII went into effect in 1965, President Johnson signed the first executive order requiring businesses that had contracts with the federal government to implement affirmative action by hiring and promoting racial minorities.¹⁷² Women were not covered by this executive order but two years later President Johnson amended his order to require that businesses with federal contracts include women in their affirmative action programs.¹⁷³

Affirmative action is also a controversial policy. Many Americans view affirmative action as overly compensating members of groups that previously experienced discrimination by forcing employers to hire less qualified employees of these groups over more qualified members of the majority group.¹⁷⁴ There have been a myriad of court decisions about the contours of acceptable affirmative action plans and in recent years the Supreme Court has narrowed the ways in which affirmative action can be used.¹⁷⁵ Most recent court cases address the use of race in affirmative action plans and focus on the use of affirmative action in higher education admission.¹⁷⁶ It therefore remains unclear to what extent gender affirmative action plans in employment are legally required or even legally acceptable.¹⁷⁷ At the entry level, affirmative action may well be obsolete. Certainly women have entered many fields in record numbers since the beginning of affirmative action pol-

¹⁷⁰ For background on the term “pink ghetto,” see Carol Kleiman, *Pink-Collar Workers Fight to Leave “Ghetto,”* THE SEATTLE TIMES, Jan. 8, 2006, http://seattletimes.com/html/business/technology/2002727003_kleiman08.html (“The term ‘pink ghetto’ was coined in 1983 in a study of women, children and poverty in America and was used to describe the limits on women’s career advancement in these traditional, often low-paying jobs . . .”); see generally LOUISE KAPP HOWE, *PINK COLLAR WORKERS* (1977).

¹⁷¹ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 20 (10th ed.1996).

¹⁷² Jonathan Leonard, *Women and Affirmative Action*, 3 J. ECON. PERSP. 61, 62 (1989).

¹⁷³ *Id.*

¹⁷⁴ Claire Andre et al., *Affirmative Action: Twenty-Five Years of Controversy*, SANTA CLARA UNIV., <http://www.scu.edu/ethics/publications/iie/v5n2/affirmative.html> (last visited July 20, 2012).

¹⁷⁵ Borgna Brunner, *Timeline of Affirmative Action Milestones*, INFOPLEASE, <http://www.infoplease.com/spot/affirmativetimeline1.html> (last visited Apr. 4, 2013).

¹⁷⁶ See Nina Totenberg, *Supreme Court Wades Into Affirmative Action Issue*, NAT’L PUB. RADIO, Feb. 21, 2012, <http://www.npr.org/2012/02/21/147212858/supreme-court-wades-into-affirmative-action-issue>; Adam Liptak, *Justices Take up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 22, 2012, at A1; Amy Ziebarth, *Solving the Diversity Dilemma*, N.Y. TIMES, June 9, 2003, at A2.

¹⁷⁷ See, e.g., Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. ECON. PERSP. 47, 47 (1990) (stating that the “federal policy of affirmative action effectively passed away with the inauguration of the Reagan administration in 1981”).

icy, as discussed in Sections II.B.2 and II.B.3 *supra*. Private law practice exemplifies this trend.¹⁷⁸

Today gender discrimination in hiring is not a major issue in most occupations although affirmative action remains a useful tool for preserving hard-won gains and for continuing progress toward achieving a more balanced gender ratio at higher levels of employment.¹⁷⁹ While achieving an equitable gender ratio in terms of number of employees at each level is a worthwhile goal in and of itself, the gender *wage* gap exists both above and below the glass ceiling so, as discussed in section II.B.3 above, removing the glass ceiling will not eliminate the gap. Indeed, since both occupational segregation and the glass ceiling contribute only marginally to the overall gender wage gap, legal strategies which address only these two discrete issues will not get at the heart of wage discrimination. For this we need specific wage discrimination legal tools.

2. Three Federal Statutes

The Equal Pay Act of 1963 remains the central piece of federal legislation outlawing gender wage discrimination.¹⁸⁰ The statute contains three main provisions: the “equal pay for equal work” formula; four affirmative defenses; and a limitation on remedies. The “equal pay for equal work” provision prohibits employers from paying male and female employees at different rates for jobs that require “equal skill, effort, and responsibility, and which are performed under similar working conditions.”¹⁸¹ This rule was intended to avoid women being paid less than men in the same job classification.¹⁸² The courts have interpreted the prohibition to also include jobs in

¹⁷⁸ See AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *supra* note 72, at 1, 3 (showing that in 2010, 45.9% of J.D. recipients and 45.4% of associates in private practice were female).

¹⁷⁹ Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HAR. J. OF LAW AND GENDER, 1, at 32–33 (2011) (discussing reasons why gender affirmative action is still important despite perceptions to the contrary). See also FED. GLASS CEILING COMM'N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 15 (1995), at 13, 22, available at <http://www.dol.gov/oasam/programs/history/reich/reports/ceiling2.pdf> (recommending the use of affirmative action to shatter the glass ceiling for women and minorities). Cf. ANALYSIS OF FEMALE MANAGERS' REPRESENTATION, CHARACTERISTICS, AND PAY, GAO REPORT 10-892R, Sept. 20, 2010, at 1–2, <http://www.gao.gov/assets/100/97082.pdf> (noting that women make up 47% of the total workforce but that “women are less represented in management than in the overall workforce”); Ann Howard & Richard S. Wellins, *Holding Women Back: Troubling Discoveries—And Best Practices for Helping Female Leaders Succeed*, DDI, 2009, at 13 (“Although women were half of the first-level leaders, they represented only about one-third of those at senior and executive levels.”); REPORT OF THE SEVENTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS, NAT'L ASS'N WOMEN LAWYERS FOUND., Oct. 2012, at 3 (noting that 46% of law firm associates are women, but that only 15% of equity partners are women).

¹⁸⁰ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2006 & Supp. V 2011)).

¹⁸¹ *Id.* § 206(d)(1).

¹⁸² LINDGREN ET AL., *supra* note 7, at 168.

different classifications where the work performed by women workers is “substantially equal” to that performed by better paid men.¹⁸³ The four affirmative defenses are where a difference in pay is based on: a seniority system;¹⁸⁴ a merit system;¹⁸⁵ a system which measures earnings by quantity or quality of production;¹⁸⁶ or a differential based on any other factor other than sex.¹⁸⁷ These defenses track the early explanations for the gender wage gap and acknowledge a potential merit gap. Over time each of these has been used less, as women’s seniority, credentials, experience, and ability to compete in quantifiable ways has closed the merit gap with men.¹⁸⁸

This statute, which does not require a filing with the EEOC and applies to virtually all employers regardless of size,¹⁸⁹ would appear to provide a powerful tool in combating indefensible gender wage discrimination. However, the statute contains a few hurdles. First, the plaintiff must prove her case by comparison to an actual male employee—not a hypothetical or composite one—in the same establishment.¹⁹⁰ Secondly, a victim must bring a claim under the Equal Pay Act within two years of the discriminatory pay.¹⁹¹ Since many women learn of wage discrimination only after years of employment, this relatively short window of time in which to file a claim often severely limits how much a victim can recover under the Act: damages under the Equal Pay Act are limited to back pay and liquidated damages so any damages caused by discrimination that occurred more than two years before the claim cannot be remedied.¹⁹²

Title VII of the Civil Rights Act of 1964 bolstered the Equal Pay Act by prohibiting employers from discriminating with respect to compensation.¹⁹³ Title VII applies to race, color, religion, national origin, as well as to gender,

¹⁸³ *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974) (“[I]t is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable . . .”).

¹⁸⁴ 29 U.S.C. § 206(d)(1)(i) (2006 & Supp. I 2007).

¹⁸⁵ *Id.* § 206(d)(1)(ii).

¹⁸⁶ *Id.* § 206(d)(1)(iii).

¹⁸⁷ *Id.* § 206(d)(1)(iv).

¹⁸⁸ See *Closing the “Factor Other Than Sex” Loophole in the Equal Pay Act*, NAT’L WOMEN’S L. CTR. (Apr. 12, 2011), <http://www.nwlc.org/resource/closing-factor-other-sex-loop-hole-equal-pay-act> (arguing that the first three defenses are relatively straightforward and therefore now quite limited in use, but the fourth “other than sex” defense has been construed too broadly and needs narrowing). See also LIZA MUNDY, *THE RICHER SEX: HOW THE NEW MAJORITY OF FEMALE BREADWINNERS IS TRANSFORMING SEX, LOVE, AND FAMILY* 57 (2012) (“[W]omen are accruing seniority . . . and extending their time on the job.”).

¹⁸⁹ 29 U.S.C. § 206(d) (2006 & Supp. I 2007); see also *Equal Pay Act Frequently Asked Questions*, AM. ASS’N UNIV. WOMEN, <http://www.aauw.org/resource/equal-pay-act-faq> (last visited Feb. 23, 2013) (explaining the differences between the Equal Pay Act and Title VII, as well as advantages and disadvantages of filing under one or the other); *Equal Pay/Compensation Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/types/equalcompensation.cfm> (last visited Feb. 14, 2013).

¹⁹⁰ *Equal Pay Act Frequently Asked Questions*, *supra* note 189.

¹⁹¹ 29 U.S.C. § 255(a) (2006 & Supp. V 2011).

¹⁹² Compensatory and punitive damages are not available under the Equal Pay Act. See 29 U.S.C. § 216(b) (2006 & Supp. II 2008).

¹⁹³ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) (2006).

so the inclusion of compensation underscored that wage discrimination was a type of discrimination that Congress intended to outlaw for all protected groups. This allows for a broader range of pay discrimination claims by women, since no male comparator is required under Title VII.¹⁹⁴ For example, women that hold jobs for which there is no comparable, higher-earning equivalent held by a male cannot recover under the Equal Pay Act, even if they can prove that they were paid less because of their sex.¹⁹⁵ Such a plaintiff may have a viable claim under Title VII. Perhaps most compelling, Title VII permits the recovery of compensatory and punitive damages.¹⁹⁶

Title VII wage claims, however, originally contained a huge limitation. A victim must bring a wage claim under Title VII within 180 days of *suffering*, as opposed to becoming aware of, wage discrimination.¹⁹⁷ Courts interpreted this period to begin at the moment that the employer decides to discriminate and issues a discriminatory paycheck.¹⁹⁸ Given that women rarely learn of wage discrimination soon after it occurs, this interpretation effectively precluded most women from utilizing the statute.¹⁹⁹ In 2007 the Supreme Court affirmed this interpretation of the statutory language, holding that Lilly Ledbetter could not collect because, even though she filed her complaint within 180 days of when she first learned that she was getting paid less than comparable male employees, she had failed to file within 180 days of the first unequal paycheck.²⁰⁰ To avoid this impractically short statute of limitations, the bulk of litigation regarding pay inequity has been asserted under the Equal Pay Act,²⁰¹ despite its proof and damages limitations.

It therefore became necessary to amend Title VII to correct its gross time limitation on claims. In 2009, President Obama signed into law The

¹⁹⁴ Title VII does contain the Bennett Amendment which applies only to gender wage claims. Under this Amendment, “[i]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 [The Equal Pay Act]” 42 U.S.C. §§ 2000e-2(h) (2006). The Supreme Court has held that the Bennett Amendment is to be understood as incorporating only the four affirmative defenses of the Equal Pay Act into Title VII, but excluding the provision of the Equal Pay Act that requires equal pay for equal work, thus allowing for a broader range of types of gender wage claims. *Cnty. of Washington v. Gunther*, 452 U.S. 161, 168 (1981).

¹⁹⁵ Deborah L. Brake & Joanna L. Grossman, *Title VII’s Protection Against Pay Discrimination: The Impact of Ledbetter v. Goodyear Tire & Rubber Co.*, REG’L LAB. REV. (Fall 2007), available at http://www.hofstra.edu/pdf/academics/colleges/hclas/cld/cld_rlr_fall07_title7_grossman.pdf.

¹⁹⁶ 42 U.S.C. § 1981a (2006).

¹⁹⁷ *Id.* § 2000e-5(e).

¹⁹⁸ Brake & Grossman, *supra* note 195.

¹⁹⁹ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 625–28 (2007) (discussing earlier cases where women were unable to collect because their complaints were not timely).

²⁰⁰ *Id.* at 627–29.

²⁰¹ LINDGREN ET AL., *supra* note 7, at 171.

Lilly Ledbetter Fair Pay Restoration Act.²⁰² Under the new law, employees have the right to file a claim under Title VII within 180 days of their most recent illegal paycheck because each paycheck is a new unlawful discriminatory act.²⁰³

The Lilly Ledbetter Act represents a major improvement in the legislative tools available to combat illegal gender wage discrimination. Nonetheless, even under the new law, women can only successfully sue once they discover an illegal wage discrepancy. While some women make these discoveries inadvertently, most women remain unaware of the compensation of their male colleagues.²⁰⁴ Hence there is a need for wage disclosure laws.

3. *Wage Disclosure*

In American culture, it is considered gauche to discuss one's salary²⁰⁵: "The way we were raised is that it was bad taste to talk about how much you make."²⁰⁶ This social norm creates a culture where employers can pay men and women differently with impunity. Since employees rarely share compensation information, such information remains a secret unless employers choose to make it public. Employers have had little incentive to make salary information public because any discrepancies would then be apparent and even legitimate differences would have to be explained. This can lead to inter-employee resentment and lowered morale.²⁰⁷ Therefore most employers only publish salary information when legislation requires it.

For over a decade the case has been made for greater wage transparency.²⁰⁸ *Working Women* magazine took on this issue in 2001 when it surveyed workers about why they keep salary information confidential and

²⁰² Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

²⁰³ *Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/statutes/epa_ledbetter.cfm (last visited Apr. 4, 2013).

²⁰⁴ Littman, *supra* note 9, at 42 (presenting survey data showing that most workers are unaware of the income of their colleagues: 49% say no co-workers know their salary; 38% say only a few know).

²⁰⁵ Lisa Belkin, *Psst! Your Salary Is Showing*, N.Y. TIMES, Aug. 21, 2008, at G2 (quoting Ed Lawler, Director, Center for Effective Organizations, Marshall School of Business, University of Southern California, who has studied salary transparency since 1962: "[Salary secrecy i]s a very American, very middle-class phenomenon."). See also Abby Ellin, *Want to Stop the Conversation? Just Mention Your Finances*, N.Y. TIMES, July 20, 2003, at C9; Littman, *supra* note 9, at 41.

²⁰⁶ Belkin, *supra* note 205, at G2 (quoting Professor Lawler).

²⁰⁷ See Littman, *supra* note 9, at 41; Belkin, *supra* note 205, at G2 (describing examples of experience at Golden Lasso, a marketing company in Seattle, where salary information was disclosed by an employee). *But see id.* (describing examples of workplaces where employers choose to disclose without ill effects).

²⁰⁸ See generally Littman, *supra* note 9. The most recent initiative is a push for a petition for a new disclosure law. See *Congressional Petition Urges Mandatory Salary Disclosure to Create Pay Equality*, YAHOO! NEWS (Apr. 12, 2012), <http://news.yahoo.com/congressional-petition-urges-mandatory-salary-disclosure-create-pay-160233320.html>.

under what circumstances they might be willing to disclose it. Not surprisingly, more than half those surveyed explained their silence about their salary by saying that talking about salaries is impolite and 49% stated that none of their coworkers knew what they earned. Interestingly, however, the survey revealed that fewer than 40% of workers would absolutely refuse to share salary information. Indeed, 31% would share the information if it would give a coworker leverage to ask for a raise, 29% would share if it would give the worker herself leverage to ask for a raise, and 28% would share if the other worker were willing to do so as well.²⁰⁹ These figures demonstrate a willingness to divulge salary information, even against cultural norms, if the revelation would increase wage equity. Still, laws that require employers to publicly disclose wages would obviate the need to overcome this social discomfort.

More recently, The Institute for Women's Policy Research ("IWPR") released survey data in late 2010 demonstrating that social discomfort is not the only reason for pay secrecy in the American workplace.²¹⁰ The study reported that 19% of employees say they work in a setting where wage discussions are formally prohibited and/or punishable, and 31% of workers said that such discussions are discouraged by managers.²¹¹ These phenomena were more pronounced in the private sector, where "61% of employees are either prohibited or discouraged from discussing wage and salary information."²¹² Hence there is a need at least to legally protect employee wage disclosure. Moreover, mandating employer wage disclosure would not only avoid burdening employees with having to make socially awkward disclosures, but would also protect employees from potential repercussions from employers.

IV. WAGE DISCLOSURE LAWS

Activists who believe that wage transparency is vital to closing the gender wage gap have pushed for legislative action in the face of employer resistance to both voluntary employer disclosure and employee disclosure.²¹³ Progress has been slow, particularly in legislation directed at the private sector, but both federal and state legislation requiring wage disclosure by public employers has expanded substantially in the past decade, as has legislation protecting employees who choose to disclose and discuss wages. The impact of these laws reveals much promise for both types of wage disclosure legislation as effective tools in combating the residual gender wage gap.

²⁰⁹ Littman, *supra* note 9, at 42.

²¹⁰ Pay Secrecy and Paycheck Fairness, *supra* note 6.

²¹¹ *Id.*

²¹² *Id.*

²¹³ See, e.g., NAT'L WOMEN'S L. CTR., CONGRESS MUST ACT TO CLOSE THE WAGE GAP FOR WOMEN 5-6 (2008), available at http://www.pay-equity.org/PDFs/PayEquityFactSheet_May2008.pdf; *Congressional Petition*, *supra* note 208.

A. Existing Laws

Laws that require mandatory wage disclosure by employers are primarily directed at public sector jobs.²¹⁴ Although this means that salaries of government employees must be made public,²¹⁵ about 90% of Americans work in the private sector²¹⁶ so these laws do not help the majority of American women in their quest to ensure that they are being paid equally to their male counterparts. Despite support from Senator Harkin (D-Iowa), Chair of the Senate Health, Education, Labor, and Pensions Committee, and other key Senators, federal bills requiring wage disclosure in the private sector as part of a package of measures to ensure wage equity have stalled.²¹⁷ Thus there is limited federal wage disclosure legislation regarding private sector employees. Some argue that the National Labor Relations Act (“NLRA”) can be interpreted to apply to wage disclosure in the private sector,²¹⁸ but to

²¹⁴ Examples of laws that require disclosure of public sector job salaries include: COLO. REV. STAT. ANN. § 30-25-111(1.5) (West 2013) (“Salary information for all county employees and officials shall be published twice annually”); IOWA CODE ANN. § 331.907(2) (West 2013) (“A copy of the final compensation schedule shall be filed with the county budget at the office of the director of the department of management.”); N.H. REV. STAT. ANN. § 9-F:1(II) (2013) (“The state transparency website shall include the following: . . . Annual salaries of all full-time state employees, listed by pay type category and in a searchable format”); N.D. CENT. CODE ANN. § 40-01-09.1 (West 2011) (with respect to city government employees, “salary checks need not be published if the governing body elects to publish an annual salary schedule for each employee”); OR. REV. STAT. ANN. § 294.250(3) (West 2012) (“Once each year the county shall publish the actual individual gross monthly salary of all regular officers and employees occupying budgeted positions.”); S.D. CODIFIED LAWS § 6-1-10 (2013) (“[T]he boards of county commissioners, the governing board of each municipal corporation, and school boards shall publish . . . a complete list of all the salaries of all officers and employees”); TEX. GOV’T CODE ANN. § 25.0172(j) (West 2011) (“Before raising a salary [of a county judge] the commissioners court must publish notice containing information of the salaries affected and the amount of the proposed raise in a newspaper of general circulation in the county.”); and WIS. STAT. ANN. § 13.695 (West 2013) (“Each agency shall file with the board . . . a statement which identifies the officers and employees of the agency who are paid a salary and whose regular duties include attempting to influence legislative action”). See also Government in the Sunshine Act, 5 U.S.C. § 552b (2006); Freedom of Information Act, 5 U.S.C. § 552 (2006 & Supp. III 2009); Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). But note that while the Sunshine Act requires “open meetings” of government agencies, internal matters—presumably including discussion or disclosure of individual low-level wages—are excluded by subsection (c)(2) (matters that “relate solely to the internal personnel rules and practices of an agency”). Section (b)(2) of the Freedom of Information Act uses the same language to exclude internal matters. The Administrative Procedure Act provides a framework within which government agencies may take action, but does not directly pertain to compensation disclosure.

²¹⁵ See *supra* note 214.

²¹⁶ S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 865 n.152 (1998).

²¹⁷ See Jennifer Steinhauer, *Republicans Block Bill to Ease Suits over Pay Bias*, N.Y. TIMES, June 6, 2012, at A10.

²¹⁸ See, e.g., Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121, 138 (2003).

date courts have permitted employers to use a number of loopholes to avoid NLRA wage disclosure.²¹⁹

There are a handful of private sector exceptions. Nonprofits must list salaries when applying for grants in some states.²²⁰ Top salaries in publicly traded organizations must often be disclosed as must those in higher education.²²¹ These exceptions still exclude most American workers, who remain in the dark about how their salaries compare with those of co-workers.²²² Indeed, the bulk of federal legislation regarding private sector wages which exists or has come under serious consideration falls well short of explicitly requiring employer wage disclosure. Instead, proposed legislation focuses on protecting employees from potentially negative ramifications of *voluntary employee* wage disclosure.²²³ For example, the NLRA bars prohibitions on wage discussions²²⁴ and the proposed Paycheck Fairness Act would restrict employers from retaliating against employees for disclosing salaries.²²⁵

While falling short of requiring employer wage disclosure, the Paycheck Fairness Act would do much more than protect employees who choose to disclose their wages. The Act is a multi-pronged attempt to enhance the Equal Pay Act (“EPA”), with provisions ranging from improving EPA remedies to establishing a grant to train women and girls how to better negotiate.²²⁶ Originally introduced by Senator Daschle (D-S.D.)²²⁷ and Rep-

²¹⁹ NAT'L WOMEN'S L. CTR., FACT SHEET: COMBATING PUNITIVE PAY SECRECY POLICIES 2 (2012), available at <http://www.nwlc.org/sites/default/files/pdfs/paysecrecyfactsheet.pdf> (also noting that NLRA's remedies are limited).

²²⁰ Rick Cohen, *Nonprofits, Transparency and Sunshine*, NONPROFIT Q. (Mar. 22, 2010), http://www.nonprofitquarterly.org/index.php?option=com_content&view=article&id=2038:nonprofits-transparency-and-sunshine&catid=149:rick-cohen&Itemid=117.

²²¹ See, e.g., I.R.S. Form 990, Part VII: “Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors” (2012); 15 U.S.C. § 78n(i) (2006 & Supp. VI 2012) (“Disclosure of pay versus performance”) (added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 § 953, “Executive Compensation Disclosures”); 17 C.F.R. § 229.402 (2012) (“Executive Compensation”); 15 U.S.C. § 77aa(14) (2006) (Schedule A, Item 14 of the Securities Act) and 15 U.S.C. § 78l(b) (2006 & Supp. VI 2012) (Section 12(b) of the Exchange Act) (listing the type of information to be included in Securities Act and Exchange Act registration statements, respectively). See generally Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158 (Sept. 8, 2006) (Securities Act Release No. 8732A, Exchange Act Release No. 54302A, Investment Company Act Release No. 27444A) (to be codified at 17 C.F.R. pts. 228, 229, 232, 239, 240, 245, 249, and 247), available at <http://www.sec.gov/rules/final/2006/33-8732afr.pdf>.

²²² Littman, *supra* note 9, at 42; Pay Secrecy and Paycheck Fairness, *supra* note 6.

²²³ See, e.g., Wage Awareness Protection Act, S. 2966, 106th Cong. (2000) (restricting employers from imposing salary confidentiality requirements on employees); Paycheck Fairness Act, H.R. 1338, 110th Cong. (2008) (restricting employers from retaliating against employees for disclosing salary).

²²⁴ 29 U.S.C. § 152(3) (2006).

²²⁵ Paycheck Fairness Act, H.R. 377, 113th Cong. § 3(b) (2013); see also Wage Awareness Protection Act, S. 2966, 106th Cong. (2000) (restricting employers from imposing salary confidentiality requirements on employees); *The Paycheck Fairness Act*, NAT'L WOMEN'S L. CTR. 3–7 (Apr. 2006), <http://www.pay-equity.org/PDFs/PaycheckFairnessActApr06.pdf> (summarizing the provisions of a previous version of the bill).

²²⁶ Paycheck Fairness Act, H.R. 377, 113th Cong. §§ 3, 5 (2013).

representative DeLauro (D-Conn.) in 1997,²²⁸ the bill acknowledges Congress's findings that an unresolved piece of the gender wage gap is the result of wage discrimination and that better legal tools are needed to root out this discrimination.²²⁹ While not requiring mandatory wage disclosure, the Act would improve the collection of pay information by the EEOC to enhance its ability to detect EPA violations and to enforce wage discrimination laws.²³⁰ It also directs the Department of Labor to develop guidelines that would help employers voluntarily compare wages paid for different jobs to attempt to identify pay differences in jobs traditionally held by women.²³¹ As stated above, it also would protect employees who voluntarily disclose their salaries.

After a previous version of the Paycheck Fairness Act failed in the Senate in 2012, President Obama issued the following statement:

This afternoon, Senate Republicans refused to allow an up-or-down vote on the Paycheck Fairness Act, a commonsense piece of legislation that would strengthen the Equal Pay Act and give women more tools to fight pay discrimination. It is incredibly disappointing that in this make-or-break moment for the middle class, Senate Republicans put partisan politics ahead of American women and their families.²³² Despite the progress that has been made over the years, women continue to earn substantially less than men for performing the same work.²³³

The bill's failure did generate widespread publicity about the Paycheck Fairness Act, and the bill gained additional cosponsors in both houses of Congress.²³⁴ The current bill, introduced by Senator Mikulski (D-Md.)²³⁵ and Rep. DeLauro (D-Conn.),²³⁶ would be strengthened by amending it to mandate wage disclosure,²³⁷ though politically this may not be feasible in the short term on the federal level.

²²⁷ Paycheck Fairness Act, S. 71, 105th Cong. (1997).

²²⁸ Paycheck Fairness Act, H.R. 2023, 105th Cong. (1997).

²²⁹ Paycheck Fairness Act, H.R. 377, 113th Cong. § 2 (2013).

²³⁰ Section 206(d) of Title 29 of the U.S. Code already requires some employers to disclose to the EEOC general job classifications and their pay statistics (while maintaining individual confidentiality) but the proposed act would enhance this provision. See H.R. 377.

²³¹ H.R. 377.

²³² All Republicans voted not to consider the bill, while all Democrats and Independents voted for it; Sen. Mark Kirk (R-Ill.) did not vote, and Sen. Harry Reid (D-Nev.) changed his vote to enable him to bring up the bill again.

²³³ *The Fight Goes On*, NAT'L COMM. ON PAY EQUITY, <http://www.pay-equity.org/index.html> (last visited Apr. 3, 2013).

²³⁴ The Senate bill now has thirty-eight cosponsors, while the House bill has 168 cosponsors. See S. 84: *Paycheck Fairness Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/113/s84#related> (last visited Feb. 12, 2013); H.R. 377: *Paycheck Fairness Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/113/hr377> (last visited Feb. 12, 2013).

²³⁵ Paycheck Fairness Act, S. 84, 113th Cong. (2013).

²³⁶ Paycheck Fairness Act, H.R. 377, 113th Cong. (2013).

²³⁷ See *infra* Part V.A.

More progress has been made with private employers on the state level, at least in the realm of protecting private sector employees who choose to voluntarily disclose or discuss their salaries. For over a decade California and Illinois both have had state statutes that protect wage-disclosing employees from retaliation by employers.²³⁸ Michigan,²³⁹ Vermont,²⁴⁰ Colorado,²⁴¹ and Maine²⁴² now have similar wage disclosure statutes and New York has proposed a similar statute.²⁴³ In each of these states employees cannot be

²³⁸ CAL. LAB. CODE § 232 (2001) (“No employer may . . . discriminate against an employee who discloses the amount of his or her wages.”); 820 ILL. COMP. STAT. 112/10(b) (2001) (“It is unlawful for any employer to discharge or in any other manner discriminate against any individual for inquiring about, disclosing, comparing, or otherwise discussing the employee’s wages . . .”).

²³⁹ MICH. COMP. LAWS ANN. § 408.483a(13a)(1) (West 2012). The law provides:

- (1) An employer shall not do any of the following:
- (a) Require as a condition of employment nondisclosure by an employee of his or her wages.
 - (b) Require an employee to sign a waiver or other document which purports to deny an employee the right to disclose his or her wages.
 - (c) Discharge, formally discipline, or otherwise discriminate against for job advancement an employee who discloses his or her wages.

Id.

²⁴⁰ VT. STAT. ANN. tit. 21, § 495(a)(8)(B)(i-iii) (West 2012). The law provides:

No employer may do any of the following:

- (i) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages.
- (ii) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages.
- (iii) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.

Id.

²⁴¹ COLO. REV. STAT. ANN. 24-34-402 (West 2012). The law provides:

- (1) It shall be a discriminatory or unfair employment practice . . . (i) Unless otherwise permitted by federal law, for an employer to discharge, discipline, discriminate against, coerce, intimidate, threaten, or interfere with any employee or other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee’s wages; to require as a condition of employment nondisclosure by an employee of his or her wages; or to require an employee to sign a waiver or other document that purports to deny an employee the right to disclose his or her wage information. This paragraph (i) shall not apply to employers who are exempt from the provisions of the “National Labor Relations Act”, 29 U.S.C. sec. 151 et seq.

Id.

²⁴² ME. REV. STAT. ANN. tit. 26, § 628 (2012). The law provides:

An employer may not prohibit an employee from disclosing the employee’s own wages or from inquiring about another employee’s wages if the purpose of the disclosure or inquiry is to enforce the rights granted by this section. Nothing in this section creates an obligation to disclose wages.

Id.

²⁴³ S. 5674A, 2011-12 S., Reg. Sess. (N.Y. 2011); Assemb. 8348A, 2011-12 Assemb., Reg. Sess., (N.Y. 2011). See generally *Wage Secrecy in New York: Why We Need a State Wage Disclosure Law*, A BETTER BALANCE: THE WORK & FAMILY LEGAL CTR., http://www.abetterbalance.org/web/images/stories/Documents/fairness/factsheets/ABB_Fact_Sheet_-_Wage_Secrecy_in_NY.pdf (last visited Apr. 4, 2013).

barred from discussing their own salaries or inquiring about those of others, nor can employers punish them for engaging in such discussions. Still, none of these statutes create any affirmative duty on a private sector employer to disclose wage information beyond that already required by the EEOC for investigatory and enforcement purposes. To assess effectiveness of a mandatory wage disclosure law, then, we are mostly left with the federal and state statutes that require the disclosure of public sector wages. Law review articles focus on the impact of pay confidentiality clauses and the removal of these clauses.²⁴⁴ Little has been written examining the impact of employer wage disclosure on the gender gap.²⁴⁵

B. Effectiveness

The Minnesota²⁴⁶ public sector wage disclosure statute, while truly a comparable worth program, does require reporting of salaries as a prelude to restructuring the pay schemes.²⁴⁷ To the extent that there is clear data available showing that this was successful in closing the wage gap,²⁴⁸ one can look to it as proof that mandatory wage disclosure is an effective tool. However, the statute did not rely on disclosure alone: it also required employers to make pay adjustments once pay discrepancies were identified between equally “valuable” jobs.²⁴⁹ Can we leave out this second piece and still have

²⁴⁴ E.g., Brian P. O’Neill, *Pay Confidentiality: A Remaining Obstacle to Equal Pay After Ledbetter*, 40 SETON HALL L. REV. 1217, 1252 (2010); 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, 186 (2004) (discussing federal bills that would “make workplace pay confidentiality/secretcy illegal”); Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41 (2005).

²⁴⁵ But see David A. Logan, *The Perils of Glasnost*, 38 U. TOLEDO L. REV. 565, 567 (2007) (observing after a review of the business literature that “there is a split of opinion on whether salary transparency is a sound policy” but concluding that transparency generally favors fairness to the employee).

²⁴⁶ Ontario has a law very similar to Minnesota’s law: Public Sector Salary Disclosure Act of 1996, S.O. 1996, c. 1, Schedule A (Ont., Can.), available at <http://www.e-laws.gov.on.ca/index.html>. See *Two Progressive Models*, supra note 166, at 1. Other international efforts have also been made. See *Règlement Concernant la Déclaration de l’Employeur en Matière d’Équité Salariale/Regulation Respecting the Report on Pay Equity*, L.R.Q. 2011, c. E-12.001, a. 4 / Que. Reg. M.O. 2011-001, s. 1 (Que., Can.) (effective Mar. 31, 2011), available at <http://www.ces.gouv.qc.ca/documents/publications/reglementdemes.pdf> (“[A]ll businesses employing six (6) people or more and registered with Quebec’s Enterprise Registrar will be subject to the requirement to produce an annual declaration in respect of pay equity.”); Ann Neir et al., *Europe*, 39 INT’L LAW. 569, 586 (2005) (“The Swiss government has published two proposals for new regulations regarding auditing and transparency of salaries.”); *U.K. Eases Gender Pay Disclosure Requirement*, CANADIAN H.R. REPORTER (Dec. 2, 2010), <http://www.hrreporter.com/articleprint.aspx?articleid=8590> (“The previous Labour government had set up a deadline of 2013 for when employers must publish details of compensation differences under the Equality Act [of] 2010.”).

²⁴⁷ MINN. STAT. § 471.9981 (2012). See also *Two Progressive Models*, supra note 166, at 1 (hauling the policies of Minnesota and Ontario as “two progressive models on pay equity”).

²⁴⁸ See *Two Progressive Models*, supra note 166, at 1.

²⁴⁹ *Id.*

a successful statute? Will employees utilize the information to privately enforce the Equal Pay Act? Alternately, will employers make greater efforts to avoid EPA violations if faced with mandatory salary disclosure? Here is where two federal models and the other state public sector statutes are useful to examine.

The federal public sector wage disclosure laws do seem to have had an impact on the gap. In 2009 the United States Government Accountability Office (“GAO”) concluded a study demonstrating that the wage gap in the federal workplace diminished between 1988 and 2007 from 28 cents to 11 cents on the dollar.²⁵⁰ In other words, in 2007 women in federal jobs were earning 89 cents on the male dollar, in contrast to the 77.8 cents on the male dollar earned by all full-time year-round female workers in the same year.²⁵¹ The federal gap moved from 28 cents in 1988 to 19 cents in 1998 to 11 cents in 2007, demonstrating a consistent and dramatic downward trend.²⁵² The GAO study authors concluded that the closing federal gap is primarily due to men and women in the federal workforce becoming more alike in characteristics related to pay.²⁵³ This overlooks that the merit gap has similarly closed in the private sector, where the gap remains much wider. So, while this and other factors may contribute to the lower gap, one strong implication of this significant difference is that disclosure enhances wage equity.²⁵⁴ Many commentators have also come to this conclusion.²⁵⁵ Indeed, even the Department

²⁵⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-279, WOMEN’S PAY: GENDER PAY GAP IN THE FEDERAL WORKFORCE NARROWS AS DIFFERENCES IN OCCUPATION, EDUCATION, AND EXPERIENCE DIMINISH 11 (Mar. 2009), available at <http://www.gao.gov/assets/290/287375.pdf>. This study looked at “snapshots” of the federal workforce at three points in time (1988, 1998, and 2007) to show changes in the federal workforce over a twenty-year period. The researchers used Central Personnel Data File data (containing gender, annual salary, and other demographic and occupational factors for federal employees within most of the executive branch as well as a few agencies in the legislative branch, but not employees in the judicial branch and federal contractors) to compute the overall pay gap between men and women. They then performed multivariate analysis to estimate how much of the overall pay gap could be explained by demographic, occupational, and other measurable factors for which they had data. The authors concluded that “[f]or each year we examined, all but about 7 cents of the gap can be accounted for by differences in measurable factors such as the occupations of men and women and, to a lesser extent, other factors such as years of federal experience and level of education.” *Id.*

²⁵¹ U.S. CENSUS BUREAU, *supra* note 2, at tbl.P-40 (women’s earnings as a percentage of men’s earnings for all races combined, based on median earnings of full-time year-round workers).

²⁵² U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 250, at 19.

²⁵³ *Id.* at 38.

²⁵⁴ Wage disclosure laws may not be the only variable affecting the wage gap as between public and private sectors. For example, the range of public sector jobs may not be as broad as private sector jobs (potentially confounding the robustness of the correlation in hard-to-predict ways); or, compensation in the public sector may come in a different form (i.e., greater benefits and lower wages) which may also have a confounding influence.

²⁵⁵ See, e.g., Gordon, *supra* note 147 (stating that “there’s good evidence” that wage transparency would give women “a significant pay bump” since the pay gap in the public sector, “where salaries are a lot more transparent” is 11% instead of 23%).

of Labor acknowledged this implication.²⁵⁶ In the wake of the GAO finding and based on an assumption that wage disclosure contributed to the narrowed federal gap,²⁵⁷ the Office of Federal Contract Compliance Program's ("OFCCP") initiated a new wage data collection tool, issuing an "advanced notice of proposed rulemaking" ("ANPRM") in August, 2011, that announced plans for this enhanced compensation data collection mechanism.²⁵⁸ Although the OFCCP previously required a subset of contractors to submit some salary data through an equal opportunity survey,²⁵⁹ the Bush administration discontinued this Clinton-initiated program.²⁶⁰ The proposed enhanced tool would be much more comprehensive than the original one. The majority of the 2,400 comments posted to the government portal in response to the ANPR supported the proposal.²⁶¹ The new regulation will provide a systematic survey of pay practices of all federal supply and service contractors (who account for 25% of the civilian workforce).²⁶² A Notice of Proposed Rulemaking ("NPRM"), the next step toward implementation, is scheduled to be issued in June 2013.²⁶³ The many groups supporting this

²⁵⁶ See Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. 49,398 (Aug. 10, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/html/2011-20299.htm> (explaining reasons for new public wage disclosure regulations).

²⁵⁷ Memorandum from John Berry, Director, Office of Personnel Management and Jacqueline Berrien, Chair, Equal Employment Opportunity Commission, to Chief Human Capital Officers, Directors of Equal Employment Opportunity 1 (Aug. 15, 2011), available at http://www.eeoc.gov/federal/upload/eeoc_opm_equal_pay_memo_signed.pdf (acknowledging unexplained gap); Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. 49,398 (Aug. 10, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/html/2011-20299.htm> (explaining reasons for new regulations).

²⁵⁸ Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. 49,398 (Aug. 10, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/html/2011-20299.htm>.

²⁵⁹ In addition to its basic compliance evaluation, "in 2000, OFCCP instituted a reporting requirement, the Equal Opportunity Survey (EO Survey), which required a subset of contractors to submit information to OFCCP independent of OFCCP compliance evaluations. 65 Fed. Reg. 68022, 68046 (Nov. 13, 2000). The EO Survey required contractors to submit information about personnel activities, compensation and tenure, and certain information about the contractor's affirmative action program." Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. at 49,399.

²⁶⁰ Coy & Dvoskin, *supra* note 8, at 7.

²⁶¹ Jay-Anne B. Casuga, *OFCCP's Pay Data Collection Tool Proposal Draws More Than Two Thousand Comments*, BLOOMBERG BNA (Oct. 25, 2011), <http://www.bna.com/ofccps-pay-data-n12884903975>; Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. at 49,399 ("All comments received, including any personal information provided, will be available online at <http://www.regulations.gov> and for public inspection during normal business hours at Room C-3325, 200 Constitution Avenue, NW, Washington, DC 20210.")

²⁶² Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. at 49,399–400; Coy & Dvoskin, *supra* note 8, at 7 (stating that employees of these contractors comprise 25% of the civilian workforce).

²⁶³ *OFCCP Unveils Its 2013 Regulatory Agenda*, FEDERAL CONTRACTOR COMPLIANCE WATCH (Feb. 3, 2013), <http://federalcontractorcompliancewatch.com/2013/02/03/ofccp-unveils-its-2013-regulatory-agenda>.

change²⁶⁴ believe that this wage disclosure tool, even without any comparable worth wage adjustment requirements attached to it, is crucial in narrowing the wage gap. Just as the gap has narrowed substantially in the face of salary disclosure for federal employees, the hope is that the same will occur for private employees of federal contractors.

The gap impact of the state public sector wage disclosure statutes (other than Minnesota) is harder to evaluate. U.S. Census data, while broken out by gender and by state, is not broken out by public and private sector jobs so gender wage differences within each sector are not easily calculated. Perhaps the pending change at the OFCCP will encourage public/private sector census wage reporting in coming years. It would be ideal to demonstrate that the wage gap for public sector employees in states with wage disclosure laws is narrower than that for private sector employees in those states and/or public sector employees in states without wage disclosure laws. In the interim, one worthy observation is that in Norway, where salary information has been publically available since 2002, the gender wage gap narrowed markedly in the following years.²⁶⁵

V. RECOMMENDATIONS

A mandatory wage disclosure law would enhance all efforts to close the gender wage gap. Inappropriate wage differences in the face of educational parity (such as those found in the AAUW study of college graduates a mere one year out of college) could be more easily identified and remedied. The financial perils of occupational segregation could be more readily illustrated to young women choosing a college major and career path. Gender wage differences within particular jobs (whether these be traditionally male or female jobs, or bottom tier, mid-level or CEO level jobs) could be more easily illustrated to employers and to courts. Wage differences currently explained by the “Mommy Penalty” could be more fully explored to ensure that there is a true correlation between reduced experience and pay. Negotiations with employers would be better informed conversations. The EEOC would have comparison data readily available when wage discrimination claims are brought. Employers would have objective data to analyze when assessing the potential biases of their own managers.

Without a mandatory wage disclosure law, it will be impossible to completely close the gap as there will never be a way to thoroughly ferret out all

²⁶⁴ *E.g.*, the American Civil Liberties Union, the NAACP Legal Defense & Educational Fund Inc., and the National Women’s Law Center. See Jay-Anne B. Casuga, *OFCCP’s Pay Data Collection Tool Proposal Draws More Than Two Thousand Comments*, BLOOMBERG BNA (Oct. 25, 2011), <http://www.bna.com/ofccps-pay-data-n12884903975>.

²⁶⁵ Rebecca Fernandez, *How Much Transparency Is Too Much?*, OPENSOURCE.COM, Mar. 25, 2010, <http://opensource.com/business/10/3/how-much-transparency-too-much>. See also David Brancaccio, *In Norway a Different View of Transparency*, Aug. 20, 2012, MARKETPLACE, <http://www.marketplace.org/topics/wealth-poverty/pay-check/norway-different-view-transparency>.

remaining wage discrimination. Instead, enforcement of equal pay laws will continue to be piecemeal and erratic, driven by inadvertent discoveries of wage inequities.²⁶⁶ Models exist for such a law at both the state and federal level.²⁶⁷ Implementation can be structured to be minimally disruptive to private sector employers. In fact, the experience of private companies that engage in voluntary wage transparency indicates that such policies actually improve employee morale and increase the efficiency of the labor market, making the policies a win-win for employers and employees.²⁶⁸ The time is ripe to enact a mandatory wage disclosure statute in conjunction with the Paycheck Fairness Act to ensure that the toolkit of approaches to eradicate the gender wage gap is complete.

A. *Mandatory Wage Disclosure Law*

A mandatory wage disclosure law for private sector employers would track those already in place for state and federal government employers as well as those for private higher education employers.²⁶⁹ Employers would be required to make annual postings for each employee. These postings would be available to all other employees as well as to all relevant government agencies, such as the EEOC and the IRS. In the truly public listing, the information could be listed without name or other information that would make an employee readily identifiable. Technology exists to limit access to this identifying information to only those inside the company and the government agencies. Nonetheless, all employees should have access to individual salaries, along with at least the gender, age, and length of service of each employee. This is because the publishing of salary ranges or bands (or medians) does not provide a male comparator needed for proof under the Equal Pay Act. If a woman sees that her salary is at the bottom of a band (or below the median), she may suspect discrimination and may be more likely to negotiate appropriately for a raise but without knowing the gender of others in the salary band, she does not have the requisite evidence of gender discrimination.²⁷⁰ For smaller companies and as an interim measure for larger companies while corporate culture adjusts to the new transparency, the law could allow for the publishing of job bands broken down by gender, race, age, and length of service. This would be some help to underpaid women, as being at the bottom of a band would at least raise a red flag that would motivate a worker to seek more information from her manager and would give her more

²⁶⁶ See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

²⁶⁷ See *supra* notes 214, 221.

²⁶⁸ Daniel Indiviglio, *The Case for Making Wages Public: Better Pay, Better Workers*, ATLANTIC MONTHLY, July 20, 2011, <http://www.theatlantic.com/business/archive/2011/07/the-case-for-making-wages-public-better-pay-better-workers/242238/#bio>.

²⁶⁹ See *supra* notes 214, 221.

²⁷⁰ *Equal Pay Act Frequently Asked Questions*, *supra* note 189.

information than mere median salaries for her job for someone with her education and experience.

This law would go well beyond the Salary Disclosure to Promote Equality Act currently being proposed by congressional petition.²⁷¹ That proposal focuses almost entirely on fairness in the setting of an employee's initial wage. If drafted into a bill and enacted into law, it would merely require: the inclusion of the pay range for all job postings; no credit checks for job candidates; no requirement for applicants to share salary history; no past employer sharing of an employee's salary history.²⁷² While these are all helpful provisions they do not address the need of employees to be aware of the wages of their colleagues to protect against wage discrimination. The broader law proposed here would provide all employees with access to wage information on their colleagues.

Employers would have the option of annotating wage data with information about an employee's education, experience, seniority, and workplace performance accomplishments as a way to digitally explain any apparent discrepancies between the salaries of employees doing similar work.²⁷³ Companies would be encouraged to implement a process for confidential inquiries into apparent wage discrepancies. Other key provisions would be a minimum company size for statutory coverage and a staged implementation of the law, giving larger employers one year in which to comply and smaller employers two years.²⁷⁴

This proposal is not unlike that proposed by the DOL's Women's Bureau. The Bureau encourages employers to voluntarily move to an "open pay policy," making the business case for such policies by pointing out a number of benefits. According to the DOL these policies: "[s]top speculation about pay—workers will know they are being paid fairly[;] [m]ake it clear that top performers are rewarded, which creates an incentive to work harder[;] [s]top meritless complaints about unequal pay[; and] [i]dentify pay disparities so they can be fixed."²⁷⁵ The National Equal Pay Task Force supports the DOL's educational efforts²⁷⁶ and a number of large employers, such as Costco Wholesale Corporation and Dell Incorporated, are accepting the DOL's challenge.²⁷⁷

²⁷¹ See *Congressional Petition*, *supra* note 208.

²⁷² *Id.*

²⁷³ Access to these annotations, which themselves might be considered somewhat private information, could be limited to those inside the company.

²⁷⁴ See, e.g., *Two Progressive Models on Pay Equity: Minnesota and Ontario*, *supra* note 166, at 1–2 (noting that staged implementation was successfully used in the Minnesota and Ontario laws).

²⁷⁵ *An Employer's Guide to Equal Pay*, WOMEN'S BUREAU, U.S. DEP'T OF LABOR 3 <http://www.dol.gov/equalpay/equalpay-employer.pdf> (last visited Feb. 16, 2013).

²⁷⁶ See generally WHITE HOUSE, *supra* note 4.

²⁷⁷ Gordon, *supra* at note 147 (stating that Costco Wholesale Corp. and Dell Inc. have moved to more transparency); Harvey Meyer, *Full Disclosure*, HUM. RES. EXECUTIVE, June 16, 2010, <http://www.hreonline.com/HRE/view/story.jhtml?id=456550026> (detailing the transparency policies at both Costco and Dell, neither of which reveals individual salaries).

B. Implementation

Any legislative proposal that ignores the concerns of private sector employers has little hope of success. Employers worry that wage disclosure will wreak havoc in the workplace.²⁷⁸ Beyond the cost of the additional paperwork involved in compliance with a wage disclosure statute,²⁷⁹ the concern is that employees will be distracted and demoralized by the information.²⁸⁰ Learning that a colleague earns more than one does, even for legitimate reasons, can breed anger, resentment, and/or jealousy.²⁸¹ Company morale may be negatively impacted and managers may be detoured from their daily tasks by the time needed to manage wage issues.²⁸² In addition, employees may not wish others to know about their compensation—either out of embarrassment at how low (or high) it is or simply because it has traditionally been a private matter.²⁸³ Employers do not want to violate their employees' privacy by posting wage information in a place with public (or even company) access.²⁸⁴ Employers also worry that EPA violations, even if inadvertent, will garner negative press for their organizations.²⁸⁵

The first answer to all of these concerns is that state and federal government workplaces are already subject to mandatory wage disclosure laws and somehow all of these worries are handled in those workplaces. Under many state laws the exact salaries of readily identifiable employees are publically posted.²⁸⁶ The sky has not fallen in. As to the argument that the public sector culture is different than that of the private sector on issues of compensation, this may be a chicken-and-egg argument since the culture is impacted by the long-term openness and standardization of salary information. Moreover, a number of the state wage disclosure statutes include disclosure requirements for selected private sector employees.²⁸⁷ These workplaces have similarly managed the public disclosure requirements without undue drama. Finally, the sorts of additional information that this proposal suggests that employers choose to add to explain apparent discrepancies—education, experience, accomplishments—would only be available within the company and would actually be no more than one might include in a resume or LinkedIn profile.²⁸⁸

²⁷⁸ See Littman, *supra* note 9, at 41.

²⁷⁹ *But see* Coy & Dvoskin, *supra* note 8, at 7 (stating that “fears about excessive paperwork are overblown”).

²⁸⁰ See Littman, *supra* note 9, at 41.

²⁸¹ Belkin, *supra* note 205, at G2 (describing negative examples of experiences at two companies where salary information was disclosed).

²⁸² *Id.* See also John Case, *When Salaries Aren't Secret*, 79 HARV. BUS. REV. 5 37, 46 (2001), available at <http://hbr.org/2001/05/when-salaries-arent-secret/ar/1>.

²⁸³ See Littman, *supra* note 9, at 42.

²⁸⁴ See Case, *supra* note 282 at 44.

²⁸⁵ *Id.*

²⁸⁶ See laws and parenthetical descriptions of requirements, *supra* note 214.

²⁸⁷ See laws cited, discussion and parenthetical descriptions, *supra* notes 221, 223.

²⁸⁸ See sample profiles at <http://www.linkedin.com>.

The second answer to employers' concerns about wage transparency is that we live in an era of decreasing privacy.²⁸⁹ The Internet has changed our access to previously private information and it has influenced our attitudes about what information should be readily accessible. In particular, millennials voluntarily share much private information and they tend to do it very broadly in social network forums²⁹⁰ as well as more professional sites, such as LinkedIn. More importantly, millennials' attitudes about sharing salary and bonus information is radically different than those of their parents.²⁹¹ Researchers have already documented organizational changes resulting from changing attitudes about sharing work-related information—including unfair allocation of bonuses and plum assignments, as well as safety violations and sexual harassment claims.²⁹² Of course, voluntary disclosure of one's own salary may be different than having your employer disclose this information but it seems fair to say that millennials are less likely to consider such information private.²⁹³

The generationally-changing perceptions of privacy do not address the sensibilities of the entire workforce, nor the particular situations of private companies transitioning to wage disclosure. Still, much can be done to ensure against employer concerns coming to fruition. In this author's proposal, small companies would be excluded from mandatory compliance with the law. All companies would be given time to phase in a wage reporting system. During this time companies could carefully review their pay schemes and make prophylactic corrections to any inadvertent EPA (or other) violations. Explanations for legitimate wage disparities can be provided to employees in advance of full public disclosure. Salaries on public websites can be listed without names or other identifying information and in some cases grouped together into salary ranges.²⁹⁴

²⁸⁹ See Case, *supra* note 282, at 44–49 (comments of the last of four expert commentators address this phenomenon).

²⁹⁰ *Id.* at 49.

²⁹¹ Some commentators have noted:

Human resource policies and, to a greater extent, managerial practices, tend to assume that people won't talk about salaries, bonuses and other intimate details of their employment relationship. That assumption won't be safe as Millennials come into the workforce with a decade or more of exposure on Myspace, Friendster, Facebook and other social networking sites. There's already evidence that they will openly share salary information, coaching conversations and development plans—testing the integrity of the organizational systems.

Celia Berenguer et al., *Catalyst for Change The Impact of Millennials on Organization Culture and Policy*, MONITOR GROUP 3–5 (2009), http://www.monitor.com/Portals/0/MonitorContent/imported/MonitorUnitedStates/Articles/PDFs/Catalysts_for_Change_Millennials.pdf.

²⁹² *Id.*

²⁹³ Indiviglio, *supra* at note 268 (“The Facebook generation has a far more liberal attitude towards sharing personal information than previous generations. As it begins to dominate the workforce, more pay disclosure could become very common.”).

²⁹⁴ *But see supra* note 72 (explaining why all employees need access to individual salary listings, not just salary ranges).

To see that it is possible to be a successful company while having wage transparency and to demonstrate that employees will accept transparency, it is useful to look at what happens when employers voluntarily disclose salary information.²⁹⁵ A 2008 survey of 10,000 employees found that effective company salary disclosure actually dispels bad feelings that employees get when comparing their salaries to informal sources and estimates on “websites like Glassdoor, Salary.com, and Payscale” and increases employee “intent to stay” by thirty-four percent and worker effort by fifteen percent.²⁹⁶ Here again is the business case for wage transparency.

Two examples of companies engaging in voluntary wage disclosure are WorldBlu in Austin, Texas, and Motek, in Beverly Hills, California. WorldBlu, a company that coaches others on the creation of more “democratic workplaces,” has eleven employees and they all know what one another makes.²⁹⁷ The company’s chief executive predicts that this openness about company ledgers “will become the norm.”²⁹⁸ At Motek, a company that develops software for warehouses, “employees at the same level receive identical salaries and raises are negotiated for the entire team.”²⁹⁹ Everyone knows what every other employee’s salary is and the company’s chief executive claims that “[t]here’s no comparing or jealousy or backstabbing.”³⁰⁰ “It’s the unknown that causes infighting,” she states.³⁰¹ Neither company has publicly reported on the impact of their wage transparency on gender differences in pay but the company comments quoted in this paragraph indicate that if any such discrepancies did exist they have been addressed. Indeed, commentators have asserted that wage transparency would not only benefit workers but would make the labor market more efficient.³⁰²

These companies are not alone in experimenting with transparent salaries. In addition to the relatively cautious forays into wage transparency be-

²⁹⁵ Gordon, *supra* note 147 (stating that examining the experience of “companies that voluntarily take an open book approach to salaries” reveals that it does not in fact “bludgeon morale”). See also DelPo Kulow, *supra* note 87, at 106–08 (demonstrating that voluntary industry policies can be examined to measure the potential effectiveness of mandatory policies and arguing for making family friendly workplace policies mandatory to avoid piecemeal use of the policy (and doing so via federal law to avoid of regional disparities)).

²⁹⁶ Gordon, *supra* note 147.

²⁹⁷ Belkin, *supra* note 205, at G2.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* (describing these two workplaces). See also *Worldblu: Freedom and Democracy at Work*, WORLDBLU, <http://www.worldblu.com> (last visited Apr. 4, 2013) (“[A] global network of organizations committed to practicing freedom and democracy in the workplace,” and receiving recent press from *The New York Times*, *The Wall Street Journal*, *BusinessWeek*, and others).

³⁰¹ Gordon, *supra* at note 147 (quoting CEO Ann Price).

³⁰² Indiviglio, *supra* note 268 (noting that while wage transparency may make low-paid workers unhappy, this is actually healthy because these poor performers will move on, finding positions better suited to their skills and vacating positions that can then be filled by employees whose skill set and/or temperament are a better fit for the job).

ing attempted by Costco and Dell,³⁰³ Whole Foods has emerged as a frontrunner in complete salary transparency. Any employee interested in the salary of any other employee can access a binder available in every store and find out what everyone got paid in the prior year, from CEO John Mackey to the lowest paid employee.³⁰⁴ Whole Foods has consistently won awards for employee satisfaction, including making the list of Fortune's "100 Best Companies to Work For" thirteen years in a row.³⁰⁵ Clearly wage transparency has not created a morale problem for the company. While this level of transparency does demand a high level of communication, it can be used effectively to drive expectations and teamwork.³⁰⁶ Whole Foods' experience dramatically illustrates the business case for wage transparency.

To assist companies with the decision of whether to voluntarily disclose wages, a Harvard Business Review ("HBR") case set out a fictitious company where a vindictive employee published everyone's salaries.³⁰⁷ The case provided a forum to discuss the advantages of an open salary system.³⁰⁸ These included not only a fair compensation system but also a better employee understanding of the business, increased productivity, and a culture of trust. The four commentators on this HBR case each offered different perspectives, but all concluded that the hypothetical employee disclosure could be turned into a positive situation.³⁰⁹ Of the four, two commentators—Dennis Bakke, CEO of AES Corporation, and Bruce Tulgan, a management consultant who has authored books on managing Generation X—advocated for publishing all employee salaries with identifying information.³¹⁰ A third commentator, Victor Sim, Vice President of total compensation for Prudential Insurance, supported publication of the information without individual names attached.³¹¹ The last commentator, Ira Kay, a compensation consult-

³⁰³ Meyer, *supra* note 277 (explaining that Costco doesn't reveal its employees' salaries but "about 90 percent of the company's 145,000 employees are hourly and pay scales for those workers are published in an 'employee agreement' . . . [s]o, based on their hours worked, the hourly employees can fairly well surmise co-workers' wages and their own pay potential." At Dell "managers tell employees their compensation is influenced by market data and how their performance compares with peers" and the human resource department "recently created tools that enable managers to frame more fair, honest and consistent communication about pay. . . [that] help more tightly align Dell's 'meritocracy' philosophy with actual pay practices").

³⁰⁴ Gordon, *supra* note 147.

³⁰⁵ *Id.*

³⁰⁶ Sarah Mills, *Salary Transparency Goes Market*, Sept. 2008, <http://nkdorg.blogspot.com/2008/09/salary-transparency-goes-market.html>.

³⁰⁷ Case, *supra* note 282, at 37.

³⁰⁸ John Case, *When Salaries Aren't Secret*, BLOOMBERG BUSINESSWEEK (Oct. 11, 2007), http://www.businessweek.com/managing/content/oct2007/ca20071011_158943.htm.

³⁰⁹ Case, *supra* note 282, at 44–49.

³¹⁰ *Id.* at 46, 49.

³¹¹ *Id.* at 44. He also notes that Prudential is legally required to report all salaries over \$60,000 and, while successful in getting the insurance department to modify its requirements so that information on most employees could be supplied without names, continues to supply names for the top earners.

ant, supported the publication of salary ranges or bands.³¹² All acknowledged that more transparency leads to a better operation, including higher profitability. The two commentators who ran companies (rather than merely consulting on compensation issues) acknowledged that their own companies—AES Corporation, a \$6.3 billion global electricity company, and Prudential Insurance—engaged in wage transparency already to some degree. More and more employers are considering the business case for wage transparency.³¹³

VI. CONCLUSIONS

Mandatory wage disclosure laws are a logical next step in the long effort to close the gender wage gap in the United States. The stalled progress on the gap illustrates that the “merit gap” is mostly closed. Multiple reliable studies indicate that even after correcting for the remaining impact of differential education among older workers, experience differences due to motherhood, self-imposed occupational segregation, and the glass ceiling, a wage gap remains that can most likely be explained by wage discrimination. The Lily Ledbetter Fair Pay Restoration Act has helped women better access the tool of Title VII in asserting their legal rights but many women remain unaware that they are victims of wage discrimination and/or lack access to salary data of a male comparator in their organization—necessary for an Equal Pay Act claim. Mandatory wage disclosure laws would rectify this and would allow all aggrieved women to more effectively use both Title VII and the Equal Pay Act.

Wage disclosure laws are already in place for public sector workers and selected private sector employees. The existing wage disclosure laws have not been unduly burdensome on the workplace and have yielded some promising results in narrowing the gender wage gap in the federal government workplace. Widespread private sector disclosure laws could be easily modeled on the existing mandatory wage disclosure laws. Careful drafting and implementation, based on experience with earlier laws, can minimize any legitimate employer concerns about the impact of disclosure laws on the private workplace. The OFCCP is on the verge of requiring wage disclosure for all federal contractors, effectively requiring wage disclosure for 25% of private sector employees. Why not extend this requirement to all private employers?

In a time of easy electronic access to information, with a generation of young adults culturally open to broader sharing of previously private information, with the technology available to protect access to the information, and with the business case growing for wage transparency, the time is ripe to

³¹² *Id.* at 48.

³¹³ See Meyer, *supra* note 277 (discussing the increased request for wage details from employees, the large number of downloads of webinars on wage transparency, and the increasing number of companies willing to experiment with these new policies).

adopt mandatory wage disclosure laws for all United States employers. On the eve of the fiftieth anniversary of the passage of the Equal Pay Act, it is time for Congress to add the last logical legal requirement necessary to finally fulfill the promise of equal pay for equal work.

