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EQUAL WORK

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Most Americans have heard of the gender pay gap and the statistic that, today, women earn on average 80 cents to every dollar men earn. What they have not heard is that there is also a racial pay gap: black and Latino men earn 71 cents to the dollar of white men. And, as women and racial minorities enter occupations formerly dominated by white men, the pay for those occupations goes down. Improvement in the gender pay gap has been stalled for nearly two decades; the racial pay gap is actually worse than it was 35 years ago. Both pay gaps exacerbate income inequality in the United States. While demographic differences are a major source of pay disparities (in hours worked and time off for childbearing for women, and education and experience levels for minority workers), economists now find that fully one-third to one-half of both pay gaps are caused by two factors: occupational segregation (meaning the unequal distribution of women and racial minorities across job fields) and discrimination. To what extent are these factors due to stereotypes about the value of women and racial minorities' work, and what, if anything, can antidiscrimination law do to respond?

Existing federal law prohibits sex and race discrimination in pay, but requires an employee to provide proof of an employer's intent to discriminate or a nearly identical "comparator" of a different sex or race performing "equal work" who is paid more. Current proposals for reform focus on narrowing an employer's defenses in a lawsuit alleging unequal pay. This approach, while likely to improve plaintiffs' successes in court, misses the forest for the trees. Leaving the definition of "equal work" untouched in threshold requirements for legal protection fails to account for the workforce segregation and gender and racial stereotyping at the root of much of the current pay gaps.

This Article explores how the limitations of existing law allow the gender and racial pay gaps to persist and analyzes proposals for its improvement. To do so, the Article contrasts current reform efforts with alternatives, including the historical movement in the 1980s for "comparable worth" legislation and its echo in newly enacted state laws in California and Massachusetts requiring equal pay for "substantially similar" or "comparable work." Given the difficulty of enacting legislative change, the Article then proposes a reframing of the concept of "equal work" in existing law, by drawing on examples of broader definitions used to set pay in some union, government, and private sector employment contexts. Finally, to debunk the common criticism that broadening equal pay laws forces employers to "compare apples and oranges," the Article concludes by looking to a recent example of lawmakers acting to correct biases in legal comparisons: federal drug sentencing reform. Framing the comparison of "equal work" more broadly, the Article argues, is essential to overcoming the challenge of occupational segregation and rooting out stereotypes in pay-setting, to close the gender and racial pay gaps once and for all.

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INTRODUCTION

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

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[1] *See* Claire Cain Miller, *As Women Take Over a Male-Dominated Field, the Pay Drops*, N.Y. Times (Mar. 18, 2016); Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950–2000 U.S. Census Data*, 88 Social Forces 865, 865-91 (2009).

[2] *See* Miller, *supra* note _; Levanon et al., *supra* note _.

[3] *See* Miller, *supra* note _; Levanon et al., *supra* note _.

Most jobs in the U.S. economy are "gendered," meaning they are performed overwhelmingly by members of one sex and, thereby, associated with that gender.[4] Most nurses, teachers, and administrative assistants are women; most engineers, firefighters, and truck drivers are men.[5] Researchers have documented steep gender segregation in the U.S. workforce, such that nearly half of all women (or of all men) would have to change jobs in order to achieve gender parity.[6] Among jobs that require the same education and experience, jobs gendered masculine pay more than jobs gendered feminine.[7] Of the 30 highest paid jobs in the U.S. economy, 26 are held mostly by men; 23 of the 30 lowest paid jobs are held mostly by women.[8] And, as the earnings of biologists, designers, ticket agents, and recreation workers over time demonstrate, when the proportion of women performing a previously male-dominated job increases, wages for that job go down.[9]

While the gender pay gap may vary by what, exactly, is measured and compared, economic data consistently shows that there is a gender pay gap, even after controlling for all relevant variables—the question is just how large a gap.[10] Statistics that aggregate unadjusted data show the biggest gap. In the most recent analyses, when comparing the median earnings of all U.S. women and men working full-time, women earn 80 cents annually and 83 cents hourly on every dollar earned by men.[11] As data is adjusted to account for variables such as education, work experience, hours worked, and geographic region, the gender pay gap becomes smaller.[12] Yet even among employees performing the same job with the same education and experience level, there is a documented pay gap between men and women.[13]

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[4] *See infra* Part I.B.

[5] *See* U.S. Department of Labor, Women's Bureau, "Traditional and nontraditional occupations," https://www.dol.gov/wb/stats/nontra_traditional_occupations.htm (last visited Mar. 1, 2017).

[6] *See infra* notes _-_.

[7] *See infra* Part I.B.; Francine D. Blau & Lawrence M. Kahn, The Gender Wage Gap: Extent, Trends, and Explanations, NBER Working Paper No. 2191, 27 (January 2016) ("A sizable literature indicates that female occupations pay less than male occupations for workers with similar measured characteristics.") (citations omitted)

[8] *See* Emily Liner, Third Way, A Dollar Short: What's Holding Women Back from Equal Pay? 14-15 (Mar. 18, 2016).

[9] *See* Miller, *supra* note _; Levanon et al., *supra* note _.

[10] *See* Elise Gould, Jessica Schieder & Kathleen Geier, Economic Policy Institute, What Is the Gender Pay Gap and Is It Real? The Complete Guide to How Women Are Paid Less than Men and Why It Can't Be Explained Away 1 (Oct. 20, 2016) ("The presence of alternative ways to measure the gap can create a misconception that data on the gender wage gap are unreliable. However, the data on the gender wage gap are remarkably clear and (unfortunately) consistent about the scale of the gap. In simple terms, no matter how you measure it, there is a gap.").

[11] *See infra* notes _-_.

[12] *See infra* notes _-_.

[13] *See infra* notes _-_. Of course, choosing to focus on the most adjusted and granualar data comparison also ignores a whole host of inequalities that should not be ignored. *See* Gould, et al., *supra* note _, at 2, 7 (explaining that using adjusted rates only "misses all of the potential differences in opportunities for men and women that affect and constrain the choices they make before they ever bargain with an employer over a wage." *Id.* at 2.)

Much less known and discussed, there is an even greater racial pay gap in the U.S. workforce. The most recent studies of unadjusted data comparing median earnings for all men show that African-American and Latino men earn just 71 cents on the dollar to white men.[14] When adjusted to control for variables like education, experience level, and geographic region, black men's pay rises to 78 cents on the dollar of similarly-situated white men.[15] Comparing only college educated men raises black and Latino men's earnings to between 80 and 82 cents.[16]

Women of color bear the brunt of both gender and racial pay gaps: in the most recent comparisons, black women earned between 63 and 70 cents on the dollar to white men, depending on adjustments, and 81 to 88 cents on the dollar to white women.[17] The unadjusted median average earnings of Latinas were as low as 54 cents on the dollar to white men.[18] And, while occupational segregation by race is harder to track than by gender, it is still a significant feature of the U.S. labor market. Recent analysis shows that black men are represented in proportion to their presence in the labor market in a mere 13 percent of all occupations, and are over-represented in nearly 40 percent of occupations with lower earnings and under-represented in nearly 50 percent of occupations with higher earnings.[19]

Economists who study the gender and racial pay gaps in the U.S. workforce attribute these disparities to a number of causes. At least half of both gaps are attributable to real demographic differences that affect employment and earnings.[20] For the racial pay gap, the primary demographic difference is in human capital factors, most notably the fact that workers who are racial minorities have, on average, lower levels of education and work experience than white workers, which leads to lower-paid jobs.[21] For the gender pay gap, human capital factors no longer represent a significant difference between female and male workers; women's rising levels of education and work experience since the 1950s created some of the gains that have been made in closing the gender pay gap.[22] Instead, the primary demographic difference contributing to the gender pay gap is in fewer hours worked and unpaid time off from work for childbearing and rearing.[23] (Notably 80 percent of American women have children by age 44.[24]) To reduce the portion of both pay gaps attributable to real workforce demographic differences requires more sustained policy interventions around access to education, child

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[14] *See infra* notes _-_.
[15] *See infra* notes _-_.
[16] *See infra* notes _-_.
[17] *See infra* notes _-_.
[18] *See infra* notes _-_.
[19] *See* Darrick Hamilton, Algernon Austin & William Darity, Jr., Economic Policy Institute, Whiter Jobs, Higher Wages, EPI Briefing Paper No. 288, at 3-4 (Feb. 11, 2011). Darrick Hamilton, Algernon Austin & William Darity Jr., Econ.; *see also* Derek Thompson, *The Workforce Is Even More Divided by Race Than You Think,* Atlantic Monthly (Nov. 6, 2013).
[20] *See infra* notes _-_.
[21] *See infra* notes _-_.
[22] *See infra* notes _-_.
[23] *See infra* notes _-_.
[24] Add cite.

care, paid family and medical leave, and more—all of which have been explored by other scholars[25] and are beyond the scope of this Article.

Yet that leaves up to one-half of the gender and racial pay gaps that are not the product of actual differences in workers' qualifications or work hours. Economists estimate that between one-third and one-half of both pay gaps is attributable to two factors on which this Article focuses: (1) occupational segregation by race and gender, and (2) stereotyping and discrimination.

Since the mid-1960s, two federal laws, and state versions of them in all but two states, have explicitly prohibited pay discrimination on the basis of sex and race—Title VII of the Civil Rights Act of 1964[26] and the Equal Pay Act of 1963.[27] Title VII prohibits any discrimination in compensation because of sex or race; yet for a plaintiff to prove that he has experienced pay discrimination, he must provide evidence of a similarly-situated "comparator" outside of his race who was paid more.[28] The Equal Pay Act requires employers to provide equal pay for "equal work" that "requires equal skill, effort, and responsibility."[29] Similarly, for a plaintiff to prove a violation of the Equal Pay Act, she must be able to compare herself to a male comparator performing a nearly identical job who received higher pay.[30] As they have been interpreted by most federal courts, both statutes define the comparisons required to prove a violation narrowly—as this Article argues, unnecessarily limited interpretations that have prevented antidiscrimination law from reach stereotyping and workforce segregation that contribute to the pay gaps.

While the existence of gender and racial pay gaps is nothing new, recent data on the persistence and the causes of such gaps sheds new light on the issue, with two modern implications. First, gender and racial pay gaps have been stubbornly persistent for now more than fifty years since federal law first prohibited sex and race discrimination in pay. After shrinking consistently since the 1950s, improvement in the gender pay gap stalled around the year 2000, resulting in no meaningful narrowing of the gender pay gap in nearly twenty years.[31] The racial pay gap has proven even more intractable: there has been no measureable improvement in the racial pay gap today as compared to the same gap in 1979, nearly forty years ago.[32] To the extent that up to half of these pay disparities are the product of workforce segregation and discrimination, existing antidiscrimination laws have failed to live up to their promise of equal treatment and opportunity in employment regardless of sex or race.

The second implication is that income inequality in the United States, a topic of recent intense political focus, cannot be addressed without addressing the gender and racial pay gaps. Both pay gaps are key contributors to the increasing distance between

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[25] *See, e.g.,* add cites.
[26] 42 U.S.C. §2000e-2 et seq.
[27] 29 U.S.C. §206(d).
[28] *See* 42 U.S.C. §2000e-2 et seq.; Part II.A.
[29] *See* 29 U.S.C. §206(d); Part II.B.
[30] *See* 29 U.S.C. §206(d); Part II.B.
[31] *See infra* notes _-_.
[32] *See infra* notes _-_.

those at the top and the bottom of the U.S. income spectrum.[33] As women and racial minorities continue to receive less pay, the differences in economic status between high- and low-wage earners compound exponentially.[34] To the extent that workforce segregation and discrimination are causing pay gaps and generally depressing wages, this is an economically inefficient trend with costs borne by the entire U.S. economy.

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

Lastly, given that legislative change is difficult to achieve, Part IV proposes a new framework for interpreting current antidiscrimination law to allow for broader comparisons of what constitutes "equal work." It does so by looking to examples in which union, government, and even progressive private sector employers have, themselves, set equal pay across a wide array of positions, in ways that have helped correct for pay differences due to occupational segregation. This part concludes by pushing back on the common criticism levied against attempts to broaden protections for equal pay that employers should not be required to "compare apples and oranges"[35] by drawing upon a recent law reform effort to correct racial stereotypes that prevented accurate comparisons: federal drug sentencing reform.

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

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[33] *See infra* notes _-_.

[34] *See infra* notes _-_.

[35] *See infra* notes _ (re: conservative statements on apples and oranges).

I. DATA AND EXPLANATIONS

In 1955, the U.S. Census Bureau started tracking statistics on women's earnings as a proportion of men's, launching body of research into the gender pay gap.[36] Data on the proportion of earnings by race followed.[37] Today, economists and social scientists have developed a significant body of research documenting the gender and racial pay gaps, ranging from the most general and aggregated to the most precise and granular. Critics of policy interventions to reduce pay gaps often focus on undercutting this data, arguing that it measures the wrong thing—that it is "comparing apples and oranges."[38] Yet an overwhelming consensus of reliable data now shows that, even after controlling for virtually all relevant variables, gender and racial pay gaps remain. This Part provides an overview of the most recent data on pay gaps in the U.S., as well as related data on income inequality and workforce segregation.

A. Measuring the Pay Gaps

The U.S. labor economy is marked by a persistent gender pay gap. While its size varies depending on what you measure, three key principles are consistent across the data. First, at every level of the economy and no matter how many variables for which you control, there is still a pay gap between men and women—it's just a question of a relatively larger or smaller gap. Second, improvement in the pay gap has been stalled for nearly 20 years. Third, when more women are present in a field, the average pay is lower. There is no female-dominated profession that, when compared to a male dominated profession requiring the same education and experience, is more highly paid. And, as more women enter a profession, the average pay for that position decreases.[39]

The rate of women's workforce participation has grown dramatically over time. In 1948, 32.7 percent of all women participated in the U.S. workforce; by 2015, that number rose to 56.7 percent, with a high of 60 percent in 1999.[40] The proportion of the U.S. labor force composed of women rose from 28.6 percent in 1948 to 46.8 percent in 2015.[41] Yet despite women's near equal participation in the paid workforce today, a persistent pay gap remains. The most often cited statistic aggregates and compares the

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[36] Add cite.

[37] Add cite.

[38] For over thirty years, this has been a perennial criticism of pay equity initiatives. *Compare* The Heritage Foundation, Comparable Worth: Pay Equity or Social Engineering? A Debate Between S. Anna Kondratas and Eleanor Smeal (June 28, 1986) (in which a Heritage Foundation Senior Policy Analyst discounted a supporter of comparable worth's attempt to prove that you can "compare apples and oranges") *to* Laura Bassett, *Conservatives Push Back Against Equal Pay Efforts*, Huffington Post (Apr. 8, 2014) (in which the executive director of the conservative Independent Women's Forum noted that "comparing men's and women's wages is like 'comparing apples to oranges.'")

[39] *See infra* notes _ -__ [Add infra cites to each sentence in parag.]

[40] U.S. Dept. of Labor, Women's Bureau, "Civilian labor force by sex 1948-2015 annual averages," https://www.dol.gov/wb/stats/facts_over_time.htm (last visited Mar. 1, 2017).

[41] U.S. Dept. of Labor, Women's Bureau, "Labor force participation rate by sex, race and Hispanic ethnicity 1948-2015 annual averages," https://www.dol.gov/wb/stats/facts_over_time.htm (last visited Mar. 1, 2017).

median pay of all women and men working full time. Data from 2015 shows that, when comparing those engaged in full-time year-round work, women earn 80 cents for every dollar earned by men annually.[42] When hourly wages are compared, allowing part-time workers to be included and adjusting for the fact that men may work more hours in a year, women earn on average 83 cents to every dollar men earn per hour.[43]

After narrowing from the late 1970s through the 1990s, improvements in the gender wage gap stalled, and the current 75 to 80 percent figure has remained relatively stagnant for nearly two decades.[44] What gains were made by women during this time period were due, in part, to their increasing levels of education and work experience, and, in part, to stagnation in men's wages. In fact the real value of men's wages have decreased by 7 percent since 1979, meaning that nearly a third of women's gains in narrowing the gender pay gap came from a decline in men's wages.[45] At the current rate of progress, experts estimate that it will take somewhere between 135 and 170 years for all women to achieve equal pay with men.[46]

Of course, aggregated statistics may be subject to the criticism that comparing all women to all men masks rational, nondiscriminatory causes for disparate pay. Yet no matter how you slice the data, a pay gap remains.[47] For example, the pay gap widens as women reach prime childbearing years, but it exists long before then, too. Full-time working women make about 90 cents on the dollar to men until the age of 35, after which the gap increases to between 74 and 82 cents until age 55, after which the gap remains at around 74 cents.[48] Likewise, while education level generally increases pay, when only women and men who have achieved the same level of education are compared, the pay gap becomes even greater, likely because the average female worker has *more* education than the average male worker.[49] Women with a high school degree earn 78 percent of what men with a high school degree earn; women with a bachelor's degree earn only 73 to 75 percent of what men with a bachelor's degree earn, as do women with an advanced degree compared to similarly educated men.[50] Even when female and male college graduates' earnings are compared just one year out of college, the female graduates earned only 82 cents to dollar of their equally situated male classmates.[51] (While

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[42] *See* Gould, et al., *supra* note _, at 1, 5; Am. Ass'n of Univ. Women, The Simple Truth About the Gender Pay Gap 4 (2017).

[43] *See* Gould, et al., *supra* note _, at 1, 6.

[44] *See* AAUW, *supra* note _, at 4; Gould, et al., *supra* note _, at 8.

[45] *See* Gould, et al., *supra* note _, at 9.

[46] *See* AAUW, *supra* note _, at 4 (estimating 135 years, until the year 2152); Jill Treanor, *Gender Pay Gap Could Take 170 Years to Close, Says World Economic Forum*, The Guardian (Oct 25, 2016) (citing Richard Samans & Saadia Zahidi, World Economic Forum, The Global Gender Gap Report (2016)).

[47] *See* Gould, et al., *supra* note _, at 1.

[48] *See* AAUW, *supra* note _, at 12 (citing U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, Highlights of Women's Earnings in 2015, Table 1); *see also* Gould, et al., *supra* note _, at 15.

[49] *See* Gould, et al., *supra* note _, at 7.

[50] *See* AAUW, *supra* note _, at 14 (citing U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, 2016 Usual Weekly Earnings Summary, Economic News Release USDL-17-0105, Table 9); *See* Gould, et al., *supra* note _, at 19.

[51] *See* AAUW, *supra* note _, at 15 (citing C. Corbett & C. Hill, AAUW, Graduating to a Pay Gap: The Earnings of Women and Men One Year After College Graduation (2012)).

disaggregating data and controlling for a variety of variables allows a narrow comparison of the most similarly-situated men and women, it also ignores differences in opportunities and workplace norms that make it harder for women to reach that level of similarity in the first place.[52])

Indeed, even after controlling for nearly all possible quantifiable variables, there remains some portion of the gender wage gap that cannot be explained, leading researchers to infer discrimination. One group of economists found a 13.5 percent difference when industry, occupation, and work hours were controlled to model "a man and woman with identical education and years of experience working side-by-side in cubicles."[53] In another study, researchers controlled for "college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status," and still found a gender wage gap of 7 percent one year after college graduation and 12 percent ten years later.[54] In yet a third study, researchers found a remaining disparity of 8.4 percent after controlling for not only education, industry, occupation, experience level, and geography, but also race, ethnicity, and metropolitan region.[55]

The U.S. economy is also marked by a steep racial pay gap that, while less commonly documented than the gender pay gap, is, nevertheless, similarly consistent. One recent study of pay data from 2015 showed that all black men's average hourly wages were 31 percent lower than all white men's.[56] After controlling for education, experience, and geography, black men earned 78 cents on the dollar to white men (a 22 percent wage gap).[57] Most disturbingly, the research showed that, except for a brief narrowing in the late 1990s, the racial pay gap between black and white workers has remained stable or increased *for over 35 years*.[58] The racial wage gap has increased even for black men with at least a college degree in the first ten years on the job market: a 10 percent pay penalty as compared to white college graduates in the 1980s increased to 18 percent in 2014.[59] Another study confirmed this lack of progress in closing the racial pay

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[52] *See* Gould, et al., *supra* note _, at 2, 7 ("[B]ecause gender wage gaps that are 'adjusted' for workers' characteristics (through multivariate regression) are often smaller than unadjusted measures, people commonly infer that gender discrimination is a smaller problem in the American economy than thought," but using adjusted rates only "misses all of the potential differences in opportunities for men and women that affect and constrain the choices they make before they ever bargain with an employer over a wage." *Id.* at 2. Thus "switching to a fully adjusted model of the gender wage gap actually can radically understate the effect of gender discrimination on women's earnings…because gender discrimination doesn't happen only in the pay-setting practices of employers making wage offers to nearly identical workers of different genders. Instead, it can potentially happen at every stage of a woman's life, from girlhood to moving through the labor market." *Id.* at 7.)

[53] *See* Gould, et al., *supra* note _, at 7, 36 n.9.

[54] *See* AAUW, *supra* note _, at 20 (citing Corbett & Hill, *supra* note _; J. G. Dey & C. Hill, AAUW Educational Foundation, Behind the Pay Gap (2007).

[55] *See* Blau & Kahn, *supra* note _; *see also* Gould, et al., *supra* note _, at 7, 36 n.10 (describing Blau & Kahn).

[56] *See* Valerie Wilson & William M. Rodgers III, Economic Policy Institute, Black-White Wage Gaps Expand with Rising Wage Inequality 1, 3-4 (Sept. 19, 2016).

[57] *See* Wilson & Rodgers, *supra* note _, at 1, 3-4.

[58] *See* Wilson & Rodgers, *supra* note _, at 1, 3-4.

[59] *See* Wilson & Rodgers, *supra* note _, at 1, 3-4.

gap for black men, who "earned the same 73 percent" of white men's earnings in both 1980 and 2015.[60] Latino men's hourly earnings increased to 71 percent in 2015 from 69 percent as compared white men's in 1980. This study also showed that, even when comparing college educated workers, black and Latino men earned 20 percent less than similarly situated white men. [61]

Not surprisingly, women of color fare the worst of all U.S. workers, experiencing both gender and racial pay gaps. In 2015, Latinas earned only 54 cents annually, 58 cents hourly and African-American women only 63 cents annually, 65 cents hourly to each dollar earned by white men.[62] Another study documented that, even after controlling for education, experience, and geography, black women earned 66 cents on the dollar to white men (a 34 percent wage gap).[63] In yet another study, black and Latina women with a college degree had a 30 percent gap as compared to the hourly wages of "similarly educated white men." [64] Black women are also at a disadvantage in earnings as compared to white women. One study reported that all black women's average hourly wages were 19 percent lower than white women's[65]; and another, that, adjusted, black women earn 88 cents on the dollar of similarly situated white women (a 12 percent wage gap).[66]

Of course, there is some significant portion of both the gender and racial pay gaps that can be explained by actual demographic differences in workforce characteristics, which are, at this point, fairly unreachable by antidiscrimination law and require greater policy interventions. For example, one study explained that one-third of the unadjusted racial pay gap was due to "differences in education and experience level"—meaning differences in the educational and job opportunities and outcomes between black and white workers.[67] In another study seeking to quantify causes of the racial pay gap, researchers determined that, among public sector workers, "individual attributes such as human capital" and "education and workforce experience" accounted for just over half of the observed racial pay gap.[68] This portion of the racial pay gap is beyond the scope of this Article.

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[60] *See* Eileen Patten, Pew Research Center, Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress (July 1, 2016); *see also* Kirsten Salyer, The Racial Wage Gap Has Not Changed in 35 Years, Time (July 1, 2016).

[61] *See* Patten, *supra* note _,

[62] *See* AAUW, *supra* note _, at 11 (citing U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplements, Table P-38; U.S. Census Bureau, 2015 American Community Survey 1-Year Estimates)(annual figures)); Gould, et al., *supra* note _, at 13 (hourly figures).

[63] *See* Wilson & Rodgers, *supra* note _, at 1, 3-4.

[64] *See* Patten, *supra* note _,

[65] *See* Valerie Wilson & William M. Rodgers III, Economic Policy Institute, Black-White Wage Gaps Expand with Rising Wage Inequality 1, 3-4 (Sept. 19, 2016).

[66] *See* Wilson & Rodgers, *supra* note _, at 1, 3-4.

[67] *See See* Wilson & Rodgers, *supra* note _, at 1, 3-4; *see also* Patten, *supra* note _ (reporting that a significant portion of the racial pay gap is caused by "differences in education [and] labor force experience").

[68] Eric Grodsky and Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 Amer. Sociolog. Rev. 542, 562-64 (Aug. 2001); *see also* Patten, *supra* note _ (describing Grodsky & Pager, *supra*).

Demographic factors contributing to the gender pay gap focus primarily on working women's time due to child and family caregiving obligations. (Today human capital factors such as education and experience represent little of the overall gender pay gap for white women, although a greater portion for women of color.[69]) Women are more likely to work fewer hours than men: twice as many women work part-time as men (one-eighth of men, one-quarter of women), often involuntarily.[70] As compared to working men and women without children, fathers work more hours per week (43.1 versus 40.4) and mothers fewer (35.5 versus 36.8).[71] Women are also more likely to be out of the workforce for some period of childbirth, childrearing, or other family caregiving.[72] Fewer hours or months of work impact women's experience levels, which compounds their relative pay disadvantage.[73] Women are more likely to need occupations or jobs that allow for what Harvard economist Claudia Goldin calls "temporal flexibility," which tend to pay less; the highest paying jobs in the U.S. economy often demand specific and very long hours.[74] All of these factors contribute to a "motherhood wage penalty," whereby women who are mothers earn less than women without children (by one estimate, 4.6 percent per hour) and less than all men, regardless of their relatively greater education, work experience, and connection to the labor force than mothers of prior generations.[75] This portion of the gender wage gap, attributable to demographics around work hours and family care, while significant, is also beyond the scope of this Article.

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[69] *See* Patten, *supra* note _, (noting that the narrowing in the pay gap for all women from 1980 to 2015 was attributed to increased human capital—"a significant increase in the education levels and workforce experience of women over time," although black (9 cent improvement) and Latina (5 cent improvement) women still lagged far behind white women on this measure).

[70] *See* Gould, et al., *supra* note _, at 16 (citing Lonnie Golden, Economic Policy Institute, Still Falling Short: The Persistence of Involuntary Part-time Work in the US Economy–Trends, Sources, Consequences, and Solutions (2016)).

[71] *See* Gould, et al., *supra* note _, at 17.

[72] *See* Gould, et al., *supra* note _, at 15-17.

[73] *See* Gould, et al., *supra* note _, at 14-17.

[74] *See* Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 Amer. Econ. Rev. 1091, 1091-19 (2014); Gould, et al., *supra* note _, at 15-16.

[75] *See* Gould, et al., *supra* note _, at 16 (citing Michelle J. Budig, Third Way Next, The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay (2014)(4.6 percent)). This portion of the gender wage gap is often attributed to women's "choices" to go into certain fields or to trade flexibility and fewer work hours for money. This characterization ignores the fact that, while women may wish to balance work and caregiving, they do not "choose" to be economically penalized for doing so. *See, e.g.*, Gould, et al., *supra* note _, at 3, 7, 21-22; Joan C. Williams, Jessica Manvell & Stephanie Bornstein, Center for WorkLife Law, U.C. Hastings College of the Law, "*Opt Out" or Pushed Out?: How the Press Covers Work/Family Conflict* (2006). Regardless, this bundle of issues—hours, inflexible work schedules, and the deterrent effect of both on the fields and industries women pursue—contributes a significant portion of the wage gap. *See e.g.* Goldin, *supra* note _, at 1116-18. Other legal scholars have sought to address these issues, which require significant and well documented legal reforms including pregnancy accommodation, paid family and medical leave, part-time parity, workplace flexibility, reduction of stigma to men for family care—a discussion of which is beyond this Article's focus on antidiscrimination law. *See, e.g.*, add cites.

Yet in addition to the portion of the racial and gender pay gaps attributable to demographic differences, there is another significant portion attributable to two major causes this Article seeks to address: occupational segregation and discrimination.

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

Numerous studies have documented that gender workforce segregation composes a significant portion of the current gender pay gap.[76] The most recent analysis by top labor economists suggests that, today, between one-third and one-half of the gender pay gap is due to occupational segregation. In a 2016 study, Cornell economists Francine Blau and Lawrence Kahn estimated that industry and occupational factors accounted for 49 percent of the current pay gap, responsible for nearly twice the portion of the gender pay gap today than thirty years ago.[77] In contrast, in a 2014 study parsing the causes of the gender pay gap, Harvard economist Claudia Goldin documented that the pay gap *within* occupations was greater than the pay gap *between* occupations, leading her to conclude that changes to hours' requirements and flexibility were more important to correcting the pay gap than gender workforce integration. Yet even while suggesting that "what is going on within occupations…is far more important to the gender gap in earnings than is the distribution of men and women by occupations," Goldin attributed 32-42 percent of the gender pay gap among college graduates working full-time full-year to the gap *between* occupations.[78] Thus, while greater policy changes around working hours and flexibility may be essential to closing the pay gap entirely, in the meantime, a focus on reducing discrimination and occupational segregation offers the potential to cut the gender pay gap nearly in half.

While, like the pay gap itself, gender workforce segregation lessened in from the 1970s through the 1990s, it, too, has stalled since 2000.[79] Segregation today among jobs and industries by sex appears as intractable as ever: recent studies identified that roughly half of all women (or of all men) would have to change jobs for the U.S. workforce to be fully integrated by gender.[80] In 2012, over 40 percent of women and only 5 percent of men worked in fields in which more than 75 percent of the workers were female; over 44 percent of men and only 6 percent of women worked in fields in which more than 75

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[76] *See* Ariane Hegewisch & Heidi Hartmann, Institute for Women's Policy Research, Occupational Segregation and the Gender Wage Gap: A Job Half Done 16 (2014) (citations omitted); Lisa Catanzarite, *Race-Gender Composition and Occupational Pay Degradation*, 50 Social Problems 14, 14 (2003) (citations omitted).

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

[78] Goldin, *supra* note _, at 1097-98; *see also* Gould, et al., *supra* note _, at 20-21.

[79] *See* AAUW, *supra* note _, at 17-18 (citing Hegewisch & Hartmann, *supra* note _).

[80] *See* Youngjoo Cha, *Overwork and the Persistence of Gender Segregation in Occupations*, 27 Gender & Soc'y 158, 159 (2013); Cecilia L. Ridgeway, Framed by Gender: How Gender Inequality Persists in the Modern World 5 (2011)(citations omitted); Blau & Kahn, *supra* note_, at 27 (51 percent in 2009, down from 64.5 percent in 1970).

percent were male.[81] While the proportion of women in professional occupations like managers, lawyers, doctors has grown from fewer than one-sixth (4 to 15 percent) to one-third (32 to 38 percent) today, many of the most common occupations for men or for women have had "remarkably little change" in terms of gender integration over the past four decades.[82]

This stall has likely contributed to the stubborn persistence of the gender pay gap. Research suggests that increased integration contributed significantly to the gains women made in closing the pay gap between the 1970s and 2000: as occupational segregation went down, the gap between women and men's pay narrowed; as integration slowed and then stalled in the 2000s, so too did improvement in the gender pay gap. Indeed one study estimated that between 40 and 60 percent of the growth of real wages experienced by white and black women and black men between 1960 and 2013 was due to increases in occupational integration by gender and race.[83]

When occupations are segregated, women bear the brunt of the difference. Throughout the U.S. economy, occupations that are female dominated pay less than those that are male dominated requiring the same levels of education and experience.[84] Aggregated statistics that focus on occupational segregation show a difference that mirror that pay gap overall: one study identified that, on average, the median weekly pay for both men and women working in female-dominated occupations (where women compose more than 50 percent of those in that occupation) is 83 cents on the dollar to the average median weekly pay for both men and women working in male-dominated occupations.[85] Looking at the gender distribution among occupations that make up the top and the bottom of the earnings in the U.S. workforce brings the data disturbingly to life. Of the 30 jobs in the U.S. economy with the highest pay, 26 are held by majority men; only pharmacists, nurse practitioners, physicians assistants and physical therapists both have more than a 50 percent female workforce and earn in the top decile of wages.[86] On the other hand, 23 of the 30 lowest paid occupations are held by majority women; only dishwashers and cooks, car cleaners and parking lot attendants, and grounds and agricultural workers are both male-dominated fields and in the lowest decile of earnings.[87]

Compounding this disparity, data shows that when more women enter a particular field or occupation, the pay decreases.[88] Numerous studies have documented that, even

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[81] *See* Hegewisch & Hartmann, *supra* note _, at 1.

[82] *See* Hegewisch & Hartmann, *supra* note _, at 2-4.

[83] *See* Chang-Tai Hsieh et al., The Allocation of Talent and U.S. Economic Growth, NBER Working Paper No. 18693 (2010) (as cited in Hegewisch & Hartmann, *supra* note _, at 12).

[84] *See* AAUW, *supra* note _, at 17-18 (citing Hegewisch & Hartmann, *supra* note _); Third Way, *supra* note _, at 10.

[85] Third Way, *supra* note _, at 10.

[86] Third Way, *supra* note _, at 14-15 (data compiled from U.S. Bureau of Labor Statistics, Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex, Table 39 (2014)).

[87] Third Way, *supra* note X, at 14-15 (data compiled from U.S. Bureau of Labor Statistics, Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex, Table 39 (2014)).

[88] *See* Miller, *supra* note _; Levanon et al., *supra* note _, at 865-92.

when controlling for required skills and education level, occupations with a greater proportion of female workers usually pay less than those with fewer female workers.[89] In a 50-year longitudinal study of U.S. Census data from 1950 to 2000, Stanford sociologists Asaf Levanon and Paula England and their colleagues set out "to assess whether or not there is a causal effect in either direction between sex composition and pay," and found "substantial evidence" that lower pay among female-dominated occupations was due to "devaluation of work done by women."[90] As the researchers explained, the theory of "devaluation" posits that "decisions of employers about the relative pay of 'male' and 'female' occupations are affected by gender bias, [whereby e]mployers ascribe a lower value for the work done in occupations with a high share of females and consequently set lower wage levels."[91] The researchers conducted a long-term analysis that compared median hourly wages for full-time workers for each occupation, in which they controlled for level of education, work experience, race, and geographic region, and accounted for changes in skills demanded by jobs.[92] "[W]e have found substantial support for the view that increased feminization of occupations diminishes their relative pay," they concluded, a trend they noted stayed consistent over time, with a slight increase in the 1980s.[93]

Beyond occupational segregation, even among the same type of occupation or even the very same job, women earn less on average than men and universally experience a pay gap.[94] In similar types of occupations, for example, car and equipment cleaners (87 percent of whom are male) earn 17 percent more than housecleaners (84 percent of whom are female).[95] Within the same occupation, female truck drivers earn 84 percent of male truck drivers; female software developers 81 percent of male software developers; female financial managers 65 percent of male financial managers.[96] Strikingly, even in traditionally feminine fields, women earn less than men. In 2014, female elementary and middle school teachers' median weekly earnings were 87 percent of what male teachers earned ($140 less), female registered nurses 90 percent of what male registered nurses earned ($114 less per week), and female administrative assistants 85 percent of male

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[89] *See* Levanon et al., *supra* note _, at 865 (citing, *e.g.*, Philip N. Cohen & Matt L. Huffman, *Individuals Jobs and Labor Markets: The Devaluation of Women's Work,* 68 Amer. Sociolog. Rev. 443 (2003); David A. Cotter, et al., *All Women Benefit: The Macro-Level Effect of Occupational Integration on Gender Earnings Equality*, 62 Amer. Sociolog. Rev. 714 (1997); Paula England, Comparable Worth: Theories and Evidence (1992)).

[90] Levanon et al., *supra* note _, at 870, 865.

[91] Levanon et al., *supra* note _, at 866.

[92] Levanon et al., *supra* note _, at 872-73

[93] Levanon et al., *supra* note _, at 885-86 ("We found some evidence for the devaluation view—an effect of earlier female proportion on occupations' later wage rates, even in the presence of controls for experience and educational requirements. When we divided our data into four periods, we saw no diminution of the devaluation effect over time; if anything, it increased (in the 1980s). This argues against the neoclassical equalizing differences view, which predicts no net effect of sex composition with adequate controls." *Id.* at 885.).

[94] *See* Gould, et al., *supra* note _, at 20-21; AAUW, *supra* note _, at 18.

[95] Third Way, *supra* note _, at 10.

[96] *See* AAUW, *supra* note _, at 18 (citing U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, Current Population Survey Annual Average Data Tables, Table 39).

counterparts ($126 less per week), despite the fact that women greatly outnumbered men in those positions, holding 80 to 95 percent of those jobs.[97] In fact, as one study documented, out of 116 occupations analyzed, including female-dominated occupations, men earned more than women in 114; the exceptions were stock clerks and health techs, jobs in which women earned the same as men.[98]

Likewise, setting aside the one-third to one-half of the racial pay gap attributable to human capital and workforce characteristics, at least one half remains. Studies of the causes of the remaining racial pay gap attribute it to income inequality and labor market tightening,[99] discrimination (at least one-third of the black-white gap according to one study[100]), and racial workforce segregation (in one study, responsible for 28 to 41 percent of the increase in the black-white wage gap between 1979 and 1985 and 11 to 25 percent of the increase in the black-white wage gap among women between 2000 and 2015[101]).

In another study on both gender and racial pay gap trends, researchers documented the phenomenon of "pay erosion" over time in occupations that became increasingly dominated by female and minority workers, which they attributed to the fact that female and minority workers tend to follow white men in occupations.[102] In jobs such as clerks, bank tellers, bartenders, and real estate and advertising agents that were once predominantly filled by white men, pay drops indicated "declining desirability," which was then compounded by "greater visibility" of women and minorities in those positions.[103] This creates what the researchers describe as the "insidious problem" that "pay deteriorates precisely where subordinate groups are concentrated."[104]

Reflecting upon the body of research on the causes of pay gaps, the impact of workforce segregation and stereotyping becomes clear. First, "women's" work and the work performed by racial minorities is valued less than the work performed by white men—and paid accordingly. Second, when women do "men's" work and racial minorities do work previously performed by white workers, *they* are valued less when doing the same work.

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[97] *See* U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, Current Population Survey, "Traditional Occupations, Traditional (female-dominated) detailed occupations by women's share of employment and median weekly earnings, 2014 annual averages," https://www.dol.gov/wb/stats/TraditionalOccupations.pdf (last visited Mar. 1, 2017); *see also* AAUW, *supra* note _, at 18.

[98] Third Way, *supra* note X, at 10, 10 n.22.

[99] *See* Wilson & Rodgers, *supra* note _, at 1, 3-4.Tanzina Vega, Wage gap between blacks and whites is worst in nearly 40 years CNN Money (Sept. 20, 2016) (describing Wilson & Rogers, *supra*).

[100] *See* Roland G. Fryer , Jr., Devah Pager & Jorg L. Spenkuch, Racial Disparities in Job Finding and Offered Wages, 56 Journal of Law and Economics 633, 633-37 (2013); *see also* Patten, *supra* note _; Wilson & Rodgers, *supra* note _, at 1, 3-4.

[101] *See* Wilson & Rodgers, *supra* note _, at 49-51, 49 n.21; *see also* Patten, *supra* note _,

[102] *See* Catanzarite, *supra* note _, at 28-30.

[103] *See* Catanzarite, *supra* note _, at 28-30.

[104] *See* Catanzarite, *supra* note _, at 28-30.

C. Relationship to Income Inequality

A current issue of much political attention is income inequality—meaning the wide and widening gap in the wealth and standard of living between those at the top and the bottom of the U.S. income spectrum.[105] The gender and racial pay gaps contribute to the existence of income inequality in the U.S. and, left unchecked, stand to magnify its impact.

In one example of this relationship, women have higher rates of poverty due, in part, to the gender wage gap: depending on their age, 10 to 14 percent of women live below the federal poverty line compared to 7 to 11 percent of men.[106] One study estimated that, if the gender pay gap was eliminated, the rate of poverty among all women would be cut in half.[107] The cumulative economic disadvantage to women due to the gender pay gap is, itself, quite shocking. Over the course of a lifetime, an average working women will lose over half a million dollars, and the average woman with a college degree $800,000, due to the gender pay gap.[108] The pay gap also impacts women's economic security in retirement, when they receive less than men from Social Security and other retirement income tied to wages earned while working.[109]

Today, a greater proportion of family earnings' come from women, and more families are headed by single mothers; thus the gender pay gap hurts not just women but all families' economic security.[110] Over 70 percent of all mothers now work, one-third of whom are single parents.[111] And mothers' income is crucial to family economic support: almost two-thirds of women bring in at least one-quarter of a family's income,[112] and 40 percent of women with minor children are the only or primary earner in the family.[113] If working single mothers received equal pay, one study estimates that two-thirds would receive an increase in their pay, and their poverty rate would also be cut in half, from 29 to 15 percent.[114] This exacts societal costs, too, as families in poverty depend on government-supported aid like Temporary Assistant to Needy Families (TANF). Another

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[105] Add cite.

[106] *See* AAUW, *supra* note _, at 4-5 (citing B.D. Proctor, J. L. Semega & M.A. Kollar, U.S. Census Bureau, Current Population Reports, Income and Poverty in the United States (2015)).

[107] *See* Heidi Hartmann, Jeffrey Hayes & Jennifer Clark, Institute for Women's Policy Research, How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy 1 (2014).

[108] Gould, et al., *supra* note _, at 7 (citing Institute for Women's Policy Research, "Status of Women in the States" (online database) (accessed Oct. 2016)).

[109] *See* AAUW, *supra* note _, at 5 (citing J. Fischer & J. Hayes, Institute for Women's Policy Research, The Importance of Social Security in the Incomes of Older Americans: Differences by Gender, Age, Race/Ethnicity, and Marital Status (2013)).

[110] Add cite.

[111] Add cite.

[112] *See* AAUW, *supra* note _, at 5 (63 percent in 2012).

[113] *See* AAUW, *supra* note _, at 5 (citing S.J. Glynn, Center for Amer. Progress, Breadwinning Mothers, Then and Now (2013).

[114] *See* Hartmann, Hayes & Clark, *supra* note _, at 1.

study estimated that, if women achieved pay equity, their earnings would amount to nearly 15 times state and federal government expenditures on TANF in 2012.[115]

Interestingly, the gender pay gap is actually worse among higher-earning women, although they have also experienced greater improvements in narrowing the wage gap over time.[116] In 2015, women who earned low wages in the 10th percentile of earnings earned 92 cents on the dollar to men, while women in the 95th percentile earned only 74 cents.[117] Yet the fact that the floor of the minimum wage keeps lower-paid women's pay on more equal footing with men is likely of little consolation to those at the 10th percentile, who earned less than $19,000 in 2015[118]—an income level at which 8 cents on the dollar is sorely missed. As one study showed, removing the gender pay differential for women who perform lower-skilled occupations would increase their annual pay by about $6000 to 7000—as the researchers note, "[w]age differences of [a] magnitude…enough to make the difference between above poverty and below-poverty family living standards."[119] Where there has been improvement in narrowing the wage gap over time, it has been felt more strongly by women at higher income levels. As one study showed, between 1979 and 2015, women in the 95th percentile of earnings (earning over $92,000 in 2015)[120] gained 11 cents on the dollar to similarly earning men (from 63 to 73.8 cents on the dollar), while women in the 10th percentile gained only 5 cents during the same time period (from 86.9 to 92 cents on the dollar).[121]

The racial pay gap is also exacerbating the problem of income inequality by race. One study documented the shocking statistic that the average African-American household has a mere 6 percent, and Latino household 8 percent, of the wealth of the average white family.[122] While median annual incomes are closer—white families average $50,400 as compared to $32,038 for black and $36,840 for Latino families annually—the wide disparity in overall wealth is attributed by researchers in large part to

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[115] *See* Hartmann, Hayes & Clark, *supra* note _, at 1. Another concern is the ability to repay student debt: because women earn roughly-three quarters of what men earn with their same level of education, women's ability to repay student debt is correspondingly lessened, and women remained saddled with student debt for longer periods of time. For example, in one study of 2007-2008 college graduates, men had paid off 44 percent of their student debt five years later, while women had paid off only 33 percent--African-American and Hispanic women less than 9 percent. *See* AAUW, *supra* note _, at 16 (data analysis from U.S. Dept. of Education, National Center for Education Statistics, 2008–12, Baccalaureate and Beyond Longitudinal Study).

[116] *See* Gould, et al., *supra* note _, at 10-11; Hegewisch & Hartmann, *supra* note _, at 14-15.

[117] Gould, et al., *supra* note _, at 10-11.

[118] Elka Torpey, U.S. Bureau of Labor Statistics, *Business Careers with High Pay* (Aug. 2016), *available at* https://www.bls.gov/careeroutlook/2016/article/mobile/high-paying-business-careers.htm (last visited Mar. 1, 2017).

[119] *See* Hegewisch & Hartmann, *supra* note _, at 15-16.

[120] Torpey, *supra* note _.

[121] Gould, et al., *supra* note _, at 10-11.

[122] *See* Laura Sullivan et al., The Racial Wealth Gap: Why Policy Matters, IASP Brandeis Univ. & Demos, 1-6, 24-31 (2015;); *see also* Laura Shin, The Racial Wealth Gap: Why A Typical White Household Has 16 Times The Wealth Of A Black One, Forbes (Mar. 26, 2015) (describing Sullivan et al., *supra*).

labor market differences.[123] Because families of color are paid less on the dollar, their relative wealth is always less. As one of the study's authors explained: "If you are facing a wealth gap of 80 cents for every dollar a white family makes, that makes you 20 percent less able to put that dollar into savings, because you may need all of those dollars to fill your consumption needs."[124] If racial wage gaps were eliminated, the researchers estimated, "median Black wealth would grow $11,488" and "median Latino wealth would grow $8,765," shrinking the wealth gap relative to white families by 11 (black) and 9 (Latino) percent, respectively. [125] Further, if the return on that income were made equal—meaning the ability to save or invest at similar rates, rather than having to spend more to cover the same basic needs—"median Black wealth would grow $44,963 and median Latino wealth would grow $51,552," closing the wealth gap with white families by 43 (black) and 50 (Latino) percent.[126]

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

II. EXISTING LAW AND ITS LIMITATIONS

For over 50 years, federal law has prohibited pay discrimination on the basis of sex and race through both civil rights (Title VII of the Civil Rights Act of 1964[127]) and wage and hour (the Equal Pay Act of 1963[128]) approaches. Since then, all but two states have enacted their own versions of both laws, either mirroring federal protections or going further to enact more stringent requirements.[129] Despite major advances in equal opportunity and increased earnings for women and racial minorities, five decades of legal protection has yet to close the gender and racial pay gaps. This Part provides an overview of existing protections against pay discrimination under federal and state law and identifies their limitations that have hampered efforts to achieve pay equity.

A. Title VII of the Civil Rights of 1964

The main federal antidiscrimination law prohibiting discrimination in employment, Title VII of the Civil Rights Act of 1964 ("Title VII"), includes specific protections against pay discrimination.[130] Title VII prohibits discrimination on the basis of race, color, national origin, sex or religion in hiring, firing, terms and conditions of employment, and "compensation."[131] The U.S. Supreme Court and the Equal

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[123] Sullivan et al, *supra* note _, at 1-6, 24-31. The other major causes of the wealth disparity are differences in homeownership rates and education levels.

[124] Shin, *supra* note _ (describing Sullivan et al, *supra* note _).

[125] Sullivan et al, *supra* note _, at 1-6, 24-31.

[126] Sullivan et al, *supra* note _, at 1-6, 24-31.

[127] 42 U.S.C. § 2000e-2 et seq.

[128] 29 U.S.C. § 206(d).

[129] *See infra* notes _-_ (re: existing state laws)

[130] *See* 42 U.S.C. § 2000e-2 et seq.

[131] *See* 42 U.S.C. § 2000e-2 et seq.

Employment Opportunity Commission—the federal agency that enforces Title VII—have interpreted the statute's word "compensation" to include not only wages but benefits, commissions, and other financial incentives and rewards attached to employment.[132]

An individual who believes she was paid less than her coworkers "because of" her sex or race can bring a Title VII claim under an individual disparate treatment theory of liability.[133] Under the proof structure articulated by the Supreme Court in early case law interpreting Title VII, the worker must make out a prima facie case of discrimination by alleging that she was qualified and performing satisfactorily at her job and experienced an adverse employment action (here, being paid too little) under circumstances giving rise to an inference of discrimination.[134]

Two parts of this prima facie case pose challenges for individuals alleging race or sex discrimination in pay. First, because employees rarely discuss their pay with each other and are often actively discouraged from doing so, it may be hard for an individual to discover, let alone prove, that he or she is being paid less than a male or white coworker.[135] In response to this problem, in 2009, Congress and President Obama enacted the Lilly Ledbetter Fair Pay Act, which made clear that the usually short statute of limitations for filing a Title VII claim would restart every time a paycheck that was infected with prior discrimination was received, so that an employee could sue for pay discrimination at any point at which she discovers it.[136] (Lilly Ledbetter did not discover that she was being paid 25 to 40 percent less than her similarly-situated male coworkers until nearly 20 years after her pay was set, when someone left her an anonymous note tipping her off.[137]) As discussed in Part III, below, current state and federal legislative proposals would add a requirement of "pay transparency" to existing laws, requiring employers to provide information on firm-wide pay.[138] This could have the effect of both strengthening employees' ability to enforce existing law and forcing employers to, themselves, track and voluntarily correct unfair pay in their own ranks.[139]

Second, to create an inference of discrimination to establish a prima facie case under Title VII, most courts require an employee to provide evidence of a similarly-situated "comparator" outside of his or her protected class (for example a man for a sex claim, a white employee for a race claim) who was paid more than the plaintiff.[140] The statutory text of Title VII makes no mention of a "comparator requirement."[141] In early case law interpreting Title VII, the Supreme Court suggested that evidence of a comparator would be "[e]specially relevant" in creating an inference of discrimination.[142]

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[132] *See* 20 CFR § 211.2.
[133] *See* 42 U.S.C. § 2000e-2 et seq.
[134] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[135] Add cite.
[136] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub.L. 111–2, S. 181.
[137] *See* Heidi Brown, *Equal Payback For Lilly Ledbetter*, Forbes (Apr. 28, 2009).
[138] *See* Part III.B. & C.
[139] *See* Part III.B. & C.
[140] *See* Stephanie Bornstein, *Unifying Antidiscrimination Law through Stereotype Theory,* 20 Lewis & Clark Law Review 919, 944-45 (2016).
[141] *See* Bornstein, *Unifying*, *supra* note _, at 944-45.
[142] *See McDonnell Douglas Corp.*, 411 U.S. at 792.

As scholars have noted, many lower courts have consistently misinterpreted this dicta as *requiring* comparator proof,[143] and, in the context of pay discrimination claims, a nearly identical comparator—a virtual twin—who was paid more than the plaintiff.[144] As a result, plaintiffs alleging pay discrimination who cannot point to someone in the same exact position with the same exact credentials will have a tough time succeeding at the prima facie stage.[145]

Moreover, should the plaintiff succeed in making out her prima facie case to create a presumption of pay discrimination, the defendant employer then responds by providing a legitimate nondiscriminatory reason for the pay disparity to rebut the presumption of discrimination.[146] Here, too, the law provides a chance for the employer to explain away any pay differential by highlighting any difference in the plaintiff's background, credentials, experience, or job duties or responsibilities, no matter how small. The plaintiff has a chance to respond that the employer's justification is merely a pretext for the real reason behind the pay disparity—discrimination.[147] But unless the plaintiff can prove that the employer's explanation is either inaccurate or far too insignificant to justify the pay differential, the employer will likely prevail.

Case law applying Title VII's individual disparate treatment proof structure to pay discrimination claims demonstrates the limitations of the law: to prevail a plaintiff must either have some sort of "smoking gun" proof of intent to pay the plaintiff less or a nearly identical comparator who is paid more. For example, a federal court held that a female accountant who served as County Fiscal Officer on an interim basis could not use as a Title VII comparator the male employee hired for the position permanently, despite their significant overlap in duties and educational background.[148] Another held that a female jewelry department Market Analyst who performed similar duties as male Assistant Product Managers in the furniture/appliances and electronics departments could not use them as comparators, in part because the departments "[did] not contribute equally to [the employer's] revenues."[149] Indeed, federal courts have upheld a variety of employer explanations to suffice as legitimate nondiscriminatory reasons for a pay disparity, including explanations that arguably perpetuate discrimination or rely on stereotypical

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[143] *See* Bornstein, *Unifying*, *supra* note _, at 944-45; Suzanne B. Goldberg, *Discrimination by Comparison*, 120 Yale L.J. 728, 745 (2011); Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 Mo. L. Rev. 831, 839 (2002); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 Ala. L. Rev. 191, 203 (2009).

[144] *See* Bornstein, *Unifying*, *supra* note _, at 944-45.

[145] *See* Bornstein, *Unifying*, *supra* note _, at 944-45.

[146] *See McDonnell Douglas Corp.*, 411 U.S. at 792.

[147] *See McDonnell Douglas Corp.*, 411 U.S. at 792.

[148] *See* Johnson v. Weld County, Colo. 594 F.3d 1202 (10th Cir. 2010). The court focused on his additional years of experience and some additional duties.

[149] *See* Sprague v. Thorn Americas, 129 F.3d 1355 (10th Cir. 1997) ("While the electronics department comprises approximately 50 percent of revenues and the furniture/appliance department accounts for approximately 45 percent of revenues, the jewelry department only produces approximately 4 percent of revenues." This, the court interpreted to mean the employees had "different levels of importance, value, and depth of responsibility between the respective departments.")

thinking, such as ”prevailing market rates” for a position or consideration of an employee’s prior salary.[150]

In addition to individual claims, Title VII allows employees to allege pay discrimination on a group-wide basis either as under a “pattern or practice” claim of disparate treatment—meaning that an employer paid a group of employees discriminatorily less—or as a disparate impact claim[151]—meaning some seemingly neutral employer practice or policy results in a disproportionately lower pay to one group by sex or race, despite no intent on behalf of the employer.[152] In both claims, plaintiffs must use statistics and anecdotal evidence to prove a prima facie case of a statistically significant disparity in pay that, again, creates an inference of discrimination.[153] Should the plaintiffs succeed in doing so, the defendant employer then raises its defense. In a pattern or practice claim, the employer would either rebut the statistical disparity to defeat the plaintiffs’ proof or offer a legitimate nondiscriminatory reason for the disparity, similar to the defense in an individual claim.[154] In a disparate impact case, the employer has a different burden; it must prove that the practice or policy the plaintiffs allege are creating a disparate impact in pay is justified as job-related and consistent with business necessity.[155]

As with individual disparate treatment claims, cases applying Title VII to pattern or practice or disparate impact claims of pay discrimination against a group of plaintiffs have offered plaintiffs useful, but limited success. For example, federal courts have held in favor of female employees alleging class-wide pay discrimination claims under Title VII where their employer, a pharmaceutical company, set base pay for female employees lower than men and refused to pay bonuses to employees who took six weeks or more of leave—a problem for employees who had to take maternity leave.[156] Yet courts have also held, for example, that setting wages according to what the labor market will allow constitutes neither a pattern or practice nor a disparate impact claim of sex discrimination in pay under Title VII.[157]

There is no doubt that, in the five decades since its passage, Title VII has helped to root out clear pay disparities among nearly identical employees and to strike down obviously discriminatory pay policies. Beyond that, however, the ability of Title VII to redress the gender or racial pay gap has been stunted by overly narrow court interpretations of proof requirements as applied to pay discrimination. The very high bar for proof required to create an inference of pay discrimination, combined with the very

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[150] *See, e.g., AFSCME v. Washington,* 770 F.2d 1401 (9th Cir. 1985) (market rates); Dreves v. Hudson Group Retail, 2013 WL 2634429 (D.Vt. 2013)(prior salary)(“Generally speaking, an employer's attempt to match an employee's previous earnings may serve as a valid justification for a pay disparity.” Id. at *6 (citation omitted)).

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

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

[153] *See Teamsters*, 431 U.S. at 324; *Hazelwood,* 433 U.S. at 299; *Griggs,* 401 U.S. at 424.

[154] *See Teamsters*, 431 U.S. at 324; *Hazelwood,* 433 U.S. at 299.

[155] *See Griggs,* 401 U.S. at 424.

[156] *See* Barrett v. Forest Laboratories, Inc., 439 F.Supp.3d 407(S.D.N.Y. 2014).

[157] *See, e.g., AFSCME v. Washington,* 770 F.2d 1401 (9th Cir. 1985).

wide berth given to employer justifications for any disparities has severely limited Title VII's ability to reach the more complex and structural causes of the gender and racial pay gaps.

B. Equal Pay Act of 1963

Beyond Title VII, a second federal law prohibits sex—but not race—discrimination in pay, the Equal Pay Act of 1963 ("EPA").[158] Passed the year before Title VII, the EPA targeted only sex discrimination in pay using a different approach. While Title VII is codified as a general antidiscrimination law that, for the most part, requires an employee to prove an employer's intent to discriminate,[159] the EPA was codified as a wage and hour statute with which employers must comply. This means that, should a plaintiff meet the text of the EPA, the employer will be held strictly liable for the violation, regardless of its intent, unless it can prove an affirmative defense.[160] As such, the EPA provides a potentially powerful second tool in federal law with which employees can challenge sex discrimination in pay.

Yet, like Title VII, excessively narrow court interpretation of the text of the EPA has limited its ability to reach beyond the most egregious cases of unequal pay. To prevail on an EPA case, an individual plaintiff must make out a prima facie case that she meets the statutory definition of being pay unequal wages for "equal work" as defined.[161] Should she succeed, the burden shifts to the employer to raise one of several possible defenses that would excuse the wage differential from constitution sex discrimination.[162] Collective actions can be brought by groups of plaintiffs under the EPA, too; the proof structure largely mirrors the individual EPA claim.[163]

Two sections of the EPA present hurdles to plaintiffs. First, the statute defines sex discrimination in pay as paying women and men "within any establishment" different wages "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[164] In regulations and cases further defining these terms, to be in the same "establishment" means the same "distinct physical place of business rather than [the] entire business or 'enterprise'"—that is, "each physically separate place of business is ordinarily considered

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[158] *See* Equal Pay Act, 29 U.S.C. § 206(d)(1).

[159] *See* 42 U.S.C. §2000-e2, et seq.; *See, e.g.*, Loyd v. Phillips Brothers, Inc., 25 F.3d 518, 525 (7th Cir.1994) (holding that"[w}hat must be shown [under Title VII] is quite specific[: t]here must be an intent to discriminate, and the intent must encompass an actual desire to pay women less than men because they are women.")

[160] *See* 29 U.S.C. § 206(d); *See, e.g.*, Lenihan v. Boeing Co., 994 F.Supp. 776, 798 (S.D.Tex. 1998) ("Unlike an EPA claim…to prevail on a wage discrimination claim under Title VII, the plaintiff must prove that the employer acted with discriminatory intent …The EPA is also dissimilar to Title VII in that, if the plaintiff succeeds in establishing a prima facie case, the burdens of production and persuasion shift to the employer to demonstrate as an affirmative defense that the difference in wages is justified by one of the exceptions specified under the Act..")

[161] *See* Stanziale v. Jargowsky, 200 F.3d 101, 107-108 (3d Cir. 2000).

[162] *See Stanziale*, 200 F.3d at 107-108.

[163] *See* 29 U.S.C. § 216(b).

[164] *See* 29 U.S.C. § 206(d)(1).

a separate establishment."[165] To perform "under similar working conditions" means in the same "surroundings" and with the same "physical hazards" that are "regularly encountered" in "frequency," "intensity," and "severity" of potential injuries, but excludes hours worked and the notion of "shift differentials."[166] Such interpretation excludes all but the narrowest focus on pay to workers in the same office of even a large, disperse employer. Most directly tied to gender wage gap data, while one federal court held that a women doing the exact same job as a man, just on a part-time basis, should be paid a proportionate salary based on the same hourly wage,[167] another court disagreed[168]—interpreting the law in a way that amplifies the cost to women for caregiving, a known significant contributing factor to the gender wage gap.

But it is the definition of "equal work" that is, perhaps, the most limiting to this section's ability to close the gender wage gap.[169] As interpreted in the EPA's regulations, to constitute "equal work" in a given case "does not require that compared jobs be identical, only that they be substantially equal."[170] Yet being "substantially equal" has been interpreted by most federal courts to be something more than substantially similar or comparable.[171] Indeed, several courts have described this standard as requiring that, while not identical, jobs must be "virtually identical" to meet the standard of "equal work."[172] Thus courts applying the "equal work" standard have held that, for example, a county's female Director and Deputy Director of the Emergency Services Department could not compare themselves to the male directors and deputy directors of other county departments who earned on average 20 percent more, because of differences between the departments—despite the fact that all performed similar managerial tasks.[173] Likewise, a female employee who earned $11.50 per hour as a lead person/service writer for a trucking company was not performing "equal work" to a male lead person who earned $16 per hour because of his greater experience, despite the fact that she sometimes covered his shifts.[174] As a consequence, the EPA as currently interpreted has virtually no

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[165] *See* 29 C.F.R. § 1620.9(a); *see, e.g.,* Lenihan v. Boeing Co., 994 F.Supp. 776 (S.D.Tex. 1998) (applying regulation test)

[166] *See* 29 CFR § 1620.18(a); *see* Corning Glass Works v. Brennan, 417 U.S. 188, 204 (1974) (holding that shift differentials do not, themselves, violate the EPA).

[167] *See* Lovell v. BBNT Solutions, LLC, 295 F. Supp. 2d 611, 620-21 (E.D. Va. 2003).

[168] *See* EEOC v. Altmeyer's Home Stores, Inc., 672 F. Supp. 201, 214 (W.D. Pa. 1987).

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

[170] 29 CFR § 1620.13(a)

[171] Compare to state law standards discussed in Part II.C. and III.C.

[172] *See, e.g.,* Brennan v. City Stores, Inc., 479 F.2d 235, 238 (5th Cir. 1973) ("When Congress enacted the Equal Pay Act, it substituted the word 'equal' for 'comparable' to show that 'the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.' The restrictions in the Act were meant 'to apply only to jobs that are substantially identical or equal'"(citations omitted)); Cohens v. Maryland Dept. of Human Resources, 933 F.Supp.2d 735, 747 (D.Md. 2013) ("To establish a prima facie case under the EPA…the plaintiff must show that the jobs in question were 'virtually identical.'" (citation omitted)..

[173] *See* Wheatley v. Wicomico County, 390 F.3d 328, 330 (4th Cir. 2004), as discussed in Eisenberg, *Shattering, supra* note _, at 40-41.

[174] *See* Parada v. Great Plains Intern. of Sioux City, Inc., 483 F.Supp.2d 777 (N.D.Iowa 2007).

ability to reach the issue of occupational segregation that drives much of today's gender pay gap.

The second section of the current EPA provides another major limitation: a giant hole in the statute created by court interpretations of language providing an employer's affirmative defense to liability. Under the statute, an employer's wage differential is excused where the employer can show that it was "based on any factor other than sex."[175] Thus even if a plaintiff can succeed in making out a prima facie case that she meets the narrow statutory definition of "equal work" codified in the statute's first section, an employer may still defeat her claim by proving another justification for the pay differential.[176] This defense functions in much the same way as the legitimate nondiscriminatory reason phase of Title VII disparate treatment; in fact, Congress specifically passed the Bennett Amendment to align the two statutes by clarifying that anything lawful under the EPA was also lawful under Title VII.[177] Cases interpreting this defense have taken a similarly deferential stance to permitting employer justifications, even if they are correlated with sex or perpetuate sex discrimination.[178] For example, federal courts have held that, in addition to the experience of the person holding the job, "market value" of the job, an employee's former salary, and "management potential" could all constitute "factors other than sex"—despite the fact that each of these justifications may be sex-linked.[179] This enormous defense as currently interpreted limits the ability of the EPA to reach the portion of the pay gap created by gender stereotyping and implicit bias, including where courts fail to recognize the bias built into factors an employer argues are "other than sex."

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

C. State Law

In addition to federal law, all but two states have enacted their own versions of federal laws prohibiting employment discrimination and unequal pay by sex.[180] While

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[175] *See* 29 U.S.C. § 206(d)(1)(iv).

[176] *See Stanziale,* 200 F.3d at 107-108.

[177] Bennett Amendment, Public Law 88-38 (June 10, 1963); codified as Title VII, § 703(h), 42 U.S.C. 2000e-2(h).

[178] *See generally* Deborah L. Brake, *Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 Idaho L. Rev. 889 (2016).

[179] *See* Brickey v. Emp'rs Reassurance Corp., 293 F. Supp. 2d 1227, 1233 (D. Kan. 2003)(citing Varley v. Superior Chevrolet Auto. Co., No. 96–2119–EEO, 1997 WL 161942, at *11 (D.Kan. Mar.21,1997); EEOC v. Aetna Ins. Co., 616 F.2d 719, 726 (4th Cir.1980); Horner v. Mary Inst., 613 F.2d 706, 714 (8th Cir.1980); Angove v. Williams–Sonoma, Inc., 70 Fed. Appx. 500, 508 (10th Cir.2003) ("The EPA only precludes an employer from relying solely upon a prior salary to justify pay disparity.").

[180] *See* National Conference of State Legislators, "State Equal Pay Laws" (Aug. 23, 2016), http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx (last visited Mar. 1, 2017);

some state civil rights laws are broader than Title VII in terms of their coverage (for example by applying to smaller employers or including additional protected classes),[181] courts applying state laws generally mirror the proof structure of Title VII for proving sex or race discrimination in compensation.[182] Thus, the limitations of Title VII to reach issues causing the current pay gap described previously apply similarly to state antidiscrimination laws.

Likewise, about half (24) of the states' equal pay laws use the same language as the federal EPA, both in defining "equal work" and establishing an employer defense of "any factor other than sex."[183] In these states, and the two that have no state equal pay law, because the text is the same as the Equal Pay Act itself, courts apply similar definitions and case law[184]; again, the limitations of the EPA discussed previously also apply to these states' equal pay laws.

In contrast, in the other near half (24) of the states, state versions of equal pay laws differ in some material way that allow the possibility for broader reach than the federal EPA. Of those states' laws, eight have unique language defining the nature of the comparison that must be made. Instead of "equal work" requiring "equal skill, effort, and responsibility," these states require "the same quantity and quality of the same classification of work" (Arizona, Missouri)[185]; "the same or substantially similar work" (Illinois, Louisiana),[186] or men and women and to be "similarly employed" (Michigan, Washington).[187] In addition, two states have laws applying to public sector workers only that require "equivalent service or [] the same amount or class of work" (Montana) or "the same kind, grade, and quantity of service" (Texas).[188] In those eight states, courts in two (Arizona, Texas) overlooked differences in statutory language and interpreted their statutes as following the same standards as the federal EPA;[189] courts in five others did not expressly define their statutory text.[190]

Notably, however, Washington state law remains open to broader interpretation. In an early case, the Washington Supreme Court explained that "[t]he federal [Equal Pay A]ct may impose a heavier burden than the state act due to its threshold requirement of

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National Conference of State Legislatures, State Employment-Related Discrimination Statutes (July 2015), http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf (last visited Mar. 1, 2017).

[181] *See, e.g.,* Cal. Gov. Code § 12900, et. seq. (both); Haw. Rev. Stat. § 378.1, et. seq. (both).

[182] *See, e.g.,* add cites.

[183] State law data compiled by original research using Westlaw and Lexis conducted Jan. 2017 and by reference to National Conference of State Legislators, "State Equal Pay Laws" (Aug. 23, 2016), http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx (last visited Mar. 1, 2017).

[184] *See, e.g.,* add cites.

[185] Ariz. Rev. Stat. Ann. § 23-340, 341; Mo. Ann. Stat. § 290.410.

[186] 820 Ill. Comp. Stat. 110/1, 112/1; La. Rev. Stat. Ann. § 23:661.

[187] Mich. Comp. Laws Ann. § 750.556; Wash. Rev. Code Ann. § 49.12.175.

[188] Mont. Code Ann. 39-3-104; Tex. Lab. Code § 659.001.

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

[190] A survey of caselaw conducted Jan. 2017 found no reported cases directly addressing definitions of relevant statutory text in Illinois, Louisiana, Michigan, Missouri, and Montana.

'equal' work compared with the state act's threshold requirement of 'similar' work," which the Court held was satisfied by the parties stipulation that the plaintiff and her comparator performed "substantially similar work."[191] Fifteen years later, relying on the state high court's decision, the Ninth Circuit Court of Appeals reiterated that the federal EPA was "more stringent" because "under the Washington State Equal Pay Act, a plaintiff need only prove that the employer paid different wages to men and women who performed *similar* work."[192]

Beyond the language of "similarity," state laws in 14 other states require that women and men be paid the same for "comparable" work, which opens the door to even greater breadth of worker comparison. Thirteen of these laws require that men and women be paid for "work of comparable character" [193] or for "comparable work" requiring "comparable" skills or requirements.[194] Notably one state, Iowa, goes further to prohibit pay discrimination, in public sector employment only, "for work of comparable *worth* between jobs held predominantly by women and jobs held predominantly by men," which the statute further defines as "the value of work as measured by the composite of the skill, effort, responsibility, and working conditions normally required."[195]

As described in Part III.A, below, the language of "comparability" in state laws stemmed from the "comparable worth" movement of advocates and legal scholars in the 1980s to strengthen the ability of equal pay laws to redress the gender pay gap.[196] Yet, with one exception, state courts have failed to so hold. Courts in five of the 14 states made no mention of the difference between "comparable" and "equal" work, instead interpreting their state statutes to be consistent with the federal EPA.[197] Courts in eight other states did not expressly define their statutory text, including the state of Iowa, in

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[191] Adams v. Univ. of Wash., 722 P.2d 74, 77 (Wash. Supr. Ct 1986). *But see* Hudon v. W. Valley Sch. Dist. No. 208, 123 Wash. App. 116, 124 (2004) (noting more generally that "Washington's equal pay act…is virtually identical to its federal counterpart, 29 U.S.C. § 206(d)[, so that d]ecisions interpreting the federal act may…be helpful" in a state law case).

[192] Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1190-91 (9th Cir. 2002) (citing Adams, 722 P.2d at 76-78) (emphasis added).

[193] *See* Alaska Stat. Ann. § 18.80.220(a)(5); Md. Labor and Employment Code Ann. § 3-301; Or. Rev. Stat. § 652.220; W. Va. Code, § 21-5B-1, § 21-5E-1 ("work of comparable character").

[194] *See* Ark. Code Ann. § 11-4-601; Idaho Code § 44-1701; Ky. Rev. Stat. § 337.420; Me. Rev. Stat. Ann. Tit. 26 § 628; Neb. Rev. Stat. Ann. § 48-1221; N.D. Century Code, 34-06.1-01; 40 Okla. Stat. Ann. § 198.1; S.D. Codified Laws § 60-12-15; Tenn. Code Ann. § 50-2-201 ("comparable work").

[195] *See* Iowa Code Ann. § 70A.18 ("comparable worth") (emphasis added).

[196] *See infra* Part III.A.

[197] These states are Alaska, Kentucky, Maryland, Tennessee, and West Virginia. *See* Alaska State Com'n for Human Rights v. State, 796 P.2d 458, 461-462 (Alaska 1990) (holding that "the history of [the state statute] convinces us that the proper interpretation of the phrase 'comparable character' is as an equal pay for substantially equal work provision"); Brown v. Wood, 575 P.2d 760, 768 (Alaska 1978) (following federal EPA in burdens of proof); Wiseman v. Whayne Supply Co., 359 F. Supp. 2d 579, 589 (W.D. Ky. 2004) (holding that "'[e]qual work' does not require…jobs be identical, but…[have] 'substantial equality of skill, effort, responsibility and working conditions'"); Nixon v. State, 96 Md. App. 485, 625 A.2d 404 (1993) (interpreting state definition as same as federal EPA definition); Cohens v. State Dep't of Human Res., 933 F. Supp. 2d 735, 747 (D. Md. 2013) (same); Tolliver v. Children's Home-Chambliss Shelter, 784 F. Supp. 2d 893, 903-904 (E.D. Tenn. 2011) (following federal EPA in burdens of proof); Largent v. State Div. of Health, 192 W. Va. 239, 243 (1994) (describing the state statute as an "'Equal Pay for Equal Work' statute")

which the potential reach of "comparable worth" remains untested.[198] This leaves the door open for courts to interpret law in these eight states in ways that meet the full promise of what their statutory text allows.

The final of these 14 states, Oregon, provides a notable exception. In two separate cases, the Oregon Court of Appeal has held that Oregon's statute goes farther than federal law. In one, the Court noted that "[w]ork of 'comparable character' is broader than 'equal work'" and that "'[c]omparable' does not require equality but that two items have important common characteristics."[199] In the other, the Court highlighted that a "difference between [state and federal equal pay acts] is that the federal act refers to 'equal' work, whereas the state act refers to "comparable" work, which is a more inclusive term."[200]

Lastly, as detailed in Part III.C., below, in 2016, in response to the persistence of the gender pay gap, California and Massachusetts passed amendments to their existing state equal pay laws.[201] These new statutes, which go into effect in 2017 and 2018, offer the greatest potential yet for using antidiscrimination law to redress workforce segregation and stereotyping that contribute to the gender pay gap.[202]

In sum, out of 24 states that use different comparisons for state equal pay laws than "equal work," only seven have indicated that they follow federal precedent under the Equal Pay Act on the threshold question of how closely work must be compared to be actionable. That leaves 13 states whose state equal pay acts could be interpreted to reach a broader comparison,[203] as well as 4 states (Washington, Oregon, California and Massachusetts) whose state laws already do.[204]

III. LAW REFORM EFFORTS

Since the late 1970s, pay equity advocates and legal scholars have worked to improve upon existing law and expand its ability to redress the gender pay gap. To date these efforts have focused primarily on improving pay equity for women; yet the most

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[198] A survey of caselaw conducted Jan. 2017 found no reported cases directly addressing definitions of relevant statutory text in Arkansas, Idaho, Iowa, Maine, Nebraska, North Dakota, Oklahoma, and South Dakota. *But see* Hammer v. Branstad, 463 N.W.2d 86 (Iowa 1990) (holding that Governor's action undoing wage adjustments did not violate comparable worth statute).

[199] Bureau of Labor and Industries v. City of Roseburg, 706 P.2d 956, 958-59, 959 n. 2 (Or. App. 1985) (holding also that because "'substantially similar work' is a stricter test than 'comparable work,'" plaintiff's "[p]roof of a violation of the stricter 'substantially similar' test necessarily proves a violation of [the statute]").

[200] Smith v. Bull Run Sch. Dist., 80 Or. App. 226, 229-230 (1986).

[201] *See infra* Part III.C; Mass. Gen. Law 149 § 105A (effective Jan. 1, 2018); Cal. Labor Code § 1197.5 (effective Jan. 1, 2017).

[202] *See infra* Part III.C; *see also* AAUW, *supra* note _, at 27 (noting that "a handful of states have particularly robust laws governing equal pay" and describing features of laws in California, Maryland, Massachusetts, and Tennessee).

[203] *See supra* notes _ (re: no caselaw on point in Illinois, Louisiana, Michigan, Missouri, and Montana) and _ (re: no caselaw on point in Arkansas, Idaho, Iowa, Maine, Nebraska, North Dakota, Oklahoma, and South Dakota.).

[204] *See supra* notes _ (Washington), _ (Oregon), and _ (Mass and Cal).

far-reaching current efforts have begun to include a focus on racial pay equity as well. This Part provides an overview of past and current efforts to reform equal pay laws at both the federal and state levels, in an effort to overcome occupational segregation and close the pay gap.

A. 1980s Comparable Worth Movement

Recent efforts at the state level to strengthen equal pay laws in response to the stubborn persistence of the gender pay gap and occupational segregation echo an earlier attempt to remedy the problem: the comparable worth movement of the 1980s. In the 1970s, due to the persistence of the gender pay gap despite the existence of Title VII and the Equal Pay Act, and to overcome the challenge of a sex-segregated workforce, pay equity advocates began to argue for the recognition of a theory of "comparable worth."[205] Under comparable worth, "sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal *value* to the employer, though otherwise *dissimilar*."[206] Thus employers would be required to pay equal wages for different jobs that are "comparable in value or worth" but "filled predominantly by women and men respectively."[207] While the concept of comparable worth seemed to go beyond the specific "equal work" statutory language of the EPA, a failure to pay women comparable worth wages could have constituted a violation of Title VII's prohibition on sex discrimination.[208] The concept of comparable worth was buoyed by the head of the EEOC during the Carter Administration, Eleanor Holmes Norton, but later renounced by President Reagan, who called it a "cockamamie idea," and rejected by Reagan's EEOC chair, Clarence Thomas.[209]

In the courts, the potential for comparable worth was shaped by three important cases decided between 1981 and 1985. First, in 1981 in *County of Washington v. Gunther*, the U.S. Supreme Court opened up the possibility of comparable worth arguments by holding that Title VII's prohibitions against sex discrimination in pay could be read more broadly than the Equal Pay Act, thus reviving a pay discrimination complaint filed by female prison guards paid less than their male peers.[210] When Title VII was passed in 1964, it included what was known as the Bennett Amendment, to comport Title VII with the EPA that had been passed the year prior.[211] The Amendment required that each of the affirmative defenses available to an employer under the EPA—

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[205] *See* Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 Harv. L. Rev. 1728 (1986); Nancy Levit & Joan Mahoney, The Future of Comparable Worth Theory, 56 U. Colo. L. Rev. 99 (1984). *Also see generally* Vicki Schultz, Taking Sex Discrimination Seriously, 91 Denv. U. L. Rev. 995 (2015).

[206] AFSCME v. Washington, 770 F.2d 1401, 1404 (9th Cir. 1985) (emphasis added).

[207] *See* Weiler, *supra* note _, at 1728-29.

[208] *See* Levit & Mahoney, *supra* note _, at 100-101.

[209] *See* Weiler, *supra* note _, at 1728-29.

[210] 452 U.S. 161 (1981).

[211] Bennett Amendment, Public Law 88-38 (June 10, 1963); codified as Title VII, § 703(h), 42 U.S.C. 2000e-2(h).

for pay differentials based on a seniority or merit system, a pay system based on "quantity or quality of production," or "any other factor other than sex"—were also defenses to Title VII.[212] In *Gunther*, the Court held that allowing such defenses did not also require a Title VII plaintiff to prove she was performing "equal work," so long as she could create an inference of pay discrimination.[213] Indeed, over a dissent by Justice Rehnquist, the Court majority noted that it was not directly addressing "the controversial concept of 'comparable worth'" in the *Gunther* case, leaving the door open for its further development.[214]

Yet any such hope for other courts to adopt a comparable worth approach failed to materialize on any notable scale in *Gunther*'s wake.[215] Two years later, in *Spaulding v. University of Washington*, the Ninth Circuit rejected a claim brought by University of Washington's School of Nursing faculty that they were underpaid relative to other faculty departments.[216] In doing so, the court held clearly—in accord with similar cases in the Eighth and Tenth Circuits—that plaintiffs could not make out a Title VII disparate impact claim using comparable worth theory.[217] Then, in 1985, the Ninth Circuit dealt comparable worth another blow in *AFSCME v. Washington*, when it held that a class of 15,500 state employees who worked in female-dominated job categories (women composed over 70 percent of the positions) could allege neither disparate impact nor disparate treatment under Title VII using comparable worth.[218] Moreover, the court robustly supported a "market defense," holding that, even where the employer conducted a pay equity study that exposed disparities by gender, setting pay using "prevailing market rates" did not constitute intentional discrimination under Title VII:

> Neither law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job…We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market. While the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so, Title VII does not obligate it to eliminate an economic inequality that it did not create.[219]

Not surprisingly, as a result of the *Spaulding* and *AFSCME* cases, legal scholars noted that the likelihood of achieving comparable worth through the courts was essentially

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[212] 29 U.S.C. § 206(d)(1); 42 U.S.C. 2000e-2(h).

[213] *Gunther*, 452 U.S. at 166.

[214] *Gunther*, 452 U.S. at 166. *But see Gunther*, 452 U.S. 183-84 (Rehnquist, J. dissenting) (arguing that Title VII and the Equal Pay Act explicitly rejected the notion of "comparable worth.")

[215] *See* Judith Olans Brown et al., Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric, 21 Harv. C.R.-C.L. L. Rev. 127 (1986); Norman Vieira, Comparable Worth and the Gunther Case: The New Drive for Equal Pay, 18 U.C. Davis L. Rev. 449 (1985).

[216] 740 F.2d 686, 705-707 (9th Cir. 1983).

[217] Spaulding, 740 F.2d at 705-707.

[218] 770 F.2d 1401 (9th Cir. 1985).

[219] AFSCME, 770 F.2d at 1407

foreclosed, and that advocates should instead turn their focus to legislative change and advances through collective bargaining.[220]

As described previously, at the state level, at least one third of state legislatures enacted state equal pay laws that explicitly go further than "equal work," to include concepts of similarity and comparability.[221] At the federal level, since the late 1980s, the concept of comparable worth all but vanished from the agenda of those seeking to protect against sex discrimination, which instead turned its focus to issues of sexual harassment, promotion and the glass ceiling, family medical leave, and access to opportunities to improve gender workforce integration.[222] Yet, in more recent years, concepts of comparable or similar work have reappeared in legislative proposals to amend the Equal Pay Act—first in the Fair Pay Act of 1994, introduced by Eleanor Holmes Norton, now a D.C. Congressperson,[223] and reappearing in the late 2000s, in early drafts of the more recent Paycheck Fairness Act.[224]

Importantly, most efforts to expand comparisons in equal pay statutes use the term substantially similar or comparable "work," not "worth." Indeed, even in states that adopted a state version of the federal EPA that incorporated the concept of comparability, all but one (Iowa), use the term "comparable work."[225] As Deborah Thompson Eisenberg has noted, this is a key difference: a comparable "work" statute "still require[s] proof of comparable work," meaning "there must be common similarities between the jobs," which is "a factual question about the nature of the work, not a value question about the intrinsic 'worth' of the job."[226] While some legislators have considered and even introduced "comparable worth" amendments to state or federal laws,[227] such efforts have largely been replaced by a more pragmatic, middle-ground approach to go beyond "equal work" that has had some success.

B. Current Federal Reform Efforts

In the wake of the challenges faced by comparable worth advocates in the 1980s, federal law reform efforts on gender equality shifted to focus on other issues in the 1990s and 2000s. For the next two decades, gender equality advocates turned to expanding

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[220] *See, e.g.,* Jean C. Kissane, The Status of Comparable Worth: Spaulding v. Univ. of Washington, 10 Del. J. Corp. L. 119 (1985); Brendan Mangan, Comparable Worth Claims Under Title VII: Does the Evidence Support an Inference of Discriminatory Intent?—American Federation Of State, County, And Municipal Employees v. Washington, 61 Wash. L. Rev. 781 (1986); Tina L. Speiser, The Future of Comparable Worth: Looking in New Directions, 37 Syracuse L. Rev. 1189 (1987).

[221] *See* Part II.C.

[222] *See, e.g.,* add cites.

[223] *See* Rhonda Jennings Blackburn, *Comparable Worth and the Fair Pay Act of 1994*, 84 Ky. L.J. 1277 (1996).

[224] *See* Brake, *supra* note _; Eisenberg, *Shattering, supra* note _

[225] *See supra* notes _ (re: state comparable work laws).

[226] *See* Eisenberg, *Shattering, supra* note _, at 48 (arguing that, while "a powerful political mobilizing force to raise consciousness about pay inequities," a "comparable worth model is not the best approach for a statutory remedy for pay discrimination").

[227] *See* Brake, *supra* note _; Eisenberg, *Shattering, supra* note _ ; Cal. SB 1063 (2015-2016) (as originally drafted).

women's access to higher paid male-dominated fields and jobs, establishing prohibitions on sexual harassment in the workplace, and establishing family and medical leave.[228] After laying dormant while improving female workers' human capital factors took center stage, starting in the mid-2000s, economists and advocates developed a renewed interest in the persistence of the gender pay gap. At the federal level, current reform efforts in the past ten years center on amendments to narrow employers' defenses under the Equal Pay Act and tracking and encouraging employer compliance with its provisions.

1. Amending the Equal Pay Act

Since 2009, some federal legislators have shown a renewed interest in amending the Equal Pay Act through federal legislation.[229] A bill known as the Paycheck Fairness Act ("PFA") has been introduced in several legislative sessions, yet with no success to date.[230] The most recent version of the bill was introduced in the 2015-16 Congress, but stalled in committee.[231]

In its current form, the PFA focuses on three main changes to strengthen existing protections under the Equal Pay Act. First, it would significantly narrow the employer's affirmative defense that a demonstrated pay disparity is due to a "factor other than sex." Under the bill, the defense is narrowed to only "a bona fide factor other than sex, such as education, training, or experience," which is met only upon an employer's ability to demonstrate that the factor "accounts for the differential," is both "job-related" and "consistent with business necessity," and that it is "not based upon or derived from a sex-based differential in compensation."[232] This would be an influential change that significantly limits an employer's EPA defense by holding the employer strictly responsible for unexplained disparate outcomes, importing language from the disparate impact context of Title VII.[233] It places the burden on the employer to justify a pay disparity in a manner that could expose unexamined stereotypes and limit justifications that are correlated with sex or infected with bias—for example, setting pay based on a female employee's prior salary. [234]

Second, the bill would strengthen anti-retaliation protections for employees penalized for discussing or seeking to discover information about firm-wide pay for the purposes of ensuring pay equity.[235] Scholars and advocates have noted the importance of "pay transparency" in exposing the problem of gender pay disparities so that employees

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[228] Add cite.

[229] *See* Brake, *supra* note _, at 889-91.

[230] Paycheck Fairness Act, S. 862, 114th Cong. (2015-16), H.R.1619, 114th Cong. (2015-16); *see* Brake, *supra* note _, at 890-93.

[231] Paycheck Fairness Act, S. 862, 114th Cong. (2015-16), H.R.1619, 114th Cong. (2015-16) status.

[232] *See* Paycheck Fairness Act, *supra* note _.

[233] *See* Brake, *supra* note _, at 890-93.

[234] *See* Brake, *supra* note _, at 890-93.

[235] *See* Paycheck Fairness Act, *supra* note_.

have the information they need to enforce existing law.[236] The PFA's third major provision would also encourage private enforcement by increasing the potential damages available to plaintiffs who sue, to allow possible compensatory and punitive damages not currently available under the Equal Pay Act.[237]

The PFA as currently drafted stands to strengthen the ability of employees to prevail should they bring a lawsuit under the EPA. By strengthening enforcement incentives and limiting employer justifications for pay disparities, the PFA also stands to help redress the portion of the gender pay gap due to stereotyping and discrimination. Of course, it is difficult to pass federal legislation expanding civil rights remedies, and given the fact that Republicans currently control by Congress and the Oval Office, progress at the federal legislative level is a virtual impossibility until 2019 at the earliest, should Congressional majorities change.

More importantly, however, even if the PFA were to pass and become law, its approach does little to redress the challenges posed by steep occupational segregation and the up to one-half of the pay gap it causes.[238] The PFA leaves the requirement of "equal work" entirely untouched, thus doing nothing to expand enforcement for the vast majority of women who cannot point to a virtually identical comparator to meet the threshold prong of proving an EPA violation.[239] Thus while the PFA would help narrow the portion of the gender wage gap caused by discrimination and stereotyping, it misses the key structural problem of workforce segregation.

2. Employer Reporting and Compliance

While legislators work toward amending the EPA, efforts put in place by the executive branch during the Obama Administration may strengthen enforcement of the EPA in its current form and encourage employer compliance. Shortly after taking office in 2009, in addition to making the Lilly Ledbetter Fair Pay Act his first enacted legislation, [240] President Obama established the National Equal Pay Enforcement Task Force to provide policy recommendations on how to close the gender wage gap.[241] As recommended by the Task Force, the administration worked toward requiring larger

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[236] *See, e.g.*, Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 Ariz. State L. J.l 951 (2011); Gowri Ramachandran, *Pay Transparency*, 116 Penn. State L. Rev. 1043 (2012); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, U.C. Irvine L. Rev. 781 (2014).

[237] *See* Paycheck Fairness Act, *supra* note_.

[238] *See supra* notes_-_ (re: half of wage gap).

[239] *See* Paycheck Fairness Act, *supra* note_. The Act does broaden the requirement that comparators work in the "same establishment" to all of the employer's workplaces within a county, which would broaden very slightly the geographic region from which a virtually identical comparator could be drawn. *See* Paycheck Fairness Act, *supra* note_. Earlier versions of the bill considered "comparable work" language, but such efforts have since been abandoned. *See Brake*, *supra* note _; Eisenberg, *Shattering*, *supra* note _.

[240] *See* Brown, *supra* note _.

[241] National Equal Pay Enforcement Task Force, https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf (Last visited Mar. 1, 2017).

employers to provide pay data as part of their reporting requirements under federal law.[242] Under federal law, private employers of 100 or more employees are required to provide certain data about their workforces to the federal government by completing what is known as the EEO-1 form on an annual basis.[243] On February 1, 2016, the EEOC issued a notice of proposed changes to the EEO-1 form to require employers to disclose "aggregate data on pay ranges and hours worked" by their workforce.[244] The rule was finalized in September 2016, with requirements to collect new data going into effect in 2017 and included in the first report due March 31, 2018.[245] The new rule requires private employers with 100 or more employees to report "summary pay data" and "aggregate hours worked data" that report the number of part- and full-time employees in each of 12 salary bands within 10 job categories by sex and race, and the hours worked by all employees in each band.[246] The goal of the enhanced reporting requirements is to facilitate greater pay transparency, both to help enforcement agencies spot trends in pay disparities among industries for targeted enforcement, and to facilitate greater voluntary employer compliance with equal pay laws.[247]

In addition, inspired by the efforts of private company Salesforce.com and its CEO Marc Benioff to equalize pay within the company,[248] the Obama White House launched an initiative to get private employers to sign a pledge to work towards correcting their own pay disparities.[249] Employer signatories to the pledge commit to, among other things, "conducting annual company-wide gender pay analysis across occupations" and "embedding equal pay efforts into broader enterprise-wide equity initiatives."[250] As of the time President Obama left office in December 2016, over 100

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[242] National Equal Pay Task Force, *supra* note _.

[243] *See* U.S. EEOC, "About the EEO-1 Survey," https://www.eeoc.gov/employers/eeo1survey/about.cfm (last visited Mar. 1, 2017); U.S. EEOC, "Filing Procedures," https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm (last visited Mar. 1, 2017);

[244] *See* U.S. Equal Employment Opportunity Commission, *Press Release: EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports* (Jan. 29, 2016); 81 Federal Register, Notices 5113 (Feb. 1, 2016).

[245] Kevin McGowan, *EEOC Finalizes Employer Pay Data Requirement*, Bloomberg Law, BNA Daily Labor Report (Sept. 30, 2016); U.S. EEOC, "Questions and Answers: The Revised EEO-1 and Summary Pay Data," https://www.eeoc.gov/employers/eeo1survey/2017survey-qanda.cfm (last visited Mar. 1, 2017).

[246] *See* Sample Revised EEO-1 Form, http://src.bna.com/i1A (last visited Mar. 1, 2017); McGowan, *supra* note _; U.S. EEOC, *supra* note _.

[247] *See* U.S. EEOC, *Press Release*, *supra* note _; Julie Hirschfeld Davis, *Obama Moves to Expand Rules Aimed at Closing Gender Pay Gap*, N.Y. Times (Jan. 29, 2016).

[248] *See* AAUW, *supra* note _, at 22 (noting that "Salesforce's actions…inspire[ed] the Obama administration to announce the White House's Equal Pay Pledge"); Lauren Weber, *Employers Are Making Pay Equity a Reality*, Wall St. Journal (Sept. 26, 2016).

[249] White House, President Barak Obama, "White House Equal Pay Pledge," https://obamawhitehouse.archives.gov/webform/white-house-equal-pay-pledge (last visited Mar. 1, 2017); White House Office of the Press Secretary, *Fact Sheet: White House Announces New Commitments to the Equal Pay Pledge* (Dec. 6, 2016); AAUW, *supra* note _, at 22.

[250] *See* White House Equal Pay Pledge, *supra* note _; White House Fact Sheet, *supra* note _;

private companies and organizations had agreed to sign the pledge, including eBay, Apple, AT&T, Mastercard, Staples, Dow Chemical, General Motors, and PepsiCo.[251]

While laudable, reporting requirements and voluntary efforts can only go so far to close the gender pay gap. To the extent that these federal reform efforts increase pay transparency and encourage voluntary employer compliance with existing equal pay laws, the net result will, of course, be a positive impact on helping to reduce the gender wage gap, even if only slightly. More interestingly, as discussed in Part IV, below, voluntary employer efforts offer another advantage: the more employers who successfully work to create pay equity among their own ranks, the more examples plaintiffs have to argue that jobs need not be identical in order to compare pay—that it is possible to take a firm-wide view of "equal work."[252]

C. Current State Reform Efforts

State policymakers are also taking an active role in trying to amend and strengthen their own state equal pay protections. In the past two legislative sessions, legislators in nearly half of the states have introduced bills to add to existing state equal pay protections, proposing a variety of ideas and approaches.[253] Two states in particular, Massachusetts and California, have succeeded in enacting the most far-reaching legislation to date that promise to offer new solutions to remedy both gender and racial pay gaps.[254]

1. Massachusetts Law, Effective 2018

In 2016, Massachusetts legislatures enacted amendments to strengthen their state equal pay act that will take effect January 1, 2018.[255] Massachusetts, like the now more than twenty others described previously,[256] already had a state law that went further than the federal EPA, to require equal pay "for work of like or comparable character or work on like or comparable operations."[257] And, like Oregon and Washington, courts had interpreted the state law to go further than the federal EPA.[258] Yet, existing state law did not define "comparable"; as amended, the state equal pay arguably broadens its own required comparisons.[259] Under the revised act, employers will be required to provide equal pay for "comparable work," which it defines as "work that is substantially similar

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[251] *See* White House Fact Sheet, *supra* note _; Weber, *supra* note _.

[252] *See infra* Part IV.A.2.

[253] *See infra* notes _-_.

[254] *See infra* notes _-_.

[255] Mass. Senate Bill No. 2119 (2015-16); Mass. Gen. Law 149 § 105A , effective Jan. 1, 2018

[256] *See supra* Part II.C.

[257] *See* Mark Esposito, *Massachusetts Pay Equity and Its Limits*, 87 B.U.L. Rev. 911, 916-17 (2007).

[258] *See, e.g.*, Mullenix v. Forsyth Dental Infirmary for Children, 965 F.Supp. 120 (D.Mass.1996); Jancey v. School Committee of Everett, 695 N.E.2d 194 (Mass. 1998); *see* Esposito, *supra* note _, at 916-17.

[259] *See* Lisa Stephanian Burton & Douglas T. Schwarz, *Massachusetts Legislature Passes Sweeping Equal Pay Amendments*, National Law Review (July 29, 2016).

in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions."[260]

Moreover, the revised act specifically prohibits an employer from "seek[ing] the wage or salary history of a prospective employee from the prospective employee or a current or former employer,"[261] making it the first state in the nation to do so.[262] Existing state law did not provide for an employer's "factor other than sex defense"—only a defense based on seniority—so no amendment to such a provision was required, as it would be in other states' and federal law.[263] But this unique provision specifically excludes a common such factor that is often infected with sex stereotypes. As such, it could serve as a model for other states seeking to reign in sex-linked "factors other than sex," by clearly prohibiting a particularly troubling defense, without requiring proof from the plaintiff that prior salary information is impermissibly "sex-based."[264]

Moreover, without adding specific protections for race-based unequal pay, this provision could have the effect of equalizing salaries based on race, too, if employers stop entirely the practice of asking all employees about prior salaries.[265]

2. California Law, Effective 2017

California went even further than Massachusetts when, also in 2016, the legislature enacted the nation's most stringent equal pay act to date.[266] Effective January 1, 2017, California's state version of the EPA requires employers to provide equal pay for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[267] The amended law also takes out the "in the same establishment" requirement altogether. Prior versions of the law mirrored the federal requirement for "equal work" on jobs requiring "equal skill, effort, and responsibility…performed under similar working conditions."[268] The amendment makes clear the legislature's intent to broaden the comparison of workers beyond only near-identical jobs.[269] An original draft of the amendment used the term

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[260] Mass. Gen. Law 149 § 105A (effective Jan. 1, 2018).

[261] Mass. Gen. Law 149 § 105A (effective Jan. 1, 2018).

[262] Jena McGregor, *What a New Equal Pay Law in Massachusetts Could Do for Everyone, Not Just Women*, Washington Post (Aug. 4, 2016).

[263] *See* Esposito, *supra* note _, at 916-17.

[264] *Compare* Mass. Gen. Law 149 § 105A (effective Jan. 1, 2018) *to* Cal. SB 1063 (2015-2016); Cal. Labor Code § 1197.5 (effective Jan. 1, 2017) *and* Paycheck Fairness Act, S. 862, 114th Cong. (2015-16), H.R.1619, 114th Cong. (2015-16) (which are not as explicit about excluding prior salary but generally more restrictive on the "any factor other than sex" defense).

[265] *See* McGregor, *supra* note _.

[266] Cal. SB 1063 (2015-2016); Cal. Labor Code § 1197.5 (effective Jan. 1, 2017). *See* Patrick McGreevy and Chris Megerian, *California Now Has One of the Toughest Equal Pay Laws in the Country*, L.A. Times (Oct. 6, 2015).

[267] Cal. Labor Code § 1197.5(a)

[268] Stats. 1937, Ch. 90; Stats. 1972, Ch. 1122; Calif. Senate Comm. on Labor & Indust. Rel., SB 358 Analysis, 2015-2016 Regular Session (Hearing date Apr. 22, 2015) ("California enacted the California Equal Pay Act in 1949 with 'equal pay for equal work' language, similar to the federal Equal Pay Act of 1963.")

[269] *See* Calif. Senate Comm. on Labor & Indust. Rel., *supra* note _.

"comparable work," but was stricken and replaced with "substantially similar," likely as a compromise in response to concerns from the California Chamber of Commerce that "determining 'comparable' work for different job duties can be extremely subjective, leading to different interpretations and…potential…litigation."[270] Legislative analysis of the bill also showed that the legislators were aware that California was lagging behind the thirteen plus states that had gone beyond "equal work" to require equal pay for "work of a substantially similar or comparable character."[271] The goal then was to go further: "to eliminate the gender wage gap by prohibiting pay differentials between men and women for substantially similar work," and to clarify the scope of comparison.[272] As explained in Senate Committee analysis of the bill,

> Existing case law has developed in such a way as to make it unclear whether "equal work" means exactly the same job or substantially similar job.…[Under the act as amended, a] plaintiff…would not have to prove that the jobs were equal in order to be paid the same wages; rather, the plaintiff's burden would be to show that the man and woman should be paid the same wages because, when viewed as a composite of skill, effort, and responsibility, they were performing substantially similar jobs.[273]

Beyond expanding threshold requirements for coverage, the new California law narrows the "factor other than sex" defense in ways similar to those proposed in the federal Paycheck Fairness Act.[274] The employer may defend based on a "bona fide factor other than sex, such as education, training, or experience," and "only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation."[275] In addition, any bona fide factor other than sex must also be "job related" and "consistent with a business necessity," defined by the statute as constituting "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve."[276] Likewise, the statute strengthens anti-retaliation protections for those seeking to enforce the act, and explicitly forbids employer's from "prohibit[ing] an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section."[277] These prohibitions will help root out stereotyping and rationales for setting pay that are infected by sex bias, even if not only "sex based." And, because they have actually been

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[270] *See* Calif. Senate Comm. on Labor & Indust. Rel., *supra* note _. (describing, as of Apr. 25, 2015, "This Bill prohibits an employer from paying any employee at wage rates less than the rates paid to employees of the opposite sex for work of a comparable character on jobs the performance of which requires comparable skills, effort, and responsibility.") (emphasis in original).

[271] *See* Calif. Senate Comm. on Labor & Indust. Rel., *supra* note _.

[272] *See* Calif. Senate Judiciary Comm, SB 358 Analysis, 2015-2016 Regular Session (Hearing date Apr. 25, 2015).

[273] *See* Calif. Senate Judiciary Comm, SB 358 Analysis, 2015-2016 Regular Session (Hearing date Apr. 25, 2015).

[274] *See supra* Part III.B.1.

[275] Cal. Labor Code § 1197.5(a)(1)(D).

[276] Cal. Labor Code § 1197.5(a)(1)(D).

[277] Cal. Labor Code § 1197.5(k)(1).

enacted, they can serve as a model and experiment for similar proposals at the federal level.

Yet perhaps most radically, California's new law is the first in the nation to add "race and ethnicity" as protected groups under the state's equal pay act: while all states include "race" in state versions of Title VII, California's is the first to include it in a state version the Equal Pay Act (which, itself, applies only to sex discrimination in pay). [278] Thus, the statute as amended is the first to require, as a strict liability labor statute, that employers pay equal pay "to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[279] California has provided a model for another legal tool to directly confront the racial pay gap head on—now treating it like the gender pay gap has been treated since the passage of the EPA in 1963.

3. Pending State Legislation

While Massachusetts and California have passed the most wide-reaching new state equal pay laws, many other states are considering legislation to follow suit. In the 2015 legislative session, four other states passed more modest improvements to their state equal wage laws, and over 20 other states proposed legislation that failed to pass.[280] Amendments to the four other states' laws that passed—Connecticut, Delaware, North Dakota, and Oregon—include similar provisions as proposed in other states and nationally like strengthening anti-retaliation protections to support pay transparency (Connecticut and Oregon) and limiting the "factor other than sex" defense (North Dakota).[281] In early 2016, legislation was again introduced in 24 states.[282]

It appears that the issue of equal pay and the inability of existing law to redress the gender pay gap has become a key legislative priority at the state level. Yet, to date, only four states clearly go beyond federal law in their protections for "equal work." With the 2016 election placing a Republican majority in both houses of Congress and the presidency, reform at the federal level is all but an impossibility for the near future. Yet even without widespread legislative change, advances in the law of sex stereotyping under Title VII and examples of employers who are, themselves, instituting comparable work efforts provide an opportunity to reframe and reinterpret existing law.

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[278] Allison Waterfield, *California Forges Ahead with Equal Pay Protections*, BNA, (Oct 26, 2016), https://www.bna.com/california-forges-ahead-b57982079183 (last visited Mar. 1, 2017); Mollie Reilly, *California Expands Equal Pay Law To Include Protections For Race And Ethnicity,*, Huffington Post (Sept. 30, 2016), http://www.huffingtonpost.com/entry/california-equal-pay-race_us_57c07edbe4b085c1ff2937f3 (last visited Mar. 1, 2017).

[279] Cal. Labor Code § 1197.5(b).

[280] AAUW, "2015 State Equal Pay Legislation by the Numbers" (Aug. 20, 2015), http://www.aauw.org/2015/08/20/equal-pay-by-state (last visited Mar. 1, 2017).

[281] AAUW, "2015 State Equal Pay Legislation," *supra* note _.

[282] *See* Lydia DePillis, *Legislators organize blitz of equal-pay legislation in nearly half the states,* Washington Post (Jan. 28, 2016).

IV. REDEFINING EQUAL WORK

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

This Part also seeks to debunk the outdated and inaccurate critique that interpreting the law in a way that can reach the disadvantages caused by labor market forces or workforce segregation is somehow requiring employers to compare and pay equal wages for "apples and oranges."[283] Both broader interpretations of "equal work" under the Equal Pay Act and broader state statutory requirements of equal pay for "substantially similar" or "comparable" work[284] seek, rather, to compare different kinds of apples—red apples and green apples, Golden Delicious apples and Fuji apples. By maintaining a focus on equivalent job criteria and requirements within one employer's business operations, the law can take a reasonable and incremental step forward to account for discrimination and segregation in the labor market rather than throwing up its hands in deference to what employers have done in the past. To make this point, this Part looks to another policy example in which lawmakers successfully acted to correct stereotyping and unexamined bias that obscured an otherwise reasonable comparison in law: the Federal Sentencing Reform Act of 2010, to correct the gross disparity in sentencing for federal drug offenses involving crack versus powder cocaine.

This Part then concludes by considering counterarguments.

A. A New Framework for What Constitutes Equal Work

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

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[283] *See supra* note _ (re; comparing apples and oranges).

[284] Here I refer to comparable "work" not "worth." *See supra* note_ (re Eisenberg's point of difference between comparable work and comparable worth).

1. Advances in Stereotype Theory under Title VII

As described previously, in the 1980s, federal courts were unreceptive to arguments about comparable worth under Title VII. Yet advances in the legal theory of sex stereotyping since then suggest a reconsideration. Notably, the *Spaulding* and *AFSCME* cases were decided by the Ninth Circuit prior to another influential case, the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins.*[285] In *Price Waterhouse*, the Court held that, where highly successful accountant Ann Hopkins was denied a promotion to partnership because she did not conform to a feminine gender stereotype, she could alleged sex discrimination under Title VII.[286] Hopkins was told that, "to improve her chances for partnership," she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[287] This, the Court held, could constitute sex discrimination because, "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[288] In the nearly two decades since the *Price Waterhouse* decision, the sex stereotype theory has grown dramatically in development and application—so much so that, in recent years, it has been applied by some federal courts to prohibit sex discrimination against male caregivers and to hold that discrimination based on transgender status is sex discrimination per se.[289]

The development of the *Price Waterhouse* sex stereotyping theory offers two doctrinal advances that may be applied to strengthen equal pay claims even under existing law. First, for pay discrimination claims alleged under Title VII, courts in stereotyping cases have held that a plaintiff successfully created an inference of discrimination even without being able to point to a direct comparator.[290] For example, when a school psychologist was denied tenure because her supervisors believed the fact that she was a mother of two young children was incompatible with her job, the Second Circuit held that she could create an inference of discrimination even without pointing to a "similarly situated man" that had been treated better.[291] According to the court, the decisionmakers' "stereotypical remarks about the incompatibility of motherhood and employment" was enough for Back to meet her burden of proof: "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive."[292] This was an important holding because of the fact that Back worked in a predominantly female occupation: 85 percent of the school's teachers were women and

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[285] 490 U.S. 228 (1989).

[286] *Price Waterhouse*, 490 U.S. at 228.

[287] *Price Waterhouse*, 490 U.S. at 235.

[288] *Price Waterhouse*, 490 U.S. at 235.

[289] *See* Stephanie Bornstein, *Unifying Antidiscrimination Law through Stereotype Theory*, 20 Lewis & Clark Law Review 919 (2016); Stephanie Bornstein, The *Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 Hastings Law Journal 1297 (2012).

[290] *See* Bornstein, *Unifying*, *supra* note _, at 945-54; Goldberg, *supra* note _.

[291] *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 126 (2d Cir. 2004); Bornstein, *Unifying*, *supra* note _, at 947.

[292] *See* Back, 365 F.3d at 117-122; Bornstein, *Unifying*, *supra* note _, at 947.

71 percent mothers.[293] Federal courts deciding pay discrimination claims alleged under Title VII should hold similarly. If there is evidence that a plaintiff's pay was infected by sex discrimination or sex stereotypes about the plaintiff or the position, to be consistent with post-*Price Waterhouse* line of cases, a plaintiff should be able to successfully create an inference of discrimination under Title VII, even without being able to point to a near identical comparator.

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

In addition, sex stereotype theory as applied in Title VII can and should be used to challenge an employer's defense that a pay differential is based on a "factor other than sex" when that factor is impermissibly tied to sex stereotyping.[294] Certain cases decided under the existing EPA have recognized and applied this approach. For example, a federal court recognized stereotyping and reinstated an EPA claim by a group of mostly female nurse practitioners who were paid less than mostly male physicians' assistants for doing "fungible" and "interchangeable" work, despite the fact that wages were set according to a Veteran's Affairs pay scale that treated the positions differently.[295] Similarly, while prior salaries and "prevailing [labor] market rates" are generally acceptable defenses, several cases have held that, without some additional reason, such as a difficult negotiation and crucial need for recruiting, defending pay disparities based on those reasons or leaving disparities in place after the recruitment may violate the EPA.[296] And, in recent cases, federal courts have held that a male employee's ability to negotiate a higher salary may not constitute a "factor other than sex" given social science data showing that women may be disadvantaged by sex stereotypes around assertiveness and negotiation.[297]

These types of stereotype-associated factors could affect the racial pay gap as well. Interestingly, while a vast literature has documented that, when pay setting involves negotiation, women are disadvantaged,[298] studies also show that, like women,

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[293] *See* Back, 365 F.3d at 122; Bornstein, *Unifying, supra* note _, at 947.

[294] *Also see generally* Brake, *supra* note _; Eisenberg, *Shattering, supra* note _.

[295] *See* Beck-Wilson v. Principi, 441 F.3d 353 (6th Cir. 2006).

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

[297] *See* Thibodeaux-Woody v. Houston Community College, 593 Fed. Appx. 280 (5th Cir. 2014); Dreves v. Hudson Group Retail, 2013 WL 2634429 (D.Vt. 2013)

[298] *See, e.g.*, Linda Babcock & Sara Laschever, Women Don't Ask: The High Cost of Avoiding Negotiation--and Positive Strategies for Change (2007) L.A. Barron, Ask and You Shall Receive? Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary, 56 Human Relations 635 (2003); L.J. Kray, A. Galinsky, and L. Thompson, Reversing the Gender Gap in Negotiations: An Exploration of Stereotype Regeneration, 87 Organizational Behavior and Human Decision Processes 386 (2002); L.J. Kray, L. Thompson, and A. Galinsky, Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations, 80 Journal of Personality and Social Psychology 942 (2001); A.F. Stuhlmacher and A.E.

racial minorities may suffer, too, so that "the context of the job negotiation itself is partly responsible for the salary gap."[299] Researchers in one study attributed this disadvantage to the process of "racial socialization," whereby "Black employees, relative to other racial and ethnic groups, are more likely to be taught at an early age that life is unfair" and taught "the importance of racial identity [to] prepare them for bias that it may provoke."[300] Thus "Black job seekers" are disadvantaged by "misalignment" of perceptions when "negotiating with dissimilar others."[301]

To be consistent with existing precedent under Title VII, if an employer defends an EPA violation by claiming "unequal work" or a "factor other than sex," and that comparison or factor involves sex or racial stereotyping, the factor should, itself, be "evidence of an impermissible, sex- [or race-] based motive"[302]—in the words of the Supreme Court in *Price Waterhouse*, impermissible "disparate treatment of men and women resulting from sex stereotypes."[303]

2. New Models for Potential Comparators

As described previously, perhaps the greatest challenge to overcoming the portion of the pay gap due to workforce segregation is the need to provide a near identical comparator who is paid more for doing "equal work" under Title VII or the EPA.[304] Yet employers in a variety of employment contexts provide examples of the ability to set similar pay for vastly different jobs that require similar background credentials, effort, and responsibility. Employers in the union, federal government, and even private sectors provide examples upon which a plaintiff alleging pay discrimination should be able to draw to meet the legal test of "equal work" under the EPA or a "comparator" under Title VII.

a. Union sector

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

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Walters, Gender Differences in Negotiation Outcome: A MetaAnalysis, 52 Personnel Psychology 653 (1999)

[299] *See* Morela Hernandez and Derek R. Avery, Getting the Short End of the Stick: Racial Bias in Salary Negotiations, MIT Sloan Management Review, (June 15, 2016). (citing, e.g., D.R. Avery, Racial Differences in Perceptions of Starting Salaries: How Failing to Discriminate Can Perpetuate Discrimination, 17 Journal of Business and Psychology 439 (2003); J. Dominitz and C.F. Manski, Perceptions of economic insecurity, 61 Public Opinion Quarterly 261 (1997); M. Gasser, N. Flint & R. Tan, Reward Expectations: The Influence of Race, Gender and Type of Job, 15 Journal of Business and Psychology 321 (2000); M.L. Seidel, J.T. Polzer, and K.L. Stewart, Friends in High Places: The Effects of Social Networks on Discrimination in Salary Negotiations, 45 Administrative Science Quarterly 1 (2000)).

[300] *See* Hernandez and Avery, *supra* note _.

[301] *See* Hernandez and Avery, *supra* note _.

[302] *See* Back, 365 F.3d at 122.

[303] *Price Waterhouse*, 490 U.S. at 235.

[304] *See supra* Parts II.A. & B.

bargaining unit.[305] In addition, having an expectation of equality and a bargaining process brings information about wages and how they are set "into the open," increasing pay transparency as a matter of course in the union context[306]—a key focus of some current pay equity reform efforts.[307]

For example, the American Federation of State, County, and Municipal Employees (AFSCME), the major union representing public sector employees in the United States (and the plaintiff in an early comparable worth case), has identified how to improve pay equity within an organization by seeking a "job evaluation study" of positions within an organization that keeps an eye out for sex segregation.[308] If that proves too burdensome for the employer, AFSCME suggests seeking to enforce any past pay studies conducted by the employer or modifying a similar study from a different "jurisdiction" to fit the needs of a workplace.[309] As AFSCME describes it, a job evaluation study should "compare jobs or job classifications within one employer, not with those of other employers" and should "look[] at job classifications," "the qualifications required to do the job," and "the duties and responsibilities that are assigned to a job," not at "how well or poorly an employee performs these duties" or at "the qualifications that an individual employee who is currently performing a job may have."[310] According to AFSCME, the most common method for evaluating jobs is the "point-factor method," which assigns points to various "compensable factors," including skill ("the experience, training, education and ability required to do a job"), effort ("the physical or mental exertion needed to perform a job"), responsibility ("the extent to which employees are accountable for the work they do"), and the working conditions under which the job is performed.[311] Factors can be weighted and assigned different steps or levels, all of which is converted into a point system; pay is then set by points.[312]

Such a system allows an employer to compare and set the same pay for very different jobs that have the same number of points. For example, in one AFSCME collective bargaining agreement for state workers in Iowa, the pay grade was the same for, among other positions, Accountant 2, Audiologist, Boiler Inspector, and Clinical Dietician.[313] In another for city workers in Detroit, the same pay rate was assigned to

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[305] *See* Institute for Women's Policy Research (IWPR), The Union Advantage for Women, IWPR #R409, The Status of Women in the States: 2015, at 1, 4 (2015).

[306] *See* IWPR, *supra* note _, at 1, 4.

[307] *See supra* notes _ (re: reform efforts on pay transparency).

[308] *See* AFSCME, "What is Pay Equity?," http://www.afscme.org/news/publications/working-for-government/were-worth-it-an-afscme-guide-to-understanding-and-implementing-pay-equity/what-is-pay-equity (last visited Mar. 1, 2017); *see also supra* notes _-_ and accompanying text (describing AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985)).

[309] *See* AFSCME, "What is Pay Equity?," *supra* note _.

[310] *See* AFSCME, "How is a Pay Equity Study Conducted?," http://www.afscme.org/news/publications/working-for-government/were-worth-it-an-afscme-guide-to-understanding-and-implementing-pay-equity/how-is-a-pay-equity-study-conducted (last visited Mar. 1, 2017);

[311] *See* AFSCME, "How is a Pay Equity Study Conducted?," *supra* note _.

[312] *See* AFSCME, "How is a Pay Equity Study Conducted?," *supra* note _.

[313] State of Iowa and Iowa Public Employees Council 61, American Federation of State, County & Municipal Employees (AFSCME), AFL-CIO (2005), at, 107-121,

Electronic Equipment Repair Worker, First Aid Station Nurse, Social Counselor, and Pharmacy Technician.[314] As AFSCME notes, a job evaluation study need not be an additional burden to an employer as "[m]ost mid- and large-sized employers already use a job evaluation system for many human resource functions."[315] While critics may argue that such a point system seems to imply assessments of comparable *worth*, the focus here is still on an objective measure of job duties, skills, and requirements, and not on any general sense of the job's intrinsic "value" to the employer.[316]

As a result of these and other union practices that track and set pay across employees, the gender and racial pay gaps among unionized workers are far smaller than those of the entire U.S. workforce. One study documented that full-time working women who are union members earn, on average, 31 percent more than women whose jobs are not unionized.[317] This translates into a significantly smaller gender pay gap: women who are members of a union earn nearly 88 cents on the dollar to men,[318] which slashes the current average pay gap of all women (80 cents on the dollar) by 40 percent.[319] Another study estimated that unionized women's gender pay gap was half that of non-unionized women.[320]

Unionized employees also see improvement in the racial pay gap: the median weekly pay for unionized Latino workers is about 40 percent higher than those who are not unionized; for African-Americans, about 30 percent higher.[321] For women of color, this translates into a significant narrowing in their pay gap—a gain of between 7 and 14 cent on the dollar, according to one study.[322] Of course, union membership is at an all-time low: in 2016, just 6.4 percent of private sector workers and 10.7 percent of the U.S. workforce overall (including public sector workers) belonged to a union[323]—a massive

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http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2422&context=blscontracts (last visited Mar. 1, 2017).

[314] Detroit, City of and Michigan Council 25, American Federation of State, County & Municipal Employees (AFSMCE), AFL-CIO (1998), at 137-147, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2448&context=blscontracts (last visited Mar. 1, 2016)

[315] *See* AFSCME, "How is a Pay Equity Study Conducted?," *supra* note _.

[316] *Compare* Eisenberg, *supra* note _. (Add discussion of her critique of points systems.)

[317] IWPR, *supra* note _, at 4-5 (citing Janelle Jones, John Schmitt & Nicole Woo, Center for Economic and Policy Research, Women, Working Families, and Unions (June 2014)).

[318] IWPR, *supra* note _, at 4-5 (citing U.S. Bureau of Labor Statistics, "Table 2. Median Weekly Earnings of Full-Time Wage and Salary Workers by Union Affiliation and Selected Characteristics," http://www.bls.gov/news.release/union2.t02.htm (accessed February 1, 2015)).

[319] *See supra* notes _ (re: overall gender pay gap of 80 cents on the dollar; an improvement of 8 cents on the dollar closes the 20 cent gap by 40 percent)

[320] Katherine Gallagher Robbins & Andrea Johnson, National Women's Law Center, Fact Sheet: Union Membership Is Critical for Equal Pay 1 (Feb. 2016) (estimating an 11 cent improvement over the 20 cent wage gap for median weekly wages of unionized to nonunionized women).

[321] *See* IWPR, *supra* note _, at 4-5 (Hispanic women 42.1 percent, men 40.6 percent; Black women 33.6 percent, men 28.5 percent).

[322] Robbins & Johnson, *supra* note _, at 1 (from a 34 cent to 27 cent gap between African American women and white men, 40 cent to 26 cent gap between Latina women and white men).

[323] *See* U.S. Dept. of Labor, Bureau of Labor Statistics, News Release: Union Members—2016 (Jan. 26, 2017), https://www.bls.gov/news.release/pdf/union2.pdf.

decline from the mid-1950s rate of 35 percent.[324] This means that any direct improvement in the pay gaps created by union practices will have a very limited impact on the pay gaps of the U.S. workforce overall. Nevertheless, the ability of unionized employers to take a broader comparative view when setting pay rates provides examples for nonunionized employees challenging existing legal definitions of "equal work" or similarly situated "comparators" in lawsuits alleging unequal pay.

b. Federal government sector

As with the example of some unionized jobs, federal government jobs rely on job classifications that assign points based on job requirements and criteria; the points are then translated into a pay grade. Each job in the federal government is assigned a "General Service" or "GS" grade number between 1 and 15, and within each GS rating there are 10 steps of pay until the job is bumped up to the next group.[325] As the U.S. Office of Personnel Management explains it:

> Agencies establish (classify) the grade of each job based on the level of difficulty, responsibility, and qualifications required. Individuals with a high school diploma and no additional experience typically qualify for GS-2 positions; those with a Bachelor's degree for GS-5 positions; and those with a Master's degree for GS-9 positions.[326]

In 2017, pay for Grade 1 ranged from $18,526 (Step 1) to $23,171 (Step 10); for Grade 15, it ranged from $103,672 (Step 1) to $134,776 (Step 10).[327] This provides another example of a system that allows an employer to compare non-identical jobs and, nevertheless, set pay similarly. For example, a recent search of postings on the federal jobs listing website USAJobs sought applications for a wide variety of positions all paid at the GS-10 level, including Clinical Nurse, Professional Engineer, Psychologist, and IT Specialist.[328]

As with union members, the gender pay gap among federal sector workers is far smaller than those of the entire U.S. workforce. According to one study, in 2012, GS-ranked female workers earned 89 cents to the dollar of all men[329]— similar to the gap for unionized women (88 cents on the dollar),[330] and nearly half the gap for all women (80

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[324] *See* Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year,* N.Y. Times (Jan. 21, 2011).

[325] *See* U.S. Office of Personnel Management (OPM), Pay & Leave, Pay Systems, General Schedule Overview, https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule (last visited Mar. 1, 2017). High-level executive and researcher positions with the government may exceed GS-15 as part of the "Senior Level Service." *See* U.S. Office of Personnel Management, Senior Executive Service, Scientific & Senior Level Positions, https://www.opm.gov/policy-data-oversight/senior-executive-service/scientific-senior-level-positions (last visited Mar. 1, 2017).

[326] *See* OPM, Pay & Leave, *supra* note _.

[327] U.S. Office of Personnel Management, Salary Table 2017-GS, Annual Rates by Grade and Step, Effective January 2017, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/GS.pdf (last visited Mar. 1, 2017).

[328] Original search of USAJobs.com for GS-10 conducted Jan. 2017.

[329] U.S. Office of Personnel Management, Governmentwide Strategy on Advancing Pay Equality in the Federal Government 12 (April 2014) (re: 11 percent gap).

[330] *See supra* notes _ (re: 12 cent pay gap for unionized women).

cents on the dollar).[331] And as with union employers, if the federal government can compare different occupations requiring the same level of qualifications and work duties, private employers can do so, too.

c. *Private sector*

Perhaps the most compelling examples for the argument that private employers can and should be held to broader comparisons of "equal work" under the EPA are those of private employers who have done so themselves. The most notable and successful example is Salesforce.com, the company whose voluntary efforts led to the Obama White House Equal Pay Pledge.[332] Despite being "initially skeptical" of any pay disparity at the company, Salesforce CEO Marc Benioff undertook this effort after two female employees suggested that women were being paid less than men.[333] Starting in August 2015, Salesforce conducted a voluntary audit of its more than 17,000 employees, to, according to the company, "determine if men and women were paid equally for comparable work."[334] To do so, the company "put employees in comparable roles into groups and analyzed salaries of those groups to determine whether there were statistically significant wage differences between women and men."[335] The company "based [its] analysis on objective factors that determine pay, such as job function, level and location," then corrected "unexplained differences," by adjusting salaries for a group of both male and female employees alike.[336]

Because the adjustments were split among men and women, one commentator suggested that one could "assume there's equity increases embedded in that number that impact diverse male employees as well," in a workforce composed of 70 percent men, 30 percent women, only 6 percent of whom were Latino, black, or mixed race.[337] As a result, Salesforce adjusted the salaries of 6 percent of its workforce to achieve gender pay equity, spending almost $3 million to do so[338]—taking a uniquely expensive approach to meet its own commitment.

The Salesforce example shows, not that the law should require affirmative and costly measures, but, instead should recognize that it is entirely possible for private sector employers to make comparisons among and between employees in different occupations that require similar credentials and skills. According to Benioff, "look[ing] at if [the company is] paying men and women the same" is "something every CEO can do today: [w]e all have modern human resource systems."[339] Far from requiring a complicated and unattainable comparison between apples and oranges, the Salesforce examples proves

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[331] *See supra* notes _ (re: 20 cent pay gap for all women).

[332] *See supra* notes _-_ (re: Salesforce started White House Pledge).

[333] Bourree Lam, *One Tech Company Just Erased Its Gender Pay Gap*, The Atlantic (Nov 10, 2015).

[334] Cindy Robbins, "Equality at Salesforce: The Equal Pay Assessment Update," (Mar. 8 2016), https://www.salesforce.com/blog/2016/03/equality-at-salesforce-equal-pay.html (last visited Mar. 1, 2018).

[335] *See* Robbins, *supra* note _.

[336] *See* Robbins, *supra* note _.

[337] Kris Dunn, *The Salesforce Pitch for Equity Equality*, Workforce Magazine (Jan. 21, 2017).

[338] *See* Robbins, *supra* note _.

[339] Claire Zillman, *CEOs to Close the Gender Pay Gap*, Fortune (Jan. 18, 2017).

that comparing occupations is more akin to comparing different types of apples—and entirely possible.

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

B. The Argument for Substantially Similar or Comparable Work

Developments in the law of stereotyping and new examples of employers' efforts provide the opportunity to push pay equity further, even under interpretations of existing federal and state laws requiring "equal work." Yet, as documented previously, almost half of the states now require equal pay for "comparable", "substantially similar," or something else broader than "equal work,"[340] and legislators in many more states may move in that direction in the near future.[341] This provides the opportunity for new case law to interpret a wider range of allowable comparisons in equal pay claims.

Given what we now know about stereotyping and implicit bias, and the continued prevalence of gender workforce segregation, a more modern and reasonable reframing of equal pay law is long overdue. Clearly, Title VII and the EPA have failed to close the gender pay gap, and improvement has been stalled for nearly two decades. Developing tools to overcome this problem is essential. Recognition of the impact of implicit bias and stereotyping on our ability to make comparisons in law has been done before. The chief argument against improving equal pay laws is that employers should not be required to compare apples and oranges. But law is entirely a field of comparisons: lawyers argue cases by applying precedent to their new facts; businesses know how to approach new business settings by analogy to how law applies to existing situations. Where the inability to make such comparisons has been rooted in stereotypes, we have worked to correct the law before.

One example of such a situation is in racially disparate sentencing for drug crimes and the move toward sentencing reform. During the 1980s, in response to a growing concern about a dangerous crack cocaine epidemic, Congress passed the Anti-Drug Abuse Act of 1986.[342] The Act established, for the first time since the 1970s, mandatory minimum sentences for drug offenses involving crack cocaine that set penalties based on amounts of the drug involved.[343] The Act established penalties for crack cocaine that would only be triggered if the drug involved was powder cocaine when 100 times as much powder cocaine was involved, referred to as "setting a 100-to-1 crack-to-powder

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[340] *See supra* Part II.C.

[341] *See supra* Part III.C.

[342] *See* U.S. Sentencing Commission, Report to the Congress: Fair Sentencing Act of 2010, at 6 (Aug. 2015).

[343] *See* U.S. Sentencing Commission, *supra* note _, at 6.

drug quantity ratio."[344] After a decade of enforcement, the racial impact of the disparate sentencing was abundantly clear.[345] In particular, data showed that, as a result of the ADAA, the average sentence for federal drug crimes was nearly 50 percent longer for African Americans than for whites, an increase of 5 times the disparity under prior law.[346]

Beginning in 1995, the U.S. Sentencing Commission began reporting to Congress on the impact of the Act, providing the recommendation that Congress amend the law to reduce the crack to powder quantity ration for sentencing of 1-to1.[347] Between the mid-1990s and 2009, over a dozen bills were introduced in Congress to effect such a change, but none succeeded.[348] In 2010, with a Democratic majority in both houses of Congress and the Presidency, Congress finally passed and enacted the Fair Sentencing Act of 2010, which reduced the ratio to 18-to-1 and eliminated a mandatory minimum sentence that had been instituted for mere possession of crack.[349] While existing law still does not reflect a 1-to-1 ratio, it is by far more comparable.

The example of federal sentencing reform provides a direct counterpoint to the argument that broadening equal pay requirements to more than virtually identical jobs is asking employers to make unreasonable comparisons. The presumption in the ADAA was that, based on racially-charged stereotypes about the difference in threats posed by those using or selling crack as opposed to powder cocaine, the two could not and should not be treated similarly. It took over two decades until, based on data, Congress and the courts stepped in to correct the gross disparity. The realization that crack and powder cocaine were not apples and oranges but, more likely, two kinds of apples, allowed lawmakers to root out racial stereotypes built into existing law and a more clear-headed framework of comparison to prevail. Similarly, it is time to recognize that interpreting Title VII and the EPA to require plaintiffs to demonstrate "virtually identical" jobs or comparators in any claim of unequal pay is an outdated, unfair, and unnecessarily limited vision of antidiscrimination law.

C. Counterarguments and Considerations

Arguments against broadening the reach of equal pay laws mirror skepticism about the existence of gender and racial pay gaps in general. The most common argument against the need to remedy the gender pay gap is that the gap reflects women's own "choices." Women prioritize shorter hours and flexibility to allow for family

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[344] *See* U.S. Sentencing Commission, *supra* note _, at 6.

[345] *See, e.g.,* Kyle Graham, Sorry Seems to Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, And Methamphetamine, 45 U. Rich. L. Rev. 765, 776 (2001); Mena Ghaly, The Fair Sentencing Act of 2010 and Federal Cocaine Sentencing Policy--How Congress Continues to Allow Implicit Racial Animus Towards African Americans to Permeate Federal Cocaine Sentencing, 14 Rutgers Race & L. Rev. 135, 146-47 (2013); LaJuana Davis, Rock, Powder, Sentencing--Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing, 14 J. Gender, Race & Just. 375, 390-91 (2011).

[346] *See* ACLU, Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law 2 (Oct. 2006).(noting that "before the enactment of [the ADAA], the average federal drug sentence for African Americans was 11 percent higher than for whites[; f]our years later, [it] was 49 percent higher").

[347] *See* U.S. Sentencing Commission, *supra* note _, at 6.

[348] *See* Graham, *supra* note _, at 776.

[349] Fair Sentencing Act of 2010, Pub. L. No. 111–220 (Aug. 3, 2010).

caregiving, the argument goes, so they choose to enter lower paid professions that demand fewer hours. This is beyond the province of antidiscrimination law, and employers should not bear the financial burden for women's choices. To the extent occupational segregation is the cause of up to one half of the gender pay gap, women choose to enter female-dominated occupations.

While it may be demographically accurate that women prefer to work fewer hours or seek out flexibility due to family obligations, women do not "choose" the economic disadvantage or professional marginalization that comes with working reduced hours.[350] Were antidiscrimination law to force employers to look closely at comparable work, it is possible that the absolute correlation between high-hours demanding jobs and high pay may start to dissipate. Moreover, taking a comparable work approach does not require pay parity for employees who work fewer hours; instead it seeks to correct underpayment of traditionally female jobs that are performed at the same level for the same hours. While that means it won't completely close the pay gap, it may narrow it.

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

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

A third counterargument is that, while closing pay gaps is a laudable ideal, it is unfair to employers to mandate anything more in law. Where an employer can afford to equalize pay, it will do so voluntarily; forcing employers to do so otherwise is asking the business sector to pay for "societal" discrimination it did not create.

Of course, voluntary efforts are warranted and encouraged, but they are clearly not enough. The gender and racial pay gaps have been stalled for nearly two and four decades respectively; it is long overdue for the law to step in. Moreover, given the decline in union power, only those at the highest end of the income spectrum will benefit when employers choose to correct pay gaps voluntarily. This ignores the greatest potential benefit in closing the gender and racial pay gaps: improvements in income inequality for those at the bottom of the income spectrum.

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[350] *See, e.g.*, Gould, et al., *supra* note _, at 3, 7, 21-22; Joan C. Williams, Jessica Manvell & Stephanie Bornstein, Center for WorkLife Law, U.C. Hastings College of the Law, "*Opt Out" or Pushed Out?: How the Press Covers Work/Family Conflict* (2006).

Certainly, a comparable work approach is not a panacea. It cannot, alone, close the pay gaps. It does not go as far as comparable *worth*, so it can only incrementally improve on the portion of the pay gaps due to occupational segregation. This approach keeps comparisons within the employer and between similarly difficult jobs. It also does nothing to address the half or more of the pay gap that is due to demographic differences between women and men (temporal inflexibility, working hours) and between white workers and workers of color (differing access to education and work experience). Despite all of these caveats, however, it is time that the law move beyond the outdated and myopic view that nothing can be done to improve pay equity unless the jobs in question are virtually identical. Reframing "comparators" and "equal work" in current law and moving toward a standard of "substantially similar" or "comparable work" in state law provides a commonsense and incrementally reasonable approach to push antidiscrimination law to do better to correct an economic injustice.

CONCLUSION

[To be written after revisions.]