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Pay Transparency

Gowri Ramachandran*

ABSTRACT

Pay discrimination, like many forms of discrimination, is a particularly stubborn problem. In many instances, just as with other forms of discrimination, it is unrealistic to allocate all the blame and burden on a single actor, whether it be an employer or employee. Thus, the traditional civil rights regime in which an individual actor is held liable for the discrimination does a poor job of dealing with this problem. I propose an intervention—pay transparency—that would help prevent, root out, and correct the discrimination in the first place, instead of relying on after the fact blame and liability.

Pay transparency—the ability for employees to find out what other employees in their workplace make—is rare outside of public employment, and cultural norms against talking about one’s income may make the concept anxiety-producing to some readers. Yet, unlike many other approaches to reducing seemingly “blameless” discrimination, such as targeting unconscious discrimination, or potentially counterproductive debiasing efforts, incentivizing pay transparency can fit very comfortably within our legal framework. By turning pay transparency into an affirmative defense to pay discrimination claims, this preventive measure can be woven neatly into our current approach to civil rights enforcement and notions of individual responsibility.

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I. INTRODUCTION

Have you ever wondered how much money your coworker is making? Did you assume you were paid the same because you had the same job? Did you guess she was paid less because she was a slacker? Or more because her dad was friends with the boss? If you have wondered, you are like most workers in the United States, who believe asking someone how much money he makes is impertinent and whose employers keep salaries secret.¹ What would happen if you no longer had to wonder, and instead you could look up your officemate’s salary on a company website? You might think this would be unnerving, as she could look up your salary too. On the other hand, especially if you work

1. INSTITUTE FOR WOMEN’S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION 1 (2011) (“Nearly half of all workers nationally are either contractually forbidden or strongly discouraged from discussing their pay with their colleagues, according to results from the IWPR/Rockefeller Survey of Economic Security.”).

for a state employer, you might already be in this situation,² and you probably accept it, though you may not like it. But much more is at stake in choosing pay transparency than your social discomfort. Lack of pay transparency facilitates continued pay discrimination, and it permits employers to exploit historical and societal discrimination for their own gain.

Pay discrimination, like many forms of discrimination, is a particularly stubborn problem and difficult to remedy.³ In many instances, just as with other forms of discrimination, allocating all the blame and burden for its continued existence on a single actor is unrealistic. Some of the blame lies with the employer, some with employee, and some with societal and historical discrimination.⁴ For instance, neither the employer nor the employee is entirely at “fault,” in the commonly understood sense of the term, when that employee has been socialized not to apply for certain jobs or to ask for more money. The employer exploits that situation in a passive manner, by watching in silence as the employee’s pay slips behind her male counterparts, and neither party is the sole cause of the socialization.⁵ Similarly, neither the

2. *Id.* at 2 (“Prohibiting or discouraging pay discussions occurs less frequently in the public sector, where only one in six workers (16.2 percent) report restrictions on pay discussions. Indeed, almost two thirds of public sector workers (65 percent) report that pay information is publicly available.”).

3. Title VII forbids discrimination in wages and other compensation on the basis of race, sex, national origin, religion, and skin color. 42 U.S.C. § 2000e-2(a)(1) (2006). Nevertheless, wage disparities based on these categories often persist, even after controlling for legitimate, non-discriminatory variables such as education, hours worked, and the like. While this does not necessarily mean that intentional discrimination is a significant contributor to the disparities, it is likely that forms of unintentional discrimination are a significant contributor. *See* discussion *infra* Part II.

4. Compare Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1816 (1990) (arguing that “[s]ex segregation persists not because most women bring to the workworld fixed preferences for traditionally female jobs, but rather because employers structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally male jobs,” and that therefore, “title VII can play a major role in producing the needed changes. . . . By attributing women’s aspirations to forces external and prior to the workworld, courts deny their own ability to (re)construct workplace arrangements and the work aspirations that arise out of those arrangements.”); with Carrie Lukas, *There Is No Male-Female Wage Gap*, THE WALL STREET JOURNAL, Apr. 12, 2011, <http://online.wsj.com/article/SB10001424052748704415104576250672504707048.html> (arguing that “choice of occupation . . . plays an important role in earnings. While feminists suggest that women are coerced into lower-paying job sectors, most women know that something else is often at work. Women gravitate toward jobs with fewer risks, more comfortable conditions, regular hours, more personal fulfillment and greater flexibility.”).

5. *See* LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003) (arguing that women are socialized not to ask for what they want, particularly in the workplace); *see also* Schultz, *supra* note 4.

employer nor the employee is entirely at “fault” when a rogue supervisor discriminates without telling anyone, an employee receives discriminatorily low pay, and neither she nor higher level management realize what has happened. She may not know that her equally or even less meritorious colleagues make more money, and upper level management may not know that she is just as meritorious, if not more, than those colleagues. Even the supervisor may be unaware, if the discrimination was unconscious.⁶

In this article, I approach pay discrimination from a perspective that seeks to deal with discrimination even where blame is not easy to assign. The widespread nature of responsibility for the problem has led some to liken discrimination to a “public health” problem, best addressed “not in the traditional manner of assigning individual responsibility and blame.”⁷ I embrace this perspective and explore the unique ways in which pay discrimination continues to infect our labor markets. I propose a new kind of intervention into discrimination through pay transparency—one that leverages the financial self-interest of employers and employees.

Pay transparency—the ability for employees to find out what other employees in their workplace make—is rare outside of public employment. But it would provide both employees and employers greater ability to prevent, root out, and correct pay discrimination—both intentional and unintentional—in the first place. Pay transparency has radical potential to spur change, and cultural norms against talking about one’s income may make it frightening to some readers. Yet, unlike many other approaches to reduce seemingly “blameless” discrimination, such as targeting unconscious discrimination,⁸ or potentially

6. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506, 1512-14 (2005) (noting a “substantial decline” in racial stereotyping and prejudice explicitly acknowledged by survey participants over the last 50 years, but summarizing a number of studies documenting some form of “implicit bias” much stronger than the mild explicit bias).

7. See Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 101 (2010).

8. See *id.* at 100 (explaining “that the argument in favor of holding the employer liable . . . on the basis of her implicit racial bias implies a shift in the operative model of discrimination from a justificatory conception (in which discrimination is centrally defined by a certain kind of inadequacy in an agent’s putative rationale in acting) to a causal conception (in which discrimination is defined by the presence of a certain kind of causal influence in an action’s psychological etiology)”; see also Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1901-02 (2009) (relying on “[s]ocial science research suggest[ing] that people are most likely to internalize norms when they feel autonomous, competent, and related to others,” and that “[r]ote compliance by those who are resigned or indifferent, perhaps even hostile, to nondiscrimination norms . . . will not achieve significant headway against implicit discrimination”).

counterproductive efforts to intervene in the decisionmaking process that bump up against legal constructions of autonomy,⁹ incentivizing pay transparency can fit comfortably within our legal framework. It requires only modest changes to Title VII, ones that can be woven neatly into our current approach to civil rights enforcement and notions of individual responsibility.

The article has four parts in addition to this introduction. In Part II, I briefly summarize the research on wage gaps associated with gender and race. This research generally points to discrimination, both intentional and unintentional, as partial causes for these wage gaps. While Title VII covers both intentional and unintentional discrimination, some courts are understandably reluctant to hold employers liable for discrimination that results, in part, from societal and historical discrimination, such as the socialization of women and people of color to negotiate less aggressively.¹⁰ On the other hand, even if their level of responsibility is low, employers may be in the best position to prevent the discrimination, and as I will explain, in the case of wage discrimination resulting from societal and historical discrimination, the employers profit from that discrimination at the expense of the discrimination's victims.

In Part III, I explore the benefits of pay transparency. I begin by presenting summaries of empirical evidence for my hypothesis that lack of pay transparency causes a disparate impact on women and people of color. Part III also provides the theoretical support for why this might be the case. It explains how pay transparency would improve the ability of less aggressive, less self-confident, and less "in the know" employees to negotiate for fair pay.

In Part IV, I explore the perceived costs of pay transparency. I argue that almost none of these costs are social costs, in the sense that they reduce the productivity of a business and its workers. Rather, most of the costs of pay transparency represent shifts in profit share from employers to employees. I acknowledge that one of these costs may represent a social cost, in the form of decreased productivity in some workplaces—though only some. The magnitude of this cost, and therefore whether it is outweighed by benefits in the form of reduced discrimination, is difficult to estimate. However, I explain how

9. For a strongly pro-autonomy version of this position, see Gregory Mitchell, *Libertarian Paternalism Is An Oxymoron*, 99 NW. U. L. REV. 1245 (2005) (arguing that "even the more truly libertarian paternalism . . . may lead to a redistribution of resources from rational to irrational persons that cannot be reconciled with the libertarian prohibition on state-based takings for any purpose other than remedying involuntary exchanges").

10. See sources cited *infra* Part II.B.2.c.

incentivizing pay transparency via an affirmative defense or safe harbor can mitigate this cost, by targeting employers whose own self-assessment indicates higher risk of liability for pay discrimination and lower costs of pay transparency.

In Part V, I operationalize this theory, translating these general ideas into a concrete proposal for employment law reform. My proposal accounts for the competing concerns set forth in Part II by rewarding those employers who take steps to prevent and correct discrimination, in the form of a defense or safe harbor from liability when employees do not voice their concerns in a timely fashion. It would also put the onus on employees to break out of their comfort zones when they see discriminatory pay disparities. They must demand better pay, or seek to switch to a more well-compensated job track. I provide the details of what would be sufficient to establish the elements of the affirmative defense or safe harbor.

The Lilly Ledbetter Act was the first piece of legislation President Obama signed.¹¹ It overturned *Ledbetter v. Goodyear Tire*,¹² which held that the statute of limitations under Title VII—only 180 days—does not run from the date an employee receives a discriminatory paycheck, but rather from the initial act of discrimination underlying the unfair paycheck, which may have been years prior.¹³ Many found the outcome unfair because Lilly Ledbetter's claim was found time-barred even though she had no idea she was being discriminated against for years.¹⁴ But a two-year cap on backpay under Title VII still prevents full recovery for people, like Ledbetter, who only discover discrimination decades after it begins.¹⁵ Worse, most employees will never discover the problem and will recover nothing. We need to incentivize practices like pay transparency to make real inroads into discrimination.

II. WAGE GAPS AND THEIR CAUSES, INCLUDING DISCRIMINATION

Is pay transparency a solution to a problem that does not exist? In other words, is pay discrimination really happening? Is there a lot of it, and is it the kind of rampant, culturally sticky problem that we should respond to in the way we responded as a country to harassment? In this Part, I briefly provide evidence that the answer to these questions is yes.

11. Lilly Ledbetter Pay Act of 2009, 123 Stat 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)(3)); Sheryl Gay Stolberg, *Obama Signs Equal Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

12. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

13. *Id.* at 628-29.

14. *Id.* at 650 (Ginsburg, J., dissenting).

15. Lilly Ledbetter Pay Act of 2009, 123 Stat 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)(3)(B)); 42 U.S.C. § 2000e-5(g)(1) (2006).

A. Evidence of Pay Gaps

There is a great deal of evidence that women and racial minorities still experience large pay gaps. Because Title VII prohibits both intentional and unintentional discrimination, the law is concerned with wage gaps even when they are not rooted in intentional race, sex, or other prohibited discrimination.¹⁶ The law prohibits even unintentional discrimination, if not justified by practices that serve a “business necessity.”¹⁷ For instance, if an employer paid people more the taller they were, this practice would have a disparate impact on women, who are on average shorter. Even in the absence of any intent to cause the disparate impact on women, the employer would have violated Title VII, unless the employer could prove that the better salaries for tall people served a “business necessity.”¹⁸

Importantly, not all of the documented wage gaps can be explained by factors that are likely to be related to business necessity, such as degrees, skills, hours worked,¹⁹ or even internal performance evaluations.²⁰ Indeed, researchers have had difficulty fully explaining these gaps by controlling for all sorts of factors independent of race and sex, such as the above variables, whether employees have children, and more.²¹ Many meta-analyses of wage disparities come to the conclusion

16. 42 U.S.C. § 2000e-2(a), (k) (2006).

17. *Id.* at § 2000e-2(k)(1)(A)(i).

18. *See id.* § 2000e-2(k) (placing the burden of persuasion on the employer to prove business necessity); *see also* *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 435-36 (1975) (rejecting an employer’s attempts to show that diploma requirements and standardized tests served a business necessity); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (“Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.”).

19. *E.g.*, GOVERNMENT ACCOUNTING OFFICE, *WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS*, GAO-04-35 (2003).

20. *E.g.*, Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479, 1481, 1484-45 (2008) (In a study of a private, primarily service-sector employer with 20,000 employees, Castilla found “evidence of performance-reward bias and show[ed] that different salary increases are granted for observationally equivalent employees (i.e., those in the same job and work unit, with the same supervisor and same human capital) who receive the same performance evaluation scores. This finding of performance-reward bias is robust after controlling for a number of complicating factors, including employee turnover.”).

21. *E.g.*, *id.*; Stephen Kulis, Diane Sicotte & Shawn Collins, *More than a Pipeline Problem: Labor Supply Constraints and Gender Stratification Across Science Disciplines*, 43 RES. IN HIGHER ED. 657 (2002); Christine Alksnis, Serge Desmarais & James Curtis, *Workforce Segregation and the Gender Wage Gap: Is “Women’s” Work as Highly Valued as “Men’s”?*, 38 J. APPLIED SOC. PSYCH. 1416 (2008).

that gender wage gaps tend to be accounted for by a combination of variables.

One variable is simply intentional discrimination, and there is little controversy around imposing liability for any wage gap due to this variable, though it can be hard to catch. Some of the other variables, such as human capital,²² or changing market prices for particular jobs,²³ are likely related to business necessity, and most policymakers would not want to impose liability for wage gaps related to these variables. A third set of variables, however, are likely not related to business necessity, yet imposing liability for the wage gaps resulting from these variables would be quite controversial, because it is difficult to allocate responsibility for these variables between individual employers, employees, and other social forces. These variables include sex segregation of the work force,²⁴ which may be driven by social norms that employers only bear partial responsibility for.²⁵

The quantity of studies examining race and gender wage gaps and attempting to account for their causes is far too vast to survey comprehensively in this article. However, a few examples will paint the picture.

For example, one study of pay at a regional United States university found statistically significant pay differences associated with gender “even after controlling for rank, academic field, and years of service . . . in fields traditionally viewed as female as well as science fields with typically lower female representation.”²⁶

Another 1997 survey found “statistically significant gender differences” in earnings of “securities professionals with highly similar human capital characteristics.”²⁷ The study controlled for marital status, whether the professionals had children, experience, hours worked per week, college majors, area of practice, firm, and the organizational measure of whether the professional was at vice president status or

22. E.g., Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33 (1985).

23. E.g., Francine D. Blau & Lawrence M. Kahn, *Swimming Upstream: Trends in the Gender Wage Differential in the 1980s*, 15 J. LAB. ECON. 1 (1997).

24. See Blau & Kahn, *supra* note 23; Kulis, Sicotte & Collins, *supra* note 21; Alksnis, Desmarais & Curtis, *supra* note 21.

25. Schultz, *supra* note 4 (arguing that employers do bear *some* responsibility); Kulis, Sicotte & Collins, *supra* note 21 (attributing some of the sex segregation in the academy to differences in academic cultures).

26. Cheryl B. Travis, Louis J. Gross & Bruce A. Johnson, *Tracking the Gender Pay Gap: A Case Study*, 33 PSYCH. OF WOMEN Q. 410, 410 (2009).

27. Louise Marie Roth, *Selling Women Short: A Research Note on Gender Differences in Compensation on Wall Street*, 82 SOC. FORCES 783, 783 (2003).

above.²⁸ Even levels of sex segregation, meaning the concentration of women or men in different areas of practice, were controlled for.²⁹

Another study documented black men receiving lower wages even when accounting for skill as measured by the employer's competitive performance rating of workers. Indeed, black men were found to receive "slightly lower returns than white men for equivalent performance ratings."³⁰ In other words, even assuming that employers' assessments of worker skill and performance are not themselves influenced by race, race was still found to influence wages.

Finally, a fourth study found "gender, race, and nationality differences" "affect[ing] salary growth [even] after performance ratings are taken into account." The author concluded that "[a]lthough these policies are often adopted in the hope of motivating employees and ensuring meritocracy, policies with limited transparency and accountability can actually increase ascriptive bias and reduce equity in the workplace." The fact that "performance evaluation bias" may be lurking in employers' ratings of employees means that the amount of the salary disparities attributable to some form of discrimination may be even greater than what studies that control for performance ratings document.³¹

B. The Causes of Pay Gaps, and the Current Legal Regime's Response

In this Section, I investigate the causes of pay gaps and explain why the current legal regime is not adequate as a solution. I argue that in many cases, it is unclear whether employers are violating Title VII, and that underlying this dispute is the fact that it is simply inaccurate in the cases to describe employers as either entirely to blame or free of responsibility. Even when the cause is more clearly a violation of Title VII, I argue that in the absence of pay transparency, the discrimination will often go undiscovered.

1. Intentional Discrimination

There is a great deal of dispute over whether intentional discrimination is a significant variable influencing gender and race based pay disparities, or whether studies such as the ones described above simply have not controlled for all the variables other than discrimination that could explain the disparities. To the extent there is intentional

28. *Id.* at 793.

29. *Id.*

30. Major G. Coleman, *Job Skill and Black Male Wage Discrimination*, 85 Soc. Sci. Q. 892, 893 (2003).

31. Castilla, *supra* note 20, at 1482.

discrimination, it is uncontroversial that Title VII should cover the discrimination, but unfortunately, employees may not know it is happening, and employers may not know, either.

Lilly Ledbetter was an employee at Goodyear Tire. For decades, unbeknownst to her, she received lower wages for the same work as her male colleagues. When she discovered the discrepancy, she sued her employer. Ledbetter alleged that years ago, her supervisor at the time, now deceased, had sexually harassed her. When she rejected him, he took revenge by giving her poor evaluations and taking other discriminatory actions, unbeknownst to her, that led to decades of pay discrimination. The jury presumably accepted this version of events,³² and therefore awarded her approximately \$3.5 million in damages, which were reduced to \$360,000 by the district judge, in accordance with Title VII's damage caps.³³

Ledbetter's suit was found to be time-barred by the US Supreme Court because Title VII has a statute of limitations of just 180 days,³⁴ and the act of intentional discrimination that instigated the discrepancy had occurred decades before. While Goodyear was vicariously liable for the supervisor's actions, and while the injury he caused Ledbetter was repeated every time she received a lower paycheck than she deserved, the Supreme Court held that the statute of limitations ran from the act of intentional discrimination itself, not from each additional infliction of injury.³⁵

Enough outrage ensued that Congress passed the Lilly Ledbetter Fair Pay Act, directing that the statute of limitation runs from each issuance of an effectively discriminatory paycheck, not from the initial act rooted in the intent to discriminate.³⁶ President Obama signed it as his first piece of legislation, and *Ledbetter* was reversed.³⁷ But just as Ledbetter had no notice of the discrimination she was suffering from, some argued that Goodyear may have lacked notice as well.³⁸ Goodyear

32. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 622, 632 n.4 (2007).

33. *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1176 (11th Cir. 2005); 42 U.S.C. § 1981a(b)(3)(D) (2006).

34. 42 U.S.C. § 2000e-5(e)(1) (2006).

35. *Ledbetter v. Goodyear Tire*, 550 U.S. at 628-29.

36. Lilly Ledbetter Payback Act of 2009, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

37. Stolberg, *supra* note 11.

38. *Ledbetter*, 550 U.S. at 630-32, 632 n.4 (arguing that the underlying purposes of statutes of limitations, including notice to the defendant, were particularly relevant in the case at hand because "Ledbetter's claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor"); *id.* at 657 (Ginsburg, J., dissenting) (arguing that doctrines such as laches would be sufficient to fulfill the purpose of "giv[ing] prompt notice to the employer") (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002)).

was certainly in a better position than Ledbetter to discover the discrimination and probably should have figured it out in this particularly egregious case,³⁹ but neither party was in a perfect position. Certainly we could imagine facts under which the employer genuinely had a hard time figuring out that discrimination was occurring.

For instance, we could imagine a scenario in which an employee is paid within the typical salary range for her job at the workplace, and her salary is always at the lower end of that range. The fact that some employees receive lower wages than other employees may be the result of differences in merit, availability for overtime when it's offered, or demonstrated loyalty to the company in intangible ways. All these factors would be considered "legitimate, non-discriminatory reasons"⁴⁰ under Title VII for paying someone less than her colleagues. Thus, simply observing a wage or salary disparity may not be sufficient for an employer to suspect that a supervisor to whom significant authority has been delegated is discriminating. Add in the fact that performance evaluations may be infected with bias that upper level management is unaware of, and the employer may believe that the employee's lack of merit has been confirmed and documented in poor evaluations. In the absence of pay transparency, most employees, like Ledbetter, will not even know the disparity exists, so they will not be able to question it either.

Even under the new Act, Ledbetter would have only recovered for at most two years of discrimination, given the two-year cap on backpay in Title VII.⁴¹ If it takes years for an employee to find out he or she has been discriminated against, the two-year cap prevents full recovery. Even worse, many employees will *never* discover the discrimination. The Act responds to public outrage, but changes little because it does nothing to improve the chances of employer and employee discovering the problem at a time it can be addressed fully.

39. *Id.* at 659-60 (Ginsburg, J., dissenting) (noting that "Ledbetter's pay, during a particular one-year period, fell below Goodyear's minimum threshold for her position").

40. *E.g.* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (first stating the rule that a prima facie case of intentional discrimination may be rebutted by the employer "articulat[ing] some legitimate, nondiscriminatory reason"); *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233, 236 (7th Cir. 1993) (finding that employer use of word-of-mouth hiring did not constitute intentional discrimination under Title VII if the hiring method was "adopted *because* it is the most efficient," even with knowledge that this "just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer").

41. *Lilly Ledbetter Fair Pay Act of 2009*, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)(3)(B)); 42 U.S.C. § 2000e-5(g)(1) (2006).

2. Unintentional Discrimination

While it is quite unclear how much intentional discrimination is contributing to pay gaps, it appears quite likely that unintentional forms of discrimination are playing a role. Whether Title VII prohibits these forms of discrimination is not always clear. In a purely doctrinal sense, it is unclear whether some of these employer actions or inactions serve a “business necessity” or not,⁴² the defense under Title VII to claims that an employer practice has a disparate impact on the basis of sex, race, or other protected characteristics. Moreover, employers are neither entirely responsible nor entirely without responsibility in these situations, in which the disparities are partially caused by historical and societal discrimination, but employers passively take advantage of that discrimination.

a. Tendency to Preserve the Status Quo

In one example, discrimination, perhaps unintentional, enters into the process of conducting market wage surveys that employers use to set wages. Supervisors in the California state civil service system have admitted, for instance, to a status quo bias in setting wages: when a market wage survey comes back showing that the market wage for a job is much higher or lower than what the state currently pays, supervisors have admitted to adjusting the skills description for the job accordingly. The reason is that they don’t want to rock the boat by recommending a huge change in wages for a particular job.⁴³ In other words, they have admitted to a process that seeks to maintain the status quo, which of course reinstates past discrimination in setting wages, such as past decisions to pay less for certain jobs simply because they were commonly performed by women.

If the desire to maintain the status quo is understood as representing intentional discrimination, it clearly violates Title VII. Courts have consistently rejected claims by employers that ending intentionally discriminatory practices would rock the boat too much, by interfering with customer and coworker preferences.⁴⁴ However, even if supervisors

42. See *infra* text accompanying notes 45-50, 62-63, 70.

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

44. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (stating the rule that customer preference for one gender over another is not a BFOQ, even in a case in which the customer preference at issue was that of foreign clients in countries with different cultural mores than Americans); see also 29 C.F.R. § 1604.2(a)(1)(iii) (1996) (“[T]he following situations do not warrant the application of the bona fide occupational qualification exception: . . . The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as

do not do this for intentionally discriminatory reasons (to privilege their male friends because they are male), they are still preserving the status quo with respect to wage setting, which has a disparate impact on the basis of race and sex. There is a good argument that such behavior violates Title VII; it is unlikely that claims of maintaining the status quo as a “business necessity” will fly with most courts enforcing Title VII. It is the employer’s burden to prove that a practice having a disparate impact serves a business necessity.⁴⁵ Tests and standards that predict ability to perform a job successfully are a classic example of a practice that serves a business necessity,⁴⁶ though only where employers successfully prove accuracy.⁴⁷ In comparison, maintaining the status quo with respect to who gets paid what, in order to avoid employees objecting, does not seem nearly as “necessary”⁴⁸ or “job related.”⁴⁹ Moreover, it smacks of grandfathering in the beneficiaries of past discrimination, and the seminal disparate impact case identified “freez[ing] the status quo” as the core problem with practices having a disparate impact.⁵⁰

Yet, once again, it’s hard for employees to know that this sort of unfairness is going on, without pay transparency to alert them to disparities that seem unwarranted in the face of what employees actually contribute to the employer.

covered specifically in paragraph (a)(2) of this section [referring to the need for actor/actress authenticity].”).

45. *See, e.g.*, 42 U.S.C. §2000e-2(k) (2000) (placing the burden of persuasion on the employer to prove business necessity, and permitting plaintiffs to rebut that showing by demonstrating that an alternative employment practice would also serve the business need with less of an impact); *see also* *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 435-36 (1975) (rejecting an employer’s attempts to show that diploma requirements and standardized tests served a business necessity).

46. *E.g.*, *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678-79 (2009) (finding that there was “no genuine dispute” that firefighter promotion “examinations were job-related and consistent with business necessity”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (“Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.”).

47. *E.g.*, *Griggs*, 401 U.S. at 431 (“On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.”); *Albermarle*, 422 U.S. at 435-36 (rejecting an employer’s attempts to show that diploma requirements and standardized tests served a business necessity).

48. *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977) (“[A] discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.”).

49. *E.g.*, *Ricci*, 129 S. Ct. at 2678 (using the “job related” term).

50. *Griggs*, 401 U.S. at 430 (“Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze’ the status quo of prior discriminatory employment practices.”).

b. Segregated Social Networks

Another form of discrimination likely stems from the fact that “the majority of jobs are found through personal referral.”⁵¹ Thus, the jobs with good pay go to those who can get a referral from someone who already has such a job. Social networks segregated by race and gender interact with this hiring choice and lead to segregation in employment as well as disparate information resources.⁵² This is a particularly stubborn problem because employers have reason to rely on these social networks in making hiring, promotion, and wage decisions: doing so can increase employer profit by creating subgroups with different reservation wages.⁵³ A reservation wage is the lowest wage for which an employee would be willing to do the job. If all employees were members of a single social network and shared information about their wages, then the employer would be unable to get away with paying some of the employees less than other employees for the same work.⁵⁴

In practice, Employee A, once learning that Employee B successfully negotiated a higher wage, would simply demand the higher wage, knowing that the employer is willing to pay it. Suppose Employee Q has the highest reservation wage of all the employees. She will not work for less than ten dollars an hour, but the rest of the employees would have worked for less, in amounts varying from eight to ten dollars an hour. To retain Employee Q, the employer has to pay her ten dollars an hour. Once the other employees find out, they will demand the same, and may even call the employer’s bluff: “If you pay me less than ten dollars an hour, I will quit.” So the employer will end up paying everyone approximately ten dollars an hour, the maximum reservation wage of all the workers. We can call this the unitary employee network system.

However, if an employer can separate employees into smaller social networks that share information internally but do not share information

51. Tavis Barr, *With Friends Like These: Endogenous Labor Market Segregation with Homogeneous, Nonprejudiced Agents*, 68 AM. J. ECON. & SOC. 703, 704 (2009) (citing Betsey Stevenson, *The Internet and Job Search* (Nat’l Bureau Econ. Res. Working Paper No. 13886, 2008)).

52. E.g., James D. Montgomery, *Social Networks and Labor Outcomes: Toward an Economic Analysis*, 81 AM. ECON. REV. 1408, 1408 (1991) (modeling the effect of social networks on wage dispersion, and “predict[ing] . . . an increase in the density of social ties or in social stratification by ability generates greater wage dispersion”); Antoni Calvó-Armengol & Matthew O. Jackson, *The Effect of Social Networks on Employment and Inequality*, 94 AM. ECON. REV. 426 (2004); Yannis M. Ioannides & Linda Datcher Loury, *Job Information Networks, Neighborhood Effects, and Inequality*, 42 J. ECON. LIT. 1056 (2004).

53. Barr, *supra* note 51, at 703.

54. *Id.*

with each other, the employer can pay these groups at different rates. We can call this the segregated employee network system. Under the segregated system, each network will end up with the maximum reservation wage of the employees in that network, but not the maximum reservation wage across all networks. Say we have two networks at the workplace, Group X and Group Y. Group X will end up with the maximum reservation wage of the workers in Group X, since the person with that maximum reservation wage within the group will tell the other members. If someone in Group Y has a higher reservation wage than anyone in Group X, and the employer pays that person the higher wage, nobody in Group X will find out. Similarly, Group Y will end up with the maximum reservation wage of the workers in Group Y, but if someone in Group X is being paid more, the members of Group Y will not know.⁵⁵

One of these groups, say, Group X, will contain the employee with the highest reservation wage of all the employees—this group will be paid the same as it would have been paid under the unitary system. However, the maximum reservation wage of the employees in Group Y will be lower. Thus, these employees will get less than they would have under the unitary system. The employer can now retain all the employees even though it is paying everyone in Group Y less than it would have in the unitary system. By permitting employers to pay different workers at different rates, the segregated system increases the profit of employers. Employers may not be responsible for creating close social networks, but it's no wonder they are happy to let them persist, and that they resist unionization, which would tend towards merger of these networks.

There are less insidious reasons that employers rely on referrals and social networks, too. If networks are segregated and closed enough, they may permit employers to take advantage of workers policing each other and punishing each other for shirking (by refusing a network member any future referrals if he or she shirks on the job).⁵⁶ Thus, they can lower the costs of getting maximum productivity out of workers.

55. Even if someone in Group Y finds out, he may be reluctant to tell the other members of Group Y, in the hopes of entering Group X himself. He may fear that “blabbing” to Group Y could put his entrance into the better-off social network at risk. Strong cultural norms in the US against talking about pay at work likely reinforce this fear. *See infra* Part IV.A.

56. *See Barr, supra* note 51, at 706; *EEOC v. Consolidated Service Systems*, 989 F.2d 233, 236 (7th Cir. 1993) (“[A]n employee who refers someone for employment may get in trouble with his employer if the person he refers is a dud; so word of mouth recruitment in effect enlists existing employees to help screen new applicants conscientiously.”).

While use of social networks for referrals can increase profits for employers, it will have the impact of race, gender, and other disparities in pay whenever social networks are relatively segregated with respect to sex, race, and other protected characteristics. If the different reservation prices different worker networks are willing to accept stem from historical and societal discrimination, then employers are increasing profit by exploiting that discrimination. Moreover, allowing employers to exploit these differences can create “a poverty trap,”⁵⁷ in which those who start out with no money, and are therefore willing to work for low wages, remain locked in low paying jobs, unable to get personal referrals for the high paying jobs, or unable to find out that the employer is willing to pay more and negotiate more aggressively.

It is unlikely, however, that exploitation of these differences would be characterized as “intentional” discrimination under Title VII. The practice of relying on social networks is facially neutral with respect to race, sex, and other protected classes under Title VII, and the motivations described above for relying on these networks constitute “legitimate, non-discriminatory reasons”⁵⁸ under Title VII. Moreover, Title VII explicitly states that it does not require employers to give preferential treatment in order to cure de facto imbalances.⁵⁹

As a form of unintentional discrimination, it is unclear whether these practices would be deemed to serve a “business necessity” or not. To the extent employers use these practices to encourage employees to police each other and be more productive, the employers’ actions are likely job related and serve a business necessity in the sense that they improve productivity. To the extent these practices are being used to break up information sharing groups and more finely target individual employees’ reservation wages, the result would probably depend on the court. While one appellate court has affirmed that “subjective decision-

57. See Barr, *supra* note 51, at 732.

58. See, e.g., *Consolidated Service Systems*, 989 F.2d at 236 (finding that employer use of word-of mouth hiring did not constitute intentional discrimination under Title VII if the hiring method was “adopted *because* it is the most efficient,” even with knowledge that this “just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer”); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (first stating the rule that a prima facie case of intentional discrimination may be rebutted by the employer “articulat[ing] some legitimate, nondiscriminatory reason”).

59. See 42 U.S.C. § 2000e-2(j) (2006) (“Nothing contained in this subchapter shall be interpreted to require . . . preferential treatment to any individual or to any group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.”).

making criteria,” including decisions to promote and decisions to “apportion training opportunities,” “carried out by a largely white supervisory corps” can form the basis of a disparate impact claim,⁶⁰ other courts may reason that employers are not even engaged in a recognizable “particular employment practice”⁶¹ when they fail to integrate employee social networks.⁶² These courts might hold that it is employees who have chosen to segregate themselves into networks, or at the very least, that it is social norms and practices outside of the workplace that have coerced employees into doing so.⁶³

c. Failure of Employees to Negotiate Well

Another form of likely unintentional discrimination stems from the fact that non-unionized employees, which amount to about 88.1% of the US workforce, negotiate salaries, raises, and promotions individually with their employers.⁶⁴ Many, including those who study and critique alternative dispute resolution, have documented weaker negotiation skills on the part of women and minorities, or really anyone who has less power than the party they are negotiating with.⁶⁵ As a result, negotiating pay, promotions, and the like is difficult for all workers, but there is reason to believe that women and minorities are particularly bad at it.

60. See *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 272, 277 (5th Cir. 2008).

61. See 42 U.S.C. § 2000e-2(k)(B) (explaining that to make out a disparate impact claim under Title VII, plaintiffs must identify the “particular employment practice” that causes the disparate impact, or the collection of such practices if they are not “capable of separation for analysis”).

62. Cf. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct 2541, 2554-55 (2011) (explaining that although disparate impact claims based on subjective decision-making “‘can’ exist,” this “does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. . . . Respondents have not identified a common mode of exercising discretion that pervades the entire company.”).

63. See Schultz, *supra* note 4 (identifying the widespread perception that workers “bring to the workworld fixed preferences,” citing numerous cases accepting this argument as an explanation for sex segregation in the workplace, and arguing that instead, workers preferences are not fixed, and that “employers structure opportunities and incentives and maintain work cultures and relations” that influence those preferences).

64. See Steven Greenhouse, *Union Membership in U.S. Fell to a 70-year Low Last Year*, N.Y. TIMES, Jan. 21, 2011, <http://www.nytimes.com/2011/01/22/business/22union.html> (The rate of unionized employees has been falling, and in the private sector, the rate of unionized employees is even lower—about 6.9%).

65. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1603-05 (1991); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78 (1984); see also Babcock & Laschever, *supra* note 5 (summarizing some of the studies documenting difficulty women have negotiating); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 139 (Harvard University Press 2010) (describing how “lack of entitlement” amongst women and people of color “translates into a failure to negotiate”).

Women and minorities may lack information due to being shut out of social networks that provide this information.⁶⁶ They may also be taught to value themselves less than dominant members of society value themselves.⁶⁷ Finally, women may be incentivized not to express their own sense of self-worth, as this is considered inappropriate, unfeminine behavior for women.⁶⁸ These expressions may also be considered inappropriate behavior for some racial minorities.⁶⁹ So, even when they do stand up for themselves, they may be penalized for it.⁷⁰ Of course, weak negotiation skills and lack of information are common problems for anyone in the “out-group.” There is simply a correlation between being in the out-group and being a woman or member of a racial minority. Thus, negotiating individually with employees can have a disparate impact on those with worse negotiation skills. As a form of unintentional discrimination, it is once again unclear whether the practice of negotiating individually with employees would be deemed to serve a “business necessity” or not. Realistically, the practice of negotiating individually with employees is so commonplace that it is unlikely courts would use their authority to find that this practice does not serve a business necessity, and therefore violates Title VII.

* * *

What drives this doctrinal debate about what does or does not constitute actionable discrimination under Title VII is that the model in which the employer is either entirely at fault or not at fault at all is inaccurate in many of these cases. The model is particularly inaccurate

66. See sources cited *supra* note 52.

67. See Williams, *supra* note 65; Babcock & Laschever, *supra* note 5; Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 190-95 (2011) (describing and summarizing research finding women exhibiting low self-valuation and resulting poor negotiation skills on their own behalf).

68. See Hannah Riley Bowles, Linda Babcock & Lei Lai, *It Depends Who Is Asking and Who You Ask: Social Incentives for Sex Differences in the Propensity to Initiate Negotiation* (Kennedy Sch. of Gov't Working Paper No. RWP05-045, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=779506## (conducting an experiment and finding that women were penalized by men but not women for trying to negotiate salary, and that “perceptions of niceness and demandingness” influenced results); see also sources cited *supra* note 67.

69. See Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1911-12 (2007) (describing efforts that Black women may make to “avoid the perception that they are . . . ‘angry black women’”); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1282 at n.54, 1283 at n.60 (2000) (describing stereotype of Blacks as aggressive and difficulties faculty members have in negotiating the distorted perceptions of their behavior that this can cause).

70. See sources cited *supra* note 69.

in the case of reliance on referrals, inaction in the face of segregated social networks, and decisions to negotiate with employees individually. In these instances, if the employer is deemed entirely at fault and branded as a “discriminator,”⁷¹ this neglects the fact that past and societal discrimination are major contributing factors. If the employer is deemed entirely without fault, this neglects the fact that employers are profiting from the past and societal discrimination, and that this is part of why they resist changing pay, hiring, referral, and negotiation practices in ways that would integrate segregated networks.

Similarly, employees are neither entirely to blame, nor are they entirely without blame. Just as employers profit from segregated social networks and the socialization of employees not to negotiate, employees are in some instances gaining forms of utility by conforming to social expectations. For instance, employees may gain a sort of “identity utility” by performing in conformist ways—a woman sticking to a job that has been coded as “female,” a Latino worker sticking to a largely Latino social network, or an African American woman behaving “modestly” and not asking for a raise.⁷² Sometimes identity utility even translates into traditional monetary utility. For instance, a woman may perform her femininity, in part by sticking to a poorly paid “female” job, in order to reduce the odds that her husband, whose income she shares, will divorce her. The husband, who one might think is irrational for implicitly encouraging his wife to make less money, may be gaining identity utility by reinforcing the privileged status of men generally. This identity utility may even pay off for him in the long run financially, by helping to sustain a system of sex discrimination in wages, in which he makes more money than he otherwise would.⁷³ Angela Onwuachi-Willig has described how “[b]eing the target of certain kinds of race discrimination can be understood, in a perverse way, as a matter of ‘choice,’”⁷⁴ a kind of “volunteer discrimination.”⁷⁵ She explains how African Americans sometimes engage in “accommodating” racially subordinating norms in order to personally advance.⁷⁶ Some may also engage in “distancing . . . from other racial outsiders” for the same reason, and others may engage in “resigned modeling . . . for the sake of serving as role models to those in their group who may look up to

71. See Shin, *supra* note 7; Bartlett, *supra* note 8.

72. See George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q. J. ECON. 715, 717, 732-40 (2000) (articulating the concept of “identity utility” and providing similar examples).

73. See *id.* at 733 n.36.

74. Onwuachi-Willig, *supra* note 69, at 1895.

75. *Id.*

76. *Id.* at 1898.

them.”⁷⁷ On the other hand, all these choices are made in the context of sometimes extreme social and financial pressures.

The fact that responsibility for these problems is widespread may make us hesitant to punish employers who take advantage of historical and societal discrimination, but that does not mean we must treat employers as if they have a right to take advantage of such discrimination. There is a compromise, and it is readily available within the structure of our civil rights laws. We can still use Title VII to incentivize employers and employees to take steps to integrate these segregated social networks and ask for fair pay. If tools and an impetus could be provided for workers to infiltrate and integrate race and gender based social networks, this would serve the ultimate goal of equal employment opportunity, and the cost to employers—that they can no longer profit from the discrimination of others by paying some employees less than others for the same work—would be just. As I argue below, pay transparency can provide that impetus by opening disadvantaged workers’ eyes to the financial benefits they would receive if they broadened their social networks beyond segregated gender and race groups, behaved in ways they have been socialized to resist, such as aggressively negotiating, and aimed for jobs they have been socialized to resist, but which have better long-term career potential. It can also provide the information required for workers to change their reservation prices.

III. HOW PAY TRANSPARENCY CAN HELP

In this part, I will argue that incentivizing pay transparency would potentially help reduce discrimination, both intentional and unintentional.⁷⁸ There is empirical and theoretical support for this thesis.

77. *Id.*

78. Pay transparency could also help promote the principles underlying other forms of labor regulation, such as the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), and state wage and hour laws. As the Supreme Court has noted, “[f]ew topics are of such immediate concern to employees as the level of their wages.” *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 569 (1978). Thus, pay transparency can help employees obtain information that triggers collective action where needed. Indeed, discussions of pay among employees are often protected by the NLRA for this reason. See Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. LAW 121, 125 (2003) (citing survey finding that only about 10% of employers had “actively adopted” pay transparency, and that “over one-third of private sector employers” had rules “prohibiting employees from discussing their [wages],” despite most of these rules likely violating the NLRA).

Access to wage information would also help enforce the FLSA and analogous wage and hour laws because it would provide the information necessary to determine that a class action is warranted against employers engaged in rampant violations.

A. *Empirical Evidence*

Pay transparency is more common in state employment and at unionized workplaces than in non-unionized private employment, and many studies have documented reduced wage disparities on the basis of race and gender in such workplaces. For instance, “[t]he gender wage gap for all full-time workers, based on median annual earnings, is 23 percent. In the federal government, where pay rates are transparent and publicly available, the gender wage gap is only 11 percent.”⁷⁹

Another study found that “market structure-driven discrimination of managers in highly unionized industries” is reduced as compared to low-union density industries. The authors proposed that this “stems from standardized, more racially equitable wages of union workers.”⁸⁰

Yet another study found that gender-based wage gaps were “significantly smaller in unionized establishments for six of [nine] industries” studied. In one industry (miscellaneous plastics), there was no significant effect of unionization on gender-based wage gaps. In two (textile dyeing and finishing men’s and boy’s shirts), there was a significant but negative effect on women’s wages. The authors determined “that unionization generally reduces wage inequality between blue-collar men and women, but the effect might be contingent both on the overall proportion of women in an industry and on union characteristics.”⁸¹ Interestingly, the two industries for which unionization was associated with a significant but negative effect are traditionally female industries. These findings, combined with social network theory, may lend support to the hypothesis that the pay transparency and standardization that often comes with unionizing is beneficial to women in industries where their exclusion from the better-paid networks of workers is a major contributor to the wage disparities they experience.

There is even some evidence that women and racial minorities gravitate to workplaces with pay transparency, perhaps because they get relatively better compensation in these workplaces for comparable jobs. One study found that not only are women “overrepresented in state government employment relative to their civilian labor force representation within a state,” “private sector race and sex-based wage

79. Ariane Hegewisch, et al., *Pay Secrecy and Wage Discrimination* 3 (Inst. for Women’s Policy Research, Fact Sheet No. C382, June 2011).

80. Jacqueline Agesa & Richard U. Agesa, *Market Structure-Driven Discrimination and the Earnings of Subordinate Managers: An Analysis by Union Density*, 30 *J. Post-Keynesian Econ.* 205, 205 (2007).

81. Marta M. Elvira & Ishak Saporta, *How Does Collective Bargaining Affect the Gender Pay Gap?*, 28 *WORK AND OCCUPATIONS* 469, 469, 480-81 (2001).

differentials, relative to those in the public sector, are positively associated with the representation of women, African-Americans, and Latinos in state government workforces.”⁸²

Piece work—being paid based on the number of products produced, rather than by the hours or months worked—is another example of employment which, while often extremely low paid, may involve high pay transparency, if the rate per product is relatively uniform across employees. One study concluded that women disproportionately work on piece rates (paid by the number of products produced) in part based on a belief that “they are subject to less wage discrimination when objective performance measures are available.” The authors of this study may not have considered the full panoply of reasons women gravitate to piece work, but they did find that piece work was associated with reduced amounts of unexplained wage gaps between men and women.⁸³

Finally, in his study of race, gender, national origin, and performance evaluations at a large service-sector company, Emilio Castilla discovered that once factors like performance evaluations, turnover, and part time status were taken into account, race and gender did not significantly influence initial salaries or whether a salary increase was awarded to an employee (although national origin did).⁸⁴ However, race and gender did significantly impact the *size* of salary increases. Castilla hypothesized varying levels of transparency, and therefore information awareness, at the various stages of work as a possible explanation:

I find that ascriptive bias exists only in the less formalized second stage . . . where administrators are not accountable for their decisions regarding the amounts of salary increases. . . . My findings that the most visible aspects of employee career outcomes—such as salary increases (regardless of quantity) and promotions—are not subject to the performance-reward bias process . . . is in contrast to the finding that females and minorities are then disadvantaged when it comes to decisions about the amount by which their compensation is increased every year, which is typically unobservable or unknown to the rest of employees. The invisibility of salary increase amounts eliminates concrete salary comparisons among employees and thus has the

82. Jared J. Llorens, Jeffrey B. Wenger & J. Edward Kellough, *Choosing Public Sector Employment: The Impact of Wages on the Representation of Women and Minorities in State Bureaucracies*, J. PUB. ADMIN. RES. & THEORY 397 (2007).

83. Uwe Jirjahn & Gesine Stephan, *Gender, Piece Rates and Wages: Evidence from Matched Employer-Employee Data*, 28 CAMBRIDGE J. ECON. 683, 683 (2004).

84. Castilla, *supra* note 20, at 1503.

potential to mask unfairness in the performance-compensation link in organizations.”⁸⁵

B. *Theoretical Support*

Of course, the correlation between pay transparency and reduced wage disparities does not necessarily mean transparency causes the reduced disparities. However, there are a number of theoretical reasons to support an inference of causation.

First, pay transparency could help tip off the people “closer to the ground,” who may be in a better position than a high-level manager to detect suspicious wage disparities, such as the ones in the Ledbetter case, whether those disparities result from intentional or unintentional discrimination. Pay transparency can also deter supervisors from discriminating in the first place, knowing that decisions will be on display for all the subordinates to see. If A got a raise and B did not, but B worked much harder and smarter, B, and his colleagues, will be suspicious of the supervisor’s motives, and may question them.

Of course, people are human, and may sometimes overestimate their own qualities and merits as compared to their colleagues, but that doesn’t mean that every time an employee deems a disparity to be unjustified, he or she is wrong. Sometimes the disparity is justified and sometimes it is not. Without some level of pay transparency, the disparity never even gets unearthed to those who have a basis for deeming it justified or not. Moreover, employees may not be so bad at soberly assessing their own performance when asked to get in the habit of doing so, and when they have to do so with others watching. One real life experiment in which employees were permitted to set their own pay, and where coworkers could see what they gave themselves, concluded that the employees tended to set their pay quite fairly.⁸⁶ Imagine yourself in a scenario of pay transparency: Would you really complain about making less money than your colleague when you know deep down—and everyone else at work does, too—that he works harder than you? And that if you successfully get an unwarranted raise, everyone else will know? Instead, you might feel motivated to work harder, seeing that if you do, you’ll actually be rewarded as he was—a fact you were never really sure of until you saw the dollar amounts.

Second, pay transparency can lead to pay uniformity. Because employers are fearful that paying employees different wages, and letting

85. *Id.* at 1515-16.

86. Tammy Erickson, *Should Your Coworkers Know How Much You Make?* HARVARD BUS. REVIEW BLOG (Apr. 25, 2009), blogs.hbr.org/erickson/2009/04/should_i_know_how_much_you_mak.html.

them know about it, will lead to dissension and hurt feelings, there may be a tendency towards more objective, uniform measures for setting pay rates under systems of transparency. Indeed, this has been provided as a reason why employers may resist compliance with the NLRA, which requires them to permit employees to discuss their pay with each other.⁸⁷ As I will argue below, this tendency towards uniformity may be misguided.⁸⁸ Non-uniform pay in a system of pay transparency may be one of the best ways to incentivize good performance. But to the extent pay transparency promotes uniformity of pay, uniformity is the flip side of discretion, and as discretion is reduced, the opportunity for intentional discrimination narrows.

Third, the weak negotiation practices of women, minorities, and anyone in the “out-group” would be mitigated by pay transparency.⁸⁹ Pay transparency cures much of the information disparity between employees. Members of out-groups could determine what is normal pay, at least at that employer, by simply looking at the numbers. Members could also feel more confident negotiating for better pay, knowing what everyone else is getting. They could also become aware of jobs and career tracks that provide more potential for advancement and raises in the long run. Women in particular may overcome gendered socialization and seek to transfer into jobs with better long term potential, if made

87. Gely & Bierman, *supra* note 78. The proposed Paycheck Fairness Act also would have prohibited retaliation against employees who talk about their pay with each other. H.R. 1338, 110th Cong. § 3(b)(1)(B) (Aug. 1, 2008).

88. See *infra* Part IV.B.

89. Deborah Eisenberg has encouraged a different kind of pay transparency on similar grounds. Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. (forthcoming 2011); Deborah Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 S.M.U. L. REV. 17, 63-67 (2010). Eisenberg does not encourage transparency in the sense I do—internal workplace transparency that would permit employees to look up the wages and salaries of their fellow employees, identified by name. Rather, she promotes the use of pay scales and clear standards for setting compensation, as well as disclosure of salary “band” information. This could be a start, but it might lead to more pay uniformity than is ideal for many businesses. See *infra* Part IV.B. In the alternative, if a very large range of salaries is permitted for a particular pay grade, so that pay need not be uniform, then disclosing the pay scale would be insufficient to provide notice to employees of unfair compensation decisions occurring within those ranges. Indeed, some form of pay scales and performance evaluations were used at Goodyear Tire to determine compensation, including raises, but Lilly Ledbetter was still subject to wage discrimination, unbeknownst to her. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 659 (2007) (Ginsburg, J., dissenting) (pointing out that “Ledbetter’s pay, during a particular one-year period, fell below Goodyear’s minimum threshold for her position,” and that Goodyear attempted to explain the disparities based on poor performance). These reasons may be why Eisenberg encourages employers to use and disclose pay scales, but does not go so far as to propose any kind of legal mandate or incentive to do so.

aware of the differences in salary potential between jobs that have been traditionally gendered female, and those traditionally gendered male.

IV. THE COSTS OF PAY TRANSPARENCY

In this Part, I consider the costs of pay transparency. As this Part will show, most of the costs perceived to stem from pay transparency are costs to the employer, not to employees. More importantly, most of these costs are not costs in the form of reduced productivity, but costs in the form of a different allocation of profits between employer and employees.⁹⁰ We should not hesitate to incentivize reforms that reduce discrimination merely because they will lead to a different allocation of profits, because that is not a social cost. Only one potential cost—reduced ability to incentivize good performance—represents a true social cost, in that it is a potential cost in the form of reduced productivity. However, even this cost may be far rarer than it is often perceived to be.⁹¹

A. *Social Discomfort*

The NLRA already secures the right of workers to tell each other how much money they make.⁹² Employers cannot stop them from doing this, even though a number of employers have formal policies that claim to do so, and which are in clear violation of the law, as other authors have pointed out.⁹³

But even with this legal protection, most employees don't tell each other what they make. Some employees mistakenly believe they can't, and very few private employers volunteer the information rather than forcing employees to disclose it to each other if they want to know.⁹⁴

90. See *infra* Part IV.C.

91. See *infra* Part IV.B.

92. See, e.g., *Jeannette Corp. v. N.L.R.B.*, 532 F.2d 916, 918 (3d Cir. 1976) (“It is obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. That is not to say that every wage discussion is protected activity. It is sufficient for finding the rule prima facie violative of section 8(a)(1) to note that wage discussions can be protected activity and that an employer's unqualified rule barring such discussions has the tendency to inhibit such activity.”) (citations and internal quotations omitted) (interpreting 29 U.S.C. §157 (2006), which states: “Employees shall have the right to self-organization, . . . to engage in [] concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .”).

93. Leonard Bierman & Rafael Gely, “*Love, Sex and Politics? Sure. Salary? No Way*”: *Workplace Social Norms and the Law*, 25 *BERKELEY J. EMP. & LAB. L.* 167, 168-69 (2004); Gely & Bierman, *supra* note 78, at 128.

94. Bierman & Gely, *supra* note 93, at 171 (citing survey finding that only about 10% of employers had “actively adopted” pay transparency, and that “over one-third of

One reason this workplace right may be so flagrantly violated and so underexercised is simply cultural. This is one of the few perceived costs to pay transparency that can be thought of as a cost to employees, rather than employers.

People in the United States often think it is dirty to talk about money. They associate money with status, and it is impolite to talk about status, or reveal it overtly.⁹⁵ Thus, pay transparency may simply make some people uncomfortable. But this kind of awkward discomfort is not a sufficiently persuasive argument against pay transparency in the face of discrimination. If we have a solution that could reduce discrimination, we should use it. Moreover, if pay transparency were more common, cultural discomfort with people making different amounts of money would likely be mitigated somewhat.

Indeed, this is exactly the kind of malleable social norm that the Civil Rights Act and the Equal Protection Clause have successfully been able to alter in the past. The arguments of those who sought to rely on social prejudices to justify employment and public accommodations discrimination, as well as family law discrimination against interracial couples, were soundly rejected.⁹⁶ This rejection is widely seen as a wise and courageous move that prevented prevalent social norms from undermining antidiscrimination law altogether. Instead, antidiscrimination law altered the social norms. It is no longer the norm to say prejudiced and injurious things to children being raised by interracial couples, for Whites to refuse to eat in the same dining room as African Americans, or for airline customers to prefer to be served by female flight attendants.

private sector employers” had rules “prohibiting employees from discussing their wages,” despite most of these rules likely violating the NLRA).

95. *Id.* at 175 (“[A] ‘code of silence’ exists with respect to the issue of pay in a large number of workplaces throughout the country. The social norms behind the establishment of these codes of silence are strong, and the potential consequences of breaching these norms are seen by many as being serious.”); see also Ray Fisman, *How Much Do You Think He Makes?: Does Knowing Your Colleagues’ Salaries Make You Happy or Disgruntled?*, SLATE (Sept. 28, 2010), <http://www.slate.com/id/2268886/>.

96. *E.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 297 (1964) (applying the Civil Rights Act to a restaurant that discriminated against African American customers, despite district court finding that “if [the restaurant] were required to serve Negroes it would lose a substantial amount of business”); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (finding removal of an infant from mother’s custody after she married an African American man to be unconstitutional, despite the “reality of private biases and the possible injury they might inflict” on the child); *Diaz v. Pan-American Airlines*, 442 F.2d 385, 389 (5th Cir. 1971) (“While we recognize that the public’s expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”).

B. *Disgruntled Employees and Uniform Pay*

Another perceived cost of pay transparency is that when employees know what everyone is making, disgruntled employees will be more common. A recent study at UC Berkeley informed employees of an easily accessible website that they could use to look up their colleagues' public salaries. Those employees who used the website and had below median salaries for their "pay unit and occupation" had decreased job satisfaction and increased likelihood of looking for a new job. Those with above median salaries reported no change in job satisfaction.⁹⁷

One response to this cost is to make pay more uniform, to avoid creating unhappy employees. Many employers assume that making pay uniform is itself a cost, believing that with more uniform pay, employees cannot be incentivized to perform better through the prospect of better pay. This assumption may not be true in all cases. Indeed, team-based performance assessment and incentive pay may, in some workplaces, provide superior results to individual-employee-based merit pay.⁹⁸ Just as more uniform pay for units and jobs can lead to freeriding, too much individualized competition for pay can lead to selfish behavior that is not targeted at group productivity and firm wide outcomes.⁹⁹

For those environments where healthy competition between employees really is the ideal approach, employers should not assume that pay transparency makes it impossible to have merit pay, nor should they assume that employee expressions of unhappiness are unwarranted. Employees may feel disgruntled about other employees making more than them because they feel the disparity is not truly merit based. If employees thought the disparity were fair, they would have no reason to seek another job. The impetus to seek another job stems from the sense that the disparity does not reflect merit. In many cases, the employees are probably right, given the fact that membership in valuable social networks and negotiating skills affect pay.

There is evidence that employees are in fact quite comfortable with merit pay when it is substantively and, importantly, *procedurally* fair. Procedural justice is the sense that the process used is fair. Studies "suggest that procedural information is used as a heuristic, i.e., serves as

97. David Card, Alexandre Mas, Enrico Moretti & Emmanuel Saez, *Inequality at Work: The Effect of Peer Salaries on Job Satisfaction* (NBER Working Paper No. 16396 Sept. 2010), available at <http://www.nber.org/papers/w16396>.

98. Phyllis A. Siegel & Donald C. Hambrick, *Pay Disparities Within Top Management Groups: Evidence of Harmful Effects on Performance of High-Technology Firms*, 15 *Org. Sci.* 259, 267 (2005).

99. *Id.* at 261-264.

a substitute for unclear or missing information on outcomes fairness.”¹⁰⁰ In other words, employees, like employers, may not be entirely sure that their pay is fair. An employee might not know if her colleague makes more because she works harder, or if she makes more because she is attractive. She’s not sure whether the colleague works harder or not. However, she may not jump to the conclusion that the pay is unfair if she has reason to guess that the procedures by which the salaries have been determined are fair.

In the salary context, researchers seeking to define the characteristics that lead to a sense of procedural justice have identified four major standards: “1. Accuracy of information about work content; 2. Relevance of evaluation criteria; 3. Consistency of application; and 4. Objectivity of the evaluation process.”¹⁰¹ There are a number of ways employers can provide more of a sense of procedural justice. One is transparency itself.¹⁰² Another major factor employers can control is the characteristics of the decision makers—their perceived objectivity and accuracy.¹⁰³ Employers can also recruit employee participation in the “process of information gathering, and by asking them to validate their job description.” They could also institute more finely grained performance evaluations.

Managers and scholars of business are now starting to acknowledge that when some form of procedural justice exists, transparent pay can be non-uniform. Moreover, it can actually incentivize good work, since it encourages substantively fair compensation, with higher compensation visibly going to those who perform more and better work, not to those who happen to have better negotiating skills.¹⁰⁴ Employees often suspect that some people get more pay for reasons unrelated to merit—they are friends with the right people, attractive, pushy, etc. Employers often claim that they could not reward merit under a system of pay transparency, but pay transparency, if combined with merit pay, could actually incentivize employees even more than an opaque system of merit pay does. With pay transparency, employers can show employees that merit really is rewarded, and supervisors can be better encouraged to reward true merit, rather than unfairly enriching their friends.

100. Julie Cloutier & Lars Vilhuber, *Procedural Justice Criteria in Salary Determination*, 23 J. Managerial Psych. 713, 733 (2008).

101. *Id.* at 716.

102. *Id.* at 731.

103. *Id.* at 731-33.

104. Tammy Erickson, *Should Your Coworkers Know How Much You Make?*, HARVARD BUSINESS REVIEW BLOG (Apr. 25, 2009, 9:27 p.m.), http://blogs.hbr.org/erickson/2009/04/should_i_know_how_much_you_mak.html.

Indeed, one author has gone so far as to promote letting employees set their own pay (under the watchful eye of their colleagues) as the next step.¹⁰⁵ At least one experiment with this process has found that employees tend to set their own pay quite fairly in these circumstances.¹⁰⁶

Another response to the cost of disgruntled employees is to treat all workers better. For instance, law professors at public universities make wildly different amounts of money. At one UC law school, for instance, in 2008 there were professors making in the mid-\$100,000s range and some making in the mid-\$300,000s range. The differences cannot be attributed solely to seniority.¹⁰⁷ These salaries are public, and while there is probably some irritation about these salary differences, the fact that many of these professors have tenure, and that all of them are quite well-paid, must help mitigate the irritation greatly. Once employers treat all employees well, they can go out of their way to reward some employees who are particularly high performing with much greater ease. While some employers may not like this solution because it costs money, an incentive to treat all employees better while reducing pay disparities that lack a basis in merit is one that we should not hesitate over.

There may be some employers for whom pay transparency, even when used in conjunction with the more innovative management practices described above, does hurt productivity by reducing employer ability to incentivize high quality performance in workers. However, we must weigh this cost against the benefits of reduced discrimination that pay transparency would provide, keeping in mind the massive wage gaps documented for women and racial minorities, as well as the fact that some substantial portion of these gaps appears explained by unjust discrimination (intentional and unintentional).

In order to mitigate (but of course not completely eradicate) the potential cost to productivity, my proposal does not make pay transparency mandatory, and my proposal links the incentive to institute pay transparency to employers' self-perceived risk of liability for pay discrimination. Through these two elements, the proposal will better target: 1) Those employers who, by their own calculations, are more likely permitting rampant wage discrimination to go unremedied; and

105. *Id.*

106. *Id.*

107. One can search *State Worker Salary Search*, SACRAMENTO BEE, <http://www.sacbee.com/statepay>, to find salaries, with names identified. Those who are familiar with the professors at a particular UC law school will be able to confirm through casual searching that seniority does not appear to be a sufficient explanation for the salary disparities.

2) Those employers who, by their own calculations, will experience lower rather than higher pay transparency-related costs.

C. Loss of Employer Information Advantage

Another cost of pay transparency to employers may be the loss of information advantages that many of them currently enjoy. Knowing what other workers make would be an advantage to *all employees* in negotiating salary. While workers can look up so-called market wages for various jobs, there are actually huge ranges of market wages for most jobs.¹⁰⁸ Thus, it is hard for employees to know what an employer really is willing to pay for a particular job. Under a system of pay transparency, many employers should expect employees' salaries to go up, as they will be better equipped to negotiate with the employer.

The benefits of procedural justice and incentives to perform well may outweigh the cost of employers losing their current information advantage. However, it is likely that in some cases, these benefits to the employer will not outweigh the costs of losing an information advantage. Nevertheless, this is not a cost to the employer that also represents a social cost, in the form of lost productivity. Instead, it is a cost in the form of a reduced share in profits, with more profits allocated to employees.

Nevertheless, some readers may be concerned that a shift in profit share from employers to employees will discourage business activity generally. Because I propose incentivizing pay transparency rather than mandating it, in cases where the loss of employer profit share is so severe as to discourage the firm from doing business at all, the employer need not embrace pay transparency. Such an employer could still defend against claims of pay discrimination in the ways it currently can: by rebutting the plaintiff's evidence of intentional discrimination with "legitimate, nondiscriminatory reasons"¹⁰⁹ for compensation decisions, and by proving that practices having a disparate impact on pay serve a business necessity.¹¹⁰ Moreover, it is the employer's self-assessment of the costs of pay transparency as compared to the benefits—reduced liability for pay discrimination—that will determine whether the employer embraces pay transparency or not. This means that pay transparency will be embraced more often in circumstances where it

108. Marlene Kim, *Employers' Estimates of Market Wages: Implications for Wage Discrimination in the U.S.*, 6 FEMINIST ECON. 97, 98-100 (2000).

109. See *supra* notes 40, 58 (explaining this method of rebutting claims of intentional discrimination under Title VII).

110. See *supra* notes 18, 45-50 and accompanying text (explaining this method of defending against claims of unintentional discrimination under Title VII).

would be socially efficient to do so—where the employer’s own assessment of the risk that it is discriminating is high, in comparison to the employer’s assessment of the cost of losing an information advantage.

D. Internalizing the Cost of Discrimination

The benefits to the employer will not outweigh the costs of pay transparency in all cases, in particular, those where the cost of losing an information advantage is high. However, when we add on reduced liability for discrimination, many employers may well find that pay transparency is worth it. Some may not. But given that the benefits to employers of pay transparency may be underappreciated currently, the nudge of a change in Title VII may help employers consider ways of rewarding and incentivizing employees that are both substantively and procedurally more fair.

More importantly, we should require employers, in making that calculation, to fully internalize the cost of discrimination that is facilitated and masked by not providing pay transparency. That is why I propose getting rid of the two-year cap on backpay for pay discrimination claims. Because I propose that we merely incentivize employers to provide pay transparency, with the carrot of an affirmative defense or safe harbor, employers that believe these costs are simply too great need not incur them. However, we should at least nudge employers to consider the benefits, in particular by forcing them to internalize the social costs of their own behavior—at least that behavior which could plausibly violate Title VII.

V. THE ELEMENTS OF THE PAY TRANSPARENCY DEFENSE

As explained above, I propose a pay transparency defense or safe harbor. Under the affirmative defense version of the proposal, employers could establish an affirmative defense to vicarious liability for pay discrimination. Under the safe harbor version, the carrot for the employer would be even stronger. Establishing that one falls within the safe harbor would be sufficient grounds for dismissal of the pay discrimination claims, and moving for dismissal on this basis would be sufficient for staying discovery during consideration of the motion. Thus, under the safe harbor version, employers would not only have a defense to the pay discrimination claims, they could avoid discovery on them.

Under either version, there would be two elements required to establish the defense or safe harbor: (1) the employer made salaries

internally transparent and (2) the employee failed to voice objections to any suspected or alleged discrimination in a timely fashion.

In this part, I first provide examples of these two options—the “reasonable care” affirmative defense to sexual harassment liability under Title VII and the “safe harbor” from European Commission data privacy law. I then provide details of what would be sufficient to establish the elements of the defense or safe harbor.

A. *The Legal Incentive for Employers to Embrace Pay Transparency*

A variety of legal incentives in the form of reduced liability for discrimination could be used to incentivize employers to embrace pay transparency. For instance, employers could obtain an affirmative defense to liability if they institute pay transparency, similar to the “reasonable care” defense for most forms of harassment liability under Title VII.

The reasonable care defense is a judge-made defense to Title VII harassment liability, created as a way of resolving the difficult question of when employers should be liable for the harassment of an employee by other employees, including supervisors.¹¹¹ Employees who engage in harassment, indeed, employees who engage in any form of discrimination prohibited by Title VII, are often acting in defiance of company policy prohibiting discrimination.¹¹² But in the case of hostile work environment harassment, the employer often lacks actual or constructive notice that the harasser is engaged in the discriminatory activity, especially when the victim of the harassment does not raise concerns.¹¹³ If the harassment occurs and nobody in the position to do something about it knows about it, it seems unfair to some to impute liability to the employer.

On the other hand, when the harasser has supervisory authority, it is arguably the authority that has been delegated to the supervisor that facilitates his or her engaging in harassment. Some argue that the

111. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 777-78 (1989).

112. For example, this is a point made in *Vinson v. Taylor*, No. 78-1793, 1980 WL 100, at *6 (D.D.C. 1980) (describing harassers, who are “gratify[ing their] own desires” despite a nondiscrimination policy as thereby distinguished from cab drivers who hit pedestrians despite the company’s safety policy, and for whose actions employers are liable through the doctrine of respondeat superior). *Vinson v. Taylor* was eventually overturned in *Meritor v. Vinson*, 477 U.S. 57 (1986), one of the early Supreme Court cases on vicarious liability for supervisor harassment.

113. The district court in *Vinson v. Taylor* made the point that the victim did not complain, and argued that notice to the harasser did not equate to notice to the employer. *Vinson v. Taylor*, 1980 WL 100, at *7.

employer ought to be strictly liable in this case as a result,¹¹⁴ just as the employer would be liable if a supervisor fired someone for discriminatory reasons, in defiance of company policy. Moreover, the employer is arguably in the best position to create the circumstances in which the harassment will be reported and promptly responded to.¹¹⁵ Employers, and not employees, are in the position to create a clear avenue for reporting harassment without fear of retaliation by both supervisors and coworkers, and employers are in the position to respond promptly.¹¹⁶

This dilemma is similar to one often faced in pay discrimination. Supervisors are frequently delegated authority to evaluate employees, recommend raises, and negotiate salaries. They may exercise that authority in a discriminatory manner (both intentionally and unintentionally). When the supervisor violates Title VII, especially if he or she does so unintentionally, the employer may not be aware. On the other hand, the employer is in the best position to structure the workplace in ways that unearth the discrimination.

In the case of harassment, the U.S. Supreme Court eventually created an affirmative defense to liability for supervisor harassment, the elements of which encourage employers to take positive steps to prevent and remedy harassment, and encourage employees to provide notice to the employer of the harassment early on. “The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹¹⁷

In response to this legal development, numerous employers have taken steps to prevent harassment, as well as to speed up discovery when it does take place. Employers have spent the time, and massive amounts of money, to educate employees about discriminatory harassment and the fact that it violates the law.¹¹⁸ They have also created avenues for

114. This is the position that the appellate court took in *Vinson v. Taylor*, 753 F.2d 141, 150 (D.C. Cir. 1985). It was also the position of Justice Marshall in *Meritor v. Vinson*, 477 U.S. at 76-77.

115. *Vinson v. Taylor*, 753 F.2d at 151.

116. *Id.*

117. *Id.* at 807.

118. Even a few days after the *Ellerth* and *Faragher* decisions, the L.A. Times noted that the sexual harassment training industry was already large. Stuart Silverstein, *Fear of Lawsuits Spurs the Birth of New Industry*, L.A. TIMES, June 27, 1998, <http://articles.latimes.com/1998/jun/27/news/mn-64125> (“[The industry’s] size isn’t known, but the annual revenue is believed to be in the billions.”). This was probably prompted by *Meritor v. Vinson* itself. *Ellerth/Faragher* only increased the incentive.

employees who are the victims of harassment to report it, even when it is being committed by their supervisor, or by coworkers. If anything, some have argued that employers have gone too far, trampling on the interests of both complainants¹¹⁹ and alleged harassers,¹²⁰ and on the interests of all in open, “unsanitized” workplaces where they feel free to date coworkers, relax and have sexual conversation.¹²¹

An affirmative defense to or safe harbor from pay discrimination that is structured to prevent and unearth the discrimination could similarly incentivize employers to act. Pay transparency deters discrimination by exposing it to employees who are victims, and unearths discrimination by letting employees know when they are being paid far less than their colleagues who do the same quality of work.

However, the costs of taking reasonable care to prevent and remedy harassment may be less than the costs of embracing pay transparency. The cultural shift may also be greater with embracing pay transparency. Nevertheless, the benefits to society could be massive. Pay transparency could undo “poverty traps” rooted in historical discrimination and social segregation. It could also incentivize women and people of color to resist socialization that encourages them to take career paths and strategies that are ultimately less financially rewarding. Making clear just how much more money one would make in the long run in that stereotypically male job could help make people’s choices in employment better informed.

Given this benefit, and given that most of the costs of pay transparency represent a shift in profit sharing away from employer to employee, rather than a social cost in the form of less productivity, it might be worth giving employers an even stronger incentive. For instance, we might provide employers with a safe harbor, modeled loosely on an arrangement between the U.S. Department of Commerce and the European Union (E.U.) for protecting the safety of personal data removed from the E.U.¹²² Under the arrangement, organizations in the U.S. that voluntarily commit to a set of principles designed to protect the personal data of individuals are in the safe harbor.¹²³ All complaints that an E.U. citizen’s data is not properly protected go to an independent

119. Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125, 130-31 (2002).

120. Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

121. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

122. Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24, 2000) [hereinafter Safe Harbor Principles]; European Commission Directive 2000/520/EC (July 26, 2000).

123. Safe Harbor Principles, *supra* note 122, at 45,666.

arbitrator, one that the U.S. organization was allowed to choose when it committed to the safe harbor principles.¹²⁴ Thus, companies that commit to the safe harbor principles are essentially getting compelled arbitration without the complainant even having signed an arbitration agreement. Of course, companies have to do something in exchange for this benefit. The safe harbor principles with which the committed companies must comply are reasonably stringent.¹²⁵

We could imagine a similarly strong carrot for employers to embrace pay transparency if the affirmative defense is deemed insufficient. Employers who prove that they provided sufficient pay transparency and that the plaintiff did not timely complain of pay discrimination, as described below, could get not just summary judgment, but dismissal of the claims of pay discrimination. This is a massive benefit, as it cuts off discovery, but encouraging this type of step to reduce pay discrimination before the discrimination starts may be just the type of reform needed to make Title VII provide fairness for all, rather than the lucky few who somehow discover quickly that they've been the victim of discrimination.

In light of the foregoing discussion, the following is a model of how the two general elements of the safe harbor or affirmative defense may be operationalized doctrinally.

B. What Constitutes Sufficient Internal Transparency

To satisfy element (1), an employer should have had in place, at the time the employee alleges he or she was paid a discriminatory paycheck, disclosure of salaries, hourly and overtime wages, piece rates, bonuses or grants awarded in the prior pay period, and any fees charged by the employee to the employer in the prior pay period for additional independent contracting work, such as consulting.

Employers would not have to disclose the fees generally paid to independent contractors, but they would have to disclose when those contractors also happen to be current employees.

Disclosure would have to be made to all employees working for the same employer, but not to the public or to employees working for subsidiaries. Disclosure would have to be distributed in a form that is "easily accessible" to employees, and employees would have to be notified of the disclosure system and the fact that failure to complain about unfair pay in a timely fashion would forfeit their claims. The

124. *Id.* at 45,668 (section on enforcement).

125. *Id.*

employer would bear the burden to prove that the system was in place and sufficient.

One example of a qualifying disclosure system would be distribution of the information via a website accessible to employees, as long as there are enough internet-enabled computers at work for employees to use without having to wait in long lines, and as long as employees are permitted to use them before or after work hours. In workplaces where this is not practical, another example of a sufficient disclosure system would be distribution of a booklet on a monthly basis containing the disclosures. Given that liability for the entire claim of pay discrimination could be avoided through distribution of the booklet and failure of the employee to complain in a timely fashion, the booklet would need to be signed for, in order to show that the employee actually received it in any given month. Employers could protect themselves from disputes about whether a website was up and running by keeping a record of successful employee logins, and showing that successful logins occurred regularly during the time period at issue. Employers could even assign an employee to login and ensure the website is functioning once a week.

Employers would have to disclose the pay data across the company, anonymized if they wish. However, if the information is anonymized, employers would have to make a second disclosure that include names of employees, but could limit that disclosure to employees working in the same department or unit, where each department or unit must be defined by an identifiable manager or management group to whom discretion to set and negotiate pay is delegated. In other words, employees should be able to compare the salaries they have negotiated with their managers to those that the same managers negotiated with others.

C. What Constitutes Failure To Complain in a Timely Fashion

If an employee failed to complain within 180 days¹²⁶ of the disclosure which put the employee on notice of the allegedly discriminatory pay, element (2) would be satisfied. Thus, if an employer updated the pay disclosure website daily, this would create a six month requirement to complain. It would also essentially create a requirement that employees check the website approximately every three months, to

126. On some level the choice of when to deem a complaint "untimely" is arbitrary, but I suggest 180 days because this is the amount of time within which typical employees must file charges of discrimination with the EEOC or a parallel state agency. 42 U.S.C. § 2000e-5(e)(1) (2006). 180 days would therefore be consistent with the amount of time employees have to file their non-pay discrimination charges, and would help avoid unnecessary complexity and confusion.

give themselves a few months to decide whether to make a complaint to the employer. If the employer updated only yearly, an employee might be able to complain up to a year and six months after the discriminatory pay, because the employee might only be on notice of the disparity a year after it began.

A complaint would have to be clearly understandable as a complaint that a pay discrepancy discriminates on the basis of some protected category. A complaint that pay is “unfair,” or otherwise problematic without alleging some form of discrimination, would not be sufficient, as a fair number of these complaints can be expected once pay is transparent, with no intent to allege discrimination. If an employer creates a formal complaint form that is distributed along with the pay disclosure to all employees, failure to fill out the form timely can constitute failure to complain timely, as long as the form provides clear notice that failure to use it can lead to forfeiting one’s claims under Title VII and the Equal Pay Act.

Finally, the two year cap on back-pay would only be lifted, and the affirmative defense or safe harbor would only be effective, prospectively.

VI. CONCLUSION

Having one’s salary exposed to one’s colleagues is a scary prospect to many readers, but those who are employees should consider that the social awkwardness will often be made up for by higher pay, since employers who take advantage of the pay transparency defense will lose much of their information advantage in salary negotiations. Moreover, employers, employees, and legislators should all be excited about the opportunity to root out both intentional and unintentional gender and race based wage gaps. All these groups should want work to reward merit, effort, creativity, and results, rather than the accidents of being friends with the right people, socialized to negotiate well, or socialized to choose the right job.
