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ARTICLES

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

*Orly Lobel**

After years of stagnation, pay equity law is gaining spectacular momentum. In the past three years, over a dozen states have passed important new legislation with numerous other bills pending before the federal, state, and local legislatures and a rising number of class action suits underway. This Article, the first to study the emerging ecology of pay equity law, argues that the underlying logic of these reforms is to structurally change the ways in which salaries are negotiated, determined, and, subsequently, detected and contested. Moreover, a central innovation of the new laws is to reverse information flows in the wage market. Efforts to eradicate wage discrimination have failed in large part because of information asymmetries and difficulties in identifying and proving discrimination. The new path of pay equity is to correct knowledge disparities in three key ways: 1) inducing more information about salaries, including protecting the exchange of information among employees; 2) reducing information that reflects existing biases by preventing employers from relying on, or even asking about, salary histories of new hires; and 3) requiring broader explanatory information from employers about pay disparities by broadening the comparisons from "equal" work to "substantially similar" or "comparable" work, shifting the burden to employers to produce reasons for disparities that exist in their salary structures. The Article explains how these developments move beyond the substantive prohibition of pay discrimination to focus on process, with the potential to shift discrimination policy from the litigation framework of traditional discrimination law to a governance approach that encourages

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dynamic, ongoing, and proactive efforts by private organizations and stakeholders. The significance of these reforms is dramatic because the new laws alter and shape the numbers and signals that circulate in the job market, including both intra- and inter-firm speech. Still, the Article argues that the reforms are piecemeal (primarily at the state level), they are heavily contested, and some of the most promising initiatives for systematic wage transparency have been halted.

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INTRODUCTION

After years of stagnation, pay equity law is gaining spectacular momentum. Over a dozen states have passed new legislation in the past three years, with numerous other bills pending before the federal, state,

and local legislatures.[1] Over five decades ago, Congress addressed the gender pay gap by passing the Equal Pay Act of 1963, mandating "equal pay for equal work."[2] The following year, Congress again addressed pay discrimination by passing Title VII of the Civil Rights Act of 1964.[3] Soon after, most states followed suit and enacted equal pay laws. Despite decades of federal and state legislation prohibiting pay discrimination, the gender pay gap has persisted into the twenty-first century.[4] The past several years, however, have brought a series of key reforms: legislative, administrative, judicial, and private efforts. This Article argues that the underlying logic behind the new wave of pay equity initiatives is to structurally change the ways in which salaries are negotiated, determined, and, subsequently, detected, and contested. Moreover, a central innovation of the new laws is to reverse information flows in the wage market. Efforts to eradicate wage discrimination have failed in large part due to information asymmetries and difficulties in identifying and proving discrimination. The new path of pay equity is to correct knowledge disparities in three key ways: (1) inducing more information about salaries, including protecting the exchange of information among employees; (2) reducing information that reflects existing biases by preventing employers from relying on, or even asking about, salary histories of new hires; and, (3) requiring broader explanatory information from employers about pay disparities by broadening the comparisons from "equal" work to "substantially similar" or "comparable" work, shifting the burden to employers to produce reasons for disparities that exist in their salary structures.

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

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1. See Melissa A. Silver, More States Seek to Close Wage Gap with Salary Question Bans, SHRM (May 24, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-wage-gap-salary-question-bans-.aspx [https://perma.cc/7C5H-GBVD].

2. Andrew Brenton, Overcoming the Equal Pay Act and Title VII: Why Federal Sex-Based Employment Discrimination Laws Should Be Replaced with a System for Accrediting Employers for Their Antidiscriminatory Employment Practices, 26 Wis. J.L. Gender & Soc'y 349, 352–53.

3. Id. at 350.

4. See Elise Gould, Jessica Schieder & Kathleen Geier, Econ. Pol'y Inst., What Is the Gender Pay Gap and Is It Real? 1 (Oct. 20, 2016), https://www.epi.org/files/pdf/112962.pdf (on file with the *Columbia Law Review*).

primarily at the state level, heavily contested, and that some of the most promising initiatives for systematic wage transparency have been halted. In particular, a major initiative of the Obama Administration, which required regular reporting on pay structures, has been stayed by the new Administration.

This Article introduces the current reforms as they relate to information flows, and correcting and detecting discriminatory pay. The goal is to analyze the promise as well as the limits of the contemporary multifaceted pay equity reforms and to suggest directions for the future of pay equity law. The most visible and highly contested new legislative reforms, which primarily took effect in 2019, prohibit employers from asking prospective employees about their previous salaries.[5] Beyond salary history *inquiry*, salary history *reliance* for determining a new offer or justifying gender disparity is also a heavily contested issue.[6] The federal courts are currently strongly split on whether employers can use salary history as a reason "other than sex" to defend against a gender pay inequity claim. In an April 2018 en banc decision, the Ninth Circuit Court of Appeals decided *Rizo v. Yovino*,[7] which held that federal pay equity law prohibits employers from justifying pay disparity based on salary histories, thereby overturning its previous precedent and diverging from several other circuits. In 2019, the Supreme Court vacated and remanded *Rizo*.[8] On remand in 2020, the Ninth Circuit once again affirmed the district court en banc.[9]

Flipping transparency on its head, the same legislative initiatives that disallow information on salary history to flow to employers are also promoting more information sharing among coworkers. As this Article explains, the new laws are anchored in a longstanding right of employees to engage in concerted activity and discuss the terms and conditions of their jobs.[10] At the same time, a rising number of employers demand secrecy and contractual confidentiality, and the legislative reforms must be understood in relation to these realities.

A third set of legislative reforms adopt a fresh lens on pay disparities by rethinking salary comparisons and shifting the burden of justifying disparity to employers.[11] Several state laws and court decisions are changing the ways in which employees are compared to one another. For example, the new laws in California, Massachusetts, New York, and several

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5. See infra section III.A.

6. See infra note 160 and accompanying text.

7. 887 F.3d 453, 468 (9th Cir. 2018), vacated, 139 S. Ct. 706 (2019). ("Reliance on past wages . . . perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate . . . . [P]ast salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors.").

8. Yovino v. Rizo, 139 S. Ct. 706 (2019).

9. Rizo v. Yovino, 950 F.3d 1217, 1221–22 (9th Cir. 2020).

10. See infra section IV.A.

11. See infra note 321.

other states move from "equal work" for equal pay to "substantially equal" or "comparable work."[12] Maryland has taken the lead in going further and prohibiting "mommy tracks," which create gender pay disparities by tailoring positions that limit career opportunities for women.[13] A federal bill, the Paycheck Fairness Act, includes a similar reform revising the Equal Pay Act.[14]

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

The study of pay equity law is the study of the interactions between substantive prohibitions and the surrounding forces that create barriers to implementation. Transparency done right is a universal challenge for law and policy. The goal of perfecting markets through information while also understanding the demands for secrecy and proprietary knowledge pervades every regulatory field. This Article draws on the robust research, including my original studies, on behavioral law and human capital law, to understand how information is exchanged, understood, and used in the market for wages. The bans on salary history inquiry and reliance are novel and controversial. They are designed to close the gender pay gap by preventing lower wages from following women from job to job. *Bloomberg* called this emerging type of legislation a "gag rule that won't help women advance,"[15] and industry groups have challenged these new rules in court on constitutional grounds.[16] This Article responds to these claims and explains the dual goal of information flow reversal: to break cycles of pay discrimination, which pervade the wage market and grow over time, and to correct for gender biases as well as negotiation differences during the

12. See infra section IV.B.

13. See infra notes 342–343 and accompanying text.

14. See infra notes 111–112 and accompanying text.

15. Opinion, A Gag Rule Won't Help Women Advance, Bloomberg (Apr. 11, 2017), https://www.bloomberg.com/view/articles/2017-04-11/a-gag-rule-won-t-help-women-advance [https://perma.cc/Z3MX-SKV3].

16. See Chamber of Commerce for Greater Phila. v. City of Philadelphia, 319 F. Supp. 3d 773, 785 (E.D. Pa. 2018).

hiring process. At every stage of employment—search, offer, promotion, and exit—ongoing disparities impede the closing of the pay equity gap.[17] Therefore, while policies that reverse information flows at the hiring stage are important, policies for continuous direct pay transparency through reporting and pay scale provision are likely to have an even greater systematic impact. The Article offers the lens of new governance—a shift from a command-and-control approach to ongoing private–public collaborative efforts—which can better ensure continuous checks and safeguards and incentivize employers to self-audit, assess, and establish better compliance practices. The recent state laws have begun moving toward new governance reforms by enacting safe havens for companies that voluntarily conduct audits and take active steps to correct inequities. Some reforms also require the provision of pay scales to prospective employees upon request.[18] Moreover, private sector initiatives, including the use of digital platforms to create networks of employees who share salary information and the use of software tools to identify internal pay gaps, are creating alternatives to mandated transparency laws.[19] While these initiatives are promising, this Article also draws on the research on new governance and compliance to analyze their limits. This Article argues that the new information-focused reforms help support a shift from a litigation-driven model of pay equity to a governance-centered model.

This Article proceeds as follows. Part I presents the most recent evidence on the persisting wage gap in our contemporary job markets. The Part analyzes the empirical studies that provide insight into the multiple reasons for ongoing pay discrimination including direct bias, gender differences in negotiation, job mobility, secrecy, occupational segregation, and private choices. Unpacking the factors that contribute to the persistent gender pay gap is key to understanding the need for multilayered reforms that target the different causes and stages of unequal compensation. Part II provides a brief history of pay equity law and introduces the wave of recent initiatives in the context of the #MeToo movement and efforts to expose and eradicate gender inequality more broadly. Part III explains the logic, controversy, and behavioral economics of salary history inquiry and reliance bans. The Part analyzes the bans in relation to insights on rational and irrational compensation markets, including executive pay, and empirical evidence on gender differences in negotiations, which I term the *negotiation deficit*, the *negotiation penalty*, and the *negative inference* processes at the hiring stage. The Part also relates the salary inquiry ban to the earlier effort to ban criminal record history inquiry and provides insights from recent empirical evidence on the effects of these bans. Part IV focuses on the goal of enhancing the information available to employees, including the ability to share salary information with coworkers and

17. See infra section I.A.

18. See infra note 287 and accompanying text.

19. See infra notes 397–398 and accompanying text.

to compare pay across comparable, even if formally different, job categories. The Part further considers the effects of clauses that impede information sharing, including nondisclosure agreements, which I have researched extensively in relation to talent mobility and innovation.[20] Building on that research, I propose a notice requirement in employment contracts about the ability to discuss pay, analogous to a requirement adopted by Congress in the 2016 Defend Trade Secrets Act with regard to whistleblowing.[21] Part V turns to federal transparency requirements, which were stayed in 2017 by the new Administration, and provides a comparative view of similar reforms recently adopted in Europe, particularly in the United Kingdom and Iceland. The Part then explains how gender pay equity is best understood within a new governance paradigm and offers a framework for enhancing the rise in private efforts toward a sustainable and robust pay equity regime.

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

"The simplicity of equal pay often gets lost in jargon and statistics."[22]

A. *A Sticky Gap*

Pay inequity continues to plague the United States. For decades, the story of the pay gap has been one of stagnation. In 2019, the pay gap remained wide, hardly narrowing in over a decade. According to the latest report from the U.S. Census Bureau, American women still earn an average of eighty to eighty-three cents for every dollar earned by their male counterparts.[23] As a 2018 *New Yorker* article put it, "American women effectively

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20. See infra note 307.

21. See infra note 318 and accompanying text.

22. Lauren Collins, How the BBC Women Are Working Toward Equal Pay, New Yorker (July 23, 2018), https://www.newyorker.com/magazine/2018/07/23/how-the-bbc-women-are-working-toward-equal-pay [https://perma.cc/M4ED-7HFR].

23. The range of eighty to eighty-three cents on the dollar stems from variations of methods in measuring the gap. Yet using alternative ways of measuring and different sets of data, the results remain remarkably consistent on the scale of the wage gap. The gap is measured for full-time employment. See, e.g., Gould et al., supra note 4, at 1 ("In simple terms, no matter how you measure it, there is a gap."). The U.S. Census Bureau cites eighty cents on the dollar. See Jennifer Cheeseman Day, Among the Educated, Women Earn 74 Cents for Every Dollar Men Make, U.S. Census Bureau (May 29, 2019), https://www.census.gov/library/stories/2019/05/college-degree-widens-gender-earnings-gap.html [https://perma.cc/B9LE-FK32] ("Overall, women workers earn about 80 cents for every dollar men earn."). In 2016, the Pew Research Center released a study noting the persistence of a gender pay gap between men and women. The study finds the gap is 83%. See Eileen Patten, Racial, Gender Wage Gaps Persists in U.S. Despite Some Progress, Pew Res. Ctr.: Fact Tank (July 1, 2016), https://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress [https://perma.cc/KW6P-YH2V]; see also Francine D. Blau & Lawrence M. Kahn, The Gender Wage Gap: Extent, Trends, and Explanations, 55 J. Econ. Literature 789, 797–800 (2017) (citing a ratio of eighty-two cents on the dollar as the average gap).

work from January 1st until March 15th without getting paid."[24] While the pay gap between men and women has lessened in the last fifty years, momentum has languished in recent decades and the gap remains persistently large.[25] When projecting at the rate the pay gap narrowed between 1960 and 2015, it is predicted that the gap could close by 2059.[26] However, when projecting solely on the rates of progress between 2001 and 2015, pay equity is not expected to be achieved until nearly one hundred years later in 2152.[27] The Institute for Women's Policy Research estimates that closing the gap would amount to approximately $513 billion in additional wage and salary income in the United States and would reduce poverty by over 50% among women.[28]

For minority women, the pay gap is even greater. According to a recent congressional report, African American women only earn sixty cents for every dollar earned by white men, while Hispanic women earn an even smaller fifty-five cents on the dollar.[29] Indeed, some of the new reforms importantly include an expansion of pay equity laws to protect against not only gender discrimination, but also racial and ethnic discrimination.[30] The size of the gap also varies greatly from state to state, from Louisiana at the bottom of the pay equity scale with a thirty-one-cent differential, to California and the District of Columbia, which tied for the top states on the scale with an eleven-cent differential.[31] As for age, the gender wage gap widens over time as women advance in their careers.[32]

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24. Lauren Collins, How the BBC Women Are Working Toward Equal Pay, New Yorker (July 16, 2018), https://www.newyorker.com/magazine/2018/07/23/how-the-bbc-women-are-working-toward-equal-pay [https://perma.cc/M4ED-7HFR].

25. See Patten, supra note 23. In 1980, white women earned sixty cents for every dollar earned by a white man; in 2015, white women earned eighty-two cents per dollar earned by a white man. Id.

26. Am. Ass'n of Univ. Women, The Simple Truth About the Gender Pay Gap 4 (2017), https://cdn.ymaws.com/www.sidnet.org/resource/resmgr/DI_Tool_Kit/The_simple_truth_about_the_g.pdf [https://perma.cc/M6HP-2XP3].

27. Id.

28. Jessica Milli, Yixuan Huang, Heidi Hartmann & Jeff Hayes, Inst. for Women's Pol'y Research, The Impact of Equal Pay on Poverty and the Economy 1–2 (Apr. 5, 2017), https://iwpr.org/publications/impact-equal-pay-poverty-economy [https://perma.cc/QLS8-7XQL].

29. Joint Econ. Comm. Democratic Staff, 114th Cong., Gender Pay Inequality: Consequences for Women, Families and the Economy 6 (2016), https://www.jec.senate.gov/public/_cache/files/0779dc2f-4a4e-4386-b847-9ae919735acc/gender-pay-inequality---us-congress-joint-economic-committee.pdf [https://perma.cc/QVV6-93D3].

30. See, e.g., S.B. 1063, 2015–2016 Leg., Reg. Sess. (Cal. 2016) (amending Cal. Lab. Code § 1197.5 to prohibit not just gender pay discrimination, but also discrimination based on race or ethnicity).

31. Nat'l P'ship for Women & Families, America's Women and the Wage Gap 1 (2019), http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf [https://perma.cc/3BU7-P4CY].

32. See Joint Econ. Comm. Democratic Staff, supra note 29, at 3 ("[W]omen face an income gap of 44 percent in retirement, a difference that is more than twice the overall gender pay gap."); see also Kara Stiles, The Unsettling Truth About Women and Retirement,

Evidence of the pay gap is strong and abundant. Systematic reviews of empirical studies on the wage gap confirm that there are multiple reasons for the pay gap.[33] These include occupational sorting or segregation—men and women typically occupying different positions and industries—and the disparity between men and women in holding senior roles.[34] Female workers on average hold lower-paying positions and occupy lower-earning occupations.[35] Full-time male workers also work longer hours than full-time female workers: Male workers average 43.5 hours per week while female workers average 41.1.[36] Of all groups, mothers experience the biggest pay gap, again a finding explained by multiple causes, including that women often take, or are channeled into, a different track.[37] Yet even on the same track, in the same job category, discrimination against mothers is well documented.[38] And although the wage gap for younger workers and unmarried workers without children is smaller, there is still a significant gender gap among those demographics.[39]

Economists studying the pay gap agree that while a portion of the gap can be explained by seemingly private choices—a contested category in itself including segregation into stereotypically gendered careers and hours, education levels, and years in the job market—there is a component of the gap that simply cannot be explained away, evidencing direct

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Forbes (Dec. 7, 2017), https://www.forbes.com/sites/karastiles/2017/12/07/the-unsettling-truth-about-women-and-retirement (on file with the *Columbia Law Review*) (listing the wage gap as one variable contributing to the financial insecurity of retired women).

33. See, e.g., Claudia Goldin, Understanding the Gender Gap: An Economic History of American Women 95–96 (Robert W. Fogel & Clayne L. Pope eds., 1990) (listing a variety of factors, such as schooling and marital status, that may have had an effect on the earnings of working women between 1888 and 1907); Sebawit G. Bishu & Mohamad G. Alkadry, A Systematic Review of the Gender Pay Gap and Factors That Predict It, 49 Admin. & Soc'y 65, 75–93 (2017) (summarizing ninety-eight peer-reviewed journal articles that explain the pay gap through factors including workplace authority, hiring and promotion, and workplace representation); Blau & Kahn, supra note 23, at 807–36 (summarizing studies discussing the influence of labor force participation, selection bias, education, labor force experience, work hours, formal training, motherhood, industry, and labor market discrimination on the gender pay gap).

34. See U.S. Gov't Accountability Office, GAO-04-35, Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings 59–60, 64–65 (2003).

35. See Gary S. Becker, Human Capital, Effort, and the Sexual Division of Labor, 3 J. Lab. Econ. S33, S55 (1985).

36. Labor Force Statistics from the Current Population Survey, U.S. Bureau of Lab. Stat., https://www.bls.gov/cps/cpsaat22.htm [https://perma.cc/B4S5-2FT7] (last updated Jan. 18, 2019).

37. See supra notes 34–35 and accompanying text.

38. See Vicki Schultz, Feminism and Workplace Flexibility, 42 Conn. L. Rev. 1203, 1215–16 (2010) (arguing that flexible workplace patterns such as family leave "tend to exacerbate women's marginalized status rather than improve it").

39. See Labor Force Statistics from the Current Population Survey, supra note 36, at 2 ("For those under age 35, the earnings differences between women and men were smaller, with women earning 90 to 92 percent of what men earned.").

discrimination.[40] Even after accounting for skill, experience, occupation, industry, job description, and factors such as evaluation and performance, which have a degree of subjectivity, a significant portion of the gap persists. As one 2016 congressional report stated, "no widely accepted methodology is able to attribute the entirety of the wage gap to observable characteristics. . . . [E]ven among rigorous studies, no widely accepted methodology has been able to attribute the entirety of the pay gap to factors other than the sex of the worker."[41] Or, as put by the Council of Economic Advisors in 2016, "When holding education, experience, occupation, industry, and job title constant, a pay gap remains."[42] After controlling for all measurable variables, economists infer discrimination as the missing piece of the puzzle that explains the remainder of the gap.[43]

One study reveals that even when the pay gap is adjusted for education, experience, age, location, job title, industry, and company, a gender wage gap of 94.6 cents to the dollar still exists.[44] In another study controlling for industry, occupation, and work hours to model "a man and woman with identical education and years of experience working side-by-side in cubicles," a 13.5% gap still persisted.[45] Yet another study controlled for college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, employment status, age, geographical region, and marital status.[46] The study shows a remaining gender wage gap of 6.6%.[47] In another study, controlling for education, occupation, experience level, and geography, as well as race and ethnicity, a disparity of 8.4% remained.[48] A consensus among researchers emerges: Even when the data are adjusted for control variables, a significant unaccounted-for gender wage gap remains.[49]

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40. See infra notes 44–50 and accompanying text.

41. Jody Feder & Benjamin Collins, Cong. Research Serv., RL31867, Pay Equity: Legislative and Legal Developments 1–2 (2016), https://fas.org/sgp/crs/misc/RL31867.pdf [https://perma.cc/DW55-B3K4].

42. Council of Econ. Advisers, The Gender Pay Gap on the Anniversary of the Lilly Ledbetter Fair Pay Act 5 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160128_cea_gender_pay_gap_issue_brief.pdf [https://perma.cc/9X28-BCZE].

43. Id.

44. Robert Hohman, This Is the Biggest Myth About the Gender Wage Gap, Fortune (Apr. 12, 2016), http://fortune.com/2016/04/12/myth-gender-wage-gap (on file with the *Columbia Law Review*).

45. Gould et al., supra note 4, at 7.

46. See Christianne Corbett & Catherine Hill, Am. Ass'n of Univ. Women, Graduating to a Pay Gap: The Earnings of Women and Men One Year After College Graduation 36–38 (2012), https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf [https://perma.cc/6NEM-22ZD].

47. Id. at 36.

48. Gould et al., supra note 4, at 7, 36 n.10.

49. See Katie Meara, Francesco Pastore & Allan Webster, Is the Gender Pay Gap in the US Just the Result of Gender Segregation at Work? § 1 (IZA Inst. of Labor Econ. Discussion Paper Series, No. 10673, 2017), http://ftp.iza.org/dp10673.pdf [https://perma.cc/FZS2-95QA].

Estimates of this unexplained gap range from five to ten cents, accounting for a quarter to half of the gender pay gap.[50]

As Ariane Hegewisch of the Institute for Women's Policy Research explains, "What is left over is what we can't explain with anything that can be easily measured, and that's basically the proxy for discrimination."[51] The pay gap grows over time in a woman's career and deepens when she becomes a mother. The Census Bureau finds that the gender gap between like-earning spouses doubles immediately after they have a child.[52] The mother's earnings never recover, while the father's earnings grow. The literature has named these parenting effects "the motherhood penalty" and the "fatherhood bonus."[53] The parenting effects go beyond changes in work hours and career tracks. A woman who has children is often perceived as low in competence, though high in warmth, whereas a childless woman is considered a "career woman" and is perceived as high in competence, but low in warmth.[54] In practice, a father is given extra work to help his family while a woman is sent home early.[55]

Related to the work–family challenges and motherhood, gender pay gaps may increase over time in part because of market friction in mobility. The number of noncompete agreements has increased in recent years and is likely to have a disparate impact on job mobility. As I recently wrote in an opinion article in the *New York Times*, "while noncompete restrictions impose hardships on every worker, for women these restrictions tend to be

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50. See Gould et al., supra note 4, at 6–7. Current research on the wage gap by ILR School professors published in the Journal of Economic Literature found a 38% gender wage gap that is unaccounted for which they believe is caused by gender discrimination in the workplace. Blau & Kahn, supra note 23, at 799.

51. Collins, supra note 24.

52. See YoonKyung Chung, Barbara Downs, Danielle H. Sandler & Robert Sienkiewicz, Ctr. for Econ. Studies, U.S. Census Bureau, No. 17-68, The Parental Gender Earnings Gap in the United States 36 (2017), https://www2.census.gov/ces/wp/2017/CES-WP-17-68.pdf [https://perma.cc/4256-BUMZ].

53. Shelley J. Correll, Stephen Benard & In Paik, Getting a Job: Is There a Motherhood Penalty?, 112 Am. J. Soc. 1297, 1321 (2007). Some scholars have also noted that the "motherhood penalty" may be larger among higher earning professionals. Aline Bütikofer, Sissel Jensen & Kjell G. Salvanes, The Role of Parenthood on the Gender Gap Among Top Earners 2 (Ctr. for Econ. Policy Research, Discussion Paper No. DP13044, 2018) (describing how parenthood impacts the careers of high-achieving women relative to high-achieving men).

54. See Amy J.C. Cuddy, Susan T. Fiske & Peter Glick, When Professionals Become Mothers, Warmth Doesn't Cut the Ice, 60 J. Soc. Issues 701, 711 (2004).

55. The Seventh Circuit has held, however, that the motherhood gap does not constitute discrimination: "Wages rise with experience as well as with other aspects of human capital. That many women spend more years in child-rearing than do men thus implies that women's market wages will be lower on average, but such a difference does not show discrimination." Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470 (7th Cir. 2005). Also note the findings about the Uber gender gap in Cody Cook, Rebecca Diamond, Jonathan Hall, John A. List & Paul Oyer, The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers 2 (Nat'l Bureau of Econ. Research, Working Paper No. 24732, 2018), https://www.nber.org/papers/w24732.pdf (on file with the *Columbia Law Review*).

compounded with other mobility constraints, including the need to coordinate dual careers, family geographical ties and job market re-entry after family leave."[56] The gender pay gap creates a vicious circle in this regard: As the spouses with the lower incomes, wives and mothers are more likely to leave without another job offer, move for their spouse's career, or take unpaid time off to perform unpaid care work.[57]

B. *Evidence of Direct Bias Affecting the Pay Gap*

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

Take, for example, the "top ten list" of reasons for the gender wage gap suggested by the National Committee on Pay Equity:[58]

(1) Wage Secrecy;
(2) Impracticability of Lawsuits as a Remedy;
(3) Effects of Raising Children;
(4) Differences in Pay Between "Women's" and "Men's" Types of Jobs;
(5) Continuing Bias;
(6) Intangibility of Discrimination;
(7) Lasting Stereotypes;
(8) Difficulty for Women to Break into Male-Dominated Jobs;
(9) Employers Failing to Address Issues
(10) Weakness of Current Laws.[59]

As discussed in the next sections, recent law reforms can be understood to address reason number ten: Current laws are weak and focus on substantive prohibition of discrimination without attention to form and dynamic processes of inequity. Most of the other listed reasons can be bundled and viewed as overlapping effects of weak laws, and the contemporary efforts to reform pay equity law should be understood as efforts to address these challenges. Reason number one, wage secrecy, underscores the importance of understanding the information asymmetries that pervade

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56. Orly Lobel, Opinion, Companies Compete but Won't Let Their Workers Do the Same, N.Y. Times (May 4, 2017), https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html (on file with the *Columbia Law Review*); see also Orly Lobel, Talent Wants to Be Free: Why We Should Learn to Love Leaks, Raids, and Free Riding 51 (2013) [hereinafter Lobel, Talent Wants to Be Free].

57. Claire Cain Miller, The Gender Pay Gap Is Largely Because of Motherhood, N.Y. Times: Upshot (May 13, 2017), https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html (on file with the *Columbia Law Review*).

58. Top 10 Reasons for the Wage Gap, Nat'l Comm. on Pay Equity, https://www.pay-equity.org/info-top10.html [https://perma.cc/4VFZ-79MH] (last visited Oct. 15, 2019).

59. Id.

the wage market. Reason two regards the difficulty of prevailing in a lawsuit and relates to attempts to proactively reform pay, rather than merely focusing on after-the-fact recovery. Reasons five, six, and seven are all elements of gender bias and the persistence of direct discrimination. Finally, reason nine, the failure of employers to address these issues, is the very core of why policy must creatively intervene—both directly and indirectly—by encouraging internal proactive compliance. As we shall see below, many of the new efforts bypass the complaint-litigation logic of earlier wage discrimination laws, the traditional core focus of the Equal Pay Act and Title VII. Importantly, the remaining factors—effects of motherhood, occupational segregation, and the glass ceiling—must also be understood as subjects of new policy efforts. Once a more comprehensive approach to address knowledge flows and ongoing biases is implemented, even those factors at the outer edges of what is considered discrimination under a litigation rubric can be addressed.

At the same time, it is illuminating to note evidence of the direct type of discrimination—the kind that is squarely illegal under the traditional litigation framework—to better understand the need for immediate corrective measures in the wage market at all stages of the employment process: hiring, promoting, evaluating, and continuing mobility throughout one's career. A set of empirical and experimental findings point to persistent patterns of pervasive direct discrimination in contemporary job markets.[60] One striking example is a lesser-known finding of the now-famous resume studies that have been replicated and varied over recent years. In 2012, a team of researchers at Yale University and Skidmore College created fictional resumes for a lab manager position.[61] Half the resumes were

60. Interestingly, one vantage point examining transgender people in the workforce reveals that "earnings for male-to-female transgender workers fell by nearly one-third after their gender transitions, but earnings for female-to-male transgender workers increased slightly." Catherine Rampell, Before that Sex Change, Think About Your Next Paycheck, N.Y. Times: Economix (Sept. 25, 2008), https://economix.blogs.nytimes.com/2008/09/25/before-that-sex-change-think-about-your-next-paycheck (on file with the *Columbia Law Review*). The researchers suggest that this finding supports that "the gender pay gap may be due more to discrimination than to how children are socialized or how much women invest in their careers versus their families." Id. The sports industry further illustrates the gender gap for comparable work. In 2017, the U.S. women's hockey team advocated for equal pay and won the battle for a signed contract with U.S.A. Hockey that compensated them equally to their male counterparts. Rob Wile & Alicia Adamczyk, 'We Need to Be Brave Enough to Stand Up': U.S. Women's Hockey Players on Their Fight for Equal Pay, Money (Mar. 29, 2017), http://money.com/money/4716694/usa-womens-hockey-equal-pay-interview [https://perma.cc/H4D9-R54V]. Similar efforts have been undertaken by the U.S. women's soccer team, which has also fought for equal pay. Louisa Thomas, Equal Pay for Equal Play: The Case for the Women's Soccer Team, New Yorker (May 27, 2016), https://www.newyorker.com/culture/cultural-comment/the-case-for-equal-pay-in-womens-sports [https://perma.cc/62SX-6E9Z].

61. See Corinne A. Moss-Racusin, John F. Dovidio, Victoria L. Brescoll, Mark J. Graham & Jo Handelsman, Science Faculty's Subtle Gender Biases Favor Male Students, 109 Proc. Nat'l Acad. Sci. 16,474, 16,475 (2012).

assigned a male name ("John") and half a female name ("Jennifer").[62] The researchers asked over one hundred faculty members nationwide to assess the resume they received.[63] "John" was rated as significantly more competent and worthier of hiring than "Jennifer."[64] The resume studies are known for showing the lesser employability of minorities and women, but the less known effect is the disparity in salary offers. When "Jennifer" was offered a job, she was offered a lower salary than "John"—an average of $4,000 less annually.[65] Strikingly, this effect was consistent regardless of whether the hiring faculty was a man or a woman.[66] As for salary increases, a recent field study of a private employer with 20,000 employees found performance-reward bias showing that different salary increases were granted for observationally equivalent employees, with the same supervisor and same human capital and position, even though they received the same performance evaluation scores.[67]

Empirical studies further show that women are not only offered lower salaries and raises but that women actually ask for less. In their seminal work, economist Linda Babcock and journalist Sara Laschever asked why "Women Don't Ask."[68] They found that women are less likely than men to negotiate for higher salaries and other benefits.[69] For example, in one study at Carnegie Mellon University, 93% of female M.B.A. students accepted an initial salary offer, while only 43% of men did.[70] In another study, female participants simulating salary negotiations asked for an average of $7,000 less than their male participants.[71] At the same time, in a large-scale field experiment, economists Andreas Leibbrandt and John List found that while women are much less likely to negotiate with employers over salary, this difference disappears and mitigates the pay gap when all job seekers are explicitly told that pay is negotiable.[72]

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62. Id. at 16,478.

63. Id.

64. Id. at 16,477.

65. Id. at 16,475.

66. Id. at 16,475, 16,477.

67. Emilio J. Castilla, Gender, Race, and Meritocracy in Organizational Careers, 113 Am. J. Soc. 1479, 1484–85 (2008).

68. Linda Babcock & Sara Laschever, Women Don't Ask: Negotiation and the Gender Divide 1 (2003).

69. Id. at 1–3.

70. Id. at 1.

71. Emily T. Amanatullah & Michael W. Morris, Negotiating Gender Roles: Gender Differences in Assertive Negotiating Are Mediated by Women's Fear of Backlash and Attenuated when Negotiating on Behalf of Others, 98 J. Personality & Soc. Psychol. 256, 261 (2010).

72. Andreas Leibbrandt & John A. List, Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment 12 (Nat'l Bureau of Econ. Research, Working Paper No. 18511, 2012), https://www.nber.org/papers/w18511.pdf [https://perma.cc/76HV-MAXY].

Other studies show that women are treated differently when they attempt to negotiate their salary. Historically, women have been universally viewed as the weaker negotiators compared to their male counterparts. In a series of experiments, participants evaluated written accounts of candidates who did or did not initiate negotiations for higher salary. The results in each experiment showed that participants penalized female candidates more than male candidates for initiating negotiations, deeming women who asked for more not "nice" or too "demanding."[73] While qualities such as "assertiveness, strength, and competition" culturally benefit male negotiators, women who display such characteristics are often considered too aggressive.[74] Too often, women "fall into feminine stereotype traps and settle for lower wages, compounding a vicious cycle of gender pay discrimination."[75]

An important finding in the research on gender disparities in negotiated salaries is that when ambiguities over the range of salary and norms of negotiation are high, the gender differences are far larger.[76] As will be further analyzed in the sections below, pay transparency can help reduce the ambiguity of negotiating situations. Bans on salary inquiry, along with mandatory presentation of a pay scale by the employer, can further reduce the social penalties some women face for initiating negotiations. Finally, governance solutions have the potential to address the biases that exist in wage-setting processes by including provisions for negotiation training, education about pay equity, and the aid of digital platform tools for employers and employees.

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73. See Babcock & Laschever, supra note 68, at 86–88 (contending that women are socialized to refrain from asking for what they want); Hannah Riley Bowles, Linda Babcock & Lei Lai, Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask, 103 Organizational Behav. & Hum. Decision Processes 84, 90–92 (2007); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545, 1603–05 (1991). Experimental studies on gender differences in workplace behavior also demonstrate that women act less in the manner of "homo economicus" and more as other-looking social enforcers. See, e.g., Yuval Feldman & Orly Lobel, Decentralized Enforcement: An Experimental Approach, 2 Reg. & Governance 165, 179–80 (2008); Yuval Feldman & Orly Lobel, The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality, 88 Tex. L. Rev. 1151, 1196–97 (2010).

74. See Laura J. Kray & Michele J. Gelfand, Relief Versus Regret: The Effect of Gender and Negotiating Norm Ambiguity on Reactions to Having One's First Offer Accepted, 27 Soc. Cognition 418, 420–21 (2009) ("Women and men . . . are treated differently for the exact same behavior by their negotiating counterparts . . . .").

75. Erin Coghlan, Inst. for Research on Labor & Emp't, Univ. of Cal. Berkeley, State Policy Strategies for Narrowing the Gender Wage Gap 3 (2018), https://irle.berkeley.edu/files/2018/04/IRLE-State-Policy-Strategies-for-Narrowing-the-Gender-Wage-Gap.pdf [https://perma.cc/R77N-SRWT] (footnote omitted).

76. See Dina W. Pradel, Hannah Riley Bowles & Kathleen L. McGinn, When Gender Changes the Negotiation, Harv. Bus. Sch.: Working Knowledge (Feb. 13, 2006), https://hbswk.hbs.edu/item/when-gender-changes-the-negotiation [https://perma.cc/2VMA-7X8B] (finding that women received about $10,000 less than similarly qualified men in high-ambiguity situations).

II. THE CONTEMPORARY MOMENTUM

"It brings tears to my eyes to know how women, every single day, are working so hard and are getting paid less. It makes me emotional to hear that. . . . I get angry; I get outraged; I get volcanic."[77]

A. *The Long, Winding Road of Pay Equity Legislation*

It's been a long road toward pay equity. In 1869, the *New York Times* published a letter to the editor asking why female government employees were paid less than their male counterparts for equal work.[78] At the time the letter was written, female employees were earning half of what their male counterparts earned.[79] The following year, Congress passed a resolution that government employees would receive equal pay regardless of gender.[80] Fourteen years later, in 1883, the workers of the Western Union Telegraph Company went on strike to fight for "equal pay for equal work."[81] The strike did not result in equal pay, but it did capture the nation's attention as communications across the country were halted.[82] During the World Wars, with American men leaving the country en masse, women began to fill jobs once thought to be only for men. This not only created space for women in the workforce, but also led the National War Labor Board to proclaim that "[i]f it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work . . . ."[83] In fact, the initiative to equalize pay during the war was championed by unions and male workers, who worried that if women were paid less for the same work, management would lower male workers' wages after they returned from the war.[84]

The initiative lost its force post-war, and the next milestone in the struggle for equal pay didn't come until the first central federal legislation for equal pay in 1963 when President John F. Kennedy signed the Equal Pay Act (EPA), which amended the Fair Labor Standards Act and required that men and women be paid equally for equal work.[85] In passing the EPA, Congress set to correct "a serious and endemic problem of employment

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77. 160 Cong. Rec. S2297 (2014) (quoting Barbara Mikulski, U.S. Senator).

78. Charlotte Alter, Here's the History of the Battle for Equal Pay for American Women, Time (Apr. 14, 2015), http://time.com/3774661/equal-pay-history [https://perma.cc/G7NL-69M6].

79. Id.

80. See H.R. 974, 41st Cong. (1870); An Appropriations Amendment Prohibiting Gender Discrimination, History, Art & Archives, U.S. House of Representatives, http://history.house.gov/historical-highlights/1851-1900/an-appropriations-amendment-prohibiting-gender-discrimination [https://perma.cc/AKP8-AJRE] (last visited Oct. 14, 2019).

81. See Alter, supra note 78.

82. Id.

83. Richard B. Gregg, The National War Labor Board, 33 Harv. L. Rev. 39, 43 (1919).

84. See Alter, supra note 78.

85. Id.

discrimination in private industry . . . ."[86] The purpose of the EPA was for women to "find equality in their pay envelopes."[87] President Kennedy signed the Act into law to eradicate "the unconscionable practice of paying female employees less wages than male employees for the same job."[88] The next year, Congress passed the Civil Rights Act of 1964, which prohibits discrimination based on race, origin, color, religion, or sex.[89] For more than fifty years, these two seminal laws, the EPA and Title VII of the Civil Rights Act, have prohibited pay discrimination. Equal pay laws have similarly been enacted in the vast majority of states.[90] Notably, the EPA passed in part because some proponents of the Act focused on how a wage gap between women and men led to inefficient underutilization of labor.[91]

Since 1964, action has centered in the courtroom. However, as we near the third decade of the twenty-first century, legislative reforms are quickly moving forward. Since 2016, a growing number of states and localities have passed a first-of-its-kind "ban the box" prohibition on employers asking for the prior salary history of prospective employees.[92] Other reforms are also underway, and, as a recent survey shows, equal pay at work is a primary concern for working Americans.[93]

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

This is an optimistic year for scholars, attorneys, and policymakers working to promote gender equality. The #MeToo movement has energized public discourse and legislative efforts to create better work environments

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86. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

87. Gerhard Peters & John T. Woolley, John F. Kennedy: Remarks Upon Signing the Equal Pay Act, Am. Presidency Project, https://www.presidency.ucsb.edu/node/236653 [https://perma.cc/ZF74-6H2N] (last visited Nov. 7, 2019).

88. Id.

89. Alter, supra note 78.

90. See State Equal Pay Laws, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx [https://perma.cc/9BDV-LL5J] (last visited Oct. 14, 2019).

91. Press Release, Jacqueline A. Berrien, Chair, U.S. EEOC, Statement to Commemorate Equal Pay Day 2011, https://www.eeoc.gov/eeoc/newsroom/equalpayday2011.cfm [https://perma.cc/QCH4-W9CH] (last visited Mar. 28, 2020).

92. Salary History Bans, HR Dive, https://www.hrdive.com/news/salary-history-ban-states-list/516662 [https://perma.cc/V42C-49VV] (last updated Oct. 31, 2019); see also Bryce Covert, Massachusetts Becomes First State Ever to Ban Employers from Asking for Salary Histories, Think Progress (Aug. 1, 2016), https://thinkprogress.org/massachusetts-becomes-first-state-ever-to-ban-employers-from-asking-for-salary-histories [https://perma.cc/9UHA-M7QN].

93. See, e.g., Gender Pay Gap Is Top Workplace Concern for U.S. Women, Thomson Reuters Found., http://poll2015.trust.org/i/?id=7ebb7b13-3791-457d-ab6f-730ebd6c598f [https://perma.cc/SXK3-GW68] (last visited Nov. 7, 2019); Andy Knauer, Taking the Lead on Equal Pay: 7 Companies that Pay Women Fairly, Forbes (Apr. 4, 2017), https://www.forbes.com/sites/justcapital/2017/04/04/taking-the-lead-on-equal-pay-seven-companies-that-pay-women-fairly (on file with the *Columbia Law Review*); see also Brenton, supra note 2, at 350–51 (proposing reforms to enhance gender-based antidiscrimination protections).

for all. At the same time, the focus on sexual harassment has been a point of debate among those working in the field of gender equality. By focusing on sexual harassment, some scholars, including myself, have urged not losing sight of some of the most important aspects of employment discrimination—those which are seemingly less *sexy*, literally and figuratively.[94] In reality, working women are keeping their sights set on pay equity. In a recent survey conducted by the AFL-CIO, women named equal pay as the single most important workplace issue.[95]

The connection between gender pay discrimination and sexual harassment is pervasive: "Underpaid persons are often undervalued in the workplace and vice versa, making them more vulnerable to harassment and discrimination and less likely to report abuse or be believed when they do report."[96] When probing a claim of sexual harassment, investigators often find evidence of wage discrimination, which would likely have gone undetected without the harassment trigger.[97] Indeed, based on interviews I have

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94. See Rachel Arnow-Richman, Of Power and Process: Handling Harassers in an At-Will World, 128 Yale L.J. Forum 85, 88 (2018) ("Sexual harassment may express itself in sexualized language or behavior or it may take the form of nonsexualized hostility toward workers . . . . Efforts to eliminate workplace sexuality are underinclusive because they fail to capture nonsexualized forms of sexual harassment."); Tristin K. Green, Was Sexual Harassment Law a Mistake? The Stories We Tell, 128 Yale L.J. Forum 152, 153 (2018) ("Sexual harassment is a form of discrimination . . . often . . . tied to broader inequality in the workplace. But our law . . . asks whether a . . . harasser engaged in acts of harassment, . . . ignoring others in the organization and the organizational structure itself as causes of ongoing hostile environments."); Orly Lobel, Reflections on Equality, Adjudication, and the Regulation of Sexuality at Work: A Response to Kim Yuracko, 43 San Diego L. Rev. 899, 906 (2006) ("[I]n reality courts categorize sexual marketing as licensing gender selective hiring because of deep insights into how gender and sexuality practically interact . . . to produce inequality. Sexuality is not intrinsically threatening to workplace production, but rather it is the combination of unequal power and sexualization that produces discriminatory environments."); Vicki Schultz, Open Statement on Sexual Harassment from Employment Discrimination Law Scholars, 71 Stan. L. Rev. Online 17, 19 (2018) ("[H]arrassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality. Harassment provides a way for some men to monopolize prized work roles and to maintain a superior masculine position and sense of self."); Vicki Schultz, The Sanitized Workplace, 112 Yale L.J. 2061, 2122 (2003) ("[T]here is now widespread agreement among HR managers and management-side labor lawyers that supervisor-subordinate relationships should be prohibited or at least strongly discouraged. The experts cite feminist arguments about the power dynamics inherent in the male supervisor/female subordinate relationships, and point to evidence that many employees disapprove of such unions.").

95. AFL-CIO, Our Voices: A Snapshot of Working Women 7 (2016), https://aflcio.org/sites/default/files/2017-03/1662_WWSurvelReport2_webready.pdf [https://perma.cc/4N8F-L4CF].

96. Joi Chaney, #PayUsMoreTouchUsLess, Equal Pay Today! (Feb. 12, 2018), http://www.equalpaytoday.org/news/2018/2/12/3yigug6hdgva7d8gu0ayrb7snfjyk4 [https://perma.cc/DU6G-NK9N].

97. Cf. Jennifer Calfas, Inside Sexual Harassment's Hidden Toll on Equal Pay, Time (Apr. 9, 2018), http://time.com/5227742/sexual-harassment-equal-pay-wage-gap [https://perma.cc/F7AQ-863Q] (finding that women who experience harassment are more likely to leave for a job with lower pay); Nat'l Partnership for Women & Families, Sexual Harassment and the Gender Wage Gap 1–2 (2018), http://www.nationalpartnership.org/research-library/

conducted with plaintiff-side attorneys litigating in the field of gender discrimination, pay equity claims are often only brought by women when something else such as an adverse action, failure to promote, or harassment occurs.[98] Moreover, plaintiffs in gender pay equity cases describe the experience of salary discrimination as equivalent to working in a hostile work environment. For example, BBC presenter Samira Ahmed wrote:

> I can only describe the feeling of being kept on much lower pay than male colleagues doing the same jobs for years as feeling as though bosses had naked pictures of you in their office and laughed every time they saw you. It is the humiliation and shame of feeling that they regarded you as second class, because that is what the pay gap means.[99]

Another broadcasting personality, Carrie Gracie, described finding out about her own pay disparity as deeply personal and "as undermining to her sense of shared reality—as learning about an infidelity."[100]

Over time, when women are forced out of positions or jobs where they experience harassment, a direct connection between harassment and pay inequity results. According to a recent report, women who are harassed are 6.5 times more likely to change jobs, even if that means losing lucrative opportunities for advancement and promotion.[101] Harassment may also shape career choices for women more broadly when they avoid positions with a greater perceived risk of harassment.[102] In other words, the pervasive existence of sexual harassment chills behaviors that promote pay equity.

The recent move to strengthen pay discrimination laws, while gaining momentum within the social cry of #TimesUp, precedes #MeToo. The #MeToo movement came to prominence in 2017,[103] but in 2009, President Barack Obama signed his first piece of legislation, the Lilly Ledbetter Fair Pay Act, which expanded the statute of limitations for wage discrimination violations.[104] The Act overturned the Supreme Court decision—a decision

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workplace-fairness/fair-pay/sexual-harassment-and-the-gender-wage-gap.pdf [https://perma.cc/LM9Y-6VRR] ("Many women take pay cuts and make sacrifices that harm their careers to escape sexual harassment.").

98. E.g., interview with Jill Sullivan Sanford, Of Counsel, Sanford Heisler & Sharp, LLP (Nov. 2, 2018) (discussing her work in a gender discrimination lawsuit filed against Qualcomm); interview with Susan Swan, Attorney, Swan Employment Law (Oct. 17, 2018).

99. Collins, supra note 24.

100. Id.

101. Chaney, supra note 96.

102. See id. (positing that women who fear harassment may pursue careers in female-dominated fields, which are also historically lower paying).

103. See Sandra E. Garcia, The Woman Who Created #MeToo Long Before Hashtags, N.Y. Times (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html (on file with the *Columbia Law Review*).

104. Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009, U.S. EEOC, https://www.eeoc.gov/eeoc/publications/upload/EPA-Ledbetter-brochure-8-20-2013-OLC.pdf [https://perma.cc/S7LW-EAJA] (last visited Oct. 15, 2019).

the *New York Times* aptly titled "Injustice 5, Justice 4"[105]—restricting the time period within which an employee is permitted to file a discrimination lawsuit regarding the employee's compensation.[106] The Ledbetter Act amended Title VII to clarify that the time limit for suing an employer for pay discrimination restarts each time a paycheck is issued, rather than running solely from the original discriminatory action of the salary decision.[107] The change was not only applied to Title VII, but also to the Age Discrimination in Employment Act and the Americans with Disabilities Act.[108]

The Obama Administration took several additional steps toward pay equity reform. It created a National Equal Pay Enforcement Task Force and increased funding for employment regulatory agencies, including the EEOC.[109] In 2014, President Obama issued two executive actions, both concerning pay transparency: one prohibiting government contractors from retaliating against employees who discuss their salaries, and the other requiring large employers to annually report data about the gender pay gap to the EEOC.[110] President Obama also urged Congress to pass the Paycheck Fairness Act, a federal bill that would have adopted many of the current reforms now being passed at the state level.[111] The Paycheck Fairness Act passed the House in March 2019.[112]

With the new Trump Administration dissipating the focus on pay equity, states are taking the lead in attacking the problem.[113] The landscape is

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105. Opinion, Injustice 5, Justice 4, N.Y. Times (May 31, 2007), https://www.nytimes.com/2007/05/31/opinion/31thu1.html (on file with the *Columbia Law Review*).

106. See Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642–43 (2007), superseded by statute, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e-5 (2018)).

107. Id.

108. Id.

109. See Press Release, Office of the Press Sec'y, The White House, FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act (Jan. 29, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly [https://perma.cc/N772-2UGE].

110. See Melanie Garunay, Taking Action to Advance Equal Pay, White House: Blog (Jan. 29, 2016), https://obamawhitehouse.archives.gov/blog/2016/01/29/taking-action-advance-equal-pay [https://perma.cc/W6DF-TPZT].

111. See Office of the Press Sec'y, The White House, supra note 109. See generally Deborah L. Brake, Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters, 52 Idaho L. Rev. 889 (2016) ("[T]he movement to close the gender wage gap has coalesced around the Paycheck Fairness Act . . . [,] [which] was introduced in Congress on the heels of the . . . LLFPA . . . to address the substantive shortcomings of the equal pay laws. It has been repeatedly introduced[] . . . but has failed to gain enough [congressional] support . . . .").

112. H.R.7 - Paycheck Fairness Act, Congress.gov, https://www.congress.gov/bill/116th-congress/house-bill/7/actions [https://perma.cc/Q2VE-TL6V] (last visited Oct. 15, 2019).

113. Martha Burk, With No Hope Under Trump, Gender Pay Gap Action Goes Local, Huffington Post (Dec. 19, 2016), http://www.huffingtonpost.com/martha-burk/with-no-hope-under-trump_b_13730364.html [https://perma.cc/8W8L-2NZJ] (last updated Dec. 20, 2017).

moving toward a more localized fight against pay disparities. Over a dozen states have recently enacted laws designed to strengthen the enforcement, compliance, and breadth of pay equity law.[114] These developments reflect the idea that changes introduced to the hiring process and dissemination of information in the job market can have a real impact in the effort to close the pay gap. The reforms focus on common patterns—restricting inquiries into, and in some cases reliance upon, past salaries, prohibiting difference in pay for similar work despite different job titles and work sites, and allowing employees to openly discuss their salaries with their coworkers.

III. FLIPPING TRANSPARENCY ON ITS HEAD: SECRECY AND TRANSPARENCY IN PERFECTING THE WAGE MARKET

"[I]mperfect information can create an impediment to mutually productive bargains."[115]

A. *Don't Ask: Banning the Salary History Box*

In 2016, Massachusetts became the first state to pass a law prohibiting employers from asking job candidates about their salary history.[116] Since then, a wave of states and cities, including California,[117] Delaware,[118] Illinois,[119]

114. See, e.g., Lisa Nagele-Piazza, Employers Should Plan for Stronger Pay Equity Laws, SHRM (June 19, 2018), https://www.shrm.org/hr-today/news/hr-news/conference-today/pages/2018/employers-should-plan-for-stronger-pay-equity-laws.aspx [https://perma.cc/8LSG-NYAU] (citing California, New York, Maryland, and Massachusetts as states that have taken local measures to advance pay equity).

115. Joseph Stiglitz, The Private Uses of Public Interests: Incentives and Institutions, 12 J. Econ. Persp., Spring 1998, at 13.

116. Mass. Gen. Laws Ann. ch. 149, § 105A (West 2019); Stacy Cowley, Illegal in Massachusetts: Asking Your Salary in a Job Interview, N.Y. Times: DealBook (Aug. 2, 2016), https://www.nytimes.com/2016/08/03/business/dealbook/wage-gap-massachusetts-law-salary-history.html (on file with the *Columbia Law Review*).

117. Cal. Lab. Code § 432.3(b) (2019).

118. Del. Code tit. 19, § 709B(b) (2019); Joon Hwang, Delaware Enacts Law to Address Gender Pay Gap by Prohibiting Employers from Requesting Compensation History of Job Applicants, Littler (June 19, 2017), https://www.littler.com/publication-press/publication/delaware-enacts-law-address-gender-pay-gap-prohibiting-employers [https://perma.cc/WG2X-VNQQ].

119. Ill. Exec. Order No. 2019-02 (Jan. 15, 2019), https://www2.illinois.gov/IISNews/19609-Executive_Order_2019-02.pdf [https://perma.cc/7D2L-K78P].

New York,[120] New Jersey,[121] North Carolina,[122] Hawaii,[123] Maine,[124] Oregon,[125] Vermont,[126] New Orleans,[127] Puerto Rico,[128] Connecticut,[129] Atlanta,[130] New York City,[131] Philadelphia,[132] Pittsburgh,[133] Chicago,[134] Louisville,[135] Cincinnati,[136] Kansas City,[137] and San Francisco,[138] have followed suit, and many other jurisdictions are considering similar law

120. S. 6549, 242nd Leg., Reg. Sess. (N.Y. 2019); N.Y.C., N.Y., Admin. Code § 8-107(25) (2017); Salary History Questions During Hiring Process are Illegal in NYC, N.Y.C. Comm'n on Human Rights, https://www1.nyc.gov/site/cchr/media/salary-history.page [https://perma.cc/4USG-6JUR] (last visited Nov. 7, 2019).

121. Assemb. B. 1094, 218th Leg. (N.J. 2019).

122. N.C. Exec. Order No. 93 (Apr. 2, 2019), https://files.nc.gov/governor/documents/files/EO93-_Prohibiting_the_Use_of_Salary_History_in_the_State_Hiring_Process.pdf [https://perma.cc/SU34-MXJF].

123. William J. Simmons, Martha J. Keon & Judy M. Iriye, Hawaii Joins Salary History Ban Trend, Littler (July 6, 2018), https://www.littler.com/publication-press/publication/hawaii-joins-salary-history-ban-trend [https://perma.cc/924R-QG2S].

124. Me. Rev. Stat. Ann. tit. 5, § 4577 (2019).

125. Oregon Equal Pay Act of 2017, ch. 197, 2017 Or. Laws 585 (codified in scattered sections of Or. Rev. Stat.). The Oregon Equal Pay Act of 2017 takes full effect on January 1, 2024. See 2017 Or. Laws at 592.

126. Joseph Lazazzero, Vermont Enacts Salary History Inquiry Law, Littler (May 15, 2018), https://www.littler.com/publication-press/publication/vermont-enacts-salary-history-inquiry-law [https://perma.cc/8W7B-555S].

127. Ogletree, Deakins, Nash, Smoak & Stewart, P.C., New Orleans Mayor Signs Executive Order Prohibiting Wage History Inquiries, JDSupra (Feb. 3, 2017), https://www.jdsupra.com/legalnews/new-orleans-mayor-signs-executive-order-70985/ [https://perma.cc/PJ5W-3EKG].

128. P.R. Leyes An. tit. 29, § 254 (2017).

129. Christopher Neary & Sharon Bowler, Connecticut Has a New Pay Equity Law, SRHM (May 30, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/connecticut-has-a-new-pay-equity-law.aspx [https://perma.cc/UC99-2XL8].

130. Press Release, Michael Smith, Press Sec'y, Mayor's Office of Commc'n, Mayor Keisha Lance Bottoms Bans "Salary History Box" Requirement on City of Atlanta Applications (Feb. 18, 2019), https://www.atlantaga.gov/Home/Components/News/News/11942/672 [https://perma.cc/KH9S-LXX9].

131. New York City's ban began on October 31, 2017. See N.Y.C., N.Y., Admin. Code § 8-107(25) (2017); Salary History Questions During Hiring Process are Illegal in NYC, N.Y.C. Comm'n on Human Rights, https://www1.nyc.gov/site/cchr/media/salary-history.page [https://perma.cc/4USG-6JUR] (last visited Nov. 7, 2019).

132. Phila., Pa., Code §§ 9-1103(1)(i), 9-1131 (2017).

133. Kate McGovern Tornone, With the Addition of Pittsburgh, Salary History Bans Pick Up Steam, HR Daily Advisor (Mar. 6, 2017), https://hrdailyadvisor.blr.com/2017/03/06/addition-pittsburgh-salary-history-bans-pick-steam [https://perma.cc/VUR9-78VV].

134. Chi., Ill., Exec. Order No. 2018-1 (Jan. 18, 2018).

135. Louisville, Ky., § 35.012 (2019).

136. Sharon Coolidge, Cincinnati's New 'Salary Equity' Law: What It Would Do, Cincinnati.com: The Enquirer (Mar. 14, 2019), https://www.cincinnati.com/story/news/politics/2019/03/14/pay-equity-cincinnati-has-new-law/3161006002 [https://perma.cc/7SDY-6XQU].

137. Kan. City, Mo., Ordinance 190,380 (May 23, 2019).

138. S.F., Cal., § 432.3 (2017).

reforms.[139] Salary history bans are under consideration in at least twenty states and the District of Columbia.[140] Similar efforts are ongoing at the federal level, with the introduction of the Pay Equity for All Act of 2017 that would amend the Fair Labor Standards Act to prohibit employers from "request[ing] or requir[ing] . . . that a prospective employee disclose previous wages or salary histories."[141] The bill explains:

> Even though many employers may not intentionally discriminate against applicants or employees based on gender, race or ethnicity, setting wages based on salary history can reinforce the wage gap. Members of historically disadvantaged groups often start out their careers with unfair and artificially low wages compared to their white male counterparts, and the disparities are compounded from job to job throughout their careers.[142]

The exact content of the salary inquiry ban varies from act to act. The new Massachusetts law requires that employers wait until they have extended a formal offer to a candidate, which includes compensation amount, before asking about the candidate's salary history.[143] Only when the applicant gives written permission can the employer contact previous employers to verify past salary rates.[144] The law also prohibits employers from requiring that the potential hire's wage or salary history meet certain criteria.[145] However, Massachusetts permits applicants to voluntarily offer salary information.[146] The New York City law prohibiting prior salary and benefits inquiry during the interview process allows the employer to use prior salary to set the new employee's salary if the employee "*voluntarily* and *without prompting* provides salary history."[147]

Other states and localities, such as Delaware, similarly prohibit employers from screening applicants based on their compensation histories.[148] New York City's salary history ban goes even further in prohibiting

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139. Among the states and localities currently considering such a ban are New York, Rhode Island, Texas, the District of Columbia, and Virginia. Yuki Noguchi, Proposals Aim to Combat Discrimination Based on Salary History, NPR (May 30, 2017), http://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history [https://perma.cc/FS4E-8RUE].

140. Id.

141. H.R. 2418, 115th Cong. § 8(1) (2017); see also Letter from the Am. Ass'n of Univ. Women, to the U.S. House of Representatives (May 24, 2017), http://www.aauw.org/files/2017/01/Pay-Equity-for-All-Act-Sign-On-nsa-1.pdf [https://perma.cc/6VVC-38PF] (expressing support for the Pay Equity for All Act).

142. 162 Cong. Rec. E1269 (daily ed. Sept. 14, 2016) (statement of Rep. Norton).

143. Mass. Gen. Laws Ann. ch. 149, § 105A(c)(2) (West 2018).

144. Id. § 105A(c)(3).

145. Id. § 105A(c)(2).

146. Id.

147. María Cáceres-Boneau, Jean Schmidt & David M. Wirtz, New York City Set to Ban Inquiries About Salary History, Littler (Apr. 14, 2017), https://www.littler.com/publication-press/publication/new-york-city-set-ban-inquiries-about-salary-history [https://perma.cc/4GFS-42BZ].

148. See, e.g., Del. Code tit. 19, § 709B(b) (2019).

employers from conducting online searches or examining publicly available records to obtain an applicant's salary history.[149] San Francisco's law explicitly prohibits former employers from providing salary history information of a current or former employee to any prospective employer without written authorization from the employee.[150] Most of the new bans allow employers and prospective employees to communicate expectations about compensation without inquiring about salary history.[151] In New York City, for example, employers and job candidates may discuss salary expectations, including asking whether an applicant will have to forfeit unvested equity if the applicant leaves a current position.[152]

In response to the wildfire of legislative reforms banning salary history inquiry, a few states have passed preventative legislation to block any such efforts. Michigan and Wisconsin have signed laws essentially banning the bans.[153] In March 2018, Michigan passed a bill that states that no local governmental body shall "adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or potential employee."[154] The new law specifically excludes criminal background checks from the ban on bans.[155] That same month, Wisconsin lawmakers passed legislation similarly prohibiting salary inquiry bans.[156] Unsuccessful efforts to ban the bans have also been made in Minnesota, Washington, and Mississippi.[157] Despite these efforts, Washington and the city of Jackson, Mississippi, have since reversed course, with both passing laws outlawing

149. N.Y.C., N.Y., Admin. Code § 8-107(25) (2017).

150. S.F., Cal., § 432.3 (2017).

151. E.g., N.Y.C., N.Y., Admin. Code § 8-107(25).

152. Id. § 8-107(25)(c). The law applies to: (1) headhunters, search firms, and other agents working on behalf of employers and/or applicants; and (2) independent contractors. See id. § 8-102 (defining "Employer" and "Employment Agency"); id. § 8-107(25)(c) (including employers, employment agencies, and employees acting as agents of an employer from inquiring about salary histories of prospective employees).

153. Jeffrey Fritz, Banning the Bans: Michigan and Wisconsin Buck the Salary History Ban Trend, Fisher Phillips (Apr. 4, 2018), https://www.fisherphillips.com/pay-equity-blog/banning-the-bans-michigan-and-wisconsin-buck [https://perma.cc/GVN9-KB6Q].

154. Id.

155. Id.

156. Id.

157. Id.

pay history inquiries.[158] Some bans have been vetoed by state governors,[159] and Philadelphia's salary history ban has been the subject of a lawsuit filed by the Chamber of Commerce for Greater Philadelphia asserting that it unlawfully impedes speech and makes the locality less competitive.[160]

B. *Against Anchoring: Behavioral Biases and Gender Negotiations*

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

The salary history bans take the market as it is: imperfect, with a long-standing and stagnant gender gap. The reforms target the fact that using salary history to determine compensation perpetuates the wage gap. Put simply, if a woman currently earns less than a man, she could be harming her salary trajectory, both in the applied-for position and for the rest of her career each time she discloses her current salary to a potential employer.[161] In fact, these gaps are likely to grow with each move and promotion as recruitment efforts and promotions are often offered as a percentile increase in relation to current base salary.[162]

Anchoring bias contributes to this dynamic effect. Even if employers are aware of a gender pay gap and are prohibited from relying on salary history to explain the gap within their workforce, merely stating the figure

158. See Allan S. Bloom & Laura M. Fant, Washington State Legislature Passes Ban on Salary History Inquiries, Nat'l L. Rev. (May 9, 2019), https://www.natlawreview.com/article/washington-state-legislature-passes-ban-salary-history-inquiries [https://perma.cc/UG7J-DXD7] (providing background on the Washington bill); Salary History Bans: A Running List of States and Localities that Have Outlawed Pay History Questions, HR Dive, https://www.hrdive.com/news/salary-history-ban-states-list/516662 [https://perma.cc/4TCH-6V4Q] (last updated Aug. 13, 2019) (providing a running list of states and localities that have banned pay history inquiries).

159. See, e.g., Bob Sanders, Will Any Bills Survive When Lawmakers Vote on Vetoes?, N.H. Bus. Rev. (Sept. 12, 2019), https://www.nhbr.com/will-any-bills-survive-when-lawmakers-vote-on-vetoes [https://perma.cc/29P9-NVZX] (reporting that a ban on salary history inquiries was among more than fifty bills vetoed by New Hampshire Governor Chris Sununu).

160. Chamber of Commerce for Greater Philadelphia v. City of Philadelphia, 319 F. Supp. 3d 773, 779, 808 (E.D. Pa. 2018) (granting a preliminary injunction against part of the Philadelphia ban). An appeal to the Third Circuit is pending. See Chamber of Commerce of Greater Philadelphia v. City of Philadelphia, U.S. Chamber Litig. Ctr., https://www.chamberlitigation.com/cases/chamber-commerce-greater-philadelphia-v-city-philadelphia-0 [https://perma.cc/FW3G-5NQ9] (last visited Oct. 15, 2019) (providing updates about the lawsuit).

161. See Nat'l Women's Law Ctr., Asking for Salary History Perpetuates Pay Discrimination from Job to Job 1 (2018), https://nwlc.org/wp-content/uploads/2018/12/Asking-for-Salary-History-Perpetuates-Discrimination-1.pdf [https://perma.cc/N26Y-6JAV] ("Employers' requests for an applicant's salary history in the hiring process, and reliance on that information to determine compensation, forces women and, especially women of color, to carry lower earnings and pay discrimination with them from job to job.").

162. See id. ("Some employers use salary history to determine a new hire's starting pay, providing a standard percentage increase over the new hire's previous salary or otherwise directly correlating the new hire's pay to her salary history.").

of an applicant's previous salary can impede rational decisionmaking. Behavioral studies on anchoring show that people are disproportionately, and often irrationally, impacted by the presentation of a number, even in cases where the number has nothing to do with the question at hand.[163] Anchoring is also related to a status quo bias.[164] Individuals tend to stick with what they had previously determined to be the appropriate salary even in the face of new facts. For example, in a study of California civil service jobs, one former personnel analyst admitted to feeling a temptation to change job and skill descriptions, rather than to adjust salaries, when market surveys showed they were paying higher or lower salaries for a particular job.[165] A third related behavioral effect is confirmation bias—when recruiters receive information about a female applicant's lower baseline salary, they may view other pieces of information in ways that confirm biases and stereotypes and justify that lower baseline salary.[166] These behavioral insights are further supported by studies that show that compensation markets are far from rational. For example, in their book *Pay Without Performance*, Lucian Bebchuk and Jesse Fried describe how determination of executive compensation is often not based on merit or logical calculations and predictions about the executive's talent and promise, but rather upon flawed processes of internal influence and corporate norms.[167]

Of course, there can be economic logic in using salary history to determine an applicant's willingness to accept a new offer and to determine the market value of the candidate. And yet, when these figures are plagued by gender disparity, this practice of reliance can perpetuate and further exacerbate existing market disparities. As the Supreme Court stated in *Griggs v. Duke Power Co.*, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[168] Rather than relying on biased figures, bans on salary history inquiry may

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163. See, e.g., On Amir & Orly Lobel, Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy, 108 Colum. L. Rev. 2098, 2112 (2008) (discussing reference dependence bias, "the tendency to judge things not in absolute value, but rather in relative terms as compared to some focal level").

164. See id. at 2120; William Samuelson & Richard Zeckhauser, Status Quo Bias in Decision Making, 1 J. Risk & Uncertainty 7, 22–26 (1988) (discussing study results showing the relationship between anchoring effects and status quo bias).

165. Marlene Kim, Employers' Estimates of Market Wages: Implications for Wage Discrimination in the U.S., 6 Feminist Econ. 97, 108–09 (2000).

166. Nicole Buonocore Porter & Jessica R. Vartanian, Debunking the Market Myth in Pay Discrimination Cases, 12 Geo. J. Gender & L. 159, 185–86 (2011) ("Once a subject has been perceived as a member of a group, people are more likely to remember behavior consistent with that group, sometimes to the point of 'remembering' stereotypical consistent behaviors that did not even occur. This is called 'confirmation bias' . . . .").

167. See Lucian Bebchuk & Jesse Fried, Pay Without Performance: The Unfulfilled Promise of Executive Compensation 2–7 (2004).

168. 401 U.S. 424, 430 (1971).

instead induce employers to consider other nondiscriminatory characteristics when determining pay—namely, experience, training, education, skill, and past performance records. Removing the anchored numerical figure may encourage employers to proactively assess pay based on the company's needs and the candidate's fit. The new laws rely on the assumption that employers should be able to price the job by the skill set needed and the value of the position. Indeed, when understood in this way, salary bans should be understood as supporting rational and productive business processes rather than impeding them.

The second reason for banning salary history inquiry is to address well-established negotiation differences between men and women. As discussed above, studies have repeatedly shown that women on average negotiate less—and when women do negotiate for higher pay, employers react negatively.[169] The first negotiation difference, which I call the *negotiation deficit*, is that women negotiate less frequently and ask for less when they do.[170] It is possible that a salary inquiry ban could mitigate, though perhaps not erase, this deficit. The salary inquiry ban has the potential to positively shift the process from letting job applicants lead with a starting point figure to employers implementing a practice of more actively suggesting a fair salary.

Salary inquiry bans can also counteract the negative assumptions employers may make when women refuse to reveal their prior salary in a regime that allows salary inquiry. This is a separate effect, which I call the *negative inference*—when employers assume women who refuse to disclose their pay earn less. This could be either a rational conscious bias, given the well-documented existence of a gender pay gap in every industry, or an unconscious bias about what women and men should make in the market. Payscale, one of a growing number of compensation data and software companies, conducted a survey asking over 15,000 job seekers whether they disclosed their pay at previous jobs during interview processes.[171] The survey found that a woman who was asked about her salary history and refused to disclose was offered 1.8% *less* than a woman who was asked and disclosed.[172] By contrast, if a man refused to disclose when asked about salary history, he received an offer that was 1.2% higher than a man who

169. See, e.g., Hannah Riley Bowles, Why Women Don't Negotiate Their Job Offers, Harv. Bus. Rev. (June 19, 2014), https://hbr.org/2014/06/why-women-dont-negotiate-their-job-offers [https://perma.cc/2AUP-5YHN] ("In repeated studies, the social cost of negotiating for higher pay has been found to be greater for women than it is for men.").

170. See Leibbrandt & List, supra note 72 (discussing study results showing that, in some circumstances, women are more likely than men to negotiate wages downward rather than upward).

171. Lydia Frank, Why Banning Questions About Salary History May Not Improve Pay Equity, Harv. Bus. Rev. (Sept. 5, 2017), https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity [https://perma.cc/B9WW-RRL8].

172. Id.

did disclose.[173] These findings of negative inferences are red flags for the new laws that ban salary inquiry but allow voluntary disclosure by the job applicant as a means for employers to set wages, because prohibiting salary inquiry might not be as effective as the laws intend. To prevent employers from making assumptions about female employees who do not disclose their salaries, the bans on salary history inquiry might either remove the voluntary-disclosure exception or prohibit employers from using voluntarily disclosed salary histories, as Oregon has done.[174] The prohibition on salary history reliance, which will be discussed below, is also a strong measure to disincentivize employers from filling in the blanks and assuming women make less.

A third negotiation difference, beyond the behavioral gender difference of the applicant and the negative inference of not disclosing past pay, is what I term the *negotiation penalty*—the well-documented finding that women face a social penalty that men do not when they initiate wage negotiation, regardless of the gender of the person with whom they are negotiating.[175] The negotiation penalty may be mitigated, but is unlikely to be fully corrected, by a salary inquiry ban. Setting salaries continues to be negotiation-based even when salary history is removed, and employers are permitted to ask about a candidate's minimum threshold salary expectation. The gender differences that occur at the negotiation and hiring process and that continue during employment—for example, at the stage of promotion, retention, and raise negotiation—suggest that a salary inquiry ban alone will not eradicate gender pay discrimination. Yet it should still be understood as a promising path within a multifaceted reform strategy.

Unsurprisingly, because bans on salary history inquiries require employers to change common hiring practices, they have been met with opposition. Employer associations argue that employers need to know salary history to assess how likely a candidate is to accept an offer.[176] They describe prior salary as useful information for saving time, organizing, and better negotiating for both the employer and employee.[177] In 2015, when the California legislature first passed a bill to prohibit asking job applicants about prior salaries, Governor Jerry Brown vetoed the bill, expressing concern

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173. Id.

174. See 2017 Or. Laws ch. 197, § 2(1)(d) (to be codified at Or. Rev. Stat. 652.220) (making it unlawful for employers to "[d]etermine compensation for a position based on current or past compensation of a prospective employee").

175. See, e.g., Bowles et al., supra note 73, 88–95 (discussing study results showing that women faced greater social costs than men when they attempted to negotiate higher salaries).

176. See Sylvia Francis & Katie Donovan, Should HR Ask for Job Candidates' Salary Histories?, SHRM (Apr. 1 2016), https://www.shrm.org/hr-today/news/hr-magazine/0416/pages/should-hr-ask-for-job-candidates-salary-histories.aspx [https://perma.cc/6RXV-VANL] ("[T]he reason employers request [salary histories] is to avoid wasting everyone's time. HR must have a means of gauging how likely a candidate is to accept an offer the company is prepared to make.").

177. See id.

about broadly prohibiting employers from obtaining relevant information "with little evidence that this would assure more equitable wages."[178] Undeterred, proponents repackaged the bill, which was then passed and signed into law in 2017.[179] After an additional bill was signed by Governor Brown in 2018, California law now prohibits employers from inquiring about an employee's prior pay, but allows questions about "salary expectations."[180] It also allows prospective employees to ask for the pay scale of the applied-for position.[181]

In 2017, when Philadelphia became the first city to adopt a salary history ban, the Philadelphia Chamber of Commerce filed a lawsuit and released a statement claiming that the ordinance was "a broad impediment to businesses seeking to grow their workforce."[182] According to the statement, "the ordinance contains numerous obstacles for businesses operating in the City, such as the exclusion of important information from the hiring process, no consideration for varying business needs, and potential civil and criminal penalties."[183] The Chamber of Commerce

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178. Margot Roosevelt, California Bosses Can No Longer Ask You About Your Previous Salary, Orange County Reg. (Oct. 12, 2017), https://www.ocregister.com/2017/10/12/in-bid-to-fight-gender-pay-gap-gov-jerry-brown-signs-salary-privacy-law [https://perma.cc/2TZC-XAAL].

179. Id.

180. Assemb. B. 2282, 2017–2018 Reg. Sess. § 1(i) (Cal. 2018).

181. Id. § 1(c); Assemb. B. 168, 2017–2018 Reg. Sess. § 1(c) (Cal. 2017); see also James Nelson, Calif. Considers 'Don't Ask, Must Tell' Pay History Bill, Law360 (June 20, 2017), https://www.law360.com/articles/936231/calif-considers-don-t-ask-must-tell-pay-history-bill (on file with the *Columbia Law Review*) (providing background on the bill's general contents and the pay scale provision); Bruce Sarchet, New California Law Prohibits Salary History Inquiries, Littler (Oct. 13, 2017), https://www.littler.com/publication-press/publication/new-california-law-prohibits-salary-history-inquiries [https://perma.cc/2KSZ-LS9N] (same). An employer may ask an applicant about their "salary expectations" for the position being applied for. Assemb. B. 2282, 2017–2018 Reg. Sess. § 1(i). If an applicant self-discloses prior salary history without prompting, the employer may consider the salary history in determining the salary to offer the applicant. Id. § 1(h).

182. Dan Packel, Philly Chamber of Commerce Sues City over Wage Equity Law, Law360 (Apr. 6, 2017), https://www.law360.com/articles/910602/philly-chamber-of-commerce-sues-city-over-wage-equity-law (on file with the *Columbia Law Review*). In response to the city ban, Pennsylvania lawmakers also proposed an amendment to the Equal Pay Law that could overturn Philadelphia's local ordinance. See Chamber of Commerce Suing Philadelphia over 'Wage History' Legislation, Phila. Bus. J. (Apr. 6, 2017), https://www.bizjournals.com/philadelphia/news/2017/04/06/chamber-of-commerce-suing-philadelphia-over-wage.html (on file with the *Columbia Law Review*). The Act goes further in providing that an employer may not "rely on the wage history of a prospective employee . . . in determining the wages for such individual at any stage of the employment process." Phila., Pa. Code § 9-1131(2)(a)(ii) (2016). Pennsylvania lawmakers also, in response to the city ban, proposed an amendment to the Equal Pay Law that could overturn Philadelphia's local ordinance. Leslie A. Pappas, State Bill Would Kill Philly Law on Pay History, Bloomberg L. (Feb. 9, 2017), https://www.bloomberglaw.com/product/labor/document/X8JDAFRS000000?search32= (on file with the *Columbia Law Review*).

183. Press Release, The Chamber of Commerce for Greater Phila., Chamber Releases Statement on Federal Lawsuit Challenging Philadelphia Wage History Ordinance (Apr. 6,

argued that the ordinance makes searching for and recruiting top talent difficult and therefore impedes Philadelphia's competitiveness.[184] Wage history, according to the lawsuit, allows an employer to determine whether it can afford a job applicant, to set a competitive, market-based salary for the positions offered, and evaluate an applicant's prior responsibilities and achievements.[185] Without it, the lawsuit asserts, employers are essentially left without a litmus test to measure the market.[186] The Chamber framed the ban as a prohibition on employers from communicating the message, "I think your prior salary would help us understand if we are a good fit for each other. Please tell it to me"—a message that, the Chamber claimed, is fully protected by the First Amendment.[187] In its argument that the ban unlawfully restricts commercial speech, the Chamber concluded that the ordinance is unconstitutional and will not advance gender wage equality.[188] Rather, the Chamber argued, the city relied purely on speculation and conjecture to demonstrate that the inquiry ban would alleviate the harms it purported to alleviate.[189]

A federal district court agreed with the Chamber of Commerce, analyzing the inquiry ban through the lens of the First Amendment as restricting lawful commercial speech.[190] The court agreed that the governmental interest of promoting gender equality is substantial. The core of the analysis, however, rested on the third prong of the First Amendment inquiry: whether the regulation directly advances the governmental interest asserted.[191]

The court stated that the city had the burden of showing that the law directly advanced a substantial interest, and to meet that burden, it had to "establish that 'the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"[192] The judge reviewed testimony from multiple professionals, conclusions of a labor economics expert, academic articles, and anecdotes from women who had been asked about

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2017), https://chamberphl.com/2017/04/chamber-releases-statement-on-federal-lawsuit-challenging-philadelphia-wage-history-ordinance [https://perma.cc/VW7K-M2B4].

184. Id.

185. Complaint at 3, Chamber of Commerce for Greater Phila. v. City of Philadelphia, 319 F. Supp. 3d 773 (E.D. Pa. 2018) (No. 17-1548).

186. Id.

187. Id. at 4–5.

188. See id. at 6–7; see also Dan Packel, Pay Inquiry Bans to Get Crucial First Test in Philly, Law360 (Apr. 10, 2017), https://www.law360.com/employment/articles/911609/pay-inquiry-bans-to-get-crucial-first-test-in-philly (on file with the *Columbia Law Review*).

189. *Chamber of Commerce*, 319 F. Supp. 3d at 788.

190. See id. at 785 (noting the lack of clarity surrounding the commercial speech doctrine, but concluding that "the Inquiry Provision does not pass muster" even under intermediate scrutiny).

191. See id. at 785, 800 (finding that the Inquiry Provision does not meet the burden under the third prong of the *Central Hudson* test because it "does not directly advance the substantial governmental interests of reducing discriminatory wage disparities").

192. See id. at 788 (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).

their wage history during the hiring process.[193] According to the judge, the "critical problem" with this evidence was that it was all "unsubstantiated conclusions."[194] The judge decided that no evidence was shown that prior wage history contributes to a discriminatory wage gap.[195] The judge concluded that "[w]hile the conclusions that a discriminatory wage gap could be affected by prohibiting wage history inquiries was characterized by respected professionals as a logical, common sense outcome, more is needed."[196] The city filed an appeal, and the Third Circuit heard arguments last year, but the case is still pending.[197] While the appeal is still pending, the National Federation of Independent Business (a national trade group representing over 12,500 businesses in Pennsylvania), in conjunction with the Pennsylvania Chamber of Business and Industry and the U.S. Chamber of Commerce, filed an amicus brief in November 2018 to support the Philadelphia Chamber of Commerce on appeal.[198]

The move to ban salary history questions echoes the earlier ban-the-box movement in many states that postpones an employer's ability to conduct a criminal background check.[199] Essentially, these bans prevent employers from requiring applicants to disclose their criminal history by removing the criminal record box that applicants need to check in their applications.[200] In the past decade, a total of thirty-five states, over 150 local governments, and the District of Columbia have banned employers from asking about conviction history until later in the hiring process.[201] The goal of fair-chance hiring policies is to postpone criminal-record questions

193. See id. at 789–92.

194. See id. at 797.

195. See id. at 797–98.

196. See id.

197. Jeannie O'Sullivan, Philadelphia Asks 3rd Circ. to Reinstate Wage Inquiry Ban, Law360 (Mar. 15, 2019), https://www.law360.com/articles/1139442/philadelphia-asks-3rd-circ-to-reinstate-wage-inquiry-ban (on file with the *Columbia Law Review*) (noting that oral arguments were heard on March 15, 2019); see also Chamber of Commerce of Greater Philadelphia v. City of Philadelphia, U.S. Chamber Litig. Ctr., https://www.chamberlitigation.com/cases/chamber-commerce-greater-philadelphia-v-city-philadelphia-0 [https://perma.cc/478A-WURN] (last visited Oct. 15, 2019).

198. Brief of Amici Curiae Chamber of Commerce of the United States, the Pennsylvania Chamber of Business and Industry, the Pennsylvania Manufacturers' Association, and the National Federation of Independent Business Small Business Legal Center in Support of Appellee/Cross-Appellant the Greater Philadelphia Chamber of Commerce, Greater Phila. Chamber of Commerce v. City of Philadelphia, No. 18-2176 (3d Cir. filed Nov. 28, 2018), 2018 WL 6248445; NFIB Challenges Philadelphia Ordinance that Hinders Small Businesses' Ability to Fill Vacancies, NFIB (Nov. 29, 2018), https://www.nfib.com/content/news/pennsylvania/nfib-challenges-philadelphia-ordinance-that-hinders-small-businesses-ability-to-fill-vacancies [https://perma.cc/AQN8-MZ3U].

199. Interview by Lakshmi Singh with Beth Avery, Attorney, Nat'l Emp't Law Project (Oct. 21, 2017), https://www.npr.org/2017/10/21/559278020/ban-the-box-what-this-law-means-for-potential-employees-with-a-criminal-record [https://perma.cc/R98B-Q27C].

200. Id.

201. Singh, supra note 199.

until after a conditional offer of employment to facilitate reentry into the job market. Moreover, the movement for banning the criminal-record box has been closely tied to preventing racial discrimination in hiring, as minorities in the United States are disproportionately likely to have a criminal record.[202] Opponents, however, have decried the bans as hindering an efficient hiring process, adding costs and uncertainty to the screening process, and possibly, perversely, deepening hiring biases against people of color.[203]

It would have been easier to assess these polar arguments if the empirical studies on the effects of the ban-the-box reforms all pointed to the same conclusion. Instead, the findings are mixed and reach polar opposite conclusions about the success of the bans. One recent study examining the effect of criminal background ban-the-box policies in neighborhoods that have adopted them finds that neighborhoods with high crime rates saw a 3.5% increase in employment compared to cities with high crime rates that did not implement the new law.[204] In particular, the policies were correlated with a 3% increase in the employment rate for African-American males.[205] The study also finds that there was a statistically significant increase of 1.5% in the number of job openings requiring a college degree and a 2% increase in job openings that wanted prior experience, indicating that employers find alternative screening factors when they are prohibited from using a common one.[206] By contrast, several studies suggest that the well-intentioned policies to remove information about racially imbalanced characteristics from job applications can do more harm than good for minority job-seekers. One study of ban-the-box policies found that the probability of being employed decreased by 5.1% for young, low-skilled black men and by 2.9% for young, low-skilled Hispanic men.[207] In an experimental study, 1,500 fictitious applications

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202. Sendhil Mullainathan, Ban the Box? An Effort to Stop Discrimination May Actually Increase It, N.Y. Times: The Upshot (Aug. 19, 2016), https://www.nytimes.com/2016/08/21/upshot/ban-the-box-an-effort-to-stop-discrimination-may-actually-increase-it.html (on file with the *Columbia Law Review*) (noting that "many of those with criminal histories are black" and that "'[b]an the box measures' are intended to address" the issue of discrimination based on criminal history).

203. Amy Cheng & James Post, State Debates "Ban the Box," Yale Daily News (Apr. 19, 2016), https://yaledailynews.com/blog/2016/04/19/state-debates-ban-the-box [https://perma.cc/DJT5-64SJ]; Mullainathan, supra note 202 (describing a study that found that "[b]anning the box extended discrimination to virtually all black applicants" because employers "us[ed] race as a proxy for criminal history").

204. Ivonne Acevedo, To Ban the Box, or Not to Ban the Box? How Policy Change Can Affect Hiring and Employment, Chi. Pol'y Rev. (Apr. 27, 2016), http://chicagopolicyreview.org/2016/04/27/to-ban-the-box-or-not-to-ban-the-box-how-policy-change-can-affect-hiring-and-employment [https://perma.cc/8QCJ-JZTW].

205. Id.

206. Id.

207. Jennifer L. Doleac & Benjamin Hansen, The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes when Criminal Histories

were submitted to low-skill job openings before and after New Jersey and New York adopted the criminal background box ban. The study found that, for applicants receiving a request for an interview, the racial gap of 7% before the ban increased to 45% after the ban, thus supporting "the concern that BTB [ban-the-box] policies encourage statistical discrimination on the basis of race."[208] Another study conducted in 2017 compares individuals with criminal records in Seattle, where ban-the-box was implemented, with people in other parts of the state, where it was not, and finds that the policy had no effect on employment for people with records.[209] A fourth study conducted in 2017 compares people with criminal records in Massachusetts at the time ban-the-box was implemented with people who did not have records yet but would be convicted later.[210] It found that ban-the-box widened the employment gap between ex-offenders and non-offenders by 2.36% and thus has a negative effect on ex-offenders' employment.[211] Yet another experimental study compared food-service job openings in Chicago, which bans the box, and Dallas, which does not. Using a fictitious ex-offender applicant profile, the study found higher callback rates in Chicago.[212] One-third of the applications in each city used a black-sounding name, one-third used a Latino-sounding name, and the final third used a white-sounding name.[213] The results of this study showed all applicants were 27% more likely to receive a callback in Chicago than in Dallas.[214] All three applicants had higher callback rates in Chicago where the box was banned, with the black applicant experiencing the largest increase.[215]

The resistance to the salary history inquiry ban, the questions about its effectiveness, and the concerns about potential counterproductive effects underscore the fact that although these reforms have corrective potential, their ability to close the gender gap remains limited. The highly mixed findings of the recent empirical and experimental studies on the

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Are Hidden 5 (Aug. 2018) (unpublished manuscript), http://jenniferdoleac.com/wp-content/uploads/2018/08/Doleac_Hansen_JOLE_preprint.pdf [https://perma.cc/55EG-VUMF].

208. Amanda Agan & Sonja Starr, Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment 1, 4 (Univ. of Mich. Law & Econ. Working Paper, No. 16-012, 2016), https://ssrn.com/abstract=2795795 (on file with the *Columbia Law Review*).

209. Evan K. Rose, Does Banning the Box Help Ex-Offenders Get Jobs? Evaluating the Effects of a Prominent Example 2 (Aug. 9, 2019) (unpublished manuscript), https://ekrose.github.io/files/btb_seattle_0418.pdf [https://perma.cc/PWP5-EXUX].

210. Osborne Jackson & Bo Zhao, The Effect of Changing Employers' Access to Criminal Histories on Ex-Offenders' Labor Market Outcomes: Evidence from the 2010–2012 Massachusetts CORI Reform 16–17, 21 (Fed. Reserve Bank of Bos., Working Paper No. 16-30, 2017), https://ssrn.com/abstract=2942005 (on file with the *Columbia Law Review*).

211. Id.

212. Dallan Flake, Do Ban-the-Box Laws Really Work?, 104 Iowa L. Rev. 1079, 1086–87 (2019).

213. Id.

214. Id. at 1107.

215. Id. at 1104–07.

implementation of ban-the-box criminal background reforms suggest uncertainty about the potential for banning information at the interview stage to completely correct for pervasive biases. The recent ban-the-box history also further highlights the need for ongoing data collection, as well as for public and private research and experimentation with different reform strategies.

Any meaningful reform that considers gender differences in negotiations, as well as gender biases that continue to plague salary structures, must do more than merely ban salary inquiries. We can imagine a practice developing in states that ban salary inquiry but allow reliance on salary history and voluntary disclosure when unprompted by an employer, that every applicant feels pressured to disclose prior pay. The exception of permitting employees to voluntarily reveal their salary is further concerning because discovering what happens at the negotiation table and whether disclosure was truly voluntary is nearly impossible. Moreover, the applicant may worry that, in her reluctance to differentiate herself by volunteering information, she may be signaling herself as a lemon among a pool of highly priced male cherries.[216] Beyond voluntary disclosure, most state bans allow recruiters to ask employees about salary *expectations*, which can similarly normalize as the new proxy for salary history, superficially shifting the anchored figure from a rubric of "history" to that of "expectation."[217] Indeed, permitting an employer to ask about salary expectations could potentially reinforce the negotiation deficit discussed above. It encourages the female applicant to suggest a salary, against which the employer could then negotiate. This is one of the most time-honored negotiation tactics: Always seek to have your counterpart in a negotiation make the first offer—it may be lower than you think.[218] This last prediction raises the question of whether employers could not only know about, but also rely upon, history or expectation differences to determine, and later justify, gender pay disparities.

C. *Don't Use: Banning Salary History Reliance*

Beyond banning the *question* about prior pay, some of the recent state reforms have extended the prohibition to *reliance* on prior salary to justify gender disparity. For example, California's new law states that an employer's reliance on salary information from an employee's previous job is not a sufficient justification to explain the wage gap and that any other asserted explanation must justify the entirety of the gap.[219] Such a ban is potentially

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216. George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488, 494–95 (1970).

217. See Kandace Miller, How Will the Laws Banning Salary History Affect Your Recruitment Team, Forbes (July 28, 2017), https://www.forbes.com/sites/forbescommunicationscouncil/2017/07/28/how-will-the-laws-banning-salary-history-affect-your-recruitment-team [https://perma.cc/4X3B-XDST].

218. I thank George Howard, Partner, Jones Day, for pressing this point.

219. Cal. Lab. Code § 1197.5(a)(3) (2019).

far more significant for closing the gender pay gap than banning the inquiry of prior pay. The reliance ban affects everyone in the workforce, including anyone who has already accepted a lower salary, without a new move to a competitor. The ban on reliance is not simply about structuring the initial negotiation of the deal—it also helps define acceptable results of the negotiation. Unsurprisingly, a ban on salary history reliance is no less controversial than a ban on inquiry, and the question of whether employers can justify existing gaps by pointing to prior salary histories is at the center of many lawsuits, leading to a strong split among the federal circuits when interpreting the Equal Pay Act. The EPA grants four affirmative defenses for employers to justify a gender gap: seniority, merit, quality/quantity of production, and—the controversial catchall defense—"any factor other than sex."[220] Whether any factor other than sex can include salary history is the subject of an ongoing federal circuit split and a very likely upcoming Supreme Court review of the issue.[221]

More recently, in 2018, the Ninth Circuit Court of Appeals sitting en banc reversed its own precedent when it upheld the ruling in *Rizo v. Yovino*—holding that "prior salary alone or in combination with other factors cannot justify a wage differential."[222] The *Rizo* court emphasized that unlike Title VII, the EPA "creates a type of strict liability; no intent to discriminate need be shown."[223] The court found that if prior salary constitutes a "reason other than sex," it would defeat the very purpose of the EPA:

> It is inconceivable that Congress meant for the "factor other than sex" exception to include salary history because Congress meant for the act to correct the "serious and endemic problem" of women being paid less than men for the same work, it cannot have meant to let businesses justify new gaps based on existing gaps.[224]

The *Rizo* district court reasoned that a pay structure based on prior wages is "so inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose."[225] The district court concluded:

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220. 29 U.S.C. § 206 (2018).

221. 9th Circuit: Employers May Not Use Pay History as Defense to Equal Pay Act Claims, McGuireWoods LLP: Legal Alerts (Apr. 12, 2018), https://www.mcguirewoods.com/Client-Resources/Alerts/2018/4/9th-Circuit-Employers-Pay-History-Defense-Equal-Pay-Act-Claims.aspx [https://perma.cc/4WHW-3EJ6].

222. Rizo v. Yovino, 887 F.3d 453, 456 (9th Cir. 2018), vacated, 139 S. Ct. 706 (2019).

223. Maxwell v. City of Tucson, 803 F.2d 444, 446 (9th Cir. 1986) (quoting Strecker v. Grand Forks Cty. Soc. Serv. Bd., 640 F.2d 96, 99 n.1 (8th Cir. 1980) (en banc)).

224. Braden Campbell, Salary History Can't Shield Equal Pay Claims, 9th Circ. Says, Law360 (Apr. 9, 2018), https://www.law360.com/articles/1031325/salary-history-can-t-shield-equal-pay-claims-9th-circ-says (on file with the *Columbia Law Review*).

225. Rizo v. Yovino, No. 1:14-CV-0423-MJS, 2015 WL 9260587, at *9 (E.D. Cal. Dec. 18, 2015).

> To say that an otherwise unjustified pay differential between women and men performing equal work is based on a factor other than sex because it reflects historical market forces which value the equal work of one sex over the other perpetuates the market's sex-based subjective assumptions and stereotyped misconceptions Congress passed the Equal Pay Act to eradicate.[226]

In arriving at its interpretation of the EPA, the Ninth Circuit considered the language, the legislative history, and the purpose of the statute, and concluded that "'any other factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance," and that salary history is not job related.[227] The court's reasoning echoes the argument presented by the City of Philadelphia in defending its salary inquiry ban ordinance: that there is no evidence that salary history is a rational business proxy for job qualifications.

In 2019, after granting certiorari, the Supreme Court vacated and remanded *Rizo*. The Court held that since Judge Reinhardt, a deciding vote in the narrow 6-5 decision made by the Ninth Circuit en banc, had passed away eleven days before his majority opinion was published, the Ninth Circuit "erred by counting him as a member of the majority."[228] On remand from the Supreme Court, the Ninth Circuit (sitting en banc) affirmed the district court.[229]

Prior to *Rizo*, in *Kouba v. Allstate Insurance Co.*, the Ninth Circuit held that past salary was a factor other than sex, and justified a pay disparity under the EPA so long as "prior salary was reasonable and effectuated some business policy."[230] The *Kouba* court interpreted the EPA as allowing the use of prior salary to justify disparities, though it recognized that an employer may "manipulate its use of prior salary to underpay female employees."[231] The Ninth Circuit's newly adopted position in *Rizo* is close to rulings held by the Second, Sixth, Tenth, and Eleventh Circuits, but is currently the most restrictive of the circuits that limit prior salary reliance.[232] These Circuits allow the use of a previous salary to prove that a

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226. Id.

227. *Rizo*, 887 F.3d at 460.

228. Yovino v. Rizo, 139 S. Ct. 706, 710 (2019) (failing to address any substantive employment-related legal issues and remanding because of the Ninth Circuit's error).

229. Rizo v. Yovino, 950 F.3d 1217, 1221–22 (9th Cir. 2020).

230. Rizo v. Yovino, 854 F.3d 1161, 1166 (9th Cir. 2017) (citing Kouba v. Allstate Ins. Co., 691 F.2d 873, 876–78 (9th Cir. 1982)).

231. *Kouba*, 691 F.2d at 878.

232. See Richard R. Meneghello, Miranda Watkins & Megan C. Winter, Appeals Court Says Salary History Can't Block Equal Pay Act Claims, Fisher Phillips (Apr. 9, 2018), https://www.fisherphillips.com/resources-alerts-appeals-court-says-salary-history-cant-block [https://perma.cc/S94P-Z6VG] (noting that while other circuits have limited the "EPA's catchall provision to job-related factors," the Ninth Circuit has provided the most "definitive and clear-cut ruling").

wage gap is justified within the limitations of the EPA, but not as the sole factor.[233]

In *Glenn v. General Motors Corp.*, the Eleventh Circuit held that "the 'factor other than sex' exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from *special exigent circumstances* connected with the business."[234] But prior salary alone cannot justify a pay disparity.[235] Similarly, the Eleventh Circuit held in *Irby v. Bittick* that the employer could not defend a showing of discrimination with the "factor other than sex" affirmative defense solely on the basis of prior pay, but could use a "mixed-motive, such as prior pay and more experience."[236] In *Riser v. QEP Energy*, the Tenth Circuit held that "the EPA 'precludes an employer from relying solely upon a prior salary to justify pay disparity.'"[237]

In *Rizo*, the Ninth Circuit rejected salary reliance even if it is part of other justifications, such as experience and skill. At the other end of the spectrum are the Seventh and Eighth Circuits, which allow reliance on salary history alone as a factor other than sex.[238] Even more restrictive is the Federal Circuit's rule, which requires a specific showing that the reason for that difference in pay is due to sex. In September 2018, the Federal Circuit ruled against two women physician plaintiffs in *Gordon v. United States* who claimed that the raises given to their male physician

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233. See, e.g., Bowen v. Manheim Remarketing, Inc., 882 F.3d 1358, 1363 (11th Cir. 2018) (prior salary plus prior experience); Perkins v. Rock-Tenn Servs., Inc., 700 F. App'x 452, 457 (6th Cir. 2017) (prior salary plus prior experience, existence of an hourly position, and pay set by a collective bargaining agreement); Angove v. Williams-Sonoma, 70 F. App'x 500, 508 (10th Cir. 2003) (prior salary plus qualifications and prior experience); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995) (prior salary plus prior experience); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570–71 & n.9 (11th Cir. 1988) (prior salary plus prior experience and background).

234. *Glenn*, 841 F.2d at 1571.

235. Id. at 1570–71; see also Wernsing v. Dep't of Human Servs., 427 F.3d 466, 469 (7th Cir. 2005) (holding that prior pay is an acceptable factor other than sex because any factor not based on race, sex, age, or religion is approved by the statute); *Angove*, 70 F. App'x at 508 (holding that prior pay on its own violates the EPA but that prior pay in conjunction with other factors is acceptable); *Irby*, 44 F.3d at 955–57 (same).

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

237. 776 F.3d 1191, 1198–99 (10th Cir. 2015) (quoting *Angove*, 70 F. App'x at 508).

238. Lauderdale v. Ill. Dep't of Human Servs., 876 F.3d 904, 908 (7th Cir. 2017) ("[T]his court has repeatedly held that a difference in pay based on the difference in what employees were previously paid is a legitimate 'factor other than sex.'" (citing *Wernsing*, 427 F.3d at 468); *Wernsing*, 427 F.3d at 469 ("The Equal Pay Act forbids . . . an intentional wrong, while markets are impersonal and have no intent.")).

counterparts violated the Equal Pay Act.[239] Judge Reyna, who wrote the opinion, described the court's decision as being tied by precedent established in *Yant v. United States*,[240] and called for the precedent to be revisited and overturned, essentially inviting an en banc sitting of the court. The court explained that the precedent is at odds with the "broadly remedial nature" of the Equal Pay Act:

> The *Yant* requirement that a plaintiff bringing suit additionally show that the complained-of difference in pay is presently or historically based on sex improperly shifts the burden from the employer to disprove discrimination to the plaintiff to prove discrimination. Such a shift is improper under the statute and at odds with Supreme Court precedent and the law of other circuits.[241]

The EEOC has released a statement that sides with the circuits that allow prior salary to be considered as part of a mix of factors but not as a justification by itself.[242] The Ninth Circuit's new decision is thus the most restrictive in comparison with other circuit courts and the EEOC's approach—signifying that, following a decision on remand, a Supreme Court substantive review of the issue is likely.[243] A federal bill, the Paycheck Fairness Act, would strike "any factor other than sex" in the EPA and insert a bona fide defense that lists education, training, or experience.[244]

D. *Breaking the Cycle*

The logic of banning reliance on salary history is disallowing a past wrong from generating future wrongs. If a job mobility tournament continuously carries over a discriminatory wage, pay discrimination will deepen. Still,

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239. Gordon v. United States, 903 F.3d 1248, 1250–51 (Fed. Cir. 2018), vacated, 754 F. App'x 1007 (Fed. Cir. 2019) (mem.).

240. Id. at 1254 ("To make their prima facie case, . . . Appellants must also establish that the pay differential between the similarly situated employees is 'historically or presently based on sex.'" (quoting Yant v. United States, 588 F.3d 1369, 1372 (Fed. Cir. 2009))).

241. Id. (Reyna, J., additional views) (emphasis omitted).

242. Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellee and in Favor of Affirmance at 10–21, Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018) (No. 16-15302), 2016 WL 5869872.

243. The Ninth Circuit Gives Support to Equal Pay Day, Duane Morris LLP (Apr. 12, 2018), https://www.duanemorris.com/alerts/ninth_circuit_gives_support_equal_pay_day_0418.html [https://perma.cc/RY4X-3AQU] (noting that the *Rizo* decision deepens a circuit court split, which may lead to Supreme Court review); Kelly Woodruff, On Appeals: Can '*Rizo*' Help Eliminate Gender Pay Gap in the Legal Profession?, Law.com: The Recorder (May 8, 2018), https://www.law.com/therecorder/2018/05/08/on-appeals-can-rizo-help-eliminate-gender-pay-gap-in-the-legal-profession (on file with the *Columbia Law Review*) (noting that the *Rizo* decision is even "broader" and "go[es] beyond" what is required by California law); *Yovino v. Rizo*, SCOTUSblog, https://www.scotusblog.com/case-files/cases/yovino-v-rizo [https://perma.cc/44H6-H9WL] (last visited Nov. 8, 2019) (noting that the case was remanded).

244. See Brake, supra note 111, at 890–91 (2016); Deborah L. Brake, The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay, 105 Geo. L.J. 559, 605–06 (2017).

reliance on salary history can make economic sense. In *Rizo*, the employer listed four reasons for relying exclusively on prior salary: It is a uniform and objective measure, prevents favoritism, saves money due to its simplicity, and attracts the best employees. The last factor, attracting the best employees, is often referred to as the market forces theory—an employer must offer more money to higher paid applicants because they will not accept less.[245] The market forces proponents argue that external forces, like the going market compensation rate for new hires, require an employer to pay employees differently. Moreover, those who would allow reliance on past salary view it as a way to tie compensation to work quality, productivity, and experience as embodied in the applicant's career.[246] In response to the market forces theory rationale, the EEOC wrote in amicus in *Rizo*:

> While it may make economic sense to pay a woman like Rizo less than her otherwise identically situated male counterparts based on her lower prior salary, an employer can do so only because she is willing to work for less. Yet that "is exactly the kind of evil that the [EPA] was designed to eliminate."[247]

The *Rizo* court reasoned that, rather than using "a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception."[248]

The same question about using salary history is unsettled even among states that have recently passed salary inquiry bans. At the state level, several new laws address the same issue by eliminating the catchall defense that the wage disparity was based on any factor other than sex.[249] For example,

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

246. See Paul H. Kehoe, Paycheck Fairness Act Would Have Drastic Consequences, Law360 (Apr. 21, 2014), https://www.law360.com/articles/529153/paycheck-fairness-act-would-have-drastic-consequences (on file with the *Columbia Law Review*) (arguing that "the [Paycheck Fairness Act (PFA)] would make it virtually impossible for employers to match competing offers for superior talent where an individual of the opposite sex in the same job would be making less"); Memorandum from Kirsten Kukowski, RNC Nat'l Press Sec'y, Andrea Bozek, NRCC Commc'ns Dir. & Brook Hougesen, NRSC Press Sec'y, GOP, to Interested Parties (Apr. 5, 2014), https://gop.com/misleading-paycheck-fairness-act [https://perma.cc/V8V7-ZK2A] (claiming that the PFA "will make it nearly impossible for employers to tie compensation to work quality, productivity and experience").

247. Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellee and in Favor of Affirmance, supra note 242, at 15 (first citing EEOC Compl. Man. (BNA) § 10-IV.F.2.g; then citing Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974)).

248. Rizo v. Yovino, 887 F.3d 453, 467 (9th Cir. 2018), vacated, 139 S. Ct. 706 (2019).

249. See Anthony J. Oncidi & Nayirie Kuyumjian, Ninth Circuit Changes Federal Pay Equity Rules, Proskauer: Cal. Emp't Law Update (Apr. 13, 2018), https://calemploymentlawupdate.proskauer.com/2018/04/ninth-circuit-changes-federal-pay-equity-rules [https://perma.cc/

the New York Pay Equity Law changes the state law from "any other factor" to a demonstration that the wage difference is based on "a bona fide factor other than sex, such as education, training, or experience."[250] Oregon's new law explicitly states that employers may not "determine compensation for a position based on current or past compensation."[251] California's new law prohibits employers from justifying pay inequality with prior pay.[252] At the same time, California allows employers to rely on prior pay to set a future salary when the information is publicly available or when the applicant voluntarily discloses it.[253] Inevitably, this is a recipe for upcoming tensions that will need to be resolved.

Banning salary history reliance, as with salary history inquiry, has the logic of addressing the dual effects of a longstanding gender pay gap and the gender negotiation disparities. In 2010, Professor Deborah Brake testified before Congress, lamenting the interpretation of the Equal Pay Act that allows reliance on salary history as a justification of pay disparity.[254] Brake stated that "men and women tend to differ in their approach to salary negotiations, and employers respond differently to them," yet "courts blithely accept negotiation as a factor other than sex, even in cases where women were told their pay was nonnegotiable."[255] One of the uncertainties of the *Rizo* decision is the role of using prior pay for negotiation purposes. The Ninth Circuit court made it clear that it was not deciding this question,[256] but the decision nonetheless is likely to signal to employers, even those in states that have not banned salary history inquiry, to be

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KQ8Z-QWXU] ("These rulings come at a time when states across the nation are enacting new laws to bolster pay equity protections for employees consistent with California's Equal Pay Act.").

250. Kristen E. Smith, Stronger New York Pay Equity Law to Take Effect in January 2016, Bond, Schoeneck & King: N.Y. Labor & Emp't Law Report (Oct. 29, 2015), https://www.bsk.com/new-york-labor-and-employment-law-report/stronger-new-york-pay-equity-law-to-take-effect-in-january-2016 [https://perma.cc/3YEH-B2V8].

251. Or. Rev. Stat. § 652.220(1)(d) (2019).

252. James McDonald, An Old-School Approach to Equal Pay at 9th Circ., Law360 (May 27, 2017), https://www.law360.com/articles/928889 (on file with the *Columbia Law Review*).

253. Sarchet, supra note 181. § 432.3(e) of the California law exempts publicly available salary history information and § 432.3(h) exempts salary history information the applicant voluntarily gives to the employer. Cal. Lab. Code §§ 432.3(e), (h) (2019).

254. A Fair Share For All: Pay Equity in the New American Workplace: Hearing on S. 182 and S. 904 Before the S. Comm. on Health, Educ., Labor & Pensions, 111th Cong. 50–51 (2010) (statement of Deborah L. Brake, Professor of Law, University of Pittsburgh).

255. Id. at 51.

256. See Pay Equity Practice Grp., Paul Hastings, *Rizo v. Yovino*: En Banc Ninth Circuit Holds that Salary History Is Not a Justification for Gender Wage Gap 1 (2018), http://www.paulhastings.com/docs/default-source/PDFs/stay-current-rizo-v–yovino-en-banc-ninth-circuit-holds-that-salary-hist.pdf [https://perma.cc/2L9K-VEE2] (noting that the court left open the issue of whether the rule applies to salary negotiations).

cautious and avoid using prior pay when establishing a salary.[257] The concurrence in *Rizo* noted that a total ban on salary history inquiries could actually work against women who want to leverage their prior salary when negotiating wages with a new employer.[258] In her concurring opinion, Judge Margaret McKeown cites to my recent book, *Talent Wants to Be Free*, to emphasize that employee mobility between competitors promotes innovation and job growth, concluding that "the Equal Pay Act should not be an impediment for employees seeking a brighter future and a higher salary at a new job."[259] As I have argued, concentrated labor markets and talent mobility impediments, including non-competes and other post-employment restrictive covenants, have a disproportionate effect on women's upward mobility because women are statistically more likely to be geographically bound and to experience family or work challenges that lead to career detours.[260] Reliance on prior salary to justify gender disparities can further deepen these dynamics. What is needed is a job market in which women can become aware of the value of their talents and the disparities they experience. The next set of reforms is therefore far better tailored than salary history to address the concerns of the concurrence to ensure a more mobile and empowered job market.

IV. BREAKING THE CODE OF SILENCE

"Light thinks it travels faster than anything but it is wrong. No matter how fast light travels, it finds the darkness has always got there first, and is waiting for it."[261]

"One of the best ways to be a male ally in the equal-pay effort is to tell your female peers what you make."[262]

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257. See Meneghello et al., supra note 232 ("[T]he scope of today's decision means that setting compensation based in whole or in part on salary history is fraught with danger in any jurisdiction governed by 9th Circuit precedent.").

258. Erin Mulvaney, Prior Salary Can't Justify Gender Wage Gap, Law J. Newsletters (May 1, 2018), http://www.lawjournalnewsletters.com/2018/05/01/prior-salary-cant-justify-gender-wage-gap (on file with the *Columbia Law Review*).

259. Rizo v. Yovino, 887 F.3d 453, 471–72 (9th Cir. 2018) (McKeown, J., concurring) (citing Orly Lobel, Talent Wants to Be Free, supra note 56, at 49–75).

260. See generally Orly Lobel, Gentlemen Prefer Bonds: How Employers Fix the Talent Market, 59 Santa Clara L. Rev. 663 (2020) [hereinafter Lobel, Gentlemen Prefer Bonds].

261. Terry Pratchett, Reaper Man 311 (1991).

262. Collins, supra note 24.

A. *Do Tell: The Spread of Non-Disclosure Agreements and the Right to Concerted Activity at Work*

The Lilly Ledbetter case, which led to President Obama's first piece of legislation,[263] centered on the application of the statute of limitations for bringing pay discrimination claims. In her passionate dissent, successfully calling on Congress to overturn the majority's ruling, Justice Ginsburg got to the heart of the matter—asymmetric information:

> The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision.[264]

The formula for pay equity is simple enough. To achieve parity, the law must move away from insularity, correct for information asymmetry, and move toward more transparency. Yet women everywhere, reinvigorated by Twitter accounts, media support, and #MeToo hashtags, are discovering that "isolation is not only a consequence of inequality but also a root cause."[265] A key to closing the pay gap is allowing for a more open wage dialogue between employees—not only before starting a new job, but throughout the duration of employment. Women can negotiate better salaries when they are made aware of where they stand relative to their coworkers.

Even before the recent wave of reforms, employers could not lawfully bar employees from disclosing their salaries to third parties. The National Labor Relations Act (NLRA), enacted in 1935, grants all workers, including non-unionized employees, the right to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[266] The National Labor Relations Board (NLRB) has consistently held that prohibiting employees from discussing their salaries violates their right to engage in concerted activity for mutual aid.[267] Even if employees or employers are unaware of the law and employee speech rights, the

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263. See Sheryl Gay Stolberg, Obama Signs Equal-Pay Legislation, N.Y. Times (Jan. 29, 2009), https://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html (on file with the *Columbia Law Review*).

264. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 650 (2007) (Ginsburg, J., dissenting), abrogated by Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e-5 (2018)).

265. Collins, supra note 24.

266. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2018)).

267. See 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, 172 (2004) ("[T]he NLRB . . . ha[s] rather consistently found [pay secrecy/confidentiality rules] illegal under the NLRA."); id. at 172 n.40 ("The NLRB and federal courts have, to date, given relatively short shrift to various defenses/legitimate business justifications raised by employers for having [pay secrecy/confidentiality] rules.").

firing of an employee for discussing salary issues is still unlawful.[268] Moreover, protection persists even where an employee has signed a nondisclosure agreement with their employer. The NLRB holds confidentiality agreements invalid when they contain provisions that "prohibit[] employees from disclosing certain personnel information unless authorized by the Company."[269] The EEOC has also begun to proactively question employment policies, practices, and agreements that "discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts," including nondisclosure agreements.[270]

Still, pay equity legislation reveals the space between law and practice in multiple ways—and pay secrecy is no exception, developing as an extralegal or even illegal norm, backed by contract and culture. Employers have continued throughout the decades to prohibit their employees from discussing salaries, and many of the current reforms attempt to directly change this reality.[271] The U.S. Department of Labor notes that "[i]n 2010, nearly half of all workers nationally reported that they were either contractually forbidden or strongly discouraged from discussing their pay with their colleagues . . . ."[272] The sharing of salary information is not merely discouraged by employers through covenants, policies, and corporate culture; it has long been taboo in American society.[273] The code of secrecy is so embedded that "the news that Jennifer Lawrence was given less for 'American Hustle'—seven per cent of profits to her male co-stars' nine per cent—constituted one of the major revelations of the Sony Pictures email hack."[274]

Sharing salary information among coworkers has been a significant aspect of mobilization toward pay equity reforms. When, for example, British women working at the BBC became motivated to expose the organization as having a pervasive gender pay gap, they formed a transparency

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268. Board Finds Houston Engineering Firm Unlawfully Fired Employee for Discussing Salaries with Coworkers, NLRB (Feb. 15, 2013), https://www.nlrb.gov/news-outreach/news-story/board-finds-houston-engineering-firm-unlawfully-fired-employee-discussing [https://perma.cc/LA9F-DTJF].

269. Debbie Berman, Andrew Vail & Licyau Wong, Employment Agreements: Employers Need to Pay Attention to Growing Government Activism, IP Watchdog (Jan. 22, 2017), http://www.ipwatchdog.com/2017/01/22/employment-agreements-employers-government-activism [https://perma.cc/E77F-P2X4].

270. Strategic Enforcement Plan Fiscal Years 2017–2021, U.S. EEOC, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm [https://perma.cc/9D8D-38KN] (last visited Oct. 26, 2019).

271. According to one study, 23.1% of private sector workers are explicitly banned from sharing information about wages; 38.1% are strongly discouraged from doing so. See Women's Bureau, U.S. Dep't of Labor, Pay Secrecy 1 (2014), https://www.dol.gov/wb/media/pay_secrecy.pdf [https://perma.cc/XQ8Q-GKUY].

272. Id.

273. See Bierman & Gely, supra note 267, at 176–81.

274. Collins, supra note 24.

group. As part of their efforts, they banded together to meet with the employer wearing "lapel badges emblazoned with their salaries."[275]

In 2014, President Obama signed an executive order banning federal contractors from retaliating against employees for discussing their compensation.[276] Under the order, companies face greater penalties for violation of pay secrecy rules, one of which includes losing their federal contract.[277] More recently, state law reforms make it illegal for any employer to prohibit pay discussions among employees. The Massachusetts Equal Pay Act, for example, prohibits employers from requiring employees to refrain from inquiring about, discussing, or disclosing information about the employee's own wages, or any other employee's wages.[278] California's new equal pay act prohibits employers from disallowing employees' disclosure or discussion of their own wages or the wages of others, including aiding or encouraging other employees to exercise their rights under the law.[279] Colorado law prohibits employers from, among other things, discharging, disciplining, or discriminating against an employee because the employee has shared or discussed their wages.[280] Employers in Colorado are also prohibited from requiring an employee to sign a waiver or other documentation that would deny the employee the right to disclose their wage information.[281] Connecticut's new Pay Equity and Fairness Act similarly makes it unlawful for an employer to prohibit an employee from discussing or disclosing wages, or asking an employee to sign a waiver of the right to discuss or inquire about their wages.[282] Several other states including Oregon,[283] New Hampshire,[284] Washington,[285] and Maryland[286] have recently passed similar laws. Other states have pending bills to protect wage discussions.

Taken together, the salary history inquiry *ban* and salary coworker inquiry *protection* also correct a long-existing, non-gender-specific double standard—employers often demand secrecy from their employees and usually do not reveal the pay scale of their employees when they interview but demand salary history. Efforts to signal, protect, and educate employees

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275. Id.

276. Non-Retaliation for Disclosure of Compensation Information, 79 Fed. Reg. 20,749 (Apr. 11, 2014).

277. Id.

278. Mass. Gen. Laws Ann. ch. 149, § 105A(c) (West 2019).

279. Cal. Lab. Code § 1197.5(k)(1) (West 2019).

280. Repeal Prohibition of Wage Sharing Information, ch. 290, 2017 Colo. Sess. Laws 1608.

281. Id.

282. Conn. Gen. Stat. § 1(b)(2018).

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

284. N.H. Rev. Stat. Ann. § 275:41-b (2015).

285. 2018 Wash. Sess. Laws 682.

286. Md. Code Ann., Lab. & Empl. § 3-304.1 (West 2016).

about their right to share information about their earnings flip this asymmetry on its head. California's new law even requires an employer, upon reasonable request by an applicant, to provide the pay scale for a position.[287] These efforts to change the playing field and rules of engagement still fall short of more systematic transparency, but they have the potential to mobilize workers, increase awareness, and change social norms.

Social norms have also been changing rapidly with the rise of online connectivity. Digital platforms including LinkedIn, Glassdoor, Salary.com, and SalaryExpert provide crowdsourced salary information and are becoming the launchpad for people on the job hunt.[288] As one scholar wrote in a recent article in the *Compensation & Benefits Review*, "Pay confidentiality has been eroding for years . . . . Millennials share every thought it seems."[289] Job search websites serve employees by providing advice and information when asking for a raise or preparing for an interview. Because the digital platforms rely on crowdsourced data, more information is likely to be available on larger employers.[290] For example, Glassdoor provides a pay data tool called *Know Your Worth*.[291] *Know Your Worth* provides users with a customized personal market value based on the user's job title, company, location, and experience. It also dynamically analyzes trends and recalculates the figures weekly.[292] According to Glassdoor, its salary estimator

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287. The new California law somewhat addresses pay transparency by extending—from two years to three—an employer's obligation to maintain records of wages and pay rates, job classifications, and other terms of employment, though the records are kept confidential unless they are ordered in discovery. See Cal. Lab. Code § 1197.5 (2019); id. § 432.3.

288. See Benjamin Arendt, Glassdoor? Google? LinkedIn? Any Which Way, the Future of Recruiting Is Transparency, Talent Daily (June 6, 2018), https://www.cebglobal.com/talentdaily/glassdoor-google-linkedin-any-which-way-the-future-of-recruiting-is-transparency [https://perma.cc/2BB6-9RXG].

289. Howard Risher, Pay Transparency Is Coming, 46 Compensation & Benefits Rev. 3, 3–4 (2014).

290. Glassdoor claims to remove comments when they have reason to believe that employees were "compensated and/or coerced," but that is a hard policy to enforce. See Lizzie Widdicombe, Improving Workplace Culture One Review at a Time, New Yorker (Jan. 15, 2018), https://www.newyorker.com/magazine/2018/01/22/improving-workplace-culture-one-review-at-a-time [https://perma.cc/EB4B-CKW3].

291. See Jillian Kramer, Are You Worth More This Year than You Were in 2018?, Glassdoor (Jan. 11, 2019), https://www.glassdoor.com/blog/are-you-worth-more-this-year [https://perma.cc/HP4C-WJ5A] (describing the features of the Know Your Worth calculator); see generally Susan Adams, How Companies Are Coping with the Rise of Employee-Review Site Glassdoor, Forbes (Feb. 24, 2016), https://www.forbes.com/sites/susanadams/2016/02/24/how-companies-are-coping-with-the-rise-of-employee-review-site-glassdoor [https://perma.cc/R689-X6DE] ("[A]n increasing number of companies are realizing they can't ignore Glassdoor reviews, especially negative ones."); Queenie Wong, Are You Getting Paid Enough? LinkedIn Launches Salary Comparison Tool, Mercury News (Nov. 2, 2016), https://www.mercurynews.com/2016/11/02/are-you-getting-paid-enough-linkedin-launches-salary-tool [https://perma.cc/9GSH-FB44] (last updated Nov. 3, 2016).

292. Know Your Worth Methodology and FAQs, Glassdoor, https://help.glassdoor.com/article/Know-Your-Worth-Methodology-and-FAQ/en_US/Glassdoor_Basics [https://perma.cc/KT95-P3K2] (last visited Oct. 16, 2019).

can calculate the market value for 77% of the U.S. workforce within an approximate 11.8% median margin of error rate.[293] As with other digital platforms, the algorithm improves as more data are introduced and the machine learns over time.[294] Companies already conduct robust market analyses of competitive salaries. For employees, this access to information offers knowledge about underpayment, which in turn makes an employee more likely to ask for a raise or seek opportunities elsewhere. The information provided by these platforms can embolden employees to negotiate higher salaries before accepting job offers, even while continuing to work for their current employer. Thus, salary sharing platforms put pressure on employers to close the gender pay gap.

Economist Gary Becker provided the theoretical foundations that help explain the persistence of the gender wage gap under conditions of secrecy.[295] Under perfect market conditions, with perfect information and perfect competition, if a group of workers is treated differently by a small proportion of employers, discrimination should be eradicated by the forces of competition. Pay secrecy allows discriminating employers to maintain an unfair pay gap because employees may not be aware that they are receiving a lower salary. Secrecy prevents employees from efficiently seeking jobs elsewhere. When the number of firms with pay secrecy is large enough, discrimination will persist. The market for wages in general is imperfect. Economists estimate billions in lost wages due to imperfect information.[296] From a gender perspective, transparency not only informs women about a possible gap between their salary and the salaries of their male colleagues; it also creates more certainty and mitigates risk aversion, which itself is gendered.[297] In other words, the pervasive gender pay gap

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293. Id.

294. See Orly Lobel, The Law of the Platform, 101 Minn. L. Rev. 87, 94–101 (2016) (discussing the dynamic evolution of businesses like Airbnb and Uber in the platform economy); see generally Chris Meserole, What Is Machine Learning?, Brookings Inst. (Oct. 4, 2018), https://www.brookings.edu/research/what-is-machine-learning [https://perma.cc/4ZEW-C4M5].

295. See Gary S. Becker, The Economics of Discrimination 9–18 (1971).

296. See Richard A. Hofler & Kevin J. Murphy, Underpaid and Overworked: Measuring the Effect of Imperfect Information on Wages, 30 Econ. Inquiry 511, 525, 528 (1992) ("[T]he efficiency cost of imperfect information to the economy as a whole, in GNP terms, is on the order of 10 percent."); Yannis M. Ioannides & Linda Datcher Loury, Job Information Networks, Neighborhood Effects, and Inequality, 42 J. Econ. Literature 1056, 1056 (2004) ("Search theory formally models frictions associated with job-seekers; access to information about availability of jobs of different types and about the conditions of employment."); Alexandre Mas, Does Transparency Lead to Pay Compression? 6 (Nat'l Bureau of Econ. Research, Working Paper No. 20558, 2014), http://www.nber.org/papers/w20558 [https://perma.cc/5T7W-UMHJ] ("[W]age cuts were not the result of the discovery of managers who exploited secrecy to inflate their wages, in general.").

297. See Rachel Croson & Uri Gneezy, Gender Differences in Preferences, 47 J. Econ. Literature 448, 451 (2009) ("In summary, we find that women are more risk averse than men in lab settings as well as in investment decisions in the field.").

chills job mobility and may deepen the gender pay gap further: a continuing vicious cycle.

Research on the effects of antiretaliation laws that prohibit employers from disallowing coworker salary discussions is limited. The research that does exist, however, suggests positive effects on closing the gender pay gap. One study using difference-in-differences comparisons examines how the gender wage gap has changed in the private sector in states that adopted anti-secrecy laws, compared to states that didn't pass such laws. The study focuses on four states that implemented anti-secrecy laws in the early 2000s—California, Colorado, Illinois, and Maine—and finds a positive correlation between adopting anti-secrecy pay laws and increasing in gender wage equality.[298] Another study similarly using difference-in-differences wage regressions finds that women, especially educated women, who live in states that outlawed pay secrecy have higher earnings and the pay gap is smaller.[299] Other studies indicate that pay transparency, and more broadly employers' financial transparency, may improve wages for all workers.[300] A British study finds that employees with employers who disclose workplace financial data earn more than otherwise similar workers not privy to such information. Controlling for profit, productivity levels, and other workplace and worker characteristics, the study finds that financial transparency results in significantly higher wages for workers.[301] The researchers conclude that "financial disclosure requirements constrain managerial discretion, shifting power downward within organizations by reducing information asymmetries and thereby legitimating workers' wage claims in the bargaining process."[302]

Like salary history inquiries, pay secrecy can have economic logic. Employers often want to differentiate between employees and boost those who are most valuable without discouraging others who are paid less.[303] Yet, while the research is somewhat mixed on pay transparency and employee performance and happiness, most studies find a positive correlation. In an early study, economist Edward Lawler found that pay secrecy leads to employee dissatisfaction and to employee's overestimation of their coworkers'

298. Olga Fetisova, Effects of Anti-Secrecy Pay Laws on the Gender Wage Gap 13 (May 2014) (unpublished B.A. thesis, University of Maryland), http://econ-server.umd.edu/~edinger/undergraduate/Fetisova_Honors_Thesis2014.pdf [https://perma.cc/76MP-Q34R].

299. Marlene Kim, Pay Secrecy and the Gender Wage Gap in the United States, 54 Indus. Rel. 648, 649, 658–62 (2015).

300. David Card, Alexandre Mas, Enrico Moretti & Emmanuel Saez, Inequality at Work: The Effect of Peer Salaries on Job Satisfaction, 102 Am. Econ. Rev. 2981, 3002 (2012) (describing the potential impact of wage transparency on employers' wage distributions).

301. Jake Rosenfeld & Patrick Denice, The Power of Transparency: Evidence from a British Workplace Survey, 80 Am. Soc. Rev. 1045, 1061 (2015).

302. Id. at 1064.

303. Card et al., supra note 300, at 2981 (finding that "workers with salaries below the median for their pay unit and occupation report lower pay and job satisfaction, while those earning above the median report no higher satisfaction").

compensation.[304] A more recent field experiment finds that telling employees about their coworkers' wages resulted in *more* labor effort and worker productivity.[305] Another study examining a shift of companies from pay secrecy to open information found similar increases in productivity.[306]

In recent years, secrecy about employment terms and work conditions has moved beyond a market norm to a standard requirement in employment clauses.[307] New state and federal efforts have been made in reaction to the many stories of companies, as well as public figures, who for years have been shielding themselves from public scrutiny by demanding nondisclosure from their employees, in both standard employment contracts and in dispute settlements. In California, in the aftermath of the first #MeToo revelations, a new law prohibits confidentiality in settlement agreements pertaining to sexual harassment, assault, and discrimination based on sex.[308] The law is far-reaching in covering all claims related to sex discrimination, and is designed to increase transparency and prevent habitual offenders from cyclically harassing or disparately treating their employees.[309] In April 2018, New York passed amendments to its laws prohibiting confidentiality in sexual harassment settlements.[310] The New York amendments are narrower than the new California law and did not include gender-based discrimination other than harassment, but were amended in August 2019 to include all discrimination.[311] In March 2018,

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304. See Edward E. Lawler III, Secrecy About Management Compensation: Are There Hidden Costs?, 2 Organizational Behav. & Hum. Performance 182, 184 (1967).

305. Jordi Blanes i Vidal & Mareike Nossol, Tournaments Without Prizes: Evidence from Personnel Records, 57 Mgmt. Sci. 1721, 1735 (2011) (describing how knowledge of coworkers' wages increases worker productivity).

306. Emiliano Huet-Vaughn, The Unexpected Benefit of Telling People What Their Coworkers Make, Atlantic (Apr. 8, 2014), https://www.theatlantic.com/business/archive/2014/04/the-unexpected-benefit-of-telling-people-what-their-coworkers-make/360301 [https://perma.cc/U7WF-9QV4].

307. See Rochelle Cooper Dreyfuss & Orly Lobel, Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security, 20 Lewis & Clark L. Rev. 419, 466–67 n.287 (2016); Orly Lobel, The DTSA and the New Secrecy Ecology, 1 Bus. Entrepreneurship & Tax L. Rev. 369, 371 (2017) [hereinafter Lobel, New Secrecy] (describing the expansion of trade secrecy liability for employees); Orly Lobel, The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property, 93 Tex. L. Rev. 789, 791 (2015) [hereinafter Lobel, New Cognitive Property]; Orly Lobel, NDAs Are Out of Control. Here's What Needs to Change, Harv. Bus. Rev. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/93LH-GY2L] ("New data shows that over one-third of the U.S. workforce is bound by an NDA.").

308. See Cal. Civ. Proc. Code § 1001 (West 2019); Jeff Daniels, New State Laws: From Workplace Harassment Protections to Mandating Women on Boards, CNBC (Dec. 28, 2018), https://www.cnbc.com/2018/12/28/new-state-laws-in-california-elsewhere-inspired-by-metoo-movement.html [https://perma.cc/4Z84-KLCJ].

309. See Cal. Civ. Proc. § 1001.

310. See Senate Bill S7507C, N.Y. State Senate, https://www.nysenate.gov/legislation/bills/2017/s7507 [https://perma.cc/W9D4-7AYJ].

311. See N.Y. C.P.L.R. Law §§ 5003-b, 7515 (McKinney 2019); N.Y. Gen. Oblig. Law § 5-336 (McKinney 2019); 2019 N.Y. Sess. Laws Ch. 160 (McKinney).

the State of Washington passed a law that prohibits employers from making employees sign NDAs pertaining to sexual assault and harassment in the workplace.[312] A federal bill, the "Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act" (EMPOWER Act), would prohibit nondisclosure clauses regarding workplace harassment and establish a confidential tip line for reporting systematic workplace harassment.[313] These efforts are related to those addressing the culture and norms of corporate salary secrecy. They signal to employees that sharing information about misconduct and unlawful work conditions is not only allowed but also crucial to prevent a workplace prisoner's dilemma, in which each employee has too much to lose by being the single David against the Goliath.[314]

The ability to reveal one's salary to coworkers and other employees in her industry is particularly significant in light of recent revelations about unlawful collusions between employers agreeing to not hire one another's employees or to fix wages.[315] The rise in postemployment restrictive covenants reduced opportunities for employees to leave their employers for a competitor and to negotiate a competitive salary. This in turn depresses wages not only for those employees bound by restrictive covenants but for employees working in that industry in general.[316] At the same time, the rise

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312. See Judah L. Rosenblatt & Amanda M. Gómez, Washington Prohibits Nondisclosure Agreements Related to Sexual Harassment or Assault, Epstein Becker Green: Retail Labor & Emp't Law (Apr. 13, 2018), https://www.retaillaborandemploymentlaw.com/sexual-harassment/washington-prohibits-nondisclosure-agreements-related-to-sexual-harassment-or-assault [https://perma.cc/ZBW7-YXZR].

313. S. 575, 116th Cong. §§ 4(a)(1), 5 (2019); H.R. 1521, 116th Cong. §§ 103(a)(1), 104 (2019); see also Nat'l P'ship for Women & Families, The EMPOWER Act: Legislation to Combat Workplace Harassment 1–2 (2019), http://www.nationalpartnership.org/our-work/resources/economic-justice/sexual-harassment/the-empower-act.pdf [https://perma.cc/E8VS-7ACJ]. For a discussion of more intermediate measures suggesting that NDAs remain enforceable, but only if they still allow the settling victims to report potential violations of Title VII to the EEOC, see Ian Ayres, Targeting Repeat Offender NDAs, 71 Stan. L. Rev. Online 76, 79–81 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Ayres-1.pdf [https://perma.cc/89CG-FXYU].

314. See Orly Lobel, The Prisoner's Dilemma in Airing Fox's Corporate Culture, Fortune (July 28, 2016), http://fortune.com/2016/07/28/fox-corporate-culture-roger-ailes-gretchen-carlson (on file with the *Columbia Law Review*) ("Blowing the whistle on a corrupt organizational culture takes courage.").

315. See U.S. DOJ & FTC, Antitrust Guidance for Human Resource Professionals 7–8 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/S9W6-C4JQ] (directing HR professionals to avoid agreements with other companies to cap wages or to refrain from poaching employees); Lobel, New Cognitive Property, supra note 307, 831–35 (documenting the "cognitive cartels," or agreements not to hire competitors' employees and to keep wages down, among major high-tech companies).

316. See Brian Fung, What the Apple Wage Collusion Case Says About Silicon Valley's Labor Economy, Wash. Post (Apr. 23, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/23/what-the-apple-wage-collusion-case-says-about-silicon-valleys-labor-economy (on file with the *Columbia Law Review*) (describing how restrictive covenants negatively impact wages for workers).

in restrictive clauses in employment contracts points to the limitations of merely passing laws that prohibit sharing salary information with coworkers. Efforts to encourage wage discussions should include legislation that declares contractual agreements and corporate policies that attempt to prevent wage discussions to be unlawful. As discussed above, such agreements and policies are already unlawful under the federal NLRA.[317] A more impactful measure could be legislation that requires positive notice in employment contracts that wages are exempted from confidentiality clauses. This would be a provision analogous to the whistleblower immunity clause, developed by Professor Peter Menell, passed by Congress, and signed into law by President Obama in 2016 as part of the Defend Trade Secrets Act (DTSA).[318] The Act requires that all employers provide notice of immunity to employees and contractors when blowing the whistle, even if that involves revealing trade secrets, "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."[319] A similar requirement could be adopted in future pay equity reforms in the context of the rights of employees to discuss compensation with coworkers and others in the job market.

B. *Do Compare (and Explain): Equity Across Job Categories*

"The wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[320]

In addition to banning salary inquiries and encouraging sharing, a third category of the new wave of pay equity reforms concerns the very definition of equity, further challenging the traditional substantive line between gap and discrimination. Several states have new laws that move away from the term "equal work," and instead toward the notion of equal pay for "comparable" or "substantially similar" work.[321] These shifts represent

317. See supra notes 266–269 and accompanying text.

318. See 18 U.S.C. § 1833(b)(3)(A) (2016); Lobel, New Secrecy, supra note 307, at 381 ("[T]he DTSA gives employees immunity from criminal or civil liability for reporting illegalities. The DTSA requires notice of this immunity in all employment contracts."); see also Peter S. Menell, Misconstruing Whistleblower Immunity Under the Defend Trade Secrets Act, 1 Nev. L.J. Forum 92, 92 (2017) (explaining that Professor Menell was, in part, responsible for developing the language of § 1833(b)(3)(A)).

319. 18 U.S.C. § 1833(b)(3)(A).

320. S. Rep. No. 176, at 1 (1963) (accompanying the bill for the Equal Pay Act of 1963).

321. Similar to the California reform, the New York Achieve Pay Equality Act was signed on October 21, 2015 and went into effect January 19, 2016. The Act is an amendment to New York's equal pay law (S.1/A.6075) and amends Labor Law Section 194. Smith, supra note 250. Massachusetts's Act defines "comparable work" as "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine comparability." Mass. Gen. Laws Ann. ch. 149, § 105A (West 2018). For

a hybrid effort between substantive change and structural reforms of information flows: Employers now have to examine disparities beyond formal job titles or positions and articulate reasons for gender disparities in relation to information they possess. Expanding the definition of equal pay addresses the difficulty employees face in piercing the veil of different job categories or positions when it is the employer who defines these jobs. The 2016 Massachusetts Equal Pay Act expressly states that "a job title or job description alone shall not determine comparability."[322] Moreover, several states now allow comparison between employees across geographic locations even if they do not work at the same establishment.[323]

As a federal bill, the Fair Pay Act seeks to amend the Equal Pay Act to expand the span of equal pay.[324] The Equal Pay Act adopted the standard of "equal skill, effort, and responsibility," which is "performed under similar working conditions."[325] When Congress adopted the EPA's equal pay standard, it expressly considered and rejected the term "comparable work."[326] The "equal work" standard, as the EPA currently stands, reflects a middle ground between a formal requirement of two jobs that are identical and expansion into job comparability. The goal of this narrower category was to maintain an employer's right to classify jobs validly.[327] The Supreme Court has adopted a test that requires that the job performed be substantially of the same skill, effort, and responsibility.[328] In determining what constitutes equal work, the courts have required not that the jobs be identical, but only that they be substantially equal.[329] In determining whether two jobs are "substantially equal," the crucial inquiry is "whether the jobs to be compared have a 'common core' of tasks, i.e., whether a significant

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a discussion of "current law reform efforts to expand equal pay protections at both federal and state levels, with a focus on . . . [those] that go the furthest toward requiring equal pay for 'substantially similar' or 'comparable work,'" see Stephanie Bornstein, Equal Work, 77 Md. L. Rev. 581, 587, 614–29 (2018).

322. Mass. Gen. Laws Ann. ch. 149, § 105A(b).

323. See, e.g., Md. Code Ann., Lab. & Empl. § 3-304(b)(2) (West 2016); N.Y. Lab. Law § 194(3) (McKinney 2016).

324. See Fair Pay Act of 2017, H.R. 2095, 115th Cong. (2017).

325. 29 U.S.C. § 206(d)(1) (2018).

326. See, e.g., Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1174–75 (3d Cir. 1977) ("In substituting the term 'equal work' for 'comparable work,' Congress rejected the approach taken by the War Labor Board.").

327. See Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974) ("Congress' intent, as manifested in this history, was to use these terms to incorporate into the new federal Act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act.").

328. See EEOC v. Madison Cmty. United Sch. Dist., 818 F.2d 577, 582 (7th Cir. 1987) (holding that "equal work" requires a substantial identity rather than an absolute identity).

329. 29 C.F.R. § 1620.13(a) (2018) ("The equal work standard does not require that compared jobs be identical, only that they be substantially equal."); Tomka v. Seiler Corp., 66 F.3d 1295, 1310 (2d Cir. 1995).

portion of the two jobs is identical."[330] In other words, to prevent employers from simply naming the same position differently for men and women, the EPA measures similarity of substance rather than form.[331]

In recent years, the courts' interpretation of the EPA's "equal work" standard has yielded mixed results.[332] In *Laffey v. Northwest Airlines Inc.*, the court held that the positions of purser and stewardess were substantially equal because the differences between the jobs largely ended with the names of the job titles.[333] Similarly, in *Odomes v. Nucare, Inc.*, the court found that a female nurse aide's work was equal to that of a male orderly who was being paid more, because they both cared for patients, bathed patients, distributed food trays, fed patients, took temperatures, and changed clothes and bed linens, and thus should have been compensated with equal pay.[334] Some circuits, however, have construed the substantially equal formulation more narrowly.[335] For example, in *Howard v. Lear Corp.*, the Eleventh Circuit viewed an HR manager position as substantially different from an HR coordinator position because the work environment of the former required more skill and complexity.[336] Similarly, in *Sims-Fingers v. City of Indianapolis*, the Seventh Circuit found that, since the men were in charge of larger parks with additional amenities, the work of a female municipal system manager was not equal to the work of the male municipal park system managers.[337]

Professor Deborah Eisenberg has shown that courts have increasingly adopted a more restrictive interpretation of "equal" work, and argues that

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330. Merillat v. Metal Spinners, Inc., 470 F.3d 685, 695 (7th Cir. 2006); see also Kob v. Cty. of Marin, 425 F. App'x 634, 635 (9th Cir. 2011) (holding that the plaintiff's position of "mediation services manager" was not substantially equal to the comparator's position of "administrative services manager" when the job descriptions reflected that the positions involved different core tasks); Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 698 (7th Cir. 2003).

331. U.S. EEOC, Fact Sheet: Equal Pay and Compensation Discrimination 1–2 (2010), https://www.eeoc.gov/eeoc/publications/upload/fs-epa.pdf [https://perma.cc/7ZCA-5A96] (last updated Apr. 1, 2010).

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

333. 567 F.2d 429, 453 (D.C. Cir. 1976).

334. 653 F.2d 246, 250–53 (6th Cir. 1981).

335. See Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222, 297 F.3d 1146, 1149–50 (10th Cir. 2002) (requiring, for a prima facie case under the Equal Pay Act, that the plaintiff show not only that the work was "substantially equal" but also that it was performed in "conditions . . . [that] were basically the same").

336. 234 F.3d 1002, 1005 (7th Cir. 2000).

337. 493 F.3d 768, 770 (7th Cir. 2007). In a 2017 case, *Chairamonte v. Animal Medical Center*, the Second Circuit found that the work of a female veterinarian was not substantially equal to the work performed by her male colleagues. The female veterinarian, like her male colleagues, was a department head, but her work could be easily performed by less-qualified personnel, whereas her male colleagues practiced in specialized areas of veterinary medicine. 677 F. App'x 689, 691 (2d Cir. 2017).

this strict standard "has rendered the EPA ineffective for a large segment of the modern workforce and has imposed a wage glass ceiling for women in upper-level or supervisory positions."[338] The more difficult it is for employees to compare across positions under the current EPA, the less the law aids professional women who uncover disparities in their workplace.[339]

The broader language of the new state reforms allows expansive comparison among workers both in the most vulnerable low-skilled industries and at the top. One of the most cited comparisons in the legislative efforts has been between female maids and male janitors.[340] But the wave of reforms has also motivated a rise in lawsuits by women attorneys, programmers, and corporate executives.[341] Maryland's Equal Pay for Equal Work Act, signed into law in 2017, provides one of the broadest expansions. It creates a cause of action when an employer provides "less favorable employment opportunities."[342] In other words, Maryland's law prohibits "mommy tracking"—the practice of funneling female employees into less desirable career paths or failing to inform women of advancement or promotional opportunities altogether.[343] The Maryland law demonstrates the substantive/information-inducing dual purpose of this category of reforms: The law expands what is prohibited, but perhaps more importantly, it further induces employers to inform employees about opportunities and to correct the disparities created by its internal processes and information asymmetries.

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338. Deborah Thompson Eisenberg, Shattering the EPA's Glass Ceiling, 63 S.M.U. L. Rev. 17, 46 (2010).

339. Id.

340. See, e.g., Testimony on the Equal Pay Act: Hearing on H. 1733 and S. 983 Before the J. Comm. on Labor & Workforce Dev., 114th Cong. 4 (2015) (statement of Ann Bookman, Director, Center for Women in Politics and Public Policy) (explaining how the median annual earnings of janitors exceed those of the more female-dominated occupation of maids and housekeeping cleaners performing comparable work).

341. See, e.g., Christine Simmons, Chadbourne Settles Sex Bias Case that Shined Light on Big Law Pay Gap, N.Y.L.J. (Mar. 14, 2018), https://www.law.com/newyorklawjournal/2018/03/14/chadbourne-settles-sex-bias-case-that-shined-light-on-big-law-pay-gap [https://perma.cc/P2FK-U8LZ] (containing a link to the court paper accepting the settlement).

342. Md. Code Ann., Lab. & Empl. Law §§ 3-304(a), 3-304.1 (West 2016).

343. Id. § 3-304(a); Brian W. Steinbach, Maryland Expands State Equal Pay Act and Broadens Employees' Right to Discuss Wages, Epstein Becker Green: Work Force Bulletin: Insights on Labor & Emp't Law (May 23, 2016), https://www.technologyemploymentlaw.com/wage-and-hour/maryland-expands-state-equal-pay-act-and-broadens-employees-right-to-discuss-wages [https://perma.cc/X7A4-XNZC]. Maryland's new Equal Pay for Equal Work Act, moreover, expands the protected identity to include "sex or gender identity." Id.

V. THE GOVERNANCE OF PAY EQUITY: BEYOND THE LAND OF LITIGATION LIES THE WORLD OF ACCOUNTABILITY

"Transparency alone will not solve this problem but it is an important and necessary first step."[344]

"[T]o grant equal rights in the absence of equal opportunity is to strengthen the strong and weaken the weak."[345]

A. *Hidden Figures and Mandatory Reporting*

The new waves of legislative reform along with central recent court decisions have the underlying logic of advancing pay equity by reversing the flow of information: State laws are increasingly banning inquiry and reliance on salary history by employers, while preventing employers from banning employee speech about their salaries. These efforts are promising, and change is underway. Many leading American companies are correcting gender-pay inequalities,[346] and more employees than ever before are taking action against their employers that have failed to make that effort.[347] Still, the current reforms fall short of systemic efforts to educate both employees and employers about pay equity, encourage employees to learn about pay disparities, and negotiate for equality. Reforms must also incentivize employers to self-assess, monitor, and actively take steps to close the pay gap. The current solutions are focused around the edges—at the beginning of the hiring process and at the litigation end. More impactful solutions would examine the entirety of the workforce internally, dynamically, repeatedly, and proactively.

The recent reforms focus on bans and prohibitions: banning distorted information from prospective employers, prohibiting the silencing of coworkers, and expanding the definitions of the fundamental prohibitions of pay discrimination. What is missing from these reforms is an initiative to expose and correct ongoing disparities through deeper transparency

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344. Theresa May, Opinion, Gender Pay Gap: Fathers Can Help by Sharing Care Role, Says Theresa May, Sunday Times (Apr. 8, 2018), https://www.thetimes.co.uk/article/gender-pay-gap-fathers-can-help-by-sharing-care-role-says-theresa-may-dl9hgn0rs (on file with the *Columbia Law Review*).

345. Lenore J. Weitzman, The Divorce Revolution 213 (1985).

346. See Lauren Weber, Why Employers Are Making Pay Equity a Reality, Wall St. J. (Sept. 26, 2016), http://www.wsj.com/articles/why-employers-are-making-pay-equity-a-reality-1474882202 (on file with the *Columbia Law Review*) ("Since then, large employers such as Apple Inc., Staples Inc., eBay Inc., Wall Street Journal owner Dow Jones, a unit of News Corp, and others have declared their commitment to rooting out gender-pay disparities—albeit sometimes under pressure.").

347. See Lieff Cabraser, Kelly Dermody Discusses Trend Toward More Pay Equity Lawsuits by Professional Women with NY Law Journal, Lieff Cabraser Heimann & Bernstein LLP: Civil Justice Blog (Oct. 26, 2016), https://www.lieffcabraser.com/2016/10/kelly-dermody-discusses-trend-toward-more-pay-equity-lawsuits-by-professional-women [https://perma.cc/4E2P-S5VG] ("In the 1990s, professional woman suing over gender bias complaints was not a standard practice. But times have changed.").

and collaborative public–private approaches. Justice Louis Brandeis famously guided us that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[348] In 2014, President Barack Obama issued an executive order set to cover more than 63 million employees, requiring companies with over 100 employees to report their employee pay, broken down by gender, race and ethnicity, to the EEOC.[349] The initiative was set to take effect in March 2018 but was extended to June 2018.[350] The EEOC already collects information from companies regarding their number of employees by gender, race, and other protected identities. The new regulations would require employers to provide summary pay data and aggregate hours-worked data, broken down by job categories and protected identities.[351] In 2017, the Trump Administration issued an immediate stay of Obama's initiative. The stay asserted that some parts of the collection of information "lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."[352] However, in *National Women's Law Center v. OMB*, decided on March 4, 2019, the U.S. District Court for the District of Columbia vacated the Trump

348. Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914).

349. Lydia Dishman, Obama Aims to Close the Wage Gap with a New Proposal for Salary Transparency, Fast Co. (Jan. 29, 2016), https://www.fastcompany.com/3056117/obama-aims-to-close-the-wage-gap-with-a-new-proposal-for-salary-transpare [https://perma.cc/SN3V-TYHS]; Office of the Press Sec'y, The White House, supra note 109.

350. U.S. EEOC, Questions and Answers: The 2017 EEO-1 Report, https://www.eeoc.gov/employers/eeo1survey/2017-qanda.cfm [https://perma.cc/N77N-U2M3] (last visited Oct. 16, 2019).

351. Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113 (proposed Feb. 1, 2016); Gerald Maatman, Jr., Christopher J. DeGroff & Matthew Gagnon, EEOC Shakeup? Top Ways Trump Presidency Could Impact the EEOC, Seyfarth: Workplace Class Action Blog (Nov. 10, 2016), http://www.workplaceclassaction.com/2016/11/eeoc-shakeup-top-ways-trump-presidency-could-impact-the-eeoc [https://perma.cc/4ZAX-FZ74].

352. Danielle Paquette, The Trump Administration Just Halted This Obama-Era Rule to Shrink the Gender Wage Gap, Wash. Post (Aug. 30, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/30/the-trump-administration-just-halted-this-obama-era-rule-to-shrink-the-gender-wage-gap (on file with the *Columbia Law Review*); Memorandum from Neomi Rao, Adm'r, Office of Info. & Regulatory Affairs, to Victoria Lipnic, Acting Chair, U.S. EEOC 2 (Aug. 29, 2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf [https://perma.cc/5VKD-4E7J]. Senators Lamar Alexander, Pat Roberts, and Johnny Isakson requested that the White House's Office of Management and Budget "disapprove of this proposal [by the EEOC]." Letter from Lamar Alexander, Chairman, Senate Comm. on Health, Educ., Labor, & Pensions, Johnny Isakson, Chairman, Subcomm. on Emp't & Workplace Safety & Senate Comm. on Health, Educ., Labor, & Pensions & Pat Roberts, U.S. Senator, to Joseph B. Nye, Policy Analyst, Office of Info. & Regulatory Affairs 1 (Aug. 15, 2016), https://dlbjbjzgnk95t.cloudfront.net/0830000/830526/senate%20letter.pdf (on file with the *Columbia Law Review*). The letter stated that the survey was contrary to the Paperwork Reduction Act, cited a National Academy of Sciences study which discouraged the EEOC from "using pay bands to collect pay data," stated their concerns of the EEOC "pursuing high-profile lawsuits without complaints," and stated the current backlog of EEOC cases, which will only grow now that the agency will have to look through the collection of data. Id. at 1–2.

Administration's stay pending appeal.[353] Also in 2017, then-Governor Jerry Brown vetoed a California bill that would have similarly required detailed reporting by larger employers of salary information broken down by gender.[354]

The purpose of mandatory reporting is threefold. First, it allows administrative agencies to better engage in compliance, investigation of complaints, and enforcement. Second, it allows employees to know where they stand and assess different employers accordingly. Third, and most important from a governance perspective, it incentivizes employers to examine their own practices. For both employers and employees, better information about jobs and positions leads to smarter and faster job matches. Pay transparency, therefore, helps both the law and the market.[355] In 1962, Nobel Laureate in Economics George Stigler described what he believed was the insurmountable problem of imperfect information in the labor market:

> The young person entering the labor market for the first time has an immense number of potential employers, scarce as they may seem the first day. If he is an unskilled or a semiskilled worker, the number of potential employers is strictly in the millions. Even if he has a specialized training, the number of potential employers will be in the thousands: [T]he young Ph.D. in economics, for example, has scores of colleges and universities, dozens of governmental agencies, hundreds of business firms, and the Ford Foundation as potential employers. As the worker becomes older the number of potential employers may shrink more often than it grows, but the number will seldom fall to even a thousand. No worker, unless his degree of specialization is pathological, will ever be able to become informed on the prospective earnings which would be obtained from every one of these potential employers at any given time, let alone keep this information up to date. He faces the problem of how to acquire information on the wage rates, stability of employment, conditions

353. Nat'l Women's Law Ctr. v. OMB, 358 F. Supp. 3d 66, 92–93 (D.D.C. 2019) (granting the plaintiffs' motion for summary judgment, since OMB initially approved the data collection and chose to enact the stay because of a discrepancy in EEOC formatting specifications that did not affect the substantive content of the data being collected).

354. S.B. 1284, 2017–2018 Reg. Sess. (Cal. 2018) (as amended and submitted by the Assembly, Aug. 8, 2018); Assemb. B. 1209, 2017–2018 Reg. Sess. (Cal. 2017) (as vetoed by Governor Brown, Oct. 15, 2017).

355. See Deborah Thompson Eisenberg, Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination, 43 Ariz. St. L.J. 951, 962–63 (2011) ("[Pay transparency] would promote a compensation market with more accurate information about the value and pricing of jobs."); Cynthia Estlund, Extending the Case for Workplace Transparency to Information About Pay, 4 U.C. Irvine L. Rev. 781, 783 (2014) ("[M]andatory disclosure of meaningful salary information would tend to produce less discrimination, less favoritism, and probably somewhat lower disparities overall."); Gowri Ramachandran, Pay Transparency, 116 Penn. St. L. Rev. 1043, 1046, 1062 n.78 (2012) (arguing pay transparency may help "prevent, root out, and correct [the] discrimination . . . in the first place").

> of employment, and other determinants of job choice, and how to keep this information current.[356]

Times have changed. Digital connectivity, shifting social norms, and new laws are operating together to change the wage information markets. While the initiative to expand pay transparency in the United States has been halted by the current Administration, since 2017 the U.K. requires employers with more than 250 employees to annually report their gender pay gap.[357] Specifically, it requires a breakdown of a company's gender pay gap in terms of hourly pay, bonus pay, percentage of men and women receiving bonuses, and proportion of men and women in each quartile of the pay scale.[358] In 2017, Germany also began requiring large firms with 500 or more employees to investigate and report any gender pay gap.[359] The overall global response to these reforms has been positive, but like in the United States, some opponents have raised concerns of efficacy, time given for preparation and transition, feasibility, how to measure impact, and whether figures were actually fair when compared.[360]

When the first reports came in, the media spent weeks covering the newly available information.[361] In April 2018, the month the reports were published, British Prime Minister Theresa May published an opinion piece in the *Sunday Times* stating that "[w]e expected the results to make for uncomfortable reading and they do."[362] One important revelation in the figures—perhaps predictable when you think about it—is a bonus gap that is "startlingly high," and, as Prime Minister May wrote, "unseen until now."[363] Most of the figures about gender pay gaps around the world study base salaries, but gender pay discrimination encompasses all forms of

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356. George J. Stigler, Information in the Labor Market, 70 J. Pol. Econ. 94, 94 (1962).

357. See How to Narrow Britain's Gender-Pay Gap, Economist (Apr. 7, 2018), https://www.economist.com/leaders/2018/04/07/how-to-narrow-britains-gender-pay-gap (on file with the *Columbia Law Review*).

358. See Alexandra Topping & Caelainn Barr, What You Need to Know About Gender Pay Gap Reporting, Guardian (Feb. 28, 2018), https://www.theguardian.com/news/2018/feb/28/what-you-need-to-know-about-gender-pay-gap-reporting [https://perma.cc/6MH5-YXF5].

359. See Tobias Buck, German Employers Forced to Reveal Gender Pay Gap, Fin. Times (Jan. 6, 2018), https://www.ft.com/content/e9f618c0-f210-11e7-ac08-07c3086a2625 (on file with the *Columbia Law Review*).

360. See, e.g., id. ("Business leaders have voiced sharp criticism of the new law, which they say imposes an undue burden on companies without an evident pay-off."); Alexandra Topping, Gender Pay Gap: Companies Under Pressure to Act in 2019, Guardian (Jan. 1, 2019), https://www.theguardian.com/world/2019/jan/01/gender-pay-gap-2018-brought-transparency-will-2019-bring-change [https://perma.cc/SX6K-LKZJ] ("Groundbreaking legislation that forced companies to reveal their gender pay gaps in 2019 for the first time has had an immediate and wide-ranging effect . . . .").

361. See Liz Alderman, Britain Aims to Close Gender Pay Gap with Transparency and Shame, N.Y. Times (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/britain-gender-pay-gap.html (on file with the *Columbia Law Review*).

362. May, supra note 344.

363. Id.

compensation, and Britain is opening up the books to see these hidden figures. Notably, "compensation" under American pay equity laws includes not only wages but also benefits, commissions, and other financial incentives and rewards attached to employment.[364] Yet most of the studies on the gender gap do not include data on how compensation beyond base salary figures into gender pay equity, because these other forms of compensation are usually even more confidential and hidden. Pay transparency pushes the agenda in opening the conversation. It often means that employers need to defend the indefensible: "Management characterized many of the fattest deals as 'anomalies,' but the anomalies appear to have been awarded consistently to men."[365] And while figures can be manipulated, "the simplicity and specificity of the reporting requirements give employers fewer places to hide unflattering data."[366] The result in Britain has been increasing public scrutiny, with some CEOs even reacting by taking a voluntary pay cut at the top.[367]

Iceland, despite, or precisely because of, being the world's most gender-equal country according to the World Economic Forum, also recently stepped up its approach with an even more aggressive initiative to close the gender pay gap.[368] Iceland's new law mandates daily fines for any workplace of more than twenty-five people that does not obtain an equal-pay certification from the government in the next four years.[369] The law is innovative because it requires that all employers actively audit and justify their pay structure instead of relying on regulators to seek out violations.[370] Iceland's legislature is one of the most gender equal in the world and, as the chair of Iceland's equality unit explained in passing the new

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364. See U.S. EEOC, Sex Discrimination: Employment Discrimination Prohibited by Title VII of the Civil Rights Act of 1964, as Amended and the Equal Pay Act of 1963, at 338 n.61 (2002) ("'Compensation' [under Title VII] has the same meaning as 'wages' under the EPA. The terms include (but are not limited to) payments whether paid periodically or at a later date, and whether called wages, salary, overtime pay[,] [or] bonuses . . . ."); see also 29 C.F.R. § 1620.12(a) (2019) ("The term wage 'rate,' as used in the EPA, . . . is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis.").

365. Collins, supra note 24.

366. Id.

367. See id. ("EasyJet's newly appointed C.E.O. . . . announced that he was taking a voluntary pay cut of thirty-four thousand pounds[] to put his salary in line with that of his female predecessor.").

368. See Liz Alderman, Equal Pay for Men and Women? Iceland Wants Employers to Prove It, N.Y. Times (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/business/economy/iceland-women-equal-pay.html?_r=2 (on file with the *Columbia Law Review*); Knauer, supra note 93 ("Iceland ranks first in the world when it comes to gender pay equity.").

369. See Camila Domonoske, Companies in Iceland Now Required to Demonstrate They Pay Men, Women Fairly, NPR (Jan. 3, 2018), https://www.npr.org/sections/thetwo-way/2018/01/03/575403863/companies-in-iceland-now-required-to-demonstrate-they-pay-men-women-fairly [https://perma.cc/TX4V-GYW8].

370. See id.; Knauer, supra note 93.

requirement, "the gender gap won't close itself."[371] Iceland will require total compliance by 2022.[372]

B. *Do Incentivize: Toward Sustainable Private–Public Pay Equity Partnerships*

Legal reforms push the best actors to go beyond compliance. Indeed, the field of antidiscrimination law is best understood from a governance perspective, examining the ways private actors can move forward and form sustainable best practices. In earlier work, I have described the concept "new governance" as a regulatory shift from adversarial command-and-control, which focuses on ex-post fines and lawsuits, to a more proactive and collaborative private–public framework:[373]

> The new governance model supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals. The adoption of governance-based policies redefines state-society interactions and encourages multiple stakeholders to share traditional roles of governance. Highlighting the increasing significance of norm-generating nongovernmental actors, the model promotes a movement downward and outward, transferring responsibilities to states, localities, and the private sector—including private businesses and nonprofit organizations.[374]

New governance emerged in the 2000s as a school of thought that emphasizes the significance of institutional design and private–public cooperation for effective reform.[375] A governance approach considers the comparative advantage of different regulatory modes, the various public and private stakeholders involved in the legal process, and the incentives and behavioral mechanisms in which reform can be initiated and sustained.[376] Examples of the benefits of new governance's approach include

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371. See Knauer, supra note 93.

372. See Alderman, supra note 368; see also Knauer, supra note 93. Iceland also requires companies with fifty or more employees to have at least 40% women directors. Third of Board Members of Larger Icelandic Businesses Are Women, up from 9.5% in 1999, Ice. Mag. (May 9, 2018), https://icelandmag.is/article/third-board-members-larger-icelandic-businesses-are-women-95-1999 [https://perma.cc/F8CK-YZ9D].

373. See Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn. L. Rev. 342, 344–45 (2004) [hereinafter Lobel, The Renew Deal].

374. Id.; see also Orly Lobel, New Governance as Regulatory Governance, *in* The Oxford Handbook of Governance 1–4 (David Levi-Faur ed., 2012), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199560530.001.0001/oxfordhb-9780199560530-e-5?print=pdf [https://perma.cc/R9PJ-CGHG] [hereinafter Lobel, New Governance as Regulatory Governance]; Orly Lobel, Setting the Agenda for New Governance Research, 89 Minn. L. Rev. 498, 499–501 (2004) [hereinafter Lobel, Setting the Agenda].

375. Lobel, New Governance as Regulatory Governance, supra note 374, at 1–2.

376. On Amir & Orly Lobel, Liberalism and Lifestyle: Informing Regulatory Governance with Behavioral Research, 3 European J. Risk Reg. 17, 18–19 (2012).

regulatory reforms in environmental law, occupational safety, and financial regulation.[377]

A new governance approach to pay equity would allow the "reorientation of the workplace equality project toward redressing problems rooted in complex organizational dynamics."[378] A useful analogy of what the literature has come to refer to as second generation antidiscrimination law is that of a public health problem rather than a single bad actor tort.[379] The challenge of equality is therefore better solved "not in the traditional manner of assigning individual responsibility and blame."[380]

In 2016, one hundred leading American companies signed the White House Equal Pay Pledge.[381] Under this pledge, companies agreed to conduct analyses and review pay policies in an effort to close the wage gap.[382] Companies that announced their intentions to analyze their gender pay data and take corrective measures include Adobe, MasterCard, AT&T, Microsoft, Intel, Apple, Nike, Airbnb, Amazon, and eBay.[383] Adobe, for

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377. See Lobel, New Governance as Regulatory Governance, supra note 374, at 9, 12 (recognizing expanded whistleblower protections and explaining how these are necessary for a governance model); Orly Lobel, Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety, 57 Admin. L. Rev. 1071, 1072–76 (2005) (examining OSHA's regulatory reforms); Lobel, Setting the Agenda, supra note 374, at 498, 506–08 (identifying work done on governance in environmental law and occupational safety).

378. Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 567 (2001).

379. See id. at 473 (explaining how second-generation discrimination is not reducible to a discrete instance but rather constitutes patterns of behavior over time).

380. See Patrick S. Shin, Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law, 62 Hastings L.J. 67, 101 (2010). At the same time, the litigation model remains a viable one. Some of the recent reforms also include stronger penalties. The new New York law also contains dramatically higher penalties than other state employment discrimination and wage/hour laws. Employers who are found to have willfully violated the law are subject to liquidated damages in the amount of 300% of the wages owed. N.Y. Lab. Law § 198 (McKinney 2019). Similarly, the California Pay Equity Act states that, if an employer is found to violate the law, an employee is entitled to wages and interest, plus an equal amount as liquidated damages, and reasonable attorneys' fees. Cal. Lab. Code § 1197.5(h) (2019).

381. See Diana Doukas, Over 100 Companies Sign the Equal Pay Pledge, White House: Blog (Dec. 7, 2016), https://obamawhitehouse.archives.gov/blog/2016/12/07/over-100-companies-sign-equal-pay-pledge [https://perma.cc/CM8B-A75V].

382. Id.

383. By the end of 2016, over 100 businesses signed on to the Equal Pay Pledge, with forty-four employers joining in the last months of the year. Id.; Emma Hinchliffe, 44 Companies Join the White House's Pledge for Equal Pay, Mashable (Dec. 7, 2016), http://mashable.com/2016/12/07/equal-pay-white-house-december [https://perma.cc/2FEV-CJJ8]. Just recently, however, four former female Nike employees filed a class action lawsuit alleging that Nike violated the Equal Pay Act and demanding a court-monitored reform of the company's hiring and compensation practices. Matthew Kish, Nike, Intel Sign White House Pay Pledge, Portland Bus. J. (Aug. 26, 2016), https://www.bizjournals.com/portland/news/2016/08/26/nike-intel-sign-white-house-equal-pay-pledge.html [https://perma.cc/Q6H5-YQE2]; see also Alexia Fernández Campbell, Why the Gender Discrimination

example, promised in 2016 that it would be closing the gender wage gap within its company. Just a year and a half later, Adobe accomplished its goal.[384] Unsurprisingly, there is a business case for equal pay—a critical mass of research providing evidence that equal pay leads to better risk management, higher profit margins and stock prices, and more innovation. Indeed, the EPA passed in 1963 in part because some proponents of the Act focused on how a wage gap between women and men led to inefficient underutilization of labor.[385]

Private efforts to go beyond compliance create a domino effect—a positive game theory of business leadership. When best practices are set by visible companies, others follow. In the past two years, over 3,700 companies have added an equal pay pledge to their company profile.[386] Boston launched a private–public partnership to train thousands of women in salary negotiation and brought dozens of leading businesses on board to express their commitment to actively closing their pay gaps.[387] Many employers are adopting nationwide practices to follow the most stringent state law reforms, even for employees outside of those states. In a recent WorldatWork survey, 37% of employers have implemented a policy prohibiting hiring managers and recruiters from asking about a job candidate's salary history in all locations within the United States, regardless of whether a law exists requiring such practice.[388]

Some of the recent state law reforms leverage the power of law to trigger self-monitoring. These reforms include either a requirement that companies conduct self-audits on salary pay structure or incentives to do so.[389] Audits can help organizations embrace change by seeing internally

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Lawsuit Against Nike Is So Significant, Vox (Aug. 15, 2018), https://www.vox.com/2018/8/15/17683484/nike-women-gender-pay-discrimination-lawsuit [https://perma.cc/ZH7K-DDHV].

384. Claire Zillman, Adobe Found and Closed a Gender Wage Gap Among Its Employees, Fortune (Dec. 7, 2017), http://fortune.com/2017/12/07/adobe-equal-pay-gender-pay-gap [https://perma.cc/5QLH-F6PZ].

385. See Press Release, Jacqueline A. Berrien, Chair, U.S. EEOC, supra note 91.

386. Jena McGregor, The Push for Pay Transparency Is Only Growing Stronger—Despite Trump's Rollback of Equal Pay Rule, Wash. Post. (Aug. 31, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/08/31/the-push-for-pay-transparency-is-only-growing-stronger-despite-trumps-rollback-of-equal-pay-rule (on file with the *Columbia Law Review*).

387. Anna Louie Sussman, How Boston Is Trying to Close the Gender Pay Gap, N.Y. Times (May 26, 2018), https://www.nytimes.com/2018/05/26/business/gender-pay-gap-boston.html (on file with the *Columbia Law Review*).

388. Quick Survey on Salary History Bans (U.S.), WorldatWork (2018), https://www.worldatwork.org/dA/9abc8ad414/salary-history-bans.pdf [https://perma.cc/M48C-NL8Z].

389. See, e.g., Laura A. Mitchell & Scott M. Pechaitis, Colorado Enacts Comprehensive Equal Pay Law, JacksonLewis: Publ'ns (May 28, 2019), http://jacksonlewis.com/publication/colorado-enacts-comprehensive-equal-pay-law [https://perma.cc/S3QL-LQ37] (explaining how Colorado's law "provides an incentive for employers to conduct proactive self-evaluations" because they may use evidence of such evaluations "to avoid an award for liquidated (double) damages").

when pay gaps exist and by encouraging employers to make self-adjustments to avoid potential litigation. The Massachusetts Equal Pay Act provides a "self-evaluation" defense for employers.[390] Under the new law, employers who complete a good faith self-evaluation of their pay practices within three years of a claim and can demonstrate that "reasonable progress has been made towards eliminating wage differentials based on gender"[391] have an affirmative defense to shield them from liability. The employer may design the self-evaluation, "so long as it is reasonable in detail and scope in light of the size of the employer, or may be consistent with standard templates or forms issued by the attorney general."[392] Other states similarly encourage employers to examine their own practices through self-assessments and proactive corrective measures. Oregon's new act contains a safe harbor provision if an employer has completed an "equal-pay analysis"—an internal audit, essentially—three years before the complaint, that "eliminate[s] the pay differentials for the plaintiff," and makes "substantial progress toward eliminating wage differential for the protected class."[393] Missouri has issued guidelines for employers to conduct self-audits to discover and correct gender pay inequality.[394] Montana's governor Steve Bullock has implemented an "Equal Pay for Equal Work" task force to address equal pay by providing resources on best practices for business, wage negotiation, and equal pay in the science and technology field.[395] The state also established a pay equality hotline.[396]

Technology reduces employers' claims that addressing equity concern issues is too cost-prohibitive, disruptive of operations, or resource-intensive. Companies like Syndio Solutions offer software as a service for organizations of any size to find pay equity concerns, address them, and stay in compliance over time.[397] The software makes it easy for employers to upload data, review results instantly, and address concerns in real time.[398] Democratizing access to analytics puts compliance within reach and eliminates the problems that make data analysis and review challenging.

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390. Mass. Gen. Laws Ann. ch. 149, § 105A (West 2019).

391. Id.

392. Id.

393. Or. Rev. Stat. § 652.235 (2017).

394. Jeremiah W. Nixon, MO., Executive Order No. 15-09 (Dec. 4, 2015), https://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2015/15-09.pdf [https://perma.cc/VE56-59XB].

395. Home, Equal Pay Mont.: Equal Pay for Equal Work, https://equalpay.mt.gov [https://perma.cc/Q74Q-9UV2] (last visited Oct. 16, 2019).

396. Ronja Abel, Update: Governor Bullock Takes More Steps to Support Equal Pay for Equal Work, Montana.gov: Dep't of Livestock (Aug. 12, 2016), http://liv.mt.gov/Newsroom/update-governor-bullock-takes-more-steps-to-support-equal-pay-for-equal-work [https://perma.cc/666J-EVBY].

397. Eradicating Workplace Pay Disparities, Syndio, www.synd.io [https://perma.cc/2DJ2-XZ8M] (last visited Oct. 16, 2019).

398. See id. (promising results that analyze company pay practices in twenty minutes).

Syndio founder Zev Eigen describes the software technology, focused on ensuring that people are paid equitably before they are even hired, as "the future of pay equity."[399] Eigen explains that the software ensures that employees are hired in an equitable way, continue to be paid fairly, and are promoted based on objective unbiased standards:

> The whole ecosystem of compensation should be established and maintained in a way that is fair and ultimately more transparent than it is now. You could even imagine a world in which people are promoted and given pay increases based on a gamified "leveling up" system derived from data and data science, putting gender pay inequity in our collective rearview mirror.[400]

One of the insights of new governance is that many regulatory requirements can benefit businesses—that standards of ethics, equality, and fairness are good market practices. Boston's initiative over the past two years has been leading the way in new governance approaches to closing the gender pay gap and companies are learning that equality is not a burden but a bedrock of market success. The Boston Women's Workforce Council, a private–public partnership, partners with businesses and organizations, including Morgan Stanley, Zipcar, and the Massachusetts Institute of Technology, to regularly share best practices and provide insights on how to close the gap.[401] "The city has [already] trained over 7,000 women in salary negotiation" and expects to train ten times more by 2021.[402] The Paycheck Fairness Act, introduced annually in Congress since 1997[403] and supported by the Obama Administration,[404] would add programs for training, including negotiation skills training for women through a grant program, research, better data collection by the EEOC, technical assistance, and a pay equity employer recognition award—the National Award for Pay Equity.[405] A comprehensive pay equity governance regime can also have positive

399. Interview with Zev Eigen, Chief Sci. Officer & Founder, Syndio Sols. (Sept. 7, 2018).

400. Id.

401. Sussman, supra note 387.

402. Id.

403. Lydia Wheeler, Dems Press for Paycheck Fairness Bill on Equal Pay Day, Hill (Apr. 4, 2017), http://thehill.com/regulation/finance/327225-dems-press-for-paycheck-fairness-bill-on-equal-pay-day [https://perma.cc/TL3F-2GTE].

404. See Tanya Somanader, This Is Why Today Is Equal Pay Day, White House: President Barack Obama (Apr. 12, 2016), https://obamawhitehouse.archives.gov/blog/2016/04/12/why-today-equal-pay-day [https://perma.cc/7YJD-URQC] (noting that President Obama had asked Congress to pass the Paycheck Fairness Act).

405. Paycheck Fairness Act, S. 819, 115th Cong. §§ 4–9 (2017). The text of the bill includes a requirement that the Secretary of Labor engage in research, education, and outreach, id. § 6, a National Award for Pay Equity, id. § 7, a system to collect pay information by the EEOC, id. § 8, and reinstatement of pay equity and data collection programs, id. § 9. See also Joint Econ. Comm. Democratic Staff, supra note 29, at 26. For the importance of including a mandate of research for a government agency in a legislative act, see Katherine Porter, The Potential and Peril of BAPCPA for Empirical Research, 71 Mo. L. Rev. 963, 964 (2006) ("By including research mandates in the new law, Congress articulated an empirical research agenda about bankruptcy for the federal government.").

effects beyond gender equality. Pay transparency not only generally increases enforcement of wage and hour laws, regardless of discrimination, but it can also increase procedural fairness—and even tolerance to disparity in income—by reducing the perception of secrecy and uncertainty.[406] Equality at work affects well-being and happiness, going beyond the fact of distributional income loss.[407] Pay transparency also improves the job search and can impact relocation decisions.[408] In a seminal article, John McCall argued that increasing the availability and accuracy of job information would reduce workforce dropouts at least as efficiently as, and without the costs of, worker training programs.[409] Moreover, as I have argued in my work on postemployment covenants and job mobility, taking professional detours and time out of the job market is gendered.[410] Economists have long argued that job search intermediaries, including the rise of the internet, would increase the efficiency of matching and shorten unemployment periods.[411] The governance of pay equity thus weaves into the greater efforts of efficiency and fairness in the labor market. In this way, pay equity is no longer a standalone antidiscrimination cause of action, it is part of a web of policies and partnerships that govern equitable dynamic markets. The web of interests and relationships that can advance the project of pay equity point to the organizing principles of new governance, which include the integration of policy domains toward an interrelated goal and continuous learning. In turn, the new governance model reveals the "false dilemma between centralized regulation and deregulatory devolution."[412] The momentous number of legislative reforms currently underway incentivizes private ordering and, in turn, private efforts point to next steps that can be adopted into the pay equity law.

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406. Cf. Adrienne Colella, Ramona L. Paetzold, Asghar Zardkoohi & Michael J. Wesson, Exposing Pay Secrecy, 32 Acad. Mgmt. Rev. 55, 59–60 (2007) (noting several costs of pay secrecy, particularly impacts on procedural fairness).

407. See Erzo F.P. Luttmer, Neighbors as Negatives: Relative Earnings and Well-Being, 120 Q.J. Econ. 963, 989–90 (2005).

408. Cf. Tara Vishwanath, Information Flow, Job Search, and Migration, 36 J. Dev. Econ. 313, 315–16 (1991) (noting that wages play an important role in a job search and its relationship to migration).

409. J.J. McCall, Economics of Information and Job Search, 84 Q.J. Econ. 113, 114–15 (1970); see also Lawler, supra note 304, at 187–88 (finding that wage secrecy negatively impacted job performance among managers); Emiliano Huet-Vaughn, Do Social Comparisons Motivate Workers? A Field Experiment on Relative Earnings, Labor Supply and the Inhibitory Effect of Pay Inequality 3–4 (2015) (unpublished manuscript), https://sites.google.com/site/ehuetvaughn/DoSocialComparisonsMotivateWorkers.pdf (on file with the *Columbia Law Review*); Huet-Vaughn, supra note 306.

410. Lobel, Gentlemen Prefer Bonds, supra note 260, at 3–4.

411. See, e.g., David H. Autor, Wiring the Labor Market, 15 J. Econ. Persp. 25, 25 (2001).

412. Lobel, The Renew Deal, supra note 373, at 343.

CONCLUSION

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