Lessons Learned From the Gender Wage Gap in the Federal Workforce: Structural Changes and Temporal Flexibility are Only the First Step to Equality

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Disclaimer

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Abstract

Lessons Learned From the Gender Wage Gap in the Federal Workforce: Structural Changes and Temporal Flexibility are Only the First Step to Equality

The federal workforce, with all its glory and might, is not immune from suffering the symptoms of the largest problem plaguing America today. More than 90 years after the creation of the federal workforce pay structure and American women in the federal workforce are still fighting to see equal wages in their pockets. The federal workforce structure embodies the principle of "equal pay for equal work,"[1] but this does not go far enough. This principle is predominately associated with the Equal Pay Act of 1963,[2] however it was adopted 40 years earlier in the construction of the federal workforce.[3] Neither the federal nor private workforce has achieved gender pay equality. Some critics dispute the existence of the gender wage gap altogether, but this is as a subterfuge to thwart advancement. The real debate lies in the extent and cause of the gender wage gap.

An examination of the federal workforce exposes the root cause of the gender pay gap and possible solutions. This paper explores the characteristics of the federal workforce, specifically the pay structure, transparency measures, and workplace flexibility programs. By isolating the federal workforce we see the limitations of these structural measures. It is clear that the passage of legislation and time will not reverse the disparity in wages. What is not and cannot be addressed by these undertakings is the lifetime of gendered socialization of men and women. The federal workforce model

[1] *See e.g.* 29 U.S.C. § 206(d)(1) (1963).
[2] *Id.*
[3] *See* Classification Act of 1923, Pub. L. No. 516, Ch. 265, 42 Stat. 1488 (1923)(amended with some differences in language at Ch. 782, 63 Stat. 954 (1949)).

indicates that a social phenomenon of this magnitude can only be addressed by a social change.

The integration of the two workforces requires a tandem effort to close the gap. The lessons learned from the federal workforce structure can be applied to the private sector to move civilization forward. Once there is a universal recognition of the cause and a will to change, we can have a real movement to advance humankind towards gender equality.

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Introduction

The principle aim of the Equal Pay Act is simple enough but hard to achieve—women and men should receive equal pay for equal work in the same establishment. [4] However, more than 50 years later, we are far from achieving this goal. When signed into law, President Kennedy acknowledged the limitations of this legislation. His signature was only the "first step" to achieve the promise that "when women enter the labor force they will find equality in their pay envelopes."[5] He cautioned that "much remains to be done to achieve equality of economic opportunity."[6] Today, this hopeful piece of legislation contains so many loopholes it cannot begin to fulfill its promise.[7] On June 10, 1963, President Kennedy knew when he placed his pen to paper that this would not be enough to achieve pay equality. It is up to the people to effectuate a change.

This was not the only time Congress considered the principle of equal pay for equal work. This same principle was considered 40 years prior however this time in the context of federal agencies. The Classification Act of 1923 created the current pay system

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[4] *See* 29 U.S.C. § 206(d)(1) (1963) (makes it illegal to pay men and women employed in the same establishment different wages for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions"); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (the Act was designed "to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.""(quoting S.Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)).

[5] *See* John F. Kennedy, President, Remarks on signing Equal Pay Act of 1963 (June 10, 1963).

[6] *Id.*

[7] *See* Caruthers G. Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 Val. U.L. Rev. 326 (1971).

structure of the United States' civil service employees.[8] The Classification Act of 1923 provided, "in determining the rate of compensation which an employee shall receive, the principle of equal compensation for equal work irrespective of sex shall be followed."[9] Sex discrimination was explicitly prohibited. This principle was refined with the Classification Act of 1949 but surprisingly does not include such explicit language. The law currently states, "the principle of equal pay for substantially equal work will be followed."[10] This language shares many similarities with the Equal Pay Act which passed some 14 years later.

Between 1923 and 1949, labor concerns were at their peak.[11] Outside the federal workforce, sex discrimination and sex-based pay discrimination policies were rejected during this period. In 1944, U.S. House Representative Winifred C. Stanley introduced the first bill to prohibit sex-based pay discrimination.[12] Congress rejected the bill that same year.[13] It was not until the passage of the Equal Pay Act of 1963[14] and Title VII of the Civil Rights Act of 1964[15] that employment discrimination on the basis of sex was made illegal.

Prohibiting a practice through legislation is merely the first step on the path to advancement. Legislation often fails to address the root cause of the prohibited practice.

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[8] Classification Act of 1923.
[9] *See* Classification Act of 1923, § 4.
[10] 5 U.S.C § 5101(1)(A) (1949).
[11] *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical View and Critical Assessment*, 43 B.C.L. Rev. 351 (2002) (this article assesses the current status of American labor and employment law by examining the evolving legal landscape and workplace changes through time).
[12] *See* Prohibiting Discrimination in Pay on Account of Sex, H.R. 5056, 78th Cong. (1944).
[13] *Id.*
[14] 29 U.S.C. § 206(d)(1).
[15] 78 Stat. 253 (1964)(currently codified at 42 U.S.C. § 2000e et seq. (2000)).

A change in a pattern of behavior or shift in thinking does not occur in a vacuum or overnight. An example of this is the current disparity in wages between men and women. The fact that "women earn 79 cents for every dollar earned by men"[16] demonstrates that these policies are not effective. Even if the Equal Pay Act worked as intended it does not eliminate the gender wage gap; it merely provides a means for individual victims of sex-based wage discrimination to bring a claim. The gender wage gap experienced today is but a symptom of the more universal issue that fuels this disparity.

Identifying the root cause of the gender wage gap is necessary to develop a set of solutions. Economists divide the gender wage gap into explained and unexplained portions.[17] The explained portion of the gap is composed of observable worker characteristics—identifiable and measureable—which contribute to the gap. These include attributes such as education, occupation, experience, age and marital status.[18] The unexplained portion of the gap is a catchall, comprised of unknown factors. Scholars posit the unexplained portion is a combination of factors, not readily observable or measurable. These factors likely include personal bias and other psychological attributes. Stating that a single or set of isolated factors is the cause of the gender wage gap is an oversimplification. The gender wage gap is a "multi-causal social phenomenon."[19]

Scholars propose many solutions for such a complex problem. Changes in the environmental landscape through legislation and policy is often the first step in fixing

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[16] U.S. Census Bureau, *Historical Income Table,* Table P-40: Women's Earnings as a Percentage of Men's Earnings by Race and Hispanic Origin (2015).
[17] *See* Solomon W. Polachek, *How the Human Capital Model Explains Why the Gender Wage Gap Narrowed*, IZA Discussion Paper Series, 1102. Bonn, Germany: Institute for the Study of Labor (Apr. 20014), *http://*ftp.iza.org/dp1102.pdf.
[18] *Id.*
[19] *See* Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, Univ. of San Francisco Law Research Paper No. 2014-12, 894, 895 (2015).

something that is broken. For example, there are a number of laws that attempt to eradicate gender discrimination in the workplace but do not quite achieve their purpose.[20] In addition to laws, the research suggests that offering of work-life balance programs encourages gender equality, which in turn results in pay equality.[21] The third proposed solution takes gender equality a step further and makes a call for social change.[22] A shift of this nature includes eradicating the obstacles men and women face while acting outside their traditional gender roles. This encompasses a re-evaluation of how work is valued and the penalties on women for acting "like a man." The gender wage gap is greater than an employment problem; it is a social phenomenon that is present in both private and government workforces.

The federal workforce's practice and structure highlight the inherent limitations of external measures. The federal workforce is the epitome for standardization and pay transparency. In addition, the work-life balance benefits and flexibility programs go beyond many private sector offerings. However, the gender wage gap in the federal government persists despite these undertakings. An analysis of the federal workforce demonstrates a social change is required to effectively combat "internal" and "external" causes to wage inequality.

Part I of this article begins by exploring the gender wage gap across all workforces. It specifically examines economic models used to explain the trends and the

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[20] *See* U.S. Dept. of Labor, *Summary of the Major Laws of the Department of Labor*, https://www.dol.gov/general/aboutdol/majlaws.com (last visited May 9, 2017).
[21] *See* Claudia Goldin, *Hours Flexibility and the Gender Gap in Pay*, Center for American Progress (Apr. 2015), https://cdn.americanprogress.org/wp-content/uploads/2015/04/Goldin_EqualPay-report14.pdf.
[22] *See* Anita Nyberg, *Closing the Gender Gap: Act Now*, Global Soc. Pol'y, 14(1), 132 (2014).

various causes—both of which must be understood prior to achieving a solution. The causes are described as explained and unexplained factors. The explained factors refer to differences between workers and the unexplained factors refer to unobserved worker characteristics.

Part II provides three mainstream proposed solutions to close the gap. The first two solutions relate to workplace structural changes—policy changes and workplace flexibility programs. The third proposed solution calls for a social change in the American culture.

Part III explores the gender wage gap in the federal workforce. It is here where the federal workforce's structure and programs are explored. In addition, the federal workforce's sub population data is analyzed to gain an in-depth understanding of the gender wage gap within this sector. Despite implementation of the first two proposed solutions, the federal workforce experiences its own gender wage gap. Through this analysis we discover that wage equality will not materialize until there is a complete societal shift across all sectors.

At the outset it is important to address two foundational concerns. The first concern is the heavy reliance on statistical data. Statistics and the underlying numerical data throughout this paper are used to aid the reader in understanding how the isolated variables create an inference of either a casual or non-causal relationship. When viewed in isolation, a singular piece of statistical evidence can be misleading. Therefore, I attempt to include other sources and samplings for comparison when the data is available and appropriate. This will alleviate many of the concerns which accompany the reliance on statistics. Due to the reliability and breadth of statistical data on the subject, the

existence of the gender wage gap is virtually uncontroverted. Regardless of the source or methodology, the data is unambiguous; the gender wage gap exists but can vary across occupational sectors and among different sub populations within those sectors.[23]

The second concern is the assumption that wage equality is a goal worth pursuing. A fundamental tenet on which gender wage gap theory is based is the inherent utility and justice of wage equality. Once firmly established that a wage disparity exists, the real debate lies in what drives this disparity and how to fix it. The need for the gap to be fixed at all ascribes to the idea that seeking wage equality among men and women is a noble cause worth pursuing. This paper does not address the debate over whether the pursuit of equality should prevail over the forces of the free market. That is a debate for an entirely different paper. This paper examines the wage gap with equality as the yard stick against which efforts are measured. This paper addresses how best to achieve such equality.

Part I. The Existence of the Gender Wage Gap and an Examination of the Contributing Conditions

A. Trends of the Gender Wage Gap

The difference between earnings for male and female workers is cloaked with many slogans—gender-based wage disparity, gender wage gap, and gender pay gap are just a few. However, what is well known is the 1970s mantra "59 cents on the dollar" or more recently, "79 cents on the dollar." This mantra comes from a comparison of the annual earnings of full-time male and female workers.[24]

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[23] *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, Explanation*, IZA Discussion Paper Series 9656. Bonn, Ger.: Inst. for the Study of Labor (Jan. 2016), http://ftp.iza.org/dp9656.pdf.
[24] *See* U.S. Census Bureau, *supra* note 16.

In 2014, men's median annual earnings were about $50,400 and women's median annual earnings were about $39,600.[25] Therefore, women's median annual earnings were 79.9 percent of men's.[26] The 79.9 percent gender earnings ratio does not account for part-time workers, weekly or hourly earnings. These other measures of earnings yield slightly narrower results when it comes to the pay gap. Comparing weekly median earnings results in a 82.5 percent ratio[27] and hourly earnings shows a 84.6 percent ratio.[28] Although no single methodology captures all circumstances, it is clear that in each calculation women on average earn substantially less than men.

Male earning trends contribute to the narrowing of the gap. Overall, males have not experienced the same earning gains as women. This stagnation helps to explain why the gender wage gap has decreased over the years. Stagnant wages for men stem from a variety of sources. The Economic Policy Institute finds that 25 years of wage stagnation is because of policy choices. These choices are divided into five broad areas: (1) "the abandonment of full employment as a main objective of economic policymaking," (2) "declining union density," (3) "various labor market policies and business practices," (4) "policies that have allowed CEOs and finance executives to capture ever larger shares of economic growth," and (5) "globalization policies."[29] Data suggests that male wages are more likely to be hurt by these policies. For example, "the decline of unions can explain about a third of the entire growth of wage inequality among men and around a fifth of the

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[25] *Id.*
[26] *Id.*
[27] *See* U.S. Bureau of Labor Statistics, Report 1058, *Highlights of Women's Earnings in 2014*, Table 1: Median usual weekly earnings of full time wage and salary workers, by selected characteristics, (Nov. 2015).
[28] *Id.* at Table 8.
[29] *See* Lawrence Mishel, *Causes of Wage Stagnation,* Econ Pol'y Inst., (Jan. 6, 2015) at 1.

growth among women from 1973 to 2007."[30] Even with stagnant wages, men pull ahead of women at every age, but exponentially for those over age 35.[31]

Over time, the gender wage gap has narrowed significantly. However, the evolution of the trend shows that convergence has slowed. More recently the workforce has experienced a plateau. No consensus exists on the reason for the slow down or the causes of the gender pay gap. The gap can be measured in a myriad of methodologies, but scholars generally divide the causes of the gender pay gap into two categories, the explained factors and unexplained factors.

1. Models Used to Explain the Trends

Economic models are used to explain the trends and extent of the gender wage gap. The main economic model used to study the outcome differences between male and female wages is called the Blinder-Oaxaca decomposition model.[32] This technique breaks down the wage gap into a portion that can be explained by observable or measured characteristics and those that cannot be explained by those characteristics—i.e., explained and unexplained factors.

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[30] *See Id.* at 2 (*citing* Lawrence Mishel et al, *The State of Working America*, 12 Ed., Ithaca, N.Y.: Cornell University Press, (2012)).

[31] *See* Joint Economic Committee, *Gender Pay Inequality—Consequences for Women, Families and the Economy*, 7 (Apr. 2016) [hereinafter JEC] (During the labor union decline, the overall U.S. labor force aged. The data suggests that the disparity in earnings increases with age. "Those between the ages of 18 and 24 earning approximately 88 percent of what their male counterparts earn. Women between the ages of 25 and 34 earn slightly less—approximately 86 percent of what their male counterparts earn…However, after age 35, women's earnings typically grow more slowly than men's, resulting in a larger pay gap for older women. Among workers 35 and older, women's median earnings in 2014 were 76 percent of men's.").

[32] *See* Alan R. Blinder, *Wage discrimination: reduced form and structural estimates*, J. of Hum. Resources, 436-455 (1973); Ronald L. Oaxaca, *Male-female wage differentials in urban labor markets.* Int'l Econ. Rev., 693-709 (1973).

The two prevailing theories of the gender pay gap—the human capital model and the labor discrimination model—use this technique. Both models seek to identify group differences, by isolating variables, as they relate to the overall outcome difference. An understanding of these two techniques aids in creating a solution. Once the factors are isolated you begin to undercover the interconnectedness of the factors and the ultimate source of the disparity.

2. Human Capital Theory and Its Limitations

Worker characteristics are generally associated with the human capital theory. Human capital "corresponds to any stock of knowledge or characteristics the worker has (either innate or acquired) that contributes to his or her "productivity."[33] Particularly the skills people acquire through education, training and experience. Human capital variables include age, prior experience, numbers of hours worked, marital status and education. These are often times referred to as the explained factors of the gender wage gap.

Human capital theory posits that earning power depends on human capital investments. Basically one's earning potential increases with the more variables he or she acquires. Participation in the workforce is a key variable since this where workers obtain labor market experience. The participation of women in the workforce grew almost 1% per year from 1970 to 1990 and then leveled off.[34] Although not at the same rate, women's lifetime work and earnings rose as women's participation in the labor force grew. The growth of labor market experience correlates with the narrowing of the gender gap. According to the research conducted by Blau and Khan in 2016, "[i]n 1981, men had

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[33] D. Acemoglu & D. Autor, *Lectures in Labor Economics*, 3-33, 3 http://econ.lse.ac.uk/staff/spischke/ec533/Acemoglu%20Autor%20chapter%201.pdf. [34] *See* Polachek, *supra* note 17.

nearly 7 more years of full time-labor market experience on average than women. By 2011, the gap had fallen markedly to only 1.4 years."[35] Therefore, just looking at "these two basic measures of human capital—schooling and actual labor market experience—women made important gains."[36]

The labor market experience explains the current trend of stagnation, but the narrowing of the gap did not achieve equality in wages. The second important piece of the human capital theory is labor market commitment. Scholars pose that the level of commitment to one's work or the perceived level of commitment by the employer correlates to earning potential. Some surveys suggest that many women are opting out of the workforce,[37]which reduces their level of commitment and decreases their lifetime work investment. However, the attrition rate does not fully explain the slow down. Additionally, this theory does little to explain why when we compare men and women at the same level of education, prior experience, and number of hours worked women still earn less. The human capital theory only gets us so far in explaining the current wage disparity.

Women have increased their capabilities over the past five decades, which results in a significant reduction and in some instances elimination of the "productivity" explanation provided under this theory. Claudia Goldin explores this concept in her

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[35] Blau & Kahn, *supra* note 23, at 5.
[36] *Id.*
[37] *See* Robin J. Ely at el, *Rethink What You "Know" About High-Achieving Women,* Harv. Bus. Rev., (Dec. 2014) (The authors surveyed more than 25,000 Harvard Business School (HBS) graduates with a large portion graduating from the MBA program. The survey showed that "77% of HBS graduates overall—73% of men and 85% of women—believe that "prioritizing family over work" is the number one barrier to women's career advancement." The actual percentage of women opting out to care for children full time is much lower at 11%. It is important to note these results may not be reflective of the population at large.).

article, *A Grand Convergence: Its Last Chapter*. She concludes "as women have increased their productivity enhancing characteristics and as they 'look' more like men, the human capital part of the wage difference has been squeezed out."[38] The portion of the gender wage gap that remains and is growing relates to the unexplained factors. This is generally known as the residual portion of the gap.[39] The question remains what is responsible for the rest of the gap.

3. Labor Market Discrimination Theory Covers the Rest of the Gap

The portion of the gap that is not due to differences in qualifications is generally described as the residual or unexplained portion. The unexplained portion of the gap accounts for a larger share of the gender gap as women raise their human capital variables. The "unexplained factors accounted for a substantial share of the gender pay gap…actually a bit larger share of gap in 2010 (85%) than in 1980 (71%)."[40] Many theories exist on how the residual portion of the gender wage gap is composed. Some claim the difference in earnings is due to actual discrimination. Others claim it is due to lack of temporal flexibility, inability to effectively negotiate, lack of desire to compete or implicit bias throughout the employment process.

Labor market discrimination is the prevailing theory on why the residual portion persists.[41] Discrimination in the labor market can mean that equally productive workers receive different pay for doing the same job. Labor market outcomes differ for many

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[38] *See* Claudia Goldin, *A Grand Convergence: Its Last Chapter,* Am. Econ. Rev. 104(4): 1091-1119 (2014).
[39] *Id.*
[40] Blau & Kahn, *supra* note 23, at 8.
[41] *See* Gary S. Becker, *The Economics of Discrimination,* Chicago: University of Chicago Press (2d ed. 1971); *but cf* David L. Dickenson & Ronald L. Oaxaca, *Statistical Discrimination in Labor Markets: An Experimental Analysis,* Economic Research Institute Study Papers, Paper 278 (2004).

groups not just men and women. Differences are evident among races and classes as well.[42] The differences can be seen at many points during a worker's lifetime. These include workforce participation, employment, wage, education and occupation.[43] Discrimination can be overt, but most of the time it is covert or an unconscious bias by the employer or co-workers.[44] Economists agree on the size of the unobserved differences, but the cause of the differences is subject to debate.

B. Causes of the Gender Wage Gap: Explained and Unexplained Factors

More important than the models used to describe the gender wage gap are the various factors that contribute to the gap. These causes are categorized into explained and unexplained factors. Elimination of both categories is the key to the reduction of the gender wage gap. These factors are described in further detail in relation to the federal workforce in Part III. Specifically the federal workforce attempts to address these identified factors through policy updates and the offering of work-life flexibility programs.

1. Explained Factors

The explained factors include human capital attributes such as education, occupation, experience, age and marital status. With the exception of age, societal norms and psychological factors generally influence these attributes. Many skeptics assert the explained factors are voluntary choices made by women; therefore they are not a result of

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[42] *See* Catherine Hill et al, *The Simple Truth About the Gender Pay Gap*, American Association of University Women (AAUW): Washington, DC (Spring 2017) (figure 7 provides figures for medial weekly earnings of women by race and ethnicity) [hereinafter Hill et al, *The Simple Truth]*.
[43] *Id.*
[44] Blau & Kahn, *supra* note 23, at 31.

social norms or pressures.[45] However, these choices are not entirely within a woman's control. Outside constraints impact the decision-making process. The Economic Policy Institute provides an illustrative example—"by the time a woman earns her first dollar, her occupational choice is the culmination of years of education, guidance by mentors, expectations set by those who raised her, hiring practices of firms, and widespread norms and expectations about work-family balance held by employers, co-workers and society."[46]

Regardless of existing constraints, women are determined to earn more. For example, women reversed the gender differential in educational attainment. Since the 1990s women have outnumbered men in undergraduate and graduate degrees.[47] The gender wage gap varies among the educational subgroups. The American Association of University Women (AAUW) found that "at every level of academic achievement, women's median earnings are less than men's median earnings. In some cases, the gender pay gap is larger at higher levels of education."[48] Additionally, one year after college

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[45] *See* Steven Horowitz, *Truth and Myth of the Gender Pay* Gap, Foundation for Economic Education (Mar. 30, 2017), https://fee.org/articles/truht-and-myth-on-the-gender-pay-gap/; *see also* Jessica Scheider & Elise Gould, *"Women's work" and the gender pay gap—How discrimination, societal norms, and other forces affect women's occupational choices—and their pay*, Economic Policy Institute (Jul. 20 2016), http://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/.

[46] *See* Scheider & Gould, *supra* note 45.

[47] *See e.g.* U.S. Department of Education, National Center for Education Statistics, Table 2015a (2015); U.S. Department of Education, National Center for Education Statistics, 2015b (2015); *see also* Christianne Corbett & Catherine Hill, *Graduating to a pay gap: The earnings of women and men one year after college graduation*, AAUW: Washington, DC (2012) (explores the gender wage gap after graduation, finds that education does not eliminate the gender pay gap).

[48] *See* Hill et al, *The Simple Truth*, *supra* note 42, at 14.

graduation, women were paid 82 percent of what their male counterparts were paid.[49] The area of study is as important as obtaining a higher education. Certain areas of study lend themselves to lower-paying occupations. Therefore the area of study is crucial as it relates to wages.

As women's education and labor market experience increase, they begin to broaden into a variety of occupations, male and female-dominated industries.[50] Even with this expansion, women tend to work in traditionally female-dominated jobs such as healthcare, education and office and administrative work.[51] Men are more concentrated in construction, maintenance and repair, and production and transportation occupations.[52]

According to the Institute for Women's Policy Research, "male-dominated occupations tend to pay more than female-dominated occupations at similar skill levels, particularly at higher levels of educational attainment."[53] However, even when women increase participation in a male-dominated field, the overall pay in the field tends to decline.[54] The gender composition of occupations is associated with the pay received by

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[49] Corbett & Hill, *supra* note 47.
[50] *See* Scheider & Gould, *supra* note 45.
[51] *See* Ariane Hegewisch et al, *The Gender Wage Gap by Occupation*, Institute for Women's Policy Research, IWPR #C350a, (Apr. 2012).
[52] *Id.*
[53] *Id.*
[54] *See* Asaf Levanon et al, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 U.S. Census Date*, Social Forces vol. 88, no. 2, 865-892 (2009).

males and females.[55] Two perspectives on this association is discussed in the next section of this paper.[56]

Occupational segregation is referred to as an explained factor because it is known and measureable. Occupational segregation is the single largest cause of the gender pay gap; it accounts for what some estimate at 54% of the gap.[57] This is an increase from 27% in 1980.[58] As exhibited by the EPI example above, entrance into an occupation is a culmination of many decisions—pursuing an education, area of study and family-work balance.

How a person is treated within their community influences their choice of occupation.[59] At a young age, girls and boys are steered into certain career paths and industries. The most notable example is the representation of women in STEM fields—science, technology, engineering, and mathematics.[60] Sociologists studying the

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[55] For a discussion of the main explanations for the negative association between the share of females in an occupation and wages see John T. Addison et al, *The Occupational Feminization of Wages*, IZA Discussion Paper Series, 9078, Bonn, Germany: Institute for the Study of Labor (May 2015), http://ftp.iza.org/dp9078.pdf.

[56] Devaluation and queuing perspectives are explored in this paper. In contrast to these two views, the equalizing differentials theory and human capital theory suggest no causal relation exists between pay and female representation. For an exploration of all four perspectives see Levanon et al, *supra* note 54, at 867-870.

[57] *See* Andrew Chamberlain, *Demystifying the Gender Pay Gap: Evidence from Glassdoor Salary Data*, Glassdoor Research Report (Mar. 2016), https://research-content.glassdoor.com/app/uploads/sites/2/2016/03/Glassdoor-Gender-Pay-Gap-Study.pdf; *but see* Blau & Kahn, *supra* note 23, at 26 (their research indicates occupational segregation accounted for 49% of the 2010 gender wage gap).

[58] Blau &Kahn, *supra* note 23, at 26.

[59] For a discussion on how societal norms and other forces affect women's occupational choices see Schieder & Gould, *supra* note 45.

[60] *See* National Girls Collaborative Project, *Statistics: State of Girls and Women in STEM* (2016), https://ngcproject.org/statistics (For example, "women make up a mere 29 percent of the STEM workforce. Female scientists and engineers are concentrated in different occupations than are men, with relatively high shares of women in social sciences (62%) and biological, agricultural, and environmental life sciences (48%) and

advancement of women in STEM fields find that the cultural belief that science and math are male domains influences a girl's decision to avoid STEM careers.[61] Basically, the negative stereotype regarding a girl's ability in mathematics becomes their reality. Girls report less confidence than boys do in their math and science ability.[62] A loss of confidence in this area persists throughout the rest of their education and shapes their career path.[63]

Graduation results show that men outnumber women in nearly every STEM field, and in some areas women earn only 20 percent of the bachelor degrees.[64] This decline is further reflected in post-graduation studies and into the workplace where women represent 29 percent of the workforce.[65] A girl's interest in math and science is staunched at an early age, regardless of her actual ability to succeed.[66] A girl's true potential is inhibited by societal norms and expectations.

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relatively low shares in engineering (15%) and computer and mathematical sciences (25%).").

[61] *See* Catherine Hill et al., *Why So Few? Women in Science, Technology, Engineering, and Mathematics*, AAUW: Washington, DC) (Feb. 2010) ("If a girl believes that most people, especially those in her immediate environment think boys are better than girls at math, that thought is going to affect her, even if she doesn't believe it herself") [hereinafter Hill, *Why So Few]*.

[62] *See* Frank Pajares, *Self-efficacy beliefs and mathematical problem-solving of gifted students*, Contemporary Educational Psychology, 21(4), 325-44 (1996).

[63] *See* Hill et al, *Why So Few*, *supra* note 61, at 22 ("A number of studies have sown that gender differences in self-confidence disappear when variables such as previous achievement and opportunity to learn are controlled.").

[64] *Id.* at 25 ("Women earn 20 percent of bachelor's degrees in physics, engineering, and computer science.").

[65] National Girls Collaborative Project, *supra* note 60.

[66]*See* Denise Cummins, *Why the STEM gender gap is overblown,* PBS Newshour (Apr. 17, 2015), www.pbs.org/newshour/making-sense/truth-women-stem-careers.com (finding that men and women score equivalently on IQ tests, with men scoring about 3 percent higher on the mathematics portion).

The gender wage gap exists within each occupational field as well.[67] This occurs in a number of occupations ranging from the financial industry, law, medicine and academia. For example women make up almost half of the mangers at Fortune 500 companies, yet comprise only 14.3 percent of executive officers and even a smaller 3.8 percent of CEOs.[68] The lower representation of women at higher levels could be due to the lack of women entering the field and the time it takes to get to the top. Or perhaps there are barriers for women to advance to the top.[69] Recent research indicates that women entering or new to the occupation fare better in wages and representation when women are highly represented at the higher ranks.[70] The same result is observed in low-paying and high-paying occupations.[71]

The gender wage gap diminishes once it is adjusted for the explained factors. One 2016 study conducted by Glassdoor Economic Research examined the gender wage gap by using data sets of Glassdoor salaries shared anonymously by employees online.[72] The study found that comparing workers with similar age, education and years of experience shrinks the gap from 24.1 percent to 19.2 percent.[73] Additionally, if you compare

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[67] *See* Schieder & Gould, *supra* note 45, at 3.
[68] *See* 2012 Catalyst Census, *Fortune 500 Women Executive Officers and Top Earners* (2012), https://www.catalyst.org/.
[69] "[I]t is difficult to determine whether the scarcity of women at the top is simply due to the fact that women are relative newcomers and it takes time to move up the ranks (the "pipeline" argument) or whether it represents particular barriers to women's advancement (i.e., a "glass ceiling"). Moreover, a lower representation of women at higher levels could be due to discrimination or subtle barriers facing women but could also reflect greater work-family conflicts for women that reduce their productivity and/or interests in high level positions." *See* Blau & Kahn, *supra* note 23, at 28-29.
[70] *Id.*
[71] *Id.*
[72] *See* Chamberlain, *supra* note 57.
[73] *Id.*

"workers with the same job title, employer and location, the gender pay gap in the U.S. falls to 5.4 percent (94.6 cents per dollar)."[74]

2. Unexplained Factors

Even after accounting for all the explained factors, a gap continues to exist. The unexplained factors make up the rest of the gap. The unexplained factors are worker characteristics not readily observable. Researchers generally include domestic responsibilities, discrimination and psychological attributes in this category.[75] The exact configuration and combination of factors in the unexplained portion is unknown. However, it is undeniable that the unexplained portion of the gap remains consistent and is observed across occupations. The trend of the unexplained portion of the gap is especially important because the gender wage gap will persist until this portion of the gap is identified and addressed.

Domestic responsibilities are cited as one of the top contributors of the gender wage gap.[76] Research indicates that the burden of meeting family responsibilities often falls on the mother. According to a 2013 Pew Research Report, 39 percent of mothers took a significant amount of time to care for a child or family member and 27 percent actually quit their jobs to fulfill these duties.[77] Placing greater priority on family responsibilities impacts the human capital variables discussed above—work experience and labor commitment. A woman may choose her occupation based on family

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[74] *Id.* (the study also found a similar pattern in four other countries: United Kingdom, Australia, Germany and France).
[75] *See* Blau & Kahn, *supra* note 23, at 31-44.
[76] JEC, *supra* note 31, at 12-15.
[77] *Id. at* 13 (compare with 24 percent of father took significant amount of time to care for a child or family member and 10 percent quit their job).

responsibilities, perhaps opting for a more flexible or part time work.[78] A woman may miss merit increases, lose out on a tenured position or receive less training. All of these variables account for part of the wage differential experienced by women.

Closely related to caring for a child or family member is the motherhood wage penalty.[79] Single mothers continue to have the lowest average rate of pay.[80] Significant empirical evidence suggests that mothers earn more than 4 percent less than women who do not have children.[81] However, we see the reverse trend in father's wages. Fathers bring home 3 to 10 percent more than males without children.[82] The studies are not conclusive on the cause of the "penalty." The lower wages could be the result of women leaving the workforce or switching to more "child friendly" jobs. Or mothers may be deterred from taking a more demanding, higher paid job. Regardless, women are effectively penalized for having children.

Another possibility is that mothers face discrimination.[83] Statistical discrimination—making decisions on the basis of the average characteristics of the group—may play a role in the employer's willingness to train, promote and make an

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[78] *See* Elise Gould et al, *What is the gender pay gap and is it real? The complete guide to how women are paid less than men and why it can't be explained away*, Economic Policy Institute (Oct. 20, 2016).
[79] *Id.* at 14.
[80] *See* Gould et al, *supra* note 78, at 16.
[81] *Id.* ("Research has consistently shown that women with children are paid less than women without children and men with or without children. In short, there does seem to be a motherhood penalty for earnings. Even after researches control for variables such as education and experience, they find that mothers are paid approximately 4.6 percent less on an hourly basis than women who are not mothers." *citing* Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, Am. Soc. rev. 66, 204-225 (2001)).
[82] *See* Alexandra Killewald, *A reconsideration of the Fatherhood Premium: Marriage, Coresidence, Biology, and Father's Wages*, Am. Soc. Rev. 78(1), 96-116 (2012).
[83] The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555 (1978) (an amendment to Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against workers on the basis of pregnancy).

investment in females that are mothers.[84] This relates back to the misperception that a mother's productivity is less than other employees. The employer is making a productivity assessment based on an assumption of the motherhood role. This is generally referred to as being on the "mommy track," where women find themselves in unfulfilling roles with little prospect for advancements. Economists believe the higher wage disparity experienced by older women may be due in part to this motherhood role.[85]

The increase in male earnings and wages as they become fathers reinforces the traditional gender role construct. These gender roles often lead to discrimination. The notion that men are the breadwinners make them seem as though they have increased effort and motivation as the primary earner. Therefore, employers reward these perceived qualities in men, but do not associate them with women. Such a finding suggests discrimination against women based on parental status.

Statistical discrimination is not limited to mothers. An employer may discriminate against a woman even if they believe she may become pregnant.[86] Employers may incorrectly expect that women will be less dedicated therefore give them less incentive to remain at the job. Much of the discrimination that we see today is not overt discrimination. Laws making sex discrimination unlawful, and its declining social acceptance, contribute to waning overt discrimination.[87] Therefore, much of the discrimination is subtle, based on discriminatory attitudes and stereotyping that may even be unconscious.

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[84] *See* Dickenson & Oaxaca, *supra* note 41.
[85] JEC, *supra* note 31, at 7.
[86] Melissa Alpert & Alexandra Cawthorne, *Labor Pains: Improving Employment and Income Security for Pregnant Women and New Mothers*, Center for American Progress (Aug. 3, 2009).
[87] *See* Blau and Kahn, *supra* note 23, at 31.

Gender discriminatory attitudes extend beyond women as a class and affect occupational pay structures. There are two predominant sociological views on the link between gender composition and pay: devaluation and queuing.[88] First, the devaluation view asserts "employers ascribe a lower value for the work done in occupations with a high share of females and consequently set lower wage levels."[89] Extensive literature suggests wage inequality is socially constructed and the institutionalized bias against women results in a devaluation.[90] In contrast, the queuing perspective claims that employers prefer to hire men; therefore this results in discriminatory hiring and placement process.[91] Women are then clustered in lower paying occupations, even though they have comparable skills with the higher paying occupations.[92]

Neither perspective is mutually exclusive and the entire wage gap cannot be explained by these two views.[93] Since empirical studies suggest that gender composition is an ongoing contributor to the pay gap, a successful solution should address this along with other identified factors.[94]

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[88] *See* Levanon et al, *supra* note 54.
[89] *Id. at* 866.
[90] *See e.g.* Donald J. Teriman & Heidi I. Hartmann 1981. *Women. Work, and Wages: Equal Pay for Jobs of Equal Value*, Washington, DC: National Academy Press (1981); Barbara S. Kilbourne et al, *Returns to skills, Compensating Differentials, and Gender Bias: Effects of Occupational Characteristics on the Wage of White men and Women*, Am. J. of Soc. 100(3), 689-719 (1994); Charlotte Magnusson, *Gender, Occupational Prestige, and Wages: A test of Devaluation Theory*, Euro. Soc. Rev. 25(1), 87-101 (2009).
[91] Levanon et al, *supra* note 54, at 865.
[92] *Id.*
[93] *Id.*
[94] *See* Levanon et al, *supra* note 54, at 865; *but cf* Paula England et al, *Does Bad Pay Cause Occupations to Feminize, Does Feminization Reduce Pay, and How can We tell with Longitudinal Data?*, Am. Soc. Assoc. (2004) (researchers used data from 1983 to 2001 to analyze the two perspectives and found no support for ongoing causal dynamics. The researchers conclude that the continuing relationship is due to institutional inertia

There is no way to determine how much of the unexplained and the explained portion of the gap is due to discrimination. Some of the variables discussed could be the result of discrimination either directly or indirectly. For example, discrimination may influence the experience, training, occupation and attrition rate of women.[95] Employers cannot distinguish between women who are labor committed versus those who are not. As a result all women may be penalized. Social norms and discrimination create a vicious cycle. Society exerts pressure on women to bear the brunt of domestic work and then they are penalized to conforming.

As discussed, discrimination may extend beyond the individual and permeate into an occupation's pay structure. Countering these varying levels of discrimination requires more than anti-discrimination laws and policies increasing female representation in certain occupations. It must be an organic process if we are to eradicate the assumptions and stereotypes that lead women down this path of inequality.

A factor even more elusive to quantify is the impact of psychological attributes on the gender wage gap. Psychological attributes encompass many areas. It is impossible to address every attribute; therefore this paper will discuss three. The three attributes are self-assurance, negotiation skills, and risk aversion. Estimating the impact of

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freezing in that early relationship. However, the paper does recognize that active policy intervention is required for female wages to reach parity with those in comparable, but different, male jobs.)

[95] Although not a focus of this paper, there are a number of examples of gender discrimination targeting men. For example, men entering traditionally female dominated professions are generally stereotyped as feminine or not normal. For further examples of gender discrimination targeting men see Kimberly A. Clow & Rosemary Ricciardelli, *Women and Men in Conflicting Social Roles: Implications from Social Psychological Research*, Soc. Issues and Pol'y Rev. 5(1), 191-226 (Dec. 2011).

psychological factors on wages is difficult. Similar to discrimination, psychological traits affect wages directly and indirectly.[96]

Studies indicate that women tend to have lower self-esteem than men which impacts wages at many different stages.[97] Self-esteem is "an individual's subjective evaluation of his or her worth as a person."[98] Additionally, women tend to be less self-confident than men.[99] Self-confidence and self-esteem often go hand-in-hand. Self-confidence means to trust in one's abilities to successfully deal with challenges.[100] Compared with men, women consider themselves less ready for promotions and routinely underestimate their abilities.[101]

Because women are less confident in their abilities they may not seek employment opportunities. A report by Hewlett Packard found women less willing to apply for jobs they were not 100 percent qualified for.[102] Men would apply if they could

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[96] Blau & Kahn, *supra* note 23, at 37 ("Some of the economic research in this area attempts to separate the direct and indirect effects of psychological factors. This is usually done in one of two ways. One may estimate reduced form wage regressions, excluding the intermediate factors and including the psychological factors; one can then compare the impact of psychological factors controlling and not controlling for covariates that they are believed to affect. Alternatively, one can estimate a structural model where the intermediate factors (schooling, occupation, etc.) and wages are endogenous variables.").

[97] *See* Wiebke Bleidorn et al, *Age and Gender Differences in Self-Esteem—A Cross-Cultural Window*, J. of Personality and Soc. Psychol.,111(3), 396-410 (2016).

[98] *See* Ulrich Orth & Richard W. Robins, *The Development of Self-Esteem*, Current Directions in Psychol. Sci., 23(5), 381-387 (2014).

[99] Blau & Kahn, *supra* note 23, at 36 ("Men are found to place a higher value on money, to have higher self-esteem, to be less risk averse, more competitive, self-confident and disagreeable, and to believe that they control their own fate (an internal, as opposed to external, locus of control) to a greater extent than women.").

[100] *See* Neel Burton, *Self-Confidence Versus Self-Esteem*, Psychology Today (Oct. 19, 2015), https://www.psychologytoday.com/blog/hide-and-seek/201510/self-confidence-versus-self-esteem.

[101] *See* Katty Kay & Claire Shipman, *The Confidence Gap,* The Atlantic (May 2014).

[102] *Id.*

meet 60 percent of the job requirements.[103] Men overestimate their abilities and performance, while women hold back even when more qualified. Action is the key to occupational progression and advancement and confidence it the key to action.[104]

Confidence is closely tied to performance-oriented situations such as negotiation.[105] Empirical studies indicate that the propensity to negotiate generally varies between men and women.[106] Women are less likely to negotiate on their own behalf[107] which is the driver to a salary increase in some positions. A study of business school students found that men initiated salary negotiations four times as often as women and that when women did negotiate they asked for 30 percent less money than their male counterparts.[108] Many believe this disparity comes from a lack of confidence.[109] This can

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[103] *See* Kay & Shipman, *supra* note 101; *see also* Peggy McIntosh, *Feeling Like a Fraud*, Wellesley Centers for Women Paper No. 18 (Apr. 1984)(discussing the fact that men have greater confidence in their ability to perform tasks than their female counterparts).
[104] *Id.* (confidence "is a belief in one's ability to succeed, a belief that stimulates action").
[105] *See generally* Charles B. Craver, *The Impact of Gender on Negotiation Performance*, 13 Cardozo J. Conflict Resol. 339, 348 (2013) ("Males tend to exude greater confidence than females in performance-oriented situations."); *see also* Muriel Niederle & Lise Vesterlund, *Gender Differences in Competition*, 24 Negot. J. 447, 450-56 (2008).
[106] Women show a significantly lower propensity to initiate negotiations for higher compensation than men, this is amplified if their negotiation counterpart is female. *See generally* Hederos Eriksson & Anna Sandberg, *Gender Differences in the Initiation of Negotiation: Does the Gender of the Negotiation Counterpart Matter,* Gender Action Portal, Harvard Kennedy School (2012).
[107] Research suggests that "women perform better when negotiating on behalf of others than they do when negotiating for themselves; no such difference emerges among male negotiators." *See* Dina Pradel et al, *When Gender Changes the Negotiation*, Harvard Business School (Feb. 13 2006) www.hbswk.hbs.edu/item/when-gender-changes-the-negotiation.
[108] Kay & Shipman, *supra* note 101.
[109] *Id.*

lead to a reduction in pay relative to men's, especially if negotiation is part of the employer's process for computing salaries, raises and promotions.[110]

Gender differences in negotiation is a culmination of various social factors and stereotypes.[111] In addition to the disparity in confidence, research suggests that women may be socialized to feel as though negotiating is a masculine behavior.[112] Negotiation is often characterized as pushy or aggressive; traits not associated with feminine qualities. Women who take on the stereotypical masculine role are often viewed more negatively than their male counterparts.[113] Others may view negotiating altogether unacceptable behavior for women. The degree to which these stereotypes, which transform into social norms, subconsciously influence one's life is unknown. Studies suggest that both genders were less interested in working with women who attempted to negotiate a better salary

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[110] *See* Linda Babcock & Sara Laschever, Women Don't Ask: The High Cost of Avoiding Negotiation—And Positive Strategies For Change, 5 (Princeton University Press (2003)) (The authors provide a persuasive example of how a single negotiation impacts a lifetime of earnings. "Suppose that at age 22 an equally qualified man and woman receive job offers for $25,000 a year. The man negotiates and gets his offer raised to $30,000. The woman does not negotiate and accepts the job for $25,000. Even if each of them receives identical 3 percent raises every year throughout their careers (which is unlikely, given their different propensity to negotiate and other research showing that women's achievements tend to be undervalued), by the time they reach age 60 the gap between their salaries will have widened to more than $15,000 a year, with the man earning $92,243 and the woman only $76,870. While that may not seem like an enormous spread, remember that the man will have been making more all along, with his extra earnings over the 38 years totaling $361,171."); *see also* Linda Babcock & Sara Laschever, Ask for It: How Women Can Use the Power of Negotiation to Get What They Really Want, (Penguin Random House (2009)) (discussing hidden bias against women at the negotiation table and how training can overcome these challenges and induce more women to negotiate their initial salaries).

[111] *See* Craver, *supra* note 105, at 351-52.

[112] *Id.*

[113] *See* Hannah R. Bowles et al, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask,* 103 Org. Behav. & Hum. Decision Processes 84, 85-87 (2007).

than they were with a man who tried to negotiate a higher salary.[114] This is yet another example of where the labor market rewards the same trait differently based on gender. Stereotypical beliefs may determine the outcome of the negotiation because this becomes a woman's reality.[115]

Studies find that men and women do not share the same tendencies towards risk and competition.[116] These behaviors can directly influence earnings. Women may be at a disadvantage in the labor market and led to avoid certain occupations or business settings.[117] Women "end up going into less competitive fields, like human resources or marketing…[t]hey don't go for finance, investment banks, or senior-track faculty positions."[118] This ties to the confidence dilemma previously discussed. If women believe they won't get the promotion or are not competent in an area, they are less likely to try.

The advantage of males in areas of self-confidence, negotiation and risk aversion correlates with occupational distribution and the unexplained portion of the gender wage gap. It paints a dull picture for women if these three attributes are viewed in isolation. Conversely, there are many areas in which women show to have an advantage. For example, women tend to have better interpersonal or people skills than men.[119] These skills are increasing their value in the workforce and are thought to increase women's

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[114] *See* Pradel et al, *supra* note 107.
[115] For a discussion on how women and men are not that different after all, but the differences are guided by stereotypes Kay Deux, The Behavior of Women and Men, 144 (Wadsworth Pub. Co. (1976)); *see also* Andrea Kupfer-Schneider et al, *Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers*, 17 Duke J. Gender L. & Pol'y 363, 368-374 (2010).
[116] *See generally* Craver, *supra* note 105.
[117] *See* Blau & Kahn, *supra* note 23, at 44.
[118] *See* Kay & Shipman, *supra* note 101 (quote is from t interview with Victoria Brescoll, whom is an assistant professor of organizational behavior at the Yale School of Management).
[119] *See* Blau & Kahn, *supra* note 23, at 50.

wages relative to men's as time progresses. Once again, what may be an advantage for a man or woman in one aspect, may be a disadvantage in others. More research should be accomplished in this area to determine the full impact of these psychological differences on earnings.

Part II. Proposals for Eliminating the Gender Wage Gap

It is difficult to untangle the causes and effects of the gender wage gap. The current literature on closing the gap varies from structural and organizational changes to public policy updates and a call for re-socialization of men and women.[120] A brief description of each solution is necessary to understand how far the federal workforce has come and where they must go. The federal system is leaps and bounds above the private sector; nevertheless gender wage inequality persists. What follows is an exploration of some of the proposed solutions: policy changes, structural changes and a social change.

A. Policy Changes Targeting Pay Transparency and Work-Life Balance

Policy changes are often the first step in modifying a broken system. For example, a number of policies attempt to eradicate gender discrimination in the workplace.[121] The Equal Pay Act of 1963 proscribes gender based pay discrimination among employees within the same establishment who perform "substantially" equal work.[122] Title VII of the Civil Rights Act of 1964 and subsequent amendments proscribe employment discrimination on the basis of sex.[123] Sex discrimination is proscribed during all stages of the employment process, to include hiring, promotion and other conditions of

[120] *See e.g.* Goldin, *supra* note 38; *see also* Nyberg, *supra* note 22.
[121] *See* Befort, *supra* note 11.
[122] 29 U.S.C. 206(d)(1).
[123] 42 U.S.C. § 2000e et seq..

employment.[124] In 2009, Congress took steps to strengthen these protections by passing the Lilly Ledbetter Fair Pay Act, which revised the 1964 Civil Rights Act 180-day statute of limitations period to allow victims of compensation discrimination to file charges within 180 days after any pay period during which they were discriminatorily underpaid.[125] The Lilly Ledbetter Fair Pay Act focused on strengthening the remedy for discrimination.[126] The proposed Paycheck Fairness Act[127] and the Fair Pay Act[128] attempt to strengthen pay equity laws, but these do not seek to address the underlying cause of the disparity.

The Obama Administration focused their attention on pay transparency in an attempt to address the cause of the disparity. The theory is that if there is a culture of secrecy around pay then women will not know if they are being discriminated against. The Institute for Women's Policy Research found that about half of all workers report that discussion of wage and salary information is discouraged or prohibited.[129] The figure is significantly reduced for those employed by a government agency with wage and salary information public. Only 18 percent of women and 11 percent of men in the public sector report discouragement or prohibition of wage and salary discussions. The IWPR did not find a direct link between pay secrecy and inequality, but they believe that pay

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[124] *Id.*
[125] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2.
[126] *Id.*
[127] Paycheck Fairness Act, H.R. 1869, 115th Cong. (2017) (originally introduced in 2007 see H.R. 2023, 105th Cong. (1997)).
[128] Lilly Ledbetter Fair Pact Act of 2009.
[129] *See* Ariane Hegewisch et al, *Pay Secrecy and Wage Discrimination*, Institute for Women's Policy Research, IWPR #Q016 (Jan. 2014).

secrecy appears to contribute to the gender gap in earnings.[130] Pay transparency is proposed by some to be the first step to pay equity because men and women will know about the disparity and have the means to address it.

Disclosing overall pay statistics may be a useful tool for ensuring "equal pay for equal work."[131] To accomplish the goals set out by the Obama Administration, the Office of Federal Contract Compliance Programs (OFCCP) and Equal Employment Opportunity Commission (EEOC) issued several rules.

First, the OFCCP amended their regulations to prohibit federal contractors from discharging or discriminating against applicants or employees who discuss or discover compensation information. Second, the EEOC implemented significant changes to the annual EEO-1 report.[132] The EEOC will begin collecting data on certain demographic

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[130] *See* Gowri Ramachandran, *Pay Transparency*, Penn St. L. Rev.116:4, 1044-1080, 1065-1066 (Article explores the different theories used to support the inference that transparency reduces wage disparities. The author proposes implementing pay transparency to " help prevent, root out, and correct discrimination" by turning pay transparency into an affirmative defense. There are three specific theories to support the relationship between transparency and reduced wage disparities. First, pay transparency will allows employees at all levels to effectively check one another's behavior to ensure the raise or increase is warranted. Second, pay transparency can lead to uniformity because employers will not want to appear to show favoritism or bias. Lastly, weak negotiation skills of women, minorities and those in the "out-group" would be mitigated because they are armed with more information.).

[131] "This new data will assist the agency in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces." *See* U.S. Equal Employment Opportunity Commission, *EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports*, Washington, DC (Jan. 29, 2016).

[132] The EEO-1 Report, otherwise known as "The Employer Information Report" can be found at the U.S. Equal Employment Opportunity Commission (EEOC) website. Reporting thresholds vary depending on type of employer. Annual filings are required for federal contractors and first-tier subcontractors with 50 or more employees and a prime contract or first-tier subject of $50,000 or more. Annual filings are required for private sector employers with 100 ore more employees. *See* U.S. EEOC, *EEO Reports/Surveys*, www.eeoc.gov/wmployers/reporting.cfm (last visited May 11, 2017).

criteria for employers who have more than 100 employees.[133] At first glance this appears to be a monitoring tool, however, employers are no longer able to turn a blind eye if they identify any disparities that correlate with race, sex, or ethnicity for employees performing similar work.

The impact of the actions taken under the Obama Administration may be stunted or expanded by his successor. As with any administration change, it is unknown where the new administration will take us.[134] However, just as President Kennedy alluded to in his signing speech of the Equal Pay Act, changes through law are only the first step.

Often family work laws are cited as a solution to counter the impact of domestic responsibilities. The Family Medical Leave Act (FMLA) of 1993 mandates that eligible employees be allowed to take up to 12 weeks of unpaid leave for birth or adoption, acquiring a foster child, illness of a child, spouse, or parent or their own illness.[135] The FMLA is available for male and female employees, but does not apply to every employer and does not provide for paid leave. The United States is the only advanced country that does not guarantee paid maternity leave.[136]

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[133] 80 Fed. Rg. 54,934; 54,977 (Sept. 11, 2015)(to be codified at 41 CFR pt. 60-1).
[134] On March 27, 2017, President Trump signed an Executive Order (order number pending) that revoked certain measures regarding federal contractors implemented by former President Obama. President Trump revoked Executive Order 13673 of July 31, 2014, section 3 of Executive Order 13683 of December 11, 2014, and Executive Order of August 23, 216. President Trump cancelled the "Fair Pay and Safe Workplaces rule." Two rules within this cancellation impact women employees—paycheck transparency and the ban on forced arbitration clauses for sexual harassment, sexual assault or discrimination claims. *See* Mary E. O'Hara, *Trump Pulls Back Obama-Era Protections For Women Workers*, NBC News (Apr. 3, 2017), http://www.nbcnews.com/news/us-news/trump-pulls-back-obama-era-protections-women-workers-n741041.
[135] Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. (1993).
[136] *See* JEC, *supra* note 31, at 22.

Paid maternity leave alone will not address the wage disparity. Work-life balance policies that are offered only to women perpetuate the stereotype that women should be the primary caregivers. Such policies can make it more likely that women leave the labor force for long periods of time, decreasing their labor market attributes. Paid parental leave is the better solution to address gender stereotypes and the stigma associated with caretaking responsibilities. Any potential losses in labor experience can be shared among the parents and not fall directly onto the woman. The social norm can be reversed in this area with the implementation of paid parental leave.

In addition to lack of paid parental leave, the high cost of childcare may push mothers out of the labor force until the children are old enough to attend school. Policies adopted to improve childcare access and affordability may strengthen a mother's connection to the workforce. Many countries have adopted such policies aimed at ensuring families have adequate access to affordable and reliable childcare.[137] Until the caregiving responsibilities are shared, the high cost of childcare will continue to disproportionately disadvantage a mother's earnings.

B. Implementation of Workplace Flexibility Programs

Closely related to policy reforms are workplace flexibility programs. As women increase representation in the workplace there is a growing need to address the conflicts faced between work and life responsibilities. Flexible workplace programs may assist employees in achieving a work-life balance.[138] Programs include alternative work

[137] For example, France adopted several policies that include affordable municipal day care, tax breaks for hiring in home childcare workers and free universal preschool beginning at 3 years of age. *Id.* at 24.

[138] *See generally* Executive Office of the President Council and Economic Advisors, *Work-Life Balance and the Economics of Workplace Flexibility*, Washington, DC (Mar. 2010).

arrangements. These include arrangements such as telecommuting, flexible schedules and job sharing.[139] Generally, less skilled workers have less workplace flexibility with their scheduled hours or location.[140] Implementation of these policies may not be practical for all firms but there should be a movement towards implementation to achieve a proper balance.

The work-family conflict increased for dual earning couples. For example, "in 2008, 60 percent of fathers and 47 percent of mothers in dual-earner couples reported work-family conflict compared to 35 percent and 41 percent in 1977, respectively."[141] As noted earlier, women are often leaving work if there is a family conflict.[142] The utilization of workplace flexibility programs varies with each employer and employee.[143] Proponents suggest these programs enable women to accumulate human capital—remaining employed without a reduction in hours. Unfortunately, utilization of these policies may cause negative career consequences. A 2009 study indicated there is a

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[139] *See* Jean McGuire et al, *Flexible Work Arrangements: The Fact Sheet*, Geo. U. L. Center (2010).
[140] *Id.* at 2.
[141] *Id. at* 7.
[142] *See* Executive Office of the President Council and Economic Advisors, *The Economics of Fatherhood and Work*, Washington DC (June 9, 2014) [hereinafter *Fatherhood and Work*] (report follows the trends of fathers in the workforce as women enter the workforce, finding that father-only families have gone from 1 percent of families in 1970 to 7 percent of families today).
[143] "The majority of workers who have flexibility in their work schedules are those who are using flexibility on an informal basis; only 38.8% of workers with flexible schedules report participating in a formal flextime program. 28.8% of full-time federal employees use flexible work schedules. In the private sector 28.9% of full-time employees use flexible work schedules. Within the private sector: the highest rate of flextime are found among those working financial activities (37.7%), professional and business services (37.6%), and information (34.9) industries. The lowest rates of flextime are found among those working in the construction (20.3%), manufacturing (24%), transportation and utilities (25.7%) and education and health services (25.6%) industries." *See* McGuire et al, *supra* note 139, at 2.

perception that employees who use workplace flexibility options are viewed as less serious about their careers.[144] The complete impact of this stigmatization on employees is yet to be seen.[145]

Workplace flexibility programs allow individuals to navigate around workplace norms to meet their individual needs. These programs do not necessarily solve issues with workplace norms, such as long hours and unpredictability.[146] Recent work by Claudia Goldin analyzed the impact of temporal flexibility on the gender wage gap. Her work focused on the gender earnings gap within occupations, not across occupations. Specifically, she looked at what happens within high earning occupations. She concludes that earning differences within occupations "is largely due to the value placed on the hours and job continuity of workers."[147] Each occupation places a different penalty on job flexibility. That is, in some sectors flexibility is extremely costly.

Flexibility is likely more costly for a job that requires meeting deadlines, emphasizes interpersonal relationships, excessive hours and open availability. In particular, workers in the corporate, financial and legal worlds often suffer a higher price

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[144] *See* Marcie Pitt-Catsouphes et al, *Workplace Flexibility: Findings from the Age & Generations Study*, The Sloan Center on Aging and Work at Boston College, Issue 19 (Jan. 2009).

[145] Studies suggest that employers that have adopted flexible workplace policies see many economic benefits, such as reduced worker absenteeism and turnover, improvements in their ability to attract and retain workers, and other positive changes that translate into increased worker productivity. *See generally Fatherhood and Work*, *supra* note 131.

[146] *See* Vicki Schultz, *Feminism and Workplace Flexibility*, Conn. L. Rev. 42(4) 1205-1220 (May 2010).

[147] *See* Goldin, *supra* note 38, at 1103.

for flexibility.[148] Goldin asserts that a structural change is required so that the cost of providing flexibility is reduced in all occupations. [149]

C. Rethinking Gender Norms and Responsibilities

Some scholars make a call for a social change.[150] Here, a social change must modify the current structure.[151] Up until this point, the two proposed solutions generate structural and organizational transformations. Structural preconditions are just that, preconditions but not the end-all solution. Only a social change can close the gender wage gap. A societal shift of this nature is dependent on a change in social relationships. A social change can reverse the norms and psychological attributes that contribute to the wage disparity. In particular, society must reject and ultimately eradicate traditional gender roles and reward occupations equally.

This shift falls into two categories: abolishing what is stereotypically masculine and feminine and equal work valuation. Abolishing the concept of masculinity and femininity means that individuals will rid themselves of the perceived norms that drive constricting traditional gender roles. For example, advancing that women are ambitious, independent, smart and men are sensitive, kind and nurturing. Psychological attributes should not be assigned by one's gender, but developed by one's innate character. The pressure to conform to gender roles is impressed at an early age. If children do not have this pressure they can enter into the field of study or occupation of their choice, based on

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[148] *Id.* at 1103-16.
[149] *Id.* at 1116-18.
[150] In sociology, a social change is "the alteration of mechanisms within the social structure, characterized by changes in the cultural symbols, rules of behavior, social organizations and value systems." *See* William Form & Nico Wilterdink, *Social Change*, Encyclopedia Britannica Inc., https://www.britanica.com/topic/social-change (last visited Mar. 8, 2017).
[151] Social change encompasses many different processes, either changes to maintain or modify the structure. The latter is often referred to as a societal change. *Id.*

their abilities and interests. The push for women to go into STEM careers is important, however, the real success is when this is an organic process.

Ridding society of gender roles includes redefining domestic work and caregiving responsibilities. As long as women are expected to bear the brunt of these responsibilities they will continue to have barriers to enter into and excel in certain fields. However, if both partners are presumed to take on caregiving responsibilities it follows that the negative perceptions regarding "motherhood" and caregiving will dissipate. Women will not be expected to prioritize their partner's career over theirs. To be fully realized this requires more than an equal share of responsibilities, but a value shift regarding family.

Ann Marie Slaughter advocated this value shift when she stated, "[m]en are socialized to believe that their primary family obligation is to be the breadwinner; women, to believe that their primary family obligation is to be the caregiver…Ultimately, it is society that must change, coming to value choices to put family ahead of work just as much as those to put work ahead of family."[152] This relates to the temporal flexibility proposed by Claudia Goldin. The value shift must extend to the workplace and transform the workplace culture.

The second half of a social change concerns the valuation of occupations and pay setting processes. This can be viewed as a subset of redefining gender expectations. Pay should be based on qualifications and job requirements. Equal value comes naturally when individuals are not bound by preconceptions of "women's work" and "men's work." Employer pay setting practices should not be guided by the gender composition of the workforce. Under either the devaluation or queuing theory, gender inequalities are a

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[152] *See generally* Ann M. Slaughter, *Why Women Still Can't Have it All*, The Atlantic, (Jul/Aug. 2012).

result of employer bias.[153] Addressing these two theories will not eliminate the entire pay gap.[154] However, a social shift will not be effective until all the elements of society address the underlying gender expectations and norms.

A societal shift in behavior requires an all-encompassing effort. For the shift to be fully realized it must become organic. Traditional gender roles must be eliminated in all facets of life. A key part of this transformation is instilling confidence and other psychological attributes into a woman's core identity. Laws and workplace policy and programs can be used to promote and encourage these individual changes. Employers must also focus on their own shift in workplace culture and pay setting practices. It is difficult to differentiate what is driving the other, but it is clear that we need both to occur before human behavior is changed.

Part III. Case Study: The Gender Wage Gap in the Federal Workforce

A. Federal Workforce Structure

This case study focuses on policies and programs that govern the federal workforce and then takes a closer look at the gender pay gap within the federal workforce. The federal civilian workforce covers over 2 million civilian non-postal

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[153] Under the queuing theory, if employers rid themselves of any bias women would not cluster in occupations offering lower pay relative to men. Additionally, under the devaluation theory, if employers rid themselves of bias employer will not ascribe a lower value for the work done predominately by women. *See* Levanon et al, *supra* note 54, at 867-70.

[154] These two theories do not explain the within occupation gender pay gap exhibited across occupations, which is generally disregarded when exploring the two theories. *Id.* at 868.

employees worldwide, with women holding 43.23 percent of these positions.[155] An analysis reveals that the federal workforce implements many of the aspects of the three proposed solutions; however, the gender pay gap remains. Although the federal workforce may be criticized as not representative of the gender, ethnic, and racial diversity of the United States' private workforce,[156] its contribution to the discussion on eliminating the gender wage gap is underestimated.

First, it is imperative to understand the structure of the federal pay systems, hiring process and leave and workplace flexibility programs. The pay system structures are expected to provide uniformity in pay throughout the workforce. There are two main classification and pay systems that govern the federal workforce: General Schedule (GS) and Federal Wage System (FWS). According to OPM, approximately 1.5 million white-collar Federal workers worldwide are categorized as GS employees. White-collar employees include professional, technical, administrative or clerical positions. Conversely, the FWS "is a uniform pay-setting system that covers Federal appropriated fund and non-appropriated fund blue-collar employees who are paid by the hour."[157]

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[155] *See* Office of Personnel Mgmt., *Federal Employment Reports—Profile of Federal Civilian Non-Post Employees,* Washington, DC (Sept. 30, 2016), https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees/.

[156] *See* James Hairston & Vanessa Cardenas, *Slow Progress Toward a Representative Federal Workforce*, Center for American Progress (Mar. 26, 2012), https://www.americanprogress.org/issues/race/news/2012/03/26/11248/slow-progress-toward-a-representative-federal-workforce/.

[157] *See* Office of Personnel Mgmt., *Pay and Leave—Pay Systems,* Washington, DC, https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/federal-wage-system/#url=Overview (last visited May 12, 2017) [hereinafter OPM Pay Systems].

The Classification Act of 1923 established the GS classification system.[158] The law was revised in the Classification Act of 1949, but maintained the same type of pay system. The revised law is premised on providing equal pay for substantially equal work, but does not explicitly delineate based on sex.[159] The pay level is determined by the individual's GS grade and step for their job. The grade of each job is based on the level of difficulty, responsibility and qualification requirements.[160] There are 15 grades, starting with GS-1 to GS-15. Within each grade are 10 step rates (1-10). Each agency is empowered to classify their positions, however, OPM prepares the standards and is the classification review authority.[161]

In addition to grade level classification, the GS is divided into occupational categories, groups and series. The classification system is organized within five occupational categories—Professional, Administrative, Technical, Clerical, and Other White-Collar (PATCO). An occupational group is a major subdivision of the GS, which covers "associated or related occupations; e.g. the Accounting and Budget Group, GS-500; the Engineering and Architect Group, GS-800."[162] A further subdivision of an occupational group is called a series. OPM established over 450 series. A series consists

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[158] Classification Act of 1923.
[159] 5 U.S.C § 5101(1)(A).
[160] *See* U.S. Office of Personnel Mgmt., *Pay and Leave—Pay Systems—General Schedule Overview*, Washington, DC, https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/ (last visited May 12, 2017) [hereinafter OPM General Schedule Overview].
[161] *Id.*
[162] *See* U.S. Office of Personnel Mgmt., *Introduction to the Position Classification Standards*, Washington, DC, 3 (Aug. 2009), https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/positionclassificationintro.pdf.

of "positions similar as to specialized line of work and qualification requirements."[163] If a position is "classified to the same schedule, series, and grade" they are more likely "to warrant like treatment in personnel processes such as testing, selection, transfer and promotion."[164]

The implementation of classification standards promotes uniformity throughout the federal workforce. The "classification standards usually include a definition of the kind of work covered by the standard; background information, such as descriptions of typical kinds of assignments found in the occupation(s) covered and definition of terms; official titles; and criteria for determining proper grade levels."[165] Setting standards assists in the equitable administration of managing federal employment programs, "such as those for recruiting, placing, compensating, training, reassigning, promoting, and separating employees."[166] These employment stages are important because at each stage the gender wage gap fluctuates.

Individuals who are not covered under the GS system fall under a variety of other pay systems.[167] Under the law, GS does not include "employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semi-skilled, or skilled manual-

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[163] *Id.* at 3.
[164] *Id.*
[165] *Id.* at 4.
[166] *Id.* at 5.
[167] "Other pay Other pay systems include the Federal Wage System (also known as the Prevailing Rate System), which covers about 9 percent of federal workers in mostly blue collar positions; the Senior Executive Service pay system for senior level managers; and other systems that are specific to agencies, such as the federal financial regulatory agencies' pay systems. The costs and percentages presented here are based on OPM's CPDF. Total compensation includes both pay and benefits." *See* U.S. Gov't Accountability Office, GAO-12-564, *Federal Workers: Results of Studies on Federal Pay Varied Due to Differing Methodologies* 5 (June 2012)[hereinafter GAO Report 12-564].

labor occupations, and other employees."[168] The FWS is the second largest pay system, covering approximately 9 percent of federal workers.[169] The FWS is based on local prevailing rates in the private sector. The goal is to ensure "employees within a local wage area who perform the same duties receive the same rate of pay."[170] It is important to note there are a number of differences between the GS and FWS in terms of occupational coverage, geographic coverage, pay ranges, and pay adjustment cycles.[171] Although there are a variety of other pay systems available, this paper will not further elaborate on the pay systems outside the GS. The statistical data used for this paper is based on white-collar and GS, non-postal civilian federal employees.

The GS pay structure directly corresponds with the grade and step classification of the position. Until the passage of the Federal Pay Comparability Act of 1970 and the Federal Employees Pay Comparability Act of 1990 (FEPCA), general pay adjustments were made through Congressional acts.[172] However, the annual GS pay adjustment authority permanently changed to the President with the passage of the Federal Pay Act of 1970.[173] At this time the GS basic pay structure consisted of an across-the-board nationwide pay schedule. This structure created a disparity between federal and nonfederal pay because "federal employees performing the same job at the same level

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[168] 5 U.S.C. 5102(c)(7).
[169] *See supra* text accompanying note 161.
[170] *See* OPM Pay Systems, *supra* note 157.
[171] To obtain an overview of the federal wage system see U.S. Office of Personnel Mgmt., *Federal Wage System Overview*, Washington, DC, www.opm.gov/policy-data-oversight/pay-leave/pay-systems/federal-wage-system/ (last visited May 12, 2017).
[172] "In 1967, Congress authorized the President to make adjustments in federal salary rates for 1968 and 1969." *See* GAO Report 12-564, *supra* note 167, at 6.
[173] *Id.* at 7.

anywhere in the country were paid the same amount."[174] To address this disparity, Congress passed FEPCA, which provides for locality-based pay adjustments. The same locality adjustment "will apply to all employees in a given local pay area, thus maintaining on a local basis the pay relationships among all jobs in the GS hierarchy of grades, consistent with the equal pay principle."[175] The pay structure is the starting point for setting wages, however the hiring and promotion processes determine where an employee will fall within the pay structure.

1. Merit-Based Hiring and Promotion System

The Federal Government operates a merit-based hiring system. Federal managers can use a variety of methods for hiring, however, the competitive examination process is the primary method for hiring permanent employees.[176] There are many steps in the competitive service hiring process; the major steps will be discussed. First the agency identifies the job and its assessment. This initial stage includes the decision to implement any hiring flexibilities and appointment authorities, which may eliminate some of the competitive hiring steps. There is a public notice period and job announcement for the open position. When the agency receives an application, they determine if the applicant is

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[174] A noted "exception was employees receiving higher special rates to address specific recruitment and retention problems." *Id*.

[175] *See* National Partnership for Reinventing Government, *Reinventing Human Resource Management: Reform the General Schedule Classification and Basic Pay system*, http://govinfo.library.unt.edu/npr/library/reports/hrm02.html (last visited May 14, 2017).

[176] The federal government has implemented several hiring flexibilities that do not confer competitive status. Appointments in the Excepted Service such as appointed under an authority defined by the U.S. Office of Personnel Management (OPM) as excepted (e.g., Veterans Recruitment Appointment) or being appointed to a position defined by OPM as excepted (e.g. Attorneys). 5 U.S.C 2103 and 5 CFR parts 213 and 302 provide more information on excepted service. *See* U.S. Office of Personnel Mgmt., *Hiring Information: Competitive Hiring*, Washington, DC, www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/ (last visited May 12, 2017).

eligible to hold the position, assess minimum qualifications, and assess relative qualifications. The agency will issue a list of applicants to the selecting official.[177] The selecting official will assess the qualifications of the top applicants and then select an applicant.

Once an applicant is selected they are notified by the Human Resource Specialist or hiring authority. The salary range is based off the initial classification of the job, with a few minor exceptions such as interdisciplinary positions.[178] A new GS employee is usually hired at step 1 of the applicable grade.[179] Agencies may set the rate of basic pay of newly-appointed employees above the minimum rate of the GS schedule because of the 1) superior qualifications of the candidate; or 2) a special need of the agency for the candidate's services.[180]

OPM regulations provide that the agency may consider ten listed factors for setting initial pay (including a candidate's existing pay, recent salary history, or salary documented in a competing job offer).[181] Interestingly, OPM makes a special note

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[177] *See* U.S. Office of Personnel Mgmt., *Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices*, Washington, DC, 2003.

[178] The final classification for interdisciplinary positions is determined by the qualifications of the person selected to fill it. For more information see U.S. Office Personnel Mgmt., *The Classifier's Handbook*, 34-35, Washington, DC (Aug. 1991).

[179] Educational job qualification is the starting point for GS classification. Typically GS-2 positions require a high school diploma and no additional experience; a GS-5 position generally requires a bachelor degree; and a GS-9 position generally requires a Master's degree. *See* OPM General Schedule Overview, *supra* note 160.

[180] *See e.g.* 5 U.S.C. § 5333; *see also* 5 CFR 531.212.

[181] The ten factors include: (1) The level, type, or quality of the candidate's skills or competencies; (2) The candidate's existing salary, recent salary history, or salary documented in a competing job offer (taking into account the location where the salary was or would be earned and comparing the salary to payable rates of basic pay in the same location); (3) Significant disparities between Federal and non-Federal salaries for the skills and competencies required in the position to be filled; (4) Existing labor market conditions and employment trends, including the availability and quality of candidates for

regarding the second factor, the existing salary and salary history. OPM highlights that the second factor is "only one of a number of factors that may be used to determine an employee's step rate."[182] For example when agencies are considering the second factor they can consider whether the candidate is a recent graduate or had a break in their career to serve as full-time care givers.[183]

At this point in the process the selectee has an opportunity to negotiate for a higher starting salary within the job announcement salary range. The selectee can use the OPM factors to justify why they should start at a higher step. For example, the selectee can emphasize their skill set, education, qualifications, and salary history. As addressed previously, the research indicates women tend to negotiate far less in regards to salary. We see this phenomenon reflected in the starting salary and discretionary pay setting authority actions, which favor male selectees.[184]

A GS employee is not locked into their starting salary. In addition to across-the-board and locality pay increases there are a variety of other pay increases available to GS employees. Generally, an employee can obtain a pay increase through a promotion.

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the same or similar positions; (5) The success of recent efforts to recruit candidates for the same or similar positions; (6) Recent turnover in the same or similar positions; (7) The importance/criticality of the position to be filled and the effect on the agency if it is not filled or if there is a delay in filling it; (8) The desirability of the geographic location, duties, and/or work environment associated with the position; (9) Agency workforce needs, as documented in the agency's strategic human capital plan; or (10) Other relevant factors. *See* U.S. Office of Personnel Mgmt., *Fact Sheet: Superior Qualifications and Special Needs Pay-Setting Authority*, Washington, DC, https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/superior-qualifications-and-special-needs-pay-setting-authority/ (last visited 12 May 2017).

[182] *Id.*

[183] *Id.*

[184] *See generally* U.S. Office of Personnel Mgmt. Report, *Governmentwide Strategy on Advancing Pay Equality in the Federal Government*, Washington, DC (Apr. 2014) [hereinafter OPM Report, *Governmentwide Strategy*].

There are three types of avenues for promotion (1) the merit promotion process, (2) career ladder promotions, or (3) a promotion based on an accretion of duties.[185] Career ladder promotions occur "when competitive hiring procedures are used to select someone to fill what is often a lower level trainee position with the purpose of developing the selectee to fill higher level full-performance position."[186] A promotion based on the accretion of duties occurs without competition, "when a job is reclassified to a higher grade level because new higher-level duties have been added to the position over time."[187]

The federal merit system promotion process is a competitive process in which the promotion is linked to the employee's individual performance. The premise is that managers will make the best possible selection when filling jobs. Additionally, similar to the purpose behind the GS, this promotion process is "designed to ensure that the decision to promote someone is made in accordance with prescribed procedures so that all the concerned parties have a reasonable assurance of being treated fairly."[188] The concept of being treated fairly includes attempting to remove personal bias in promotion decisions.[189] MSPB surveys indicate supervisors and employees are skeptical whether the above objectives are actually being achieved. The surveys reveal the number one reason is pre-selection. A stunning figure includes those who were denied promotion; 31 percent

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[185] *See* U.S. Merit Systems Protection Board, *The federal merit promotion program: process vs. outcome: a report to the President and Congress of the United States* 3, Washington, DC: The Board (2001) [hereinafter MSPB Report].
[186] *Id.*
[187] *Id.*
[188] *Id.* at 4.
[189] Merit Selection Procedures Board survey results found that a significant number of employees believed they were passed over as a result of a prohibited practice. The three top reasons offered were because of gender, race and age. *See id.* at 19.

believe that it occurred because the selecting official unfairly considered the gender of the employee.[190]

Three specific pay increases and monetary awards are linked to the employee's individual performance.[191] For example, "each grade has 10 step rates (steps 1-10) that are each worth approximately 3 percent of the employee's salary."[192] The first type of pay increase is a Within-Grade increase, which "are periodic increases in a permanent employee's rate of basic pay from one step of a grade to the next higher step within a grade."[193] Performance and longevity much reach an acceptable level for an increase, "(waiting periods of 1 year at steps 1-3, 2 years at steps 4-6, and 3 years at steps 7-9). It normally takes 18 years to advance from step 1 to step 10 within a single GS grade if an employee remains in that single grade."[194]

However, employees with "[o]utstanding or equivalent" performance ratings can qualify for Quality step increases, which are "faster-than-normal step increases that are designed to recognize excellence in performance," limited to one per year.[195] The last

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[190] "It is also worth noting that within our survey respondent population, men who felt they had been denied promotion were more likely to report that they had been passed over because of gender (39 percent reported this) than were women (23 percent)." *Id.*
[191] The GAO analyzed the three pay increase and awards and found that, "within grade increases were the least strongly linked to performance. Ratings-based cash awards were more strongly linked to performance depending on the rating system the agency used, and quality step increase were also more strongly linked to performance." *See* GAO Report 12-564, *supra* note 167, at 16.
[192] *See* OPM General Schedule Overview, *supra* note 160.
[193] *See* GAO Report 12-564, *supra* note 167, at 14.
[194] See OPM General Schedule Overview, supra note 160.
[195] *See* GAO Report 12-564, *supra* note 167, at 14.

type of pay increase is a ratings-based on cash awards which "are lump sum cash payments that are designed to recognize performance."[196]

2. Federal Workforce Benefits and Programs

For an employee, the availability of noncash compensation is almost as important as cash compensation. Noncash compensation is closely tied to the gender wage gap because some of the identified factors contributing to the gap are mitigated through flexibility programs and benefits[197] offered by the employer. Cash and noncash compensation is commonly referred to as the total compensation package.[198] Total compensation differs between the federal government and private sector. Almost all federal workers participate in one of the two offered retirement systems, health benefits program and paid leave.[199]

In addition to noncash compensation, the Federal Government offers various programs to assist employees in meeting their work and family obligations. Alternate work schedules (AWS) are available under Title 5 U.S.C. 6101. AWS allows "an

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[196] To gain a better understanding of the pay increases' and awards' eligibility see GAO Report 12-564, *supra* note 167, at 15.

[197] Benefits in this context include noncash compensation such as health insurance, retirement pension and paid leave. *See* Cong. Budget Office Study, Pub. No. 4403, *Comparing the Compensation of Federal and Private-Sector Employees* (2012), https://www.cbo.gov/publication/42921 [hereinafter Cong. Budget Office Study, *Comparing Compensation*].

[198] *Id.*

[199] The majority of federal workers participate in the Federal Employees Retirement System or Civil Service Retirement system (those employed prior to 1983). As far as paid leave, most federal employees receive 10 paid holidays a year; they also earn between 13 and 26 days of annual leave, and may be eligible for up to 13 days of paid sick leave annually. *See* Cong. Budget Office Study, *Comparing Compensation*, *supra* note 197, at 15-16.

employee to complete an 80-hour biweekly pay period in less than 10 days."[200] AWS may apply to employees of any executive agency (excluding the U.S. Postal Service), any military department, the Government Printing Office or the Library of Congress.[201] Each agency has the discretion to offer AWS, subject to limitations with bargaining unit employees.[202] AWS come in two forms—compressed work schedules and flexible work schedules.[203]

In addition, telework and remote work are two options that provide greater flexibility. In both cases, the employee is not required to report physically to the regular worksite, but is authorized to work at an alternate location. If an employee is unable to perform full time work, part time employment and work sharing agreements are available. Part-time employees do not lose their fringe benefits. They "are eligible, on a prorated basis, for the same benefits as full-time employees: leave, retirement, and health and life coverage."[204] Workplace flexibility programs such as these attempt to strike a balance between work responsibilities and caregiving responsibilities.

Another important workplace flexibility that expanded over the years is the Federal Leave System. The current leave system was enacted in 1951 and includes annual

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[200] *See* U.S. Office of Personnel Mgmt., *Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care*, at 23, Washington, DC (Apr. 2015) [hereinafter OPM Handbook on Leave and Workplace Flexibilities].
[201] 5 U.S.C. § 6101.
[202] However, "AWS programs for bargaining unit employees are established by negotiated agreements, bargaining unit employees and their supervisors and managers should consult the applicable collective bargaining agreement for its AWS provisions." *See* U.S. Office Personnel Mgmt., *Handbook on Alternative Work Schedules*, Washington, DC, https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/handbooks/alternative-work-schedules/Handbook (Last visited Mar. 12, 2017).
[203] For a discussion of compressed versus flexible work schedules see OPM Handbook on Leave and Workplace Flexibilities, *supra* note 200.
[204] *Id.* at 25.

leave, sick leave and leave without pay.[205] Since 1951, the leave system has expanded to meet the caregiving needs of its employees.[206] This expansion covers many situations, which include pregnancy, childbirth, adoption, and dependent care. With the exception of leave without pay and leave without pay under FMLA, the federal employee is paid during their absence from work. Subject to the rules of each program, an employee is able to use some or all of the leave programs.[207] The amount of leave available is dependent on many factors to include hours of sick leave, hours of annual leave, accumulated donated leave, and qualification for FMLA. OPM provides sample leave calendars for childbirth, which can extend for six plus months.[208] At the completion of utilizing the leave programs above, a federal employee can then request an AWS to provide for further flexibility.

Health and wellness programs supplement the federal workplace flexibility and leave programs. These programs include employee assistance program, dependent care, healthcare and insurance. The level of services vary from agency to agency, but generally surpass the programs that are offered to the overall labor force. Childcare needs and costs are generally cited as a contributing factor to the gender wage gap. Two programs are offered to alleviate these concerns. Federal agencies have the option to use appropriated

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[205] *Id.* at 6.

[206] The leave original system has expanded and now provides a variety of leave programs such as Federal Leave Sharing Act of 1988, Family and Medical Leave Act (FMLA) of 1993, Federal Employees Family-Friendly Leave Act of 1994 and Sick Leave for Adoption (1994). For a history of the evolution and expansion of federal leave programs see *id.* at 6-7.

[207] *See* OPM Handbook on Leave and Workplace Flexibilities, *supra* note 200, at 43.

[208] *Id.* at 50.

funds to assist lower income employees with the costs of childcare.[209] In addition, there are over 800 independently operated on-site childcare centers across the country.[210]

B. The Gender Wage Gap in the Federal Workforce

Although often praised as the gold standard for its workforce practices, the gender pay gap exists in the federal workforce. As part of President Obama's initiative on pay transparency, he ordered the examination of pay equality within the federal government. In 2014 the Office of Personnel Management released a study entitled Government-Wide Strategy on Advancing Pay Equality. The report analyzes the pay of Federal employees over the last 20 years. The report mirrors the overall workforce findings in regards to workforce changes and the shrinking of the gender pay gap. Interestingly, the data demonstrates the gender wage gap persists in the federal workplace despite the implementation of pay transparency, flexibility programs and employee benefits.

1. Office of Personnel Management Report on Advancing Pay Equality

The underlying data and findings of the 2014 OPM report are used as the main source of comparison and analysis for this case study. This report is the most recent comprehensive report on federal government employees available to the public at this

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[209] "OPM issued final regulations 5 CFR Part 792 effective March 24, 2003 implementing Child Care Subsidy Program legislation, entitled "Agency Use of Appropriated Funds for Child Care costs for Lower Income Employees." In accordance with the childcare legislation, 40 USC 590(g), enacted on November 12, 2001, executive agencies may use any appropriated funds, including revolving funds that are ordinarily used for salaries and expenses to assist lower income employees with the costs of childcare." *See* Office Personnel Mgmt., *Childcare Subsidy*, Washington, DC *https://www.opm.gov/policy-data-oversight/worklife/dependent-care/#url=Child-Care-Subsidy* (last visited May 12, 2017).

[210] 40 U.S.C. Section 490(b) authorizes agencies "to provide, free of charge for rent or services, space for child care centers" that meet certain conditions. *See* Office of Personnel Mgmt., *Childcare Resources Handbook*, Washington, DC, https://www.opm.gov/policy-data-oversight/worklife/reference-materials/child-care-resources-handbook/ (last visited May 12, 2017).

time. OPM gathered workforce data reported by Government agencies. OPM primarily focused on white-collar employee starting salaries, promotions and agency-specific policies. The report provides an in-depth review of 37 white-collar Federal job categories. The three types of statistical reports produced include workforce snapshot data, multivariate regression-decomposition data analysis, and workforce dynamic data.[211] In addition, OPM collected data on various factors, which influence the statistical showings such as occupation, age, agency, education level, length of service and supervisory status.[212]

2. Findings on Federal Workforce Wages

The overall gender pay gap dramatically shrunk over the years studied.[213] Over the OPM study years of 1992, 2002 and 2012 the gender pay gap decreased from about 30 percent to 13 percent for all white-collar and to 11 percent for GS only.[214] The

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[211] The three types of statistical reports described by the Officer of Personnel Management are " 1. Workforce snapshot data. We extracted and analyzed data by gender to obtain a picture of specific workforce characteristics (or a snapshot) in each December of 1992, 2002, and 2012, such as occupation and grade distribution. 2. Multivariate regression and decomposition data analysis. We used a multivariate regression and decomposition statistical analysis method to account for pay differences by gender that may be due to objective factors or characteristics such as occupation, age, or educational background. This method can be used to isolate the portion of any pay gap that cannot be attributed to identifiable factors or characteristics. We performed this analysis using data for December 1992, December 2002, and December 2012. 3. Workforce dynamic data. We extracted and analyzed data to gain an understanding of any gender differences in certain personnel actions such as use of the superior qualifications and special needs pay setting authority and promotion and quality step increase actions. We examined data for calendar years 1992, 2002, and 2012." *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at 8-9.

[212] *Id.* at 9.

[213] Interestingly, the overall percentage in females in the White Collar workforce decreased 2 percent, from 48 percent in 1992 to 46 percent in 2012. *See id.* at 11.

[214] "In making pay or salary comparisons, we are using adjusted basic pay, which is base pay plus any applicable locality payment or special rate supplement. In comparing female to male salaries, we used male salaries as the base for comparison. Thus, in this report, we express the average female salary as a percentage of the average male salary. For

multivariate regression-decomposition analysis breaks down the pay gap into an explained portion and an unexplained portion. This mirrors the economic model technique explained in Part I.

The explained factors account for a large portion of the total gender wage gap, but the portion of the gap explained by these factors has decreased. For example in 1992 the actual pay gap was 29.7 percent, with 25 percent as the explained portion.[215] In 2012, the actual pay gap was 10.8 percent, with 7.8 percent as the explained portion.[216] The unexplained portion has remained constant over the three cohort years.

Occupational distribution and education remain key factors in explaining the federal workforce gender pay gap, as they are still the largest contributors.[217] The impact of these factors has decreased over time. Similar to the private sector workforce, female federal employees increased their capabilities over time. Increases in educational attainment, federal work experience and occupational distribution contribute to the reduction of the explained portion of the gap. For example, the OPM report found a

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example, for the overall White Collar population (all pay plans) in December 2012, the average female salary was 87.3 percent of the average male salary. The shorthand term used in this report for this percentage is the "female salary percentage." In addition, the gender pay disparity or "pay gap" is expressed in this report as a percentage by (1) subtracting the average male salary from the average female salary and (2) dividing the resulting difference by the average male salary. If the female salary percentage is already computed, 100 percent is subtracted from the female salary percentage to derive the pay gap percentage. For example, if the female salary percentage is 87.3 percent, the pay gap is -12.7 percent (87.3 - 100 = -12.7). In other words, the average female salary is 12.7 percent below the average male salary. (In this report, we show the overall pay gap as a positive number, since it is understood that the gap represents the degree to which female pay is below male pay.)" *See id.*

[215] *Id.* at 13.

[216] *Id.*

[217] In 2012, 76 percent of the explained portion of the gap for White Collar pay gap was attributable to the occupational factor. The GS population produced similar results with 93 percent of that explained portion attributable to occupational distribution. *Id.*

gender pay gap at all educational levels, somewhere between 8-10 percent.[218] However, the "female salary percentages for the Education Level subpopulations were much closer to the overall raw average in 2012 than in past years; this suggests that differences in education level are explaining less of the gender pay disparity over time."[219]

The workforce changes in the federal government model the changes in the private sector workforce. There are large shifts in occupational categories and education levels. Along with occupational shifts, there are shifts in the male-female distribution across occupations and education levels.[220] Since 1992, clerical employees have decreased and administrative employees have increased.[221] The overall decline of this occupational category is important because this accounts for a portion of the reduction of the gap that we see today. Historically women accounted for the majority of clerical workers, which are among the lowest paid group in the federal government. Along with the occupational shift, occupations have moved towards gender integration. Reduction and integration in this category results in a reduction in the overall gender gap, as an "explained factor."

The OPM Report is not the first report to look at the decline in the clerical workforce. In 2009, the Government Accountability Office (GAO) conducted their own report, "Women's Pay: Gender Pay Gap in the Federal Workforce Narrows as Differences in Occupation, Education and Experience Diminish," which analyzes the pay

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[218] *Id.* at 12.
[219] *Id.*
[220] *Id.* at 10.
[221] In 1992 Clerical employees comprised 15.8% of PATCO populations with a male/female split of 14:86, compared with 5.3% and male/female split of 31:69 in 2012. In 1992 Administrative employees comprised of 32.7% of PATCO populations with a male/female split of 60:40, compared with 43.6% and male/female split of 57:43 in 2012. *Id.*

gap between men and women in the federal workforce.[222] Their research confirms that although the pay gap has narrowed, the disparity continues to exist for federal workers. They posit the decline in clerical jobs is due to several trends such as the overall decline in defense-related jobs, government efforts for increased efficiency and employee education levels.[223]

A correlation exists between the shifts in occupational categories and educational gains for both men and women. The number of employees with a Bachelor degree increased to 45 percent in 2012 up from 33 percent in 1992.[224] These gains were in large part due to female employees obtaining higher education. Over this period, female employees holding higher degrees went from 28 percent to 49 percent.[225] This increase in education corresponds with the occupational shifts, as clerical employees have fewer years of higher educational attainment.[226]

Although occupation and education distribution account for a large portion of the gap, it does not explain the pay disparities within occupational groups. Within the 37 occupational groups, the male average salary exceeded the female average salary for 22 groups. Of those 22 groups, females had a salary percentage of less than 95 percent in 15

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[222] The GAO performed analyses using September data for 1988, 1998, and 2007. Notably there were some differences between the GAO and OPM analysis in terms of the populations studied and factors used. *Compare* OPM Report, *Governmentwide Strategy*, *supra* note 184, *with* U.S. Gov't Accountability Office, GAO-09-279, *Women's Pay: Gender pay Gap in the Federal Workforce Narrows as Differences in Occupation, Education, and Experience Diminish* (2009) [hereinafter GAO Report 09-279].
[223] *See* GAO Report 09-279, *supra* note 222.
[224] *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at 10.
[225] *Id.*
[226] *See* Cong. Budget Office Study, Pub. No. 2839, *Characteristics and Pay of Federal Civilian Employees* 12 (2007), https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/03-15-federal_personnel.pdf.

groups. An examination of the pay gaps by grade level for the GS population show female and male average salaries were close in all three years. In fact, the average female salary is higher than the male average salary in 9 out of the 13 grades.[227] On its face, it is not intuitive why within the GS population the female average salary is higher than males when the overall female percentage is 89.2 percent. The difference relates back to occupational distribution, and that women are often found in lower grades which reduces the overall average.

In 2012, the unexplained portion of the pay gap accounted for 30 percent of the total pay gap for all white-collar employees and 33 percent of the total pay gap for the GS employees.[228] This percentage remains constant over the study years.[229] The GAO report also found an unexplained portion of the gender wage gap based on a similar regression-decomposition analysis.[230] Both reports identified possible theoretical explanations for the unexplained pay gap: discrimination, imprecise measurement or reporting of data included in analysis, prior work experience outside the federal government, educational major, individual priorities, motivation, work performance, care-giving responsibilities, and workplace flexibility.[231] The numerical contribution of each theoretical factor is unknown.

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[227] For purposes of the study, OPM merged the populations for grades of 1, 2, and 3, which results in 13 grade levels instead of 15. *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at 13.

[228] For example the in 2012 the GS population's actual pay gap was 10.8 percent and the unexplained portion of that gap was 3.8 percent. *See id.*

[229] *Id.*

[230] The GAO decomposition method showed the unexplained percentage as constant. "Specifically, it was 7.8 percent in 1988, 8.1% in 1998, and 7.5 percent in 2007." *See* GAO Report 09-279, *supra* note 222, at 63.

[231] *See e.g.* OPM Report, *Governmentwide Strategy*, *supra* note 184, at 14; *see also* GAO Report 09-279, *supra* note 222, at 3, 24, 37, 43-45, 53, 98.

3. Subpopulation Findings and Dynamic Data Findings

The results of subpopulation findings and dynamic data findings provide insight regarding possible causes of the pay gap in the federal workforce. First, the gender pay gap is smaller in the younger age groups. For example, in 2012 for the age group of 25-34 women earned 95.1 percent, a significant increase from 77.6 percent in 1992.[232] For the age group of 55-64 women earned 83.1 percent, up from 63.9 percent in 1992. [233] There is a gradual decline in percentage as age increases.[234]

A subpopulation closely related to age, is length of service. Similar to what is seen in the age category, as length of services increases so does the pay gap to some degree. With less than 5 years of service, female salary percentage is at 88.7 percent. The pay gap is the largest for length of service 25-29 years at 80.8 percent.

Second, OPM's dynamic data analyzed pay-setting actions, starting salaries and other pay increases between women and men. OPM found that superior qualifications and special needs pay-setting actions were used more frequently for men than women across all years.[235] Special actions were used more frequently in male dominated fields; 44 percent of these actions occurred in three male dominated occupational categories.[236] However, the report does not look at who initiated these actions—either the prospective

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[232] *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at app. 3.
[233] *Id.*
[234] These percentages include all white-collar jobs. The age group of less than 25 encompasses 2.7% of the total population and female salary average percentage is 92.1 percent. The decrease percentage for the youngest female age group is not explored in the study. *Id.*
[235] In 2012, 34.9 percent of actions were used for females. The percentage of female new hires receiving this action was 8.3 percent and 12.6 percent for male new hires. *Id.* at app. 5.
[236] The 3 occupational categories are Professional (mainly engineers), Administration (information technology), and Professional (other Professional), which covers only 12 percent of the total GS workforce. *Id.* at 15.

employee or pay-setting authority, or why there is a concentration in male dominated fields.

Starting salary results show similar results. On average, starting salaries were lower for women than for men across all years. The overall pay gap in starting salaries for new hires was about 10-12 percent in 2012.[237] OPM suggests throughout their report the pay setting action and starting salary results are attributed to differences in occupational distribution.[238]

Although starting salaries on average were lower, women were awarded (on a percentage basis) more quality step increases (QSI) and promotions overall in the years studied. In 31 of the 37 occupational categories women received a QSI more frequently than men.[239] In 2012, 3.53 percent of women received a QSI, compared with 3.11 percent of men.[240] The promotion rate results are similar, with women slightly edging out men at 4.55 percent compared with 4.05 percent of the male population.[241] Unlike actions taken during the initial stages of employment, these results are less linked to hiring practices and occupational differences between men and women.

B. Proposed Solutions Applied to the Federal Workforce

Now that we have sufficient background information we come down to the ultimate question of why does the gender wage gap persist in the federal workforce? And

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[237] OPM examined the GS starting salaries by GS grade level and found that the average salaries for males and females were relatively equally. Although females are treated equal at the same grade level, the concentration of females in lower grades affects the overall grade distribution. *Id.* at 16.
[238] *Id.* at 2, 15-16.
[239] *Id.* at 16.
[240] *Id.* at app. 5.
[241] In 2012, the female promotion rate exceeded the male rate for 27 of the 37 categories. *Id.* at 16.

how can these findings be used to improve the private sector gap? In the following paragraphs each proposed solution is evaluated, starting with the policy initiatives, then moving on to workplace flexibility and finally the implementation of a social change.

1. Pay Transparency Has Its Limitations

From inception, the federal workforce was constructed to ensure equal pay for substantially equal work.[242] The current structure and policies seek to reinforce this principle. For example, the federal workforce system is often lauded as the epitome of transparency for workers.[243] GS employees can easily access starting pay for vacant positions, can see how their salaries compare with others at their grade level, and are less likely to be discouraged from discussing pay with their co-workers.[244] At every step, from hiring, to promotion to attrition, the federal government provides standards that are premised on fairness and equality. The high degree of transparency in the federal workforce may contribute to increase pay equity, but the exact impact is immeasurable.

Standardized rules provide the proper baseline for gender equality in pay, but application of these standards provides a degree of discretion that may result in a disadvantage to women. For example, OPM posts fact sheets on the superior qualifications and special needs pay setting authority on their public website. They are fully transparent in their options and salary information. However, this level of transparency does not create an equal paying field when looking at starting salaries or when pay setting authority is exercised. In both categories, regardless of occupation or education, men come out on top and remain there.

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[242] Classification Act of 1923.
[243] Hill et al, *The Simple Truth, supra* note 42, at 23.
[244] Agencies are required by law and regulation to post starting pay on competitive service job announcements. *See* 5 CFR 330.104; *see also* Hill et al, *The Simple Truth, supra* note 42, at 23.

OPM publishes transparent standards, but the decision-making process is nebulous. Step 1 is the default for starting salary, but this can be adjusted based on an agency determination. The agency considers one or more of the ten OPM factors when determining which step to start a selectee.[245] OPM published a special note to agencies considering the existing salary and recent salary of a candidate who has taken a break for caretaking responsibilities. OPM emphasizes this is only one of many factors the agency can consider. OPM instructs the agencies to look at the whole person and all circumstances.

Although OPM's regulation provides discretion to the agency, not all agencies follow this guidance. OPM found that 14 reporting agencies mandate the use of the candidate's existing salary or that the existing salary when setting pay.[246] In practice, the mandatory application of this factor counteracts any attempts by OPM to neutralize the impact to those returning to the workforce or women entering the federal workforce from the private sector where they were paid less than their male counterparts. Regardless of the standards, agencies will ultimately give as much or little weight to OPM's criteria as they desire.

The data demonstrates an issue with either the starting salary standards or the application of the standards. An easy fix is to rid the system of any pay setting above step 1. This solution is not practical as circumstances most likely warrant hiring at a higher step. However, hiring authorities that continue flexibility in setting pay should create safeguards to ensure these policies are applied in gender-neutral ways. OPM can mandate

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[245] For an example how a one step increase per year adds up to a substantial sum see Babcock, *supra* note 110, at 5.
[246] *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at 20.

additional procedural safeguards for agency implementation. For example, there should be uniformity in the application of these factors and factors should remain strictly discretionary.[247] In addition, the approval authority for any agency exercising this authority can be elevated. Transparency in pay setting only gets you so far in reaching equality when there is a high level of discretion. Ultimately, the decision-maker must act consciously, objectively, and accurately.

In addition, most of these actions occur in traditionally male-dominated occupations. The data does not provide information as to why this phenomenon exists. This could be a result of the expertise required for these occupations or simply because men engage in the negotiation process far more than women. If it is the former, the classification authorities should examine the effectiveness of the classification system. Reclassification based on the skill required may not address the overall gender pay gap, however, it could narrow the gap for starting salaries and pay setting actions.

The negotiation process may be what is to blame for the disparity in starting salaries and other hiring flexibilities. These results align with what is observed in the private sector negotiation process. Simply put, men are more likely to initiate a pay increase and generally request more when doing so. Pay transparency is thought to mitigate the perceived weak negotiation practices of women because there is no longer an information disparity. The federal wage gap does not support a positive causal relationship between transparency and the negotiation process because the wage gap exists at the stage where negotiation has its largest impact on wages.

[247] *See supra* text accompanying note 181.

The OPM study does not provide information of whether the applicant or the agency initiated an increase, the sex of either party or the starting salary numbers. This information would be helpful in understanding the impact negotiation has on the pay setting process. Regardless, negotiation is most likely here to stay. Women must not fall victim to the stereotypes and use their skills and the information available to more successfully engage in this process.

The private sector is unlikely to voluntarily implement pay transparency measures. Empirical evidence and theory support the conclusion that the benefits of pay transparency outweigh the costs.[248] The costs are mitigated if employers and employees alter how they think about the issue. At its core, pay transparency is about dissemination of information, this does not necessarily equate to uniformity in pay or the loss of merit pay increases. Pay transparency can be used as a tool to incentivize employers to reward based on performance and encourage employees to perform better. The federal wage data does not conclusively prove or disprove the benefits associated with pay transparency. Unlike the private sector, the federal workforce's pay setting schedules have been transparent from the beginning. The full extent of this factor is unknown, but may account for why the pay disparity is smaller for the federal workforce.

2. Flexibility Program's Impact on Wages is Unknown

Generally employers recognize work-life programs as essential to recruit and retain a workforce, however the direct impact on wages is unknown. The private sector inspired the federal government to ramp up their efforts in providing work-life

[248] *See* Ramachandran, *supra* note 130, at 1067-73 (social discomfort, disgruntled employees and uniform pay and the loss of employer information advantage are identified as costs by the author).

programs.[249] A large push came with President Obama's 2014 Presidential Memorandum—Enhancing Workplace Flexibilities and Work-Life Program—directing agencies to better educate, train and expand the availability of workplace flexibilities and work-life programs.[250] Emphasizing these programs is relatively new; therefore the impact on federal wages remains to be seen. Additionally, analysis is limited because federal agencies are not currently required to collect data on program usage or effectiveness.[251] In winter of 2016 OPM announced it will conduct a federal work-life survey to evaluate the benefits offered and the current needs of employees.[252] Collection of this data will be key to understanding the direct impact of flexibility programs.

Although the true impact on wages is unknown, studies indicate flexibility options offered by the federal government resolve caretaking and family conflicts faced by women.[253] Federal government employees combine different flexibility programs to meet

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[249] For example, Congress has authorized flexible and compressed work schedules, voluntary leave transfer and leave bank programs, use of appropriated funds to support child care centers and appropriated funds to subsidize child care. *See e.g.* 5 U.S.C. §§ 6120-6133; 5 U.S.C. §§ 6331-6340; 5 U.S.C. §§ 6361-6373; 40 U.S.C. § 590; 40 U.S.C § 590(g).

[250] *See* Barack Obama, *Presidential Memorandum—Enhancing Workplace Flexibilities and Work-Life Program*, Office of the Press Secretary (June 23, 2014).

[251] *See generally* U.S. Gov't Accountability Office, GAO-11-137, *Federal/Work Life Programs*: *Agencies Generally Satisfied with OPM Assistance, but More Tracking and Information Sharing Needed* (Dec. 2010).

[252] *See* U.S. Office of Personnel Mgmt., *Announcements & News: Federal Work-Life Survey*, Washington, DC (Dec. 20, 2016), www.opm.gov.policy-data-oversight/worklife/news/2016/12/federal-work-life-survey/.

[253] "In 2015, 33% women in the Federal Government had a Flexible Work Schedule (FWS); 36% teleworked; 27% participated in worksite health & wellness programs; 16% used the Employee Assistance Program (EAP); 4% used child care programs; and 3% used elder care programs. Satisfaction with Federal work-life programs is very high among women who participate: 90% of women in the Federal Government are satisfied with their agency's FWS program; 79% with telework; 81% with worksite health & wellness, 77% with EAP; 72% with child care programs; and 68% with elder care programs." *See* U.S. Office of Personnel Mgmt., *Women in the Federal Workforce*,

their needs, sometimes being away for months without losing their positions. The option to spend time away, without quitting, positively influences human capital attributes of women, namely work experience.

In 2013, women accounted for 43.4 percent of all separations from federal service during fiscal year 2013.[254] The attrition rate of women is proportional to their representation in the federal workforce. This data suggests women in the federal workforce do not leave at the same rate as women in the private sector, where they leave in a greater number than their workplace representation. Yet, a length of service analysis reveals women are on the decline. The percentage of women within all categories of less than 20 years of federal service have declined since the first cohort group in 1992.[255] However, this number does not accurately represent why women left federal service or the decline of federal hiring.[256]

Another proposed contributor to the gender wage gap is missing merit increases or promotions.[257] Unlike the private sector, women receive both promotions and quality step increased more frequently than their male counterparts.[258] Caretaking responsibilities

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Washington, DC, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/women-in-the-federal-workforce-infographics.pdf.

[254] *See* Partnership for Public Service, *Fed figures 2014: Federal Departures*, Washington, DC, https://ourpublicservice.org/publications/viewconentdetails.php?id=352 (last visited May 14, 2017).

[255] *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at app. 3.

[256] The number of new employers hired by the government has declined every year since 2009. *See* Partnership for Public Service, *supra* note 254, at 2.

[257] However, the Government Accountability Office study found that women entering the study group in 1988 were more likely to take unpaid leave or have a break in service, but this did not significantly affect the pay gap. "In spite of difference in leave patterns between men and women, taking unpaid leave and having a break in service consistently accounted for less than 1 cent of the pay gap for this cohort of federal workers." *See* GAO Report 09-279, *supra* note 222, at 32.

[258] *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at app. 5.

are often cited as a primary reason for women to leave the workforce. Flexibility programs are offered to ease the burden of outside work responsibilities that often impact individual performance. Remaining in the workforce, transparent performance standards, and the ability to remain career-focused play a role in earning a merit increase. Although outside the scope of this paper, many theories exist on why we see this trend. A rise in merit increases could be a result of male discrimination, an initial undervaluing of women contributions or an employer's effort to achieve equality in pay. Once again the correlation of offering flexibility programs and merit increases is unknown.

Flexibility programs have not reversed the trend for women ages 35 through retirement age. Similar to the private sector statistics, the gender pay gap widens for women over 35.[259] Therefore, flexibility programs do not appear to have an impact on women's salaries peaking earlier. Peaking "during this time of life reflects the disproportionate impact of family responsibilities on women's careers."[260] Other research shows women may peak earlier because of occupational differences, underrepresentation at high-paying executive positions, being undervalued in their position or suffering from the "motherhood penalty."[261] Flexibility programs have yet to make an impact on this subpopulation.

Workplace surveys suggest flexibility programs improve the quality of life of women, however, the positive impact on wages remains to be seen. Workplace

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[259] *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at app. 3.
[260] *See* Gould et al, *supra* note 78.
[261] *See e.g.* Babcock & Laschever, *supra* note 110; Gould et al, *supra* note 78, at 16; Visier Insights, *Gender Equity Report 2016*, Vancouver, BC (June 21, 2016)(study found that the gender wage gap starts to noticeably widen at age 32, their analysis uncovers a definitive link between the underrepresentation of women in manager positions and the gender wage gap).

flexibilities contribute to the explained and unexplained factors of the gender wage gap to an unknown extent. Those who participate in workplace flexibility programs maintain their worth because human capital attributes are maintained. The influence of workplace flexibilities on the unexplained portion of the gap is not documented. As workplace flexibilities become the norm we may see a reduction in the unexplained portion of the gap. Normalizing these programs relates to the third solution, which requires a social change in the valuation of work and family.

Implementation of universal flexibility programs in the private sector presents a challenge. Working flexibility depends on the size of the employer, industry and employee education level.[262] According to the Families and Work Institute's 2014 National Survey of Employers, flexibility options declined in the private sector for time away from full-time work; including career breaks for personal or family responsibilities from 64 percent in 2008 to 52 percent in 2014.[263] However, the private sector experienced an increase in Employee Assistance Programs and wellness programs.[264] Private sector employers who implement these programs experience many rewards, such as increased employee satisfaction, higher retention rate, a positive impact on recruiting and increased productivity.[265]

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[262] *See* Kenneth Matos & Ellen Galinsky, *2014 National Study of Employers*, Families and Work Institute (2014), www.familiesandwork.org/downloads/2014NationalStudyOfEmployers.pdf.

[263] "These include sharing jogs (29% to 18%); working part year on an annual basis (27%to 18%); and flex career options such as sabbaticals (38% to 28%)." *Id.* at 10.

[264] Private employers offering Employee Assistance Programs was 78 percent in 2014 compared with 49 percent in 2008. Private employers offering wellness programs was 60 percent in 2014, compared with 51 percent in 2008. *Id.* at 33, 40.

[265] *See* Phylis Moen et al, *Does a Flexibility/Support Organization Initiative Improve High-Tech Employees' Well-Being? Evidence from the Work, Family and Health Network,* Am. Soc. Rev. 81(1), 134-164 (2016).

3. Social Change Will Take Us One Step Closer

The federal workforce leads the way when it comes to transparency and workplace benefits and flexibility, but does not go far enough to bridge the wage gap. The elimination of the gap will not come to fruition until there is a social change in all sectors of the community. The policy and programs adopted by the federal government facilitate social change. The federal government enforces changes at the organizational and structural level but is limited on its reach at an individual level. For example, the Obama Administration doubled their efforts to narrow the gap with the expansion of gender equality policies. Unfortunately, there was very little change in the gender pay gap during his years in office. The efforts of the Administration ushered the issue to the national stage again. Perhaps this will be enough to spark changes at the individual level and lead to pay equality.

While the extent in which social norms impact the explained and unexplained factors is unclear, scholars and policymakers agree to some correlation. The explained portion of the gap accounts for a large, but reducing percentage of the total wage gap. The explained portion of the gap is less influential as the human capital worth of women reach parity with men. Although these factors are explained, they are not immune from social influence.

a. Impact of Social Influence on the Explained Portion of the Gap

A woman's choice regarding her career is not made in a vacuum immune from social influence. For example, a woman may be discouraged from entering certain majors in school or unable to work in certain occupations because of care-taking responsibilities. These challenges are reflected in some of the data we see in the federal workforce. Specifically, the federal workforce continues to encounter significant occupational

distribution, a concentration of women at lower step positions within an occupation, lower starting salaries and women's salaries peaking earlier. OPM's report links occupational distribution as the key source for the latter three findings.[266]

Occupational distribution is the largest contributor of the gender pay gap in the federal and private workforces. This leads us to the broader question of what is the root cause? Women and men in the federal workforce exhibit similar traits such as age, education, work experience and length of service. Additionally, they equally benefit from pay transparency measures and workplace flexibilities. The reason for the gender distribution among occupations can no longer be explained away by human capital traits.

If human capital traits do not provide an explanation for occupational distribution, the next avenue is to explore how gender composition affects the overall pay structure. Is occupational distribution due to the lack of hiring women in these occupational categories, groups and series? If so, this may lead them to cluster in the lower grade category, groups and series. This explanation assumes employer bias and closely resembles the queuing theory. However, little data exists to fully explore this possibility. Until such data is collected the extent to which women may be discriminated against in federal hiring and the placement process is unknown.

An alternative is to explore how OPM sets the pay for each position. The pay systems that govern the federal workforce are based on OPM standards and classification. The system is intended to promote uniformity throughout the federal workforce; however, the classification system itself should be under scrutiny. At the time of the original classifications, women to a larger extent than today filled the majority of clerical

[266] *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at 2-3, 12-14.

and technical positions.[267] The average positions in these categories fall on the lower end of the pay scale. The positions that were dominated by women may have been devalued and the pay scale is now frozen to reflect this devaluation. A reevaluation of the OPM classification system may be necessary to fix the pay scale for those categories; however, reclassification does not address the factors that may contribute to the occupational distribution experienced today.

OPM's report does not reach any conclusions for the difference in occupational distribution.[268] OPM acknowledges that the element of discrimination may influence the explained factors, such as occupational distribution. Specifically, "to the extent that the explaining factors are subject to employee or employer control, some unknown portion of the explained gap may reflect the effects of discrimination (either societal or employer-specific)."[269] Further, OPM acknowledges the possibility that traditional societal expectations may result in disproportionate representation.[270] OPM does not make any explicit findings but their recommendations are revealing.

OPM recognizes the importance of addressing occupational distribution differences in the federal workforce and proposes two strategies to reverse this trend.[271] OPM recommends sharing best practices among agencies and to "develop recruitment and outreach strategies for growing female populations in occupations where they are

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[267] Women continue to fill the majority of these positions, however to a lesser extent. For a breakdown among all three cohorts see OPM Report, *Governmentwide Strategy*, *supra* note 184, at 25.
[268] *Id.* at 14.
[269] *Id.*
[270] OPM posits that if traditional societal expectations cause occupational segregation, "then strategies to encourage women to enter nontraditional occupational fields could be developed." *Id.*
[271] *Id.* at 22.

underrepresented."[272] The proposed solutions generate further structural and organizational changes, but these do not address the root cause. Sharing practices, recruitment and expanding education in STEM fields only treats the symptom of the ultimate problem. OPM recognizes the potential for societal impact, but does not tackle it. If the goal is equal representation in all occupations every choice and social influence must be explored. The decision to go into a STEM field must be organic, not addressed on the backend after women experienced a lifetime of contradictory socialization.

b. Impact of Social Influence on the Unexplained Portion of the Gap

Similar to the explained factors, the unexplained portion of the gap is not immune from social influence. The steadfast nature of the unexplained portion exposes the extent to which social norms contribute to the gender wage gap.[273] Each year the unexplained portion accounts for an increasing share of the gender wage gap. Why is this portion uninterrupted by the federal workforce structural and organization changes? One likely explanation is the actual causes of the unexplained portion are not addressed by those two solutions. As the term implies, the unexplained portion accounts for factors, which are unobservable. Scholars posit the unexplained portion is likely composed of discrimination, psychological attributes and the impact of caretaking. A shift in the way one thinks about gender roles can positively impact each of these causes. The categorical solution yet to be fully embraced is a social change.

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[272] The OPM report does not cite workplace flexibility as a contributing factor for occupational segregation in the federal workforce. *Id.*

[273] *See e.g.* OPM Report, *Governmentwide Strategy*, *supra* note 184; GAO Report 09-279, *supra* note 222; *see also* Blau and Kahn, *supra* note 23 (finding that the residual portion of the gender wage gap narrowed in the 1980's from between 21 and 29 percent in 1980 to between 8 and 18 percent in 1989; however, the unexplained portion of the gap has remained stable since then).

For example, a social change can reverse the gendered differences observed in the negotiation process. Most studies conclude women are simply bad at negotiation or believe they are bad it and this translates into lower starting wages and lack of promotions. This is especially true when women negotiate for themselves. This can be turned upside down if men and women change their way of thinking about appropriate gender roles. Specifically, women and men should move away from these stereotypes. Women must realize their worth and cease the trend of low self-valuation to see results at the negotiation table.[274] They need to have out-of-body experiences where they imagine that they are negotiating the salaries on behalf of others with their personal and professional backgrounds.

This change must not only occur in women. Psychological attributes such as confidence and valuation are shaped by all of society. Moreover, decision-makers must rid themselves of the bias surrounding feminine and masculine behavior. A woman may make many personal changes but this is only one part of the equation. An increase in wage equality will result when hiring authorities cease to penalize women for acting unfeminine at the negotiation table. This is just one of many examples of how a social change can reverse the trend of women obtaining lower starting salaries and concentrating in lower step positions. If women start in parity with men there is a greater likelihood of a lifetime of equal earnings.

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[274] *See* Hannah Riley Bowles et al, *It Depends Who is Asking and Who You Ask: Social Incentives for Sex Differences in the Propensity to Initiate Negotiation,* Kennedy School of Working Paper N. RWP05-045 (July 2005) https://papers.ssrn.com/abstract=779506 (Finding that sex differences influence the negotiation process, specifically that women were penalized by men but not women for trying to negotiate salary, and that "perceptions of niceness and demandingness" influenced results. Additionally, finding that women were less likely than men to choose to negotiate with a male evaluator.).

A social change can evolve from a number of different sources. An attempt to account for all the transformations required for a social shift of this magnitude is far too vast to survey comprehensively in this paper. However, there are some prerequisites. First, a shift must occur across all sectors. This includes family, media and the school system. The change must be ingrained in all facets of life to successfully defeat the gender wage gap. Second, private sector employers cannot sit idly by waiting for a shift. All employers should voluntarily move forward with formal improvements that encourage a social shift. The federal workforce gender pay gap will remain stagnant until progress is made in these other areas of life.

Finally, the discussion is not complete without recognizing the significant differences between the public and private sector workforces. Wages are influenced by these differences. For example, the federal government employs a greater concentration of federal employees in professional occupations, federal employees are more likely to have a bachelor's degree or higher and the average age of the federal employee is higher.[275] All of these factors generally increase worker compensation. However, these differences do not negate the comparison. The private and public sector workforces must learn from each other in order to close the gender wage gap for all Americans.

Conclusion

[275] Professional employees make up 33 percent of the federal workforce compared to 18 percent in the private sector. Professional employees are generally older with higher education, therefore we see that the average age of the federal employee is four years higher and with at least 51 percent having a bachelor's degree or higher, compared to 13 percent in the private sector. *See* OPM Report, *Governmentwide Strategy*, *supra* note 184, at 10-11.

A social shift is a scary prospect to employers and employees alike. But this does not compare with the prospect of an indefinite gender wage gap. The federal workforce sub-population data aids in isolating the root cause of the gender wage gap and provides a set of possible solutions. As discussed, the federal workforce pay structure is premised on equal pay for equal work. This principle permeates into the entire federal workforce structure. Transparent employment processes and workplace flexibilities provide the structural prerequisite to achieve this purpose. However, the current state of the federal workforce demonstrates that structural changes alone will not result in wage equality.

The federal workforce structure creates the safe space to achieve wage equality, but individuals must transform their social relationships to eradicate the driver of the gap—a culture shaped by gender stereotypes. This culture extends beyond issues of employment and encompasses all facets of life.

As history demonstrates, America has undergone many dimensions of development that begin with structural changes. These changes translate into a broad societal change when individuals liberate themselves from the current conditions. The environment in which we live must change. Wage equality will not be achieved through laws or policies that attempt to fix it on the back-end after a lifetime of gendered socialization. It will be realized once it is universally accepted that the gender wage gap is real and there is a will to eradicate the root cause by all of society.