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HIDDEN FIGURES: WAGE INEQUITY AND ECONOMIC INSECURITY FOR BLACK WOMEN AND OTHER WOMEN OF COLOR

CASSANDRA JONES HAVARD[†]

Remember the ladies.

—*Abigail Adams*¹

bein alive & bein a woman & bein colored is a metaphysical dilemma

—*ntozake shange*²

INTRODUCTION

One hundred years after women secured the right to vote, wage inequality remains prevalent in the United States. The gender wage gap, or pay inequity based solely on sex, arguably, is a measure of the current failure of full and equal participation by women in American society. The gender wage gap exists despite federal legislation designed to further wage equality.³ In fact, a

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¹ Letter from Abigail Adams to John Adams (March 31, 1776) (on file with the Massachusetts Historical Society). Abigail Adams is said to have pleaded with her husband while he was helping draft the Constitution, but John Adams was dismissive of his wife's idea, saying men "know better than to repeal our Masculine systems." Letter from John Adams to Abigail Adams (April 14, 1776) (on file with the Massachusetts Historical Society).

² NTOZAKE SHANGE, *no more love poems # 4*, in FOR COLORED GIRLS WHO HAVE CONSIDERED SUICIDE/WHEN THE RAINBOW IS ENUF 59 (2010).

³ Equal Pay Act of 1963, 29 U.S.C. § 201 et seq. (2006). Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. §2000e-2(a). Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§701–718, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§2000e to 2000e-17 (2006)). The job loss experienced by women during the COVID-19 pandemic furthered the existing gender wage gap. Women lost at least 4.2 million jobs since the beginning of the pandemic. Almost half of that number, or approximately 2 million, of those women are still unemployed and not expecting to recover before 2023. See Francesca Chambers, *Economic Recovery Could Take Years*

difference as small as two cents over a lifetime costs a woman approximately \$80,000.⁴ Currently, it is predicted that for a majority of white women, the pay parity will be attained between 2059–2069.⁵ However, Black women and other women of color will not reach pay equity before 2369.⁶

Most of society is oblivious to the fact that wage inequality is pervasive for Black women.⁷ The intersectionality framework recognized the failure of the law to account for how race and gender combine to marginalize Black women.⁸ When combined,

for Women Who Lost Jobs During Pandemic—Even with Biden's Plans, IWPR (May 27, 2021), <https://iwpr.org/media/press-hits/economic-recovery-could-take-years-for-women-who-lost-jobs-during-pandemic-even-with-bidens-plans/> [<https://perma.cc/55RT-R9QM>]. Women also disproportionately lost or were forced to leave their jobs, which in turn means they missed out on promotions which affects their wealth accumulation. See Kai Ryssdal & Andie Corban, *Sallie Krawcheck, On What The Pandemic Means For Women's Finances*, MARKETPLACE (July 27, 2021), <https://www.marketplace.org/2021/07/27/sallie-krawcheck-on-what-the-pandemic-means-for-womens-finances/> [<https://perma.cc/4YF4-T9UR>].

⁴ See *The State of the Gender Pay Gap in 2021*, Payscale (Mar. 2021), <https://www.payscale.com/data/gender-pay-gap> [<https://perma.cc/Z3JV-WLZ7>]. A PayScale report compiled from 1.8 million women between 2017 and 2019 shows that “[w]omen in the controlled group make \$0.98 for every \$1.00 a man makes.” *Id.*

⁵ See Valerie Lacarte & Jeff Hayes, *Women's Median Earnings as a Percent of Men's, 1985-2019 (Full-time, Year-Round Workers) with Projections for Pay Equity*, by Race/Ethnicity, IWPR (Sept. 28, 2020), <https://iwpr.org/iwpr-publications/quick-figure/pay-equity-projection-race-ethnicity-2020/> [<https://perma.cc/DY4P-SPP5>]; *Race and the Pay Gap*, AAUW, <https://www.aauw.org/resources/research/race-and-the-pay-gap/> [<https://perma.cc/7WW9-S7QK>] (last visited July 28, 2022).

⁶ *Race and the Pay Gap*, AAUW, *supra* note 5. According to the AAUW study, Black women earned 63% of what white men earned, which would maintain a wage gap for Black women until 2369. *Id.* The gap is predicted to close in 2041 for Asian women and 2451 for Latina women. *Id.*

⁷ See *The Pay Gap is the Tip of the Iceberg for Black Women*, CISION PR NEWSWIRE (Aug. 22, 2019), <https://www.prnewswire.com/news-releases/the-pay-gap-is-the-tip-of-the-iceberg-for-black-women-300905708.html> [<https://perma.cc/CH5Z-247H>]. The recent survey indicates that 53% of Americans are unaware of the pay disparities that Black women face or the barriers to career advancement compared to white women. *Id.* According to the 2020 *Hired Survey*, 33% of men are either uncertain of or deny the existence of a gender wage gap, compared to 16% of women. *The 2020 State of Wage Inequality in the Workplace*, HIRED.COM, <https://hired.com/h/wage-inequality-report#intro> [<https://perma.cc/YD2N-BWAV>] (last visited July 30, 2022).

⁸ Intersectionality studies how structures of domination combine to marginalize Black women. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296–97 (1991) (“[U]nveil[ing] the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them.”). Sociologist Patricia Hill Collins, whose work on the intersection of race and gender was instrumental in establishing black feminism as an academic discipline, is also worth noting here. See generally PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* (1990).

racial and gender discrimination lead to economic, social, and political ramifications, any and all of which impact Black women differently.⁹

As presently enacted, neither of the two federal statutes that prohibit gender pay inequities—the Equal Pay Act (“EPA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”)—adequately address the racialized wage gender gap. Nor do they differentiate the extent of the discrimination that Black women and other women of color experience based on their multiple identities of gender and race. Most importantly, neither corrects the market imperfections that sustain racialized gender inequality. Law has failed to expose and sufficiently regulate the structural and systemic bias that sustains racialized gendered marginalization and socio-economic inequalities.¹⁰ The central question is: what allows this systemic inequity to self-perpetuate?

Identifying the interconnected structures of domination that are continuously replicated is central to disarming them.¹¹ A critical analysis confirms how neoliberal economic assumptions

⁹ The wage gap for Black women is 61% less than white men. See Mark Paul, Darrick Hamilton & William Darity Jr., *Discriminatory Penalties at the Intersection of Race and Gender in the United States*, WASH. CTR. EQUITABLE GROWTH (Aug. 7, 2018), <https://equitablegrowth.org/discriminatory-penalties-at-the-intersection-of-race-and-gender-in-the-united-states/> [<https://perma.cc/6WAG-YCF5>]. Using identity intersections to perform an economic analysis of discrimination, researchers concluded that failing to disaggregate the penalties associated with two or more socially marginalized identities misstates the complexity of employment discrimination. *Id.*

¹⁰ See *infra* Part I.

¹¹ The maturation of intersectionality as a legal theory requires expanding beyond identifying just race and gender, or the multiple identifiers in which discrimination is experienced, to an analysis of the inter-connectedness of domination structures. Jennifer C. Nash, *‘Home Truths’ on Intersectionality*, 23 YALE J.L. & FEMINISM 445, 469–70 (2011). Nash posits that a “rigorous re-thinking” uncouples Black feminism and intersectionality to expand theoretical explorations in at least three ways: (1) analyzing the particular situational contexts of race and gender to determine when intersections are rigid as opposed to fluid; (2) understanding the conditions under which race and gender intersect and may or may not “bolster[] and reproduce[]” other structures of domination; and (3) establishing which social processes that connect structures of domination and allow those connections to “originate and replicate” themselves. *Id.* Professor Terri McMurtry-Chubb concludes that the term has become “rhetorical shorthand to express interlocking identities when discussing claims of discrimination and marginalization.” Teri A. McMurtry-Chubb, *There Are No Outsiders Here: Rethinking Intersectionality as Hegemonic Discourse in the Age of #MeToo*, 16 LEGAL COMM. & RHETORIC 1, 32 (2019). McMurtry-Chubb argues that “continu[ing] this discourse in ways that both define and solidify difference does little to address the nuances of white supremacy, patriarchy, and capitalism as they operate in the descriptors ‘race,’ ‘class,’ ‘gender,’ ‘sexuality,’ and ‘sexual orientation.’” *Id.* at 15.

embedded within legal doctrine and gendered racial subordination essentialize the racialized wage gap. Specifically, the legal rules either implicitly or explicitly embed neoclassical economic principles allowing the inequitable compensation schemes to go unchecked. Consequently, in this context, law and economic theory coalesce to become a structural barrier to economic equality.

Part I introduces the theory of intersectionality and provides a summary of the existing pay equity statutes. An examination of the empirical data on the racialized gender wage gap makes a strong argument for why race and gender cannot be viewed in isolation when assessing bias and legally defined discrimination.¹² Part I also briefly reviews case law surrounding the Equal Pay Act and Title VII to show the particular inadequacy of the rules designed to ensure pay equality.

Part II discusses the structural barriers that create and perpetuate the racialized wage gap.¹³ The Part begins with an examination of neoclassical economic principles and how the assumptions underlying them contribute to discrimination and structures of oppression and privilege. The discussion then turns to the structural barrier of political invisibility and lays the foundation for tackling the racialized gender gap by discussing the social contract among a society's citizens. This discussion begs the question of why the policies on wage equality are not more protective of Black women and other women of color from this type of discrimination. Finally, this Part examines the negative effect that racial stereotypes and tropes have had on limiting the economic opportunities and jeopardizing the economic security for Black women and other women of color.

Part III begins with the acknowledgement that, to address the racialized gender gap, the perspective of the least privileged must be included within relevant policies and strategies. This Part also addresses the concerns of those who are more advantaged yet without the same risk of some segments being left behind.¹⁴ It

¹² Elizabeth R. Cole, *Intersectionality and Research in Psychology*, 64 AM. PSYCH. 170, 178 (2009).

¹³ See Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond The Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1827–30 (2020) (advocating that laws and policies in a structurally reformed political economy replaces an over-reliance on neoliberal economic principles with an apolitical framework that balances power, equality, and democracy).

¹⁴ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987); Nancy Chi Cantalupo, *And*

identifies ways to address the de-constructed structural biases embedded in the anti-discrimination statutes and case law. The proposed reforms are preliminary efforts to change the law and policy, and ultimately employer behavior, so that all employees, but especially Black women and other women of color, are guaranteed an economically equitable workplace.

I. THE RACIALIZED WAGE GAP

A. *Defining Intersectionality*

Gender oppression has always been dominant in American society. Tasks and responsibilities involving the home—often referred to as “women’s work”—were not equally valued as the work that men performed because men were the designated breadwinners. This imbalance in the power structure gave rise to feminism, which critiques and acknowledges the bias that women encounter in power structures.¹⁵ Yet, feminist theory has not always understood or acknowledged the ways in which Black women experience bias in power structures.¹⁶ As one author argues, white middle-class Western feminists articulated a view of gender that privileged themselves while marginalizing others.¹⁷ Feminism, as originally presented, simply provided another form of oppression for Black women.¹⁸

Even More of Us Are Brave: Intersectionality and Sexual Harassment of Women Students of Color, 42 HARV. J.L. & GENDER 1, 66 (2019); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 167 (“It is somewhat ironic that those concerned with alleviating the ills of racism and sexism should adopt such a top-down approach to discrimination. If their efforts instead began with addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit.”).

¹⁵ BELL HOOKS, *FEMINIST THEORY: FROM MARGINS TO CENTER* 26 (1984) (“Feminism is the struggle to end sexist oppression.”).

¹⁶ *Id.* at 1–3.

¹⁷ See generally ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1990).

¹⁸ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L.J. 581, 588–89, 615 (1990) (arguing that contrary to Western middle-class feminist views of gender as based on men’s sexual desires, variations among backgrounds and culture dictates and defines gender for different groups of women); see also Alison Stone, *Essentialism and Anti-Essentialism in Feminist Philosophy*, 1 J. MORAL PHIL. 135, 151 (2004) (critiquing feminist essentialism and universality by arguing that culture defines identity as female).

Intersectionality theory is a response to the complexity of race and gender and intersectionality addresses the oppression that Black women face in the American legal and political system.¹⁹ The crux of intersectionality is eliminating hierarchies and dismantling structural inequities.²⁰ Specifically, intersectionality posits that Black women are discriminated against in ways that cannot solely be placed within the legal categories of racism or sexism.²¹

Intersectionality theory acknowledges the difficulty of discriminatory conduct that is multidimensional and complex. It also encapsulates the full identity of Black women's experiences giving equal weight to the effect of race and gender in discrimination claims. As an advocacy tool, intersectionality aligns the interests of different groups that are resisting the status quo. Instead of requiring Black women plaintiffs to make a choice on immutable characteristics, intersectionality theory melds the multiple forms of inequality and identity to show their interconnectedness.²²

¹⁹ Crenshaw, *supra* note 14, at 149.

²⁰ Pauli Murray is credited with ensuring that the concept of intersectionality was included in the Civil Rights Act. See Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L.J. F. 512, 512 (2020). She saw the uniqueness of the women's liberation movement and the civil rights movement and the need to combine the interest as an advantage for the Black woman. *Id.* Murray wrote: "The Negro woman can no longer postpone or subordinate the fight against discrimination because of sex to the civil rights struggle but must carry on both fights simultaneously,' because women's 'full participation and leadership' was 'necessary to the success of the civil rights revolution.'" *Id.* at 519 (quoting Pauli Murray, "The Negro Woman in the Quest for Equality," speech to the National Council of Negro Women Convention (Nov. 14, 1963)).

²¹ Crenshaw, *supra* note 14, at 150. Crenshaw explained:

I am suggesting that Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.

Id. at 149.

²² Critical Race scholar Richard Delgado warned against the fragmentation that intersectionality can create. Richard Delgado, *Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1264 (2011) ("[I]ntersectionality can easily paralyze progressive work and thought because of the realization that whatever unit you choose to work with, someone may come along and point out that you forgot something.").

Yet, addressing racism and its obvious and latent policies and practices requires comprehension of additional axes of oppression at separate times and in various contexts. An inclusive feminism acknowledges the subjectivity of the experiences of Black women and other women of color rather than marginalizing them. Failing to deconstruct the impact of racism, classism, and discrimination in policies perpetuates inequality and justifies the exclusion of those who are affected.²³

The challenge of intersectionality theory as a tool of reform is its haphazard development. As an offshoot of critical race theory (“CRT”), perhaps the most justified critique is intersectionality has not adequately identified or analyzed the particular oppressive structures that result in subordination of Black women.²⁴ In this regard, the concept has been reduced to a word that is both misunderstood and misused. One author argues, the theory does not fulfill its promise as “a transformative model for addressing patterns of domination in historical, cultural, political, and social context.”²⁵ Further, as will be discussed in Section I.D., courts have not readily embraced the concept.

B. *The Existing Laws*

Two specific statutes mandate pay equity, the Equal Pay Act (“EPA”)²⁶ and Title VII of the 1964 Civil Rights Act (“Title VII”).²⁷ The U.S. Equal Employment Opportunity Commission (“EEOC”) enforces both statutes.²⁸ The EPA prohibits differential pay based

²³ See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE xii (1989); MAXWELL CONSTANTINE CHANDO MUSINGAFI ET AL., PHILOSOPHIZING EXPERIENCES AND VISION OF THE FEMALE BODY, MIND, AND SOUL HISTORICAL CONTEXT AND CONTEMPORARY THEORY 24 (2021) (“[O]bjectification cannot serve as the common condition for womanhood since it varies considerably depending on one’s race and class.”).

²⁴ Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. REV. 457, 483–86 (2018) (proposing that intersectionality becomes a more credible theory by identifying the structural inequities that produce the intersecting discrimination).

²⁵ McMurtry-Chubb, *supra* note 11, at 37.

²⁶ Equal Pay Act of 1963, 29 U.S.C. § 206 (1963). The Equal Pay Act of 1963 amended the Fair Labor Standards Act of 1938. *Id.*

²⁷ Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1) (2018). It also prohibits employment discrimination based on “color, religion, . . . and national origin.” *Id.*

²⁸ See *Overview*, EEOC, <https://www.eeoc.gov/overview> [<https://perma.cc/3WPH-MUF8>] (last visited July 30, 2022). An employee filing a timely claim under Title VII alleging discrimination by an employer must be filed with the EEOC within 180 days

on gender by monitoring the pay differentials between men and women, working in the same establishment, performing jobs that require “substantially equal skill, effort and responsibility under similar working conditions.”²⁹

Title VII prohibits discrimination in employment, including hiring and compensation, based on race or sex.³⁰ This Section focuses on the history and intent behind both statutes. Neither statute as presently configured ameliorates sex- and race-based discrimination. As argued below, to turn a blind eye to the political and legal principles that foster discrimination and create unjust economic conditions for Black women and other women of color is inconsistent with the purpose of laws intended to prohibit gender discrimination.

1. Equal Pay Act of 1963

The United States first recognized the gender wage gap as problematic during World War I. During World War I, the National War Labor Board regulated wartime wages by requiring equal pay for equal work.³¹ Attempts to regulate the gender wage

of the violation. See *Time Limits for Filing a Charge*, EEOC, <https://www.eeoc.gov/time-limits-filing-charge> [<https://perma.cc/5X4C-4HGN>] (last visited July 30, 2022). In 2012, the EEOC published a Strategic Enforcement Plan. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN: FISCAL YEARS 2017–2021 (2017), <https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021> [<https://perma.cc/ZYH3-W4KV>]. The EEOC stated, “[t]he Commission continues to focus on gender-based pay discrimination. In addition, in recognition of the pay disparities that persist based on race, ethnicity, and for individuals with disabilities and other protected groups, the Commission extends its equal pay priority to explicitly reach all workers.” *Id.*

²⁹ *The Equal Pay Act of 1963*, EEOC, <https://www.eeoc.gov/statutes/equal-pay-act-1963> [<https://perma.cc/4UD6-86DM>] (last visited July 20, 2022); see also Equal Pay Act of 1963, 29 U.S.C. § 206 (1963).

³⁰ 42 U.S.C. § 2000e-2(a)(1). Title VII's employment discrimination prohibitions include “color, religion, . . . and national origin.” *Id.*

³¹ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, 0Q7 NO. LOI, LABOR AS AFFECTED BY THE WAR (1921) (“That in all cases where women do the same work as men they shall receive equal pay for equal work.”). During World War II, the National War Labor Board “issued a ruling establishing the principle of equal pay for equal work.” Marguerite J. Fisher, *Equal Pay for Equal Work*, 2 INDUS. AND LAB. REL. REV. 50, 51 (1948). Although the United States refused to adopt it, the International Labor Organization ratified the Equal Remuneration Convention (No. 100) in 1951, representing an international consensus on pay equity. See *Equal Remuneration for Work of Equal Value*, INT'L LAB. ORG., https://www.ilo.org/global/topics/wages/minimum-wages/rates/WCMS_433906/lang-en/index.htm [<https://perma.cc/9G69-LUGL>] (last visited July 30, 2022); *Up-to-date*

gap continued after World War I and World War II, and in 1962 Congress began considering wage equity on the federal level.

In 1945, Congress introduced the Women's Equal Pay Act.³² This initial proposal mandated equal pay for "comparable quality and quantity" of work.³³ However, Congress rejected this approach reasoning that enforcement of the proposed standard would become burdensome.³⁴ Accordingly, the standard became "equal pay for equal work."³⁵ For years, critics of the EPA have justified the gender wage gap as an old wives' tale. Simply put, many critics deny the gender pay gap exists: "The gap isn't real, because after adjusting for the different types of jobs that men and women tend to have, the gap shrinks to single digits."³⁶ Men and women are paid differently because they choose to go into different professions; unequal work, thus unequal pay.³⁷ This type of reasoning allowed private industry to use subjective job classifications and position evaluations to maintain wage differentials.

The EPA's legislative history makes clear the congressional intent was to eliminate pay disparities between men and women, and thus eradicate economic inequalities.³⁸ Although the employee bears the burden of proof to establish a wage differential,

Conventions and Protocols not ratified by the United States of America, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO:P11210_COUNTRY_ID:102871 [<https://perma.cc/3UZ2-5FHJ>] (last visited July 30, 2022).

³² *Equal Pay*, HISTORY (Apr. 2, 2019), <https://www.history.com/topics/womens-rights/equal-pay-act> [<https://perma.cc/CS2K-EYUJ>].

³³ *Id.*

³⁴ In expressing his support for the bill, Representative Goodell of New York explained, "[w]e do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal." 109 CONG. REC. 9197 (1963) (remarks of Rep. Goodell).

³⁵ See *Corning Glass Works v. Brennan*, 417 U.S. 188, 190, 205 (1974) (deciding whether it was a violation of the EPA for an employer to pay male inspectors more than female inspectors doing the same job).

³⁶ Bourree Lam, *What Gender Pay-Gap Statistics Aren't Capturing*, ATLANTIC (July 27, 2016), <https://www.theatlantic.com/business/archive/2016/07/paygap-discrimination/492965/> [<https://perma.cc/8E2Q-BJAZ>].

³⁷ *Id.*

³⁸ The EPA provides,
No employer . . . shall discriminate . . . between employees on the basis of sex . . . except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.
29 U.S.C. § 206(d)(1).

discriminatory intent on the part of the employer is not required.³⁹ Meeting the burden only requires the employee to identify a similarly situated male employee, who performs “substantially equal” work.⁴⁰ The burden then shifts to the employer to “show that the factor of sex provided *no basis* for the wage differential.”⁴¹

It is unambiguous that the statute is remedial and imposes strict liability on employers.⁴² By requiring clarity in the criteria of seniority, merit, and productivity, employers can put forth affirmative defenses that justify the wage differentials.⁴³ It is less clear if the statutory intent is followed when an employer’s justification for a wage differential falls under the catchall affirmative defense.⁴⁴ The catchall affirmative defense—based on “any other factor other than sex”—has been interpreted by courts to allow an employer to use evidence of ambiguous factors—for example, prior salary, worth, flexibility, and future potential.⁴⁵ This rationale seems at best an indirect way for an employer to use “sex-related” factors to justify discriminatory wages.⁴⁶ Although an employee can present a *prima facie* case by showing the salary differences, the employer can defend by providing a rationale that is not based on prohibited criteria. The employee must then prove that the stated reason is merely a pretext for a decision based on prohibited criteria.⁴⁷ Some circuits have

³⁹ *Id.*; *Corning Glass Works*, 417 U.S. at 195–97.

⁴⁰ *Corning Glass Works*, 417 U.S. at 204 n.24. The EPA plaintiff has the burden of establishing a *prima facie* case, which requires showing: (1) “an employer pays different wages to employees of opposite sexes”; (2) “for equal work on jobs the performance of which requires equal skill, effort, and responsibility”; and (3) “which are performed under similar working conditions.” *Id.* at 195.

⁴¹ *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995) (quoting *Mulhall v. Advance Sec., Inc.* 19 F.3d 586, 590 (11th Cir. 1994)).

⁴² Referring to the EPA, the Supreme Court of the United States in *Corning Glass Works* described the statute as “broadly remedial . . . it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.” 417 U.S. at 208.

⁴³ 29 U.S.C. § 206(d).

⁴⁴ See 109 CONG. REC. 1963 at 9210 (statement of Rep. Goodell) (noting that it would be “impossible to list each and every exception”).

⁴⁵ 29 U.S.C. 206(d)(1); *County of Washington v. Gunther*, 452 U.S. 161, 169–70 (1981); see *infra* note 48.

⁴⁶ Currently there is a split among the circuits on whether an employer can use prior salary as an *other-than-sex-related* factor under the EPA. See *infra* notes 47–54 and accompanying text.

⁴⁷ See *Keziah v. W.M. Brown & Son, Inc.*, 888 F.2d 322, 326 (4th Cir. 1989) (“One of the things undermining the company’s defense is the pure subjectivity of the salary-setting process. The salaries were based on nothing more than [a] subjective evaluation of [the employees’] worth.”).

permitted the “factor other than sex” defense to apply only if prior salary is not the only basis of the affirmative defense.⁴⁸

2. Title VII of the Civil Rights Act of 1964

Title VII’s prohibition against gender discrimination has a sordid history. The “sex amendment” was intended to ensure that proposed legislation prohibiting race discrimination would never become law.⁴⁹ Instead, prohibiting gender discrimination gained broader support, as feminists advocated for prohibiting their unequal treatment under law as well.

Title VII has broad remedial powers. Disparate impact is where a facially neutral employment policy has the effect without the intent of discrimination against a protected group of employees, whereas disparate treatment is intentional employment discrimination.⁵⁰ Thus, the key difference between treatment and impact, is that a disparate impact claim does not require intent.⁵¹ The Supreme Court of the United States articulated disparate impact in *Griggs v. Duke Power Co.*, where the Court determined that Title VII prohibits “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”⁵² Further, the Court stated, “[t]he touchstone is business necessity.”⁵³ Thus, if the employer could not show that the neutral employment practice is related to the

⁴⁸ See *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570–71 (11th Cir. 1988) (prior salary alone cannot justify a pay disparity but may be combined with unique characteristics of the same job; the “individual’s experience, training, or ability; or from *special exigent circumstances* connected with the business”) (emphasis added); see also *Irby v. Bittick*, 44 F.3d 949, 955–57 (11th Cir. 1995) (explaining that employers may use evidence of prior salary history if there is a “mixed-motive, such as prior pay and more experience”); *Riser v. QEP Energy*, 776 F.3d 1191, 1198–99 (10th Cir. 2015) (“[T]he EPA ‘precludes an employer from relying solely upon a prior salary to justify pay disparity.’”) (quoting *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500, 508 (10th Cir. 2003)).

⁴⁹ There was a genuine concern even among feminists that adding sex discrimination to the civil rights legislation would torpedo the legislation’s passage. See 110 CONG. REC. 2581 (1964) (statement of Edith Green) (“[L]et us not add any amendment that would place in jeopardy in any way our primary objective of ending that discrimination that is most serious, most urgent, most tragic, and most widespread against the Negroes of our country.”).

⁵⁰ Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL’Y REV. 95, 96, 104 (2006).

⁵¹ *Id.* at 99 (“For this reason, disparate impact has been likened to a negligence theory in claims of discrimination.”) (footnote omitted).

⁵² 401 U.S. 424, 431 (1971).

⁵³ *Id.*

job and job performance, the practice is prohibited.⁵⁴ However, because disparate impact is a “creature of case law,” the Court has been able to chip away at its protections.⁵⁵

Disparate treatment is completely different than disparate impact because disparate treatment is premised on intentional employment discrimination. Importantly, the burden of persuasion as to whether the employer intentionally discriminated against the plaintiff remains with the plaintiff throughout the trial.⁵⁶ In *McDonnell Douglas Corp. v. Green*, the Supreme Court set out the elements of a prima facie case:

(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open, and the employer continued to seek applicants from persons of complainant's qualifications.⁵⁷

After the plaintiff makes out a prima facie case, the burden shifts to the defendant employer to show that there was a nondiscriminatory and legitimate reason.⁵⁸ If the defendant satisfies this, the plaintiff must show that the employer's action was simply a pretext for intentional discrimination.⁵⁹

Until 1980, a Title VII gender-based wage discrimination claim required the EPA's “equal pay for equal work” standard. For women claiming wage discrimination, this requirement severely limited the available remedies under Title VII because men predominately held high-paying jobs and positions.⁶⁰ However, after *Washington County v. Gunther*, the “equal work” criteria was no longer a bar for women challenging wage disparity.⁶¹ Yet,

⁵⁴ *Id.*

⁵⁵ Seiner, *supra* note 50, at 101.

⁵⁶ Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

⁵⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (footnote omitted). Notably, the Court stated, “[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.” *Id.* at 802 n.13.

⁵⁸ *Id.*

⁵⁹ *Id.* at 798.

⁶⁰ *Washington County v. Gunther*, 452 U.S. 161, 202 (1981) (Rehnquist, J., dissenting).

⁶¹ As a result of *Gunther*, the requirements for a prima facie case under the Equal Pay Act no longer restrict Title VII actions. *Id.* at 180–81.

Gunther left open questions as to proving sex-based wage discrimination under the disparate impact framework as well.⁶²

[T]he Supreme Court held that the Bennett Amendment incorporates into Title VII the four affirmative defenses of the Equal Pay Act, but not the unequal pay for equal work requirement. Treating the case as one of disparate treatment, the Court did not discuss whether the Bennett Amendment precludes all disparate impact claims of sex-based wage discrimination. The Court also declined to address whether unequal pay for jobs of “comparable worth” violates Title VII.⁶³

One of the problems with anti-discrimination law regarding equal pay is the individualized nature of the discrimination claim. To avoid wide-spread liability, there must be a causal connection between the employer and employee. Industry-wide studies show the prevalence of discrimination along gender, racial and ethnic lines. However, these studies cannot be used to bring a discrimination case unless the studies can show a specific employer paid a Black woman or a woman of color less because of sex or race. Examining the data on the distribution of wage inequality among different groups is helpful in assessing areas of reform.

C. *The Political Economy of the Gender Pay Gap*

Economic security is a measure of a person’s financial position, the ability to earn income, and to build and maintain wealth. Increased enforcement of equal pay laws is a workplace protection that women need.⁶⁴ Examining the overlay of race and gender shows the relationship between equal pay and economic security. Out of the 38.1 million people living in poverty, 21.4 million of them are women.⁶⁵ Black women experience poverty about twice as much as white women.⁶⁶ The wage gap is exacerbated through its effect on women’s retirement income.

⁶² Mark B. Seidenfeld, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083, 1084 (1982).

⁶³ *Id.* (footnote omitted).

⁶⁴ Additional workplace protections for women include flexibility for pregnant women and nursing mothers and expanding employment opportunities for women in high-wage, high-demand occupations.

⁶⁵ ROBIN BLEIWEIS ET AL., CTR. FOR AM. PROGRESS, THE BASIC FACTS ABOUT WOMEN IN POVERTY 1 (Aug. 3, 2020), https://cdn.americanprogress.org/content/uploads/2020/08/07060425/Women-In-Poverty-UPDATE.pdf?_ga=2.188258216.1019663776.1627847104-1733293776.1625491108 [<https://perma.cc/34X2-UA2H>].

⁶⁶ *Id.* at 2–3.

“Women’s lifetime earnings exert a large impact on their level of retirement security, as they determine Social Security benefits, DB pension income, and savings”⁶⁷ Women, age 65 and older, are 80% more likely to be impoverished in retirement than men.⁶⁸ Further, “women between the ages of 75 [and] 79 are three times more likely than men to be living in poverty.”⁶⁹

The wage gap is closing, but for Black women that progress is limited. The most significant improvement has been for white and Asian women. Over the last 30 years, Asian women’s earnings ratio changed from 69% to 87%—an 18% difference; the Asian women’s wage gap is expected to close by 2041.⁷⁰ Similarly, white women’s earnings ratio changed from 64% to 79%—a 15% difference; the white women’s wage gap is projected to close by 2069.⁷¹

The changes in the racialized wage gap are more limited for Black women and other women of color. For Black women, there was a 4% improvement in the ratio, up to 63% from 59%.⁷² For Latina women, the earnings ratio increased only by 2%, up to 55% from 53%.⁷³ Given these current ratios, Black women can expect the gap to close in 2369, or in 350 years, and Latina women can expect their gap to close in 2541, which is in 432 years.⁷⁴ Black women’s median annual earnings are less than white men’s in every state in the country.⁷⁵ “Black women’s lower earnings are due to numerous systemic inequalities, including discrimination in recruitment and promotion, the undervaluation of work in occupations where many Black women work, and their underrepresentation in the jobs that pay most.”⁷⁶ Evidence of industry-wide discrimination against women of color is

⁶⁷ JENNIFER BROWN ET AL., NAT’L INST. ON RET. SEC., SHORTCHANGED IN RETIREMENT CONTINUING CHALLENGES TO WOMEN’S FINANCIAL FUTURE 2 (March 2016), https://www.nirsonline.org/wp-content/uploads/2017/06/final_shortchanged_retirement_report_2016.pdf [<https://perma.cc/EL6E-986X>].

⁶⁸ *Id.* at 1.

⁶⁹ *Id.*

⁷⁰ *Race and the Pay Gap*, AAUW, *supra* note 5.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ ARIAN HEGEWISCH & CHANDRA CHILDERS, INST. FOR WOMEN’S POL’Y REPORT (IWPR), BLACK WOMEN TO REACH EQUAL PAY WITH WHITE MEN IN 2130, IWPR #Q086, at 2 (August 2020), <https://iwpr.org/wp-content/uploads/2020/08/Black-Women-Equal-Pay-Day-Policy-Brief.pdf> [<https://perma.cc/NXW7-7Q2P>].

⁷⁶ *Id.*

compelling. Even when women of color have greater educational attainment than white men, women of color are paid less.

While the wage gap decreased for white women as education level increased, higher education does not make a significant difference in earnings for women of color. Black women who graduated high school earned 65.99% of what similarly educated white, non-Hispanic men earned.⁷⁷ When they completed a bachelor's degree, that earnings ratio dropped to 65.14%.⁷⁸ Latina women who graduated high school earned 66.78% of what white, non-Hispanic male high school graduates earned—a number that dropped to 62.73% upon graduating with their bachelor's degree.⁷⁹ “Native American women who earned a high school diploma earned 66.7% of what their white, non-Hispanic male counterparts earned,” but decreased to 59.2% for Native American women with a bachelor's degree.⁸⁰

Finally, although the wage gap for Asian women appears less significant, the best indicator is a woman's country of origin.⁸¹ The wage gap is non-existent or relatively insignificant for women who report Indian or Chinese ethnicity or ancestry.⁸² But women who identify as Filipina, Vietnamese, and Korean are paid much less.⁸³ Moreover, the “model minority myth” tends to ignore the discrimination these women encounter as an ethnic subgroup.⁸⁴

⁷⁷ *Race and the Pay Gap*, AAUX, *supra* note 5.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ NAT'L PARTNERSHIP FOR WOMEN AND FAMILIES, ASIAN AMERICAN AND PACIFIC ISLANDER WOMEN AND THE WAGE GAP 1 (Mar. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/asian-women-and-the-wage-gap.pdf> [<https://perma.cc/QK54-KHSZ>].

⁸² *Id.* at 4.

⁸³ *Id.* at 2.

⁸⁴ See Tami Abdollah & Trevor Hughes, *Hate Crimes Against Asian Americans are on the Rise. Here's What Activists, Lawmakers and Police are doing to stop the violence*, USATODAY (Mar. 4, 2021), <https://www.usatoday.com/story/news/nation/2021/02/27/asian-hate-crimes-attacks-fueled-covid-19-racism-threaten-asians/4566376001/> [<https://perma.cc/2U7L-DHV3>]; Suzanne Nuyen, *Anti-Asian Attacks Rise During Pandemic. Read NPR's Stories On The Surge In Violence*, NPR (Mar. 17, 2021), <https://www.npr.org/2021/03/17/978055571/anti-asian-attacks-rise-during-pandemic-read-nprs-stories-on-the-surge-in-violen> [<https://perma.cc/XC4X-FYPV>]; Vivian Ho, *Asian Americans Reported 3,800 Hate-Related Incidents During the Pandemic, Report Finds*, GUARDIAN (Mar. 16, 2021), <https://www.theguardian.com/us-news/2021/mar/16/asian-americans-hate-incidents-pandemic-study> [<https://perma.cc/5LTM-G8QK>].

D. *The Inadequacy of Existing Laws*

The EPA differs from Title VII in three key respects. First, the EPA is limited to wage discrimination based on sex when male and female coworkers in the same workplace are paid differently.⁸⁵ Second, unlike Title VII, which can only be enforced if the employer has fifteen or more employees, the EPA applies to any employer.⁸⁶ Third, the claims process under Title VII requires a plaintiff to file a claim with the EEOC for review before the institution of a lawsuit.⁸⁷ What follows is a brief look at how the case law has developed under the EPA and Title VII, which will provide a better understanding of why the law and accompanying regulations should become uniformly consistent in prohibiting discrimination against Black women and other women of color employees.

1. Equal Pay Act of 1963

Congress intended the Equal Pay Act to remedy the severe, widespread problem of employment discrimination in private industry. When the statute was passed in 1963, the myth of male superiority was still prevalent.⁸⁸ Thus, to uncover discrimination it was necessary to require employers to justify any decision to not pay equally for equal work. The loophole in the EPA is the causal connection needed between the male comparator salary and the “factor other than sex” defense.⁸⁹

⁸⁵ 29 U.S.C. § 206(d)(1) (2012).

⁸⁶ *Coverage of Business/Private Employers*, EEOC, https://www.eeoc.gov/employers/coverage_private.cfm [<https://perma.cc/6KRJ-UD8C>] (last visited June 23, 2022); see also *Know Your Rights: Title VII of the Civil Rights Act of 1964*, AAUW, <https://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/title-vii/> [<https://perma.cc/5L6D-MEKW>] (last visited June 23, 2022).

⁸⁷ The EPA statute of limitations is longer. A plaintiff may bring a claim within two years of receipt of the last discriminatory paycheck. *Coverage of Business/Private Employers*, *supra* note 86. With Title VII claims, the complainant has at least 180 days from the time the discrimination occurred to file a charge and 90 days to file a lawsuit after receiving a Notice of Right to Sue. *Know Your Rights: Title VII of the Civil Rights Act of 1964*, *supra* note 86.

⁸⁸ At that time, throughout the private employment sector, there was the outdated belief that a man, because of his role in society, should be paid more than a woman although his duties were the same. Undoubtedly, this belief remains.

⁸⁹ The Paycheck Fairness Act (H.R.7) was reintroduced in the House of Representatives on January 28, 2021, by Rep. Rosa DeLauro (D-CT). Originally introduced on January 9, 2009, and passed by the House of Representatives, it would close the loophole in the EPA that allows employers to use the “factor other than sex” as an affirmative defense. Unfortunately, the Paycheck Fairness Act does not alter

Unlike Title VII's business necessity defense, the EPA's "factor other than sex" defense is, by definition, a broad, ill-defined justification.⁹⁰ Under the comparable Title VII "business necessity" standard, an employer must demonstrate that a practice is job related for the position in question and consistent with business necessity. Further, under Title VII, the employer bears the burden of showing that the rejected alternative employment practice would both have a less disparate impact and satisfy its legitimate business interest.

Pursuant to the EPA, after the plaintiff presents a prima facie case that a comparable male employee makes more money for performing equal work—doing jobs that require equal skill, effort, and responsibility—the employer can justify the wage disparity using one of four affirmative defenses.⁹¹ An employer may justify such conduct if it set wages pursuant to: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings, quantity or quality of production; or (iv) a differential based on any other factor other than sex."⁹² Although the "factor other than sex" defense does not fall into one of the enumerated defenses—seniority, merit, or quantity of production—it should be interpreted consistently with the Equal Pay Act's goal of rooting out pay discrimination. Yet, unlike in the following cases where the "factor other than sex" is properly interpreted, the standard is often misapplied.

In *Corning Glass Works v. Brennan*, the Supreme Court rejected a neoclassical economics argument that "market economics" can constitute a "factor other than sex."⁹³ The defendant, Corning Glass Works ("Corning"), argued that the market value of men's labor for the position determined the higher salaries for men's work over women's.⁹⁴ Men, who historically made up the workforce and who had greater bargaining power, received a higher salary.⁹⁵

the safeguards embedded in the Equal Pay Act that ensure that employers exercise appropriate discretion in setting compensation in nondiscriminatory ways.

⁹⁰ *Id.*

⁹¹ 29 U.S.C. § 206(d)(1).

⁹² *Id.*

⁹³ 417 U.S. 188, 207-08 (1974).

⁹⁴ *Id.* at 205-08.

⁹⁵ *Id.* at 204-06. See also *Siler-Khodr v. Univ. of Texas Health Science Ctr.*, 261 F.3d 542, 549 (5th Cir. 2001) (citations omitted) ("This Court has previously stated that the University's market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA.").

Corning instituted a night shift inspector position at a time when New York and Pennsylvania prohibited female employees from working at night.⁹⁶ To recruit male employees to these inspector positions, Corning paid male employees more than the dayshift, female employees.⁹⁷ Corning argued that male employees would not perform inspection work unless they received more money than the daytime female inspectors; in other words, that the pay differential was not based on sex, it was based on their need to accommodate the male night shift workers.⁹⁸ The Court rejected Corning's argument reasoning that the company's decisions to pay women less for the same work men performed "took advantage" of the market and was illegal under the Equal Pay Act.⁹⁹

Under *Corning Glass Works*, courts should require employers using the "factor other than sex" affirmative defense to evaluate whether an employer's assertion of more experience or better credentials are necessary for the position. This is to ensure that the prior salary earned by a male comparator is not itself the product of sex discrimination or a residual effect of the traditionally enhanced value attached to work performed by men.

Several circuit courts have followed *Corning*. In *Belfi v. Pendergrast*, the employer refused to increase the salary of a female railroad office engineer to equal that of male office engineers alleging that it was applying a gender-neutral salary plan.¹⁰⁰ The Second Circuit correctly required that the employer prove that its established policy was not connected to the gender-based discrimination.¹⁰¹ *Keziah v. W.M. Brown & Son, Inc.*, involved a salary differential based on the male comparator's "experience and customer base."¹⁰² The Fourth Circuit held that the absence of salary guidelines or concrete standards for determining salary resulted in purely subjective salary

⁹⁶ *Corning Glass Works*, 417 U.S. at 191-92.

⁹⁷ *Id.* at 191 n.3. Many men viewed the inspector position, which had historically been a day position composed of only women, as inferior "women's work." *Id.*

⁹⁸ *Id.* at 197, 204.

⁹⁹ *Id.* at 205.

¹⁰⁰ 191 F.3d 136 (2d Cir. 1999).

¹⁰¹ *Id.* at 139 ("Where there is a discrepancy in wages and the employer offers its established policy as an explanation, inquiry must focus on whether that policy has been used reasonably in the case at hand, in light of the employer's stated purpose for the policy and in light of the employer's other practices.").

¹⁰² 888 F.2d 322, 324 (4th Cir. 1989).

determinations.¹⁰³ In *Rizo v. Yovino*, the Ninth Circuit limited the scope of the “factor other than sex” affirmative defense based on the employer’s use of prior pay as a job-related factor.¹⁰⁴ Additionally, the Ninth Circuit determined that although different pay can be justified when it is based on certain affirmative defenses, salary history is not a justification for different pay.¹⁰⁵

Despite *Corning*, employers have continued to argue, and courts have continued to accept, a “market forces” theory to justify pay differentials. In *Merillat v. Metal Spinners, Inc.*, the Seventh Circuit allowed an employer to take market forces into account when using the “factor other than sex” affirmative defense.¹⁰⁶ Notably, the court was aware that the market forces defense could justify discrimination.¹⁰⁷

Equally, some courts have narrowed and constrained the EPA in ways that undermine its fundamental goals. Specifically, courts have interpreted the EPA’s “factor other than sex” as inapposite to the comparable Title VII “business necessity” standard. Some courts allow unrestricted rationales—legitimate or not—for “factor other than sex” defense.¹⁰⁸

Courts avoid the EPA’s mandate of equal pay for equal work and instead support an employer’s claim that a man’s greater experience or education justifies a higher salary.¹⁰⁹ In *Boriss v. Addison Farmers Insurance Company*, an Illinois federal district court improperly accepted the male comparators’ purportedly superior qualifications as a “factor other than sex” without justifying whether those qualifications were in fact necessary for the job.¹¹⁰ In fact, at least two circuits have accepted the argument that *any* “factor other than sex” should be interpreted literally and

¹⁰³ *Id.* at 326.

¹⁰⁴ 950 F.3d 1217, 1227 (9th Cir. 2020).

¹⁰⁵ *Id.*

¹⁰⁶ 470 F.3d 685, 697–98 (7th Cir. 2006).

¹⁰⁷ *Id.* at 697 n.6.

¹⁰⁸ *See* Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir.1989) (“The fourth affirmative defense (any other factor other than sex) is a broad ‘catch-all’ exception and embraces an almost limitless number of factors, so long as they do not involve sex.”).

¹⁰⁹ Notably, the Ninth Circuit recently stated that the Seventh Circuit’s opinion in *Fallon* is an outlier, and that it could not “reconcile it with either well-settled rules of statutory construction or the ‘broadly remedial’ purpose of the EPA.” *Rizo v. Yovino*, 950 F.3d 1217, 1226 (9th Cir. 2020).

¹¹⁰ No. 91 C 3144, 1993 WL 284331, at *9 (N.D. Ill. July 26, 1993).

that employers need not justify whether certain qualifications are necessary for the job.¹¹¹

The most egregious cases occur when the courts approve “factors other than sex” arguments that seriously undermine the stated principles of the EPA. Some courts have, for example, authorized employers to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by those male workers without any analysis as to whether the prior salary itself was inflated because of sex discrimination. In *Sparrock v. NYP Holdings, Inc.*, a New York federal district court dismissed the plaintiff’s EPA claim, holding that “salary matching is permitted under the Equal Pay Act” because “it allows an employer to award prior experience and to lure talented people from other settings.”¹¹² The district court ignored the evidence that the male and female employees had similar experience and qualifications for the position.¹¹³

Other courts have abandoned any effort to determine whether the employer’s purported “factor other than sex” is in any way related to the qualifications, skills, or experience needed to perform the job. In *Glunt v. GES Exposition Services, Inc.*, the court approved offering a male employee a higher starting salary and stated that “[o]ffering a higher salary in order to induce a candidate to accept the employer’s offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity.”¹¹⁴ The court reasoned that “[i]t is widely recognized that an employer may continue to pay a transferred or reassigned employee his or her previous higher wage without violating the EPA, even though the current work may not justify the higher wage.”¹¹⁵ In *Drury v. Waterfront Media, Inc.*, the court accepted an argument that higher pay for a male comparator was necessary to “lure him away from his prior employer.”¹¹⁶ The court emphasized that “[s]alary matching and experience-based compensation are

¹¹¹ See *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) (“The disagreement between this circuit (plus the eighth) and those that required an ‘acceptable business reason’ is established, and we are not even slightly tempted to change sides.”).

¹¹² *Sparrock v. NYP Holdings, Inc.*, No. 06 Civ. 1776, 2008 WL 744733, at *15–16 (S.D.N.Y. Mar. 4, 2008).

¹¹³ *Id.*

¹¹⁴ 123 F. Supp. 2d 847, 859 (D. Md. 2000).

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ No. 05 Civ. 10646, 2007 WL 737486, at *4 (S.D.N.Y. Mar. 8, 2007).

reasonable, gender-neutral business tactics, and therefore qualify as ‘a factor other than sex.’”¹¹⁷ In fact, the Seventh Circuit went a step further and held that it “does not require that the factor other than sex be related to the requirements of the particular position in question, or that it be a ‘business-related reason’ [].”¹¹⁸

The uneven interpretation of the EPA’s “factor other than sex” defense defeats the EPA’s intended impact as a vehicle for addressing pay inequity. Reforms are crucial to implement the statute as intended. Similarly, as discussed below, reforms are also needed to Title VII to address the false dichotomy posed by the statute for Black women and other women of color.

2. Title VII of the Civil Rights Act of 1964

The outstanding issue involving Title VII and the racialized wage gap is whether and how to use intersectionality theory. Intersectionality posits that among a heterogeneous group, there are different experiences of discrimination and inequality. Specifically, it espouses that the discriminatory wrong-doing experienced by Black women is both gendered and racialized.¹¹⁹ Yet, Black women plaintiffs claiming discrimination are limited to bringing claims based on either race or sex in most jurisdictions.¹²⁰ Title VII has a categorical framework that recognizes racism and sexism. This protects Black men and white women from employment discrimination but marginalizes Black women.¹²¹

Intersectionality within Title VII litigation has been difficult to achieve. While Black women plaintiffs continue to present the theory as the basis of a discrimination claim, courts have continued to analyze the identities—race and gender—separately.¹²² In *DeGraffenreid v. General Motors*, five Black women filed a lawsuit challenging the disparate impact of GM’s

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1211 (citing *Covington v. Southern Illinois Univ.*, 816 F.2d 317, 321–22 (7th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987)).

¹¹⁹ Crenshaw, *supra* note 14, at 150–52.

¹²⁰ Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1457–59 (2009) (study concluding that multiple claims are not as successful as single claims).

¹²¹ See Pegg R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN’S L.J. 21, 21 (1991) (“We are rarely recognized as a group separate and distinct from Black men, or as a present part of the larger group ‘women’ in this culture.”) (citing BELL HOOKS, *AIN’T I A WOMAN* 7 (1981)).

¹²² Kotkin, *supra* note 120, at 1458–59.

“last hired first fired” policy, which gave birth to claims of intersectional discrimination.¹²³ The trial court determined that the plaintiffs could sue on the basis of race or on the basis of sex, but they were not allowed to combine the claims.¹²⁴ In rejecting the claim of intersectional discrimination, the district court reasoned that to combine claims would create a special subclass beyond the scope of Title VII.¹²⁵ The Eighth Circuit held that the statute arguably allows plaintiffs to bring a claim based on only one protected class, race or sex, thus, limiting the plaintiffs’ ability to expose the breadth and depth of their experienced inequality.¹²⁶

The Fifth Circuit allowed a combined claim of race and sex a discrimination in *Jefferies v. Harris Community Action Ass’n*.¹²⁷ In that case, which alleged disparate treatment, a Black woman employed as a secretary, was denied several promotions within the company.¹²⁸ Instead of the plaintiff, a Black man and a white woman were promoted.¹²⁹ The district court found in favor of the defendant employer.¹³⁰ The district court found that plaintiff did not meet her prima facie burden because a Black man and a white woman had been promoted.¹³¹

In reversing the district court’s decision, the Fifth Circuit used a “sex-plus” analysis.¹³² Applying this theory allowed the plaintiff to bring a gender discrimination plus a race discrimination claim based on a neutral factor.¹³³ The court directly refuted *DeGraffenreid*, saying, “the fact that black males and white females are not subject to discrimination is irrelevant.”¹³⁴ This expansive view of Title VII is significant for Black women alleging discrimination based on multiple identifiers. But the *Jefferies*

¹²³ 413 F. Supp. 142, 143 (E.D. Mo. 1976).

¹²⁴ *Id.* at 143–44.

¹²⁵ *Id.* at 143, 145.

¹²⁶ 558 F.2d 480, 484 (8th. Cir. 1977) (“We do not subscribe entirely to the district court’s reasoning in rejecting [the Black women’s] claims of race and sex discrimination under Title VII.”).

¹²⁷ 615 F.2d 1025 (5th Cir. 1980).

¹²⁸ *Id.* at 1029.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1030–31.

¹³¹ *Id.* at 1031.

¹³² *Id.* at 1033.

¹³³ *Id.* (adopting the reasoning of *Phillips v. Martin Marietta Corp.*, where the court found systemic disparate treatment claim based on a company policy that forbade hiring women with preschool children. The discrimination category was sex. The neutral category was having pre-school age children. 400 US 542, 544 (1971)).

¹³⁴ *Id.* at 1034 n.7.

court did not provide a framework for intersectional discrimination cases going forward.¹³⁵

Legal decisions that interpret the EPA and Title VII in ways that foster discrimination and create unjust economic conditions for Black women and other women of color are inconsistent with the intent of anti-discrimination laws. Thus, the gender discrimination laws as implemented are ineffective. The next Part critiques the racialized gender wage gap as a structure of oppression and privilege by analyzing how neoclassical economics, political invisibility, and cultural stereotypes promote rather than eliminate it.

II. THE STRUCTURAL BARRIERS OF THE RACIALIZED WAGE GAP

Intersectionality is an inclusive concept for understanding and contesting multiple oppressions.¹³⁶ Using the theory to analyze marginalization requires unpacking the particular ways in which dominance and control are perpetuated and protected. By examining the nuances of the intersecting identities, scholars can interrogate the power structures that propagate oppression and facilitate the discriminatory relationship between the oppressor and the oppressed. Failure to segregate and separately examine the underlying structures results in incomplete knowledge about its effect, obscures the harm to the individual, and hampers effectual dismantling.¹³⁷ As discussed below, neoclassical economic theory, political invisibility, and cultural stereotypes and tropes each contribute to the perpetual existence of the racialized wage gap.¹³⁸

¹³⁵ Angela Mae Kupenda et al., *Political Invisibility of Black Women: Still Suspect but No Suspect Class*, 50 WASHBURN L.J. 109, 123–24 n.110 (2010).

¹³⁶ See BARBARA SMITH, HOME GIRLS: A BLACK FEMINIST ANTHOLOGY xxxi (2000) (Smith described the women’s liberation movement as “a movement committed to fighting sexual, racial, economic, and heterosexist oppression, not to mention one which opposes imperialism, anti-Semitism, the oppressions visited upon the physically disabled, the old and the young, at the same time that it challenges militarism and imminent nuclear destruction is the very opposite of narrow.”).

¹³⁷ See McMurtry-Chubb, *supra* note 11, at 14–15 (arguing that failing to uncouple and separately examine the theories that comprise intersectionality is “hegemonic discourse,” but not an effective theory for social changes).

¹³⁸ A review of the substantive law is beyond the scope of this article. Rather, the discussion focuses on the economic principles that support discriminatory labor practices.

A. *Economic Theory & the Racialized Gender Wage Gap*

Law shapes the economy and economic principles shape the law.¹³⁹ Neoclassical economic theory is the predominant economic model supporting the development of law. This economic analysis of law examines issues from the perspective of marketplace efficiency.¹⁴⁰ An outgrowth of Adam Smith's *Invisible Hand* theory, neoclassical economic theory eschews even "a minimum level of governmental interference" or state intervention in economic affairs.¹⁴¹

"Neoclassical economics describes the economy as a state of equilibrium, in which the forces of supply and demand interact to achieve optimal allocation of society's resources."¹⁴² Its axioms are premised on "voluntary, informed, and rational (i.e., utility maximizing)" economic decision-making.¹⁴³ Neoclassical economics models are also based on perfect competition.¹⁴⁴ The market fairly and efficiently allocates resources and achieves a societal equilibrium as individuals make "self-interested economic decisions."¹⁴⁵

Neoclassical economic models are centered around "systems of generalizations."¹⁴⁶ This system "describes the relationships among a range of stated variables," and the analysis of these

¹³⁹ DEBORAH M. FIGART & TONIA L. WARNECKE, HANDBOOK OF RESEARCH ON GENDER AND ECONOMIC LIFE 1 (2013) (noting that "the economy is embedded in society.").

¹⁴⁰ Law and economics is the academic school of thought that emanates from neoclassical economics. See Paul G. Mahoney, *Adam Smith, Prophet of Law and Economics*, 46 J. LEGAL STUDIES 207, 219–25 (2017); see also Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 139–47 (2003).

¹⁴¹ Adam Smith saw labor and market forces as inter-connected with the market adjusting prices to reflect the value of the individual's labor. Individuals exercising self-interest devoid of political restrictions was in the best interest of the nation. See RICHARD R. WILK & LISA C. CLIGGETT, *ECONOMIES AND CULTURES: FOUNDATIONS OF ECONOMIC ANTHROPOLOGY* 49–52 (2d ed., 2007).

¹⁴² Charles R. Pouncy, *Contemporary Financial Innovation: Orthodoxy and Alternatives*, 51 SMU L. REV. 505, 540 (1998). See E. Ray Canterbury, *THE MAKING OF ECONOMICS* 92–95 (1976). See also Kenneth M. Casebeer & Charles J. Whalen, *Taking Interdependence and Production More Seriously: Toward Mutual Rationality and a More Useful Law and Economics*, 66 U. MIAMI L. REV. 141, 148–50 (2011) (arguing that economic theory must be based on mutual rationality).

¹⁴³ Pouncy, *supra* note 142, at 540.

¹⁴⁴ *Id.* at 541. See JÜRIG NIEHANS, *A HISTORY OF ECONOMIC THEORY* 490–92 (1990).

¹⁴⁵ Pouncy, *supra* note 142, at 541.

¹⁴⁶ *Id.*

variables can be used to predict changes in other variables.¹⁴⁷ This is particularly significant when discussing discrimination considering two neoclassical economics principles. The first is the axiom of static equilibrium, which means that the market responds to external stimuli as necessary and achieves a new equilibrium, a new resting point, repeatedly.¹⁴⁸ The second is the axiom that competitive economies eliminate discriminatory wages.¹⁴⁹ Theoretically, this means that over time race discrimination should diminish.¹⁵⁰ The ever-widening racialized wage gap is an indication that the market has not responded to the exogenous conditions that produce racialized economic inequality. Income inequality and wage gaps, at every economic level, continue to plague the Black community

Neither of the neoclassical economics theories of discrimination, statistical and taste, provide an adequate explanation for the racialized gender wage gap. This is, in part, because of the variables used in neoclassical economics to analyze discrimination in general, and intersectional discrimination in particular.¹⁵¹ The statistical discrimination model explains employment outcomes based entirely on “rational expectations equilibrium.”¹⁵² It equates employers’ beliefs about workers’ skill levels with “the willingness to hire.”¹⁵³ The employer then determines the amount and degree of its human capital investment based on its expectations.¹⁵⁴ The employers’ self-fulfilling, rational expectations determine workers’ actual skill

¹⁴⁷ *Id.* See MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 4 (1953) (arguing that economic models must respond to the realities of present conditions).

¹⁴⁸ Pouncy, *supra* note 142, at 542.

¹⁴⁹ *Id.*

¹⁵⁰ See Lawrence E. Blume, *The Dynamics of Statistical Discrimination*, 116 *ECON. J.* 480, 480–81 (2006).

¹⁵¹ The omitted variable problem commonly raises an issue in statistical analysis. A variable may not be included in the linear regression because it is unknown or not available. Omitting a variable may lead to upward bias, if there is an over-estimation or downward bias, if there is an under-estimation. See Jongbin Jung et al., *Omitted and Included Variable Bias in Tests for Disparate Impact*, SHARAD GOEL 5 (Aug. 29, 2019), <https://5sharad.com/papers/included-variable-bias.pdf> [<https://perma.cc/LWK5-FFCM>]. Implicit statistical discrimination occurs when protected class variables, such as race, gender, age, are excluded but other information that is highly correlated with omitted characteristics, such as zip codes, or credit scores, are proxies for the relevant factors. DEVIN G. POPE & JUSTIN R. SYDNOR, *IMPLICIT STATISTICAL DISCRIMINATION IN PREDICTIVE MODELS* 1 (May 2007).

¹⁵² See Blume, *supra* note 150, at 480.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

levels.¹⁵⁵ Whether these presumptions are correct or become “the self-fulfilling prophecy” is the question that often is raised regarding the phenomenon.¹⁵⁶ Expectations often turn into reality for no reason other than they were based on flawed, even biased, selections.¹⁵⁷

The employer's system “can have multiple equilibria with distinct employment and wage levels, each with correct expectations.”¹⁵⁸ When employment varies among groups, that difference is explained by pointing to different equilibria.¹⁵⁹ Yet, there is no critical evaluation of the equilibria factors nor policy employed when there is a poor or weak equilibrium.¹⁶⁰

Critics of neoclassical economics reject the employers' rational belief of group low productivity. Instead, this result is explained by human capital theory.¹⁶¹ Employers “learn” that they can pay less-productive employees less. Alternatively, employers might determine that the less-productive employees are productive. As that information is disseminated in the marketplace, other employers might hire the newly labeled, productive employees.¹⁶² Employers who did not ‘experiment and learn’ would be less profitable, while those who take the risk of experimenting can pay lower wages for the same quality of work.¹⁶³

Nobel Prize winner Gary Becker developed the taste for discrimination framework. Becker posits that discrimination occurs when an employer is “willing to pay.”¹⁶⁴ Taste discrimination differs, however, because the employer is obviously biased. Discrimination occurs when there is a preference to a person with a particular characteristic, despite the equal or superior qualifications of a less-desired person.¹⁶⁵ If an employer

¹⁵⁵ *Id.* at 485–86.

¹⁵⁶ See Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 THE ANTIOCH REV. 193, 196 (1948). See Blume, *supra* note 150, at 480.

¹⁵⁷ Blume, *supra* note 150, at 495–96.

¹⁵⁸ *Id.* at 481.

¹⁵⁹ *Id.*

¹⁶⁰ Gunnar Myrdal referred to an equilibrium of beliefs and behavior as “the principle of cumulation” and as “the vicious circle.” See GUNNAR G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 75–78 (1944). He advocated for remedial policies that would destabilize one equilibrium in favor of another one. *Id.*

¹⁶¹ See Blume, *supra* note 150, at 484–85.

¹⁶² *Id.* at 496.

¹⁶³ *Id.*

¹⁶⁴ GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 16–17 (1957).

¹⁶⁵ *Id.*

is prejudiced against a person of a specific race or sex, the question becomes, how much more is the employer willing to pay to avoid hiring the less-desired person.¹⁶⁶ Wage discrimination is sustainable in the presence of employers who prefer prejudice to profits.¹⁶⁷

Challenges to the neoclassical economics model are numerous because of its impact on legal decision-making.¹⁶⁸ To the extent that the present economic models influence legal decision-making, a critical assessment safeguards rather than limits employees' economic choices instead of licensing employers' choices that are a pretense for illegal economic conduct. Moreover, legal rules need to expand beyond economic rationality. Law has relied heavily on rational-person economics in evaluating discriminatory conduct based on the essential differences between men and women. However, when making gender decisions law has not accounted for the interdependence of social structures and human relationships.

In an effort to analyze the marginalization of women's economic contributions, economist Marilyn Power coined the term "social provisioning."¹⁶⁹ Her sole objective was to broaden the traditional market measures of work and its pecuniary value to include those contributions that were either low wage or

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* (describing the discrimination coefficient as a measure of the amount an employer is willing to pay to exercise the employer's prejudice).

¹⁶⁸ The feminist challenge to neoclassical economics began with an examination of the masculine biases in economic theory. *See generally* BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS (Marianne A. Ferber & Julie A. Nelson eds., 1993) (a compilation of essays arguing that economics is based on subjective rather than objective factors because its economic analysis is based on masculine assumptions.) A later perspective argued that the feminist approach to welfare economic theory by necessity incorporates social welfare functions that are important to women. *See* Gillian K. Hadfield, *Feminism, Fairness, and Welfare: An Invitation to Feminist Law and Economics*, 1 ANNUAL REV. L. & SOC. SCI. 285 (USC CLEO Research Paper No. C05-15, USC Law Legal Studies Paper No. 05-22, 2005), <https://ssrn.com/abstract=846606> [<https://perma.cc/8RNW-HF28>] (challenging the well-established notion that efficiency and income redistribution, the foundations modern welfare theory, conflict with a commitment to fairness and to well-being.) A more recent criticism of neoclassical economics developed from a collaboration of European countries is even broader and focuses on the rights of lower-wage workers, who often are women. *See* Johannes Dolderer et al., *From Neoclassical Economics to Common Good Economics*, 13 SUSTAINABILITY 1 (2021), <https://www.mdpi.com/2071-1050/13/4/2093/pdf> [<https://perma.cc/UEY2-2Z59>] (described as an interdisciplinary approach to economic theory designed to meet current economic, social and global challenges).

¹⁶⁹ Marilyn Power, *Social Provisioning as a Starting Point for Feminist Economics*, 10 FEMINIST ECON. 3, 6–7 (2004).

performed outside of markets.¹⁷⁰ Power identified five categories: (1) care work and unpaid labor; (2) well-being as economic success; (3) race, ethnicity, and class classifications; (4) agency, individual choice, and power dynamics; and (5) ethical goals and values that require a critical analysis of their effect on economic markets.¹⁷¹ Specifically, she argues that a feminist economic perspective would assign a quantifiable value to the effect of the category in economic production and exchange markets instead of having the economic effect go unmeasured.¹⁷² Eliminating these embedded economic outcomes is essential to closing the racialized wage gap.

B. *Political Invisibility*

Visibility is a power dynamic exercised by the dominant group in a socio-political structure.¹⁷³ It permits the dominant group to determine the policies, procedures, and operations of institutions. Political invisibility describes the obscurity of a citizen group when societal institutions systematically deny a group social and political rights.¹⁷⁴ To be invisible in a society is to be politically or economically powerless.¹⁷⁵ The dominant group designates which

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 9–10.

¹⁷² *Id.* at 7–15. As one scholar argues, the Supreme Court frequently furthers economic gender inequality by avoiding a nuanced examination of the economic effects of the gender issues in favor of an over-simplified market approach. See Michele E. Gilman, *En-Gendering Economic Inequality*, 32 COLUM. J. GENDER & L. 1, 22 (2016) (discussing recent Supreme Court decisions that failed to take account of the economic impact of the legal rulings on women).

¹⁷³ In an article contrasting visibility and invisibility within the work setting, psychological researchers use the following definitions:

Visibility implies that individuals are perceived in a way they desire; in the workplace, this might include being noticed for one's skills and abilities, rather than being categorized by others in terms of stereotypes about one's group. . . . We assert that for marginalized individuals, hypervisibility and invisibility are contrasts to visibility and represent different manifestations of the same oppressive forces – subjugation and devaluation. Both reflect distortions of individuals and the groups to which they belong, and both function to maintain a social hierarchy where marginalized groups are constrained to the periphery.

Nicole Buchanan & Isis H. Settles, *Managing (In)visibility and Hypervisibility in the Workplace*, 113 J. VOCATIONAL BEHAV. 1, 2–3 (2019).

¹⁷⁴ See Kupenda et al., *supra* note 135, at 115 (discussing the political invisibility of Black women and why they should be a suspect class under Title VII).

¹⁷⁵ See Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 C.R.-C.L. L. REV. 9, 9–11 (1989) (describing the dual status of Black women as creating a condition “which is more terrible than the sum of their two constituent parts”); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*,

groups are visible or invisible, excluding groups that are designated as sub-human.¹⁷⁶

In his acclaimed novel, *Invisible Man*, Ralph Ellison used the concept of invisibility to describe how Black Americans as a race feel in a society where their socio-political rights are denied.¹⁷⁷ Although the invisible woman is a citizen living in a democracy, she has limited choices and feels manipulated by the power structures that control her existence. Ellison uses invisibility to describe the relationship between an individual or group with the power structure.¹⁷⁸

Political visibility is synonymous with rights and power. Societies create social contracts with their citizens as a way of structuring order.¹⁷⁹ As a result, citizens do not have to self-defend against other citizens because they are protected by rules and laws.¹⁸⁰ John Locke's notion of the social contract is well-known.¹⁸¹ To become part of a society, citizens permanently give up their individual agency in order to receive the protection of their rights

79 CAL. L. REV. 775, 778–80 (1991) (discussing the economic fragility of women of color in the labor market).

¹⁷⁶ See Cassandra Jones Havard, *Invisible Markets Netting Visible Results: When Sub-Prime Lending Becomes Predatory*, 26 OKLA. CITY U. L. REV. 1057, 1060–67 (2001) (analogizing Ralph Ellison's notion of forced invisibility due to undemocratic exclusion to the economic subordination that forced borrowers into predatory home mortgage loans).

¹⁷⁷ Addressing the spectrum of oppression and thus recognizing as visible those who are otherwise treated as invisible, the narrator says: "I am invisible, understand, simply because people refuse to see me. . . . When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me." RALPH ELLISON, *INVISIBLE MAN* 3 (Prologue, 2d Vintage Int'l ed. 1995). As one commentator notes:

[A] democracy is always pregnant with its contradiction." This applies to the Invisible Man, who lives in a democratic society but, in effect, has had very little say in how his life has progressed. He has been shunted from one circumstance to another, being controlled by those who are more powerful than he and who forbid him from obtaining any real power of his own.

Marcy L. Tanter, *Steal Away: How the Invisible Man Lights His World*, 26 OKLA. CITY U. L. REV. 989, 994–95 (2001) (citations omitted).

¹⁷⁸ *Id.* See ELLISON, *supra* note 177.

¹⁷⁹ See generally Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 33 (1999).

¹⁸⁰ The notion of a social contract is firmly planted in legal theory. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE, ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT* 1–2 (Barnes & Noble Books ed., 1962) (1690); see also Allen, *supra* note 179, at 33 (1999) ("The social contract authorizes society to limit the liberty of persons who interfere with the very interests whose protection motivates rational persons to consent by contract to collective authority.").

¹⁸¹ See Allen, *supra* note 179, at 2–11.

and interests.¹⁸² An individual citizen enters into the bargained agreement voluntarily because it enhances and secures freedom.¹⁸³ But those who are deemed unworthy or relegated to a subordinate position in the society are not offered the opportunity to become protected members.¹⁸⁴ Social contracts extend privileges only to certain classes of individuals.⁴⁴ Analyzing what it means to be raced and gendered, Carol Pateman and Charles Mills explored the notion of political exclusion and subordination based on the social status of being human but not counted as a full person.

Carol Pateman expanded on Locke's notion of the social contract by offering a gendered critique of the agreement.¹⁸⁵ Pateman argues that because of systemic sexism, the power imbalance in existing societies exclude women.¹⁸⁶ The ever-widening racialized wage gap is an indication that the market has not responded to the exogenic conditions that produce racialized economic inequality.¹⁸⁷ In regard to gender, the social contract enshrines men's superior political rights over women.¹⁸⁸

Similarly, Charles Mills, in *The Racial Contract*, examined the politics of dehumanization and exclusion with respect to race.¹⁸⁹ Using the thematic from Pateman's work, he explores the political power that the social contract gives to non-whites who are typically marginalized and subordinated.¹⁹⁰ Mills argues that the racial contract underwrites the social contract and ensures that non-whites are excluded or marginalized.¹⁹¹

Economic inequality—that is, the gender wage gap—ignores the racial aspects of Black women receiving equal pay. Wage inequality for women of color is even more pervasive regardless of the industry, level of education, or experience.¹⁹² Political

¹⁸² See *id.* at 33.

¹⁸³ See *id.* at 18.

¹⁸⁴ See Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Re/conceptualization of Violence for the Twenty-First Century*, 60 ALBANY L. REV. 607, 615–16 (1997).

¹⁸⁵ See generally CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

¹⁸⁶ *Id.* at 6, 52.

¹⁸⁷ *Id.* at 88.

¹⁸⁸ *Id.*

¹⁸⁹ See CHARLES MILLS, *THE RACIAL CONTRACT* 6–7 (1997).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* 6–7, 120. Mills deconstructs and exposes the theories and moral justifications that support the “nonideal polity” and European myth that non-white people are savages born “unfree and unequal.” *Id.* at 5, 16.

¹⁹² NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *AMERICA'S WOMEN AND THE WAGE GAP* 3 (Mar. 2021), <https://www.nationalpartnership.org/our->

invisibility provides a framework for focusing on how different forms of power articulate change in the life experiences of Black women. Although not exclusive to Black women, systemic erasure is an active choice to marginalize or ignore the experiences of this group.¹⁹³ The particularized harm of Black women goes unaddressed and is subsumed among the remedies for the dominant group, in this case, discriminated Black men and white women. Consequentially, the society deprives Black women of their uniqueness, their authenticity, and obliterates their agency. Systemic erasure evolves into invisibility.

For Black women, invisibility commonly means being “unnoticed” and having their voices going “unheard.”¹⁹⁴ The vulnerabilities that Black women face are significant to their lived, American experience. Invisibility is an oppressive structure of power and privilege that makes clear the racialized wage gap is

work/resources/economic-justice/fair-pay/americas-women-and-the-wage-gap.pdf [https://perma.cc/C9WS-FGV9].

¹⁹³ See generally, Kyle C. Velte, *Straightwashing the Census*, 61 B.C. L. Rev. 69, 90 (arguing that the undercount of SOGI in Census data undermines needed and beneficial policy reforms). Census data is collected in part to ensure that policies fairly and equitably serve the needs of all races and ethnicities. The Census collects specific data on Black women. Yet, the political invisibility of poor Black women, in particular, shows that policy reforms are not aimed at prioritizing their economic needs given the heightened risk of poverty due to the combined effects of race and gender. The 2019 Census poverty data shows that eighteen percent of Black women were living in poverty and Black women who were working full-time were getting paid sixty-three cents as compared to every dollar a white man made. Black women who are heads of households continue to experience increased exposure to food insecurity and economic job loss caused by the impacts of COVID-19, making them more vulnerable to inadequate living conditions. CDF Staff, *Breonna Taylor and the Invisibility of Black Women and Girls in America*, CHILDREN’S DEFENSE FUND (Sept. 28, 2020), <https://www.childrensdefense.org/blog/breonna-taylor-and-the-invisibility-of-black-women-and-girls-in-america/> [https://perma.cc/KWA7-J54G].

¹⁹⁴ Psychologists have evaluated the invisibility of Black women in different contexts. One study examined the social invisibility of Black women by testing if they were noticed and heard in social settings. The results suggested that Black women are more likely than Black men or white men and women to go unnoticed by others in a group or social situation. A follow-up study showed that Black women were also more likely to go unheard when contributing to a group conversation made up of a largely white audience. See Amanda K. Sesko & Monica Biernat, *Prototypes of Race and Gender: The Invisibility of Black Women*, 46 J. EXPERIMENTAL SOC. PSYCH. 356, 358 (2010). See also R. Simpson & P. Lewis, *An Investigation of Silence and A Scrutiny of Transparency: Re-Examining Gender In Organization Literature Through The Concepts of Voice and Visibility*, 58 HUMAN RELATIONS 1253 (2005). The psychological effects of invisibility for Black women are well documented. The lack of agency from not being authentic results in emotional harm and stress. See generally PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2d ed., New York: Routledge 2000).

not inadvertent. Economic conditions are rooted in the design of this country's political and economic structure.¹⁹⁵ Even in a democracy, the political system adopts an economic order that is imposed on its citizens. How those who are the most vulnerable fare, socio-politically and economically, is dependent upon the society's rules and policies. Again, it is imperative to refer to the neoclassical principle on the free market. In a free-market economy, the accepted myth is that income inequality is self-derived.¹⁹⁶ It is therefore politically acceptable to disregard the economic conditions of those who are not economically prosperous. Yet, the inequitable political system perpetuates the socioeconomic wrongs underlying the economic exclusion by failing to address them.¹⁹⁷

If citizenship is defined as "membership in a political community," invisible people are either completely excluded from citizenship or are, in effect, sub-citizens. In this regard, citizenship becomes exclusionary. When the social contract systematically and arbitrarily deprives citizenship protections, those individuals are deprived of the benefits and safeguards that the society provides. They are politically or economically powerless populations and the society can ignore their needs with nominal immediate consequence. The paradox for Black women is that the gains made during the feminist and civil rights

¹⁹⁵ Christina Pazzanese, *How Political Ideas Keep Economic Inequality Going*, HARV. GAZETTE (Mar. 3, 2020), <https://news.harvard.edu/gazette/story/2020/03/pikettys-new-book-explores-how-economic-inequality-is-perpetuated/> [<https://perma.cc/P4FU-Q2QJ>]. See generally THOMAS PIKETTY, *CAPITAL IN THE 21ST CENTURY* (2019) (defining the inequality regime as the justification [used] for the structure of inequality and also the institutions—the legal system, the educational system, the fiscal system—that help sustain a certain level of equality or inequality in a given society).

¹⁹⁶ Sociologist Joel Rogers describes the organization of capitalist economies in western countries as either "high road" or "low road." In the *New York Times 1619 Project*, which examines the legacy of slavery in America, Rogers describes how today's economy is shaped by the era of enslaved workers and the financiers who profited from them. See Matthew Desmond, *In Order To Understand The Brutality Of American Capitalism, You Have To Start On The Plantation*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html> [<https://perma.cc/RN35-SFY9>]. According to Rogers and sociologist Erik Olin Wright, the American economy is a low road capitalist economy, given the low wages paid to unskilled workers to produce low-priced goods that sacrifice quantity for quality. Low road capitalism fosters income inequality, furthering poverty. See JOEL ROGERS & ERIK OLIN WRIGHT, *AMERICAN SOCIETY: HOW IT REALLY WORKS* 240 (2d ed., 2015).

¹⁹⁷ See generally BUT SOME OF US ARE BRAVE: A HISTORY OF BLACK FEMINISM IN THE UNITED STATES (Akasha Hull, Patricia Bell-Scott & Barbara Smith eds., 2015).

movements for white women and Black men do not apply to Black women; thus, the Black woman remains marginalized.¹⁹⁸

Instead of hearing the Black woman's political voice, erroneous representations and negative characterizations become substitutes for the Black women's perspective. As a result, the varied concerns among sub-groups of Black women are homogenized, denying any Black woman agency, and making any single concern an interchangeable option that the dominant power addresses at its discretion. The next Section discusses cultural stereotypes as a structural barrier to the racialized gender wage gap.

C. *Cultural Stereotypes & Tropes*

The Black women's labor market history reveals deep-seated race and gender discrimination. Commonly held myths and stereotypes—Mammy, Jezebel, and Sapphire—proliferate profoundly negative images. These portrayals are harmful to both the employer and the employee. Further, stereotypes of Black women are harmful and provide a structural barrier to achieving wage parity. The portrayals are belittling and undoubtedly contribute to implicit bias about Black women. Many of the names and images of stereotypical Black women continue to negatively impact the way Black women are perceived in American society.¹⁹⁹

One of the earliest images of a Black woman is of “Mammy.”²⁰⁰ The history of slavery, where Black women were expected to take care of the slave owner's children, contributed to the image of an “ideal Black maternal figure.”²⁰¹ Absolutely critical to providing for the white family structure, Mammy raised and protected the children, providing much order and balance in maintaining the household.²⁰² While Mammy was praised for her assigned role of

¹⁹⁸ Adia Harvey Wingfield, *Women are Advancing in the Workplace, But Women of Color Still Lag Behind*, BROOKINGS (Oct. 2020), <https://www.brookings.edu/essay/women-are-advancing-in-the-workplace-but-women-of-color-still-lag-behind/> [<https://perma.cc/LX57-UNWH>].

¹⁹⁹ MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 33 (2011) (“Mammy, Jezebel, and Sapphire are common and painful characterizations of black women and . . . each has a long history in American social and cultural life.”).

²⁰⁰ *Id.*

²⁰¹ Kupenda et al., *supra* note 135, at 115 (2010); DEBORAH GRAY WHITE, *AR’N’T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 47 (1985) (“Mammy was the woman who could do anything, and do it better than anyone else.”).

²⁰² WHITE, *supra* note 201, at 47–48. “This, therefore, is the broad outline of Mammy. She was a woman completely dedicated to the white family, especially to the

carrying for and raising white children, little attention was paid to the relationship she had with her own children, especially in terms of whether as a “working mother” their needs were adequately met. In fact, the welfare and care of Black children was generally disregarded.²⁰³ Mammy is nurturing and compassionate, though her influence and assertiveness may be hidden.²⁰⁴

“Jezebel” refers to the “seductive, alluring, wordly, beguiling, tempting, and lewd” Black woman.²⁰⁵ The persona is of one who dominates, manipulates, and uses her curvaceous body to her own advantage.²⁰⁶ This stereotype is based on “a misinterpretation of African culture by whites brought about because of the tropical dress and cultural dance of African women,” which was misinterpreted as “lewdness” or “uncontrollable lust.”²⁰⁷ The Jezebel stereotype was used to “justify the rape, abuse, and economic exploitation of Black women.”²⁰⁸ Jezebel was “depicted as a [B]lack woman with an insatiable appetite for sex . . . who was not satisfied with black men. . . . [Thus,] white men did not have to rape [B]lack women . . . [because they] desired sexual relations with white men.”²⁰⁹

“Sapphire” is the loud-mouthed, angry Black woman. She is a domineering female who emasculates men.²¹⁰ She was characterized as a strong, masculine workhorse who labored with Black men in the fields or an aggressive woman, whose overbearing nature drove away her children and partners.²¹¹ The Sapphire stereotype, stoked by Daniel Patrick Moynihan’s 1965 widely circulated report on “The Negro Family: The Case for

children of the family. . . . The Mammy image is fully misleading as that of Jezebel. Both images have just enough grounding in reality to lend credibility to stereotypes that would profoundly affect black women.” *Id.* at 49.

²⁰³ Kupenda et al., *supra* note 135, at 115–16.

²⁰⁴ *Id.*; WHITE, *supra* note 201, at 48–49.

²⁰⁵ Jim Crow Museum of Racist Memorabilia, *The Jezebel Stereotype*, FERRIS STATE UNIV., <https://www.ferris.edu/jimcrow/jezebel/> [<https://perma.cc/R7MB-AGU5>] (last visited July 19, 2022). This is in contrast to the stereotype of white women as “models of self-respect, self-control, and modesty.” *Id.*

²⁰⁶ Kupenda et al., *supra* note 135, at 115.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Jim Crow Museum of Racist Memorabilia, *The Jezebel Stereotype*, *supra* note 205.

²¹⁰ Jim Crow Museum of Racist Memorabilia, *The Sapphire Caricature*, FERRIS STATE UNIV., <https://www.ferris.edu/HTMLS/news/jimcrow/antiblack/sapphire.htm> (last visited July 19, 2021).

²¹¹ HARRIS-PERRY, *supra* note 199, at 93.

National Action,” is characterized as outspoken, tenacious, emasculating, loud, brash, nagging, and acting outside her proper role in society.²¹² The Moynihan Report framed Black women as “uniquely aggressive,” which Moynihan used to claim that the “black matriarchy” was the reason why Black people have not achieved equality.²¹³ Moynihan’s conclusions granted two generations of conservative policymakers permission to imagine poor Black women as domineering household managers whose unfeminine insistence on control both emasculated potential male partners and destroyed their children’s future opportunities.²¹⁴ The Sapphire, or angry Black woman, stereotype held “‘Black women responsible for power they do not possess, power that is, in fact, being utilized in very real ways by members of other social groups who can claim emotional innocence as they hide behind, and persecute, [Black women].’”²¹⁵

The Sapphire stereotype perpetuated the “Welfare Queen.” Ronald Reagan is responsible for adding the “Welfare Queen” to the vernacular.²¹⁶ This was a way of demonizing those who were on public assistance for long periods of time. The image depicts an undeserving aid recipient getting rich on the backs of taxpayers; many considered it a racist dog whistle exploited by politicians.²¹⁷

Stereotypes are not only negative and inaccurate portrayals of a group that implicitly create bias, they also create hypervisibility. This occurs when members of marginalized groups are under intense surveillance.²¹⁸ Although visibility in a work environment is usually positive, hypervisibility results in a level of increased scrutiny that comes with judgements and often

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Gillian Brockell, *She Was Stereotyped as “The Welfare Queen.” The Truth Was More Disturbing, A New Book Says*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/history/2019/05/21/she-was-stereotyped-welfare-queen-truth-was-more-disturbing-new-book-says/> [https://perma.cc/4RGG-JQNN].

²¹⁷ Jared Bernstein, *After All These Years, “Welfare Reform” is the Same Racist Dog Whistle it Always Was*, WASH. POST (Jan. 8, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/01/08/after-all-these-years-welfare-reform-is-the-same-racist-dog-whistle-it-always-was/> [https://perma.cc/4UYS-LM9C].

²¹⁸ Buchanan & Settles, *supra* note 173, at 1, 2 (citation omitted) (“This hypervisibility and perception of deviance lead marginalized individuals to become the focus of increased surveillance from others.”).

negative perceptions.²¹⁹ As one study reports, “for members of marginalized social groups, negative stereotypes combine with being marked as different to result in their being perceived as deviant.”²²⁰ There is “increased surveillance” and intensified precautions about the employee’s performance.²²¹

Under these conditions of hypervisibility, mistakes (real or perceived) are used to confirm negative stereotypes, and evidence that could counter negative perceptions is minimized or held suspect (e.g., when the person does superior work, dominant group members assume they must have had help). Similarly, when individuals are hypervisible, their personal identities are invisible as they are seen only in terms of their marginalized group membership (e.g., being the token person of color to represent diversity on a committee).²²²

Professor Paulette Caldwell described the scope of the harm:

Stereotypes and negative images of black women serve many functions. They separate black and white women from each other and limit all women’s choices by perpetuating competing ideologies of womanhood based on race The black woman’s invisibility serves to blind all women and all blacks to the interactive relationship between race and gender, leads to the development of legal theories and social policies directed at either race or gender without fully considering the implications of such theories and policies, and ultimately assures the perpetuation of domination on the basis of race and gender for all women and members of subordinated races.²²³

Stereotypes are a way to divert attention away from discriminatory social and economic policies. Instead of changing the conditions under which Black women are forced to work and develop their economic security, a trope is used to hyperscrutinize and possibly make negative judgements without a separate evaluation of the individual on the merits. These cultural stereotypes create a particularized vulnerability to certain kinds of discrimination.

²¹⁹ *Id.* “In its most benign definition, hypervisibility is simply the state of being extremely visible, which can be positive for dominant group members (e.g., being extremely visible as a valued, active contributor to the workplace.)” *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 395.

Reframing the government regulations to monitor employer behavior more effectively is crucial to ensuring that Black women and other women of color receive equitable pay and as a result are able to have adequate economic security. Not only do neoclassical economics, political invisibility, and stereotyping harm, subjugate and injure Black women and other women of color, the negative spillover effects impact their families, the communities in which they live, and all women. Deconstructing the structural barriers and the other hierarchies that support the racialized wage gap requires changing the discourse from oppression to one of equity and inclusion. As argued below in Part III, reforms, including monitoring employers' salary setting practices, are needed to execute policies that are aligned with the legislative intent of the statutes.

III. PROMOTING RACIALLY GENDERED PARITY IN THE AMERICAN WORKPLACE

The gender racialized wage gap is woven into the American milieu.²²⁴ Admittedly, the American economic system was not designed with women and Black employees in mind. The labor of both groups was expected to remain unpaid. Yet, the American economy will not grow without concentrating on the negative economic phenomenon of wage inequity.²²⁵

Likewise, full citizenship rights, as envisioned by the passage of the Nineteenth Amendment, requires addressing the political, economic, and cultural structures that curtail the economic security of Black women and other women of color. At its core, the implication of addressing the racialized gender wage gap is the stated recognition that women are not all equally situated and therefore some measures will need to be customized to protect all employees.

²²⁴ Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?* 21 ACAD. MGMT. PERSPECTIVES 7, 9 (2007) (study found forty percent of the overall gender pay gap is not explainable after controlling for observable data for education, field of study, and occupation).

²²⁵ See Naila Kabeer & Luisa Natali, *Gender Equality and Economic Growth: Is There a Win-Win?*, 2013 INST. DEV. STUD. 21, 34 (Feb. 2013), <https://www.ids.ac.uk/files/dmfile/Wp417.pdf> [<https://perma.cc/3WPD-VXWE>] (discussing how gender equity boosts economic growth).

A long-standing critique of the feminist movement is that the issues of white women dominate proposals for reform.²²⁶ Reform efforts undertaken that disregard the multiple identities of women may resolve the harms suffered by women who are privileged but are less likely to meet the needs incurred by Black women and other women of color. The reforms below focus on Black women and women of color not in an effort to be divisive. Yet, to do so acknowledges that addressing the concerns of those least privileged inevitably addresses the concerns of those who are more advantaged. Quite simply, gender wage parity cannot be accomplished by ignoring the distinction. Moreover, ignoring unequal pay will result in more women who will need support from the federal government during their retirement years.

The EEOC has acknowledged “intersectional discrimination” as a valid claim.²²⁷ As the administrative agency charged with enforcing Title VII and the EPA, the EEOC should provide more guidance. The EEOC can implement the proposed measures that shift salary decision-making into an equitable, transparent framework.

One question to consider is how to incentivize employers to instill fair and transparent policies that promote wage equity and close the racialized gender gap. Incentivizing employers is crucial to having them comply with the letter and the spirit of the law. To address this pervasive problem, Congress should adopt incentives for self-regulation by employers, such as pay transparency and periodic pay audits, in exchange for certain affirmative defenses in EPA litigation.

Eradicating race and gender-based economic inequality requires the “disinfectant of sunshine.”²²⁸ Title VII policy should

²²⁶ Emilie Aries, *The Imperative of Intersectional Feminism*, FORBES (Aug. 30, 2017), <https://www.forbes.com/sites/emiliearies/2017/08/30/the-imperative-of-intersectional-feminism/?sh=6d655d2b1914>.

²²⁷ *EEOC Enforcement Guidance on National Origin Discrimination*, EEOC, https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518804 [https://perma.cc/J849-7KHK] (“Title VII also prohibits ‘intersectional’ discrimination, which occurs when someone is discriminated against because of the combination of two or more protect bases (e.g. national origin and race).”) (last visited July 17, 2022).

²²⁸ See Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 958 (2011) (“With ‘sunshine’ as a disinfectant, boards are encouraged to develop sound compensation structures and award compensation consistent with job requirements and executive performance.”) (citing LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1932)).

require preemptive employer action through reporting requirements. Mandatory reporting would establish that employees are paid equally, for the “skill, effort, and responsibility” of the job.²²⁹ The reporting requirement would oblige employers to establish useful salary information for employees. It would also give employers a basis to explain legitimate salary differentials.²³⁰ Employers would be more careful to ensure that the wage offered was consistent with the “skill, effort, and responsibility” and therefore be able to explain any pay disparities between employees performing substantially similar jobs, just as the EPA requires.²³¹

First, outside the public sector, it is very difficult for an employee to discover what her colleagues are paid. If one does not know one is being paid less than one’s coworkers, it is impossible to challenge any differential that exists.²³² Transparent pay systems would encourage employers to develop and explain to employees the criteria on which compensation is based, and to ensure that they can justify pay disparities. The regulatory approach to pay discrimination should be more similar, at least on a conceptual level, to that of executive compensation.²³³

A McKinsey report on promoting gender parity in the workplace identifies best practices for increasing female representation. Among its top recommendations is “tracking and eliminating gender pay gaps.”²³⁴ Several European countries including the United Kingdom, France, and Germany require companies to report on gender pay gaps.²³⁵ Publicly reporting on pay gaps and wage transparency can help companies reach these goals.

As the administrative agency tasked with enforcing Title VII and the EPA, the EEOC should provide more guidance to plaintiffs

²²⁹ Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 264 (2012).

²³⁰ *Id.* at 263–66.

²³¹ *Id.* at 264.

²³² *See id.* at 260–97.

²³³ *Id.* at 258.

²³⁴ Laura D’Andrea Tyson, *Promoting Gender Parity in the Global Workplace*, MCKINSEY & COMPANY (Jan. 1, 2015), <https://www.mckinsey.com/business-functions/organization/our-insights/promoting-gender-parity-in-the-global-workplace#> [<https://perma.cc/GGU9-ML2D>].

²³⁵ Maitane Sardon, *EU Moves to End Gender Pay Gap With Transparency Rules*, WALL ST. J. (Mar. 4, 2021, 2:45 PM), <https://www.wsj.com/articles/eu-moves-to-end-gender-pay-gap-with-transparency-rules-11614887136> [<https://perma.cc/H37U-H9VN>].

and to the courts on the intersectional discrimination framework, including underscoring the significance of being a member of the protected classes listed in Title VII.²³⁶ As this Article argues, the rights and contributions of Black women are too significant for their economic security to be ignored. Denying a plaintiff's use of an intersectional framework limits the possibility of her being able to prove the extent of the discriminatory conduct.

Similarly, Title VII should be amended so that the word "or" in the listing of prohibited categories does not cause so much disagreement among courts and deter plaintiffs with multiple identifiers from pursuing their claims. This recommendation is consistent with the statute's legislative history.²³⁷ Courts appear confused about the interrelationship between the categories listed in Title VII. Each is a protected classification, and individuals alleging discrimination should not have to choose between them. The risks that allow the racialized wage gap to continue can be mitigated through targeted action to help Black women and other women of color earn the income that improves their financial position and makes them economically secure. The proposed reforms in policies and laws must change to correct the structural inequities.

CONCLUSION

The colored woman of to-day occupies, . . . a unique position in this country. . . . She is confronted by both a woman question and a race problem, and is as yet an unknown or an unacknowledged factor in both.

—*Anna Julia Cooper*²³⁸

The guarantee of economic equality for women across opportunity and pay levels of employment requires identifying the distinctive race, class, and gender issues that Black women and

²³⁶ *The E-RACE Initiative (Eradicating Racism and Colorism from Employment, EEOC* <https://www.wsj.com/articles/eu-moves-to-end-gender-pay-gap-with-transparency-rules-11614887136> [<https://perma.cc/6TN5-88VL>] (last visited July 17, 2022).

²³⁷ Rosalio Castro & Lucia Corral, *Women of Color and employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 *LA RAZA L.J.* 159, 172 (1993). Castro and Corral have suggested Title VII be amended to include the phrase "or any combination thereof." *Id.* Some scholars argue that Title VII was never meant to be interpreted through a single-issue framework.

²³⁸ ANNA J. COOPER, *A VOICE FROM THE SOUTH: BY A BLACK WOMAN OF THE SOUTH* 134 (The Aldine Printing House, 1892).

women of color face. To do otherwise furthers employment discrimination and perpetuates economic marginalization. Yet, fundamentally, an intersectional approach will reduce gender-based employment inequities overall.

At its best, the goal of feminism is to represent all American women.²³⁹ Greater inclusiveness is needed to achieve feminism's economic objectives. A justifiable anti-racist and anti-sexist corrective acknowledges political and economic intersectionality and, at a minimum, the dual subordination that Black women and other women of color face in the labor market. Black women and other women of color—although not privileged and invisible to the larger society—are a crucial, viable segment of the American workforce. Tackling the racialized gender gap ensures that Black women and other women of color are not excluded from the American political economy, which is in the best interest of all Americans.

²³⁹ As critics of feminism's strategies have observed, the "goal of representing all American women remains an elusive vision." MYRA MARX FERREE & BETH B. HESS, *CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT ACROSS THREE DECADES OF CHANGE* 99 (Taylor & Francis ed., 2002) (1985) (critiquing policies and approaches of the feminist movement).