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Income Disparity, Gender Equality, and Free Expression

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**THE ROBERT L. LEVINE
DISTINGUISHED LECTURE**

**INCOME DISPARITY, GENDER EQUALITY,
AND FREE EXPRESSION**

*Sylvia A. Law**

INTRODUCTION

In the past half century, our world has experienced a radical change comparable to the Industrial Revolution of the nineteenth century. At least five elements are key: growing disparity of human opportunity, advance of formal human rights and equality, information transformation, economic globalization, and climate change. My focus is on economic disparity and gender equality in the United States. These two issues, huge in and of themselves, interact with the other cataclysmic changes of our time.

I came to law teaching in the early 1970s from civil rights work with poor people. For many years, I taught first-year Torts. Ben Zipursky,¹ organizer of this conference and now a Torts professor himself, was one of many fabulous students. At the end of each semester, I offered some thoughts on the meaning of life in the law:

One fact, more than any other, influences the personal and professional choices facing lawyers and law students today and the collective choices that we face as a society. It is that we live in a world in which there are gross disparities in the distribution of money, political power, and personal opportunity for significant life choices.²

* Professor Emerita, NYU School of Law. I am grateful to many knowledgeable people who shared ideas on this talk and paper. The errors or misjudgments are my own. Thanks to Arthur Garfield Hays Fellows Seminar, Deborah Ellis, Chai Feldblum, Janice Goodman, Helen Hershkoff, Nan Hunter, Evelyn Murphy, and Stephanie Wildman. I am most especially grateful to my magnificent research assistant, Carmen Tellez, NYU Law 2019, and my faculty assistant, Kellene O'Hara. These remarks were delivered in conjunction with the Symposium entitled *Gender Equality and the First Amendment*, hosted by the *Fordham Law Review* on November 1–2, 2018, at Fordham University School of Law. For an overview of the Symposium, see Jeanmarie Fenrich, Benjamin C. Zipursky & Danielle Keats Citron, *Foreword: Gender Equality and the First Amendment*, 87 *FORDHAM L. REV.* 2313 (2019).

1. Benjamin C. Zipursky, James H. Quinn '49 Chair in Legal Ethics, Fordham Law School, and organizer of this Symposium.

2. Sylvia A. Law, *The Messages of Legal Education*, in *LOOKING AT LAW SCHOOL* 155, 155–56 (Stephen Gilles ed., 1977).

I bemoaned the fact that the top fifth of the population receives 40 percent of income, while the bottom fifth only 5 percent.³ While the situation was infinitely worse for those at the bottom, even those who made it to the top were not secure because life is unpredictable.

These disparities were profoundly disturbing in 1973. Today, the years from the end of World War II into the mid-1970s are remembered as a period of economic equality, substantial growth, and broadly shared prosperity.⁴ Incomes grew rapidly and at similar rates across the income ladder, roughly doubling in inflation-adjusted dollars.⁵ The income gap between high-income people and those on the middle and lower rungs did not change much.⁶ In 1973, the average CEO earned 22.3 times as much as the average worker.⁷ By 2013, the average CEO earned 295.9 times as much as the average worker.⁸ During that period, the maximum marginal tax rate on individual income fell from 70 percent to 37 percent.⁹ What happened?

I. GROWING INCOME INEQUALITY

Beginning in the mid-1970s, economic growth slowed and the income gap widened. Income growth for middle- and lower-income households slowed sharply, while incomes at the top grew fast. The concentration of income at the very top rose to unprecedented levels not seen since the Gilded Age of the Roaring Twenties.¹⁰ By 2015, the top 1 percent of households earned one-fifth of the nation's income; wealth inequality is even greater with the top 1 percent owning approximately 38 percent of the nation's wealth.¹¹

Today, the much publicized good news is that, in 2017, the median U.S. household income rose for a third straight year, by 1.8 percent to \$61,372,¹²

3. *Id.* at 156.

4. See CHAD STONE ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, A GUIDE TO STATISTICS ON HISTORICAL TRENDS IN INCOME INEQUALITY 1 (2018).

5. *Id.*

6. See *id.* See generally MARK BLYTH, AUSTERITY: THE HISTORY OF A DANGEROUS IDEA (2013).

7. LAWRENCE MISHEL & ALYSSA DAVIS, ECON. POL'Y INST., CEO PAY CONTINUES TO RISE AS TYPICAL WORKERS ARE PAID LESS 3–7 (2014).

8. *Id.*

9. Robert H. Frank, *How Rising Income Inequality Threatens Access to the Legal System*, 148 DAEDALUS 10, 14 (2019).

10. Michele E. Gilman, *En-Gendering Economic Inequality*, 32 COLUM. J. GENDER & L. 1, 7 (2016).

11. *Id.* at 3. In 2015, the top 1 percent received 17 percent of the nation's income before federal taxes and transfers and 13 percent after. STONE ET AL., *supra* note 4, at 13. The Federal Reserve estimates that in 2016 the top 1 percent of the population owned 38.6 percent of the nation's wealth. Jesse Bricker et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULL., Sept. 2017, at 1, 10 (“The wealth share of the top 1 percent climbed from 36.3 percent in 2013 to 38.6 percent in 2016, slightly surpassing the wealth share of the next highest 9 percent of families combined.”).

12. KAYLA FONTENOT ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017, at 4 (2018).

the highest on record since 1967.¹³ The reassuring news about rising income is distorted in many ways. First, it does not take into account even sharper increases in the costs of basic life essentials, particularly the costs of housing. In the past twenty years, the prices for daily goods—food, housing, transportation, and education—have increased faster than inflation, giving the dollar less buying power.¹⁴ The Consumer Price Index (CPI) maintained by the federal Bureau of Labor Statistics measures the average price change over time of all consumer products purchased in urban areas, where approximately 90 percent of the U.S. population lives.¹⁵ For example, as of July 2018, basic consumer products that would have cost \$20 in 1998 would now cost \$31.¹⁶

Consider the costs of housing. In the twenty-first century, the costs of housing have risen faster than incomes, at over double the speed of wages.¹⁷ Home prices are up 6.1 percent annually, while wages are increasing 2.4 percent a year.¹⁸ Rental cost increases are similar. In 2015, the CPI for rent of a primary residence increased 3.5 percent annually, outpacing the overall index's rates.¹⁹ In 2018, rental costs increased an average of 3.7 percent, while wages for that same time period only rose 2.7 percent.²⁰ The “housing wage” describes the relationship between income and housing costs.²¹ What full-time hourly wage does a person need to earn to rent a modest one-bedroom apartment? Nationally, the 2017 housing wage was \$21.21, which is 2.9 times the federal minimum wage.²² The statistics are even bleaker in

13. *Id.* (“With this adjustment, the 2017 real median household income is not statistically different from the estimates in any year between 1998 and 2001 or 2005 through 2007, but is higher than all other years since 1967.”).

14. *How Does the Current Cost of Living Compare to 20 Years Ago?*, INVESTOPEDIA (Feb. 10, 2019), <http://www.investopedia.com/ask/answers/101314/what-does-current-cost-living-compare-20-years-ago.asp> [<https://perma.cc/9EUA-Q9S3>].

15. Will Kenton, *Consumer Price Index for All Urban Consumers (CPI-U)*, INVESTOPEDIA (Apr. 20, 2018), <https://www.investopedia.com/terms/c/cpiu.asp> [<https://perma.cc/G7VT-8YY7>].

16. *How Does the Current Cost of Living Compare to 20 Years Ago?*, *supra* note 14.

17. *See, e.g.*, Mitchell Hartman, *Home Prices Rise Much Faster Than Wages and Consumer Prices*, MARKETPLACE (Nov. 28, 2017, 6:55 AM), <https://www.marketplace.org/2017/11/28/economy/home-prices-rise-much-faster-wages-and-consumer-prices> [<https://perma.cc/G5Y4-MPTM>].

18. *See id.*; *see also* Press Release, S&P Dow Jones Indices, *The S&P CoreLogic Case-Schiller National Home Price NSA Index Reaches New High as Momentum Continues* (Oct. 31, 2017), <https://www.prnewswire.com/news-releases/the-sp-corelogic-case-schiller-national-home-price-nsa-index-reaches-new-high-as-momentum-continues-300546378.html> [<https://perma.cc/UU5P-M7J8>].

19. Jeffrey Sparshott, *Rising Rents Outpace Wages in Wide Swaths of the U.S.*, WALL ST. J. (July 28, 2015), <https://www.wsj.com/articles/rising-rents-outpace-wages-in-wide-swaths-of-the-u-s-1438117026> [<https://perma.cc/2VZV-YQU4>].

20. Andrea Riquier, *Rents Are Still Growing Much Faster Than Wages, Even as Growth Cools Slightly*, MARKETWATCH (June 13, 2018), <https://www.marketwatch.com/story/rents-are-still-growing-much-faster-than-wages-even-as-growth-cools-slightly-2018-06-12> [<https://perma.cc/ELA2-9UP9>].

21. ANDREW AURAND ET AL., NAT'L LOW INCOME HOUS. COAL., *OUT OF REACH 2017: THE HIGH COST OF HOUSING 1* (2017).

22. *Id.*

localities with low housing stock, rising rent prices, or stagnant wages.²³ While housing in the private market becomes more costly, federal support for housing for low-income people, through Section 8 vouchers²⁴ or public housing,²⁵ has fallen sharply.

Good news about modestly rising income is also misleading because the private costs of education have increased exponentially. In 2016, the average cost of a four-year college education was \$104,480, while the comparable cost for a four-year degree in 1989 was \$26,902 (\$52,892 adjusted for inflation).²⁶ The burden of student loans is now a bigger share of consumer debt than either credit cards or auto loans.²⁷ The quality of primary and secondary education in the United States has fallen, even as a growing global economy makes education more essential.²⁸ Caring parents scramble to educate their children, but most lack the income to supplement inadequate public schools or to relocate to neighborhoods where schools are better. In addition to failing to account for the rising costs of essential services, general data on rising income ignores disparities based on gender, race, and other factors. In 2017, the median annual earnings in the United States for women and men working full-time and year-round were \$41,977 and \$52,146,

23. For example, in San Francisco, a person needs to earn \$179,529 to rent the average available apartment, while in Phoenix the figure is only \$41,057 and in Detroit, \$46,586. Derek Miller, *The Income Needed to Pay Rent in the Largest U.S. Cities—2017 Edition*, SMARTASSET (Sept. 20, 2018), <https://smartasset.com/mortgage/the-income-needed-to-pay-rent-2017-edition> [<https://perma.cc/YLF7-KT7E>].

24. The U.S. Department of Housing and Urban Development (HUD) is authorized to provide housing assistance, including housing choice vouchers, under section 8 of the U.S. Housing Act of 1937. See CONG. RESEARCH SERV., AN OVERVIEW OF THE SECTION 8 HOUSING PROGRAMS: HOUSING CHOICE VOUCHERS AND PROJECT-BASED RENTAL ASSISTANCE 1 (2014). The Trump administration has proposed cuts to HUD's Section 8 programs. See, e.g., DOUGLAS RICE, CTR. ON BUDGET & POL'Y PRIORITIES, CONGRESS SHOULD INCREASE HUD FUNDING IN 2019 TO PREVENT VOUCHER CUTS, HELP CHILDREN ESCAPE POVERTY 2 (2018); Glenn Thrush, *As Affordable Housing Crisis Grows, HUD Sits on the Sidelines*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/us/politics/hud-affordable-housing-crisis.html> [<https://perma.cc/BM37-E6D4>].

25. In the past two decades, the number of public housing units fell by 250,000, while need increased. *Public Housing*, CTR. ON BUDGET & POL'Y PRIORITIES 2 (Nov. 15, 2017), <http://www.cbpp.org/sites/default/files/atoms/files/policybasics-housing.pdf> [<http://perma.cc/BP43-QHAF>].

26. Camilo Maldonado, *Price of College Increasing Almost 8 Times Faster Than Wages*, FORBES (July 24, 2018, 8:23 AM), <https://www.forbes.com/sites/camilomaldonado/2018/07/24/price-of-college-increasing-almost-8-times-faster-than-wages/> [<https://perma.cc/ASPW-MGR2>].

27. *Id.*

28. See Drew DeSilver, *U.S. Students' Academic Achievement Still Lags That of Their Peers in Many Other Countries*, PEW RES. CTR. (Feb. 15, 2017), <http://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science> [<https://perma.cc/3QJ4-9LJ3>]. In 2015, the Programme for International Student Assessment tested fifteen-year-olds in seventy-one developed and developing countries and placed the United States thirty-eighth in math and twenty-fourth in science and literacy. *Id.* Among the thirty-five members of the Organisation for Economic Cooperation and Development, the United States ranked thirtieth in math and ninetieth in science. *Id.*

respectively, a gender pay gap of 20 percent.²⁹ The gap compounds over a lifetime, follows women into retirement, and impacts Social Security and pensions.³⁰

The racial pay gap is even greater than the gender gap. In 2015, black men's average hourly wages were 31 percent lower than all men's.³¹ More disturbingly, except for a brief narrowing in the late 1990s, the racial pay gap between black and white workers has remained stable or increased for nearly forty years.³² In 2017, while median household income for white, non-Hispanic households rose 2.6 percent to \$68,145, it fell 0.2 percent to \$40,258 for African American households.³³

While the Fordham celebration and this paper focus on women, that category includes women of many colors, ethnicities, religions, sexual identities and orientations, classes, nationalities, ages, and more. Each of these categories is consequential and deserves its own careful examination. Use of the category "woman" hides complexity and, more insidiously, could reduce "woman" to white women of relative privilege.³⁴ At the same time, "[c]ognitively, we need simplifying categories, and the unifying category of "woman" helps to organize experience, even at the cost of denying some of it.' Abandoning mental categories completely would leave us . . . terrorized by the sheer weight and particularity of experience."³⁵

II. FEDERAL LAWS PROHIBITING GENDER PAY DISCRIMINATION AND THE REMEDIES TO ENFORCE THEM ARE WEAK

Before examining the detail of the cultural and legal commitment to equal pay for equal work, consider the experiences of two women who eventually won claims for equal pay.

Lilly Ledbetter was a supervisor at a Goodyear tire plant in Alabama for nineteen years, from 1979 to 1998, when she received an anonymous note informing her that her less experienced male colleagues earned a lot more.³⁶ Her pay was initially in line with her coworkers, but by 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy

29. See AM. ASS'N OF UNIV. WOMEN, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP: FALL 2018 EDITION* 7 (2018).

30. *Id.* at 5.

31. VALERIE WILSON & WILLIAM M. RODGERS III, *ECON. POL'Y INST., BLACK-WHITE WAGE GAPS EXPAND WITH RISING WAGE INEQUALITY* 1, 3 (2016).

32. *Id.*

33. *Id.*; see also Katanga Johnson, *U.S. Incomes Rose but Inequality Widened in 2017: Data*, REUTERS (Sept. 12, 2018, 12:03 PM), <https://www.reuters.com/article/us-usa-economy-poverty/u-s-incomes-rose-but-inequality-widened-in-2017-data-idUSKCN1LS2HX> [<https://perma.cc/Y3HU-UQXA>].

34. For a classic statement of the issues, see generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

35. *Id.* at 607 (quoting Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 51 (1988)).

36. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting).

between her and her fifteen male counterparts was stark.³⁷ She was paid \$3727 per month; the lowest-paid male area manager received \$4286 per month, and the highest-paid man in the same position was paid \$5236.³⁸ She sued under federal law, and in 2007, the U.S. Supreme Court in a 5-4 decision held that the 180-day statute of limitations barred her from claiming relief for decades of discrimination.³⁹ Justice Ginsburg, dissenting for four, would have held that the discrimination was ongoing and cumulative.⁴⁰ Congress, following Ginsburg's advice, passed the Lilly Ledbetter Fair Pay Act of 2009.⁴¹ The vote was along party lines, except for five Republican senators, including four Republican women Senators, who supported Ledbetter.⁴² On January 29, 2009, it was the first bill that newly elected President Obama signed into law.⁴³

A second woman, Carrie Gracie, grew up in Scotland, graduated from Oxford University, and began work at the BBC in 1987.⁴⁴ Four years later, she became the BBC World Service's correspondent in China, threw herself into Chinese life, became fluent, married a Chinese musician, and had two children.⁴⁵ In 1997, the BBC promoted her to Beijing bureau chief.⁴⁶ She was the main breadwinner of the family.⁴⁷ When Gracie's daughter developed leukemia, they returned to England for medical care.⁴⁸ Gracie worked at the BBC as an anchorperson and continued to cover China from abroad, producing a Peabody Award-winning documentary on the transformation of a rural community.⁴⁹ In 2013, the BBC offered her the position as chief China editor.⁵⁰ Her children were teenagers settled in England, but she loved the work.⁵¹ She sought and got assurance that her pay would be equal to colleagues in equivalent posts in other parts of the

37. *Id.*

38. *Id.*

39. *Id.* at 621 (majority opinion).

40. *Id.* at 647-50 (Ginsburg, J., dissenting).

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

42. *S. 181 (111th): Lilly Ledbetter Fair Pay Act of 2009*, GOVTRACK, <https://www.govtrack.us/congress/votes/111-2009/s14> [<https://perma.cc/8XKT-76JJ>] (last visited Apr. 10, 2019).

43. Remarks on Signing the Lilly Ledbetter Fair Pay Act of 2009, 1 PUB. PAPERS 22 (Jan. 29, 2009).

44. See Jane Martinson, *Carrie Gracie: Fearless Leader of Battle for Equal Pay at the BBC*, GUARDIAN (Jan. 13, 2018), <https://www.theguardian.com/media/2018/jan/14/carrie-gracie-fearless-leader-of-battle-for-equal-pay-at-bbc> [<https://perma.cc/Y23H-X5BS>]; see also Ben Dowell, *Carrie Gracie Profile: Award-Winning Journalist with Years at World Service*, GUARDIAN (May 12, 2009), <https://www.theguardian.com/media/2009/may/12/carrie-gracie-bbc-news-salary-profile> [<https://perma.cc/867K-4EF5>].

45. Lauren Collins, *How the BBC Women Are Working Toward Equal Pay*, NEW YORKER (July 23, 2018), <https://www.newyorker.com/magazine/2018/07/23/how-the-bbc-women-are-working-toward-equal-pay> [<https://perma.cc/YBQ3-CEDY>].

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

world.⁵² In 2017, the British government required the publicly funded BBC to publish a list of high earners.⁵³ The two male chief foreign editors were on the list.⁵⁴ Gracie and the other woman chief foreign editor were not.⁵⁵ The women earned 50 percent less than their male colleagues.⁵⁶ Gracie protested by saying that she was not asking to be paid more, only to be paid equally.⁵⁷ After months of wrangling, the BBC apologized and paid her back wages, which she donated to the Fawcett Society, a British women's rights organization providing legal advice and strategic support for women seeking equal pay.⁵⁸

Violations of legal and cultural equal pay norms are common. A culture of pay secrecy often makes it impossible to know whether there is a violation. The money matters, especially for the majority who struggle financially. But it is not only about the money. As Carrie Gracie put it, she felt as though her male bosses had a naked picture of her in their office and laughed every time they saw it, saying: "It is the humiliation and shame of feeling that they regarded you as second class."⁵⁹ Pay secrecy is not the only problem. Even with information, there are other obstacles, both substantive and procedural, to redress violations of equal pay norms.

Civil rights advocates have traditionally looked to federal laws and courts to enforce equality norms. This Part briefly examines the federal laws bearing on pay equality and the remedies available to enforce those laws. It finds them seriously deficient. Further, for the foreseeable future, the most that advocates for civil rights and equality can expect from federal courts is adherence to established precedent and enforcement of clearly articulated federal laws. That is not nothing, but more is needed and possible paths forward are explored in Part III.

Since 1963, a year before the historic Civil Rights Act of 1964, the federal Equal Pay Act has made it illegal to pay men and women different wages for equal work.⁶⁰ The core liberal principle of equal pay for women and men who do equal work commands broad public support, even among those who reject feminism and women's liberation.⁶¹ In 1964, Congress prohibited discrimination in voting, public accommodations, education, and

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Amie Tsang, *BBC Apologizes to Carrie Gracie, Former China Editor, over Unequal Pay*, N.Y. TIMES (June 29, 2018), <https://www.nytimes.com/2018/06/29/business/media/bbc-gender-pay-carrie-gracie.html> [<https://perma.cc/XV7W-HA4B>].

59. Collins, *supra* note 45.

60. Equal Pay Act of 1963, Pub. L. No 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2012)).

61. *See Most Americans Support Equal Pay for Men and Women*, RASMUSSEN REP. (Apr. 13, 2018), http://www.rasmussenreports.com/public_content/business/jobs_employment/april_2018/most_americans_support_equal_pay_for_men_and_women [<http://perma.cc/82LW-TURS>] (finding in a nationwide survey that 67 percent of adults support a California law requiring equal pay for men and women for substantially similar work).

employment on the basis of race, color, religion, or national origin, as well as discrimination in employment on the basis of sex.⁶² The 1964 Civil Rights Act was a response to the massive movement for basic civil rights for the African American descendants of those brought to the United States as slaves.⁶³ Title VII is broader than the Equal Pay Act, both in terms of groups covered and forms of discrimination prohibited.⁶⁴

When the Equal Pay Act was adopted in 1963, women earned 59 cents on the male dollar,⁶⁵ and today they earn 80 cents.⁶⁶ But that ratio has been stalled for almost thirty years.⁶⁷ Factors, other than the federal equal pay law, contribute to the reduction of the gender pay gap; most importantly, changes in higher education. Between 1970 and 2010, the proportion of women undergraduates rose from 42 percent to 57 percent, while the proportion of women graduate students grew from 35 percent to 59 percent, and the proportion of women in medicine, law, and business shot up from 9 percent to 47 percent.⁶⁸ Women are now more educated than men, but they still earn less.⁶⁹ Why does the disparity persist? Three factors seem most important. First, work is segregated by gender.⁷⁰ To put it simply, men are more likely to be plumbers and women, nurses and teachers.⁷¹ Traditional

62. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

63. The prohibition on sex discrimination was included at a late stage. People dispute whether it was a segregationist effort to defeat the bill with the “ridiculous” idea that women should be treated equally under the law or an astute move by politically unified feminists. *See, e.g.,* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1014–20 (2015). Schultz documents the standard popular and scholarly story that the addition of “sex” was a conservative Southern effort to defeat the bill and offers an alternative story that the National Women’s Party, and lawyer-activist Pauli Murray, organized to push for a narrow, but important, version of equality for working women. *Id.* The effort was helped by the 1963 publication of Betty Friedan’s best-selling book, *The Feminine Mystique*. *Id.* at 1017.

64. Since 1979, the enforcement of the Equal Pay Act rests with the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing Title VII, as well as the Department of Justice and Department of Labor. *See Civil Rights Center (CRC)*, U.S. DEP’T LAB., <http://www.dol.gov/oasam/programs/crc/about-crc.htm> [<https://perma.cc/KLZ7-8AMR>] (last visited Apr. 10, 2019); *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes> [<https://perma.cc/W889-5DEZ>] (last visited Apr. 10, 2019); *Laws Enforced by the Employment Litigation Section*, U.S. DEP’T JUST., <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> [<https://perma.cc/M5EL-M395>] (last visited Apr. 10, 2019).

65. *About NCPE*, NAT’L COMMISSION ON PAY EQUITY, <https://www.pay-equity.org/about.html> [<https://perma.cc/G7LR-FZBN>] (last visited Apr. 10, 2019).

66. JASMINE TUCKER, NAT’L WOMEN’S LAW CTR., *WOMEN EXPERIENCE A WAGE GAP IN NEARLY EVERY OCCUPATION 1* (2018).

67. AM. ASS’N OF UNIV. WOMEN, *supra* note 29, at 5.

68. *Degrees Conferred by Degree-Granting Institutions, by Level of Degree and Sex of Student: Selected Years, 1869–70 Through 2020–21*, NAT’L CTR. FOR EDUC. STAT., http://nces.ed.gov/programs/digest/d11/tables/dt11_283.asp [<https://perma.cc/UN8B-7M2C>] (last visited Apr. 10, 2019).

69. *See, e.g.,* Jillian Berman, *Millennial Women Are More Educated Than Men, but Are Still Paid Less*, MARKETWATCH (Apr. 11, 2015, 9:05 AM), <https://www.marketwatch.com/story/millennial-women-are-more-educated-than-men-but-are-still-paid-less-2015-04-08> [<https://perma.cc/T5YN-FDY6>].

70. *Id.*

71. *Id.*

male jobs pay more.⁷² Second, women take greater responsibility for childcare and are assumed to be less valuable as workers. This raises complex issues. But, “42 percent of mothers with children under the age of 18 are their families’ primary or sole breadwinners.”⁷³ Assumptions that men deserve more because they are the primary or sole family support no longer describe the way we live. Even women without children experience gender pay disparity.⁷⁴ The third explanation for the gender wage disparity is discrimination, and that has long been illegal.

Substantively, the U.S. federal requirements for gender-based wage equality are weak under both the Civil Rights Act and the Equal Pay Act. Most courts have interpreted both statutes to require a wage comparison between a man and a woman doing near-identical work.⁷⁵ Finding a comparable employee who meets the requirement for “equal work” is further complicated by changes to workplaces resulting from the new economy. “[I]n today’s workplaces, routine duties have become increasingly mechanized or outsourced, with the remaining employees performing varied and discretionary tasks.”⁷⁶ As fewer people perform identical tasks in a particular workplace, it is more difficult to identify an identical male counterpart.

Even if a woman identifies a man in the same establishment who does identical work and is paid more, the federal law allows the employer to show that the pay difference for near-identical work is supported by a “legitimate, nondiscriminatory reason”⁷⁷ or by any “factor other than sex.”⁷⁸ Judicial interpretation of these defenses has given employers wide latitude to “derail equal pay claims by allowing any facially neutral factor to justify paying women less than men for performing equal work.”⁷⁹

In the 1980s, the stubborn persistence of the gender pay gap and the perceived weakness of federal equal pay standards led many feminists, and some unions and states, to advocate a broader concept of pay equity. “Comparable worth” builds on the observation that work in the United States is highly sex-segregated, and the work typically done by women is paid less than work done by men.⁸⁰ Under comparable worth theory, “sex-based wage

72. AM. ASS’N OF UNIV. WOMEN, *supra* note 29, at 14.

73. *Id.* at 6.

74. Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—a Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 400 (2013).

75. Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 609 (2018).

76. Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 474 (2018).

77. Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

78. 29 U.S.C. § 206(d)(4) (2012); *see also* 42 U.S.C. § 2000e-2(h) (2012); Deborah L. Brake, *Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889, 890–91 (2016).

79. Brake, *supra* note 78, at 891.

80. *See, e.g.*, Bornstein, *supra* note 75, at 615–19; Nancy Levit & Joan Mahoney, *The Future of Comparable Worth Theory*, 56 U. COLO. L. REV. 99, 100 (1984). *See generally* Paul

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*.”⁸¹ Employers would be required to pay equal wages for different jobs that are comparable in value but filled predominantly by women and men, respectively. But the question of equal value is obviously complex and deeply gendered.

Advocates of comparable worth claims recognized that the Equal Pay Act was not helpful, so they argued that Title VII’s broader language prohibiting pay discrimination “on the basis of sex” supported such claims. During the Carter administration, the Equal Employment Opportunity Commission (EEOC) Chair, Eleanor Holmes Norton, supported the concept.⁸² Ronald Reagan appointed Clarence Thomas as EEOC Chair and he, of course, rejected the idea.⁸³ Elections matter.

In 1981 in *County of Washington v. Gunther*,⁸⁴ the U.S. Supreme Court, in a 5-4 decision, held that Title VII’s prohibitions against sex discrimination in pay could be read more broadly than those in the Equal Pay Act.⁸⁵ The county paid male prison guards more than female prison guards.⁸⁶ Recognizing that the work demanded was not identical, the county hired consultants to advise it whether the pay disparities were justified by differences in the nature of the work.⁸⁷ The experts recommended that the women guards be paid 90 percent of the male wage.⁸⁸ The county rejected the recommendation and offered the women 70 percent.⁸⁹ The issue before the Court was whether Title VII prohibited a broader range of pay equality claims than that allowed by the Equal Pay Act.⁹⁰ Justice William J. Brennan, writing for the majority, found that “the failure of the county to pay [the female guards] the full evaluated worth of their jobs can be proven to be attributable to intentional sex discrimination.”⁹¹ In his dissent, Justice William Rehnquist protested that the majority opened the door to “comparable worth” claims under Title VII.⁹² Even Brennan, for the majority, denied that it was adopting “the controversial concept of ‘comparable worth.’”⁹³

Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986).

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

82. Weiler, *supra* note 80, at 1728.

83. *Id.* at 1729.

84. 452 U.S. 161 (1981).

85. *Id.* at 178–79.

86. *Id.* at 163–64.

87. *Id.* at 180.

88. *Id.*

89. *Id.* at 181.

90. *Id.* at 168.

91. *Id.* at 181.

92. *Id.* at 183–84 (Rehnquist, J., dissenting).

93. *Id.* at 166 (majority opinion).

The modest promise of *Gunther* was not realized. In a series of cases, public sector unions persuaded states to conduct studies to determine whether men and women were paid equally for work that was comparable in terms of education, training, skill, effort, responsibility, value to employers, and other factors.⁹⁴ When the studies demonstrated that jobs dominated by women systematically paid less than comparable jobs dominated by men, and states refused to make the recommended pay adjustments, women sought relief in federal courts under Title VII.⁹⁵ These claims were rejected.⁹⁶ The courts relied on a “market defense” and held that, even where the employer conducted a pay equity study that exposed disparities by gender, setting pay using “prevailing market rates” did not constitute discrimination under Title VII. Then–Ninth Circuit Judge Anthony Kennedy opined that “[n]either law nor logic deems the free market system a suspect enterprise.”⁹⁷ Seventh Circuit Judge Richard Posner opined that “the issue of comparable worth . . . is not of the sort that judges are well equipped to resolve intelligently or that we should lightly assume has been given to us to resolve by Title VII or the Constitution.”⁹⁸

There are answers to these claims. “Prevailing market rates” developed over centuries in which women and people of color were not recognized as full citizens or people, and were relegated to separate, inferior spheres. Title VII was part of a larger civil rights movement rejecting those assumptions. Judges are paid to do hard work, interpreting and enforcing the law. As conservative Justice John Marshall Harlan wrote in a different context, “Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding.”⁹⁹ Judges are expected to interpret and enforce complex laws. Courts enforce the Sherman Act, even though the statute is far from precise and the factual issues are dauntingly complex. The comparable worth concept, now rejected under federal law, is explored further in Part III.

Procedural obstacles to the enforcement of pay equity norms are even more problematic than the weak substantive federal pay equality rules.¹⁰⁰ Under Rule 56 of the Federal Rules of Civil Procedure, a party to a civil claim is entitled to summary judgment, as a matter of law, if a complaint and answer raise no disputed genuine issue of material fact and the law is clear.¹⁰¹ Since the 1960s, there has been a steady and substantial increase in the rate of case

94. See, e.g., *Am. Fed’n of State, Cty. & Mun. Emps. v. Washington*, 770 F.2d 1401, 1403 (9th Cir. 1985).

95. See generally *Am. Nurses’ Ass’n v. Illinois*, 783 F.2d 716 (7th Cir. 1986); *Am. Fed’n of State, Cty. & Mun. Emps.*, 770 F.2d 1401; *Spaulding v. Univ. of Wash.*, 740 F.2d 686 (9th Cir. 1984).

96. See, e.g., *Am. Nurses’ Ass’n*, 783 F.2d at 730; *Am. Fed’n of State, Cty. & Mun. Emps.*, 770 F.2d at 1408; *Spaulding*, 740 F.2d at 692.

97. *Am. Fed’n of State, Cty. & Mun. Emps.*, 770 F.2d at 1407.

98. *Am. Nurses’ Ass’n*, 783 F.2d at 720.

99. *Rosado v. Wyman*, 397 U.S. 397, 412 (1970).

100. For an excellent overview of these issues, see generally Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump and Constitutional Change*, 34 CONST. COMMENT. 43 (2019).

101. FED. R. CIV. P. 56(a).

termination by summary judgment.¹⁰² Although summary judgment can be granted in favor of either a plaintiff or a defendant, it is granted far more often in favor of defendants, closing the courthouse door on the plaintiff's claims.¹⁰³ Summary judgments are sought in all types of federal cases. But, according to the Federal Judicial Center, summary judgment motions by defendants are far more common in employment discrimination cases than in other cases; 35 percent in employment cases as opposed to 10 percent in contract claims and 11 percent in torts, for example.¹⁰⁴ When defendants are granted motions for summary judgment, plaintiffs are denied the ability to take discovery and to present their claims to a jury.¹⁰⁵ While the growing use of summary judgment to bar plaintiffs' claims is disturbing in many contexts,¹⁰⁶ it has a harshly disproportionate impact on gender equality claims.¹⁰⁷

Similarly, in 2009, the Court made it more difficult to sue in federal court by requiring that plaintiffs demonstrate that their claims are "plausible" rather than simply describing the case in sufficient detail to put the defendant on notice.¹⁰⁸ Whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."¹⁰⁹ If the judge finds the claim to be "implausible," it must be dismissed. In criticizing this decision, many have observed "judicial experience and common sense" has often been deaf, blind, and worse to the experience of women.¹¹⁰

Other seemingly neutral technical "procedural" decisions have made it more difficult for women to challenge discriminatory workplace practices. For example, in 2011, in *Wal-Mart Stores, Inc. v. Dukes*,¹¹¹ the Court, in a 5-4 decision, dramatically restricted the ability to bring antidiscrimination

102. See, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592-93 (2004).

103. *Id.* at 616.

104. Memorandum from Joe Cecil and George Cort to Judge Michael Baylson, Fed. Judicial Ctr. 12 tbl.7 (Aug. 13, 2008), <http://www.uscourts.gov/sites/default/files/sujulrs2.pdf> [<https://perma.cc/Q44U-PML7>].

105. *Id.* at 15-17. Motions are granted in 20 percent of employment cases, 6 percent of contracts cases, and 5 percent of torts claims. *Id.* at 16.

106. For example, under the federal law requiring hospitals to provide treatment to people in emergencies, particularly women in active labor, hospitals typically move for and obtain summary judgment even when the facts are contested. See Nathan S. Richards, Note, *Judicial Resolution of EMTALA Screening Claims at Summary Judgment*, 87 N.Y.U. L. REV. 591, 593 (2012).

107. See, e.g., Hershkoff & Schneider, *supra* note 100, at 101-10.

108. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744 (2016).

109. *Iqbal*, 556 U.S. at 679.

110. See Hershkoff & Schneider, *supra* note 100, at 91; Schultz, *supra* note 63, at 999 ("Advancing workplace equality has meant taking on common sense assumptions about who 'women' are, what they want, and what they should do (while implicitly disputing parallel assumptions about men).").

111. 564 U.S. 338 (2011).

claims as a class.¹¹² Wal-Mart is the largest private employer in the United States, employing more than one million people in over 3000 stores.¹¹³ Plaintiffs presented statistical data showing that women filled 65 percent of the hourly jobs at Wal-Mart but only 33 percent of management positions.¹¹⁴ Affidavits from 121 prospective class members documented explicit gender bias.¹¹⁵ Plaintiffs challenged company-wide policies giving its mostly male managers broad discretion over pay and promotions.¹¹⁶ The trial court certified a proposed class, finding evidence that the gender disparity resulted from subjective the selection process¹¹⁷ combined with a centrally controlled corporate culture and micromanagement that promoted gender stereotypes.¹¹⁸ A panel of the Ninth Circuit, and the Ninth Circuit en banc, affirmed.¹¹⁹

The Court reversed in a 5-4 decision. Justice Antonin Scalia, for the majority, found that a policy of subjective discretion is not a uniform employment practice that provides the necessary commonality for class certification.¹²⁰ Justice Ginsburg dissented, observing that “[t]he risk of discrimination is heightened when . . . managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.”¹²¹ As Michele E. Gilman observes,

[E]xtensive research establishes that subjective, discretionary personnel practices contribute to pay disparities. Despite these modern understandings of discrimination, Justice Scalia was wedded to old-fashioned notions that focus solely on the employer’s state of mind rather than on how unconscious bias interacts with organizational structures to allow unchecked stereotypes to determine employment outcomes.¹²²

For yet another example of how the interpretation of seemingly neutral procedural rules can undermine legislative and popular efforts to enforce long-standing gender and racial pay equity norms and other workers’ rights, consider the question of whether employers can demand that workers forfeit rights to seek collective arbitration or class action remedies for shared grievances. In recent years, employers increasingly demand, as a condition of employment, that employees waive rights to sue for violation of federal or state laws or contract terms and, rather, insist that employees rely on

112. *See id.* at 376 (Ginsburg, J., concurring in part and dissenting in part).

113. *Id.* at 342 (majority opinion).

114. *Id.* at 370 (Ginsburg, J., concurring in part and dissenting in part).

115. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 165 (N.D. Cal. 2004), *rev’d*, 564 U.S. 338 (2011).

116. *Id.* at 141–42.

117. *Id.* at 148–49.

118. *Id.* at 151–54.

119. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 628 (9th Cir. 2010) (en banc), *rev’d*, 564 U.S. 338 (2011).

120. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2001).

121. *Id.* at 373 (Ginsburg, J., concurring in part and dissenting in part).

122. Gilman, *supra* note 10, at 29–30.

individual arbitration.¹²³ “Agreements” to arbitrate conflicts resulting from employment are placed in the small print of a job application, a slip of paper in a paycheck envelope, the employment handbook, or a severance agreement. Mandatory arbitration clauses cover at least thirty million employees.¹²⁴ Such “contracts” often seem inconsistent with basic common-law rules prohibiting agreements so unfair as to be “unconscionable” or contracts of “adhesion” in which a powerful party forces unfair terms on a weaker party.¹²⁵ Further, collective remedies, whether in courts or in arbitration, are often the only effective means to effectuate rights where individual claims are relatively small. If the value of the individual claim is less than the costs of enforcement, claims will be heard only if brought in the aggregate. In *Epic Systems Corp. v. Lewis*,¹²⁶ the Court considered employee claims of “wage theft”—that their employers underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938.¹²⁷ Employers required workers to sign “agreements” waiving their rights to seek collective judicial or arbitral remedies.¹²⁸ Two federal laws speak to the question.¹²⁹ The Federal Arbitration Act of 1925 (FAA) allows disputes related to contract agreements to be settled through arbitration outside the judicial process.¹³⁰ Second, the National Labor Relations Act of 1935 (NLRA) protects employees’ “right to self-organize” and to engage in “concerted activities for the purpose of mutual aid or protection.”¹³¹

Justice Gorsuch, for the majority, held that the FAA expressed a strong “federal policy favoring arbitration” and that the NLRA’s protection of “other concerted activities” did not include class litigation or arbitration.¹³² Justice Ginsburg, for four, protested that the FAA was intended to support the ability of businesses to enter into informed agreements to arbitrate, not this arm-twisting “take-it-or-leave-it” contract.¹³³ Federal labor law protects

123. Nantiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1125.

124. *Id.*

125. *See, e.g.*, U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM’N 2018); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981); *see also* *Klos v. Pulski Linie Lotnicze*, 133 F.3d 164, 168 (2d. Cir.1997) (“A contract of adhesion is a contract formed as a ‘product of gross inequality of bargaining power’ between parties. A court will find adhesion only when the party seeking to rescind the contract establishes that the other party used ‘high pressure tactics,’ or ‘deceptive language,’ or that the contract is unconscionable.” (quoting *Aviall, Inc. v. Ryder Sys. Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996))).

126. 138 S. Ct. 1612 (2018).

127. *Id.* at 1619–20.

128. *Id.*

129. *Id.*

130. Arbitration agreements are valid except “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2012).

131. “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2012).

132. *Epic Sys. Corp.*, 138 S. Ct. at 1621–32.

133. *Id.* at 1636 (Ginsburg, J., dissenting).

collective action and does not countenance such isolation of employees.¹³⁴ Justice Ginsburg observed that “[t]he inevitable result of today’s decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.”¹³⁵ Violations of minimum-wage and overtime laws are widespread, and government agencies rely on private parties to enforce them.¹³⁶ She noted that Congress also relied on private enforcement to assure compliance with federal civil rights laws and suggested that “it would be grossly exorbitant to read the FAA to devastate Title VII . . . and other laws enacted to eliminate, root and branch, class-based employment discrimination.”¹³⁷ It remains unclear how the decision might impact claims of gender and race discrimination otherwise prohibited by Title VII.

As Justice Ginsburg did in her dissent from the majority’s decision to deny Lilly Ledbetter the right to sue for decades of illegal pay discrimination, she called on Congress to act:

[T]he edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their “mutual aid or protection.”¹³⁸

Labor unions,¹³⁹ newspapers,¹⁴⁰ and others¹⁴¹ have taken up the call.

III. SOME PATHS FORWARD TO CLOSING DISCRIMINATORY INCOME GAPS

Since the Civil War, advocates for civil rights and equality have looked first to the federal government for redress. Since the 2016 election, and for the foreseeable future, the most that can be expected of the federal courts is adherence to established precedent and enforcement of rules clearly articulated by Congress. Advocates for civil rights and equality, and those

134. *Id.* at 1633–35.

135. *Id.* at 1646 (citing J. R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protections*, 80 BROOK. L. REV. 1309 (2015)).

136. *Id.* at 1647 (“[The] Department of Labor investigates fewer than 1 percent of FLSA-covered employers each year.” (citing J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1150–51 (2012)).

137. *Id.* at 1648.

138. *Id.* at 1648–49.

139. Daniel Hemel, *The Arbitration Fight Isn’t Over*, SLATE (May 22, 2018, 3:30 PM), <https://slate.com/news-and-politics/2018/05/the-epic-systems-v-lewis-mandatory-arbitration-ruling-was-awful-heres-how-states-can-counteract-it.html> [https://perma.cc/59XN-S3KY].

140. *See, e.g.*, Editorial, *After Supreme Court Decision, Congress Must Preserve Workers’ Right to Sue*, L.A. TIMES (May 22, 2018, 5:00 AM), <https://www.latimes.com/opinion/editorials/la-ed-supreme-court-workplace-lawsuit-labor-20180521-story.html> [https://perma.cc/U4JS-F3JN].

141. The Restoring Justice for Workers Act would do just that. *See generally* Restoring Justice for Workers Act, S. 3615, 115th Cong. (as introduced in Senate, Nov. 14, 2018).

who teach them, need to learn dramatic new ways of thinking and action, including organizing, state and local lawmaking, and leadership by progressive private enterprises. This Part suggests paths forward, relying on transparency and collective action on individual, workplace, community, local, and state levels. Recognizing that the United States has lagged far behind other developed countries in addressing discriminatory economic disparity, this Part looks to other models to identify what is feasible and the large positive impact of greater economic equality on overall productivity and well-being. The information revolution, while creating huge challenges, facilitates transparency and collective action at every level from the personal to the global.

Every story of a successful challenge to the gender wage gap begins with a woman discovering that she is earning less than a male colleague who does similar, or less demanding, work. There is a strong social norm against discussing wages.¹⁴² A common explanation is that it is a matter of etiquette.¹⁴³ Disclosing high pay can be seen as bragging, while disclosing low pay may feel embarrassing, as though it is revealing something about one's worth.¹⁴⁴ Pay secrecy may be an aspect of America's social and cultural values regarding privacy.¹⁴⁵ While it seems plain that there has been a social taboo against revealing wages and wealth, the reasons for it are far from obvious. Further, it seems that younger generations are less likely to share the norm against discussing wages,¹⁴⁶ in part because the internet accustoms people to sharing large swaths of data.¹⁴⁷

Far more important than uncertain and perhaps changing social norms, workers do not discuss their pay because they believe that they are prohibited

142. See, e.g., Nadira A. Hira, *Your Salary: Don't Ask, Don't Tell?*, FORTUNE (Apr. 30, 2008), <http://fortune.com/2008/04/30/your-salary-dont-ask-dont-tell> [<https://perma.cc/AL93-DWD2>]; Jena McGregor, *Why Is It Still So Taboo to Talk About What We Make?*, WASH. POST (May 5, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/05/05/why-is-it-still-so-taboo-to-talk-about-what-we-make/> [<https://perma.cc/5RPL-U9BD>]; Lisa Roolant, *How People from Different Countries Feel About Discussing Salary*, BUS. INSIDER (Mar. 11, 2014, 10:48 AM), <https://www.businessinsider.com/discussing-salary-around-the-world-2014-3> [<https://perma.cc/X92U-7YRR>].

143. Sarah Lyons, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. SOC. PROBS. 361, 381 (2013) (referring to Professor Ed Lawler describing this as a middle-class phenomenon).

144. *Id.*; Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1068 (2012).

145. Adrienne Colella et al., *Exposing Pay Secrecy*, 32 ACAD. MGMT. REV. 55, 62 (2007); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 797 (2014).

146. Chris Weller, *Millennials Are Breaking the One Big Salary Taboo—and It's Changing How Companies Operate*, BUS. INSIDER (Oct. 25, 2017, 2:19 PM), <https://www.businessinsider.com/salary-not-taboo-for-millennials-changing-how-businesses-work-2017-10> [<https://perma.cc/JE88-5TDG>]; cf. Arianna Davis, *The Real Reasons Millennial Women Don't Talk About Their Salaries*, REFINERY29 (Apr. 10, 2018, 6:00 AM), <https://www.refinery29.com/2018/04/195951/real-women-salary-secrecy-competition> [<https://perma.cc/CFM8-ZLSZ>].

147. Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 958 & n.24 (2011).

from doing so. In the private sector in 2010, 62 percent of women and 60 percent of men reported that their employer discouraged or prohibited the sharing of wage information and that the violation can lead to punishment.¹⁴⁸ In the public sector, only 18 percent of women and 11 percent of men report that discussion of wage or salary information is discouraged or prohibited.¹⁴⁹

Informed academics and practitioners assert that the NLRA protects the right of covered workers to share information about wages and salary.¹⁵⁰ How do we understand the disparity between the federal legal rule protecting workers' right to share pay information and the widely held belief that one might get fired for doing so? While forbidding employee discussion about pay may be illegal under the NLRA,¹⁵¹ this law is rarely enforced, the penalties are de minimis, most workers do not know that the law might offer protection, and they have no capacity to enforce whatever rights they might have.¹⁵²

Individual sharing of information and experience is a key first step, both daunting and insufficient. Aggregated, transparent information is also essential. In signing the Lilly Ledbetter Fair Pay Act of 2009, the Obama administration recognized that the statute of limitations was only one small piece of the answer to the multiple problems of discriminatory pay.¹⁵³ The administration, after notice and comment, issued regulations requiring employees with at least 100 workers to include aggregate, anonymous information about pay for categories of employees on forms they already submit with information on sex, race, and ethnicity.¹⁵⁴ The Obama regulations were very limited and only allowed access to researchers and EEOC enforcers. In 2017, before the regulations went into effect, the Trump administration suspended them without notice or comment.¹⁵⁵

Congress has considered very modest proposals to address these issues. The Paycheck Fairness Act, considered between 2013 and 2017, would have prohibited employer retaliation against employee discussion of wages and require the EEOC to collect compensation and employment data disaggregated by sex, race, and national origin, available for research and

148. INST. FOR WOMEN'S POL'Y RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION 1 fig.1 (2014).

149. *Id.*

150. See, e.g., Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 392 (2011).

151. Employees who share information about salaries with coworkers are engaged in "concerted activities for . . . mutual aid or protection." 29 U.S.C. § 157 (2012).

152. Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 45–47 (2005); Estlund, *supra* note 150, at 388–89.

153. Remarks on Signing the Lilly Ledbetter Fair Pay Act of 2009, 1 PUB. PAPERS 22 (Jan. 29, 2009).

154. Bornstein, *supra* note 75, at 621–22; Kulow, *supra* note 74, at 418.

155. *What You Should Know: Statement of Acting Chair Victoria A. Lipnic About OMB Decision on EEO-1 Pay Data Collection*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/newsroom/wysk/eo1-pay-data.cfm> [<http://perma.cc/SG9K-Z6P3>] (last visited Apr. 10, 2019).

federal enforcement purposes but not to the public or individual workers.¹⁵⁶ The proposed law was rejected by party-line votes.¹⁵⁷

Information about wages is available for a large segment of workers, including unionized workers, federal employees, state workers in a number of states, and workers in some private enterprises.¹⁵⁸ The evidence, while complex and imperfect, shows that wage transparency reduces wage disparity.¹⁵⁹ For example, a large study by the U.S. General Accountability Office published in 2009 showed that, between 1988 and 2017, under a regime of wage transparency, the wage gap in the federal workforce diminished from 28 cents to 11 cents on the dollar.¹⁶⁰ While factors other than wage transparency may explain part of the change, overall, the gender-wage disparity is narrower in workplaces where wage information is readily available.¹⁶¹

With the transformation of the federal courts, activists for civil rights and equality—and the law schools that train them—need to become more adept at seeking change at the state and local level. Even in an era when Congress and the federal courts took primary responsibility for promoting civil rights and equality, state law often provided concrete remedies and models for federal change.¹⁶² Consider two well-known examples: abortion funding and LGBTQ equality. First, with respect to abortion funding, in 1980, the Court upheld the Hyde Amendment, which excludes payment for abortion from the otherwise comprehensive Medicaid program, which finances healthcare for millions of low-income women.¹⁶³ At the federal level, that discriminatory rule has been extended to millions of others, including federal employees, military personnel, federal prisoners, and residents of the District of Columbia, and remains federal law today.¹⁶⁴ Nonetheless, a majority of U.S. women now live in states in which Medicaid covers abortion with state

156. Kulow, *supra* note 74, at 420–23.

157. *Id.*

158. *Id.* at 422–27.

159. *Id.*

160. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-279, WOMEN'S PAY: GENDER PAY GAP IN THE FEDERAL WORKFORCE NARROWS AS DIFFERENCES IN OCCUPATION, EDUCATION, AND EXPERIENCE DIMINISH 11 (2009).

161. See, e.g., Morten Bennedsen et al., *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them*, HARV. BUS. REV. (Jan. 23, 2019), <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them> [<https://perma.cc/R26G-4VYJ>].

162. State constitutions and courts are often more protective of civil rights and equality, but they are also often ignored. See generally STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS (10th ed. 1993); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Susan Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057 (1989); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

163. See generally *Harris v. McRae*, 448 U.S. 297 (1980).

164. For discussion, see Rhonda Copelon & Sylvia A. Law, *Nearly Allied to Her Right "to Be"—Medicaid Funding for Abortion: The Story of Harris v. McRae*, in WOMEN AND THE LAW STORIES 207 (Elizabeth Schneider & Stephanie Wildman eds., 2011).

funds.¹⁶⁵ While some states did that through legislative action, in others, state courts held that funding discrimination was prohibited by state constitutions.¹⁶⁶

LGBTQ equality provides a second example. In 1986, the Court in *Bowers v. Hardwick*¹⁶⁷ held that nothing in the federal constitution prevented Georgia from criminally prosecuting adults who engaged in private, consensual sexual activity with a person of the same sex.¹⁶⁸ Over the next decades, enormous popular movement persuaded localities, states, private enterprises, and state courts interpreting state constitutions to reject discrimination against LGBTQ people, including discriminatory exclusion from marriage.¹⁶⁹ The Court overruled *Bowers* in 2003¹⁷⁰ and, in 2015, recognized that denying same-sex couples the right to marry violates the federal constitution.¹⁷¹ The state-level struggles for equality for poor women seeking abortions and for liberty and equality for LGBTQ people provide models for fights for gender pay equality.

States, cities, unions, and private employers are now considering new approaches to address the gender pay gap: prohibitions on employer questions about prior salaries, more effective prohibitions on punishment for worker pay disclosure, broader promotion of pay transparency, and an invigorated form of comparable worth.¹⁷²

Gender pay equity proponents argue that, given the substantial evidence of the persistent gender pay gap, employers should not be allowed to ask job applicants about prior salaries and that to do so violates the existing Equal Pay Act.¹⁷³ In 2000, the EEOC instructed that reliance on salary history does not, by itself, legally justify paying women less.¹⁷⁴ Several federal courts, including the Ninth Circuit, have rejected employers' argument that basing pay on salary history alone is a neutral "factor other than sex" justifying paying women less and is lawful under the Equal Pay Act.¹⁷⁵ Other federal courts have disagreed and the Court recently remanded the Ninth Circuit case

165. See *State Funding of Abortions Under Medicaid*, HENRY J. KAISER FAM. FOUND. (Nov. 16, 2018), <https://www.kff.org/medicaid/state-indicator/abortion-under-medicaid/> [<https://perma.cc/6XVL-EBPQ>].

166. See *id.*

167. 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 538 U.S. 558 (2003).

168. *Id.* at 189.

169. For a discussion of these developments, see Michael D. Sant'Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705 (2011).

170. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

171. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

172. See, e.g., Amanda Novello, *States Are the New Proving Ground for Equal Pay Policies*, CENTURY FOUND. (Oct. 24, 2018), <https://tcf.org/content/commentary/states-new-proving-ground-equal-pay-policies> [<https://perma.cc/A66Q-KB7B>].

173. See generally NAT'L WOMEN'S LAW CTR., *ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB* (2018).

174. EQUAL EMP'T OPPORTUNITY COMM'N, *COMPLIANCE MANUAL § 10-IV(F)(2)(g)* (2000), <https://www.eeoc.gov/policy/docs/compensation.html#g.%20Market%20Factors> [<https://perma.cc/4ZDQ-6J8H>].

175. See, e.g., *Rizo v. Yovino*, 887 F.3d 453, 457 (9th Cir. 2018), *vacated*, No. 18-272 (U.S. Feb. 25, 2019) (per curiam).

because it held that a circuit judge who died before the en banc decision was filed could not be counted in the en banc majority.¹⁷⁶ Whatever the outcome under federal law, the issue is being debated in states and localities. In 2016, Massachusetts became the first state to prohibit employers from seeking salary history from job applicants, and other states, and counties across the country have followed suit.¹⁷⁷

As a second approach, some states and cities have adopted laws protecting wage-disclosing employees from retaliation that are much stronger than the ambiguous federal rule.¹⁷⁸

Third, Minnesota, Massachusetts, several Canadian provinces, and several European countries have required various forms of wage transparency.¹⁷⁹ After the Massachusetts law went into effect in July 2018, Elizabeth Rowe, a principal flutist of the Boston Symphony Orchestra, filed suit, complaining that she earned \$70,000 a year less than her colleague, principal oboist John Ferrillo.¹⁸⁰ Ferrillo supported her claim.¹⁸¹ Rowe and the Boston Symphony Orchestra settled in February 2019, but court documents did not provide the terms of the settlement.¹⁸²

Finally, comparable pay is another potential response, now rejected at the federal level. In response to the comparable worth movement of the 1980s, many states adopted laws requiring that men and women be paid equally for comparable work.¹⁸³ But state courts often interpreted these statutes as requiring no more than the federal Equal Pay Act.¹⁸⁴ Since the Trump election, legislators in forty states have considered proposals to strengthen state protections to promote equal pay for comparable worth.¹⁸⁵ Stephanie Bornstein identifies three state laws in California, Massachusetts, and Oregon as offering the strongest protections to remedy both gender and racial pay gaps.¹⁸⁶ These laws are just now going into effect, and it is too soon to know whether they will be promote equal pay for comparable worth.

176. *Yovino v. Rizo*, No. 18-272, slip op. at 5 (U.S. Feb. 25, 2019) (per curiam).

177. See generally NAT'L WOMEN'S LAW CTR., *supra* note 173.

178. See, e.g., AM. ASS'N OF UNIV. WOMEN, *supra* note 29, at 20; Kulow, *supra* note 74, at 423–24.

179. Kulow, *supra* note 74, at 424; see also Alison Omens, *Equal Pay for Women: Why the U.S. Needs to Catch Up on Data Disclosure and Transparency*, FORBES (Apr. 10, 2018, 10:30 AM), <https://www.forbes.com/sites/justcapital/2018/04/10/equal-pay-for-women-why-the-u-s-needs-to-catch-up-on-data-disclosure-and-transparency/> [https://perma.cc/T87Y-NHPQ].

180. Geoff Edgers, *A Boston Symphony Orchestra Flutist Was Paid \$70,000 Less Than a Male Counterpart. She Sued*, BOSTON.COM (Dec. 11, 2018), <https://www.boston.com/news/local-news/2018/12/11/boston-symphony-orchestra-flutist-elizabeth-rowe-lawsuit> [https://perma.cc/W5YJ-8XJM].

181. *Id.*

182. Malcolm Gay, *BSO Flutist Settles Equal-Pay Lawsuit with Orchestra*, BOS. GLOBE (Feb. 14, 2019), <https://www.bostonglobe.com/arts/music/2019/02/14/bso-flutist-settles-equal-pay-lawsuit-with-orchestra/0iRyJCdjtU1BLWCAoqfQDL/story.html> [https://perma.cc/UG2G-UBPT].

183. Bornstein, *supra* note 75, at 610–15.

184. *Id.* Iowa is a notable exception. *Id.* at 611–12.

185. *Id.* at 629.

186. *Id.* at 623.

The fourth, and perhaps the most likely to be most effective, response to the gender pay disparity gap is not commanded by federal or state law but rather voluntarily undertaken by unions and employers. It is recognizing the value of paying people on the basis of performance and contribution and acknowledging our common, often unconscious, history of racial and gender discrimination. Unions have long conducted comparable pay studies and have sometimes persuaded employers to implement them.¹⁸⁷ Similarly, some companies and private organizations have undertaken comparable worth studies and adjusted pay accordingly.¹⁸⁸

In 2016, the Obama administration announced a White House “Equal Pay Pledge” for private sector companies committed to equal pay for their employees. These companies committed to conducting annual gender pay analyses across occupations, reviewing hiring and promotion processes and procedures to reduce unconscious bias and structural barriers, and embedding equal pay efforts into broader company initiatives.¹⁸⁹ Simmons College now hosts the Employers for Pay Equity Consortium. As of September 2018, more than thirty-five companies had joined the consortium, including Delta Airlines, Deloitte, Facebook, Gap Inc., General Motors, Johnson & Johnson, Microsoft, PepsiCo, and Staples.¹⁹⁰ The information revolution of the twenty-first century allows workers to aggregate information online to develop metrics of corporate responsibility, including wage fairness, and to disseminate them broadly.¹⁹¹

We need a popular movement against wage inequality. Popular movements often begin with individuals sharing experiences that were previously secret. Think, for example, of the #MeToo and Time’s Up movements; advocacy for reproductive justice, LGBTQ rights, and marriage equality; and feminist and antiracism activism more generally. Sharing individual experience is essential, but not alone sufficient for change. Second, we then need systematic, aggregated, accessible information to understand the nature and depth of the wage gap problems, both for women and other historically disfavored groups. Third, we need stronger substantive norms and remedies to enforce them. As a practical matter, these need to be created by state and local governments, unions, and enlightened private organizations. Global information allows us to learn from the examples of others.

CONCLUSION

In closing, I want to share more stories particularly relevant to the celebration of 100 years of women at Fordham Law School. In May 2018,

187. JANELLE JONES ET AL., *WOMEN, WORKING FAMILIES, AND UNIONS* 14–17 (2014).

188. Bornstein, *supra* note 75, at 622–24.

189. AM. ASS’N OF UNIV. WOMEN, *supra* note 29, at 20.

190. *Id.*

191. See, e.g., GLASSDOOR, <http://www.glassdoor.com/index.htm> [<https://perma.cc/MP57-HYNR>] (last visited Apr. 10, 2019); JUST CAP., <http://justcapital.com> [<http://perma.cc/SF7D-4BB4>] (last visited Apr. 10, 2019).

the University of Denver agreed to pay \$2.66 million to compensate the women faculty of the Sturm College of Law for the gap between their pay and that of male colleagues doing equal work since 1973.¹⁹² The Law School has a “boldly progressive reputation”¹⁹³ and has long been home to leading feminist scholars.¹⁹⁴ The Law School agreed to a six-year monitoring plan.¹⁹⁵ A highly reliable source told me of another recent, similarly dramatic settlement at a second U.S. law school. It included a confidentiality agreement prohibiting those involved from discussing the case, and so I am not able to share the details. While it is impossible to know, I believe that the pattern revealed in these two schools is the norm, not the exception, in private law schools.

My hope is that, in this conference, we can make change by talking with one another and our male colleagues, demanding transparency in our own institutions, and, if problems are revealed, achieving change. More importantly, legal scholars and educators have a special ability, and perhaps responsibility, to take on the challenge of addressing the issues of illegal and unjust gender and race wage disparities in less rarified workplaces, where the money matters even more to those on the short end of the stick. Finally, and most ambitiously, my dream is that by focusing on these issues in the relatively simple context of gender pay disparity, we can begin to address the larger issues of the vast and growing disparity of income, wealth, and opportunity in the United States.

192. Joey Bunch, *Denver Law School Pays Up Big-Time over Gender Pay Disparity*, GAZETTE (Sept. 22, 2018), https://gazette.com/education/denver-law-school-pays-up-big-time-over-gender-pay/article_2d7cbbda-bb6a-11e8-8ebd-8f391b97fafb.html [<https://perma.cc/M36F-LQ26>].

193. *Id.* One plaintiff in the claim is Professor Joyce Sterling, an expert in gender pay inequities, who taught at the University of Denver for forty-one years. Kirk Mitchell, *University of Denver Will Pay \$2.7 Million to Settle Unequal-Pay Lawsuit Brought by Female Law Professors*, DENV. POST (May 17, 2018, 10:07 PM), <https://www.denverpost.com/2018/05/17/university-of-denver-unequal-pay-lawsuit-settlement> [<https://perma.cc/YWY9-ZB7R>].

194. Michael Roberts, *DU Won't Apologize for Underpaying Female Law Profs, but It Will Pay Millions*, WESTWORD (May 18, 2018, 5:08 AM), <https://www.westword.com/news/university-of-denver-pays-266-over-female-law-professor-discrimination-10326915> [<https://perma.cc/2A8P-ZZYT>].

195. *Id.*