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## Confronting the Racial Pay Gap

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# Confronting the Racial Pay Gap

*Stephanie Bornstein\**

*For several decades, a small body of legal scholarship has addressed the gender pay gap, which compares the median full-time earnings of women and men. More recently, legal scholars have begun to address the racial wealth gap, which measures racial disparities in family economic security and wealth accumulation. Yet a crucial component of both the gender pay gap and the racial wealth gap remains unaddressed in the legal literature: the pay gap between the earnings of White workers and workers of color. Today, all women average eighty-two cents to each dollar men earn, but Black and Latinx workers average only seventy-four cents on the dollar to White workers. Black and Latinx women, affected by both racial and gender pay gaps, average a mere sixty-three and fifty-five cents respectively per White men's dollar. And while the gender pay gap has narrowed, albeit slowly over time, the racial pay gap has grown. Black and Latinx workers now earn less relative to White workers than they did in the late 1970s.*

*The lack of legal attention to the racial pay gap reflects a belief that to remedy the problem would take major social change to dismantle the education, criminal justice, and other systems that lead Black and Latinx workers to disproportionately hold lower paid jobs. While widescale change may be necessary (and still insufficient) to fully close the racial pay gap, more can and should be done to narrow it now. The racial pay gap has worsened despite significant gains in educational attainment by Black and Latinx Americans. Economists have documented that between one-third and two-thirds of today's racial pay gap cannot be attributed to known causes and is due to "unobservable" factors including discrimination. A handful of states have added the protected class of race in recent amendments to strengthen their state law versions of the federal Equal Pay Act. This Article details the scope of the racial pay gap that may be reachable through antidiscrimination law and provides new legal strategies for doing so. Yet beyond strengthening pay*

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*discrimination claims, this Article argues for tackling structural pieces of the racial pay gap even as we work toward improving those structures—for example, by limiting the present effects on pay of racially disparate criminal justice and education systems.*

*Recent public reckoning from the #MeToo and Time's Up movements has sparked renewed interest in closing the gender pay gap. The growth of the Black Lives Matter movement in the wake of the killing of George Floyd has drawn attention to the racial wealth gap as part of the legacy of White supremacy. But interest in the equally important—and not insurmountable—issue of closing the racial pay gap has yet to catch on. This Article begins the process of reframing to highlight how confronting the racial pay gap is an essential but overlooked piece of the zeitgeist, key to resolving the gender pay gap for women of color, the racial wealth gap, and income inequality overall.*

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## INTRODUCTION

In 1979, the average Black worker in the United States working full-time, year-round earned 81.9 cents on the dollar to the average White worker working the same, reflecting what is known as a racial “pay gap” of 18.1%.<sup>1</sup> In 2019, after four decades during which most believe the social and economic status of Black Americans improved significantly,<sup>2</sup> the average Black worker earned 73.5 cents on the dollar of the average White worker—a pay gap of 26.5%.<sup>3</sup> Likewise, Latinx<sup>4</sup> men, who averaged 76 cents on the dollar of White men in 1979, averaged only 67.5 cents in 2017<sup>5</sup>; all Latinx workers averaged 74.6 cents on a White worker’s dollar in 2019.<sup>6</sup> And while Black and Latinx women made gains in pay relative to White men during this time, their pay relative to White women went down from 92.1 and 82.5 cents on

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1. VALERIE WILSON & WILLIAM M. RODGERS III, *ECON. POL’Y INST., BLACK-WHITE WAGE GAPS EXPAND WITH RISING WAGE INEQUALITY* 8 tbl.1 (2016), <https://files.epi.org/pdf/101972.pdf> [<https://perma.cc/UYG9-KVWW>].

2. WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 28–30 (2020) (discussing misperceptions of equality achieved in surveys of both Black and White respondents).

3. Elise Gould, *Black-White Wage Gaps Are Worse Today Than in 2000*, *ECON. POL’Y INST.: WORKING ECON. BLOG* (Feb. 27, 2020, 5:34 PM), <https://www.epi.org/blog/Black-white-wage-gaps-are-worse-today-than-in-2000> [<https://perma.cc/GPM6-PH5A>]; see also WILSON & RODGERS, *supra* note 1, at 8 tbl.1 (showing a 26.7% gap in 2015).

4. The term “Latinx” used here encompasses a wide array of ethnicities because most publicly available data combine all into one group. See *About the Hispanic Population and Its Origin*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/hispanic-origin/about.html> (last visited July 26, 2022) [<https://perma.cc/C4XG-EVXJ>]:

People who identify with the terms “Hispanic” or “Latino” are those who classify themselves in one of the specific Hispanic or Latino categories listed on the decennial census questionnaire and various Census Bureau survey questionnaires—“Mexican, Mexican Am., Chicano” or “Puerto Rican” or “Cuban”—as well as those who indicate that they are “another Hispanic, Latino, or Spanish origin.”

5. MARIE T. MORA & ALBERTO DÁVILA, *ECON. POL’Y INST., THE HISPANIC–WHITE WAGE GAP HAS REMAINED WIDE AND RELATIVELY STEADY* 12–13 (2018), <https://files.epi.org/pdf/147311.pdf> [<https://perma.cc/JT3E-TU8Y>].

6. ELISE GOULD, *ECON. POL’Y INST., STATE OF WORKING AMERICA WAGES 2019: A STORY OF SLOW, UNEVEN, AND UNEQUAL WAGE GROWTH OVER THE LAST 40 YEARS* 14 (2020), <https://files.epi.org/pdf/183498.pdf> [<https://perma.cc/53GL-9RAX>].

White women's dollar in 1979 to 80.1 and 70.4 cents in 2019, respectively.<sup>7</sup> The racial pay gap is *worse* than it was forty years ago.<sup>8</sup>

During the same time, the overall gender pay gap—the difference in the median earnings of all U.S. women and men working full-time, year-round—has steadily, albeit very slowly, improved.<sup>9</sup> The gender pay gap between men and women shrank precipitously between the 1970s and 2000, dropping from a gap of 40–45% to 20–25% in the early 2000s.<sup>10</sup> Since then, narrowing has slowed to a crawl but continues, reducing the overall gap to 18%, or earnings of 82 cents on the dollar, in 2019.<sup>11</sup> Consistent advocacy has kept the issue of the gender pay gap in the public eye for decades, with renewed interest since 2017 in the wake of the #MeToo and Time's Up movements. Internet searches, social media interest, and news coverage of the gender pay gap all increased noticeably in the last five years as compared to the five years prior.<sup>12</sup> By the fall of 2019, polling in advance of the 2020 presidential election showed that nearly 60% of voters surveyed “agree[d] that women make less than men for the same work

7. *Median Annual Earnings by Sex, Race, and Hispanic Ethnicity*, U.S. DEPT OF LAB., <https://www.dol.gov/agencies/wb/data/earnings/median-annual-sex-race-hispanic-ethnicity> (last visited July 26, 2022) [<https://perma.cc/GKS7-FJYN>] (To generate the data for 1979: select “White Women,” “Black Women,” and “Hispanic Women” from the sidebar, then identify the line designated for each race and place the cursor over the year to generate the mean annual earnings for the women in each racial group in that year. To generate the data for 2019: select “White, non-Hispanic Women,” “Black Women,” and “Hispanic Women” from the sidebar, then identify the line designated for each race and place the cursor over the year to generate the mean annual earnings for the women in each racial group in that year).

8. While employment and other forms of discrimination are equally acute against Asian Americans and Pacific Islanders, the specific issue of the relative wage gap is unique. In 2019 Asian men earned, on average, more than White men (\$1.16 on the dollar), and Asian women, more than White women (\$1.11 on the dollar), although Asian women still experienced a gender pay gap relative to White men (\$0.87 on the dollar). *Id.* (select “Asian Women,” “Asian Men,” “White, non-Hispanic Men,” and “White, non-Hispanic Women” from the sidebar, then identify the line designated for each race/gender combination and place the cursor over the year to generate the mean annual earnings for each race/gender combination in that year). For this reason, this Article focuses primarily on the Black-White and Latinx-White racial pay gaps. In addition, for brevity, this Article sometimes uses the term “the racial pay gap” to refer collectively to multiple distinct measures—the Black-White gap, the Latinx-White gap, the racialized gender gap experienced by Black women, and the racialized gender gap experienced by Latinx women.

9. *The Simple Truth About the Gender Pay Gap*, AM. ASS'N OF UNIV. WOMEN (2018), <https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf> [<https://perma.cc/F25T-EC3Z>] [hereinafter AM. ASS'N OF UNIV. WOMEN, 2018 ed.]; *The Simple Truth About the Gender Pay Gap*, AM. ASS'N OF UNIV. WOMEN (2020), [https://www.aauw.org/app/uploads/2020/12/SimpleTruth\\_2.1.pdf](https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf) [<https://perma.cc/DP4P-HY65>] [hereinafter AM. ASS'N OF UNIV. WOMEN, 2020 update].

10. AM. ASS'N OF UNIV. WOMEN, 2018 ed., *supra* note 9, at 5 fig.1.

11. *Id.*; AM. ASS'N OF UNIV. WOMEN, 2020 update, *supra* note 9, at 2.

12. Original data compiled by author as of February 1, 2022, using Google search trends and Lexis news searches to compare returns on search terms “pay gap,” “gender pay gap,” “racial wealth gap,” and “racial pay gap” during periods 2010–2015 and 2016–2021. Data on file with author.

[and that] the federal government isn't doing enough to rectify the issue."<sup>13</sup>

More recently, the issue of the racial wealth gap—the difference in overall economic security and accumulated wealth of families by race that is a legacy of White supremacy—has also drawn attention. Current data shows that the average White family has a median net worth nearly ten times greater than the average Black family<sup>14</sup> and nearly seven times greater than the average Latinx family.<sup>15</sup> Interest in the structural nature of racial economic inequality, sparked by the growth of the Black Lives Matter Movement since 2013, has risen precipitously since protests erupted in the wake of George Floyd's killing in May 2020.<sup>16</sup> Attention to the issue has become so popular that it generated a recent trend of corporate and philanthropic commitments to help close the wealth gap between Black and White families.<sup>17</sup>

To date, however, the staggering—and worsening—racial *pay* gap has garnered less popular attention, despite composing an essential piece of both the *gender* pay gap for women of color and the racial *wealth* gap for Black and Latinx families.<sup>18</sup> Black and Latinx women experience racialized versions of the gender pay gap that lead to double pay penalties. While efforts to close the racial wealth gap stand to greatly improve economic inequality, they focus on long-term investments that may be undermined if Black and Latinx workers continue to earn disproportionately low annual pay.

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13. Caitlin Oprysko, *Poll: Majority of Voters Say U.S. Government Should Do More to Address Gender Pay Gap*, POLITICO (Sept. 27, 2019, 1:33 PM), <https://www.politico.com/news/2019/09/27/poll-gender-pay-gap-006066> [<https://perma.cc/JDG6-ZKHN>].

14. Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS INST. (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [<https://perma.cc/C9BV-VJJE>] (\$171,000 for White as compared to \$17,150 for Black families).

15. Danyelle Solomon & Christian E. Weller, *When a Job Is Not Enough: The Latinx-White Wealth Gap*, CTR. FOR AM. PROGRESS (Dec. 5, 2018), <https://www.americanprogress.org/issues/race/reports/2018/12/05/461823/job-not-enough/> [<https://perma.cc/5YQ9-H24L>] (\$142,180 for White as compared to \$20,765 for Latinx families).

16. Original data compiled by author, *supra* note 12.

17. See, e.g., Associated Press, *Businesses and Philanthropy Unite to Fight Racial Wealth Gap*, U.S. NEWS & WORLD REP. (Apr. 6, 2021), <https://www.usnews.com/news/business/articles/2021-04-06/businesses-and-philanthropy-unite-to-fight-racial-wealth-gap> [<https://perma.cc/4WGL-VGB6>]; Isabel Togoh, *JP Morgan Pledges \$30 Billion to Help Remedy Racial Wealth Gap*, FORBES (Oct 8, 2020, 5:53 AM), <https://www.forbes.com/sites/isabeltogoh/2020/10/08/jp-morgan-pledges-30-billion-to-help-remedy-racial-wealth-gap/?sh=515abee594d> [<https://perma.cc/9ZNY-ZS24>].

18. Original data compiled by author, *supra* note 12.

The racial pay gap has lacked attention from legal scholars,<sup>19</sup> likely due to the belief that to close the gap poses a daunting challenge. The racial pay gap, and its worsening over time, are due to a complex group of causes, including differences in workers' "human capital" like education and work experience, occupational segregation by gender and race, and "unobservable factors" like discrimination.<sup>20</sup> To fully close the racial pay and racialized gender gaps would require significant policy reform in many areas, including education, criminal justice, health care, childcare, and housing; indeed, *total* pay parity may be unachievable. But acknowledging that reality does not justify doing nothing to redress its present harms.<sup>21</sup>

It is time to confront the racial pay gap. While advocates work toward long-term social change, more can and should be done now to address the significant portion of the racial pay gap that economists attribute to discrimination. Where existing law fails to redress race discrimination in pay, the law must be strengthened or expanded, as some states have begun to do. More can and should also be done to draw popular attention to the issue of the racial pay gap—attention that is needed to garner the political will to make necessary long-term social change. As has happened with the gender pay gap and more recently the racial wealth gap, the injustice of the racial pay gap and the belief that the law can help narrow it must become part of the public consciousness.

This Article begins the process of reframing the issue of the racial pay gap within legal scholarship. Part I provides the most current data on racial pay and racialized gender pay gaps. It contrasts this with data on the gender pay gap and the racial wealth gap, identifying areas of overlap and demonstrating how narrowing the racial pay gap is an

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19. In legal scholarship, only a handful of articles engage with the issue of the racial pay gap. See, e.g., Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849 (2013); Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57 (2009); Michael Olneck, *Economic Consequences of the Academic Achievement Gap for African Americans*, 89 MARQ. L. REV. 95 (2005).

20. See *infra* Part I.C.

21. As legal scholar and critical race theorist Derrick Bell explained in 1992 when calling for "racial realism," we can "acknowledge that our actions are not likely to lead to transcendent change," yet our "dedication based on that realization, can lead to policy positions and campaigns that are less likely to worsen conditions" and "more likely to remind those in power that there are imaginative, unabashed risk-takers who refuse to be trampled upon." Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992); see also Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 HOW. L.J. 79, 91 (1991) (urging readers "[to hold] both the recognition of the futility of action (where action is more civil rights strategies that are destined to fail) and the unbelievable conviction that something must be done, that action must be taken"). For a critique and suggested reframing of Bell's argument to include the possibility of racial equality, see John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533, 550 (1992). For additional responses included in a Commentary section of the volume, see 24 CONN. L. REV. 499–566 (1992).



essential component of addressing each of these more popular issues. It concludes by identifying the causes of the racial pay gap, including the underlying role of discrimination, to provide context for solutions offered in subsequent Parts.

Part II focuses on addressing the racial pay gap through more robust use of antidiscrimination law. It illustrates the role of both Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 in redressing pay discrimination. It then examines a recent, promising development in equal pay law: amendments to state versions of the federal Equal Pay Act for gender that add the protected category of race. This Part also looks to other specific antibiasing measures on pay transparency, prior salary information, and pay data collection being adopted to close the gender pay gap that offer similar promise for narrowing the racial pay gap.

Recognizing that there are unique causes and harms of the racial pay gap, however, Part III turns to the project of reframing what appear to be intractable, long-term challenges to spark more incremental change. This Part takes on two areas in need of structural overhaul—criminal justice and education—and proposes specific legal approaches to redress their current effects on pay to help narrow the racial pay gap now while advocates work toward greater systemic change.

Public consciousness around the gender pay gap and the racial wealth gap have reached a highpoint, leading to calls to close those gaps. As this Article argues, beginning to tackle the racial pay gap is an essential, and possible, component of both efforts.

## I. DATA ON THE RACIAL PAY GAP AND ITS CAUSES

Current economic data documents a significant, and worsening, racial pay gap between the average earnings of Black and Latinx workers and those of White workers in the United States. This Part provides data on the scope of the racial pay gap and its relationship to both the gender pay gap and the racial wealth gap. It also details what economists identify as the causes of the racial pay gap and its persistence over time.

While the racial pay gap has long-standing roots deriving from the legacy of slavery, intentional racial segregation, and hostility to immigrants, its causes are identifiable and, although complex, redressable. As this Part details, study of the racial pay gap is not new in the field of labor economics: Economists and demographers have measured the scope of racial differences in pay from a variety of angles

and sought to identify their causes. With a handful of exceptions,<sup>22</sup> however, this data has yet to make its way into the legal literature. This Part collects and synthesizes existing economic data on the racial pay gap—both to support the legal proposals developed in later Parts and, hopefully, to spark the engagement of other legal scholars.

### A. *The Racial Pay Gap and the Gender Pay Gap*

By now, most Americans are familiar with the concept of the “gender pay gap,” which compares the median earnings of women and men working full-time, year-round.<sup>23</sup> While women have always worked, their presence in the formal U.S. labor market grew dramatically in the mid-twentieth century due to increased industrialization and the shortage of male labor during World War II.<sup>24</sup> By the late 1960s, over 40% of women participated in the paid workforce.<sup>25</sup> In 1970, the average full-time working woman earned about 60 cents to the dollar of the average full-time working man.<sup>26</sup> Between the late 1970s and the early 2000s, the gender pay gap shrank at a steady pace, narrowing from 40–45% to 20–25% by the early 2000s.<sup>27</sup> Since 2000, women’s pay gains have slowed dramatically, yet the pay gap has continued to narrow.<sup>28</sup>

As of 2019, an average U.S. woman working full-time, year-round earned 82 cents to the dollar of the average U.S. man, reflecting an overall gender pay gap of 18%.<sup>29</sup> The pay gaps for Black and Latinx women are more complex due to the intersection of gender and race, as discussed below; but their gender pay gaps as compared to men of the same race were the same or smaller than the overall gender pay gap. In 2019, Black women earned 91 cents and Latinx women earned 81 cents on the dollar of Black and Latinx men, respectively.<sup>30</sup> These unadjusted data compare all men and women working the same hours. Yet recent studies show that, even when adjusted for factors including education,

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22. See Mitchell, *supra* note 19; Jones, *supra* note 19; Olneck, *supra* note 19.

23. AM. ASS’N OF UNIV. WOMEN, 2018 ed., *supra* note 9, at 7; see Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018) [hereinafter *Equal Work*].

24. See RUTH MILKMAN, GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II 1 (David Brody et al. ed. advisors, 1987); David Freeman Engstrom, “Not Merely There to Help the Men”: *Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action*, 70 STAN. L. REV. 1, 14–15, 65–66 (2018).

25. U.S. DEP’T OF LAB., *supra* note 7.

26. AM. ASS’N OF UNIV. WOMEN, 2018 ed., *supra* note 9, at 5 fig.1.

27. *Id.*

28. *Id.*

29. AM. ASS’N OF UNIV. WOMEN, 2020 update, *supra* note 9, at 2.

30. *Id.*

work experience, industry, occupation, geography, and race, a gender pay gap of 8.4 to 13.5% remains.<sup>31</sup>

For decades, pay equity advocates have worked consistently to draw attention to the issue. In 1979, a collation of gender, labor, and civil rights advocates founded the National Committee on Pay Equity.<sup>32</sup> In 1996, the Committee launched what is now known as “Equal Pay Day”—the symbolic day into the next calendar year to which an average woman must work to earn the same as the average man earned the prior year.<sup>33</sup> While the issue of the gender pay gap has long had an advocacy presence, it has garnered even greater attention in the wake of the #MeToo and Time’s Up movements.<sup>34</sup>

In contrast, the “racial pay gap” is not as widely known or discussed, despite that it is both larger and has seen less improvement over time. Using the same metric of comparing only workers who work full-time, year-round, in 2019, the average Black worker earned 73.5 cents<sup>35</sup> and the average Latinx worker earned 74.6 cents on the dollar to the average White worker.<sup>36</sup> Most disturbingly, while there was some improvement prior to 2000, these racial pay gaps are now *larger* than they were four decades ago.<sup>37</sup>

From 1950 to 1980 the Black-White pay gap shrank, due in part to the introduction of civil rights laws, but also to economic trends and increasing unionization that raised wages for low- and middle-income earners, among whom workers of color are disproportionately represented.<sup>38</sup> Yet with changes in wage trends generally, progress in

31. *Equal Work*, *supra* note 23, at 591 nn.59–61. One group of economists found a 13.5% difference when industry, occupation, and work hours were controlled to model “a man and woman with identical education and years of experience working side-by-side in cubicles.” ELISE GOULD, JESSICA SCHIEDER & KATHLEEN GEIER, ECON. POL’Y INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? THE COMPLETE GUIDE TO HOW WOMEN ARE PAID LESS THAN MEN AND WHY IT CAN’T BE EXPLAINED AWAY 7 & n.9 (2016), <https://files.epi.org/pdf/112962.pdf> [<https://perma.cc/27UX-5ZJT>]. Another found a remaining disparity of 8.4% after controlling for not only education, industry, occupation, experience level, and geography, but also race, ethnicity, and metropolitan region. Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 797, 798 fig. 2 (2017) (documenting that, when fully adjusted, women earned 91.6% of men’s wages in 2010).

32. *About NCPE*, NAT’L COMM. ON PAY EQUITY, <https://www.pay-equity.org/about.html> (last visited July 26, 2022) [<https://perma.cc/8L22-XQLS>].

33. *Equal Pay Day*, NAT’L COMM. ON PAY EQUITY, <https://www.pay-equity.org/day.html> (last visited July 26, 2022) [<https://perma.cc/54UV-X6BB>].

34. Original data compiled by author, *supra* note 12.

35. Gould, *supra* note 3, fig.A (showing an average gap of 26.5%).

36. Gould, *supra* note 6, at 14.

37. See Gould, *supra* note 6, at 13–14; *supra* notes 1–7 and accompanying text.

38. David Leonhardt, *The Black-White Wage Gap Is as Big as It Was in 1950*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/opinion/sunday/race-wage-gap.html> [<https://perma.cc/CA6Z-S68Z>]; Patrick Bayer & Kerwin Kofi Charles, *Divergent Paths: A New*

narrowing the racial pay gap stalled.<sup>39</sup> In the 1980s, as unemployment rose and unionization rates fell, the Black-White wage gap increased.<sup>40</sup> In the 1990s, with an increase in the minimum wage and strengthening labor markets generally, the gap declined for a period of time, stalling again in the early 2000s.<sup>41</sup>

In the two decades since, the Black-White wage gap has increased in all wage quartiles for workers of all education levels.<sup>42</sup> Economist Elise Gould found that the average overall Black-White pay gap increased from 21.8% in 2000 to 26.5% in 2019, with marked increases at every level of education: from 15.3% to 18.3% for high school, 17.2% to 22.5% for college, and 12.5% to 17.6% for advanced degree holders.<sup>43</sup> That means that, in 2019, Black advanced degree holders earned on average 82.4 cents to the dollar of White advanced degree holders. Even a multiple regression analysis that controlled for not only education level but also age, sex, and geographic region of workers revealed a significant, and worsening, gap from 10.2% in 2000 to 14.9% in 2019.<sup>44</sup>

Likewise, the wage gap between Latinx and White men grew during the 1980s and 1990s, reaching its peak in the 2000s; after a slight decline, it has remained mostly stagnant for over a decade.<sup>45</sup> Despite some improvement, the Latinx-White pay gap remains vast. Median wages of Latinx workers increased from 69.7% in 2000 to 74.6% in 2019 of White wages, still reflecting a 25.4% pay gap today.<sup>46</sup> When controlling for age, sex, education, and region, the adjusted gap narrowed somewhat from 12.3% in 2000 to 10.8% in 2019.<sup>47</sup> Other data on adjusted pay gaps that account for education, years of experience, region of work, and, where available, immigration status show the

*Perspective on Earnings Differences Between Black and White Men Since 1940*, 133 Q.J. ECON. 1459, 1496–99 (2018).

39. Leonhardt, *supra* note 38; Bayer & Charles, *supra* note 38, at 1496–99; see also Eduardo Porter, *Black Workers Stopped Making Progress on Pay. Is It Racism?*, N.Y. TIMES, <https://www.nytimes.com/2021/06/28/business/economy/black-workers-racial-pay-gap.html> (last updated July 1, 2021) [<https://perma.cc/3DYS-8836>].

40. WILSON & RODGERS, *supra* note 1, at 1, 4–5.

41. *Id.*

42. Gould, *supra* note 3; see also Elise Gould, *Stark Black-White Divide in Wages Is Widening Further*, ECON. POL'Y INST.: WORKING ECON. BLOG (Feb. 27, 2019, 10:50 AM), <https://www.epi.org/blog/stark-Black-white-divide-in-wages-is-widening-further/> [<https://perma.cc/A98N-MKFF>].

43. Gould, *supra* note 3.

44. *Id.*

45. MORA & DÁVILA, *supra* note 5, at 13–14, 14 fig.G, 36 (“In general, we find that the adjusted wage gaps between Hispanic full-time workers and non-Hispanic white working men have not narrowed since the early- to mid-2000s—with a few significant exceptions.”)

46. Gould, *supra* note 6, at 14.

47. *Id.*

persistence and “relative stability” of Latinx-White gaps in hourly pay from an adjusted gap of 16.5% in 1979 to 14.9% in 2017.<sup>48</sup>

For women of color, the story is more complicated, yet still reveals a growing racialized gender pay gap. Women of color experience a “double gap” in pay, an intersectional relationship of their gender and race that is not merely “additive,”<sup>49</sup> resulting in pay that is proportionately the lowest of all workers. In 2019, Black women earned only 63 cents to the dollar of White men, and Latinx women only 55 cents.<sup>50</sup> These numbers, while shockingly low, in fact represent small gains over time: In 1979, Black women earned 54.1 cents and Latinx women 48.5 cents to the dollar of White men.<sup>51</sup> Yet these gains at least in part reflect a shrinking gender pay gap due to the improvement in women’s wages as compared to men’s overall. During the same period, the gender wage gap for all women shrank by half, from about 40% to about 20%—though disproportionately so for White and Asian women.<sup>52</sup>

When compared to the earnings of White women, then, the racial pay gap for Black and Latinx women has also increased. Black women went from earning 92.1% of what White women earned in 1979 to 80.1% in 2019 and Latinx women from 82.5% to 70.4%.<sup>53</sup> In recent years, advocacy around the gender pay gap has highlighted the intersectional

48. MORA & DÁVILA, *supra* note 5, at 15–17.

49. MICHELLE HOLDER, ROOSEVELT INST., THE “DOUBLE GAP” AND THE BOTTOM LINE: AFRICAN AMERICAN WOMEN’S WAGE GAP AND CORPORATE PROFITS 5 (2020), [https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI\\_DoubleGap\\_Report\\_202003.pdf](https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_DoubleGap_Report_202003.pdf) [<https://perma.cc/Q7KP-2EL2>]. See generally Mark Paul, Khaing Zaw, Darrick Hamilton & William Darity Jr., *Returns in the Labor Market: A Nuanced View of Penalties at the Intersection of Race and Gender*, FEMINIST ECONOMICS, Mar. 29, 2022, at 1, 4:

[T]here is no average “gender” or “race” penalty irrespective of one’s race or gender[.] . . . holding multiple identities cannot so easily be disaggregated in an additive fashion, but rather the penalties associated with the combination of two or more socially marginalized identities interact in nuanced—and at times multiplicative—ways;

MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 8 (2019) (coining the term “raceXgender” bias to explain the compounding nature of intersectional discrimination).

50. AM. ASS’N OF UNIV. WOMEN, 2020 update, *supra* note 9, at 4.

51. U.S. DEP’T OF LAB., *supra* note 7 (Select “White Men,” “Black Women,” and “Hispanic Women” from the sidebar, then identify the line designated for each race/gender combination and place the cursor over the year to generate the mean annual earnings for the race/gender combination in that year).

52. AM. ASS’N OF UNIV. WOMEN, 2018 ed., *supra* note 9, at 5–6; AM. ASS’N OF UNIV. WOMEN, 2020 update, *supra* note 9, at 4. See also *supra* note 8 on Asian women’s earnings.

53. U.S. DEP’T OF LAB., *supra* note 7 (To generate the data for 1979: select “White Women,” “Black Women,” and “Hispanic Women” from the sidebar, then identify the line designated for each race, and place the cursor over the year to generate the mean annual earnings for the women in each racial group in that year. To generate the data for 2019: select “White, non-Hispanic Women,” “Black Women,” and “Hispanic Women” from the sidebar, then identify the line designated for each race, and place the cursor over the year to generate the mean annual earnings for the women in each racial group in that year.)

nature of pay discrimination for women of color—for example, the annual “Equal Pay Day”<sup>54</sup> has been accompanied by additional days into the year for Black, Latinx, Asian, and Indigenous women workers.<sup>55</sup> Pay gaps for women of color are the slowest to show gains as compared to White men, making them deeply persistent and troubling.<sup>56</sup> Moreover, the job losses during the COVID-19 pandemic have been borne disproportionately by women, especially Black and Latinx women, which means that pay gaps for women of color will likely increase in the immediate future.<sup>57</sup>

Critics of wage gap measurements argue that such instruments are too blunt. A perennial criticism of data on the gender wage gap, for example, is that it “compare[s] apples and oranges,”<sup>58</sup> meaning that it fails to account for the actual demographic differences in men’s and women’s qualifications and jobs that are the real cause of pay disparities. Some have even asserted that there is no gender pay “gap,” just different “choices” by men and women about life and work.<sup>59</sup> By

54. See *supra* note 33 and accompanying text.

55. See, e.g., Elise Gould, *Latina Workers Have to Work Nearly 11 Months into 2019 to Be Paid the Same as White Non-Hispanic Men in 2018*, ECON. POL’Y INST.: WORKING ECON. BLOG (Nov. 19, 2019, 12:27 PM), <https://www.epi.org/blog/Latina-pay-gap-2019/> [<https://perma.cc/U7QU-9HZA>].

56. *Systemic Racism and the Gender Pay Gap*, AM. ASS’N OF UNIV. WOMEN 2–7 (2021), [https://www.aauw.org/app/uploads/2021/07/SimpleTruth\\_4.0-1.pdf](https://www.aauw.org/app/uploads/2021/07/SimpleTruth_4.0-1.pdf) [<https://perma.cc/J6MH-4LML>]; MORA & DÁVILA, *supra* note 5, at 36 (“Hispanic women . . . suffer from a much wider wage gap than Hispanic men and have not been able to narrow the gap with white men . . . since 2000.”). Moreover, women of color continue to face steep hurdles to intersectional discrimination claims of all kinds. See generally Jamillah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMP. RTS. & EMP. POL’Y J. 13, 51 (2021) (surveying court approaches to intersectional harassment and discrimination claims brought by Black women).

57. AM. ASS’N OF UNIV. WOMEN, *supra* note 56, at 2; see also Angela Onwuachi-Willig, *The Intersectional Race and Gender Effects of the Pandemic in Legal Academia*, 72 HASTINGS L.J. 1703 (2021); *Gender and Racial Inequity During Crisis: The Pay Gap*, TIME’S UP FOUND. (2020), [https://timesupfoundation.org/wp-content/uploads/2020/07/Jul2020\\_Pay-Equity-Survey-Factsheet\\_FINAL.pdf](https://timesupfoundation.org/wp-content/uploads/2020/07/Jul2020_Pay-Equity-Survey-Factsheet_FINAL.pdf) [<https://perma.cc/F78N-4R65>].

58. See *Equal Work*, *supra* note 23, at 587 & n.36 (“For over thirty years, this has been a perennial criticism of equal pay initiatives.”). Compare S. Anna Kondratas & Eleanor Smeal, Heritage Found., *Comparable Worth: Pay Equity or Social Engineering?*, (June 28, 1986), <http://www.heritage.org/jobs-and-labor/report/comparable-worth-pay-equity-or-social-engineering> [<https://perma.cc/57ZE-TJ6R>] (a debate in which a Heritage Foundation Senior Policy Analyst discounted a comparable worth supporter’s attempt to prove that you can “compare apples and oranges”), with Laura Bassett, *Conservatives Push Back Against Equal Pay Efforts*, HUFFINGTON POST (Apr. 7, 2014, 4:49 PM), [http://www.huffingtonpost.com/2014/04/07/republicans-equalpay\\_n\\_5106329.html](http://www.huffingtonpost.com/2014/04/07/republicans-equalpay_n_5106329.html) [<https://perma.cc/6EMG-X62Z>] (reporting that the executive director of the conservative Independent Women’s Forum “not[ed] comparing men’s and women’s wages is like ‘comparing apples to oranges.’”).

59. See Christina Hoff Sommers, *The Wage Gap Myth Exposed—By Feminists*, HUFFINGTON POST (Nov. 4, 2014, 9:03 PM), [https://www.huffingtonpost.com/christina-hoff-sommers/wagegap\\_b\\_2073804.html](https://www.huffingtonpost.com/christina-hoff-sommers/wagegap_b_2073804.html) [<https://perma.cc/PJT9-4LGZ>]; Lisa Annese, *Dispelling the Myths: Why*

analogy, similar arguments could be raised against the utility of aggregated data on the racial pay gap.

Such criticisms warrant two strong responses. First, while gender and racial pay gaps do get smaller as you control for a variety of actual demographic differences like age, occupation, industry, education level, and geographic region, even the most adjusted data reveals unexplainable pay gaps remain by gender (of 8–14%)<sup>60</sup> and race (of up to 15%).<sup>61</sup> Economists have shown that between one-third and one-half of the gender pay gap is caused by discrimination and occupational segregation.<sup>62</sup> Likewise, scholars have documented that “observable” or “explained” factors like education, work experience, and geography fail to account for between one-third and two-thirds of racial pay gaps.<sup>63</sup> There is no longer any question about whether racial and gender pay gaps exist; the only question is the size of those gaps depending on the level of adjustments of data. Where no controllable factor accounts for the difference that remains, economists infer that discrimination is in part to blame.<sup>64</sup>

Second, while adjusted pay gap statistics help reveal *discrimination*, unadjusted pay gap statistics are important to reveal *inequality*. Unadjusted data shows that, in 2019, the average Black or

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*the Gender Pay Gap Does Not Reflect the ‘Choices’ Women Make*, GUARDIAN (Nov. 7, 2016, 10:07 PM), <https://www.theguardian.com/sustainable-business/2016/nov/08/dispeiling-the-myths-why-the-gender-pay-gap-does-not-reflect-the-choices-women-make> [<https://perma.cc/7GYG-CPG7>]. For responses to this argument, see 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 (1990); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992); and Joan C. Williams, Jessica Marvell & Stephanie Bornstein, “Opt Out” or Pushed Out?: *How the Press Covers Work/Family Conflict*, CTR. FOR WORKLIFE L. (2006), <https://www.psychologytoday.com/files/attachments/47131/optoutorpushedoutreportfinal.pdf> [<https://perma.cc/L524-YP94>].

60. See *supra* note 31.

61. See *supra* note 44 and accompanying text.

62. See *Equal Work*, *supra* note 23, at 594 (“[I]ndustry and occupational factors now account for 49% of the gender pay gap . . .” (citing Blau & Kahn, *supra* note 31, at 26)); see also *id.* (“Goldin . . . attributed 32–42% of the gender pay gap among college graduates working full-time year-round to the gap between occupations” (citing Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 1091, 1117 (2014))).

63. WILSON & RODGERS, *supra* note 1, at 3 (noting that “[d]ifferences in observable factors such as education and experience levels can explain more than a quarter of the black-white wage gap for men and over a third of the gap for women,” which, along with regional differences, accounts for “9.0 of 31.0 percentage points” for men and “7.3 of 19.0 percentage points” for women in Black-White pay gaps in 2015); Roland G. Fryer, Jr., Devah Pager & Jörg L. Spenkuch, *Racial Disparities in Job Finding and Offered Wages*, 56 J.L. & ECON. 633, 635, 669–70 (2013) (“[O]ur data reveal that the impact of racial discrimination on offered wages is at least one-third of the raw gap for blacks.”).

64. WILSON & RODGERS, *supra* note 1, at 51 (“[D]iscrimination and/or unobservable skills remain predominantly responsible for changes in racial wage gaps.”).

Latinx worker in the United States who worked full-time year-round earned only three-fourths of what the average White worker working the same hours earned;<sup>65</sup> Black and Latinx women earned a mere three-fifths compared to White men.<sup>66</sup> Regardless of the causes of that difference—whether type of job, education level, or anything else—the average Black or Latinx worker lacks access to the same earnings potential as the average White worker. This illustrates systemic racial inequality that limits access to opportunity and mobility for workers of color. The fact that this measure has not improved in four decades is staggering.

Yet even these measures of inequality paint an overly rosy picture because pay gap data does not include the zero earnings of working age Americans shut out of the paid workforce by unemployment or incarceration—a disproportionately greater number of whom are Black and Latinx men.<sup>67</sup> Rates of unemployment have been higher for Black Americans than the overall U.S. rate every year since 1972, when the Bureau of Labor Statistics began collecting data.<sup>68</sup> Rates of unemployment for Latinx workers have also exceeded the average for all U.S. workers since at least 1980.<sup>69</sup> When jobs are scarce—for example, in times of recession or during the COVID-19 pandemic—Black and Latinx workers are more likely to be unemployed and for longer periods of time than White workers, exacerbating earnings gaps.<sup>70</sup>

Mass incarceration expands these gaps further. Data on those incarcerated for at least one year in state or federal prisons show gross racial disparities: In 2018, Black Americans were imprisoned at almost two times the rate of Latinx and over five times the rate of White Americans.<sup>71</sup> This racial disparity in incarceration rates has remained

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65. See *supra* notes 3, 6 and accompanying text.

66. See *supra* note 50 and accompanying text.

67. Leonhardt, *supra* note 38 (documenting that Black and Latinx men have consistently higher rates of both unemployment and incarceration than White men).

68. Jenny Leonard & Readé Pickert, *Black America's Jobs Gap Makes Case for Keeping Extra Benefits*, BLOOMBERG L. NEWS (June 29, 2020, 3:00 AM), <https://news.bloomberglaw.com/daily-labor-report/black-americas-jobs-gap-makes-case-for-keeping-extra-benefits> [<https://perma.cc/4JBS-R2UB>]; see also JHACOVA WILLIAMS & VALERIE WILSON, ECON. POL'Y INST., BLACK WORKERS ENDURE PERSISTENT RACIAL DISPARITIES IN EMPLOYMENT OUTCOMES 1 (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment/> [<https://perma.cc/NYJ5-42MG>].

69. MORA & DÁVILA, *supra* note 5, at 5–6.

70. Leonard & Pickert, *supra* note 68; Jamillah Bowman Williams, *COVID-19 Widens Disparities for Black, Indigenous, and Other Workers of Color*, in *WORK LAW UNDER COVID-19* (Sachin S. Pandya & Jeffrey M. Hirsch eds., 2021).

71. John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [<https://perma.cc/JM4E-JM3Q>].



consistent despite a marked decline in U.S. incarceration rates overall from a high in 2001.<sup>72</sup> Thus in 2018, Black Americans composed 12% of the U.S. adult population, but 33% of its prison population, while White Americans, who composed 63% of the U.S. population, accounted for only 30% of its prisoner population.<sup>73</sup>

A discussion of the factors contributing to these unadjusted numbers is beyond the scope of this Article; the point here is that the vast racial pay gap does not account for the additional economic inequality wrought by excess unemployment and mass incarceration of Black and Latinx Americans. As sociologist Becky Pettit has documented, because incarcerated people are not counted in national statistics on the economy, the economic progress of Black men overall has been significantly overstated.<sup>74</sup> Pettit estimates that, if jobless men including those incarcerated were factored into the racial pay gap, the “wage advantage” for White men would be two to three times as high as observed by traditional data, with a steady increase from 1980 to 2008.<sup>75</sup> Economists Patrick Bayer and Kerwin Kofi Charles estimate that a Black-White wage gap accounting for those out of the workforce entirely—roughly 30% of Black and 15% of White men—would double in size, with Black men earning in 2018 only 51 cents on the dollar of White men, *the same amount as in 1950*.<sup>76</sup>

Regardless of which measure is used, however, the racial pay gap is significant and should spark more public focus than it has to date. Despite being larger and more resistant to improvement than the gender pay gap—and despite contributing to the gender pay gap for

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72. Compare Gramlich, *supra* note 71 (documenting general statistics on Black imprisonment rate), with THOMAS P. BONCZAR, U.S. DEPT. OF JUST., PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (Aug. 2003), <https://bjs.ojp.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/255E-WX8J>] (“The rate of ever having gone to prison among adult black males (16.6%) was over twice as high as among adult Hispanic males (7.7%) and over 6 times as high as among adult white males (2.6%).”). See also Glenn Kessler, *The Stale Statistic That One in Three Black Males ‘Born Today’ Will End Up in Jail*, WASH. POST (June 16, 2015, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/06/16/the-stale-statistic-that-one-in-three-black-males-has-a-chance-of-ending-up-in-jail/> [<https://perma.cc/8CUR-KQFW>] (clarifying statistics in 2001 compared to 2015).

73. Gramlich, *supra* note 71 (compiled using U.S. Census Bureau and Bureau of Justice Statistics data). Latinxs were also overrepresented, composing 16% of the United States but 23% of its prison population. *Id.*

74. BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS 3–9 (2012).

75. *Id.* at 65–66, 66 fig. 4.5; see also Bruce Western & Becky Pettit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. SOCIO. 553, 573 (2005) (“By 1999, the high rate of black joblessness inflated black relative earnings by between 7% and 20% among working-age men, and by as much [as] 58% among young men.”).

76. Bayer & Charles, *supra* note 38, at 1497; see also Leonhardt, *supra* note 38; Porter, *supra* note 39.

women of color—the racial pay gap has yet to garner the same attention in the public discourse.

### *B. The Racial Pay Gap and the Racial Wealth Gap*

A separate but related issue attracting recent attention is the racial wealth gap, which measures racial disparities in family net worth. An individual's pay is merely one source of income contributing to wealth; family wealth is composed of savings, stocks, bonds, benefits, real or personal property, or anything else of value that can be passed down to children or other family members.<sup>77</sup> A family's net worth provides not only economic security to cover periods of short-term job loss but also access to opportunities for higher pay and even greater wealth—for example, the ability to own property in a neighborhood with higher quality public schools or to obtain an elite college degree without incurring student debt.<sup>78</sup> Thus while connected, the racial pay gap and the racial wealth gap are distinct measures of inequality, requiring complementary but distinct solutions.

The legacies of slavery, Jim Crow era segregation, and hostility to immigration in the United States have resulted in significant racial wealth gaps for Black and Latinx families as compared to White families.<sup>79</sup> As with the racial pay gap, despite gains in the perceived social and economic status of Black and Latinx Americans, racial wealth gaps are worse than they were thirty years ago.<sup>80</sup> Recent estimates show the median net worth of an average White family is nearly ten times that of an average Black family (in 2016, \$171,000 compared to \$17,100)<sup>81</sup> and nearly seven times that of the average Latinx family (in 2019, \$142,180 as compared to \$20,765).<sup>82</sup> Less than

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77. Christian E. Weller & Lily Roberts, *Eliminating the Black-White Wealth Gap Is a Generational Challenge*, CTR. FOR AM. PROGRESS (Mar. 19, 2021), [https://americanprogress.org/wp-content/uploads/2021/03/BlackWhiteWealthGap-report11.pdf?\\_ga=2.153542129.897412133.1656099684-527299093.1655767176](https://americanprogress.org/wp-content/uploads/2021/03/BlackWhiteWealthGap-report11.pdf?_ga=2.153542129.897412133.1656099684-527299093.1655767176) [https://perma.cc/DGC6-U4TA].

78. *See id.*

79. McIntosh et al., *supra* note 14; William Darity Jr., Darrick Hamilton, Mark Paul, Alan Aja, Anne Price, Antonio Moore & Caterina Chiopris, *What We Get Wrong About Closing the Racial Wealth Gap*, SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY 3 (2018), <https://socialequity.duke.edu/wp-content/uploads/2020/01/what-we-get-wrong.pdf> [https://perma.cc/J226-QNS8].

80. McIntosh et al., *supra* note 14. Yet this may be less surprising given that wealth compounds over time, and much of a household's net worth comes from intergenerational transfers of wealth. Darity et al., *supra* note 79, at 27.

81. McIntosh et al., *supra* note 14; Darity et al., *supra* note 79. A recent factual "finding" in a piece of federal legislation included that African American families "average . . . less than 1/16 of the wealth of White families, a disparity which has worsened, not improved over time." *See* H.R. 40, 117th Cong. § 2(a)(6) (2021).

82. Solomon & Weller, *supra* note 15.

2% of households in the top 1% of the U.S. wealth distribution are Black; over 96% of the wealthiest U.S. households are White.<sup>83</sup>

The issue of the Black-White wealth gap gained popular attention in the summer and fall of 2020 when the Black Lives Matter movement accelerated after the murder of George Floyd and during the 2020 presidential election.<sup>84</sup> As the United States confronts its racial history, the racial wealth gap has become an important tool for demonstrating how the structural mechanisms of White supremacy foster and maintain racial economic inequality. Media coverage of the racial wealth gap has led to calls for change, including efforts to support Black-owned businesses and corporate and philanthropic commitments to invest in communities of color.<sup>85</sup>

This reckoning is essential and overdue. Yet with a few exceptions, most responses to closing racial wealth gaps are longer-term propositions, requiring significant policy reform and social change.<sup>86</sup> Economists and other scholars and advocates have identified ways to close the racial wealth gap, ranging from investing capital in Black-owned businesses,<sup>87</sup> forgiving student loan debt,<sup>88</sup> and increasing Black

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83. Darity et al., *supra* note 79, at 2.

84. Original data compiled by author, *supra* note 12; see also Mark Miller, *America's Retirement Race Gap, and Ideas for Closing It*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/business/retirement-inequality-racism.html> [<https://perma.cc/FC77-LHJK>] (“The protest movement across the United States this summer has prompted a national conversation about ways to correct the acute economic inequities facing Black and other Americans of color.”).

85. See, e.g., Associated Press, *supra* note 17 (describing NinetyToZero initiative); NINETY TO ZERO, <https://ninetytozero.org> (last visited July 30, 2022) [<https://perma.cc/2FQJ-ZRNR>]; Togoh, *supra* note 17 (describing JP Morgan pledge).

86. A full discussion of responses to the wealth gap is beyond the scope of this Article. See, e.g., Darity et al., *supra* note 79, at 4 (“Addressing racial wealth inequality will require a major redistributive effort or another major public policy intervention to build black American wealth.”); Mitchell, *supra* note 19, at 852:

[G]reater economic equality in the United States is achievable only if policymakers make fundamental changes in certain key areas of public policy. Although it is unlikely that the legal system can serve as a primary tool to reduce economic inequality in any substantial way, there are a number of legal strategies and initiatives that lawyers and legal organizations, including law schools, could pursue [to help].

87. See, e.g., Jeff Kaufflin & Janet Novack, *Five Big Ideas to Narrow The Racial Wealth Gap*, FORBES (June 25, 2020), <https://www.forbes.com/sites/jeffkaufflin/2020/06/25/five-big-ideas-to-narrow-the-racial-wealth-gap/?sh=220e9b6451ac> [<https://perma.cc/X3M8-XQ5T>].

88. See, e.g., *id.*

home ownership<sup>89</sup> to comprehensive banking,<sup>90</sup> tax,<sup>91</sup> and inheritance law reform<sup>92</sup> to establishing “baby bond” child development accounts<sup>93</sup> or instituting a program for reparations for the continuing effects of slavery.<sup>94</sup> The idea of reparations is not new;<sup>95</sup> but, in a sign of growing interest in the racial wealth gap, it had its largest political victory yet in April 2021, when a bill to establish a federal commission to study reparations passed out of congressional committee for the first time.<sup>96</sup> The bill had been introduced repeatedly since the 1990s.<sup>97</sup>

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89. See, e.g., Mitchell, *supra* note 19, at 888. But see Scott N. Markley, Taylor J. Hafley, Coleman A. Allums, Steven R. Holloway & Hee Cheol Chung, *The Limits of Homeownership: Racial Capitalism, Black Wealth, and the Appreciation Gap in Atlanta*, 44 INT’L J. URB. & REG’L RSCH. 310 (2020).

90. See, e.g., MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017); HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* (2021).

91. See, e.g., DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021).

92. See, e.g., Lily L. Batchelder, *Leveling the Playing Field Between Inherited Income and Income from Work Through an Inheritance Tax*, in *TACKLING THE TAX CODE: EFFICIENT AND EQUITABLE WAYS TO RAISE REVENUE* 43 (Jay Shambaugh & Ryan Nunn eds., 2020) (ebook), [https://www.hamiltonproject.org/assets/files/Batchelder\\_LO\\_FINAL.pdf](https://www.hamiltonproject.org/assets/files/Batchelder_LO_FINAL.pdf) [<https://perma.cc/NC3S-XUX9>].

93. See, e.g., Darrick Hamilton & William Darity Jr., *Can ‘Baby Bonds’ Eliminate the Racial Wealth Gap in Putative Post-Racial America?*, 37 REV. BLACK POL. ECON. 207 (2010).

94. See, e.g., DARITY & MULLEN, *supra* note 2. Of course, reparations are about much more than money: Scholars describe the effort as a type of “truth and reconciliation” project, a “national reckoning” with the reality and horrors of slavery in the United States. See, e.g., *id.*; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/2DKE-FXNV>]. Yet while not the only issue, most discussions about reparations do tie in some way to past and present economic discrimination against Black Americans. Legal and economic scholars have proposed a variety of options for structuring reparations, including programs that focus on access to jobs and training or direct payment options based on Black-White income gaps, Coates, *supra*, or the wages and property stolen from the family wealth of descendants of slaves, DARITY & MULLEN, *supra* note 2.

95. See, e.g., BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003); Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006); Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1 (2007); Coates, *supra* note 94; DARITY & MULLEN, *supra* note 2, at 256–70.

96. See H.R. 40, 117th Cong. (2021); Nicholas Fandos, *House Panel Advances Bill to Study Reparations in Historic Vote*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/us/politics/reparations-slavery-house.html> [<https://perma.cc/S53N-HV77>] (“Mr. Darity’s vision of reparations primarily focuses on closing the wealth gap between African-Americans and white people.”); Savannah Behrmann, *House Committee Approves Bill to Study Slavery Reparations for First Time*, USA TODAY (Apr. 14, 2021, 10:57 AM), <https://www.usatoday.com/story/news/politics/2021/04/14/house-committee-hold-historic-vote-study-slave-reparations/7210967002/> [<https://perma.cc/RGZ4-BXBF>] (“According to an analysis by Mullen and Darity, reparations could lead to the elimination of the Black-white wealth gap within 10 years.”).

97. Fandos, *supra* note 96; Behrmann, *supra* note 96.

Despite its obvious link to the racial wealth gap, however, the issue of the racial pay gap has not received as much public or media attention. Of course, closing the racial pay gap will not solve the racial wealth gap, but the two are closely related. Research by economist Raj Chetty and colleagues demonstrated the impact of parental income on the upward mobility of Black and Latinx children.<sup>98</sup> Their findings indicated that a racial pay gap in a worker's income today affects not only their current household wealth, but also the future earnings of their children, with the strongest effects being on Black men.<sup>99</sup> Other recent work by economists Hero Ashman and Seth Neumuller set out to identify to what extent differences in pay contribute to racial wealth gaps.<sup>100</sup> Using an "overlapping-generations" model that accounted for, among other factors, race, education, and family structure, they estimated that differences in income alone explained 43% of the Black-White racial wealth gap, while "bequest motives" (reasons to leave money to others) (28.6%) and wealth transfers across generations (25.8%) accounted for the rest.<sup>101</sup> Based on this, the authors concluded that income differences were the most "proximate cause" of the Black-White racial wealth gap: "[I]f the income gap in our model were eliminated, racial disparities in wealth would eventually disappear. Thus, policies aimed at reducing income differences are likely to be the most direct and potent means for reducing the racial wealth gap."<sup>102</sup>

More directly, a significant source of household wealth is retirement income; those with the lowest incomes rely on Social Security benefits, which are tied to annual wages.<sup>103</sup> The racial pay gap in income during a worker's working years contributes to lower retirement savings and Social Security benefit payouts. In 2016, for example, Black and Latinx households approaching retirement had

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98. Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711 (2019).

99. *Id.* at 714–716.

100. Hero Ashman & Seth Neumuller, *Can Income Differences Explain the Racial Wealth Gap? A Quantitative Analysis*, 35 REV. ECON. DYNAMICS 220 (2020).

101. *Id.* at 221.

102. *Id.* at 237; see also Dionissi Aliprantis & Daniel Carroll, *What Is Behind the Persistence of the Racial Wealth Gap?*, FED. RESRV. BANK OF CLEVELAND 4 (Feb. 28, 2019), [https://www.clevelandfed.org/-/media/content/newsroom%20and%20events/publications/economic%20commentary/2019/ec%20201903/ec\\_201903.pdf](https://www.clevelandfed.org/-/media/content/newsroom%20and%20events/publications/economic%20commentary/2019/ec%20201903/ec_201903.pdf) [<https://perma.cc/7U96-529E>] (taking "account [for] the dynamic nature of wealth accumulation" in an "economic model of savings"—rather than a statistical model—and finding that "one factor accounts for the racial wealth gap almost entirely by itself: the racial income gap").

103. Sylvain Catherine, Max Miller & Natasha Sarin, *Social Security and Trends in Wealth Inequality* 38 (Jacobs Levy Equity Mgmt. Ctr. for Quantitative Fin., Working Paper, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3546668](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546668) [<https://perma.cc/7P89-BUYN>] ("We find that, when Social Security is incorporated into inequality estimates, top wealth shares have not increased since 1989.").

only 46% and 49%, respectively, of the retirement wealth of the average White family.<sup>104</sup>

The importance of addressing the racial wealth gap cannot be overstated, yet the project is one for the longer term. In the meantime, efforts to address the racial pay gap are also needed. Correcting pay discrimination and closing racial pay gaps in workers' present pay are necessary, though not sufficient, to help narrow racial wealth gaps into the future.

### C. Causes of the Racial Pay Gap

So far, this Article has documented the scope of the racial pay gap and highlighted that it is a key element of the gender pay and racial wealth gaps. It now turns to the challenge of proposing legal interventions to narrow the racial pay gap. To do so first requires identifying the causes of the racial pay gap; legal and policy approaches vary based on suggested cause.

Economists attribute racial and racialized gender pay gaps to three types of causes: (1) "human capital factors" that reflect actual demographic differences between workers whose pay is being compared; (2) "occupational segregation," meaning the distribution of workers by race and gender in different industries and occupations; and (3) the "unexplained" or "unobservable" factors that remain, which include discrimination.<sup>105</sup>

*Human capital factors.* Depending on what factors are measured, economists attribute up to one-half of overall, unadjusted racial pay gaps to actual demographic differences between workers.<sup>106</sup> These factors may include things like sex, age, geographic region in which work is performed, work experience, and level of education. Accounting for these factors results in "adjusted" racial pay gaps that are smaller than the overall median. Thus, using one example of data mentioned previously, the racial pay gap comparing median wages of

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104. Miller, *supra* note 84 (citing Wenliang Hou & Geoffrey T. Sanzenbacher, *Social Security Is a Great Equalizer*, CTR. FOR RET. RSCH. BOS. COLL. 4 tbl.5 (Jan. 2020), [https://crr.bc.edu/wp-content/uploads/2020/01/IB\\_20-2.pdf](https://crr.bc.edu/wp-content/uploads/2020/01/IB_20-2.pdf) [<https://perma.cc/PDD4-REN5>]).

105. For commentary by Professor William Spriggs, Howard University Economics Professor and Chief Economist for the AFL-CIO, on how economists have traditionally been unwilling to recognize systemic racism, see William Spriggs, *Is Now a Teachable Moment for Economists? An Open Letter to Economists from Bill Spriggs*, HOWARD UNIV. (July 2020), [https://www.minneapolisfed.org/~media/assets/people/william-spriggs/spriggs-letter\\_0609\\_b.pdf?la=en](https://www.minneapolisfed.org/~media/assets/people/william-spriggs/spriggs-letter_0609_b.pdf?la=en) [<https://perma.cc/M3GN-G24H>]. See also Elizabeth Schulze, *Economists Must Remove Racial Biases from Their Profession, AFL-CIO Chief Economist Says*, CNBC (July 24, 2020, 10:00 AM), <https://www.cnbc.com/2020/07/24/afl-cio-chief-economist-william-spriggs-racial-bias-in-economics.html> [<https://perma.cc/K8BE-42RZ>].

106. See *supra* notes 44, 47, and accompanying text.

all Black and White men in 2019 drops from an unadjusted 26.5% to 14.9% when adjusted.<sup>107</sup>

Because these human capital factors account for a significant portion of racial pay gaps, it would make sense that policy efforts designed to improve the status of Black and Latinx workers focus on these measures. Yet the factor likely most malleable—education level—is more complex than it may seem. While the data has varied over time, today it is clear that racial pay gaps persist despite equal education levels among workers. The education gap between workers of color and White workers has closed dramatically over the past four decades, yet the pay gap has not kept pace.<sup>108</sup> For 2019, when comparing Black and White workers with the same level of education, economist Elise Gould found a pay gap of 22.5% among college graduates and 17.6% among advanced degree holders.<sup>109</sup> As she concluded, “education is not a panacea” for closing pay gaps: “Black workers can’t simply educate their way out of the gap.”<sup>110</sup> Economists Marie Mora and Alberto Dávila documented that getting a college degree has also failed to close the Latinx-White pay gap.<sup>111</sup> In 2016, Latinx men with a college degree earned 20.1% less, and Latinx women with a college degree 36.4% less, than college-educated White men—a gap that was the same (for Latinx women) or worse (for Latinx men) than it was thirty-five years prior.<sup>112</sup>

Some data suggests that this phenomenon may be explained by a distinction between quantity and quality of education: Among workers with the same level of education, White workers often have access to better quality schools than Black and Latinx workers.<sup>113</sup> In a study of only college-educated men, economist Dan Black and colleagues found that “differences in . . . formal education (in specific majors and degrees)” mattered, as did family backgrounds: for Latinx

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107. Gould, *supra* note 3.

108. Porter, *supra* note 39 (“In 1960, 20 percent of Black men had a high school diploma, well below the 50 percent for whites. By 2014, high school completion rates for men of both races were near 90 percent.”).

109. Gould, *supra* note 3.

110. *Id.*

111. MORA & DÁVILA, *supra* note 5, at 3.

112. *Id.* (including 1980 data of 37.7% and 12.3% pay gaps between college-educated Latinx women and men, respectively, as compared to college-educated White men).

113. See, e.g., Jonathan Rothwell, *The Stubborn Race and Class Gaps in College Quality*, BROOKINGS INST. (Dec. 18, 2015), <https://www.brookings.edu/research/the-stubborn-race-and-class-gaps-in-college-quality/> [<https://perma.cc/TE9G-VM33>]; Srikanth Ramamurthy & Norman Sledgley, *A Note on School Quality, Educational Attainment, and the Wage Gap*, 45 E. ECON. J. 415 (2019); Dan Black, Amelia Haviland, Seth Sanders & Lowell Taylor, *Why Do Minority Men Earn Less? A Study of Wage Differentials Among the Highly Educated*, 88 REV. ECON. & STAT. 300 (2006); Michael Olneck, *Economic Consequences of the Academic Achievement Gap for African Americans*, 89 MARQ. L. REV. 95 (2005).

men, whether English was spoken at home; for Black men, whether they were born in the U.S. South, a factor “related to the generally poor quality of education afforded the[m] at the precollege and college levels.”<sup>114</sup> Likewise, economists Srikanth Ramamurthy and Norman Sledgley documented that “lower school quality decreases educational attainment and, consequently, the equilibrium wages” a worker can obtain; thus the Black-White wage gap can be explained in part by “the general lack of access to quality schooling for [B]lack[]” as compared to White Americans.<sup>115</sup>

The skills gained during the educational experience may also relate to the ability to access better-paying jobs.<sup>116</sup> Economists Erik Hurst, Yona Rubinstein, and Kazuatsu Shimizu distinguished employers’ demand for education in general from their demand for certain skills, showing that racial pay differences may be explained in part by different skills acquired and tasks performed, regardless of the degree obtained.<sup>117</sup>

Another body of research shows that the value of a college education may not be as useful as it once was in achieving pay parity. One study compared two periods of wage growth and documented that, while between 1996 and 2000 wages grew the most for Black college graduates (11.5% for Black, as compared to 10.6% for White workers), twenty years later the picture had changed dramatically: Between 2015 and 2019, “wages of black college grads fell 0.3% versus 6.6% wage growth for white college grads.”<sup>118</sup> A second study documented that, when comparing only college-educated workers, Black workers are both more likely to be unemployed (3.5% of Black, as compared to 2.2% of White, college-educated workers) and to be *underemployed*, meaning to

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114. Black et al., *supra* note 113, at 301–02, 305–07, 311–12:

[Evidence of] large race and ethnicity wage gaps among college-educated men . . . has led some to conclude that improved educational opportunities for minorities cannot be the solution to reducing wage disparities. Our work suggests, to the contrary, that even among the most highly educated, minority wage gaps are in large measure the consequence of differential acquisition of productive skills.

115. Ramamurthy & Sledgley, *supra* note 113, at 415, 420.

116. See, e.g., Erik Hurst, Yona Rubinstein & Kazuatsu Shimizu, *Task Based Discrimination* (Nat’l Bureau of Econ. Rsch., Working Paper No. 29022, 2021), <https://www.nber.org/papers/w29022> [<https://perma.cc/G6HK-DUSG>]; Melinda Petre, *Contributions of Skills to the Racial Wage Gap*, 13 J. HUM. CAP. 479 (2019); see also Porter, *supra* note 39.

117. Hurst et al., *supra* note 116, at 12–13, 47–48; see also Petre, *supra* note 116, at 483 (noting results of her study “suggest that skills are a source of the wage gaps,” which “implies that raising skills either through policies that foster skill development or policies that reduce discrimination might help reduce wage gaps”).

118. Elise Gould & Valerie Wilson, *Wage Growth Is Weak for a Tight Labor Market—And the Pace of Wage Growth Is Uneven Across Race and Gender*, ECON. POL’Y INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-wage-growth-gaps/> [<https://perma.cc/4A23-LAGJ>].



be in a job that does not require a college degree (40% of Black, as compared to 31% of White, college-educated workers).<sup>119</sup>

Researchers attribute this to an increase in education requirements for jobs over time.<sup>120</sup> Economists Patrick Bayer and Kerwin Kofi Charles found that, while Black men's wages may have increased overall due to their increased educational attainment, their wages relative to White men did not reflect improvement, having been offset by "sharply rising return to education in the labor market" despite "considerable racial convergence in educational attainment."<sup>121</sup> Another study by economist Siwei Cheng and colleagues showed that wages of Black workers at both the top and bottom of the educational spectrum have continued to deteriorate relative to similarly educated White workers, and that narrowing of the racial pay gap between workers with a high school degree reflects the worsening labor market position of White workers rather than the improving position of Black workers.<sup>122</sup> Wilson and Rodgers describe this as an "erosion in opportunity" for all workers that started in the 1980s but suggest that the "challenges that all young college graduates face" may be "more acute" for Black Americans.<sup>123</sup>

*Occupational segregation.* A second major cause of the racial pay gap is occupational segregation, which refers to the unequal distribution of workers in the labor market by race and gender.<sup>124</sup> Racial and gender pay gaps are caused in significant part by both "horizontal segregation," meaning separation between jobs requiring equally important but different tasks and "vertical segregation," meaning separation between clearly higher and lower paid occupations in the

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119. WILLIAMS & WILSON, *supra* note 68; see also Joni Hersch, *Catching Up Is Hard to Do: Undergraduate Prestige, Elite Graduate Programs, and the Earnings Premium*, 10 J. BENEFIT COST ANAL. 503, 504 (2019) (documenting that "the substantial [wage] premium to an elite undergraduate degree remains even among those who earn [elite] graduate or professional degrees," which, "[i]n combination with the far lower likelihood that graduates of nonselective institutions earn graduate or professional degrees of any kind, . . . ha[s] implications for individuals . . . the mechanism by which educational policy can affect income mobility").

120. See also Porter, *supra* note 39:

In 1960, 20 percent of Black men had a high school diploma, well below the 50 percent for whites. By 2014, high school completion rates for men of both races were near 90 percent. Over this period, however, the pay for jobs requiring only a high school education stalled. By 2014, a good wage required a college education.

121. Bayer & Charles, *supra* note 38, at 1491–97.

122. Siwei Cheng, Christopher R. Tamborini, ChangHwan Kim & Arthur Sakamoto, *Educational Variations in Cohort Trends in the Black-White Earnings Gap Among Men: Evidence from Administrative Earnings Data*, 56 DEMOGRAPHY 2253, 2272 (2019).

123. WILSON & RODGERS, *supra* note 1, at 52.

124. See generally KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT (2012).

U.S. labor market.<sup>125</sup> One recent study attributed 28% of gender and 39–49% of racial pay gaps among workers aged 21 to 30 to occupational segregation.<sup>126</sup> Another study documented that gender segregation at work has declined somewhat since the 1970s but, because it started so high, remains steep, while racial segregation has been less extreme but more resistant to change, declining little over the same period.<sup>127</sup>

Black and Latinx workers and all female workers are overrepresented in the lowest-paid occupations and underrepresented in the highest-paid occupations and industries throughout the U.S. economy.<sup>128</sup> A study by economists Darrick Hamilton, Algernon Austin, and William Darity classified 87% of U.S. occupations as “racially segregated,” which they defined as those in which Black men were disproportionately represented “relative to their share of the civilian population that meets the educational requirements” for the job.<sup>129</sup> According to their estimates, occupations filled by a larger share of Black men pay less, specifically by an average of \$10,000 less for every seven percentage points more Black men occupying the job.<sup>130</sup> Sociologists Matt Huffman and Philip Cohen have also demonstrated that segregation of Black workers into Black-dominated jobs—and the wage inequality that results—increase where the Black population is relatively large, reflecting that “white racism and its attendant practices are more severe in places where the black population is more threatening numerically.”<sup>131</sup> Likewise, sociologist Lisa Catanzarite identified the rise of “brown-collar” jobs—which she defines as

125. Kim A. Weeden, *Occupational Segregation*, PATHWAYS, Special Issue 2019, at 33–34, [https://inequality.stanford.edu/sites/default/files/Pathways\\_SOTU\\_2019.pdf](https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2019.pdf) [<https://perma.cc/R4LB-B2GF>].

126. *Id.* at 33.

127. *Id.* at 33–35.

128. See Kate Bahn & Carmen Sanchez Cumming, *Four Graphs on U.S. Occupational Segregation by Race, Ethnicity, and Gender*, WASH. CTR. FOR EQUITABLE GROWTH (July 1, 2020), <https://equitablegrowth.org/four-graphs-on-u-s-occupational-segregation-by-race-ethnicity-and-gender/> [<https://perma.cc/7GUE-V4AX>]; Darrick Hamilton, Algernon Austin & William Darity Jr., *Whiter Jobs, Higher Wages: Occupational Segregation and the Lower Wages of Black Men*, ECON. POL’Y. INST. 3 (Feb. 28, 2011), <https://files.epi.org/page/-/BriefingPaper288.pdf> [<https://perma.cc/9J7A-YZNC>] (“Black men are overrepresented in 38% of occupations [that average \$37,005 annually] and underrepresented in 49% of occupations [that average \$50,533 annually].”).

129. Hamilton et al., *supra* note 128, at 3; see also Judith K. Hellerstein & David Neumark, *Workplace Segregation in the United States: Race, Ethnicity, and Skill*, 90 REV. ECON. & STAT. 459, 475 (2008) (documenting the extensive segregation in the workplace based on education, language, race, and ethnicity).

130. Hamilton et al., *supra* note 128, at 3.

131. Matt L. Huffman & Philip N. Cohen, *Racial Wage Inequality: Job Segregation and Devaluation Across U.S. Labor Markets*, 109 AM. J. SOC. 902, 919, 926 (2004); Matt L. Huffman, *More Pay, More Inequality? The Influence of Average Wage Levels and the Racial Composition of Jobs on the Black-White Wage Gap*, 33 SOC. SCI. RSCH. 498, 515–17 (2004).

“occupations where immigrant Latinos are overrepresented, largely in low-level service, construction, agriculture, and manufacturing jobs”—and the “significant wage disadvantage for both U.S.-born workers and earlier-immigrant Latinos” who fill them.<sup>132</sup>

For women of color, occupational segregation is compounded. One study of workplaces between 1940 and 2010 found that, with “the addition of gender to the analysis of segregation by race/ethnicity, segregation more than triples,” and that “segregation increases by . . . one-third with the addition of race/ethnicity to the analysis of segregation by gender.”<sup>133</sup> Gender job segregation and related pay penalties are extreme: 26 of the 30 highest paid jobs in the United States are held predominantly by men, while 23 of the 30 lowest paid jobs are held predominantly by women.<sup>134</sup> Job segregation is both the most severe and the most resistant to change for Black<sup>135</sup> and Latinx<sup>136</sup> women. In 2013, Black and Latinx women composed only 13% of the U.S. workforce overall but 27% of the low-wage workforce and over 40% of the low-wage female workforce.<sup>137</sup>

Even when they work in the same industries, Black and Latinx workers and all female workers are less likely than White male workers to be in higher-paid, more senior positions. Research has shown that not only are Black workers less represented in higher-paid positions,<sup>138</sup> but that, when promoted, Black men receive a smaller wage return from their promotions than similarly promoted White men, further

132. Lisa Catanzarite, *Wage Penalties in Brown-Collar Occupations*, UCLA CHICANO STUD. RSCH. CTR. 1–2 (Sept. 2003), [https://www.chicano.ucla.edu/files/LPIB\\_08Sept2003.pdf](https://www.chicano.ucla.edu/files/LPIB_08Sept2003.pdf) [<https://perma.cc/92VZ-M83J>].

133. Coral del Río & Olga Alonso-Villar, *The Evolution of Occupational Segregation in the United States, 1940–2010: Gains and Losses of Gender–Race/Ethnicity Groups*, 52 DEMOGRAPHY 967, 983 (2015).

134. *Equal Work*, *supra* note 23, at 583 & n.8; Emily Liner, *A Dollar Short: What’s Holding Women Back from Equal Pay*, THIRD WAY, <https://www.thirdway.org/report/a-dollar-short-whats-holding-women-back-from-equal-pay> (last updated Sept. 13, 2017) [<https://perma.cc/M6YH-TJD2>].

135. Will McGrew, *How Workplace Segregation Fosters Wage Discrimination for African American Women*, WASH. CTR. FOR EQUITABLE GROWTH (Aug. 28, 2018), <https://equitablegrowth.org/wp-content/uploads/2019/06/082818-african-american-women-paygap.pdf> [<https://perma.cc/29RA-PU3N>].

136. Kate Bahn & Will McGrew, *The Intersectional Wage Gaps Faced by Latina Women in the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Nov. 1, 2018), <https://equitablegrowth.org/the-intersectional-wage-gaps-faced-by-latina-women-in-the-united-states/> [<https://perma.cc/9BYT-3FF4>].

137. NAT’L WOMEN’S L. CTR., UNDERPAID AND OVERLOADED: WOMEN IN LOW-WAGE JOBS 13–14, 21 (2014), [https://nwlc.org/wp-content/uploads/2015/08/final\\_nwlc\\_lowwagereport2014.pdf](https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_lowwagereport2014.pdf) [<https://perma.cc/RC6Y-UADR>].

138. Huffman, *supra* note 131, at 516.

exacerbating racial pay gaps.<sup>139</sup> And, because workers of color are overrepresented in jobs in the lower half of the pay scale, rising income inequality generally has worsened racial pay gaps over time.<sup>140</sup>

*Discrimination.* A final significant cause of racial and racialized gender pay gaps is discrimination. In general, after economists account and adjust for all other factors, both human capital and occupational, they infer that discrimination contributes to the “unobservable” or “unexplained” portion that remains.<sup>141</sup> Recent studies indicate that discrimination now accounts for at least a significant, if not the majority portion of racial pay and racialized gender pay gaps. One recent study found that at least one-third of the Black-White racial pay disparity was due to discrimination;<sup>142</sup> other studies estimate that about half<sup>143</sup> or two-thirds<sup>144</sup> of the Black-White pay gap could not be explained by

139. Sophie Tripp & Yariv Fadlon, *Promotions and Race: An Analysis of Wage Returns and Job Satisfaction*, 34 *LABOUR* 176, 176, 188–89 (2020) (“We find strong evidence of racial differences in the wage returns to promotions. Our results show that black males earn about 48 per cent of the wage return for white males.”)

140. WILSON & RODGERS, *supra* note 1, at 51:

The other factor consistently contributing to the expansion of these wage gaps has been growing earnings inequality in general . . . [T]he wages of most workers, especially less-skilled workers, have stagnated. . . [which] contributes to the widening of black-white wage gaps because the typical black worker is paid the wage of a low- to moderate-skilled white worker;

see also David R. Howell, *From Decent to Lousy Jobs: New Evidence on the Decline in American Job Quality, 1979-2017* 2, 7 (Wash. Ctr. for Equitable Growth, Working Paper, 2019), <https://equitablegrowth.org/wp-content/uploads/2019/08/WP-Howell-From-Decent-to-Lousy-Jobs.pdf> [<https://perma.cc/SAU8-9NKT>] (finding that “the racial lousy-job gap has widened for both men and women,” with “lousy jobs” defined as those paying less than “two-thirds of the full-time median wage (\$13.33 in 2017)”).

141. Mary C. Daly, Bart Hobijn & Joseph H. Pedtke, *Disappointing Facts about the Black-White Wage Gap*, FED. RSRV. BANK OF S.F. 3–4 (Sept. 5, 2017), <https://www.frbsf.org/economic-research/files/el2017-26.pdf> [<https://perma.cc/D4AG-TSSY>]:

Economists generally use a statistical method known as regression analysis to separate differences in pay. . . . The most important fact highlighted by our decomposition is that a significant portion of the wage gap between blacks and whites is not traceable to differences in easily measured characteristics, but rather is *unexplained* within our model. . . . Perhaps more troubling is the fact that the growth in this unexplained portion accounts for almost all of the growth in the gaps over time. . . . This implies that factors that are harder to measure—such as discrimination, differences in school quality, or differences in career opportunities—are likely to be playing a role in the persistence and widening of these gaps over time.

142. *But see* Fryer, Jr. et al., *supra* note 63, at 669–70 (“While there exists almost unanimous consensus that differences in formal schooling and premarket skill are important determinants of the observed disparities, the extent to which discrimination contributes to the gap remains one of the most debated issues in the social sciences.”).

143. Daly et al., *supra* note 141, at 4 (noting that in 2016 the “unexplained portion” accounted for “just under half of the total earnings gap” for Black men).

144. See WILSON & RODGERS, *supra* note 1, at 3 (“Differences in observable factors such as education and experience levels can explain more than a quarter of the black-white wage gap for

observable factors. Yet while discrimination does not necessarily account for what cannot be observed, to rely on a negative inference alone—meaning to count only what is leftover—would also understate the evidence of how bias influences pay.

A sizeable body of research now documents that racial bias (whether explicit or implicit), stereotyping, and discrimination affect pay setting throughout the labor market in a variety of ways. Economists Arthur Goldsmith, Darrick Hamilton, and William Darity have documented what they identify as a “preference for whiteness,” whereby the Black-White wage gap rises as the skin shade of the Black worker darkens.<sup>145</sup> In other work, they developed a theory of “ability misperception” in which employers undervalue non-White workers’ skills from previous employment (though non-White workers then make greater relative wage gains than White workers from job tenure).<sup>146</sup>

Other research documents specific examples of Black and Latinx workers receiving lower pay offers than White workers within the same occupational field, including technology professionals<sup>147</sup> and even professional basketball players—a job held 75–80% by Black men.<sup>148</sup> Numerous studies also document the phenomenon of what scholars call pay “erosion” or “degradation”: When the proportion of women or people

men [9.0 of 31.0 percentage points in 2015] and over a third of the gap for women [7.3 of 19.0 percentage points in 2015].”)

145. Arthur H. Goldsmith, Darrick Hamilton & William Darity, Jr., *From Dark to Light: Skin Color and Wages Among African Americans*, 42 J. HUM. RES. 701, 729 (2007).

146. Arthur H. Goldsmith, Darrick Hamilton & William Darity, Jr., *Does a Foot in the Door Matter? White-Nonwhite Differences in the Wage Return to Tenure and Prior Workplace Experience*, 73 S. ECON. J. 267, 294 (2006).

147. Tekla S. Perry, *Black Tech Professionals Are Still Paid Less than Their White Colleagues: And Women Make Less than Their Male Colleagues, Regardless of Racial Identity*, INST. ELEC. & ELECS. ENG’RS (July 28, 2020), <https://spectrum.ieee.org/black-tech-professionals-are-still-paid-less-than-their-white-colleagues#toggle-gdpr> [<https://perma.cc/33SL-D4T9>]:

[I]n 2019 black tech professionals were offered an average of US \$10,000 a year less than white tech workers . . . Hispanic tech professionals lag[ged] \$3,000 behind their white counterparts . . . Within each racial group, tech professionals who identified themselves as female received lower average salary offers than their male counterparts.

148. Candon Johnson & Eduardo Minuci, *Wage Discrimination in the NBA: Evidence Using Free Agent Signings*, 87 S. ECON. J. 517, 517, 522, 533 (2020) (analyzing free agent contract signings from 2011 to 2017 to find that “Black NBA athletes are on average underpaid by 13.1% compared to their Non-black counterparts,” which “suggest[s] the presence of consumer discrimination in the NBA,” and “finding an increase in the racial wage gap as the share of White population in the . . . team [metropolitan area] increases.”); *see also* Fryer et al., *supra* note 63, at 670 (testing “the impact of racial discrimination on offered wages” and determining that “[it] is at least one third of the raw black-white wage gap in our data, subject to our identifying assumptions”).

of color performing an occupation that was previously performed predominantly by White men goes up, the pay for that job goes down.<sup>149</sup>

Moreover, even those factors that can be observed and explained are not free from the influence of race and gender. While discrimination in pay setting may be the most obvious form of racial bias reflected in pay gaps, both human capital factors and occupational segregation reflect structural discrimination too.<sup>150</sup> Human capital factors, like educational quality and geographic mobility, are affected by systemic racism—for example, when Black and Latinx Americans are disproportionately concentrated in schools of lower educational quality and in jobs in the U.S. South, where wages are lower.<sup>151</sup> Work experience level is also complicated by time spent out of the workforce through job interruptions,<sup>152</sup> unemployment and job turnover,<sup>153</sup> and incarceration,<sup>154</sup> all of which occur at higher rates for Black and Latinx workers due at least in part to the structural impacts of race and gender. Occupational segregation itself can both reflect and serve as a

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149. See Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950–2000 U.S. Census Data*, 88 SOC. FORCES 865, 868 (2009); Catanzarite, *supra* note 132, at 14–18, 30–31 (describing this phenomenon as pay “erosion” or “degradation”); see also *Equal Work*, *supra* note 23.

150. See Spriggs, *supra* note 105; see also Hurst et al., *supra* note 116, at 48:

While racial differences in parental background, school quality, and neighborhood sorting have had a notable impact on racial gaps in people’s ability to earn, Spriggs [*supra*] argues that any racial gap in earnings stemming from such differences are the result of man-made discrimination. . . . We want to stress that these racial gaps in skills are themselves endogenous and subject to discrimination. . . . [R]acial skill gaps themselves stem from past racial prejudice.

151. See, e.g., Black et al., *supra* note 113, at 312 (“We cannot rule out the possibility that the reduced wages associated with speaking a language other than English at home (for Hispanics and Asians) or with being born in the South (for blacks) are the consequence of cultural or class prejudice.”).

152. See Katherine Weisshaar & Tania Cabello-Hutt, *Labor Force Participation over the Life Course: The Long-Term Effects of Employment Trajectories on Wages and the Gendered Payoff to Employment*, 57 DEMOGRAPHY 33, 55 (2020) (finding that workers who experience interruptions in their employment paths, including all women and Black men, have significantly lower relative wages than those with nonintermittent employment).

153. See Mary C. Daly, Bart Hobijn & Joseph H. Peditke, *Labor Market Dynamics and Black-White Earnings Gaps*, 186 ECON. LETTERS 1, 2 (2019) (demonstrating that higher rates of job turnover and periods of unemployment contribute to the Black-White pay gap); Paul E. Gabriel & Susanne Schmitz, *Are Estimates of Racial Wage Discrimination Influenced by Labor Market Conditions? Evidence from the National Longitudinal Survey*, 27 APPLIED ECON. LETTERS 1215, 1218 (2020) (finding that racial wage discrimination rises as unemployment increases and falls as labor markets tighten).

154. See Bruce Western & Catherine Sirois, *Racialized Re-Entry: Labor Market Inequality After Incarceration*, 97 SOC. FORCES 1517 (2019) (describing the labor market disadvantages of formerly incarcerated men and women); Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 SOC. PROBS. 257 (2011) (examining how time spent in prison affects future wage growth and showing that wages grew at a rate of 21 percent slower for Black as compared to White formerly incarcerated people after being released from prison); see also Leonhardt, *supra* note 38; PETTIT, *supra* note 74.

form of discrimination—for example, in steering of applicants into certain fields or distribution of tasks or assignments among workers.<sup>155</sup> Most strikingly, today's occupational segregation is a direct legacy of *actual de jure segregation* in the Jim Crow era during which Black workers were purposefully and lawfully excluded from certain jobs and schools.<sup>156</sup> The terminology is not coincidental.

When viewed more comprehensively with an understanding of the role of structural discrimination in shaping “objective” human capital and occupational factors, then, racial bias affects even the observable factors that explain the portion of the racial pay gap not attributed to discrimination.

The complex and overlapping causes of racial and racialized gender pay gaps leave much room for varied approaches to legal and policy reform. Based on the deeply embedded nature of many components of the racial pay gap, significant social change will be needed to uproot the legacy of White supremacy. Long-term solutions should focus on equalizing human capital factors, like education and work experience, which in turn would help reduce occupational segregation—for example, improving the quality of education for Black and Latinx children, making higher education more accessible, and increasing access to the types of degrees and skills that lead to higher-paid jobs. Criminal justice reform, to correct disproportionate incarceration rates and sentence length, and access to quality affordable childcare are also necessary to reduce work interruptions and increase work-experience tenure.

More immediate solutions that focus on labor rights can also help at the margins of pay gaps but require a heavy political lift. Increasing the federal minimum wage would help narrow the overall pay gap due to the overrepresentation of workers of color in minimum wage jobs.<sup>157</sup> Data shows that raising the federal minimum wage to \$15

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155. MARINA ZHAVORONKOVA, ROSE KHATTAR & MATHEW BRADY, CTR. FOR AMER. PROGRESS, OCCUPATIONAL SEGREGATION IN AMERICA (Mar. 29, 2022), <https://www.americanprogress.org/article/occupational-segregation-in-america/> [<https://perma.cc/UPT9-XCXV>].

156. Hina B. Shah, *Radical Reconstruction: (Re) Embracing Affirmative Action in Private Employment*, 48 U. BALT. L. REV. 203, 217–22 (2019); Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57, 63–67, 71–74 (2009).

157. Black workers account for 11.8% of the U.S. workforce, but 16.9% of minimum wage workers. DAVID COOPER, ECON. POL'Y INST., RAISING THE FEDERAL MINIMUM WAGE TO \$15 BY 2024 WOULD LIFT PAY FOR NEARLY 40 MILLION WORKERS 3 (Feb. 5, 2019), <https://www.epi.org/publication/raising-the-federal-minimum-wage-to-15-by-2024-would-lift-pay-for-nearly-40-million-workers/> [<https://perma.cc/3FHE-NPBM>]; see also Ellora Derenoncourt & Claire Montialoux, *Minimum Wage and Racial Inequality*, 136 Q. J. ECON. 169, 171 (finding that the 1966 expansion of federal minimum wage law accounted for over 20% of the decline in the Black-White racial pay gap between 1965 and 1980); Ellora Derenoncourt & Claire Montialoux, *Opinion, To*

per hour would increase wages for 23.2% of White workers as compared to 38.1% of Black and 33.4% of Latinx workers.<sup>158</sup> Redressing the growth of the gig economy, increasing unionization rates, and protecting organizing rights can also help, as being part of a union raises wages for all workers, including workers of color,<sup>159</sup> and reduces racial and gender pay gaps.<sup>160</sup> Paid sick and family and medical leave could also narrow gaps, especially for women of color who most often lose income or jobs when forced to take unpaid leave for caregiving.<sup>161</sup>

Yet at the core of the racial pay gap is discrimination, on which the remainder of this Article focuses. Part II examines direct pay discrimination and how to narrow racial pay gaps through more robust uses of civil rights and equal pay laws. It also looks to lessons from advocacy around the gender pay gap, proposing specific reforms in the context of the racial pay gap that can further debias pay setting. Part III then turns to the task of reframing more indirect, systemic causes of the racial pay gap, proposing pieces of criminal justice and education reform that can and should be addressed to better equalize pay now.

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*Reduce Racial Inequality, Raise the Minimum Wage*, N.Y. TIMES (Oct. 25, 2020), <https://www.nytimes.com/2020/10/25/opinion/minimum-wage-race-protests.html> [<https://perma.cc/57WW-DQF2>].

158. Valerie Wilson, *The Raise the Wage Act of 2019 Would Give Black Workers a Much-Needed Boost in Pay*, ECON. POL'Y INST. (Feb. 13, 2019), <https://www.epi.org/publication/the-raise-the-wage-act-of-2019-would-give-black-workers-a-much-needed-boost-in-pay/> [<https://perma.cc/PQH2-CKG9>]; COOPER, *supra* note 157. Critics of raising the minimum wage would argue that doing so could cause job losses, which would counteract wage gains by Black and Latinx workers, who are more likely to be unemployed. This issue is beyond the scope of this article. Compare David Neumark & Peter Shirley, *Myth or Measurement: What Does the New Minimum Wage Research Say about Minimum Wages and Job Loss in the United States?* (Nat'l Bureau of Econ. Rsch., Working Paper 28388, 2022), <http://www.nber.org/papers/w28388> [<https://perma.cc/28K8-YKGE>], with DAVID CARD & ALAN B. KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE—TWENTIETH-ANNIVERSARY EDITION* (2015) (updating their foundational 1995 book).

159. Gould, *supra* note 3.

160. *Equal Work*, *supra* note 23, at 636 (documenting smaller racial and gender pay gaps among unionized than nonunionized workers); WILSON & RODGERS, *supra* note 1, at 5, 42–46 (“Declining unionization has had a role in the growing black-white wage gap . . . [b]etween 1983 and 2015 . . .”).

161. *Paid Leave Will Help Close the Gender Wage Gap*, NAT'L P'SHIP FOR WOMEN & FAMS. (Mar. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/paid-leave-will-help-close-gender-wage-gap.pdf> [<https://perma.cc/R575-D5HW/>]; *Paid Family and Medical Leave: A Racial Justice Issue – and Opportunity*, NAT'L P'SHIP FOR WOMEN & FAMS. (Aug. 2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf> [<https://perma.cc/977U-YA95>]. See also Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 821–24 (2018) (documenting the importance of wage replacement for workers during pregnancy leave).



## II. REVITALIZING ANTIDISCRIMINATION LAW TO NARROW THE RACIAL PAY GAP

For the portion of the racial pay gap that economists attribute to discrimination, two types of statutes provide the most direct remedial approach: (1) civil rights statutes barring race and sex discrimination in compensation and (2) wage and hour statutes requiring equal pay. These federal and state laws offer the promise of great protection. Yet as the persistence of pay discrimination by race and gender reveals, there is room to both strengthen enforcement and expand coverage of existing laws. New state laws on equal pay by race and new antibiasing measures to close the gender pay gap offer some promise.

### *A. Title VII of the Civil Rights Act of 1964*

#### 1. Disparate Treatment

Title VII of the Civil Rights Act of 1964 (“Title VII”)—the main federal civil rights statute prohibiting employment discrimination<sup>162</sup>—makes it unlawful for any public or private employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>163</sup> This part of the statute prohibits intentional “disparate treatment” in pay, providing an employee or group of employees a cause of action if they can show they were paid less than other employees on the basis of race.<sup>164</sup> Yet because

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162. Nearly all 50 states have their own state versions of Title VII, which may be more protective—for example, by applying to smaller employers or including additional protected classes. See *Fact Sheet: The EEOC and FEPA Data-Sharing*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/fact-sheet-eeoc-and-fepa-data-sharing> (last visited July 30, 2022) [<https://perma.cc/MQ54-YVTT>]. Where the statutes overlap, as they do for compensation discrimination because of race or sex, state courts interpret state law consistent with their federal court of appeals’ interpretation of Title VII. For this reason, discussion of state civil rights laws is omitted from this Part as unnecessary. State and federal laws do vary, however, on the separate issue of equal pay, as discussed in Part II.B.

In addition, a separate federal civil rights statute enacted prior to Title VII provides another path for alleging race discrimination in pay: Section 1981 of the Civil Rights Act of 1866 which provides, in relevant part, that “[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .” 42 U.S.C. § 1981(a). Section 1981 has been interpreted to prohibit intentional discrimination in employment on the basis of race and ethnicity only, and to require that race be a “but-for” cause of the discrimination. *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020). Thus, relevant cases also overlap with a subset of Title VII disparate treatment claims.

163. 42 U.S.C. § 2000e-2(a)(1).

164. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

of the way both pay disparities and contemporary bias operate, plaintiffs face significant challenges when attempting to enforce these protections.<sup>165</sup>

To prove a disparate treatment claim for pay discrimination, an employee must prove a prima facie case that, despite being qualified or performing satisfactorily, they were paid less “under circumstances which give rise to an inference of unlawful discrimination.”<sup>166</sup> The employer can then articulate a “legitimate, nondiscriminatory reason” for the pay disparity, which the employee must prove was a pretext for the real reason: race discrimination.<sup>167</sup> For a plaintiff to bring an individual pay claim under Title VII, they must first know that they were being paid less than similarly situated coworkers of another race and make a timely complaint. This is a significant hurdle given both cultural norms about, and employer efforts to prevent, discussing pay with coworkers<sup>168</sup>—a hurdle so significant that it led to a 2009 amendment to Title VII. Named after a plaintiff who discovered that, for many years, she had been paid less than male peers only after receiving an anonymous note listing her coworkers’ pay rates, the Lilly Ledbetter Fair Pay Act resets the clock to file a Title VII charge each time a discriminatory paycheck is received.<sup>169</sup>

If an employee discovers pay discrimination and files a timely claim, they must prove an inference of discrimination, usually—though not required by the statute—through evidence of a similarly situated coworker outside the protected class who was paid more.<sup>170</sup> Given significant occupational segregation by race and gender in the U.S.

165. In the context of gender, see also *Equal Work*, *supra* note 23, at 602–05. For a foundational study documenting the overall positive economic impacts of the passage of Title VII on Black employment and wages, see Kenneth Y. Chay, *The Impact of Federal Civil Rights Policy on Black Economic Progress*, 51 INDUS. & LAB. REL. REV. 608, 631 (1998), documenting an annual increase in Black employment rates and narrowing of the Black-White wage gap at small employers in the South after Title VII was extended to cover them in 1972.

166. *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253–54, 253 n.6 (1981) (discussing requirements of *McDonnell Douglas*, 411 U.S. at 802).

167. *McDonnell Douglas*, 411 U.S. at 802.

168. See, e.g., Time Herrera, *Why You Should Tell Your Co-Workers How Much Money You Make*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/smarter-living/pay-secrecy-national-labor-rights-act.html> [<https://perma.cc/8DY4-VDUG>].

169. Lilly Ledbetter Fair Pay Act, Pub. L. No. 111–2, 123 Stat. 5 (2009).

170. See *Equal Work*, *supra* note 23, at 604; Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 944–45 (2016); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745 (2011); Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839 (2002). But see Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 203 (2009) (addressing that at least one court has rejected comparator proof as necessary, but still noting the relevance of comparators).

workforce,<sup>171</sup> even if a plaintiff believes their pay was infected by racial stereotypes or biases—for example, that due to their race, their past experience was unfairly discounted when their pay was set<sup>172</sup>—it is nearly impossible to make out a prima facie case of pay discrimination without such “comparator evidence.”<sup>173</sup> Courts have allowed evidence of sex stereotyping, particularly involving motherhood, to create an inference of sex discrimination under Title VII; yet courts have been less able or willing to recognize racial stereotyping evidence similarly.<sup>174</sup>

Should an employee have enough proof to make out their prima facie case of a pay disparity, they must still overcome the employer’s defense that another reason explains the pay difference.<sup>175</sup> Legitimate distinctions in human capital factors like education or experience will, of course, suffice. But so, too, will *any other reason* so long as the court does not believe it to be discriminatory—for example, a difference in the two employees’ prior pay or a bonus to retain an employee who received another job offer, both “market-based” explanations that plaintiffs alleging sex discrimination have argued perpetuate prior discrimination.<sup>176</sup> Title VII disparate treatment claims require proving “intent” to discriminate, a legal term of art that goes well beyond a conscious decision to treat someone worse based on protected class.<sup>177</sup> In claims of race discrimination in pay, however, courts are often unwilling to recognize even intentional actions that result in biased pay, often going to great pains to find that an employer’s reason for the pay difference is justified.<sup>178</sup>

171. See *supra* notes 124–140 and accompanying text.

172. See *supra* note 146 and accompanying text (discussing Goldsmith, Hamilton and Darity’s theory of “ability misperception”).

173. See *Equal Work*, *supra* note 23, at 602–05.

174. See Bornstein, *supra* note 170, at 945–50, 967–72; e.g., *Smith v. Thomasville*, 753 F. App’x 675, 697 (11th Cir. 2018) (strict view of appropriate comparator in race case); *Hill v. Emory Univ.*, 346 F. App’x 390, 392–94 (11th Cir. 2009) (same); *Moore v. Shands Jacksonville Med. Ctr., Inc.*, No. 3:09-CV-298, 2013 WL 12178163, at \*6–7 (M.D. Fla. Oct. 18, 2013) (same); *Russell v. Cnty. of Nassau*, 696 F. Supp. 2d 213, 233 (E.D.N.Y. 2010) (same).

175. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

176. See *infra* Part II.C; see, e.g., *Freyd v. Univ. of Or.*, 990 F.3d 1211, 1224–29 (9th Cir. 2021) (EPA and Title VII disparate impact claims where male professors earned on average \$15,000 more than comparable female professors due to “retention raises” made when male professors got outside job offers).

177. See Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1077–83 (2017).

178. See, e.g., *Robertson v. Interactive Coll. of Tech./Interactive Learning Sys., Inc.*, 743 F. App’x 269, 275 (11th Cir. 2018) (deferred to employer’s stated nondiscriminatory reason, despite strong evidence for plaintiff); *Cole v. Bd. of Trustees*, 838 F.3d 888, 899 (7th Cir. 2016) (ignored evidence of racial animus); *Johnson v. TCB Constr. Co.*, 334 F. App’x 666, 670 (5th Cir. 2009) (deferred to employer’s stated nondiscriminatory reason, despite strong evidence for plaintiff); *Williams v. Krug Lincoln-Mercury*, 848 F. Supp. 763, 769 (E.D. Mich. 1994) (same).

Beyond individual claims, a group of employees can allege systemic disparate treatment on a classwide basis, arguing that the employer's standard operating procedures amounted to a "pattern or practice" of discrimination using statistics and anecdotal evidence.<sup>179</sup> The employer may rebut this inference by challenging the employees' statistics, introducing alternative statistics, and/or offering legitimate reasons for the disparity.<sup>180</sup> Here, a class of plaintiffs alleging race based pay discrimination must first convince a court to certify the case as a class action—that is, to view lower pay against a group by race as a "pattern or practice" of discrimination rather than just a bunch of individual decisions.<sup>181</sup> Should plaintiffs nevertheless succeed in getting certified and making out a statistical case that creates an inference of pay discrimination, they again must overcome courts' willingness to excuse bias-infected justifications for employer pay setting.<sup>182</sup>

A recent empirical survey of cases demonstrates the difficulty of bringing pay discrimination claims under existing federal antidiscrimination law. A search of all available federal cases in Westlaw to date<sup>183</sup> returned only 2800 cases involving pay discrimination based on race or race in combination with another protected classification (e.g., gender, disability, or age). Of these, only 301 alleged compensation discrimination claims under Title VII and/or Section 1981<sup>184</sup> (which prohibits race discrimination in contracting and generally follows Title VII proof structures) that were substantively discussed in the case. These included cases alleging race or intersectional discrimination in a workplace action that impacted pay, such as denial of promotion or training that could lead to pay increases or demotion that reduced pay. Out of the 301 cases, plaintiffs prevailed<sup>185</sup> on one or all claims alleged in only 69.

This is not intended to be a comprehensive survey: It does not include cases filed in state courts alleging federal claims, nor does it account for cases not included in Westlaw that may have been strong

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179. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 333, 336 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301 (1977).

180. *Teamsters*, 431 U.S. at 339–40.

181. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345–46 (2011); Tristin Green, *The Future of Systemic Disparate Treatment Law*, 32 *BERKELEY J. EMP. & LAB. L.* 395, 408–10 (2011).

182. See *supra* notes 175–176 and accompanying text.

183. Original data compiled by author as of Feb. 2022, Westlaw search using term: [advanced: ("race discrimination" /p (wages OR pay) AND ("Title VII" OR 1981)) AND (dispar! OR gap)]. The search was limited to federal court opinions at any time. Notably, employees may bring Title VII or Section 1981 claims in state court as well; the focus on federal cases was meant to provide a reasonable sample with which to survey trends.

184. 42 U.S.C. § 1981, Civil Rights Act of 1866.

185. For the purposes of this survey, "prevail" means that plaintiff survived a defendant's motion to dismiss or motion for summary judgment.

enough to settle or that went to arbitration. Nevertheless, this qualitative sample illustrates the paucity of successful published race-based pay discrimination cases brought under Title VII and Section 1981 in federal courts.

A close review of these cases reveals two unsurprising trends.<sup>186</sup> First, when evaluating pay discrimination claims, courts tend to discount arguably discriminatory evidence too early in the litigation, dismissing or disposing of cases at summary judgment. This is primarily due to a lack of similar enough comparators<sup>187</sup> or by racially biased statements being dismissed as mere “stray remarks.”<sup>188</sup> Second, the amount of deference given to an employer’s legitimate nondiscriminatory reason for the pay disparity or adverse action affecting pay is often dispositive, even where there is supportive evidence but not enough for the court to find that the plaintiff proved pretext.<sup>189</sup>

Thus even as it currently stands, courts could interpret Title VII disparate treatment law more robustly on the issue of equal pay. In particular, courts could take a more searching view of what constitutes a “legitimate, non-discriminatory reason” to justify any racial pay disparity a plaintiff proves. Courts could also take a broader view of appropriate comparators for pay claims and of evidence of racially biased attitudes that are worthy of surviving early dismissal. While the disparate treatment theory prohibits only intentional discrimination by the defendant employer and does not redress the impacts of so-called

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186. These trends are “unsurprising” as they have been well documented by legal scholars as among the reasons discrimination claims often fail. *See* Bornstein, *supra* note 174 (discussing and citing related scholarship).

187. *See, e.g.*, Shine v. Bd. of Trustees, No. 2:18-CV-2093-CLM, 2021 WL 6198064, at \*7 (N.D. Ala. Dec. 30, 2021) (illustrating that in the Eleventh Circuit, a pay comparator must be “similarly situated in all material aspects”—that is, “sufficiently similar, in an objective sense that cannot be reasonably distinguished,” which sets a very high bar).

188. *See, e.g.*, Alvarez-Soto v. B Frank Joy, LLC, 253 F. Supp. 3d 615, 628 (D. Md. 2017) (evidence of several instances of work personnel using derogatory names to refer to Black or Latinx employees to support a claim of lower hourly wages and smaller wage increases as White employees doing the same work was dismissed because use of derogatory language was not linked to a specific adverse employment action).

189. *See, e.g.*, Sampson v. City of Fort Smith, 255 F. Supp. 3d 873, 893 (W.D. Ark. 2017) (holding that a Black police officer failed to prove pretext where employer relied on internal investigations and objective/subjective content of the promotion process, despite evidence of racist remarks by decisionmakers; the Court found there was “no place in a civilized society for some of the racially charged comments alleged,” but still held plaintiff did not establish a claim); Robertson v. Interactive Coll. of Tech./Interactive Learning Sys., Inc., 743 F. App’x 269, 275 (11th Cir. 2018) (“[W]hile it may have been unfair that [African-American plaintiff] Robertson had more management responsibilities than [his White co-manager] Spyers, yet was paid less for a period of time, unfair treatment, absent racial discrimination, is not an unlawful employment practice under Title VII.”).

“societal discrimination,”<sup>190</sup> courts can and should hold employers accountable for their current intentional use of pay-setting practices that perpetuate the impacts of past racial bias.<sup>191</sup>

## 2. Disparate Impact

Title VII also makes it unlawful “to limit, segregate, or classify . . . employees or applicants . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” because of race or another protected class.<sup>192</sup> This part of the statute has been interpreted to allow for “disparate impact” claims, where facially neutral policies or practices have disproportionately negative effects on one group by protected class.<sup>193</sup> Disparate impact claims should allow plaintiffs to challenge more structural causes of the racial pay gap: Unlike disparate treatment, no intent is required and the claim looks to the discriminatory outcomes of seemingly neutral rules. Yet again, courts have interpreted the law rigidly and given wide berth to employer choices that may worsen pay disparities.<sup>194</sup>

To prove a disparate impact claim for a neutral practice that results in pay discrimination by race, an employee or group of employees must show that a facially “neutral” employment rule or criterion disproportionately affects employees by race, resulting in a substantial statistical disparity within the proper labor market.<sup>195</sup> The employer can then either rebut the employee’s statistics or show that the practice is job related and consistent with “business necessity”—defined as minimum qualifications or requirements for the job, with courts usually deferring to the employer’s judgment of what satisfies the minimum.<sup>196</sup> Employers often prove business necessity using a

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190. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 272, 274 (1986) (discussing “societal racial discrimination” in the context of affirmative action); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1407–12 (2014) (discussing the challenge of proving liability under Title VII for “[b]igotry, stereotyping, and animus ‘in the air,’” despite that it is “a pretty good indication that . . . discrimination is a problem on the ground” in workplaces).

191. See, e.g., *Rizo v. Yovino*, 950 F.3d 1217, 1228 (9th Cir. 2020) (“[T]he history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer’s burden to show that sex played no role in wage disparities between employees of the opposite sex.”).

192. 42 U.S.C. § 2000e-2(a)(2).

193. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

194. See *Equal Work*, *supra* note 23, at 605–06.

195. See *Griggs*, 401 U.S. at 429–30; cf. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); Civil Rights Act of 1991, Pub. L. 102-166, § 105(a).

196. See *Griggs*, 401 U.S. at 429–30.

“validation study” that shows a correlation between the practice and successful performance of the job.<sup>197</sup> Should the employer prove a business necessity, the employee may attempt to rebut the employer’s defense by showing that a less discriminatory alternative rule or criteria would also serve the employer’s interests.<sup>198</sup>

As with those brought under a disparate treatment theory, cases alleging race discrimination in pay under a disparate impact theory show how courts interpret existing antidiscrimination law too stringently.<sup>199</sup> Even if plaintiffs succeed in proving their prima facie case through statistical proof, courts often take an unnecessarily broad view of the “business necessity” defense,<sup>200</sup> deferring to an employer’s justification for the challenged practice despite that it may incorporate bias.

Moreover, due largely to the influence of the late Justice Scalia, many federal courts have undercut the ability of disparate impact to reach structural discrimination as intended.<sup>201</sup> Justice Scalia believed that the disparate impact framework should only be allowed to “smoke out” hidden intentional discrimination; to interpret the statute otherwise, he believed, went too far, holding employers responsible for societal discrimination for which they were not responsible.<sup>202</sup> Thus some federal courts will defer to employer judgment unless an employee can show some evidence of racial animus.<sup>203</sup> Yet neither the statutory text of Title VII nor Supreme Court case law interpreting it require this; to date, Scalia’s view has not been adopted by the Court majority.<sup>204</sup>

Under current law, then, as with disparate treatment claims, Title VII allows room for stronger interpretation of the law of disparate impact. The disparate impact framework was established to redress the effects of structural discrimination by allowing plaintiffs to pursue a

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197. See *Employment Tests and Selection Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Dec. 1, 2007), <https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures> [<https://perma.cc/4K9F-MW3H>]; Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387 (1996).

198. See *Griggs*, 401 U.S. at 431; Civil Rights Act of 1991.

199. See *supra* notes 174–178 and accompanying text.

200. See Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 388 (1996) (arguing in favor of a “strict necessity” interpretation).

201. Many scholars have written about the inability of Title VII’s disparate impact theory to live up to its potential more generally—a discussion of which is beyond the scope of this Article. See, e.g., Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157 (2013); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357 (2017).

202. *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

203. See *supra* notes 175–178 and accompanying text.

204. See *Ricci*, 557 U.S. at 586 (2009); *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015).

claim without proof of intent. Courts could take a less deferential view and engage in a more searching review of the real "necessity" of an employer's practice or policy when it unintentionally perpetuates racially disparate impacts on pay.

### *B. Equal Pay Acts*

#### 1. The Federal Equal Pay Act for Gender

In addition to Title VII and its state equivalents, a separate federal statute, the Equal Pay Act of 1963 ("EPA"),<sup>205</sup> prohibits unequal pay by sex. Enacted as part of the Fair Labor Standards Act one year prior to the passage of Title VII, the EPA offers a second protection under wage and hour law that prohibits "paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and . . . performed under similar working conditions."<sup>206</sup> The statute, however, provides several exceptions for an employer to justify unequal pay with an established seniority, merit, production system, or, most importantly, "a differential based on any other factor other than sex."<sup>207</sup> As discussed in the next Section, nearly all states have their own version of the federal equal pay law; yet unlike state versions of Title VII, which largely mirror protections for pay discrimination by sex and race under federal law, state equal pay acts offer more variation.<sup>208</sup>

At the federal level, the EPA provides a complementary approach to Title VII for plaintiffs alleging sex discrimination in pay.<sup>209</sup> Enacted as a civil rights statute, Title VII places the ultimate burden of proof squarely on the employee, who must prove either the employer's "intent" to discriminate or a disparate impact from the employer's chosen pay practices.<sup>210</sup> In contrast, as a wage and hour statute, the EPA has no intent requirement: Once the employee shows a pay disparity as defined by the statute, the EPA shifts the burden of justifying a pay disparity to the employer.<sup>211</sup> This is a significant advantage to plaintiffs in that liability attaches regardless of the

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205. 29 U.S.C. § 206(d).

206. 29 U.S.C. § 206(d)(1).

207. *Id.*

208. *See infra* Section II.B.2.

209. *See Equal Work, supra* note 23 at 607-10.

210. *See supra* Part II.A.

211. 29 U.S.C. § 206(d); *see Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).



employer's intent or motives, subject only to the employer proving an affirmative defense. For an employee to get liability to attach, however, is no easy feat. While a plaintiff can pursue a Title VII claim for any form of sex discrimination in pay, the EPA requires plaintiffs to prove they received unequal pay for "equal work" as narrowly defined by the statute.<sup>212</sup> Should the plaintiff succeed in shifting the burden to the employer, the affirmative defense of "any other factor other than sex" is as vast as any defense under Title VII.<sup>213</sup>

Notably, the federal EPA offers an additional channel to challenge only sex-based pay discrimination; it does not include the protected class of race. Thus, its only utility in the context of the racial pay gap is to help redress intersectional pay discrimination claims experienced by women of color that plaintiffs can prove are due, at least in part, to their sex in combination with their race.<sup>214</sup> As described below, recent state legislation offers a model for how the federal EPA could be amended to prohibit unequal pay by race, too. But at the federal level, efforts to improve the EPA's existing coverage for the protected class of sex have been unsuccessful,<sup>215</sup> making the idea of expanding federal law to include race a virtual impossibility at this point. Instead, state law offers more promise.

## 2. State Equal Pay Acts That Include Race

In a positive development in antidiscrimination law toward closing racial and gender pay gaps, over the past five years states have begun to amend their own versions of the federal EPA in two ways. First, states have expanded existing protections against unequal pay by sex. Eighteen states to date have broadened the scope of jobs that may be compared for an equal pay claim, moving beyond "equal work" to allow plaintiffs to challenge unequal pay for "substantially similar" or "comparable" work.<sup>216</sup> A handful of states have also narrowed the "any

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212. *Corning Glass Works*, 417 U.S. at 195 ("[E]qual work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.").

213. See *supra* notes 206–207 and accompanying text; Bennett Amendment, 42 U.S.C. § 2000e-2(h); *Washington Cnty. v. Gunther*, 452 U.S. 161, 171 (1981) (holding defenses of the EPA apply to Title VII).

214. See *supra* notes 49–57 and accompanying text.

215. See *Equal Work*, *supra* note 23, at 620–22.

216. *Id.* at 610–15 (citing and discussing the equal pay provisions in 17 states); ARK. CODE ANN. § 11-4-601(a) (2022); CAL. LAB. CODE § 1197.5 (West 2022); IDAHO CODE § 44-1702(1) (2022); 820 ILL. COMP. STAT. ANN. 110/1, 112/10 (West 2022); IOWA CODE § 70A.18 (2022); LA. STAT. ANN. § 23:664 (2022); ME. REV. STAT. ANN. tit. 26, § 628 (2022); MASS. GEN. LAWS ANN. ch.149, § 105A (West 2022); MICH. COMP. LAWS ANN. § 750.556 (West 2022); MO. ANN. STAT. § 290.410 (West

other factor other than sex” defense, limiting it to only job-related or certain specified factors.<sup>217</sup>

More importantly as it relates to racial and racialized gender pay gaps, nine states to date have enacted state law versions of the federal EPA that include the protected category of race or race in combination with sex.<sup>218</sup> Two of the statutes were passed over a decade ago (Iowa, Ohio),<sup>219</sup> the remaining seven were enacted in just the past five years (Alabama, California, Colorado, Illinois, New Jersey, New York, Oregon).<sup>220</sup> Six of these statutes both go beyond “equal work” to a broader view of allowable job comparisons and limit the “any other factor other than sex” defense to job-related or specified factors (California, Colorado, Illinois, New Jersey, New York, Oregon).<sup>221</sup>

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2022); MONT. CODE ANN. § 39-3-104 (2021); NEB. REV. STAT. § 48-1221 (2022); N.D. CENT. CODE § 34-06.1-01 (2021); OKLA. STAT. tit. 40, § 198.1 (2014); OR. REV. STAT. ANN. § 652.210(4) (West 2022); S.D. CODIFIED LAWS § 60-12-15 (2022); WASH. REV. CODE ANN. § 49.58.020 (West 2022).

217. *Progress in the States for Equal Pay*, NAT'L WOMEN'S LAW CTR. 4 (Nov. 2020), <https://nwlc.org/wp-content/uploads/2019/12/State-Equal-Pay-Laws-2020-11.13.pdf> [<https://perma.cc/8Q4C-ZQM9>] (citing and discussing amendments to COLO. REV. STAT. § 8-5-102 (2019), 820 ILL. COMP. STAT. ANN. 112/10 (2019), Law Against Discrimination, c.169, 1945 N.J. Laws 589 (2018), and WASH. REV. CODE § 49.12.175 (2018)).

218. ALA. CODE § 25-1-30 (2022); CAL. LAB. CODE § 1197.5 (West 2022); COLO. REV. STAT. ANN. §§ 8-5-102, 24-34-402 (West 2022); 820 ILL. COMP. STAT. ANN. 112/10 (West 2022); IOWA CODE ANN. § 216.6A(2)(a) (West 2022); N.J. STAT. ANN. § 10:5-12(t) (West 2022); N.Y. LAB. LAW § 194 (McKinney 2022); OHIO REV. CODE ANN. § 4111.17 (West 2022); OR. REV. STAT. ANN. §§ 652.220(1)(a), .210(6) (West 2022).

219. IOWA CODE ANN. § 216.6A(2)(a) (West 2010); OHIO REV. CODE ANN. § 4111.17 (West 2000).

220. ALA. CODE § 25-1-30 (effective Sept. 1, 2019); CAL. LAB. CODE § 1197.5 (West effective Jan. 1, 2016); COL. REV. STAT. ANN. § 8-5-102 (West effective Jan. 1, 2021); 820 ILL. COMP. STAT. ANN. 112/10 (West effective Sept. 29, 2019); N.J. STAT. ANN. § 10:5-12(t) (West effective Jan. 21, 2020); N.Y. LAB. LAW § 194 (McKinney effective Oct. 8, 2019); OR. REV. STAT. ANN. §§ 652.220(1)(a), .210(6) (West effective Jan. 1, 2020).

221. CAL. LAB. CODE § 1197.5 (West 2022); COLO. REV. STAT. ANN. § 8-5-102 (West 2022); 820 ILL. COMP. STAT. ANN. 112/10 (West 2022); N.J. STAT. ANN. § 10:5-12(t) (West 2022); N.Y. LAB. LAW § 194 (McKinney 2022); OR. REV. STAT. § 652.220(1)(a) (West 2022); *see also* NAT'L WOMEN'S L. CTR., *supra* note 217.

STATE EQUAL PAY ACTS THAT INCLUDE RACE<sup>222</sup>

State <sup>223</sup>	Statute	Comparison Term	Prohibited Bases
Alabama	ALA. CODE § 25-1-30 (2022)	“equal work”	“sex or race”
California	CAL. LAB. CODE § 1197.5 (West 2022)	“substantially similar work”	(a) “sex”; (b) “race or ethnicity”
Colorado	COLO. REV. STAT. ANN. §§ 8-5-102, 24- 34-402 (West 2022)	“substantially similar work”	“sex, or . . . sex in combination with another protected status” defined as “disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, age, national origin, or ancestry”
Illinois	820 ILL. COMP. STAT. ANN. 112/10 (West 2022)	“same or substantially similar work”	“sex” and “African-American employee”
Iowa	IOWA CODE ANN. § 216.6A(2)(a) (West 2022)	“equal work” <sup>224</sup>	“age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability”
New Jersey	N.J. STAT. ANN. § 10:5- 12(t) (West 2022)	“substantially similar work”	“protected class” defined as “race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait . . . or . . . service in the armed forces”

222. Research last updated February 1, 2022.

223. In addition to these statutes, ALASKA STAT. ANN. § 23.05.062 (West 2021) requires the state human rights commission to prepare an annual, public report “regarding pay practices in the state by election district” that includes information on “to what extent employees in one or more election districts of the state are paid equal pay for work of comparable character, regardless of race, religion, color, national origin, age, physical or mental disability, sex, marital status, change in marital status, pregnancy, or parenthood.”

224. IOWA CODE § 70A.18 (West 2022) provides broader protection for public sector workers for sex only, prohibiting pay discrimination for “work of comparable worth between jobs held predominantly by women and jobs held predominantly by men.” “Comparable worth” is defined as “the value of work as measured by the composite of the skill, effort, responsibility, and working conditions normally required . . .” *Id.*

New York	N.Y. LAB. LAW § 194 (McKinney 2022)	(a) “equal work”; or (b) “substantially similar work”	“status within one or more protected class or classes” defined as “age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status”
Ohio	OHIO REV. CODE ANN. § 4111.17 (West 2022)	“equal work”	“race, color, religion, sex, age, national origin, or ancestry”
Oregon	OR. REV. STAT. ANN. §§ 652.220(1)( a), .210(6) (West 2022)	“work of comparable character”	“protected class” defined as “race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, veteran status, disability or age”

Each of these statutes now provides an additional mechanism by which employees can challenge pay discrimination by race or race in combination with sex, improving their ability to close the portion of racial pay gaps due to discrimination. Among the nine, New Jersey, New York, and Oregon offer the strongest models, including protections against unequal pay by any protected class, a broader view of what jobs can be compared (making an employee’s *prima facie* burden easier to meet), and a narrower view of a “factor other than sex” (making an employer’s defense harder to meet).<sup>225</sup>

Because these statutes are so new, only a handful of cases have been published to date alleging race discrimination under them, and none yet provide any clear interpretation of the breadth of their reach. In Ohio and Iowa, where race has been included in state equal pay laws the longest, both state statutes otherwise follow the federal EPA, requiring a plaintiff to prove they were performing “equal work” as narrowly defined and subject to an employer’s defense that the disparity was caused by a “factor other than race.”<sup>226</sup> Among the other states, two decisions were published in California, the earliest of the six states to adopt broader language than the federal EPA. In each case, the court identified the broader language of state law, yet nevertheless

225. N.J. STAT. ANN. § 10:5-12(t) (West 2022); N.Y. LAB. LAW § 194 (McKinney 2022); OR. REV. STAT. § 652.220(1)(a) (2020).

226. See *supra* note 219 and accompanying text; OHIO REV. CODE ANN. § 4111.17 (West 2022); IOWA CODE ANN. § 216.6A(2)(a) (West 2022).

granted summary judgment to the employer due to the employee's failure to produce enough evidence to support their initial prima facie burden.<sup>227</sup>

Future case decisions, and more study, will be needed to determine what effect these statutes have on employer behavior. Regardless, that nearly one-fifth of states have recognized the importance of expanding legal protections to challenge unequal pay by race offers the promise of new legal pathways to help narrow racial pay gaps between workers in those states.

### *C. Other Antibiasing Measures*

Beyond expanding equal pay acts to cover the protected class of race, several other laws being considered at both the state and federal level to reduce the gender pay gap can be useful for closing the racial pay gap as well. Recent measures aim to reduce implicit or explicit bias around pay setting, including laws ensuring pay transparency, banning inquiry into a new employee's prior salary, and requiring pay data collection from certain employers. Some proposals have begun to incorporate considerations of race. Because racial bias in pay setting may operate similarly to gender bias, these proposals offer additional avenues for narrowing the racial pay gap.

#### 1. Pay Transparency and Prior Salary Information Bans

In response to the limited reach of Title VII and the EPA discussed previously,<sup>228</sup> advocates have looked for additional ways to reduce the negative influence of gender bias on women's pay. The most common approach advocated for is regulating information about pay: increasing information given to employees about their relative pay through greater pay transparency and decreasing information to employers about employees' prior salaries that could depress women's wages. Both ideas have been part of repeated federal legislative proposals to expand the EPA, all of which have been unsuccessful to date.<sup>229</sup> Many such provisions have, however, been enacted in state law, providing a patchwork of greater protections.

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227. *Beard v. IBM Corp.*, No. C 18-06783 WHA, 2020 WL 1812171, at \*13 (N.D. Cal. Apr. 9, 2020); *English v. Gen. Dynamics Mission Sys., Inc.*, No. EDCV 18-908, 2019 WL 2619658, at \*11 (C.D. Cal. May 8, 2019).

228. See *supra* Parts II.A–II.B.

229. Deborah L. Brake, *Reviving Paycheck Fairness: Why and How the Factor Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889, 908–12 (2016); Paycheck Fairness Act, H.R. 7, 117th Cong. (2021–2022).

Advocates began to focus on the issue of pay transparency to ensure employees' access to information about what their coworkers earn in conjunction with the passage of the Lilly Ledbetter Fair Pay Act in 2009.<sup>230</sup> Were it not for an anonymous note providing her with the information, Ledbetter would never have known that she was being underpaid compared to her male peers, prompting her to file her discrimination lawsuit.<sup>231</sup> Current federal law under the National Labor Relations Act prohibits employers from disciplining workers who engage in "concerted activities for the purpose of . . . mutual aid or protection," which has been interpreted to include speaking with each other about pay.<sup>232</sup> Yet as with all employment laws, an employer will only face consequences for violating the law if an employee is willing to come forward and file a complaint despite fear of retaliation. As a result, employers often implicitly deter—and sometimes explicitly prohibit—workers from speaking to each other about pay.<sup>233</sup> And even without employer direction, workplace cultures (and American culture in general) make it taboo to discuss what one earns with others.

In response, many states have introduced or enacted state laws that encourage workers to arm themselves with this information and provide greater protection when they do. Such laws vary in approach, ranging from prohibiting employers from penalizing employees who share pay information to allowing workers to request more pay information from their employers to requiring employers to provide such information voluntarily.<sup>234</sup> To date, over twenty states have passed some form of pay transparency law.<sup>235</sup>

In a related effort, and in response to unfavorable case law on the issue under federal law, advocates have also sought to prohibit employers from using information about an employee's salary at their previous job to set their current pay. As discussed previously, Title VII and the EPA provide an employer with a legal defense for a pay disparity that can be justified by a nondiscriminatory reason or any

230. See *supra* notes 168–169 and accompanying text.

231. See *supra* notes 168–169 and accompanying text.

232. 29 U.S.C. § 157.

233. *Quick Figures: Pay Secrecy and Wage Discrimination*, INST. FOR WOMEN'S POL'Y RSCH. (Jan. 2014), <https://iwpr.org/wp-content/uploads/2020/09/Q016.pdf> [<https://perma.cc/G4JT-BZ5G>].

234. See *Equal Pay and Pay Transparency Protections*, U.S. DEP'T OF LAB., WOMEN'S BUREAU, <https://www.dol.gov/agencies/wb/equal-pay-protections> (last visited July 30, 2022) [<https://perma.cc/3PZZ-C84W>] (scroll to map and hover cursor over any state to see that specific state's laws); NAT'L WOMEN'S L. CTR., *supra* note 217.

235. U.S. DEP'T OF LAB., WOMEN'S BUREAU, *supra* note 234 (select "Pay Transparency" from the key on the right side of the map, scroll to map, and hover cursor over any state to see that specific state's laws).

“factor other than sex.”<sup>236</sup> Until recently, many federal courts considered an employee’s prior salary a “factor other than sex” that could justify an employer offering lower pay to a female employee than her similarly situated male coworker based on “market demand.”<sup>237</sup> Today, there is a split among federal appellate courts. The U.S. Court of Appeals for the Seventh Circuit follows the traditional approach, allowing prior salary to serve as a “factor other than sex.”<sup>238</sup> The Ninth Circuit recently rejected this view, overruling its own precedent to hold that because “setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination,” it “does not suffice to defeat an EPA claim.”<sup>239</sup> Five other circuits take a middle-ground approach, allowing consideration of prior salary among other job-related factors but not standing alone to justify a pay disparity.<sup>240</sup> In the face of this uncertainty in federal law, states have begun to act, passing a variety of laws that bar or delay an employer from asking about or punishing an employee who refuses to respond when asked about their prior salary.<sup>241</sup> To date, nineteen states have enacted a limitation on using prior salary information to set current employee pay.<sup>242</sup>

Legislative efforts around information exchange are based on two main principles: (1) helping women to discover when they may be experiencing sex-based pay discrimination so they can redress it and (2) strengthening women’s position when negotiating pay with their

236. See *supra* notes 180, 207 and accompanying text; see also 42 U.S.C. § 2000e-2(h); *County of Washington v. Gunther*, 452 U.S. 161 (1981) (holding defenses, but not *prima facie* case of the EPA, applies to Title VII).

237. See, e.g., *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989).

238. See *id.*; *Lauderdale v. Ill. Dep’t of Hum. Servs.*, 876 F.3d 904 (7th Cir. 2017); *Wernsing v. Dep’t of Hum. Servs.*, 427 F.3d 466 (7th Cir. 2005).

239. See *Rizo v. Yovino*, 950 F.3d 1217, 1228–1229 (9th Cir. 2020) (en banc) (overruling *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982)), *cert. denied*, 141 S. Ct. 189 (2020):

[T]he history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer’s burden to show that sex played no role in wage disparities between employees of the opposite sex. And allowing prior pay to serve as an affirmative defense would frustrate the EPA’s purpose as well as its language and structure by perpetuating sex-based wage disparities.

240. See, e.g., *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071 (8th Cir. 2009); *Balmer v. HCA, Inc.*, 423 F.3d 606, 612 (6th Cir. 2005); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992); see also Daniela Porat, *Equal Pay Act’s ‘Other than Sex’ Defense Meaning Still Murky*, LAW360 (July 27, 2021, 7:52 PM), <https://www.law360.com/employment-authority/articles/1407167/equal-pay-act-s-other-than-sex-defense-meaning-still-murky> [<https://perma.cc/R9QK-BWK3>].

241. ROBIN BLEIWEIS, CTR. FOR AM. PROGRESS, *WHY SALARY HISTORY BANS MATTER TO SECURING EQUAL PAY* (2021), <https://www.americanprogress.org/issues/women/reports/2021/03/24/497475/salary-history-bans-matter-securing-equal-pay/> [<https://perma.cc/63MP-KZVZ>].

242. *Id.* (stating that, as of 2020, nineteen states have enacted such laws).

employers.<sup>243</sup> Employees cannot bring lawsuits if they do not know that they have reason to sue. Social science data has demonstrated extensively that when pay is subject to negotiation, women are disadvantaged by gender stereotypes and penalized for asserting their own interests while men are not.<sup>244</sup> Both approaches were designed to close gender pay gaps.

Yet both phenomena also hold true for racial bias in pay setting. All discrimination claims, regardless of protected class, are initiated only by an employee complaint, and discussions about pay and race may be even more fraught than those about pay and gender. Social science evidence shows that people of color, and especially women of color, are also disadvantaged in pay negotiations.<sup>245</sup> Thus, antibiasing efforts around information exchange designed to close the gender pay gap can also be useful in closing racial and racialized gender pay gaps. Importantly, most state laws regarding information exchange are standalone provisions that cover all “applicants” or prospective “employees” and are not limited by protected class to only sex.

While such laws are still relatively new, early studies show their positive effects on narrowing not only gender but also racial pay gaps.<sup>246</sup> One study estimated that in states enacting salary history bans, the earnings ratio of women increased by 1% overall (in California, 2.3% for women over age 35 and 4.7% for married women with children over age 5), and that a ban “could close the gender earnings gap by over 20 percent for those switching jobs.”<sup>247</sup> Another found that, in states with salary history bans, the pay for all workers changing jobs was 3.9% higher than in states without salary history bans—rising to 6.4% higher when comparing only female workers and 7.7% higher when comparing

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243. See Orly Lobel, *Knowledge Pays: Reversing Information Flows & the Future of Pay Equity*, 120 COLUM. L. REV. 547, 549 (2019); *Equal Work*, *supra* note 23, at 602–603.

244. See LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE* (2007); Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 192–194 (2011); Lisa A. Barron, *Ask and You Shall Receive? Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. RELS. 635, 653 (2003); Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 598 (2001).

245. See, e.g., Morela Hernandez & Derek R. Avery, *Getting the Short End of the Stick: Racial Bias in Salary Negotiations*, MIT SLOAN MGMT. REV. (June 15, 2016), <https://sloanreview.mit.edu/article/getting-the-short-end-of-the-stick-racial-bias-in-salary-negotiations/> [<https://perma.cc/PT2V-ZP52>].

246. See BLEIWEIS, *supra* note 241.

247. Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban* 4–5 (Nat'l Bureau of Econ. Rsch., Working Paper 27054, 2020), [https://www.nber.org/system/files/working\\_papers/w27054/w27054.pdf](https://www.nber.org/system/files/working_papers/w27054/w27054.pdf) [<https://perma.cc/K7GU-Y962>].



only non-White workers.<sup>248</sup> Yet more recent studies raise questions about just how effective salary bans may be, either due to the “unravelling” effect caused by the fact that employees may volunteer salary information anyway<sup>249</sup> or to any assumptions employers may make in the absence of information.<sup>250</sup>

It remains to be seen, then, whether such laws will have a net positive effect on wages for women and workers of color. Yet regulating information exchange about pay may offer an incremental step that other states and the federal government can take to help narrow racial and racialized gender pay gaps.

## 2. Pay Data Collection

Pay transparency and prior salary bans are important interventions, yet both rely on the actions of employees who are willing and able to act on the information in individual complaints or pay negotiations. A second antibiasing approach that instead puts the onus on employers to redress their own gender and racial pay gaps is government-mandated pay data collection.<sup>251</sup> The framework already exists in federal law: Since 1966, certain employers have been required to provide limited data to the U.S. Equal Employment Opportunity Commission (“EEOC”), the federal agency that enforces Title VII and the EPA.<sup>252</sup> Private employers of one hundred or more employees and federal contractors with fifty or more employees and at least \$50,000 in federal contracts must complete an annual Employer Information

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248. James Bessen, Chen Meng & Erich Denk, *Perpetuating Inequality: What Salary History Bans Reveal About Wages* 29 (Bos. Univ. Sch. of L., Pub. L. & Legal Theory Paper No. 20-19, 2021), [https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2137&context=faculty\\_scholarship](https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2137&context=faculty_scholarship) [<https://perma.cc/ZP5V-5MBK>].

249. Amanda Agan, Bo Cowgill & Laura Katherine Gee, *Do Workers Comply with Salary History Bans? A Survey on Voluntary Disclosure, Adverse Selection, and Unraveling*, 110 AEA PAPERS & PROC. 215, 219 (May 2020); see also Amanda Agan, Bo Cowgill & Laura Gee, *Salary History and Employer Demand*, VOXEU (Jan. 6, 2022), <https://cepr.org/voxeu/columns/salary-history-and-employer-demand> [<https://perma.cc/2UTL-EA6M>].

250. See, e.g., Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 49, 66–70 (2016) (documenting that employers’ “ambiguity aversion” negatively affected the employment prospects of female applicants who concealed their familial status and hypothesizing similar effects of laws that restrict information on applicants’ criminal records.); *infra* note 286 and accompanying text.

251. See Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 320–321 (2021) [hereinafter *Disclosing Discrimination*]; Ruqaiyah Yearby, *Internalized Oppression: The Impact of Gender and Racial Bias in Employment on the Health Status of Women of Color*, 49 SETON HALL L. REV. 1037, 1062–64 (2019).

252. See 42 U.S.C. § 2000e-8(c); 29 C.F.R. §§ 1602.7–14 (2020); Exec. Order No. 11,246, 3 C.F.R. § 339 (1965); *EEO-1 Data Collection*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/eo-1-data-collection> (last visited July 30, 2022) [<https://perma.cc/NC9U-4XWE>]; see also *Disclosing Discrimination*, *supra* note 251, at 322–23.

Report EEO-1 (“EEO-1”), providing snapshot data on the gender and race of employees in ten occupational categories.<sup>253</sup> Federal contractors may also be subject to “compliance evaluations,” and therefore required to provide employee-specific pay data upon request.<sup>254</sup>

In an effort to help close persistent gender pay gaps, in 2016, during the Obama Administration, the EEOC engaged in the regulatory process to revise the EEO-1 form to add more detail to the information collected.<sup>255</sup> Referred to as “Component 2” data, the new form added twelve pay bands and work hours to give more granular detail on the pay of employees by sex, race, ethnicity, and occupation.<sup>256</sup> The approved change was set to be added to EEO-1 reporting years 2017 and 2018<sup>257</sup> when the presidential administration changed; the EEOC under the Trump Administration stayed the regulation, refusing to collect the additional data.<sup>258</sup> After the National Women’s Law Center sued successfully to force compliance with the validly enacted regulation, the District Court for the District of Columbia required Component 2 data to be collected for the covered years.<sup>259</sup> But after just seven months, and having completed the 2017 and 2018 data collection required of it by the 2016 regulation,<sup>260</sup> the EEOC announced that it would not seek to renew the Component 2 addition to the EEO-1 form.<sup>261</sup> The EEOC under the Biden Administration is currently studying the data that was collected and will likely revisit the issue in the near future.<sup>262</sup>

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253. See Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC Implements Final Revisions to EEO-1 Report (Jan. 27, 2006), <https://www.eeoc.gov/newsroom/eeoc-implements-final-revisions-eeo-1-report> [<https://perma.cc/LFG4-H7YL>]; see also *Disclosing Discrimination*, *supra* note 251, at 323.

254. 41 C.F.R. § 60-1.7 (2020); see also *Disclosing Discrimination*, *supra* note 251, at 323.

255. See Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45,479, 45,483, 45,491 (July 14, 2016) [hereinafter EEO-1 Revision]; see also *Disclosing Discrimination*, *supra* note 251, at 323–328.

256. EEO-1 Revision, *supra* note 255, at 45,479.

257. Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC to Collect Summary Pay Data (Sept. 29, 2016), <https://www.eeoc.gov/newsroom/eeoc-collect-summary-pay-data> [<https://perma.cc/EF3L-PUMW>].

258. Nat’l Women’s L. Ctr. v. Off. of Mgmt. & Budget, 358 F. Supp. 3d 66, 74–75 (D.D.C. 2019) (citing Memorandum from Neomi Rao, Administrator, Off. of Info. & Regul. Affs., to Victoria Lipnic, Acting Chair, Equal Emp. Opportunity Comm’n (Aug. 29, 2017)).

259. Nat’l Women’s L. Ctr. v. Off. of Mgmt. & Budget, No. 17-cv-2458 1 (D.D.C. Feb. 22, 2022); EEO-1 Revision, *supra* note 255, at 45,483–89.

260. Joint Status Report at 1, *Nat’l Women’s L. Ctr.*, 358 F. Supp. 3d 66.

261. Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48,138, 48,141 (Sept. 12, 2019).

262. Press Release, Equal Emp. Opportunity Comm’n, EEOC Announces Analysis of EEO-1 Component 2 Pay Data Collection (July 16, 2020), <https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection> [<https://perma.cc/4AAR-J6QG>].

In the face of the stalled federal effort, two states have taken matters into their own hands, enacting pay data collection under their state law versions of Title VII. Effective March 2021, California state law requires private employers with one hundred or more employees already required to comply with federal EEO-1 reporting to provide pay data that tracks sex, race, and ethnicity in ten job categories to the state fair employment practices agency.<sup>263</sup> Following California's lead, Illinois enacted a similar pay data collection law that also applies to employers of one hundred or more starting in January 2023.<sup>264</sup> Going further than any other U.S. law, the Illinois law allows the data to be made public on the Illinois Secretary of State's website.<sup>265</sup> (California and federal law only allow agencies to publish limited aggregated reports on data they collect.<sup>266</sup>) The Illinois law also requires covered employers to obtain an "equal pay registration certificate" from the state department of labor by March 2024 that certifies, among other things, "the average compensation for its female and minority employees is not consistently below the average compensation . . . for its male and non-minority employees within each of the major job categories" reported.<sup>267</sup>

As with pay information laws, pay data collection laws are new, so their effects on gender and racial pay gaps are currently unknown. But evidence from years of federal EEO-1 data collection on workforce composition, even without information on pay, has been effective in identifying workforce segregation and disparities that have allowed for more targeted enforcement efforts.<sup>268</sup> Outside the United States, over a dozen European and other high-income countries have enacted their own pay data collection laws to target gender pay gaps, providing more early evidence that suggests positive effects in the context of gender.<sup>269</sup>

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263. S.B. 973, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (enacted); *California Pay Data Reporting*, CAL. DEPT OF FAIR EMP. & HOUS., <https://www.dfeh.ca.gov/paydatareporting> (last visited June 21, 2022) [<https://perma.cc/YD9Q-X3WN>]; see also *Disclosing Discrimination*, *supra* note, 251, at 321–22.

264. S.B. 1480, 101st Gen. Assemb. (Ill. 2021)(enacted).

265. Ill. S.B. 1480 § 11.

266. Cal. S.B. 973 § 3(k); 42 U.S.C. § 2000e-8(e); see also *Disclosing Discrimination*, *supra* note 251, at 322, 329.

267. Ill. S.B. 1480 § 11(b), (c)(1)(B).

268. See JOCELYN FRYE, CTR. FOR AM. PROGRESS, WHY PAY DATA MATTER IN THE FIGHT FOR EQUAL PAY (Mar. 2, 2020), <https://www.americanprogress.org/article/pay-data-matter-fight-equal-pay/> [<https://perma.cc/L5SV-M58F>]; see also WILSON & RODGERS, *supra* note 1, at 52–53 (describing importance of data collection efforts).

269. See *Disclosing Discrimination*, *supra* note 251, at 315–318; Morten Bennedsen, Elena Simintzi, Margarita Tsoutsoura & Daniel Wolfenzon, *Do Firms Respond to Gender Pay Gap Transparency?* 4 (Nat'l Bureau of Econ. Rsch., Working Paper 25435, 2019), [https://www.nber.org/system/files/working\\_papers/w25435/w25435.pdf](https://www.nber.org/system/files/working_papers/w25435/w25435.pdf) [<https://perma.cc/7KPY-EBS4>].

Requiring employers to gather and produce pay data may increase compliance with antidiscrimination law: By helping employers see the often unintentional inequality that exists in pay and promotions within their own ranks, pay data collection laws offer another mechanism to help reduce racial pay gaps.<sup>270</sup>

Because racial bias and discrimination, whether explicit or implicit, are at the heart of current racial pay gaps, antidiscrimination law plays a critical role in remedying the problem. As this Part has shown, strengthening existing law under Title VII, the EPA, and their state equivalents is a necessary and important step to better redress pay discrimination. Specific additional efforts around pay transparency, information exchange, and data collection enacted to help close the gender pay gap can make a meaningful difference in narrowing racial pay gaps, too. Yet efforts focused on pay setting are the tip of the racial-pay-gap iceberg; underneath lies structural race discrimination that remains unaddressed, to which the next Part turns.

### III. REFRAMING SYSTEMIC ISSUES TO NARROW THE RACIAL PAY GAP

Confronting the racial pay gap is a fundamental piece of advancing racial equality; that the racial pay gap has garnered little attention in legal scholarship and less public attention than the gender pay and racial wealth gaps signals the need to reframe the issue. While fully closing the racial pay gap is a long-term endeavor requiring significant policy reform on issues including criminal justice and education, well beyond the scope of this Article, more can be done now to address the economic impacts of systemic racism. Antidiscrimination law should be able to reach the present effects of structural race discrimination. This Part begins that effort, reframing pieces of two systemic challenges as present discriminatory harms to help narrow the racial pay gap now.<sup>271</sup>

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270. See *Disclosing Discrimination*, *supra* note 251, at 315–320 (discussing examples of pay data collection laws and their positive effects).

271. Another important mechanism that could help reduce the racial pay gap is voluntary affirmative action in employment, an issue that is beyond the scope of this Article. In recent work, legal scholar Hina Shah argues powerfully that private employers, who often espouse valuing “diversity,” can and should engage in more robust use of affirmative action as allowed under existing federal law to correct for the continuing “systemic, locked-in advantage” White Americans gained “[b]y excluding black[ American]s from a sizeable segment of the labor market for centuries,” suggesting that “a shift in the public discourse is feasible today thanks in large part to” social “[m]ovements such as #BlackLivesMatter and MeToo.” Shah, *supra* note 156, at 203, 205, 209, 217–22, 264–67; see also David B. Oppenheimer, *The Disappearance of Voluntary Affirmative Action from the US Workplace*, 24 J. POVERTY & SOC. JUST. 37, 38, 46–47 (2016) (documenting how both Title VII’s statutory text and case law interpreting it allow private employers to engage in

*A. Overcriminalizing: The Pay Penalties of a Criminal Conviction*

There is no more obvious example of structural race discrimination in U.S. society than the criminal justice system. The Black Lives Matter movement and countless articles, studies, books, cases, and more have documented how, at every step in the policing and prosecution process, Black and Latinx Americans, and particularly Black men, are disproportionately targeted, harmed, or even killed.<sup>272</sup> This premise is taken as a given, and the issue of fairness in the criminal justice system is beyond the scope of this Article. The focus here is on its additional economic impact: identifying how disproportionate criminal penalties on Black and Latinx Americans foster economic inequality and contribute to racial pay gaps.

The large body of data documenting racial disparities in arrests, prosecutions, convictions, and sentence length relates to the racial pay gap in two ways. First, as identified previously, more time incarcerated leads to less time in the workforce, which reduces the human capital factors of work tenure without interruptions and overall work experience.<sup>273</sup> Second, and more readily redressed through antidiscrimination law, having been convicted of a crime creates a stigma that results in fewer job offers, lower-level employment, and lower pay.<sup>274</sup> Even setting aside the fact that while incarcerated, people are statistically “invisible” for wage data calculations,<sup>275</sup> that Black and Latinx Americans are disproportionately convicted and incarcerated for longer periods of time exacerbates all racial pay gaps subsequent to their release.

Antidiscrimination law has recognized this problem, but there is room for improvement. This issue most often arises when an employer runs a criminal background check or asks prospective employees on an application form or in an interview whether they have been arrested or convicted of a crime and then acts on that information in hiring or pay-setting decisions. Under Title VII and its state law equivalents, where an employer asks only non-White applicants about criminal records or treats non-White applicants worse than White applicants with comparable criminal convictions, employees may likely succeed in

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certain limited preferences for underrepresented groups in hiring and promotion, but that, since the Reagan-era of the 1980s, employers have abandoned affirmative action in favor of diversity policies and, subsequently, abandoned their focus on underrepresented workers).

272. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

273. See *supra* notes 71–76 and accompanying text.

274. See J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2468–70 (2020) (collecting and discussing research).

275. See generally PETTIT, *supra* note 74.

bringing a disparate treatment claim.<sup>276</sup> More commonly, employees challenge this “facially neutral” practice under a disparate impact theory. As described previously, an employee must prove the practice creates a statistically significant disparate impact by race; the employer can then justify it as a job-related “business necessity,” which an employee can only overcome by proving there was a less discriminatory alternative practice that also served the employer’s stated purpose.<sup>277</sup>

Employees bringing this claim have had some success, for example, where an employer adopts a blanket policy against hiring applicants with a prior conviction that does not consider specifics of the conviction or its relation to the job.<sup>278</sup> In addition, the EEOC has recognized the importance of this issue and in 2012 issued enforcement guidance on the subject.<sup>279</sup> The guidance made clear that “[n]ational data supports a finding that criminal record exclusions have a disparate impact based on race and national origin,” and it recommended that employers “consider[ ] at least the nature of the crime, the time elapsed, and the nature of the job” before screening out applicants.<sup>280</sup> Yet it also documented how employers could “validate[ ] the criminal conduct exclusion for the position in question” by meeting the standards of disparate impact law.<sup>281</sup> Moreover, the guidance, while a statement of the EEOC’s position on the issue, is not legally binding,<sup>282</sup> and one circuit court of appeals (the Fifth) has held that the EEOC may not enforce it against the state (Texas) as an employer.<sup>283</sup>

Thus, as with most plaintiffs alleging disparate impact, those seeking to challenge an employer’s practice of considering prior convictions face significant hurdles in proving discrimination through statistics and overcoming court deference to employers’ judgment on business necessity.<sup>284</sup> Scholars have proposed ways to strengthen

276. See *supra* notes 162–167 and accompanying text.

277. See *supra* notes 195–198 and accompanying text.

278. See, e.g., *Field v. Orkin Extermination Co.*, No. Civ. A. 00-5913, 2002 WL 32345739, at \*1 (E.D. Pa. Feb. 21, 2002) (unpublished) (“[A] blanket policy of denying employment to any person having a criminal conviction is a [per se] violation of Title VII . . .”).

279. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2012-1, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (Apr. 15, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> [<https://perma.cc/5A2C-A5Y8>] [hereinafter ARREST AND CONVICTION].

280. *Id.* (citing *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975)).

281. *Id.*

282. *Id.* (“The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.”).

283. See *Texas v. Equal Emp. Opportunity Comm’n*, 933 F.3d 433, 437–38 (5th Cir. 2019).

284. See, e.g., *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 211 (2d Cir. 2020); *Carson v. Lacy*, 2021 WL 1526433 (8th Cir. 2021); see also *supra* notes 195–198 and accompanying text.

antidiscrimination law's response to the issue, including shifting the focus from disparate impact to mixed-motive disparate treatment claims,<sup>285</sup> adapting Title VII to better balance affected applicants' need for employment with employers' safety concerns,<sup>286</sup> and looking to disability and genetic-information discrimination laws as a model to redress the social stigma effects of a prior conviction.<sup>287</sup>

Given the challenges of bringing such claims under antidiscrimination law, a large and growing number of states have enacted "ban the box" laws, referring to the box on a job application asking about prior convictions. To date, over a dozen states have passed laws limiting private employers' inquiries into criminal records and over thirty-five states have passed laws limiting public employers' inquiries by delaying when or how such questions can be asked or considered in the hiring process.<sup>288</sup> In a promising new development, the federal government recently enacted a law, effective December 2021, that prohibits most federal agencies and contractors from asking applicants about their criminal history until after they have been given a conditional job offer.<sup>289</sup>

Data on the impact of ban the box laws, while mixed, provides some evidence that these laws decrease hiring discrimination against Black and Latinx workers, which in turn increases wages. Early data raised concerns that such laws might backfire; for example, employers who were barred from asking were more likely to assume that Black or Latinx applicants had a criminal history and engage in unlawful

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285. Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 5 (2012).

286. Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45 (2015).

287. Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 924–27, 932–35 (2014). Other scholars have proposed ways to limit the discriminatory impacts of incarceration on employment outside of relying on antidiscrimination laws themselves. See, e.g., Ifeoma Ajunwa & Angela Onwuachi-Willig, *Combating Discrimination Against the Formerly Incarcerated in the Labor Market*, 112 NW. U. L. REV. 1385 (2018) (proposing racial impact statements for proposed legislation and contract-based remedies for entities that rely on prison labor); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOWARD L.J. 753 (2011) (describing the model Uniform Collateral Consequences of Conviction Act's proposal of greater procedural protections for those who may suffer collateral consequences after a conviction).

288. Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Oct. 2021), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2021.pdf> [<https://perma.cc/U6ZZ-LLGZ>].

289. Fair Chance Act, 5 U.S.C. § 9202 (effective Dec. 20, 2021). This law codified and superseded similar federal regulations in effect since March 2017. See *FAQ: Fair Chance to Compete for Jobs Act of 2019*, NAT'L EMP. L. PROJECT, <https://www.nelp.org/publication/faq-fair-chance-to-compete-for-jobs-act-of-2019/> (last visited July 30, 2022) [<https://perma.cc/RAN7-RBDA>].

statistical discrimination.<sup>290</sup> More recent empirical evidence has countered these critiques, finding an increase in the likelihood that an applicant with a criminal conviction would receive a callback or be employed after a ban the box law, particularly in public employment.<sup>291</sup>

A related and more promising approach to reducing the pay effects of a prior criminal conviction is to increase efforts to expunge or seal past criminal records. Recent research by J.J. Prescott and Sonja Starr documents that the employment rate of those whose records were expunged increased nearly 8% in their first year.<sup>292</sup> Moreover, one year after expungement, participating men's wages increased by 17% and women's wages increased by 30%.<sup>293</sup> Likewise, research by Jeffrey Selbin, Justin McCrary, and Joshua Epstein shows that "record clearing" services—often sought by participants after a period of low earnings—increased both rates of employment and average earnings.<sup>294</sup> The benefits of expungement are not unknown to lawmakers. To date,

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290. See, e.g., Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. ECON. 451 (2006) (testing use of race, employment gaps, education level, or receipt of public assistance to infer criminality); Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276 (2004) (showing that access to criminal records may increase wages for those with none and average wages for groups with large numbers of convicted individuals, such as Black men); Jennifer L. Doleac & Benjamin Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22469, July 2016), [https://www.nber.org/system/files/working\\_papers/w22469/w22469.pdf](https://www.nber.org/system/files/working_papers/w22469/w22469.pdf) [<https://perma.cc/X4L7-MLTX>] (finding that young Black and Latinx men without a college degree were less likely to be employed after a ban the box law 3.4% and 2.3% respectively); Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 133 Q.J. ECON. 191 (2016) (finding increased callback disparity between White and Black applicants from 7% before a ban the box law to 45% after in favor of White applicants). Cf. Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 49, 66-70 (2016) (documenting that employers' "ambiguity aversion" negatively affected the employment prospects of female applicants who concealed their familial status and hypothesizing similar effects of laws that restrict information on applicants' criminal records).

291. See Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079 (2019) (summarizing studies); see, e.g., Terry-Ann Craigie, *Ban the Box, Convictions, and Public Employment*, 58 ECON. INQUIRY 425 (2020) (finding after a ban the box law an increased likelihood of employment for individuals with criminal convictions of 4% overall, 30% in public employment); Agan & Starr, *supra* note 290, at 32 (finding that ban the box policies "effectively eliminate" the effect of having a criminal record on receiving an employment callback); Daniel Shoag & Stan Veuger, *Ban-the-Box Measures Help High Crime Neighborhoods*, 64 J.L. & ECON. 85 (Feb. 2021) (finding that ban the box policies increased employment of residents in high-crime neighborhoods by up to 4%).

292. Prescott & Starr, *supra* note 274, at 2527, 2532.

293. *Id.*; see also Sonja B. Starr, *Expungement Reform in Arizona: The Empirical Case for a Clean Slate*, 52 ARIZ. ST. L.J. 1059, 1078 (2020) (reporting average wages of expungement recipients increased about 23% within a year of expungement, largely due to an increase in job stability).

294. Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1 (2018).



nearly forty states have enacted some form of expungement law.<sup>295</sup> Yet, as Prescott and Starr note, there is a significant “uptake gap”: In their study, a mere 6.5% of those eligible to have their records expunged did so within five years due in large part to the difficulty and cost of accessing expungement services.<sup>296</sup> Other scholars raise additional challenges—for example, that data may live on the internet even after expungement<sup>297</sup> and that most expungement laws place the burden on recipients to “prove their worthiness” rather than on the state to justify the need to retain criminal records.<sup>298</sup> Nevertheless, the dramatic ameliorative effects of expungement on future employment and pay demand attention as a means to close the racial pay gap.

This body of research demonstrates clearly how an unfair criminal justice system compounds economic disadvantage by overcriminalizing Black and Latinx Americans for whom any past criminal conviction limits employment opportunities in perpetuity and contributes to the racial pay gap. Combining a variety of approaches to both strengthen antidiscrimination law and limit the stigmatizing effects of a criminal history offers promise.<sup>299</sup> While advocates work to dismantle structural racism in the criminal justice system in the long term, adopting stronger antibiasing measures around prior criminal convictions can reduce the present discriminatory impacts on pay.

### *B. Overskilling: The Mismatch of Education Requirements to Jobs*

Another area in need of significant policy reform to achieve racial equality is the education system at both primary and secondary levels and in higher education. Extensive research, also well beyond the scope of this Article, has documented that Black and Latinx children disproportionately lack access to quality public schools in large part as a legacy of Jim Crow era segregation of both schools and housing.<sup>300</sup> The quality of primary and secondary education has a direct impact on

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295. See Prescott & Starr, *supra* note 274, at 2463 & n.11.

296. See *id.* at 2501–06.

297. See Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321 (2015).

298. See Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 670–71, 715 (2021).

299. See CHRISTINA STACEY & MYCHAL COHEN, URB. INST., BAN THE BOX AND RACIAL DISCRIMINATION: A REVIEW OF THE EVIDENCE AND POLICY RECOMMENDATIONS (Feb. 2017), [https://www.urban.org/sites/default/files/publication/88366/ban\\_the\\_box\\_and\\_racial\\_discrimination\\_4.pdf](https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination_4.pdf) [<https://perma.cc/WSG8-N9QA>].

300. See, e.g., Erika Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382 (2021); Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> [<https://perma.cc/ED7E-EZLH>].

college attendance and quality.<sup>301</sup> The high and rising cost of college and the related student loan debt crisis<sup>302</sup> pose major bars to lower-income families, who are disproportionately Black and Latinx.<sup>303</sup>

As discussed previously, whether a worker goes to college and the quality of that education, play significant roles in the human capital factor portion of the racial wage gap.<sup>304</sup> While Black and Latinx workers have made significant gains in educational attainment over time, they have not yet achieved parity with White workers, and a small degree gap remains.<sup>305</sup> Some evidence shows that the quality of the degree, or the types of skills developed, may explain why racial pay gaps persist between workers with the same level of education.<sup>306</sup> But evidence points more strongly to a different explanation: The value of a college degree has diminished such that the wage returns on attending college have become relatively less for Black and Latinx workers than for White workers.<sup>307</sup> This is due, in large part, to the ratcheting up of educational requirements for jobs over time, often not tied to what is needed for the job, but instead to labor market trends.<sup>308</sup>

Recent initiatives by private employers on this issue offer potential solutions. In December 2020, in response to public attention on the racial wealth gap, a group of thirty-seven leading U.S. employers announced a coalition effort called OneTen that committed to “hire, promote and advance one million Black individuals who do not have a four-year degree into family-sustaining careers over the next 10 years.”<sup>309</sup> In describing the initiative, one of its founders, Merck Chief Executive Officer Kenneth Frazier, explained that “many times companies require four-year degrees for the kinds of jobs that really do not require a four-year degree[; w]e’re trying to urge companies to take a skills-first approach rather than a credentials approach.”<sup>310</sup> Beyond this specific initiative, individual employers in the technology sector,

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301. See *Darling-Hammond*, *supra* note 300.

302. Jessica Dickler & Annie Nova, *This Is How Student Loan Debt Became a \$1.7 Trillion Crisis*, CNBC (May 6, 2022), <https://www.cnbc.com/2022/05/06/this-is-how-student-loan-debt-became-a-1point7-trillion-crisis.html> [<https://perma.cc/P5BR-NQQE>].

303. See *Darling-Hammond*, *supra* note 300.

304. See *supra* notes 108–117 and accompanying text.

305. See *supra* notes 108–117 and accompanying text.

306. See *supra* notes 113–115 and accompanying text.

307. See *supra* notes 118–123 and accompanying text.

308. See *supra* notes 118–123 and accompanying text.

309. ONETEN, <https://oneten.org/about/mission/> (last visited July 30, 2022) [<https://perma.cc/BY33-SNKA>]. For a separate initiative focused on closing the racial wealth gap, see NINETYTOZERO, *supra* note 85.

310. Khristopher J. Brooks, *Top CEOs Vow to Hire 1 Million Black Americans*, CBS NEWS (Dec. 11, 2020, 6:20 PM), <https://www.cbsnews.com/news/employers-vow-hire-1-million-black-americans-2020s/> [<https://perma.cc/627E-WW72>].

including Google, Apple, Tesla, and Netflix, have announced their own commitments to providing specific skills training to potential employees without a four-year college degree.<sup>311</sup> Recent data suggests that such commitments may be more aspirational than robust yet still appear to be making a small impact.<sup>312</sup>

These voluntary efforts raise another possibility: If education requirements are not truly necessary, antidiscrimination law can and should play a larger role in redressing the issue. Interestingly, the earliest Supreme Court case to establish the legal framework of disparate impact under Title VII, the 1971 case *Griggs v. Duke Power Co.*,<sup>313</sup> involved an educational requirement. Prior to the enactment of Title VII, the Griggs Power Company in North Carolina explicitly discriminated on the basis of race, hiring Black employees but only into the lowest paid of five departments in the company.<sup>314</sup> After Title VII made such practice illegal, Griggs adopted a policy of requiring a high school degree and a satisfactory score on a general intelligence test to be promoted or transferred to another department, which disproportionately disadvantaged Black employees due to the history of racial segregation in North Carolina public schools.<sup>315</sup> Griggs adopted the requirements based on its “judgment that they generally would improve the overall quality of the work force”; it provided no evidence that either the high school degree or test “[bore] a demonstrable relationship to successful performance of the jobs for which it was used.”<sup>316</sup> When a group of Black employees sued, the Court held in the group’s favor, establishing that Title VII prohibits discriminatory employment practices “that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability,” regardless of an employer’s intent.<sup>317</sup> Subsequent cases and an amendment to Title VII clarified disparate impact theory so that, as discussed previously, Title VII now requires an employer to justify a job criteria with a racially

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311. Lisa Eadicicco, *Apple and Google Are Looking for New Ways to Hire People Without College Degrees*, BUS. INSIDER (Oct. 8, 2020, 1:09 PM), <https://www.businessinsider.com/apple-google-hire-jobs-without-degree-experts-say-college-important-2020-10> [https://perma.cc/9LD5-EFET]; Allana Akhtar, *Elon Musk Said a College Degree Isn’t Required for a Job at Tesla*, BUS. INSIDER (Dec. 27, 2020), <https://www.businessinsider.com/top-companies-are-hiring-more-candidates-without-a-4-year-degree-2019-4> [https://perma.cc/6M9V-N429].

312. Steve Lohr, *A 4-Year Degree Isn’t Quite the Job Requirement It Used to Be*, N.Y. TIMES (Apr. 8, 2022), <https://www.nytimes.com/2022/04/08/business/hiring-without-college-degree.html> [perma.cc/XZZ5-54PZ].

313. 401 U.S. 424 (1971); see also *supra* notes 192–198 and accompanying text.

314. *Griggs*, 401 U.S. at 426–29.

315. *Id.*

316. *Id.* at 431.

317. *Id.* at 432.

disparate impact as a “business necessity” that is the minimum requirement for the job.<sup>318</sup>

Educational requirements have risen sharply over time for jobs that in the past did not require college degrees, and employers may even change the education level they require for a particular job depending on the state of the labor market—for example, requiring a college degree when there are more workers than jobs but not when there are more jobs than workers.<sup>319</sup> A *Griggs*-style legal challenge may now provide an important intervention: If without changing the job, an employer no longer requires a college degree, was having a college degree ever a “business necessity” for the job?

Since *Griggs*, other plaintiffs have alleged that educational requirements creating racially disparate impacts violate Title VII, including challenges to college degree requirements for such positions as social worker, police officer, or pilot.<sup>320</sup> In cases involving college education, plaintiffs rarely prevail, either due to an inability to prove that the education requirement (rather than other hiring procedures) caused a statistically significant disparate impact by race,<sup>321</sup> or due to significant deference to an employer’s judgment about what qualifications are necessary for a job requiring professional skills or judgment.<sup>322</sup>

Given the current level and stubborn persistence of racial wage gaps—and the role of unequal access to quality higher education in

318. See *supra* notes 195–198 and accompanying text.

319. See *supra* notes 120–123 and accompanying text; see also Marco Quiroz-Gutierrez, *The Tight Labor Market Has Companies Reconsidering Whether a College Degree Is a Must*, FORBES (June 7, 2021), <https://fortune.com/2021/06/07/tight-labor-market-2021-post-covid-open-jobs-hiring-do-you-need-a-college-degree/> [<https://perma.cc/SY75-HS3W>].

320. See, e.g., *Davis v. Dist. of Columbia*, 925 F.3d 1240 (D.C. Cir. 2019) (social worker); *Walls v. Miss. State Dep’t of Pub. Welfare*, 730 F.2d 306 (5th Cir. 1984) (social worker); *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir. 1985) (police officer); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1973) (pilot); see also Stacy A. Hickox, *The Job-Relatedness and Business Necessity of the New and Improved High School Diploma*, 36 BERKELEY J. EMP. & LAB. L. 43 (2015); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996).

321. See, e.g., *Walls*, 730 F.2d at 314; *Davis*, 925 F.3d at 1254; *Jerelds v. City of Orlando*, No. 6:98CV876ORL31C, 2000 WL 33996240 (M.D. Fla. Aug. 17, 2000), *aff’d*, 251 F.3d 164 (11th Cir. 2001); *Drake v. City of Fort Collins*, 927 F.2d 1156 (10th Cir. 1991); *Jackson v. Curators*, 456 F. Supp. 879 (E.D. Mo. 1978); *Townsend v. Nassau Cty. Med. Ctr.*, 558 F.2d 117 (2d Cir. 1977).

322. See, e.g., *Rice v. City of St. Louis*, 607 F.2d 791 (8th Cir. 1979); *Tate v. Shelby Cty. Rd. Dep’t*, 215 F.3d 1327 (6th Cir. 2000). See Elizabeth Barthelet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 965–970 (1982) (discussing how, in “upper-level job cases” challenging educational requirements, “courts have taken a very different approach [to disparate impact analysis],” seemingly “persuaded by evidence of apparent rationality and good faith” and “applying a ‘legitimate business purposes’ test [like that] rejected in *Griggs* in favor of the business necessity test”). But see Earl M. Maltz, *Title VII and Upper Level Employment – A Response to Professor Barthelet*, 77 NW. U. L. REV. 776 (1983).

fostering those gaps—courts should reconsider this view, requiring a more rigorous analysis of the “necessity” of a college degree, particularly where employers have been inconsistent about the requirement.

Beyond looking to the courts to reinterpret disparate impact law, the inflation in educational requirements for most jobs and the related student debt crisis make the area ripe for regulatory study and intervention. As it has done with the issue of prior criminal convictions,<sup>323</sup> the EEOC should consider issuing guidance on how to ensure that educational requirements for jobs do not have a disparate impact on Black and Latinx workers unnecessarily.

The EEOC has twice issued materials related to employment selection procedures. In 1978, the agency issued regulations known as the Uniform Guidelines on Employee Selection Procedures, which provided guidance on methods employers can use to “validate” their selection procedures as “job-related and consistent with business necessity” to avoid a disparate impact charge.<sup>324</sup> Three decades later in 2007, the agency issued a shorter additional guidance on tests that had become more popular in the employment process, including “cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks.”<sup>325</sup> Yet both guidance focus primarily on selection tests; neither directly addresses how to ensure that any education level requirement is valid for a given job. The EEOC should convene a hearing to gather input on the topic with the aim of issuing guidance. Short of guidance, the agency should consider new outreach to train employers on this issue, perhaps partnering with companies that have voluntarily taken action to ensure their requirements do not unnecessarily exclude skilled Black and Latinx workers.<sup>326</sup>

Of course, correcting the overskilling of well-paid jobs that should not require a college degree is no substitute for improving Black and Latinx students’ access to higher education. Equal access to quality education is necessary to achieve any level of racial equality in the United States, and a college or advanced degree is still the best way for an employee to achieve career advancement and higher pay.<sup>327</sup> That said, while advocates work toward more comprehensive education reform, challenging excessive education requirements in the context of structural racism offers another mechanism for limiting its present effects on pay.

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323. ARREST AND CONVICTION, *supra* note 279.

324. 29 C.F.R. § 1607.1, et. seq.

325. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 197.

326. *See, e.g., supra* notes 309–312 and accompanying text.

327. *See supra* notes 106–107 and accompanying text.

## CONCLUSION

Over the past five years, the United States has reached a highpoint of public consciousness about the structural nature of racial and gender inequality. The popularization of the #MeToo and Time's Up movements in 2017 has led to greater knowledge about and advocacy around the gender pay gap. The rapid expansion of the Black Lives Matter movement in 2020 has heightened awareness of the racial inequality that flows from the legacy of slavery, including the racial wealth gap. Yet despite being an essential component of both the gender pay gap for women of color and the racial wealth gap for Black and Latinx families, the issue of the racial pay gap has received much less public attention.

The racial pay and racialized gender pay gaps are both vast and persistent. Without recognizing and addressing this reality, efforts to close gender pay and racial wealth gaps cannot succeed. At its core, whether due to human capital factor differences, occupational segregation, or implicit or explicit bias, racial pay gaps are caused by discrimination in all its forms: individual, systemic, and structural. To come close to fully closing racial pay and racialized gender gaps will require significant long-term policy reform and social change. In the meantime, antidiscrimination law can and should do more of the work to narrow existing gaps now.