MISSING THE FOREST FOR THE TREES: GENDER PAY DISCRIMINATION IN ACADEMIA

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ABSTRACT

Women in virtually every job category still make less than men. Academia is no exception. This Article will explore some of the structural explanations for this continued disparity and the continued resistance to seriously confronting those structural barriers to equality. Using the still-unfolding story of a charge of discrimination filed against a university, this Article examines the script that has become all-too-familiar in discussions about the gender pay gap, whether in academia or elsewhere. The basic storyline in pay discrimination litigation is this: Evidence is presented about the existence of a gap between men's earnings and women's earnings. The response is that the numbers cannot be looked at as a group because there are individual explanations for each pay decision. With this move, the focus of attention is shifted from an evaluation of the troubling structural picture to an evaluation of an individual employee. Until we are willing to resist that shift, it will be nearly impossible to address the root causes of continued pay inequity.

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INTRODUCTION

> Any gap in the pay of men and women, whether forty or ten or one percent, is an implicit statement to our children that we value the work of our daughters less than that of our sons.
>
> —*Dreves v. Hudson Group Retail, L.L.C.*[1]

Although it has been illegal to discriminate on the basis of sex in setting pay for more than fifty years now, women in academia—like women in virtually every job category—still make less than their male counterparts. Discussions about why that pay gap persists tend to break down into uncomfortable disagreements about whether it can best be explained by lower performing or less ambitious women or by sexist supervisors. In fact, the reasons for pay disparities rarely fit within either narrative. Instead, continued pay inequity in academia is more plausibly explained as a function of the structure of academic jobs and the highly subjective ways that the academy has come to define merit. As in other areas of discrimination, however, it is hard to keep the focus of the gender pay gap debate on its structural causes. The pull of individual explanation is overwhelming strong.

The pull of individual explanation is also, perhaps not surprisingly, a central element of litigation over pay disparities, even when the claim reveals structural disparities that seem to reach well beyond any individual employee's rate of pay. This Article will use the still-unfolding story of a charge of discrimination filed against a university to examine the script that has become all-too-familiar in discussions about the gender pay gap, whether in academia or elsewhere. Here is the basic storyline: Evidence is presented about the existence of a gap between men's earnings and women's earnings. The response is that the numbers cannot be looked at as a group because there are individual explanations for each pay decision. What this script does is to shift the focus of attention adroitly from an evaluation of the troubling structural picture to an evaluation of an individual employee—usually to the woman who has raised concerns about the structural problem.

This Article will first tell the story of Professor Lucy Marsh's charge of discrimination, filed against the University of Denver Sturm College of Law in July 2013. It will then examine the ways in which the circumstances that create pay disparity in academia are in fact structural—even when they are described as individual. Finally, the Essay will consider why the move from the systemic to the individual in the pay discrimination narrative is so persistent—why do we continue to miss the forest for the trees?

1. No. 2:11–CV–4, 2013 WL 2634429, at *13 (D. Vt. June 12, 2013).

I. PROFESSOR LUCY MARSH'S LAWSUIT

In July 2013, Professor Lucy Marsh, a forty-year veteran of the University of Denver Sturm College of Law (DU Law), filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC).[2] The charge alleges violations of both Title VII of the Civil Rights Act of 1964 and the Equal Pay Act (EPA), stemming from the fact that Professor Marsh's salary is lower than those of her male colleagues.[3] In addition to challenging her own salary as discriminatory, the charge filed by Professor Marsh observes that the gender pay disparity at DU Law is systemic, stating that "female professors at the Law School were discriminated against with respect to compensation because of their gender, and were paid less than men performing substantially equal work under similar conditions in the same establishment."[4]

Professor Marsh's charge followed the circulation of a memo to the DU Law faculty in December 2012 in which Dean Martin Katz explained a set of competitive merit raises he had recently awarded to top-performing faculty members as a result of a university-wide initiative.[5] After explaining the raises he did give, the dean went on to explain that the funds for this round of raises were allocated "without regard to trying to correct potential inequities."[6] He did, however, look at the school's salary structure "to see if there appeared to be any significant gender disparities," and he found, among other things, that:

> The median salary for female Full Professors was $7,532/year less than that for males before this round of raises and $11,282/year less than that for males after this round of raises. The mean salary for female Full Professors was $14,870/year less than that for males before this round of raises and $15,859/year less than that for males after this round of raises.[7]

It was these numbers that prompted Professor Marsh to file her charge with the EEOC.

Professor Marsh's discrimination claim garnered national attention in part because it coincided with the fiftieth anniversary of the enactment of the EPA and the continued prevalence of gender pay disparity had been a recently announced focus of concern for the EEOC.[8] Among aca-

2. Colleen O'Connor, *DU Professor Files Gender-Based Wage-Bias Case Against Law School*, DENV. POST, July 10, 2013, at 6A.

3. *Id.*

4. PROFESSOR LUCY MARSH: ATTACHMENT TO EEOC INTAKE QUESTIONNAIRE, *available at* http://www.scribd.com/doc/152792415/EEOC-addendum.

5. Memorandum from Martin Katz, Dean, Univ. of Denver Sturm Coll. of Law, to the Faculty of Univ. of Denver Sturm Coll. of Law: Faculty Salary Competitiveness Initiative (Dec. 13, 2012), *available at* http://www.scribd.com/doc/152790023/DU-Faculty-Competitiveness.

6. *Id.* at 3.

7. *Id.* at 3–4.

8. O'Connor, *supra* note 2.

demics, her claim received attention as well because it told a familiar story; the gender wage gap in academia is not unique to DU Law School. A 2006 study of salaries by the American Association of University Professors found that the average salary for female full professors was 88% of male faculty members at the same rank.[9] The wage gap across the academic spectrum remains at about 81%, in large part because the ranks of tenure-track and full professors are still dominated by men, while women make up the majority of the lower status, untenured teaching positions at universities.[10]

Professor Marsh's case is also remarkably similar to other instances of gender wage disparity in the way that her employer responded to evidence of a gender wage gap. In his December 2012 memo to the faculty, after reporting the median salary difference among full professors of over $11,000 and mean salary difference of almost $16,000, Dean Katz asserted that "there is only so much that one can glean from looking at these figures."[11] These numbers have less meaning, according to the memo, because:

> there are at least three significant determinants of individual salary differences: (1) differential starting salaries (accounting for teaching and legal experience), as well as any special circumstances or deals that may have affected that number, (2) differential merit raises, often over many years, and (3) other circumstances in individual salary histories, such as offers from other schools or lasting salary effects from holding administrative positions. Accordingly, to determine whether a salary gap reflects inequity requires an individualized analysis.[12]

While the dean invited individual faculty members to talk with him if they had concerns about the numbers his memo had revealed, he closed by noting that "unless I have strong evidence to the contrary, I will need to assume that all of my predecessors' merit raises were accurate reflections of performance."[13]

Dean Katz's explanation does two things that are particularly notable. First, his response to the numbers he has just revealed shifts the focus of attention. The question that he asks us to focus on is not, Why is the average salary among female professors at DU Law School nearly $16,000 lower than that among their male colleagues? Instead, it is whether Lucy Marsh—or any other female faculty member—is good enough to be earning more. The consequences of that shift cannot be

9. MARTHA S. WEST & JOHN W. CURTIS, AAUP FACULTY GENDER EQUITY INDICATORS 2006, at 11 (2006), *available at* http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf.

10. John W. Curtis, *Faculty Salary Equity: Still a Gender Gap?*, ON CAMPUS WITH WOMEN (2010), http://www.aacu.org/ocww/volume39_1/feature.cfm?section=2.

11. Katz, *supra* note 5, at 4.

12. *Id.*

13. *Id.*

overstated. In addition to refocusing from the structural to the individual, the dean's memo makes a starting assumption—that all past merit raises accurately reflected performance—that itself rests on a necessary additional assumption that the gender pay disparity reflects a corresponding gender performance disparity. Women have been paid less because they have performed less well. Neither of these aspects of the memo is unique. But the fact that this is how conversations about salary disparities in academia tend to go does not mean that they should.

II. THE STRUCTURES THAT CONTRIBUTE TO GENDER PAY DISPARITY IN ACADEMIC WORK

Much of the explanation for gender pay inequity in academia today is structural, embedded within the assumptions that have come to define merit and status in the academic job market. The mix of scholarship, teaching, and service that generally defines the academic job privileges scholarship significantly over the other facets of the job, but women are more regularly pressed into additional teaching and service obligations. Even within the broad categories of teaching, service, and scholarship, women's work is systematically undervalued. While similar patterns of gender stereotyping, segregation, and second tiering occur throughout the academy, this discussion will focus specifically on women in legal academia. In doing so, it will draw from the work of other scholars who have examined how law faculties reproduce gender stereotypes by focusing "on those invisible law school structures and practices that have a disparate effect on women faculty members."[14]

Gender inequity in law school faculties, as in other parts of the academy, begins with segregation and stratification. There are significantly fewer women than men on the tenure track and it remains the case that women are generally steered into lower status, lower security positions at law schools.[15] The most recent data from the American Association of Law Schools (AALS) show very slow increases in the number of women faculty members in the most prestigious roles in law schools. In the thirteen years between academic year 1995–1996 and academic year 2008–2009, the percentage of women full professors increased from 18.1% to just 29.9%.[16] During that same time period, the percentage of

14. Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 105.

15. *Id.* at 101–04; *see also* Marina Angel, *Women Lawyers of All Colors Steered to Contingent Positions in Law Schools and Law Firms*, 26 CHICANO-LATINO L. REV. 169, 175–76 (2006); Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 314 (2000) (finding that "*everywhere* in legal education the line between the conventional tenure track and the lesser forms of faculty employment has become a line of gender segregation").

16. *See* THE ASS'N OF AM. LAW SCH., AALS STATISTICAL REPORT ON LAW FACULTY (2000–09), *available at* http://www.aals.org/resources_statistical.php (compare the data in Table 2A of the 2001–02 Report with the data in the Titles section of the 2008–09 Report); Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745, 1747.

women law school deans went from 8.4% to 20.6%.[17] By contrast, in 2008–2009 the percentage of lecturers and instructors who were women was 60.2 and 66.4% respectively, a drop of less than 10% in either category from the 1995–1996 academic year.[18] Looking at the tenure track itself, while the percentage of assistant professors who are women has been nearly 50% (and higher in many years) since 1993, the percentage of full professors who are women has yet to exceed 30%.[19] Women who start on the law school academic ladder don't stay on it or move up it at the same rate that men do. This segregation and stratification is an important piece of the inequity puzzle, particularly in the ways that it reinforces stereotypes about gender and status.

Job segregation does not, however, explain the gender pay gap *within* the rank of full professor at DU Law (and, no doubt, at other law schools). This is an important point because job segregation is so often identified as explaining wage disparity and as being a function of individual men's and women's choices. Even putting to the side the questions about how freely these choices are made, choice cannot explain the persistence of pay disparity. "Too often, both women and men dismiss the pay gap as simply a matter of different choices, but even women who make the same occupational choices that men make will not typically end up with the same earnings."[20] The explanations for wage disparities between men and women within the same job category must be something other than job segregation.

At law schools accredited by the AALS, faculty members are supposed to be evaluated based on scholarship, teaching, and service.[21] At most schools, the stated formula for evaluation is 40% scholarship, 40% teaching, and 20% service. Conventional wisdom is that this formula understates the importance of scholarship and overstates the importance of both teaching and service to actual annual evaluations. Whatever the actual formula might be, an overarching concern about evaluation in the legal academy is that the job of law professor has come to be defined in ways that demand more than full-time commitment and availability. In this way, law schools—like law firms—are what organizational theorists

17. THE ASS'N OF AM. LAW SCH., *supra* note 16. In 2011, only 20.6% of law school deans were women. ABA COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2011, at 3 (2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp_current_glance_statistics_2011.authcheckdam.pdf.

18. THE ASS'N OF AM. LAW SCH., *supra* note 16. In 1995–1996, AALS categorized lecturers and instructors as a single group, rather than dividing them into two distinct groups. During that academic year, 70.8% of lecturers and instructors were female. *Id.*

19. *Id.* Note that this finding is based on the most recent data in the 2008–09 Report.

20. JUDY GOLDBERG DEY & CATHERINE HILL, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., BEHIND THE PAY GAP 2–3 (2007), *available at* http://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf.

21. THE ASS'N OF AM. LAW SCH., BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. §§ 6-4, 6-6 (2008), *available at* http://www.aals.org/about_handbook_bylaws.php.

describe as "gendered organizations."[22] A gendered organization is one "defined, conceptualized, and structured in ways that puts a premium on masculine characteristics, including a willingness to work 'on demand,' free from domestic responsibilities."[23] When the demands of the organization put a premium on absolute availability, structural bias flowing from these demands may call into question nominally neutral conceptions of merit. [24]

While scholarly excellence sounds like a gender-neutral evaluation criterion, there is much in the definition of scholarly excellence that fosters or permits inequity. Several scholars have argued that the focus on scholarship as the near exclusive measure of merit on law school faculties has a disparate negative impact on women.[25] In part, this may be because the "trial period" of the scholarly track to tenure disadvantages women because of its timing; most law professors are developing toward tenure between twenty-seven and thirty-seven years old.[26] This is also the time in life when most women who are going to have families start those families. The demands of scholarly productivity and the demands of young children are at best inconsistent. As Paula Monopoli has recently observed, these demands become even more unrealistic when scholarly productivity is expected to be simultaneous with a regular schedule of teaching and service.[27]

Moreover, excellence in scholarship is an extremely subjective standard. Law schools often turn to publication venue as a proxy for excellence because of the difficulties with evaluating excellence in any other way.[28] But the assumption that placement reflects merit is suspect in a field where the vast majority of law reviews are run by and articles selected by students with one or two years of legal studies. A 2010 study of the authors published in the top law journals found "significant gender disparity in publication" in these top journals.[29] Scholarly excellence is also defined, or significantly shaped, by the author's reputation in the field.[30] And reputation in the field, in turn, is shaped not only by the merit of any individual piece of scholarship, but also by participation in con-

22. *See* Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU L. REV. 515, 519 (2013).

23. *Id.*

24. Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139, 148–50 (1990).

25. *See, e.g.*, Monopoli, *supra* note 16, at 1759–60.

26. McGinley, *supra* note 14, at 120–21.

27. Monopoli, *supra* note 16, at 1760.

28. *Cf.* Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 771 (1998) (using publication in a "top-twenty" journal as a measure of the quality of an article).

29. Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews*, 31 WOMEN'S RTS. L. REP. 385, 386 (2010).

30. See, e.g., Christine Hurt & Tung Yin, Blogging While Untenured and Other Extreme Sports, 84 WASH. U. L. REV. 1235, 1248 (2006) ("The goal of a junior professor who wishes to advance in academia is to be recognized nationally as a capable scholar.")

ferences and other forms of national outreach. The marketing time required to develop the "national reputation" that many schools now define as the touchstone of scholarly excellence is significant. The explosion of the blogosphere has only exacerbated these phenomena. Being visible on the Internet has become an important part of developing a national reputation but the time-consuming and time-sensitive nature of maintaining a blog is hard to square with an effort to balance work and family commitments.[31] Unfortunately, the premium placed on being invited to, and accepting invitations to, conferences around the country adds to the subjectivity of the excellence measure, as conference organizers will tend to invite the people they know and feel comfortable with. The extensive scholarship on the risks of bias in systems built on subjective evaluation has tended to focus more on evaluation internal to an organization,[32] but the same phenomena are at play with evaluations made across institutions.

A willingness to be considered for lateral moves is also a significant contributor to national reputation—and the existence of a lateral offer (or even the possibility that one might be in the offing) is a common explanation for salary differentials.[33] But willingness to relocate continues to be a gendered attribute, as women continue to be more constrained by their partners' careers and their family obligations.[34] In the absence of significant social change, using this factor as either a measure of excellence or as an independent salary variable will consistently and predictably disadvantage women.

Turning from scholarship to the less valued but still-required areas of teaching and service, the evidence that bias infects evaluation and work allocation in these areas is abundant. In terms of allocation of responsibilities, a number of studies have found that women in academia spend more time on teaching and on service than their male counter-

31. See, e.g., Paul M. Secunda, Tales of a Law Professor Lateral Nothing, 39 U. Mem. L. Rev. 125, 130–32 (2008) (discussing the importance of blogging to developing a national reputation and getting noticed in the lateral hiring market).

32. *See, e.g.*, Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1051 (1991); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 151–152 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995).

33. *See, e.g.*, Lloyd Cohen, *Comments on the Legal Education Cartel*, 17 J. CONTEMP. LEGAL ISSUES 25, 36 (2008) (discussing the need to increase a faculty member's salary in the face of competing offers).

34. *See, e.g.*, Rosa Brooks, *What the Internet Age Means for Female Scholars,* 116 YALE L.J. POCKET PART 46, 47 (2006) ("Start with a relatively uncontroversial premise. In American society, women—including women employed full-time outside the home—still do far more 'care-taking' than men. They do more housework, cook more meals, and spend more time caring for children. Some men, of course, do more of these tasks than many women—but the average man does not. Many professional men with children have wives who don't work outside the home, at least if there are young children in the picture; meanwhile, very few working women, mothers or otherwise, have husbands who don't work outside the home.").

parts.[35] And within each area, women often have to work harder than men to be viewed as equally good. For example, studies have found that women faculty members have to prove their competence in the classroom more than men do.[36] Other studies have demonstrated that female faculty are segregated in lower-status course offerings.[37] Women professors also often find themselves with busier office hours and more student questions than their male counterparts.[38]

In the area of service work, female faculty again tend to get the short end of the stick. As Nancy Levit has aptly described it, much of the work that women are asked to do on law school faculties is the "housework" of the institution.[39] Women are more often asked to chair or serve on the lower status committees that address student life and experiences rather than on the more powerful committees such as appointments or tenure and promotion.[40] Even more disturbing is the possibility, suggested by Ann McGinley, that as women take on the more prestigious roles— associate deanships or chairs of the once higher status committees—"[i]nternal work seems to be less important to the prestige of the school and, concomitantly, to the career of the faculty member."[41] Service work that once was important, and handled by male faculty members, has become less important as women have broken into its ranks.[42] Now even the once-important service work is left to women, leaving the men free to focus on their own individual scholarship and the work of developing the requisite national reputation through participation in conferences and the Internet self-promotion that has become such a central element of legal academic production.[43]

An over-arching challenge to all of these measures of evaluation—scholarship, teaching, and service—is that excellence in each is hard to

35. John W. Curtis, Persistent Inequity: Gender and Academic Employment 5 (Apr. 11, 2011) (unpublished report), *available at* http://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent_inequity.pdf.

36. *See, e.g.*, Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 334 (1996); Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235, 265–67 (2008).

37. *See, e.g.*, Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 295–96 (2004); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 258–273 (1997). When women teach in lower-status areas, their scholarly production is likely also to be in those lower-status fields. This job segregation may thus contribute to the challenges women face gaining national recognition as scholars as well. Merritt & Reskin, *supra*, at 267.

38. *See, e.g.*, Susan B. Apel, *Gender and Invisible Work: Musings of a Woman Law Professor*, 31 U.S.F. L. REV. 993, 999–1000 (1997).

39. Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 777 (2001).

40. *Id.* at 786–87; *see also* Apel, *supra* note 38, at 1000–02.

41. McGinley, *supra* note 14, at 150; *see* Kristen Monroe et al., *Gender Equality in Academia: Bad News from the Trenches, and Some Possible Solutions*, 6 PERSP. ON POL. 215, 219–20 (2008).

42. *McGinley*, *supra* note 14, at 150–51.

43. *Id.*; *see also* Levit *supra* note 39, at 785–89.

define without resorting to extremely subjective standards. And yet, the more informal and subjective an evaluation system is, the more likely it will be applied unevenly.[44] This may be one piece of why, as one district court recently recognized, "women who have earned professional degrees, work longer hours, or hold management positions are subject to some of the largest pay disparities."[45] Academia, like many other fields requiring professional degrees, has developed evaluation metrics that are extremely difficult to standardize. An evaluation of whether these metrics are being applied correctly or fairly is consequently more difficult.

III. THE SHIFT FROM THE STRUCTURAL TO THE INDIVIDUAL

While these structural attributes of legal academia are very likely to be major contributors to gender pay disparities, conversations about pay inequity tend to move—like Dean Katz's memo—quickly to individual explanations and a focus on what might explain why any individual female faculty member receives lower pay than her male peers.

A number of factors might explain this instinct to focus on the individual, rather than the structural. First, the law that governs pay discrimination claims pushes to individual explanations. Second, for those inside the structures of legal academia, it is uncomfortable to consider the implications of structural biases. Solutions for these structural problems are also not immediately apparent. It is easier to focus on individual employees, to look for the aberration, than it is to consider that the entire system may be broken.

A. Legal Standards Push to the Individual Explanation

The law of pay discrimination has been written and interpreted to favor the individual instead of the structural explanation for disparities. Both the EPA and Title VII incorporate elements and defenses that focus attention on specific employees and discrete employment decisions.

A prima facie case under the EPA requires a woman to prove that she was paid differently from male employees for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[46] The defendant is then able to respond with one of four statutorily defined affirmative defenses.[47] Of the four, the one that is most common in academic settings is an argument that the differential is "based on any other

44. *See, e.g.*, Sterling & Reichman, *supra* note 22, at 520–21.

45. Dreves v. Hudson Grp. Retail, L.L.C., No. 2:11–cv–4, 2013 WL 2634429, at *12 (D. Vt. June 12, 2013); *see also* U.S. BUREAU OF LABOR STATISTICS, REPORT 1045: HIGHLIGHTS OF WOMEN'S EARNINGS IN 2012, at 9, 11 (2013), *available at* http://www.bls.gov/cps/cpswom2012.pdf (showing an earnings ratio of 73% between women and men who have earned a bachelor's degree or higher, and a pay ratio of 71.6% for women in management, professional, and related occupations).

46. 29 U.S.C. § 206(d)(1) (2012).

47. *Id.*

factor other than sex."[48] Both the prima facie case and the "factor other than sex" defense result in extensive discussion of not only an individual plaintiff, but also specifically identified opposite sex comparators, even in instances where the challenged employment practices are structural. *Brock v. Georgia Southwestern College*[49] offers a particularly clear example of this in the academic context. The Department of Labor (DOL) brought this case as a result of its investigation into employment patterns at the college, first among custodial employees and then within the faculty ranks.[50] While DOL challenged the college's hiring and pay-setting practices at a structural level—arguing that the college's entire approach to employment decision making was excessively subjective—the focus of the court's decision is on six specific women and their specific comparators.[51] The structural challenge is relegated to a footnote, as the EPA's statutory requirements push the court into the one-to-one comparisons that dominate the opinion.

One of the most significant challenges of an EPA claim for an academic is that "plaintiffs in non-standardized jobs have a difficult time showing that they can even compare themselves to their peers."[52] Some courts and commentators question whether the EPA even applies to jobs in fields such as academia.[53] The argument is that the statute was really designed for standardized jobs in which it is evident that two people are performing the "same" work. In academia, where professors do different amounts of research and writing, teach different classes with different numbers of students, and provide different services to the law school or the legal community, it is hard to know whether two people can ever reasonably be described as doing the same work.[54] This argument puts

48. *Id.* The other available defenses are the presence of a seniority system, a merit system, or a system that "measures earnings by quantity or quality of production." *Id.*

49. 765 F.2d 1026 (11th Cir. 1985).

50. *Id.* at 1029.

51. *Id.* at 1030–33 & 1030 n.6.

52. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 31 (2010).

53. *See id.* at 39–41 (discussing the difficulties of applying the EPA to situations involving professionals in high-level, non-standardized positions).

54. *Cf.* Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 699–700 (7th Cir. 2003) (looking behind nearly identical job titles to evaluate whether the particular circumstances of a female professor and her male comparator were different and concluding that their jobs were not the "same"); Fisher v. Vassar Coll., 70 F.3d 1420, 1452 (2d Cir. 1995) (highlighting that although plaintiff and comparator were both assistant professors teaching biology, plaintiff had not established a prima facie case under the EPA because, "at one point, [plaintiff] acknowledged that [comparator] had responsibilities [plaintiff] did not share"); Strag v. Bd. of Trs., 55 F.3d 943, 950 (4th Cir. 1995) (describing how the plaintiff failed to establish a prima facie case under the EPA because her proposed comparator taught in the biology department, while she taught mathematics); Spaulding v. Univ. of Wash., 740 F.2d 686, 696–97 (9th Cir. 1984) (finding that the nursing faculty at the university failed to establish proof of sufficiently similar work when comparing nursing work to work in other disciplines of the university), *overruled by* Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987). *See generally* Ana M. Perez-Arrieta, Note, *Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring "Equal Work" and "Any Other Factor Other Than Sex" in the Faculty Context*, 31 J.C. & U. L. 393, 399–403 (2005).

too heavy a burden on plaintiffs.[55] The better approach is to accept the employer's job titles—Assistant Professor or Professor, for example—as defining the job and leave questions about quantity or quality of work actually performed as part of the employer's defense.[56] Either way, however, the comparison of the plaintiff's work to the work of other identified employees directs attention to the individual faculty members and away from the structures of the workplace and its system of evaluation.

For an academic plaintiff who makes out a prima facie case, she is likely to face a relatively predictable set of "factor other than sex" affirmative defense arguments. Many of them, in fact, were included in Dean Katz's memo to the DU Law faculty. In particular, "differential starting salaries . . . [and] special circumstances or deals that may have affected that number" and "other circumstances in individual salary histories, such as offers from other schools" are two common explanations—both in litigation and out—for pay disparities.[57] These defenses are most often discussed in terms of "market factors" in judicial opinions, and many courts—though not all—have accepted the argument that market factors can be the non-sex-based explanation for gender wage disparities.[58] The use of market factors to explain differential pay should, however, be carefully examined. Insights from social science research have taught us a great deal about the limits of the "market" as a neutral source of information about men's and women's actual potential or performance.[59] Indeed, Nicole Porter and Jessica Vartanian recently argued that "[p]rior salaries and outside competitive offers are not always neutral; they are often tainted with bias, and we should eliminate the effect of that bias by precluding employers from relying on these factors when setting pay."[60] Some courts have similarly recognized the gender bias that infects the market and have expressed reluctance to incorporate that bias into the law.[61] Even those courts, however, have ultimately allowed

55. It also seems to ignore the fact that, when Congress created exceptions to the Fair Labor Standards Act for professional employees in 1972, the legislature specifically provided that professional employees remained protected by the EPA. *See* 29 U.S.C. § 213(a)(1) (2012).

56. *See, e.g.*, Brock v. Ga. Sw. Coll., 765 F.2d 1026, 1033–34 (11th Cir. 1985) ("We hold, however, that plaintiff can meet its burden of going forward by showing that the teachers compared are in the same discipline and that their job is to teach classes to students in that discipline. To require plaintiff to do more would be unrealistic, for it would require plaintiff to prove the absence of any conceivable difference between teaching class X and teaching class Y, without defendant even having to allege specific differences." (footnote omitted)).

57. *See* Katz, *supra* note 5, at 4.

58. *See* Perez-Arrieta, *supra* note 54, at 409–13 (collecting cases in which courts have considered such market forces as the basis for pay disparities).

59. Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 183–90 (2011).

60. *Id.* at 190.

61. *See, e.g.*, Kouba v. Allstate Ins. Co., 691 F.2d 873, 877 n.7 (9th Cir. 1982); Drum v. Leeson Elec. Corp., 550 F. Supp. 2d 1071, 1078 & n.9 (W.D. Mo. 2008), *rev'd*, 565 F.3d 1071 (8th Cir. 2009). *But see* Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470–71 (7th Cir. 2005) (concluding that criticizing the market as being gender-biased will not defeat a defendant's reliance on the market as a factor other than sex).

the market arguments to shield defendants from liability without looking too closely at the structural dynamics at play in that market.[62]

A third element that the DU Law memo raised as an explanation for the significant gender gap in full-professor salaries at the law school was "differential merit raises."[63] This is certainly among the most common factors other than sex raised to explain pay disparities.[64] As discussed above, however, a university's evaluation metrics and their application may suffer from structural flaws that contribute significantly to salary inequities.[65] In *Kovacevich v. Kent State University*,[66] the Sixth Circuit Court of Appeals, recognizing this reality, reinstated a jury verdict because the appellate court concluded that the jury could reasonably have been suspicious of a "merit award system [that] was driven largely by an opaque, decision-making process at the administrative level . . . and rewarded men disproportionately to women."[67] The *Kovacevich* decision is unique among reported appellate cases to acknowledge that a system described by neutral qualities such as merit may nonetheless be applied in ways that create sex-based disparities that violate the EPA.

Academic plaintiffs are not often successful in pursuing challenges under the EPA. A 2010 study of federal appellate EPA cases found that of the twenty-three such cases involving university professors, the plaintiffs lost 65% of the time, frequently at summary judgment.[68] In these cases, courts have tended to treat a university's evaluation of teaching ability and scholarship, as well as the university assessment of market demand, with a great deal of deference.[69] Indeed, some courts view the need for deference to universities to be even greater than the need for deference to other employers because they see faculty hiring as tied directly to academic freedom, and academic freedom to the First Amendment.[70] As the First Circuit expressed it in an early EPA case:

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62. For a remarkable exception to this general approach, see Dreves v. Hudson Grp. Retail, L.L.C., No. 2:11–cv–4, 2013 WL 2634429, at *13 (D. Vt. June 12, 2013).

63. *See* Katz, *supra* note 5, at 4.

64. *See, e.g.*, Wu v. Thomas, 847 F.2d 1480, 1485 (11th Cir. 1988).

65. *See supra* text accompanying notes 21–45.

66. 224 F.3d 806 (6th Cir. 2000).

67. *Id.* at 827. One of the things that made *Kovacevich* rather unique among EPA decisions is that the appellate court had the benefit of a jury verdict to review; most EPA cases from academic settings, despite the fact-driven nature of the EPA inquiry, have been dismissed by courts at summary judgment. Eisenberg, *supra* note 52, at 33–34.

68. *See* Eisenberg, *supra* note 52, at 33.

69. This deference to universities and its impact on the viability of discrimination claims in academic institutions has been long recognized. *See, e.g.*, Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1318 (1992) ("Courts in the United States have traditionally exercised restraint in cases involving the academic decisions of colleges and universities."); Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 69 (1994) (noting that "the federal courts have always deferred to academic institutions and hesitated to scrutinize the faculty personnel process").

70. *See, e.g.*, Keyishian v. Bd. Of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amend-

> A university is, of course, not free of the Equal Pay Act, but when it is confronted with possibly opposing pressures or obligations, some of which involve the difficult subject of gender, it must be allowed substantial room to maneuver, rather than find itself between the devil and the deep blue sea. Otherwise, instead of some measure of academic freedom, it will face the constant prospect of judicial reproof.[71]

The invocation of academic freedom as a barrier to judicial evaluation of pay disparities risks insulating significant structural inequity from any review in the academic setting. Together with a more general judicial reluctance to look behind individual explanations for the structural causes of disparity, this judicial deference to academic employers has made the EPA a very tough path for women professors challenging pay inequities.

Pay discrimination claims can, of course, also be pursued through the prohibitions against sex discrimination contained in Title VII. This route presents a slightly different set of hurdles for plaintiffs challenging gender-based pay disparities. While Title VII does not require that plaintiffs identify specific comparators performing similar work to pursue a claim, a disparate treatment claim does demand that the plaintiff provide sufficient evidence to suggest that the employer intentionally discriminated based on sex in making pay decisions. The focus on employer intent operates in much the same way that the EPA requirements do, to push parties and the court to individual explanations for decision making. Moreover, Title VII specifically incorporates the affirmative defenses contained in the EPA, so the "factor other than sex" analysis is effectively the same under the two statutes. Ultimately, as Tristin Green has noted, "[t]raditional disparate treatment theory conceptualizes discrimination as individual, measurable, and static."[72]

Many scholars, including Green, have argued in recent years for application of antidiscrimination laws in ways that recognize the structural nature of discrimination and that shift focus away from the individualized model to recognize and remedy systemic harms.[73] This scholarly push was paralleled during the 2000s by impact litigation efforts led by national public interest law firms like Equal Rights Advocates and the

ment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 265–67 (1989).

71. Winkes v. Brown Univ., 747 F.2d 792, 797 (1st Cir. 1984) (footnote omitted).

72. Green, *supra* note 32 at 112.

73. *Id.* at 111–12; *see also, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 4–20 (2006); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 767–88 (2005); Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 641–42 (1998).

Impact Fund.[74] These lawsuits, most famously the challenge mounted by Betty Dukes and other plaintiffs against pay and promotion discrimination at Wal-Mart, challenged the excessively subjective, unguided decision-making policies that led to significant gender inequities at Wal-Mart Stores all over the country.[75] For many years, these suits seemed to be making inroads into the individual-focused presumptions in discrimination liability. Unfortunately, however, the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*[76] made systemic challenges under Title VII much more difficult precisely because of the Court's reluctance to permit challenges that do not have "significant proof" linking complained-of structural problems to individual decisions.[77]

B. Challenging Structure Is Hard

Even outside of litigation, discussions of pay equity tend to drift to consideration of individual employees or decision makers. At bottom, it is easier to talk about whether one person or another is making the right amount of money than it is to talk about whether an entire system of evaluation and pay setting is flawed.

Asserting that the structure of a job or a workplace is biased is relatively easy from outside of that job or workplace. But making the same claim from within is much harder. For law professors evaluating a gender pay gap in legal academia, there is a natural push away from condemning the system itself as biased. Social science research on "system justification" demonstrates that both those who benefit from and those who are harmed by implicit structural biases will take great pains to justify the status quo of the systems within which they are operating.[78] Part of the challenge that contributes to system justification is that acknowledging systemic flaws requires a person to then decide whether to address them or ignore them. Neither choice is easy.

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74. *See generally* Hart, *supra* note 73, at 778–88. As the Impact Fund explains on its website, the Fund "maintains an active litigation docket in order to stay at the forefront of the class action and collective action legal field and to demonstrate the means for using these legal mechanisms to achieve broad social change." *Litigation*, IMPACT FUND, http://impactfund.org/litigation/ (last visited July 18, 2014). Similarly, Equal Rights Advocates has "transformed the law for hundreds of thousands of women and girls for over four decades through impact litigation, advice and counseling, and policy reform." *Fighting for Women's Equality*, EQUAL RTS. ADVOCS., http://www.equalrights.org/our-work/ (last visited July 18, 2014). Interestingly, Equal Rights Advocates has been working with Lucy Marsh on her dispute with the University of Denver. *See* Cynthia Foster, *Client Professor Lucy Marsh Called "Champion for Fair Pay" by Colorado Law Week*, EQUAL RTS. ADVOCS. (Jan. 9, 2014), http://www.equalrights.org/client-professor-lucy-marsh-called-champion-for-fair-pay-by-colorado-law-week/; s*ee also* O'Connor, *supra* note 2.

75. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011); *see also* Melissa Hart, *Learning from* Wal-Mart, 10 EMP. RTS. & EMP. POL'Y J. 355, 359–65 (2006).

76. 131 S. Ct. 2541 (2011).

77. *Dukes*, 131 S. Ct. at 2553–54 (internal quotation marks omitted).

78. John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 883 (2004) (emphasis omitted).

Imagine you are a legal academic (if you are reading this law review article, you probably *are* a legal academic): you have decided to join a profession in which the metrics that are being used to define merit include excellence in scholarship, teaching, and service. If you've been a legal academic for any amount of time, you've been trying to write law review articles, agonizing over which law journals accept or reject them, worrying about whether your articles are cited in other articles, and whether you are invited to national conferences, or asked to guest blog on some much-read site or another. You've been working long hours to succeed in these efforts, and we haven't even gotten to teaching or service yet. If you open up the Pandora's Box of questions about whether the system of evaluation that has pushed you to work so hard at these things suffers from structural bias, you not only have to question what you have been spending all of these hours doing, but you also have to decide whether to keep doing it or to push for some different system. If you have received positive feedback for your success within this system, you would have to ask whether your success is truly meaningful if the evaluation system is flawed. And even if you have not received the kind of feedback you might have hoped for, you have still been striving within this system, and rejecting or questioning it means questioning your own choices.

Moreover, if you were to decide to push for a different system, it isn't immediately obvious what that different system would be. Even in the current climate of uncertainty for law schools and critique of legal education, it is hard to find serious proposals for restructuring the current system of responsibilities and rewards in legal academia. Paula Monopoli recently made an interesting suggestion for decoupling productive teaching years from productive scholarly years in recognition of how difficult it is to do both things well simultaneously.[79] The ABA Task Force on the Future of Legal Education has gently suggested moving away from tenure for law professors.[80] Their concerns are not with gender pay equity, but with the costs of legal education.[81] It is possible, though, that a shift away from a tenure system that privileges scholarship might have gender-leveling effects. It seems equally likely that the job of law professor in schools that adopt that regime will, much like the current positions of instructor and lecturer, become sex-segregated with women dominating the new, lower status field and men moving on to something else.

79. Monopoli, *supra* note 16, at 1764–74.

80. *See* ABA TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATIONS 7, 14–16, 31 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

81. *Id.* at 31 (discussing the tenure standards as standards that should be reevaluated in light of their impact on the cost of a JD education).

The structural problems are equally difficult from the perspective of a well-intentioned decision maker. DU Law's Dean Katz is, I believe, just such a decision maker. Put yourself for a moment in his shoes. You've looked at the spread of salaries for full professors, and you have found that the median salary for female full professors is far below the median salary for male full professors. What should you do?[82] You could decide to provide across-the-board increases for female faculty members to address the disparity. That is what Virginia Commonwealth University did in 1996.[83] In response, male faculty members brought a lawsuit challenging the raises as sex discrimination.[84] And litigation risk is not the only reason that an across-the-board equity adjustment may not be the best choice. At some point, focusing on the forest can lead one to ignore the individual trees. What do you do about a hard-working, talented male professor who will be leapt over in an across-the-board adjustment? It is not difficult to see why a more nuanced approach to salary adjustment would be appealing. And yet, if you decide not to do a uniform adjustment, but to only adjust certain salaries, you are moving to individual evaluation.

It is not entirely surprising that one of the common structural solutions proposed to address gender pay gaps, in academia and elsewhere, is a system of lockstep pay increases. The argument for lockstep pay recognizes that "[a]s long as salaries are determined primarily by private individual negotiation or administrative discretion, inequities will reemerge."[85] Lockstep salaries, set at years of service, avoid the subjectivity of annual evaluations of merit. They also eliminate the salary maneuvering that can occur with lateral offers, and the "special deals" made at hiring. As a mechanism for salary equity, lockstep pay is pretty perfect. As a mechanism for job equity, it may not be. Lockstep pay ensures that people are paid the same amount at each year of service. It does not ensure that they work as hard. Before reformers embrace lockstep pay as a solution to the pay equity problem, they should consider carefully what inequities might unintentionally be created by such a system.

Most scholars who examine gender disparities among academics emphasize the need for salary transparency as a first step to addressing these disparities.[86] Professor Marsh's story is instructive in this regard.

82. In the months following his December 2012 memo to the faculty, Dean Katz hired a consulting firm to conduct an equity study of salaries at the Law School to assess "whether there are individual or structural factors that have contributed to pay distinctions on the basis of gender." E-mail from Martin J. Katz, Dean, Univ. of Denver Sturm Coll. of Law, to Denver Law Community (Feb. 27, 2014, 2:26 PM) (on file with author). The results of that study will be released to the law school, and it remains to be seen whether equity adjustments or other changes will occur.

83. *See* Smith v. Va. Commonwealth Univ., 84 F.3d 672, 674–75 (4th Cir. 1996).

84. *Id.* at 674; *see also* Maitland v. Univ. of Minn., 155 F.3d 1013, 1015 (8th Cir. 1998) (male professors brought a lawsuit arguing that implementation of a gender-based salary adjustment discriminated against them).

85. Curtis, *supra* note 10.

86. *See* Eisenberg, *supra* note 52, at 63–64; Sterling & Reichman, *supra* note 22, at 518.

While Marsh and other women had raised questions about whether there was salary disparity at DU Law, the University of Denver is like most private employers in maintaining secrecy about salaries.[87] Only when the dean of the law school, in an effort to be more transparent, circulated a memo to the faculty identifying a significant difference in median pay for male and female full professors did the possibility of a direct challenge to that disparity become evident.

There certainly may be benefits to transparency. One of the common explanations offered for pay disparities is that "[w]omen don't ask."[88] Without transparency, however, it is at best complicated to place the blame for disparity at the feet of those being paid less. "Unless wage rates are published, women do not know what to demand."[89] Thus, transparency might encourage negotiation. Transparency might also encourage better behavior by schools, as decision makers will be called on to articulate explanations for inequities. Transparency is also hard. When colleagues are aware of who is being paid more and who is being paid less, the opportunities for hurt feelings and anger are significant. Transparency risks having a corrosive impact on workplace culture. The benefits may outweigh those risks, but it is not immediately obvious that they will.

IV. A POSSIBLE ALTERNATIVE TO MISSING THE FOREST FOR THE TREES

The fact that challenging structure is hard does not mean it shouldn't be done. It might even mean just the opposite—we should be challenging structure precisely because it is hard. To that end, perhaps the most troubling line in Dean Katz's memo to the DU faculty is his statement that "unless I have strong evidence to the contrary, I will need to assume that all of my predecessors' merit raises were accurate reflections of performance."[90] With that starting assumption, current salary disparities are frozen in place as presumptively reflecting the relative merit of the individual faculty members. Embedded in that assumption, given the gender disparities in full professor salaries, seems to be a further assumption that male faculty members are, on the whole, better performers than female faculty members.

87. *See, e.g.*, Gowri Ramachandran, *Pay Transparency*, 116 PENN. ST. L. REV. 1043, 1044 & n.1 (2012) (noting that studies show that most employees in the United States work for employers who maintain salary confidentiality rules).

88. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE ix–x (2007).

89. Eisenberg, *supra* note 52, at 65; *see also* Paula A. Monopoli, *In a Different Voice: Lessons from* Ledbetter, 34 J.C. & U.L. 555, 556–57 (2008) ("Any good negotiation relies in large part on information . . . . Without reliable data on where one stands in the faculty array vis-à-vis male colleagues, and with amorphous standards of merit that rule in the academy, women are at a significant disadvantage.").

90. Katz, *supra* note 5, at 4.

What would it look like to make a different assumption? What if a dean, confronted with systemic gender disparities, were to assume instead that these gender disparities would not have developed absent discrimination in either the standards being applied or the way those standards are being applied? How would that starting point affect pay decisions?

One principle that might be properly applied in such a circumstance is "first, do no harm."[91] Perhaps an employer who encounters a significant gender pay disparity should be barred from offering raises that exacerbate the disparity. Once a pay disparity, like that in the salaries of full professors at DU Law, comes to light, available raise pools can only be allocated in ways that either decrease or maintain the disparity. This "do no harm" approach would be analogous to the three-part test applied in evaluating claims under Title IX, which prohibits gender discrimination in funding for educational programs.[92] In the Title IX context, a university facing a challenge to its funding of athletic programs must show either that it provides proportionate funding for male and female athletic programs; that it is engaged in a "continuing practice of program expansion" to meet the interests of the underrepresented sex; or that "it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."[93] The practical result of this test is that a university cannot make an existing funding inequity worse. In order to demonstrate that it is meeting one of the three requirements, the university will have to show either that there is no existing inequity or that progress is being made toward addressing an existing inequity.

Applied in the context of salary setting, this approach would allow a decision maker tasked with offering merit raises, or competitive-salary raises, to make the individual assessments necessary for that type of raise. But it would also require that decision maker to acknowledge the structural problem presented by the wage disparity—and to acknowledge it as a structural problem, rather than simply as a series of individual stories.

CONCLUSION

The frustrating persistence of gender pay inequity is a systemic problem, and yet pay equity is just one of many employment contexts in which structural causes are too often overlooked as discussion turns instead to individual explanations. Unfortunately, the move from the struc-

91. This expression, from the Latin *primum non nocere* is a basic principle of bioethics. *See* Stedman's Medical Dictionary 1226 (27th ed. 2000).

92. 20 U.S.C § 1681(b) (2012).

93. 44 Fed. Reg. 71418 (Dec. 11, 1979); *see also* DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 62–82 (2010).

tural to the individual significantly diminishes the likelihood of systemic change. It is a move we can no longer afford.