Wage Gender Disparities: Challenging Prevailing Assumptions, Theoretical Approach

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Abstract

Women in the United States are, on average and consistently, earning less than their male peers. Sometimes, they are even paid less than the men they supervise. A common response concerns about the 23 cent gender wage gap for full-time year-round workers across occupations, is that it is simply a byproduct of the choices women make: choices to prefer family life and needs, work fewer hours, take on lower-paying jobs, or opt out of the workforce for longer periods of time than men. Under this view, the gender pay gap is not a result of sex discrimination but of women's preferences. The gap between the average salaries of men versus women is attributed to female behavior, decision-making and women's preferences rather than to a pre-existing, biased structure. I argue that this assumption is at least partially wrong.

This paper offers a different perspective on gender analysis within the discourse about wage gender disparities. In this paper I argue that payment systems are neither neutral nor objective. Inspired by Schultz’s work, I contend that women’s preferences are in fact a result of the discrimination they face at workplaces and not the cause, as the common misconception posits. I further claim that this misinformed belief in women’s preferences is a concept commonly held by legislators and governmental policymakers as well as by employers, male and female workers, and the public in general. Furthermore, the reality of the gender pay gap causes women, as rational decision makers, to take other venues away from discriminating and segregated workplaces resulting in lower wages. In effect, women act rationally when adopting the gender pay gap rules of the game. If true opportunities were to appear more often, women might take them. Therefore, workplace norms, rather than women’s desire to avoid a full-time commitment to work, lead to a discriminative pay gap against women (as well as other excluded groups). Hidden mechanisms (“bricks” reinforcing the glass ceiling) have created a structure which has led to both establishing and perpetuating gender gaps in salary.

These main arguments are innovatively supported by three channels. First, by a theoretical approach explaining the narrow summit of the hierarchical structure of workplaces. Second, by comparing US data about gender pay gap with other countries. Third, by proving the perception false, relying on studies regarding (1) childless women who face unequal pay, (2) payment by the hour, (3) employer bias and stereotypes, (4) economic reasoning: budgeting on women’s backs and (5) the different behavior of women and men in workplaces: negotiating and working patterns.

The study may help eliminate gender pay gap, a mission which has not yet been achieved with the intensive existing regulation. We cannot fully understand and resolve the pay gap unless we understand the lack of true, decent and egalitarian opportunities that are accessible to women, enabling them to earn high salaries under good working conditions.
Introduction

Women in the United States are, on average and consistently, earning less than their male peers.requently, they are even paid less than the men they supervise, without knowing it. This was what Kerri Sleeman, a mechanical engineer from Houghton, Michigan, was shocked to discover. After her employer of five years went out of business, she learned, through bankruptcy proceedings, that almost all the men she had supervised had been earning more than she did. Her former supervisor, when asked about this disparity, unapologetically informed her that the young men were probably paid more because they were sole breadwinners with wives and children. Sleeman’s glowing performance reviews and her role, senior to those men, were insufficient factors to garner her a salary that exceeded those of her male supervisees.

Women currently earn 77 cents for every dollar that men make. “An all-too-common response to workers and advocates concerned about the 23-cent gender wage gap for full-time year-round workers across occupations is that it is just a byproduct of the choices women make: choices to work fewer hours, take

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on lower-paying jobs, or opt out of the workforce for longer periods of time than men. When framed in this way, it’s easy to dismiss equal-pay policies or legislation as superfluous. After all, we can’t force women to apply for higher-paying jobs or to work longer hours, right?"⁴

The wage gap affects all women and is even larger among minority women and women with disabilities.⁵ Employers and employees, both men and women, often explain this pay disparity as the outcome of the role women can, should, and want to play at home and in their families as opposed to their roles at work.⁶ These claims assume that women prefer and choose to take care of their children as their main role and hence that they prefer to work fewer hours and devote more time to household and childcare matters. Under this view, the gender pay gap is not a result of sex discrimination but of women's preferences. The gap between the average salaries of men versus women is attributed to female behavior and decision-making and not to a pre-existing, biased structure.

This article offers a different perspective on gender analysis within the discourse about pay gap. The debate is ongoing and appears intractable, even though eliminating the gender gap in wages and benefits has been cited as one of

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⁴ Jane Farrell & Sarah Jane Glynn, *What Causes the Gender Wage Gap?* CENTER FOR AMERICAN PROGRESS, Apr. 9, 2013, available at http://www.americanprogress.org/issues/labor/news/2013/04/09/59658/what-causes-the-gender-wage-gap/ (trying to understand the origin of gender pay gap beyond the above statement. Unfortunately, decades of evidence have revealed a far more complicated story, and it is clear that the gender wage gap is about more than just personal choice. It is a real and persistent problem, and it is a problem that calls for immediate and nimble policy solutions. But in order to achieve pay equity, it helps to understand the origins of the gap.).


the primary goals of presidential policy during the Obama administration. A significant portion of the literature on gender pay gap focuses on women’s various working habits stemming from behavioral approaches. A significant part of that literature discusses the tendency of women to favor more flexible jobs, shorter working hours or part-time positions and less competitive environments. Essentially, these arguments blame women for receiving lower wages than men, assuming that if women were willing to work as men do, they would not face any pay gap. In this article, I argue that this assumption is at least partially wrong.

This article posits that a legal analysis based on a feminist perspective would contribute to more fully understanding the gender pay gap phenomenon and hence, could suggest better solutions for the problem. The article focuses on the mechanism of excluding women from equal payments within workplaces.

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This excluding mechanism, although hidden and consequently difficult to detect, serves the same objective as the common justifications by explaining the gap. As long as one of the key tools for distribution of justice, capital, honor, and rights that enhance personal and economic growth is not fully understood, the exclusion of women from full workplace participation (ranging from contribution to remuneration) will continue to occur.\textsuperscript{10}

This article is written from an optimistic perspective. Legal tools can cause discrimination but they can also reduce disparities between the genders. “Locked gates” (the gender pay gap) cause discrimination by providing the conditions that lead to the exclusion of women. However, even though salaries and benefits are not equally available to women and men — a status quo that deters women from taking an egalitarian role at the workplace — exposing this different approach enriches the discussion because it can be used to repair the distorted distributive consequences.

This article focuses on women and the gender pay gap. But we must not overlook the fact that many racial and ethic groups (\textit{i.e.} African Americans compared to white Americans) also endure a pay gap. Theories explaining the paradigms of excluding women and discrimination against women are suitable for other disadvantaged groups, including the African American group.\textsuperscript{11} I argue that

\textsuperscript{10} See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 6 (1982) (arguing that to understand human development, we must take the female experience into account). See also Alice H. Eagly & Steven J. Karau, Role Congruity Theory of Prejudice Toward Female Leaders, 109 PSYCHOL. REV. 573 (2002) (proposing a theory of prejudice against females based on gender roles).

\textsuperscript{11} See Alex Lindsey, Eden King, Tracy McCausland, Kristen Jones & Eric Dunleavy, What We Know and Don’t: Eradicating Employment Discrimination 50 Years After the Civil Rights Act, 6 INDUS. & ORG. PSYCHOL. 391 (2013).
discussing the exclusion of women may contribute to a better understanding of the exclusion of other groups from receiving benefits.

Part I of this article describes the state of pay inequity between genders, beginning with a brief history along with recent developments in the United States and then offering a global perspective on the issue. This is followed by a discussion in Part II as to whether the gap is the result of social forces or, as this article posits, a self-perpetuating cause of wage inequity. This provides a backdrop for the paper's main arguments, provided in Part III: that the narrow-summits of typical hierarchal pay structures that predominate have an ingrained biased structure, and that these structures are self-perpetuating, creating the “vicious cycle” that prevents the gender pay gap from narrowing.

I. Challenging The False Concept Of Women Responsibility For Gender Pay Gap

The phenomenon of the ongoing gender pay gap is complex and should not be analyzed from one perspective only, but rather by using a holistic approach that views the issue from a variety of angles, including family structure, social norms and different cultures. Some women (as well as some men) do avoid holding full-time positions and working long hours.\textsuperscript{12} The family structure and norms as well as the inherent conflict between careers at workplaces and domestic life are vivid and influential.\textsuperscript{13} A full picture of the issue must include these

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phenomena. However, this reasoning cannot serve as the sole explanation for the
gender pay gap. This article strives to aid the process of exposing all the hidden
mechanisms that may deter women from fully taking active part in the workplace,
suggesting a totally different approach toward understanding the existing gender
pay gap. Although at first glance it seems that the payment systems are objective
and gender neutral, my main claim is that payment systems are neither neutral nor
objective. I suggest that an opposing mechanism might lead to the existing
gender pay gap and that the assumption that women’s behavior has led to their
lower salaries is biased. We cannot fully understand and resolve the pay gap
unless we understand the lack of true, decent, and egalitarian opportunities that
are accessible to women, enabling them to earn high salaries under good working
conditions. A lack of opportunities might cause rational women to avoid
struggling with locked gates. Women do not gather together around tribal fires to
express their desire to escape prestigious positions or fair, egalitarian wages in
favor of changing diapers and cleaning their houses. One can reasonably assume
that women do desire to hold good positions and earn decent salaries within
interesting roles, if such opportunities were welcoming them. In fact, women
understand that the opportunities workplaces offer are limited, the environments
are often hostile, and the best positions are not open equally to both genders.

14 Testing for neutrality is a complex task. See Kevin F. Hallock, Pay System Gender Neutrality,
15 Jenny M. Hobbler, Grace Lemmon & Sandy J. Wayne, Women’s Underrepresentation in Upper
Management: New Insights on a Persistent Problem, 40 ORG. DYNAMICS 151, at 152-53, available
Vicki Schultz, in her masterpiece *Telling Stories About Women and Work*, argues that, after one federal court interpreted sex segregation as an expression of women’s own choice, courts failed to recognize the role of employers in shaping women's work aspirations. Women actually develop their job preferences in response to changing structural and cultural features of work organizations, rather than on the basis of their own preternatural interests. Inspired by Schultz’s work, I further claim that this misinformed belief in women’s preferences is a concept commonly held by legislators and governmental entities as policy makers as well as by employers, male and female workers, and the public in general. I argue that women’s preferences are a result of the discrimination they face at workplaces and not the cause, as the common misconception posits.

Furthermore, the reality of the gender pay gap causes women, as rational decision makers, to take other venues, away from discriminating and segregated workplaces. In effect, women act rationally when adopting the gender pay gap rules of the game. If true opportunities were to appear more often, women might take them. But workplace norms, rather than women’s desire to avoid a full-time

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commitment to work, lead to a discriminative pay gap against women (as well as other excluded groups). Hidden mechanisms (“bricks” reinforcing the glass ceiling) have created a structure, which has led to both establishing and perpetuating gender gaps in regard to payment in workplaces.

I further claim that special consideration should be given to mechanisms that filter rights, capital, and other goods. These are the mechanisms that establish the distributive rules, serving as political gatekeepers and controlling who stays in and who is thrown out of the game.19 This article expresses the idea that workplaces do not use objective and natural criteria when distributing salaries between male and female employees.20 Accordingly, the practices are neither objective nor neutral but rather contain a built-in gender bias.21

The following subchapter will discuss the legal arena of gender pay gap in the United States and in other jurisdictions.

II. The Gender Pay Gap

A. The United States

19 Shlomit Yanisky Ravid, Gender Biases In Virtual Open Space, (TBP) (2015) (claiming that Net Neutrality is a delusion and women are excluded from the virtual “open” world by controlling and filtering out their postings and be virtual harassment).

20 See, e.g., Monica Biernat, M.J. Tocci & Joan C. Williams, The Language of Performance Evaluations: Gender-Based Shifts in Content and Consistency of Judgment, 3 SOC. PSYCHOL. & PERSONALITY SCI. 186 (2012) (finding that male supervisors judged male attorneys more favorably than female attorneys on numerical ratings and other data suggesting patterns of gender bias); Madeline E. Heilman, Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent up the Organizational Ladder, J. OF SOC. ISSUES 657 (2001) (positing that the scarcity of women at upper levels or organization is a consequence of gender bias).

21 See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 133-212 (1997) (discussing the principle of neutrality); GEORGE SHER, BEYOND NEUTRALITY - PERFECTIONISM AND POLITICS 20-175 (1997); Owen M. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982) (arguing that a claim of lack of objectivity itself suffers from a lack of objectivity because it can be interpreted as biased in favor of women).
When Congress enacted the Equal Pay Act in 1963, women earned approximately fifty-nine cents for every dollar men earned. Nowadays, after fifty years, women earn about eighty cents for every dollar paid to men.\textsuperscript{22} While the past fifty years have seen extraordinary progress for women and the wage gap has narrowed, it has not disappeared and has been virtually stable over the past decade.\textsuperscript{23}

Over the course of women's lifetimes, this gap will cost women and families lost wages, reduced pensions, and reduced social security benefits. American families are relying now, more than ever, on the wages of women. Lower pay for women means less economic income and hence, financial security not only for women but also for the families that depend on them during their working and retirement years.\textsuperscript{24} The persistence of a significant gender pay gap has caused the government to reinvigorate its efforts to enforce anti gender pay gap laws as well as other discrimination laws.\textsuperscript{25} In trying to achieve equal pay, the focus of policymakers for decades has been on more and more legislation and increased enforcement.

Attempts to adopt an Equal Rights Amendment, which would have provided a constitutional guarantee of equality to both sexes, have failed, leaving protection against sex discrimination in employment practices to federal and state

\begin{footnotesize}
\textsuperscript{23} U.S. DEP’T OF LABOR, FACT SHEET, \textit{id}.\textsuperscript{2} \\
\textsuperscript{24} Id. \\
\textsuperscript{25} Siniscalo, supra note 6.
\end{footnotesize}
legislators and to the judiciary to the extent they interpret those laws or create a common law.\textsuperscript{26} To understand the gender-pay-gap problem, one should be aware of the legal tools that have been created to fight this phenomenon.

Blau and Kahn argue that trends in the U.S. gender pay gap are mixed. On the one hand, they conclude, after a half-century of stability in the earnings of women relative to men, there has been a substantial increase in women's relative earnings since the late 1970s. One of the things that make this development especially dramatic and significant is that the recent changes contrast markedly with the relative instability of earlier years. On the other hand, they admit that there is still a gender pay gap and it is unlikely to disappear. Women continue to earn considerably less than men on average, and the convergence, or narrowing of the gap that began in the late 1970s has slowed noticeably, starting in the 1990s.\textsuperscript{27} Since then, women’s participation in the labor force also began to slip, relative to participation rates in other developed countries.\textsuperscript{28} They ask: is this slowdown just a blip in an overall trend, or has the pay gap converged as far as it can?\textsuperscript{29}

Legal tools such as legislation and regulations are the primary means of battling discrimination and the gender pay gap in the United States. Indeed,


\textsuperscript{27} Francine D. Blau & Lawrence M. Kahn, \textit{The Gender Pay Gap: Have Women Gone As Far As They Can?}, 21 ACAD. MGMT. PERSPECT. 7 (2007) (looking at the issue in depth and making some predictions) [hereinafter Blau & Kahn, Gender Pay Gap].

\textsuperscript{28} Francine D. Blau & Lawrence M. Kahn, \textit{Female Labor Supply: Why is the United States Falling Behind?}, 103 AM. ECON. REV. PAPERS & PROCEEDINGS 251 (2013 ) (reviewing data and policy in the U.S. and other developed countries, noting that an increase in “family-friendly” employment practices in other nations led to an increase in women’s overall labor market participation in those nations.) [hereinafter Blau & Kahn, Female Labor], available at http://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.103.3.251.

\textsuperscript{29} Blau & Kahn, \textit{Gender Pay Gap, supra} note 27.
American efforts to address this issue on a legal basis are nothing short of
tremendous, and perhaps even excessive. The most important federal laws
designed to combat gender-based discrimination are the Equal Pay Act of 1963
(“EPA”)\(^\text{30}\) and Title VII of the Civil Rights Act of 1964.\(^\text{31}\) Title VII prohibits
compensation discrimination based on race, color, sex, religion, national origin,
age, disability (each of which is a protected class), or protected activity.\(^\text{32}\) A claim
of compensation discrimination can be brought under this statute even if no
person outside the protected class holds a “substantially equal” higher paying
job.\(^\text{33}\) Title VII also prohibits discriminatory practices that indirectly affect
compensation, such as limiting groups protected by these statutes to lower paying
jobs.\(^\text{34}\)

These practices are not covered by the EPA. Rather, the EPA is more
targeted, requiring employers to pay male and female employees at the same
establishment equal wages “for equal work on jobs the performance of which
requires equal skill, effort, and responsibility, and which are performed under
similar working conditions.”\(^\text{35}\) The jobs that are compared need be only
substantially equal, not identical. Unequal compensation can be justified only if
the employer shows that the pay differential is attributable to a bona-fide
seniority, merit, or incentive system, or any other factor other than gender.\(^\text{36}\) A

\(^{32}\) Id.
\(^{33}\) Siniscalco, supra note 6, at 6.
\(^{34}\) Id.
Bennett amendment allows employees to bring sex-based wage-discrimination claims under Title
claim of unequal compensation based on sex can be brought under either the EPA or Title VII, as long as the jurisdictional prerequisites are met. To fully protect the victim, antidiscrimination laws prohibit retaliation by employers who have been challenged under the statutes. The anti-retaliation provisions protect persons “who take steps to oppose compensation discrimination, or who participate in complaint proceedings addressing allegations of compensation discrimination.”

Other laws designed to protect against employment discrimination includes the Notification and Federal Employee Antidiscrimination & Retaliation Act of 2002 (No FEAR Act) and Executive Order 11246. Aside from federal antidiscrimination laws, state laws also address employment discrimination, including the gender pay gap. There are also several federal institutions in

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38 Id.
41 Every state, as well as the District of Columbia, has adopted legislation banning employment discrimination on the basis of various factors. For a summary of these factors by jurisdiction, see National Conference of State Legislatures (NCSL), State Laws on Employment Discrimination (Jan. 2014), at http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx (note that only one state – Alabama – does not include gender or sex as a factor against which employment discrimination is prohibited).
42 For example, New Mexico specifically targeted the gender pay gap by enacting the Fair Pay for Women Act on March 9, 2013, See N.M. STAT. ANN. §28-23-3. Following suit, on May 14, 2013, Vermont’s governor signed into law an Act Relating to Equal Pay. See VT. STAT. ANN. tit. 21 §495 (2013). For a state-by-state breakdown of the gender wage gap, see National Women’s law
charge of enforcing antidiscrimination laws, including the Equal Employment Opportunity Commission ("EEOC"),\textsuperscript{43} the Department of Labor,\textsuperscript{44} Offices for Civil Rights at the U.S. Department of Education\textsuperscript{45} as well as at the U.S. Department of Health and Human Services,\textsuperscript{46} the U.S. Department of State\textsuperscript{47} and other federal agencies,\textsuperscript{48} the U.S. Government Accountability Office (GAO),\textsuperscript{49} as well as the National Glass Ceiling Commission\textsuperscript{50} and the National Equal Pay Task Force.\textsuperscript{51}

\textsuperscript{43} The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing several federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person who complained or filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. See http://www.eeoc.gov/.

\textsuperscript{44} The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) enforces equal employment opportunity laws – in particular, Executive Order 11246, which, as discussed supra at note 40, prohibits discrimination against job applicants and employees of federal contractors and subcontractors. See http://www.dol.gov/.

\textsuperscript{45} See: http://www2.ed.gov/about/offices/list/ocr/index.html (The mission is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights. The OCR, among other things, provides technical assistance to help institutions achieve voluntary compliance with the civil rights laws that OCR enforces).

\textsuperscript{46} http://www.hhs.gov/ocr/office/

\textsuperscript{47} http://www.state.gov/s/ocr/

\textsuperscript{48} For example, the Department of Justice. See http://www.justice.gov/crt/.


\textsuperscript{50} Created by the Glass Ceiling Act, Title II of the Civil Rights Act of 1991, Pub. L. 102, §§203 - 204(a 21member bi-partisan body appointed by President Bush and Congressional Leaders and chaired by the Secretary of Labor, received a mandate to conduct a study of opportunities for, and artificial barriers to, the advancement of women to management and decision-making positions in business). See http://digitalcommons.ilr.cornell.edu/glassceiling/.

\textsuperscript{51} See The White House, Equal Pay Task Force Accomplishments: Fighting for Fair Pay in the Workplace (Apr.2012), available at: http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf (last visited Sept. 6, 2014) (the Equal Pay Task Force, consisting of professionals at the U.S. Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor and the Office of Personnel Management, was established by President Obama in 2010 to crack down on violations of equal pay laws. Since its creation, the EEOC has recovered more than $62.5 million in monetary relief through administrative enforcement for victims of sex-based wage discrimination, obtained changes to workplace practices that benefit about one quarter of a million workers, and filed five
One more “institution” fighting the gender pay gap is the Equal Pay Day, celebrated in 2015 on April 14. This date symbolizes the extent to which women must work into the year to earn as much as males earned the previous year. Equal Pay Day originated in 1996 by the National Committee on Pay Equity (NCPE) to raise public awareness of the gender pay gap problem.\textsuperscript{52} Supporters of this and other public awareness and lobbying initiatives, such as the American Association of University Women (AAUW), advise that victims of pay discrimination can file a claim with the EEOC or, under certain conditions, can sue an employer for unfair compensation practices.\textsuperscript{53}

The practice of confronting the gender pay gap with legislation and enforcement continues nowadays. President Obama has repeatedly stated a commitment to achieving equal pay for women.\textsuperscript{54} To highlight that point, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 days into his first term as his first bill signed into law.\textsuperscript{55} This Act restores the interpretation of cases challenging sex-based wage discrimination. \textit{See} http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf\textsuperscript{52} See the National Committee on Pay Equity website, \textit{available at: http://www.pay-equity.org/day.html} (last visited Sept. 6, 2014).

\textsuperscript{53} For example, the AAUW website offers general legal advice, describing Title VII and the Equal Pay Act and the circumstances under which a victim of discriminatory pay practices can file a claim under either law. \textit{See} http://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/equal-pay-act/.


the law that a pay discrimination claim accrues whenever pay discrimination affects an employee, reversing a Supreme Court’s holding\textsuperscript{56} that people subject to pay discrimination have only 180 days from the date the employer first determines their pay level to file a discrimination claim and reinstating a longstanding interpretation of the law that treats each paycheck as a separate discriminatory act that re-sets the clock for statute of limitations purposes.

Another significant piece of legislation encouraged by the Obama administration was the Paycheck Fairness Act. “The President believes there are steps we should take to prevent unequal pay from happening in the first place. That’s why the Administration was so disappointed when an important bill to give women more power to stop pay disparities – the Paycheck Fairness Act – was blocked by just two votes in the Senate, after it had already passed the House. The President is committed to keeping up the fight to pass the reforms in the Paycheck Fairness Act – commonsense legislation that updates and strengthens the Equal Pay Act. The Act would close the loopholes in the Equal Pay Act that give employers unjustified defenses to their discriminatory conduct, strengthen retaliation prohibitions, and ensure that women receive the same remedies under the Equal Pay Act as are available to people subjected to wage discrimination on other bases.”\textsuperscript{57}

To increase enforcement of anti-discrimination laws, Obama established the National Equal Pay Enforcement Task Force, bringing together the EEOC, the


\textsuperscript{57} U.S. DEP’T OF LABOR, FACT SHEET, supra note 22. \textit{See also} discussion, supra note 3.
Department of Justice, the Department of Labor and the Office of Personnel Management to address specific challenges preventing women from receiving equal pay for equal work.\textsuperscript{58} The excess of legal tools aiming to cope with the gender pay gap suggests a few unwritten conclusions: the challenge of closing the gap has been there for years; policy makers believe that legal tools are capable of solving the problem or at least diminishing the gap; the fact that the gender pay gap persists may reflect on the effectiveness and the efficiency of these legal tools.

With such a large quantity and high quality of legal tools aiming to reduce gender pay inequality, one would expect to find a small or at least shrinking gender pay gap in the U.S. Studies, however, reveal a different picture. The plethora of legal tools has \textbf{not} led to a dramatic reduction in the gender pay gap or solve the underlying problem of gender discrimination. In fact, studies report the gender pay gap in the U.S., at roughly 20 percent, to be among the \textbf{highest} in the western world.\textsuperscript{59} The good news is that this percentage is smaller than the gender

\textsuperscript{58} U.S. DEP’T OF LABOR, FACT SHEET, \textit{supra} note 22 (“These recommendations call for new levels of interagency coordination and communication and will result in improved enforcement of equal pay laws and a workforce better educated on its right to equal pay and employers better educated on how to provide it.”).

\textsuperscript{59} The World Economic Forum, a consortium of international researchers, publishes a report on the gender pay gap, produced by collaborating faculty from Harvard University and the University of California at Berkeley. Last year’s report ranked the U.S. as 23rd in the world, behind developing countries such as Nicaragua (ranked 10th), Cuba (15th), Lesotho (16th) and Burundi (22nd). \textit{See} \textsc{World Economic Forum, The Global Gender Gap Report 2013}, \textit{available at} \url{http://www3.weforum.org/docs/WEF_GenderGap_Report_2013.pdf}.  
The bad news may be that, at the current pace at which the gap is decreasing, we need another 45 years to reach egalitarian pay parity. Enacting so much legislation through the years, the U.S. legislature reflects optimism and faith in itself, and is still producing new drafts, trying to obtain the same old goal of equal pay. With these goals in mind, there are currently two drafts of federal legislation pending in Congress: the Fair Pay Act of 2013 and the Paycheck Fairness Act. Under debate is whether those proposed laws, added to existing policy, address the issue effectively. Grasping the factors that contribute to gender pay disparity is crucial to creating an effective strategy to reduce the gap. For a better understanding of the phenomenon and its roots, it is worthwhile to look beyond American borders and examine data on the gender pay gap in other western countries.

B. A Global Perspective

A Pew Research study analyzed the narrowing gap, which, they estimate to have been at 36 percent in 1980. See Patten, supra note 8. See INSTITUTE FOR WOMEN’S POLICY RESEARCH, supra note 2, and National Committee on Pay Equity, supra note 52.

H.R. 438 and S. 168, 113th Cong. (2013-2015). See https://www.congress.gov/bill/113th-congress/house-bill/438; also available at: http://www.govtrack.us/congress/bills/113/hr438/text (last visited Oct. 4, 2014) (Would amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on the basis of sex, race or national origin, require employers to provide equal pay for jobs that are comparable in skill, effort, responsibility and working conditions, prohibit companies from reducing other employees’ wages to achieve pay equity and require public disclosure of employer job categories and pay scales, without requiring specific information on individual employees.).

S. 184 and H.R. 12, 113th Cong. (2013-2015). See https://www.congress.gov/bill/113th-congress/senate-bill/84. The legislation has not been adopted several times in the past, although it was passed by the House of Representatives in January, 2014. However, it has since been blocked twice in the Senate. See Ramsey Cox, Senate GOP Blocks the Paycheck Fairness Act for the Second Time, THE HILL (Sept. 15, 2014, 05:59 p.m.), at http://thehill.com/blogs/floor-action/senate/217775-senate-gop-blocks-equal-pay-bill-again. If adopted, this legislation would extend the limitation period, prohibit retaliation on employees for disclosing compensation or inquiring about wage policies, and should facilitate class action Equal Pay claims and improve remedies.
Surprisingly, a gender pay gap exists all over the world, in all countries, all jurisdictions and all cultures. Recently, the Swiss Institute of Comparative Law ("SICL") conducted a comprehensive study, comparing the gender pay gap and public policy related to it in fourteen countries: Australia, Austria, Belgium, Canada, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden, the United Kingdom and the United States. The outcomes were not surprising. The 181-page study found that almost all of the countries in the study have legislation or legal authorities (such as the U.S. EEOC) responsible for enforcement of equal pay policies.64

The European Union ("EU") is concerned about gender pay gap. The EU defines the gender pay gap as the relative difference in the average gross hourly earnings of women and men within the economy market.65 In the data published by the EU Commission on Gender Equality and Gender Pay Gap, the average EU pay gap in 2012 was estimated at 16.4%.66 The European Commission brings data on gender pay gap among the different countries: 67

66 Id.
67 Id.
<table>
<thead>
<tr>
<th>Country</th>
<th>Gender Pay Gap 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU27</td>
<td>16.4</td>
</tr>
<tr>
<td>Belgium</td>
<td>10</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>14.7</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>22</td>
</tr>
<tr>
<td>Denmark</td>
<td>14.9</td>
</tr>
<tr>
<td>Germany</td>
<td>22.4</td>
</tr>
<tr>
<td>Estonia</td>
<td>30</td>
</tr>
<tr>
<td>Ireland</td>
<td>14.4</td>
</tr>
<tr>
<td>Greece</td>
<td>15</td>
</tr>
<tr>
<td>Spain</td>
<td>17.8</td>
</tr>
<tr>
<td>France</td>
<td>14.8</td>
</tr>
<tr>
<td>Croatia</td>
<td>18</td>
</tr>
<tr>
<td>Italy</td>
<td>6.7</td>
</tr>
<tr>
<td>Cyprus</td>
<td>16.2</td>
</tr>
<tr>
<td>Latvia</td>
<td>13.8</td>
</tr>
<tr>
<td>Lithuania</td>
<td>12.6</td>
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<tr>
<td>Luxembourg</td>
<td>8.6</td>
</tr>
<tr>
<td>Hungary</td>
<td>20.1</td>
</tr>
<tr>
<td>Malta</td>
<td>6.1</td>
</tr>
<tr>
<td>Netherlands</td>
<td>16.9</td>
</tr>
<tr>
<td>Austria</td>
<td>23.4</td>
</tr>
<tr>
<td>Poland</td>
<td>6.4</td>
</tr>
<tr>
<td>Portugal</td>
<td>15.7</td>
</tr>
<tr>
<td>Romania</td>
<td>9.7</td>
</tr>
<tr>
<td>Slovenia</td>
<td>2.5</td>
</tr>
<tr>
<td>Slovakia</td>
<td>21.5</td>
</tr>
<tr>
<td>Finland</td>
<td>19.4</td>
</tr>
<tr>
<td>Sweden</td>
<td>15.9</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>19.1</td>
</tr>
</tbody>
</table>

The U.S. average gender pay gap of about 20% is notably higher than the EU’s average gap of 16.4%, positioning the U.S. as having one of the highest gaps in any fully developed economy. The EU estimations reflect considerable differences among the member states, with the gender pay gap ranging from an impressive low of 2.5% in Slovenia and less than 10% in Malta, Poland, Italy, Luxembourg and Romania, to more than 22% in Germany, Austria, and a high of
30% in Estonia. A gender pay gap similar to that of the U.S. can be found in countries such as United Kingdom and Finland.\textsuperscript{68}

The EU commission asserts that statistics regarding gender pay differences do not measure overall inequality between women and men, as they only measure data on wage earners. For a complete picture, the gender pay gap must be considered in conjunction with other labor market indicators, especially those that reflect women’s various working patterns. Thus, a lower than average pay gap may be partially attributed to the fact that the overall rate of female employment is low (e.g. Italy), possibly reflecting a small proportion of low-skilled or unskilled women in the workforce. A high pay gap is attributed to a highly segregated labor market; that is, women are either more concentrated in a restricted number of sectors or professions (e.g. Czech Republic, Estonia and Finland), or a significant proportion of women work part time (e.g. Germany and Austria). Finally, local policy and institutional wage setting mechanisms and systems can influence the pay gap.\textsuperscript{69}

The SICL study discusses several components as key factors to more egalitarian pay. Among these are transparency and enforcement.\textsuperscript{70} But this discussion does not contribute to untangling the problem, for these components exist in the U.S. discrimination laws as discussed above, but have not led to equal gender pay. Thus, the question that remains open is “why?” Why do women earn

\textsuperscript{68} Id. Data on gender pay gap may be considered unadjusted; we can explain part of the earnings gaps according to differences in observable local characteristics. See http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Gender_pay_gap_statistics.

\textsuperscript{69} Id.

\textsuperscript{70} Curran and Peters, supra note 26.
less than men? Why are workplaces less favorable to and toward women? Why do such practices persist and what are their continuing ramifications for women at workplaces? Innovative answers from a new perspective are proposed and discussed in depth and for the first time below.

III. The Gender Pay Gap: The Result or a Cause?

A. Prevailing Explanations

Women select low paid occupations and low paid positions within the industry, women choose to work fewer hours each year, women have more work interruptions over their lifetimes, and women spend more time doing unpaid work than do men. The common explanation for the gender pay gap is that women withdraw from paid work outside the home, preferring to devote time to family and other compelling personal interests, such as housework. Scholars (and politicians) thus explain the gender pay gap by directly or indirectly blaming women. Their studies argue that marriage, children, and preference as well as occupational and educational choices are significant factors influencing the gender wage gap. These studies list tidbits of data, such as findings that, on average, women work 472 fewer hours per year than men and have two years less

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71 Siniscalco, supra note 8, at 2 (tackling gender pay gap means understanding the glass ceiling as well). See also: Deborah L. Rhode, The Subtle Side of Sexism, 16 COLUM. J. GENDER & L. 613 (2007) (noting that women hold 25 percent of upper-level state governmental positions, 16 percent of congressional seats, less than 25 percent of top academic positions; that only 2 percent of Fortune 500 CEOs, fewer than 20 percent of law firm partners; and just 16 percent of board directors and corporate officers are female.).

72 Siniscalco, supra note 8, at 9-20. (Independent studies from around the world consistently show that women choices and their work pattern and other social factors bear significantly on the pay gap and glass ceiling).
work experience, that a larger portion of women than men work part time, and that women spend three times more time out of the workplace than men.\textsuperscript{73}

“We can’t get mothers to work more hours. We’ve tried, and failed, for forty years. Mothers won’t bite for a simple reason: if they work 55 hours a week, they will leave home at, say, 8:30 and return at 8:30 every day of the workweek. . . Most moms have this one little hang-up: they want to see their children awake.’’\textsuperscript{74} This conclusion is blaming women.

The situation of gender segregation and the gender pay gap as well as women’s alleged “preference” of working fewer hours and “choosing” low income occupations and hard family work over prestigious positions and high salaries all reflect the result of rational behavior in response to closed opportunities and are not the cause of the gender pay gap but ultimately the result of discriminative predispositions found in workplace settings. In addition, the common explanations that blame women for earning less (actually the result of the preliminary social structure, which is the main cause) overlook the underlying discriminatory structure inherent in workplaces and therefore, misinterpret and misunderstand the social forces that lead to the gender pay gap. The result is that


\textsuperscript{74} Joan C. Williams, \textit{Why Men Work So Many Hours}, HARV. BUS. REV.; HBR BLOG NETWORK (May 29, 2013), available at: http://blogs.hbr.org/2013/05/why-men-work-so-many-hours/ (last visited, Oct. 4, 2014) (“mothers most likely to enter the fast track — graduates of elite universities — are less likely to be working full time than mothers with less prestigious degrees. Only 45.3 percent of mothers who graduated from top-tier institutions — and only 34.8 percent of MBAs — have full-time jobs.”).
the intensive legislation and enforcement legal tools are unable to solve the problem or reduce the gap dramatically. The following section explains and proves this argument.

B. Refuting False Assumptions by Applying Alternative Reasoning to the Gender Pay Gap

The pay gap cannot be fully explained by a set of measurable variables such as experience, education, industry, motherhood and even hours of work. Although the wage gap still persists to a large extent, the discourse on gender pay gap contains many variables that are still unknown. These unknown variables are not negligible. Studies reveals that more than 40 percent of the gender wage gap is “unexplained,” meaning that there is no obvious measurable reason for a pay difference. This leaves us with possible explanations that range from overt sexism to unintentional gender-based discrimination to reluctance among women to negotiate for higher pay.

Alternative reasons to explain the ever-existing gender pay gap are discussed below. These reasons do not attribute the gender pay gap to family or

75 U.S. DEP’T OF LABOR, FACT SHEET, supra note 22.
76 Sharon Rabin Margalioth, The Market Defense, 12 U. PA. J. BUS. L. 807, 809 (2010) (There are at least three causation issues that remain unsettled in the literature discussing the gender wage gap. First, disagreement surrounds the identification of the variables responsible for the wage gap. Second, the relative significance of various contributing factors is disputed. Third, the underlying relationship between some factors and past and present societal discrimination is also often questioned); Francine D. Blau & Marianne A. Ferber, Discrimination: Empirical Evidence from the United States, 77 AM. ECON. REV. 316, 316 (1987) (the influence of theories on understanding discrimination).
77 See Farrell & Glynn, supra note 4 (“One mitigating factor that has actually reduced the gender wage gap is women’s access to higher education. This has helped ease the disparity by nearly 7 percent . . . but women’s access to college and advanced degrees has not been enough to close the gap completely. Women need an additional degree in order to make as much as men with a lower degree over the course of a lifetime. A woman would need a doctoral degree, for instance, to earn the same as a man with a bachelor’s degree, and a man with a high school education would earn approximately the same amount as a woman with a bachelor’s degree).
housekeeping preferences. The reasoning contradicts traditional arguments of women preferring household and family care as opposed to dedicating time and efforts to promote their contribution in workplaces. The following discussion may support the argument that other factors cause the gap and, therefore, the gap is the result and not the cause.

1. Childless Women Face Unequal Pay

Wage differences are just partially explained by comparing women with children versus women without children.78 Jane Waldfogel’s study revealed that only one year after graduating from college, women working full time already earn less than male counterparts.79 Even after controlling for several factors, that study admits that seven percent of the gender pay gap remains unexplained.80 Furthermore, the gap exists for women working full time as well as part time, and, more interestingly, the gap begins when women are first employed and is often there before women have any children.81

80 Id. at 2-3.
One would expect to find a similar pattern of unequal pay, which is not rooted in women’s behavior, within work roles, in which family and household constraints are irrelevant. Some argue that employer reluctance to invest fully in single female employees is the result of employers’ culturally reasonable expectations that most single women will get married, have children, and eventually prefer to work less. Accordingly, the expectation that women will eventually marry and have children justifies paying women less in the present. In this regard it might be interesting to check for a gender pay gap when women work under short-term contracts, in which a brief period of time is sufficient to complete the work. Even though I do not have the data, I dare suggest, based on more general studies, that a gender pay gap would be identified under such circumstances as well.82

2. Payment by the Hour

Blaming women by concluding that women prefer to work fewer hours as the cause of the gender pay gap may be challenged by studies comparing the gap on an hourly basis. Whereas women might earn less per month (due to working flexible schedules or part-time), they should earn equal amounts per hour,

82 Studies of temporary employment find gender segregation around the globe, with women more likely to be short-listed for lower-paying temporary jobs and men more likely to be placed in the higher-paying short-term positions. Isabel Fernandez-Mateo & Zella King, Anticipatory Sorting and Gender Segregation in Temporary Employment, 57 MGMT SCI 989 (2011). See also Javier Campos-Serna, Elena Ronda-Pérez, Lucia Artacoz, Bente Moen & Fernando Benavides, Gender Inequalities in Occupational Health Related to the Unequal Distribution of Working and Employment Conditions: A Systematic Review, 12 INT’L J. FOR EQUITY IN HEALTH 57 (2013), available at http://www.biomedcentral.com/content/pdf/1475-9276-12-57.pdf (finding that women have more job insecurity, lower control, worse contractual working conditions and poorer self-perceived physical and mental health than men).
especially when performing similar jobs. However, according to the most recent data published prior to this writing by the Federal Bureau of Labor Statistics, women who were paid by the hour had median hourly earnings of $11.99, 86 percent of the median for men paid by the hour ($13.88), a gap of 14 percent, perhaps exacerbated by the fact that six percent of women working for hourly wages were paid at or below the federal minimum wage, compared to three percent of men paid by the hour.\textsuperscript{83} Such typically low-skill, low-pay jobs are not generally the type in which a long-term commitment by the worker is expected, so the effect of family demands on women’s pay as suggested above is improbable.

A majority of the pay gap between men and women comes from differences within occupations.\textsuperscript{84} Therefore, it is important to note that, across the board, men out-earn women working \textit{in the same occupation}.\textsuperscript{85} Even in those lower-paying occupations traditionally dominated by women, such as secretarial work, housekeeping, social work, nursing and teaching, men are paid more than their female counterparts.\textsuperscript{86} I conclude that this data, along with other studies, challenges the common assumptions that blame women for the gender pay gap.

\textbf{3. Employer Bias and Stereotypes}

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Additional and very important explanations of the gender pay gap, not rooted in women’s behavior, focus on employer false bias and stereotype against women. Biases and stereotypes play a major part in forming the gender pay gap. One of the most common biases is the “motherhood penalty.” This penalty is imposed on female employees who have children. Stereotypes, biases, and generalizations about working mothers lead employers to the assumption that women prefer to put family ahead of work. In punishment for this presumed attitude, women get paid less than men. In their article, “Getting a Job: Is There a Motherhood Penalty?” Corell, Benard and Palik revealed that participants in a study recommended paying mothers less than non-mothers when evaluating the same job being done with a worker holding the same background. Fathers, however, did not receive the same punishment.

Cultural beliefs about the tension between motherhood and the ideal worker’s commitment to a job may play a part in determining salaries and perpetuating the gender pay gap. Joan Williams described the ideal worker as man who works more than 50 hours per week. Asking Why Men Work So Many Hours, she cites the “long hours problem” as a key reason why the percentage of women in top jobs has stalled at about 14 percent, a figure that has held steady for a decade. Only nine percent of all working mothers (and just 13.9 percent of those with college degrees) work more than 50 hours a week during the key years of career advancement (ages 25 to 44). The fast track that leads to top jobs, Williams finds,

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87 Sinsicalo, supra note 8, at footnotes 76-79 and the language in between.
requires a time commitment that excludes most mothers — and by extension, most women.  

4. Economic Reasoning: Budgeting on Women’s backs

A general economic explanation for lower pay focuses on the fact that profit-motivated employers prefer to save wherever they can and generally try to get more work for less money. The Courts are aware of this justification. When interpreting Equal Pay Act, the U.S. Supreme Court articulated that “the [pay] differential arose simply because men would not work at the low rate paid to women . . . and it reflected a job market in which employers would pay women less than men for the same work. The realm in which companies take advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.” Margalioth likewise argues that market justifications for discriminating against women as a group should not be accepted as a legitimate defense in gender pay discrimination cases, mainly because women negotiate differently and do not stand up for their rights and equal pay. 

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89 Williams, supra note 74 (If institutions are serious about advancing women, they’ll have to address the problem of requiring long hours).
90 Shlomit Yanisky Ravid, Eligible Patent Matter - Gender Analysis of Patent Law: International and Comparative Perspectives, 19 AM. UNIV. J. OF GENDER, SOCIAL POLICY & THE LAW, 767, 854-55 (2011) (the widespread perspective of “gender as difference” merely serves as an exclusory mechanism blocking the growth of women as well as for purposes of distributing less power, capital and statuses in general and in this article according to its focus, for the exclusion of women inventors).
91 Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) (Supreme Court rejected the argument of profit maximizing by paying men inspectors more than women inspectors). See also Margalioth, supra note 76 at p. 811-14 (arguing that market justifications and especially women’s acquiescence to lower wages should not justified paying women less).
92 Margalioth, supra note 76, at p. 811-14.
Nonetheless, employers prefer to maintain the status-quo of paying women less, consciously attributing the decision to market demand and budget constraints. Employers thus seek external reasoning to justify paying women less. The truth is that workplaces are neither gender blind nor do they act without power differentials, and individuals who get less are part of the weaker group of employees. Beyond the superficial justifications, the underlying reason, which perpetuates the situation, is one in which the victims are blamed.

5. Women Behave Differently in Workplaces: Negotiating and Working Patterns

Another alternative explanation for the gender pay gap focuses on differences in negotiating skills between the genders. Women and men act differently when negotiating their salaries in workplaces. The book Women Don’t Ask: Negotiation and the Gender Divide, written by Linda Babcock & Sara Laschever,93 exposes the pattern of negotiating that women adopt: women evaluate their work in lower units than men performing the same task and avoid negotiating for a better reward (higher salaries and better working benefits) than do men; they expect less and ask for less.94 Studies also reveal that women lack the confidence and optimism to win a better wage, and also avoid competitive

94 Id. at 62-84. One explanation focused on different childhood experiences, where boys control and shape events and girls are educated to focus on other people needs.
behavior and competitive environments. This results in women receiving lower wages at workplaces.\textsuperscript{95}

These data reflect rational behavior. Women encountering closed gates to opportunities and segregated workplaces evaluate their chances in a rational way; their assessments result in their asking for what they can reasonably get, which is lower wages and inferior working conditions. This process is discussed below.

It is important to note how rational women can be. Women act rationally after realizing and internalizing the data about the existing gap. The above section explains that when women negotiate their salaries they ask for lower sums than average men do. However, the more important part to this discourse is the following: once a woman knows the sum she can get, she changes her demand accordingly. It is the lack of information that causes women to act with uncertainty and ask for lower wages. Women evaluate their work less than men do referring to the same task.\textsuperscript{96} The rational behavior of women is reflected by studies, which reveal that once women know what they can be paid they will demand this amount and value their work accordingly.\textsuperscript{97}

\textsuperscript{95} Margalioth, supra note 76, at 814-15 (bringing gender behavioral studies to refute the market justification for gender pay gap).

\textsuperscript{96} Charlene M. Callahan-Levy & Lawrence A. Messe, Sex Differences in the Allocation of Pay, 37(3) J. PERS. SOC. PSYCHOL. 433 (1979) (participants from both genders were asked to perform the same task. Then they were divided into two groups. One group had to evaluate (compensate) themselves for the task and the other one to evaluate (compensate) the other group. On average women evaluated themselves lower than man. Women assigned 19\% lower compensation to themselves than men. When evaluating others, woman compensated (men and women) more than men did without any difference in the quality of the task). John T. Jost, An Experimental Replication of the Depressed Entitlement Effect Among Women, 21 PSYCHOL. WOMEN Q. 387 (1997) (women paid themselves almost 20 percent less than men). \textit{See also} Margalioth, supra note 76, at 815-16 (women undervalue their own work although they can objectively evaluate the work of others).

\textsuperscript{97} Brenda Major, Dean B. McFarlin & Diana Ganon, Overworked and Underpaid: On The Nature of Gender Differences in Personal Entitlements 47(6) J. PERS. SOC. PSYCHOL. 1399 (1984) (once women were given a list with information on how much other participants compensated
C. Summary

The fact that the gender pay gap is influenced by many factors diminishes the influence of women’s preference as the main cause for the gap. In addition to the factors discussed above, there are differences in education, horizontal segregation in occupations, varying work patterns experience as well as other factors.98

The discussion above points to my conclusion that the gender pay gap is a result of excluding mechanisms and not the cause of unequal pay. Adherence to the parenting argument perpetuates gender gaps, allowing the rhetorical argument to justify gaps even in cases when the gaps are not in fact justified. Employers will blame everyone except for themselves for unequal wages, citing the market, women’s preferences, women’s failure to negotiate better wages, etc. It is time to shine a light on excluding mechanisms within firms and, more generally, the ways in which these mechanisms are constructed within societies.

IV. Theoretical Approach to Gender Pay Gap

A. Theory of Top Narrow Hierarchal Structure of Workplaces

Are payment mechanisms in workplaces gender blind? The gender pay gap may be considered a result of women’s various work habits. It can also be explained as a reflection of society, because inequalities in the labor market offer

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an overall picture of gender discrimination within the culture. In this article, I raise a more theoretical approach to the gender pay gap. I view the gender pay gap as the cause for discrimination and not just as the result or a reflection.

Understanding my approach might spur new solutions to the problem instead of perpetuating policy makers’ same old approach. I contend that hidden legal structures, which must be exposed, are used to create and sustain gender-based workplace inequality. Exposing these legal structures is not simple, because they are hidden within sophisticated behavioral justifications for the pay gap (i.e. the argument that women want to work part-time jobs because they want to take care of households). These social structures have been internalized over centuries by both sexes. The only hard evidence available for critical examination of the rules is the resulting pay gap itself, wherein women are de-facto ineligible to as many benefits as men receive. But the causal connections between the discriminatory effects of social rules are not always clear.

The connection between a structured hierarchy, particularly one with a narrow summit that leaves room for only a small number of controlling or dominant people, and gender bias is natural and immediate. Therefore, detecting and illuminating hierarchy structures within workplaces is one of the most important aims of the discourse on gender pay gap. The creation and perpetuation of hierarchal structures that enable limited, male domination at the top of the pyramid and the exclusion of women from distribution of capital, power

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99 European Comm. on Gender, supra note 65.
and control, can be easily detected when discussing gender pay gap within workplaces. Feminist theories claim that such norms are political and that the legal system supports the existing order and prevents change.\(^\text{101}\) Moreover, norms at workplaces reinforce the status of powerful groups at the top of the hierarchy and keep subordinate groups from altering the existing structure. The theory describes the repetitive process of the exclusion and repression of women which occurs in many circumstances (such as sexual harassment).\(^\text{102}\)

The process of exclusion usually can be described in three stages. The first stage is the creation of narrow-summit hierarchical structures “from scratch.” Even before it is “populated,” the structure is built with pyramid-like structure of the dominant and the dominated, with a relatively small number of dominant people, compared to the number of those subject to them. The second stage is “grabbing” the top of the hierarchy, and the third stage is the creation of rules that limit or block others’ access by explaining it (i.e. women prefer working less).\(^\text{103}\)

Extreme cases of women’s historical exclusion from property rights found

\(^\text{101}\) Despite a trend toward the end of the twentieth century in which postmodern discourse advocated for flattened hierarchies, the traditional organizational structure still dominates. See, e.g., Jeffrey Pfeffer, You’re Still the Same: Why Theories of Power Hold Over Time and Across Contexts, 27 ACAD. MGMT. PERSP. 269 (2013) (arguing that, despite perceptions and discourse to the contrary, classic power structures are deeply rooted and pervasive). Researchers have found that people in hierarchical cultures may “cherish the gender gap.” Hamid Yeganeh & Diance May, Cultural Values and Gender Gap: A Cross-national Analysis, 26 GENDER IN MGMT. INT’L J. 106 (2011).

\(^\text{102}\) Joan Acker, Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations, 4 Gender & Soc. 139 (1990); Joanne Martin, The Organization of Exclusion: Institutionalization of Sex Inequality, Gendered Faculty Jobs and Gendered Knowledge in Organizational Theory and Research, 1 ORG. 401 (1994). See also Sheena J. Vachhani, The Subordination of the Feminine? Developing a Critical Feminist Approach to the Psychoanalysis of Organizations 33 Org. Studies 1237 (2012) (proposing that organizations can be studied under feminist psychoanalytic approaches to better understand gender relations in organizations.).

\(^\text{103}\) CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 34 (1987).
expression in the outright denial of those rights. Contemporary expressions of exclusion, however, use a more complex mechanism, one which is even more hidden from view. Narrow-summit, hierarchical structures that result in the subordination of weaker parties present an example of such exclusionary mechanism, worthy of condemnation. They place an obstacle on the individual’s path to self-fulfillment and their perpetuation leaves women, as a group, without alternatives (i.e. better salaries and all that is attendant to better income).

Wherever there is hierarchy and power, there are dominant and dominated people. Power is the ability to influence another person; in the workplace, there are several types of power, especially by control of resources; remuneration and rights (the power of compensation); control of penalties (power to impose); control of promotion; and control of information (information power). The higher a person’s position in the hierarchy, the more sources of power to which he or she has access. At the root of the question of hierarchy lie questions about whom power serves and who benefits from it.

There is a different path through which we all can walk. Other non-strictly hierarchal paradigms, distributing the power more evenly among all interested parties, are preferable. The alternative structures created by these paradigms would take into account women’s presence and contributions to the inventing

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process, and would award equal rights and equal pay accordingly. Most of today’s workplaces reflect a hierarchical-masculine structure that differs from feminine egalitarian perceptions of equal and cooperative relationships. In general, the hierarchical structure with an inherently narrow summit literally blocks and excludes women from equal pay, equal benefits, and equal rights, and therefore actually discriminates against women. However, broadly reproving the hierarchical structure is not sufficient. It is necessary to point out and analyze the specific structures that exclude women.107

B. Gender Pay Gap - The Perpetuation Mode

One of the interesting questions regarding gender pay gap focuses on the consistency of gender pay gap through the years. As mentioned above, the tremendous amount of legal tools devised to combat pay discrepancies could only reduce the gap over the years, but they have failed to completely level the playing field. A full understanding of the problem of the gender pay gap, which might lead to a better solution, should focus on recognizing and identifying the mechanism that perpetuates the gap. Working women find themselves in an infinite loop, in which they keep on receiving lower wages with fewer benefits than men. Facing the reality of a structured gender pay gap, women are tracked into those specific spheres that are open and welcoming to them. These segregated spheres offer traditional roles, such as nursing, teaching, cleaning, secretarial administration, among other such jobs.108 Once women enter other,
more “masculine” or gender-neutral roles, women earn less. Women acting rationally recognize this reality, and thus continue to direct themselves into these most feasible spheres. Thus, women continue to seek, and hence receive, lower levels of wages and benefits. My conclusion states that this mechanism perpetuates with but a miniscule hope to break the chain. The assignment of blame for the gender pay gap upon women and, more importantly, women’s internalization of that blame, renders the miniscule possibility of an end to the cycle even more remote.

Support for this argument is found in Graciela Chichilnisky’s article, which explains the origins of the gender pay gap with an economic analysis focusing on the low value of women work at home as householders.109 Expectations about women’s lower market wages leads to the over utilization of women in the household, and this, in turn, leads to lower productivity and lower wages for women in the marketplace. In her economic analysis, Chichilnisky concludes that the situation is rational, presenting a “prisoner's dilemma”: inequity at home breeds inequity in the marketplace and reciprocally, leading to a persistent gender gap. In her model, she finds that, with learning by doing, at high levels of skill there is a Pareto superior (i.e. improved efficiency without harm to another) without equilibrium, where men and women share efforts equally at home,

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109 Graciela Chichilnisky, *Gender Pay Gap*, 3 INT’L J. GREEN ECON. 157 (2009) (Incomplete information about women's work at home and in the marketplace creates a “Nash equilibrium” that causes the gender pay gap, with inequity at home breeding inequity in the workplace.)
receive the same pay in the marketplace, firms enhance their profits and there is additionally welfare at home is improved.\textsuperscript{110}

### Conclusion

The most noticeable evidence for the linkage between the excluding principles of gender segregation and resultant discrimination is the data about gender pay gap. The causal relationship between the principles and the discriminatory result is not always clear. The absence of negative intent, the lack of evidence for a masculine “conspiracy” and other values (advancement of science, technology and economic welfare) that justify the principles all hamper critical examination of the status quo. The fact that the same principles also discriminate against other groups, in addition to women, further weakens the claim that the principles are discriminatory merely because they are “masculine.” Finally, rescinding principles that are deeply rooted in the legal and economic system, which have become foundation stones for an entire society over the years, is considered by many to be impossible or even unjustifiable.

The main purpose of this article is to draw attention to existing problems because, without the explicit centralized recognition that the gender pay gap at workplaces blocks women from equal participation, the legal-property discourse will continue to exclude women. While this article ultimately focuses on one aspect of gender discrimination in the context of pay gaps at workplaces, the whole phenomenon is complex and should be analyzed from various perspectives,

\textsuperscript{110} \textit{Id.} at 159 (updating Family Law or devising appropriate contract arrangements between family and marketplace could achieve equality and help increase productivity and economic growth in the economy as a whole).
including the ones with this article presents its arguments. Carol Gilligan expressed this well when she wrote, “My goal is to expand the understanding of human development by using the group left out in the construction of theory to call attention to what is missing in its account.” Accordingly, one should better understand the reasoning behind the gap in order to create more egalitarian workplaces open equally to both genders.

\footnote{Gilligan, *In a Different Voice*, supra note 10, at 3-4.}