

Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms

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This Note addresses the Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co. and the subsequent legislative response, the Lilly Ledbetter Fair Pay Act (LLFPA). Through the LLFPA, Congress overrode the Ledbetter decision and enacted a paycheck-accrual rule for Title VII pay-discrimination cases, the purpose of which is to provide victims with a longer — and more realistic — statute of limitations for pay-discrimination claims. This Note explores the congressional justifications for the LLFPA and the workings of pay-discrimination claims, and argues that the legislation does not address all of the obstacles that prevent victims from effectively challenging pay discrimination because the statute's goals are frustrated by social norms of pay secrecy. This Note argues for a transformative legal intervention to enable Title VII to remedy all instances of pay discrimination.

I. INTRODUCTION

The gap between male and female earnings is striking: Department of Labor statistics show that, on average, a woman who works full-time makes only seventy-seven to eighty cents on the dollar as compared to a similarly situated man.¹ While there are

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many causes for this striking discrepancy, discrimination in the workplace is one of them.² Employment discrimination “with respect to . . . compensation, terms, conditions, or privileges of employment . . . because of sex” is illegal under Title VII of the Civil Rights Act of 1964,³ but recognizing, challenging, and remedying illegal pay discrimination under Title VII is far more difficult than appreciating that pay inequality is a widespread societal problem.

The pay gap is present in all sectors of the United States economy, and in all fields.⁴ Although many critics dismiss the pay gap

1. *Women's to Men's Earnings Ratio by Age, 2009*, BUREAU OF LABOR STATISTICS (July 8, 2010), http://www.bls.gov/opub/ted/2010/ted_20100708.htm (“In 2009, women who were full-time wage and salary workers had median weekly earnings that were about 80 percent of the earnings of their male counterparts.”); *Congress Must Act to Close the Wage Gap for Women*, NAT'L WOMEN'S LAW CTR. 1 (Apr. 2008), http://www.pay-equity.org/PDFs/PayEquityFactSheet_May2008.pdf [hereinafter *2008 White Paper*] (“Although the general population has suffered because of the economic downturn, women have had a greater loss of jobs and a greater loss of wages than men during this period . . . Women working full-time, year-round earn only about 77 cents for every dollar earned by men, virtually the same amount women earned in 2005.”); *Women's Lower Wages Worsen Their Circumstances in a Difficult Economy*, NAT'L WOMEN'S LAW CTR. 1 (Apr. 2010), www.pay-equity.org/PDFs/PFA-FactSheet-2010.pdf (“American women who work full-time, year-round are paid only 77 cents for every dollar paid to their male counterparts.”). The House Report for the Lilly Ledbetter Fair Pay Act also referenced the stark wage gap between men and women. H.R. REP. NO. 110-237, at 16-7 (2007) (“Congressional action to reassert the viability of discrimination claims with respect to pay is particularly timely now, with recent reports that gender gap in pay is not improving. An April 2007 study, for example, conducted by the American Association of University Women . . . found that women who are only one year out of college make 80 percent of what men earn, and 10 years later, make only 69 percent.”).

2. *Myth Busting the Pay Gap*, (WORK IN PROGRESS), THE OFFICIAL BLOG OF THE U.S. DEPT' OF LABOR, (June 7, 2012), <http://social.dol.gov/blog/myth-busting-the-pay-gap>; see also Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. OF MGMT. PERSP. 1, 12 (2007) (discussing factors that may account for the wage gap and finding that 41.1% of the wage gap is “unexplained” and therefore possibly attributable to discrimination); Deborah Thompson Eisenberg, *Money, Sex and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 974 (2011) (“[S]ubstantial evidence exists that pay discrimination against women remains widespread, persistent, and systemic, even after controlling for facts — such as education, years of work experience, age, hours worked, occupational field, and jobs held—that may explain some of the disparity.”).

3. 42 U.S.C. § 2000e-2 (2006). The Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56, also prohibits employers from paying women less than similarly situated men because of their sex.

4. *Myth Busting the Pay Gap*, *supra* note 2 (“The pay gap for women with advanced degrees, corporate positions, and high paying, high skill jobs is just as real as the gap for workers overall Catalyst review 2011 government data showing a gender gap for women lawyers, and that data confirms that the gap exists for a range of professional and technical occupation.”); *2008 White Paper*, *supra* note 1, at 2 (“The earnings gap between

as the result of individual female choices (for example, the so-called “choice” to take time off from the labor market after having a baby or to work fewer hours due to family responsibilities) or market forces,⁵ statistical and economic studies confirm that the pay gap cannot solely be attributed to choices made by employees.⁶ Rather, a significant portion of the gap is unexplained by either market forces or individual choices and is likely caused by pay discrimination by employers.⁷ Although the pay gap began to shrink after the passage of the Equal Pay Act in 1963⁸ and Title VII of the Civil Rights Act of 1964, the gap persists and the pace at which it shrinks has slowed since the 1990s.⁹

During the second presidential debate in October 2012, the candidates were asked about the gender pay gap.¹⁰ President Obama responded by highlighting that the first bill that he signed

women and men also persists across all education levels. While education lifts all boats, it lifts men’s boats much higher than women’s.”).

5. See, e.g., *Full Transcript of the Second Presidential Debate*, N.Y. TIMES (Oct. 16, 2012), <http://www.nytimes.com/2012/10/16/us/politics/transcript-of-the-second-presidential-debate-in-hempstead-ny.html?pagewanted=all> (reflecting that Governor Romney, after being asked about what he would do to remedy pay inequality, repeatedly emphasized the importance of flexible work arrangements, giving credence to the view that women’s personal life choices are responsible for pay inequality); Eisenberg, *supra* note 2, at 982 (“In sum, actual conflicts between work structures and caregiving responsibilities, and explicit or unconscious biases against working mothers, may affect women’s career opportunities and compensation levels. But traditional “choice” explanations for the gender wage gap are less salient today, especially for workers under age fifty and for women in professional and leadership positions.”).

6. Blau & Kahn, *supra* note 2, at 12.

7. Blau & Kahn, *supra* note 2, at 12 (finding that after controlling for “human capital characteristics,” women’s wages are 91% of men’s wages); see also *2008 White Paper*, *supra* note 1, at 3.

8. Litigants typically assert both Equal Pay Act (EPA) claims and Title VII-based claims when faced with pay inequality. See, e.g., *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1527 (1992) (“Title VII and the Equal Pay Act exist side by side in the effort to rid the workforce of gender-based discrimination. Plaintiffs have two tools for relief, each of which provides different burdens of proof and may produce different amounts of compensation.”); *infra* note 25 (discussing differences between EPA and Title VII claims).

9. Blau & Kahn, *supra* note 2, at 9; LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* xiii (2003) (“These stagnating figures suggest that we may have gotten as much mileage as possible out of the changes we’ve already made — and that new solutions need to be found if women’s progress is to continue.”).

10. *Full Transcript of the Second Presidential Debate*, *supra* note 5 (Voter Katherine Fenton asked: “In what new ways do you intend to rectify the inequalities in the workplace, specifically regarding females making only 72 percent of what their male counterparts earn?”).

as President was the Lilly Ledbetter Fair Pay Act (LLFPA).¹¹ Further, President Obama, referring either to the *Ledbetter v. Goodyear Tire and Rubber Co., Inc.* decision (which held that the charging period for a Title VII pay-discrimination claim begins when the challenged compensation decision is made by the employer, and does not restart anew after each paycheck is issued) specifically or to pay inequality generally, stated “so, we fixed that.”¹²

This response is representative of the popular narrative surrounding the LLFPA, which regards the Act as an expansive and novel legislative solution to the pay gap.¹³ The LLFPA is a direct legislative response to a Supreme Court decision that had created a nearly insurmountable procedural hurdle for many plaintiffs challenging pay discrimination under Title VII.¹⁴ Congress passed the LLFPA to amend Title VII to provide employees with a realistic avenue to bring claims of pay discrimination within the relevant charging period.¹⁵ But the mechanics of the LLFPA, and pay-discrimination lawsuits generally, analyzed below, show that the LLFPA is only a partial remedy and cannot be expected to entirely eliminate pay inequality.¹⁶

Because pay inequality is incredibly pervasive, it necessarily requires a sweeping, transformative legal intervention. Such an intervention must get at the root of the problem in order to be truly effective: it must disrupt and reconstitute the widespread social norms that shroud pay in secrecy. Social change is critical because pay secrecy is perpetuated in most workplaces by a widespread social norm against discussion of salary, rather than a coercive legal rule forbidding such discussion.¹⁷ The strong norm

11. *Full Transcript of the Second Presidential Debate*, *supra* note 5.

12. *Full Transcript of the Second Presidential Debate*, *supra* note 5.

13. *Full Transcript of the Second Presidential Debate*, *supra* note 5.

14. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

15. An individual must file a charge of discrimination with the Equal Employment Opportunity Commission within either 180 or 300 of the discriminatory action. *See Time Limits for Filing a Charge*, U.S. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/timeliness.cfm> (last visited March 25, 2012). This period of time is called the charging period. *See id.* The dispute at issue in *Ledbetter* was when the charging period was triggered, i.e. when it began to run. *See* 550 U.S. at 621. For the purposes of this Note, the charging period and statute of limitation are treated as interchangeable.

16. *See infra* Part II.A.

17. Some workplaces have explicit pay-secrecy rules. *See infra* Part III.A.

against discussion of salary information prevents discovery of pay inequality in the workplace at all in many instances, as it obscures differences in compensation between similarly situated individuals.¹⁸

This Note examines and critiques the LLFPA, signed into law by President Obama in 2009.¹⁹ Part II describes the passage of the LLFPA, including the *Ledbetter* decision that prompted it. This Part also evaluates the LLFPA and argues that it does not go far enough to combat pay inequality, as it only remedies pay inequality caused by discrimination that is actually challenged by the victim in court. In spite of the LLFPA, social norms in the workplace are a barrier to private enforcement of Title VII's prohibition on pay discrimination.

In Part III, this Note explores the relationship between social norms and legal rules in order to understand when or how legal intervention can destabilize social norms. Finally, Part IV proposes a two-part remedy to remake the workplace and weaken pay secrecy. First, Congress should pass the Paycheck Fairness Act (PFA), a proposed piece of legislation that would promote pay transparency and enable more people to both bargain for fairer wages and bring claims under Title VII. Second, this Note proposes a prophylactic regulatory rule requiring affirmative disclosure of salary information by employers to their employees. This rule would serve not only to eliminate the barriers to successful pay-discrimination claims, but would likely reduce pay inequality generally, even when pay inequality is not the result of discrimination, because it would enable employees and employers to bargain with equal access to crucial information.

II. HISTORY OF THE *LEDBETTER* DECISION AND THE LILLY LEDBETTER FAIR PAY ACT

The Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* in 2007 led to the passage of the Lilly Ledbetter Fair Pay Act,²⁰ intended as a legislative override to facilitate the

18. See *infra* Part III.A.

19. Sheryl Gay Stolberg, *Obama Signs Equal Pay Legislation*, N.Y. TIMES (Jan. 30, 2009), <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

20. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

litigation of pay-discrimination claims.²¹ Part II.A will begin by outlining the framework for pay-discrimination cases brought under Title VII. Part II.B will then provide background on both the *Ledbetter* decision and the mechanics and goals of the LLFPA in order to illustrate how pay secrecy frustrates these objectives.

A. PAY-DISCRIMINATION MECHANICS AND ADJUDICATIONS

Pay inequality may be challenged under Title VII of the Civil Rights Act of 1964.²² An examination of how pay-discrimination cases are actually litigated illustrates the mechanics of Title VII and its interaction with workplace policies and practices. In order to challenge compensation decisions under Title VII, a plaintiff must establish that the pay disparity or compensation complained of was the result of the employer's intentional discrimination (disparate treatment) or that the pay disparity was the result of an otherwise neutral policy that had an adverse effect on members of a protected class (disparate impact).²³

In order to prevail on a Title VII pay-discrimination claim brought under the disparate-treatment theory, a plaintiff must show that the employer committed intentional discrimination by paying the employee less because of his or her race, sex, national origin, or religion — known as a *Gunther* claim after the Supreme Court case of *Washington v. Gunther*.²⁴ Alternatively, the plaintiff may demonstrate that she received “unequal pay for equal work” as compared to a co-worker — not a member of the plaintiff's class — doing work “requiring substantially the same re-

21. *Id.* Congress found that “The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.* . . . significantly impair[s] statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades.” *Id.*

22. 42 U.S.C. § 2000e-2 (2006).

23. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”). *But see* *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2554 (2011) (holding that Wal-Mart's corporate policy of giving local managers discretion to set pay could not be challenged in a class action by female Wal-Mart workers under a disparate impact theory).

24. 452 U.S. 161, 168 (1981) (internal quotation marks omitted) (“[C]laims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or any other factor other than sex.”); *Plemer v. Parson-Gilbane*, 713 F.2d 1127, 1132 (5th Cir. 1983).

sponsibility,” and that the “adverse employment decision occurred under circumstances that raise an inference of discrimination”.²⁵

A court evaluating a Title VII claim evaluates the merits of the case under a three-pronged burden-shifting framework, known as the *McDonnell Douglas* framework, which dictates each party’s respective burdens of proof and the order that the evidence should be evaluated.²⁶ The plaintiff in a Title VII disparate-treatment case must first establish her prima facie case.²⁷ Second, the employer has a burden of production to rebut the prima facie case by proffering a legitimate, non-discriminatory explanation for the pay-setting decision.²⁸ Finally, the burden shifts back to the plaintiff to show that the proffered reason is pretext for discrimination.²⁹

25. *Belfi v. Prendergast*, 191 F.3d 129, 139–40 (2d Cir. 1999). Pay inequality may also be challenged under the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (2006). The parties’ burdens are different under the EPA than under Title VII: if a female plaintiff brings an EPA claim, she must show that she was being paid less than a male doing the same or similar work (“unequal pay for equal work”), at which point the burdens of production and persuasion shift to the employer to prove an affirmative defense — such as that the pay structure was set pursuant to a seniority system — to avoid liability. See § 206(d)(1); *EEOC v. Grinnell Corp.* 881 F. Supp. 406, 410 (S.D. Ind. 1995); Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 837–39 (2010).

Essentially, the EPA differs from Title VII because, under the EPA, a plaintiff must show that she is performing the same or similar work as a higher paid male co-worker, whereas under Title VII a plaintiff need not necessarily make such a showing (which she may not be able to do if she does not have a co-worker doing the same or similar work); however, the Title VII plaintiff must prove that the pay discrepancy was the result of the defendant’s discriminatory intent. *Belfi*, 191 F.3d at 135 (“One of the main substantive differences between these two laws [the EPA and Title VII], which both provide remedies to victims of sex discrimination, is that the former provides strict liability while the later [sic] requires proof of discriminatory intent.”); *Miranda v. B & B Grocery Store, Inc.*, 975 F.2d 1518, 1525–27 (11th Cir. 1992) (discussing the differences between the EPA and Title VII).

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

27. *Id.* at 802 (holding that, in order to establish a prima facie case, a plaintiff must show “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualification”); *Butler v. N.Y. Health & Racquet Club*, 768 F. Supp. 2d 516, 529 (S.D.N.Y. 2011) (stating the requirements of a prima facie case as follows: “an employee must show that: (a) he was within the protected class; (b) his job performance was satisfactory; (c) he was subjected to an adverse employment decision or discharge; and (d) the adverse action occurred under circumstances giving rise to an inference of discrimination” and holding that unequal pay can satisfy the third element of the prima facie case).

28. *Green*, 411 U.S. at 802–03.

29. *Id.* at 804.

The Eleventh Circuit case of *Miranda v. B & B Cash Grocery Store, Inc.*³⁰ is an example of a successful pay-discrimination claim brought under Title VII. There, the court held that a plaintiff in a disparate-treatment pay-discrimination case is not required to show direct evidence of discriminatory intent in order to prevail.³¹ The plaintiff, a female buyer for a grocery-store chain, was paid \$420 per week, while all other buyers at the chain (all of whom were male) received between \$600 and \$650 per week.³² The court held that the plaintiff had successfully established a prima facie case of gender discrimination by showing that she was female, that she was paid less than other employees, and that those other employees did similar work as her.³³ The employer attempted to rebut the plaintiff's prima facie case with a legitimate, non-discriminatory reason for the pay discrepancy, namely, that the plaintiff was paid less than her male co-workers because there was a limited budget and the plaintiff had transferred from a lower-paying position.³⁴ The Eleventh Circuit affirmed the trial court's determination that the reasons proffered by the defendant were pretext for discrimination, as the plaintiff's manager had made sexist remarks, and there was also other circumstantial evidence that weakened the credibility of the defendant's proffered reasons.³⁵ The court also found that the manager's remarks, together with the employer's proffered reason that the plaintiff had transferred from a lower-paying position, only demonstrated defendant's "reliance on an illegitimate market force theory to justify its failure to pay Miranda the same salary as the male employees in her classification."³⁶

But a Fifth Circuit opinion, *Plemer v. Parsons-Gilbane*,³⁷ illustrates the difficulty a Title VII plaintiff may meet in challenging compensation decisions. In that case, the plaintiff worked for a federal contractor as an equal-employment representative, and was paid \$8700 less than a male (Willis) hired for a position that had been left vacant for period of time, during which time the

30. 975 F.2d 1518 (11th Cir. 1992).

31. *Id.* at 1531.

32. *Id.* at 1523–24.

33. *Id.* at 1529.

34. *Id.*

35. *Id.* at 1529–30.

36. *Id.* at 1530.

37. 713 F.2d 1127 (5th Cir. 1983)

plaintiff performed the job duties for that position.³⁸ Although the plaintiff met her burden of establishing a prima facie case under the Equal Pay Act,³⁹ the court held that she had failed to establish a *Gunther* claim because she had not shown direct evidence of a decision to depress her wages on account of her sex and pay Willis the full value of his duties.⁴⁰ As the court put it:

Plemer asks too much. She would have the courts make an essentially subjective assessment of the value of the differing duties and responsibilities of the positions of Plemer and Willis and then determine whether Plemer was paid less than the value of her position because she was female. If Plemer had shown that the Company had placed those values on her and Willis' respective duties and responsibilities and were paying Willis the full value while paying Plemer less than her evaluated worth, her claims could be considered. It is not the province of the courts, however, to value the relative worth of Plemer's and Willis' differing duties and responsibilities⁴¹

The court's reasoning indicates that some courts will decline to question management decisions regarding pay, even in the face of large discrepancies between the salaries of male and female employees who perform very similar work, in the absence of compelling evidence of discriminatory intent.⁴²

Because a plaintiff must either show discriminatory intent or point to a specific policy that disparately impacts members of a protected group in order to succeed under Title VII, not all pay inequality between male and female employees is challengeable in court.⁴³ In pay-discrimination cases, *Plemer* is typical of courts that decline to find an inference of discrimination on the basis of disparate salaries when the defendant offers some explanation of

38. *Id.* at 1134.

39. For a discussion of a plaintiff's burden under the Equal Pay Act, see *supra* note 25.

40. 713 F.2d at 1134.

41. *Id.*

42. *Id.*

43. 42 U.S.C. § 2000e-2 (2006) (requiring evidence of discriminatory intent, or evidence of a specific neutral factor that disparately impacts a protected group and is not necessary to the business).

the salaries, even when the explanation is not related to the plaintiff's productivity or skill at work.⁴⁴ For example, an employer might assert that a woman is paid at a certain rate because of her salary history or because of the employer's particular hiring needs at the time that different employees were hired.⁴⁵ In fact, if male employees are generally compensated better than female employees because of general societal discrimination — allowing male, but not female, employees, to credibly argue that they could leave and find better-paying jobs — the employer might not face Title VII liability because it could defend by arguing that it set pay in response to an employee's threat to leave the company if his pay was not set at a certain level.⁴⁶

As a result, pay-discrimination plaintiffs may have difficulty mounting successful cases because some courts are eager to credit business-related reasons for pay discrepancies and may not impose an especially high burden on employers for rationalizing pay differences among employees; this makes it harder for a plaintiff to show that her pay is the result of discriminatory intent.

B. THE *LEDBETTER V. GOODYEAR TIRE & RUBBER CO., INC.*
DECISION

The discussion above helps to contextualize the controversial *Ledbetter v. Goodyear Tire and Rubber Co., Inc.* decision, in which

44. See, e.g., *Belfi v. Prendergast*, 191 F.3d 129, 140 (2d Cir. 1999) (holding that even if plaintiff proves that defendant's proffered reasons for salary discrepancy are pretextual or false, plaintiff has not met her burden to show that the real reason was defendant's discriminatory intent).

45. See, e.g., *id.* at 139–40. But see *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304 (10th Cir. 2006) (rejecting employer's argument that plaintiff's male co-worker's high salary was the result of his salary history and competing job offers at the time he was hired); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1013 (10th Cir. 2002) (denying employer's motion for summary judgment where plaintiff showed fact issues relating to whether employer's rationale for pay discrepancy — that plaintiff had worked at another plant location and that it could not afford to pay her more — was pretextual).

46. See Eisenberg, *supra* note 2, at 993 (describing how “prior salaries have become a heuristic for an employee's value.”); Gowri Ramachndran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1045 (2012) (“Some of the blame [for pay discrimination] lies with the employer, some with employee, and some with societal and historical discrimination. For instance, neither employer nor the employee is entirely at ‘fault,’ in the commonly understood sense of the term, when that employee has been socialized not to apply for certain jobs or to ask for more money.”).

the Supreme Court upheld the dismissal of a Title VII pay-discrimination claim because the statute of limitations had run.⁴⁷

The facts of the *Ledbetter* case illustrate pay secrecy at work. Ledbetter worked for Goodyear from 1979 until 1998,⁴⁸ and sued Goodyear for pay discrimination, bringing claims under Title VII and the Equal Pay Act, after retiring in 1998.⁴⁹ Ledbetter's pay — \$3727 per month compared to the lowest-paid male area manager's salary of \$4286 per month⁵⁰ — was the lingering effect of intentional discrimination early in her career. It was the result of an evaluation made by her supervisor many years prior to her retirement in retaliation for Ledbetter's rejection of his sexual advances.⁵¹ Despite receiving more favorable evaluations later in her career, these early discriminatory evaluations in Ledbetter's career caused her to be paid "significantly less than any of her male colleagues" at the time she retired.⁵² Ledbetter did not know that she was being paid less than her male peers until the eve of her retirement when she received an anonymous note indicating that that was the case.⁵³ Goodyear had a policy forbidding employees from discussing salary information with other employees,⁵⁴ which had concealed the pay discrepancy from Ledbetter during the tenure of her employment.⁵⁵

Ledbetter's EPA claim was dismissed after Goodyear filed for summary judgment, but her Title VII claim proceeded to trial, where a jury found in her favor.⁵⁶ On appeal, the Eleventh Circuit reversed, dismissing Ledbetter's claim as time-barred be-

47. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

48. *Id.* at 621.

49. *Id.* at 621–22.

50. *Id.* at 643 (Ginsburg, J., dissenting).

51. *Id.* at 632. Ledbetter introduced evidence at trial showing that this supervisor discriminated against her in his evaluations. *Id.* at 622. The supervisor sexually harassed Ledbetter, and when she rebuffed his harassment, he retaliated against her in the employee evaluation that set her pay rate. *Id.* at 632 n.4.

52. *Id.* at 622.

53. *Id.* at 643 (Ginsburg, J., dissenting) ("By the end of 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her 15 male counterparts was stark: Ledbetter was paid \$3,727 per month; the lowest paid male area manager received \$4,286 per month, the highest paid, \$5,236.").

54. *Id.* at 650 (Ginsburg, J., dissenting) ("Tellingly, as the record in this case bears out, Goodyear kept salaries confidential; employees had only limited access to information regarding their colleagues' earning.").

55. *Id.*

56. *Id.* at 622.

cause the discriminatory evaluations had been made outside of the charging period for her claim.⁵⁷ In so doing, the court rejected the paycheck-accrual rule, a longstanding doctrine applied in pay-discrimination claims, which resets the clock on the statute of limitations period every time the plaintiff receives a new paycheck.⁵⁸ When the case reached the Supreme Court, Justice Alito, writing for the majority of the Court, upheld the Eleventh Circuit's reasoning and cast aside the paycheck-accrual rule.⁵⁹ The Court held that a "paysetting decision is a discrete act that occurs at a particular point of time" and that the charging period begins when the discrete act occurs.⁶⁰ Since Ledbetter's claim rested on a theory of discriminatory intent, it traced back to the manager's discriminatory motive in filling out the evaluations, and as such, the clock started running at the time of the initial discriminatory evaluations, even though the effects of that action extended far into the future.⁶¹ The Court reasoned that because the decisions leading to Ledbetter's salary had been made by her superiors outside of the statute of limitations, she was not entitled to bring her claim, even though she had been affected by those decisions (i.e., she had received a discriminatorily lower paycheck compared to her male peers) during the charging period.⁶² The majority opinion further pointed to the policy considerations behind the short statute of limitations, stating that it was meant to encourage would-be plaintiffs to resolve their claims promptly.⁶³

Dissenting, Justice Ginsburg argued that it is not feasible for plaintiffs to challenge discriminatory decisions of which they are unaware and called for Congress to respond by reinstating the

57. *Id.* at 622–23. An individual must file a charge of discrimination with the Equal Employment Opportunity Commission within either 180 or 300 of the discriminatory action. *Time Limits for Filing a Charge*, *supra* note 15. This period of time is called the charging period. *See Time Limits for Filing a Charge*, *supra* note 15.

58. *Ledbetter*, 550 U.S. at 623. The paycheck-accrual rule will be discussed in detail in Part II.C, *infra*.

59. *Ledbetter*, 550 U.S. at 632.

60. *Id.* at 621.

61. *Id.* at 637.

62. *Id.*

63. *Id.* at 630–31.

paycheck-accrual rule.⁶⁴ Justice Ginsburg, furthermore, recognized the social reality in which Ledbetter's case was situated:

The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.⁶⁵

Justice Ginsburg also distinguished between pay-discrimination claims and discriminatory-hiring or -firing claims, arguing that the majority was wrong to use the same inflexible doctrine to determine when the charging period begins under both kinds of claims.⁶⁶ Justice Ginsburg stressed that it is generally more difficult to bring pay-discrimination claims within the statute of limitations, as compared to discriminatory-hiring or -firing claims, because pay differentials occur incrementally — actionable wrongs emerge only after the differentials in each successive paycheck accumulate to create a significant difference in total compensation.⁶⁷ In this regard, pay-discrimination claims stand in contrast to Title VII claims challenging discrete employment decisions like being fired or passed over for a promotion.⁶⁸

Furthermore, Justice Ginsburg continued, unlike a discrete employment act, a victim of pay discrimination often may be pre-

64. *Id.* at 661 (Ginsburg, J., dissenting) (“Once again, the ball is in Congress’s court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”).

65. *Id.* at 645 (Ginsburg, J., dissenting); see also BABCOCK & LASCHEVER, *supra* note 9, at 5 (noting that small initial discrepancies amount to large disparities over the long term; for example, an employee paid \$30,000 at age 22, who earns 3% raises every year, will retire at age 60 with \$568,834 more in his bank account than a co-worker whose starting salary was \$25,000 and who also earned 3% raises every year).

66. *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

67. *Id.*

68. *Id.*

vented from becoming aware of discrepancies between her paycheck and those of her co-workers, and thus may be denied a remedy.⁶⁹ She may lack knowledge about comparative salary information because of an employer policy forbidding salary disclosure or expressly keeping salary information confidential.⁷⁰ Alternatively, workplace social norms may create a taboo against frank and open salary discussion among co-workers.⁷¹

Justice Ginsburg noted that Justice Alito's majority opinion obscured the differences between pay discrimination and other forms of illegal employment discrimination. Because the majority opinion viewed pay-setting decisions as a "discrete act" triggering the charging period,⁷² it looked to the intent and actions of the decision-maker rather than to the effect of those decisions on the employee.⁷³ The Court's holding denied Ledbetter a recovery even though she was paid significantly lower than her male co-workers during her entire career, a discrepancy that a jury had found to be caused by intentional discrimination.

C. THE LILLY LEDBETTER FAIR PAY ACT AND THE PAYCHECK-ACCRUAL RULE

Responding to Justice Ginsburg's call for legislative action, Congress passed the Lilly Ledbetter Fair Pay Act in 2009, which amended Title VII and codified the paycheck-accrual rule.⁷⁴ The LLFPA amends Title VII by recognizing the differences between pay-discrimination claims and employment-discrimination claims that arise from discrete acts by requiring that the charging period be calculated differently for each.⁷⁵ The LLFPA, the first piece of legislation signed into law by President Obama, was enacted on January 29, 2009.⁷⁶

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 621.

73. *Id.*

74. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

75. See Pub. L. No. 111-2, pmb., 123 Stat. at 5 (providing that, for purposes of Title VII, pay discrimination occurs "each time compensation is paid pursuant to the discriminatory compensation decision . . .").

76. *Id.*; Stolberg, *supra* note 19.

Under the LLFPA's paycheck-accrual rule, a victim of pay discrimination may file a claim at any time within either 180 or 300 days of receiving a discriminatorily lower paycheck (the charging period is extended to 300 days if a state or local agency enforces a law that prohibits the same type of discrimination).⁷⁷ For purposes of calculating when the statute of limitations begins to run under Title VII and other employment discrimination statutes, the LLFPA provides that an actionable employment practice occurs "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."⁷⁸ Thus, in order to meet the statute of limitations, a plaintiff must file a charge within 180 days (or 300 days, as the case may be) of receiving a paycheck affected by the discriminatory decision or "other practice" alleged.⁷⁹

Congress passed the LLFPA in order to remedy pay discrimination, as distinct from other forms of employment discrimination.⁸⁰ When the bill was on the floor of the House, the House Education and Labor Committee distinguished between discriminatory compensation decisions and other discrete employment actions,⁸¹ and held two hearings related to the proposed legislation, both of which focused on gender wage gap and pay-discrimination issues.⁸² The titles of the hearings are indicative of the particular harms that Congress sought to remedy through the LLFPA; the first hearing was called "Strengthening the Middle Class: Ensuring Equal Pay for Women" and the second hearing was called "Justice Denied? The Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*"⁸³ The Committee Report explains why discriminatory compensation decisions are different by their nature from other discriminatory employment decisions:

77. *Time Limits for Filing a Charge*, *supra* note 15 (outlining EEOC guidelines for timeliness); *see also* Carolyn E. Sorock, *Closing the Gap Legislatively: Consequences of the Lilly Ledbetter Fair Pay Act*, 85 CHI. KENT L. REV. 1199, 1215 (2010).

78. § 3, 123 Stat. at 6.

79. *Id.*; *see infra* Part II.D.

80. H.R. REP. NO. 110-237, at 3 (2007).

81. *Id.* at 6.

82. *Id.* at 3-4.

83. *Id.*

In *Ledbetter*, the Court held that under Title VII, employees must file a claim of discrimination within 180 days of the alleged unlawful practice, which runs from the initial decision to pay an employee less because of his or her race, color, religion, sex or national origin. The result is fundamentally unfair to victims of pay discrimination who may lose their right to challenge a discriminatory compensation action even though it is on-going but may be unknown. While workers know immediately when they are fired, refused employment or denied a promotion or transfer, the secrecy and confidentiality associated with employees' salaries may make pay discrimination difficult to detect.⁸⁴

The report makes clear that the purpose of the LLFPA was to correct the *Ledbetter* decision by creating a statutory regime for pay discrimination that recognized the fundamental differences between pay discrimination and other types of employment discrimination.⁸⁵ From a policy perspective, the Committee viewed the *Ledbetter* holding as problematic and in need of reversal because if it stood, "it will become more difficult for employees to bring pay discrimination claims under Title VII, and countless meritorious claims will never be adjudicated."⁸⁶ Relying on the hearing testimony of Wade Henderson, president and CEO of the Leadership Conference on Civil and Human Rights, the report also reiterated that pay discrimination is hard to detect and workplace rules and social norms serve to conceal comparative pay information.⁸⁷

The LLFPA includes a findings section that summarizes many of the of policy arguments made in the House report.⁸⁸ The findings section points explicitly to the ill effects of the *Ledbetter* decision on victims of pay discrimination, by stating that the decision "significantly impairs statutory protections against discrimination in compensation that have been bedrock principles of

84. *Id.* at 6.

85. *Id.*

86. *Id.* at 7.

87. *Id.* ("The *Ledbetter* decision ignores the reality that pay discrimination is incredibly difficult to detect. Employees often have no access to the kinds of information necessary to raise a suspicion of pay discrimination, including company-wide salary data. In fact, workplace norms often discourage conversations among employees about salaries.")

88. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5.

American law for decades.”⁸⁹ The findings section also states that the *Ledbetter* holding “ignores the reality of wage discrimination.”⁹⁰ The history of the *Ledbetter* case, the legislative history of the LLFPA, and the statute itself show that workplace realities pose challenges to employees who are being discriminated against in compensation because they might not know about the discrimination.

D. CRITICISMS OF THE LILLY LEDBETTER FAIR PAY ACT

This Part addresses the extent to which the LLFPA adequately responds to Justice Ginsburg’s criticisms of the Court’s *Lebetter* decision, namely the difficulty that many pay-discrimination victims face in finding out about pay discrepancies. One main short-fall of the Act is that the paycheck-accrual rule that it codifies is both under-inclusive and over-inclusive: while pay-discrimination victims who are aware of discrimination enjoy the benefit of the longer statute of limitations afforded by the paycheck-accrual rule, other discrimination victims who do not know that adverse employment actions were caused by discrimination are still bound by Title VII’s short limitations period which begins to run at the time of the adverse employment action.⁹¹ On the other hand, the paycheck-accrual rule extends the statute of limitations indefinitely for pay-discrimination claims even in instances where a plaintiff may immediately be aware of facts supporting a Title VII claim, enabling the plaintiff to sit on her claim rather than seek immediate redress.⁹²

89. *Id.*

90. *Id.*; see also *Noel v. Boeing Co.*, 622 F.3d 266, 273 (3d Cir. 2010) (“In our view, Congress’ motivation for enacting the FPA was to overturn the perceived harshness of *Ledbetter* and to provide greater protection against wage discrimination but not other types of employment discrimination. This intention is evidenced by Congress’ use of the term “compensation,” repeated five times throughout the Act, indicating the driving force behind the FPA was remedying wage discrimination.”).

91. Jeremy A. Weinberg, *Blameless Ignorance? The Ledbetter Act and Limitations Periods for Title VII Pay Discrimination Claims*, 84 N.Y.U. L. REV. 1756, 1768–69 (2009) (“If the argument for a legislative response to *Ledbetter* was that pay discrimination is different because of its secretive nature, it seems odd that the legislative solution does not limit itself to those for whom pay discrimination was, in fact, a secret.”).

92. *Id.*

Because of these pitfalls, the LLFPA has been criticized for failing to codify a discovery rule.⁹³ The discovery rule is “the rule that a limitation period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim.”⁹⁴ The discovery rule tolls statutes of limitation in fraud cases, as well as other areas of the law.⁹⁵ Pay discrimination, like fraud, is often concealed, so the proponents of a discovery rule argue that the same framework should apply in both contexts.⁹⁶ Alternatively, the LLFPA could have enacted an injury-discovery rule.⁹⁷ Under such a rule, the statute of limitations period would begin to run when the employee becomes aware that she is being paid less than her co-workers (the injury), rather than at the later point when she discovers facts sufficient to support a Title VII suit arising out of the pay discrepancy.⁹⁸ The injury-discovery rule balances employer interests with concern for the hidden nature of salary information, and supports society’s interest in repose.⁹⁹

Although the analogy between fraud and pay discrimination is apt, the statute clearly does not enact a discovery rule; it does not mention discovery or knowledge of disparity when it states what constitutes “an unlawful practice” under Title VII or other discrimination statutes.¹⁰⁰ But the discovery rule has pitfalls of its own: while the discovery rule would toll the statute of limitations until an employee discovered facts sufficient to support a pay-discrimination lawsuit, a discovery rule in itself does not facilitate actual discovery of facts supporting a suit. Although it differs in kind from the solution enacted in the LLFPA, it is similar-

93. See, e.g., *id.* at 1770–71 (detailing potential pitfalls of the paycheck-accrual rule adopted by the LLFPA and arguing that an injury discovery rule would have been a more sensible approach). Before the LLFPA was enacted, Senator Kay Bailey Hutchinson had proposed including a discovery rule in the law. Nancy Zisk, *Lilly Ledbetter, Take Two: The Lilly Ledbetter Fair Pay Act of 2009 and the Discovery’s Rule’s Place in the Pay Discrimination Puzzle*, 16 WM. & MARY J. WOMEN & L. 1, 11 (2009). That proposal failed. *Id.*

94. BLACK’S LAW DICTIONARY 533 (9th ed. 2009).

95. See, e.g., Zisk, *supra* note 93, at 23.

96. Zisk, *supra* note 93, at 3–4 (noting that the LLFPA “does not . . . address the real problem facing employees, which is the difficulty of discovering that pay discrimination exists in the first place. . . . [T]he law needs to incorporate a rule that allows a limitations period to begin when the discrimination is, or should be, discovered.”).

97. Zisk, *supra* note 93, at 3–4.

98. Weinberg, *supra* note 91, at 1771.

99. Weinberg, *supra* note 91, at 1771.

100. See 42 U.S.C. § 2000e-5 (Supp. 2011).

ly flawed because it only rectifies a problem experienced by pay-discrimination plaintiffs who actually discover and respond to pay discrimination through Title VII litigation. Accordingly, neither the paycheck-accrual rule nor the discovery rule provides an avenue for all victims of pay discrimination to timely assert claims, and some victims will not be able to harness the judicial system to remedy illegal pay discrimination.¹⁰¹

Finally, some commentators have responded that, as an alternative to the discovery rule, courts could apply the doctrine of equitable tolling to Title VII pay-discrimination claims.¹⁰² This common-law doctrine tolls the statute of limitations period if the defendant has acted to prevent the would-be plaintiff from discovering facts sufficient to mount a claim in court.¹⁰³ Equitable tolling, under this theory, would apply where an employer mandated that its employees could not discuss their salaries or took other steps to conceal pay discrepancies from being discovered by employees.¹⁰⁴ These types of rules, which hinder discovery, could be considered a type of “fraudulent concealment” by a court choosing to extend the limitations period under an equitable-tolling theory.¹⁰⁵ But while this theory is compelling, it would not extend the statute of limitations for plaintiffs who did not discover pay discrepancies for reasons other than employer policies prohibiting discussion about salaries.

The criticisms discussed above all highlight the central weakness of the LLFPA in its attempt to rectify pay inequality: employees who are the victims of pay discrimination, while helped by a longer statute of limitations, still might never discover that they are being discriminated against. However, these criticisms are directed at remedying the problem through the use of alter-

101. See Brian P. O’Neill, *Pay Confidentiality: A Remaining Obstacle to Equal Pay After Ledbetter*, 40 SETON HALL L. REV. 1217, 1218–19 (2010) (“The LLFPA does not change the statute-of-limitations period, and thus, Title VII continues to offer relief only to employees that discover a compensation disparity within 180 days after their final paycheck.”).

102. Weinberg, *supra* note 91, at 1784.

103. Weinberg, *supra* note 91, at 1784.

104. Weinberg, *supra* note 91, at 1789 (“[S]pecific intent to obstruct an investigation of pay discrimination is not necessary [for equitable tolling to apply to an employee’s claim] so long as the employer adopted the rule with a general intent to discourage discussions about pay.”).

105. Weinberg, *supra* note 91, at 1789.

native statute of limitations frameworks, and do not address the fundamental issue of pay secrecy.

III. SOCIAL NORMS AND SOCIAL CHANGE

While a significant amount of academic criticism of the LLFPA has highlighted alternative statute of limitations-based solutions to address the challenges of bringing pay-discrimination claims, this Note argues that pay discrimination must be addressed holistically by weakening social norms that hide pay inequality in the workplace. The paycheck-accrual rule is an imperfect solution because it does not attempt to alter the informal rules and norms of the workplace that discourage wage transparency.¹⁰⁶ Part III.A begins by describing how pay secrecy is promoted and perpetuated through cultural and social norms that discourage pay transparency and impose social sanctions on individuals who openly discuss their salary or ask about another's salary.¹⁰⁷ In order to understand how a legal solution can be structured to facilitate discovery, Part III.B examines how legal scholars understand social norms generally and how social norms control choices or behavior in ways that are extraneous to the legal system.¹⁰⁸ This section will also investigate how the law can play a central role in shaping and dismantling social norms.

A. PAY SECRECY AS A SOCIAL NORM

Traditional etiquette cautions against discussing salary with co-workers.¹⁰⁹ One *New York Times* article describes the social

106. See, e.g., Eisenberg, *supra* note 2.

107. Marci Alboher, *Demystifying Salary Secrecy*, N.Y. TIMES (Jul. 17, 2008), <http://shiftingcareers.blogs.nytimes.com/2008/07/17/demystifying-salary-secrecy/>; Lisa Belkin, *Psst! Your Salary is Showing*, N.Y. TIMES (Aug. 21, 2008), <http://www.nytimes.com/2008/08/21/fashion/21Work.html?pagewanted=all>; Daniel Indiviglio, *The Case for Making Wages Public: Better Pay, Better Workers*, THE ATLANTIC (Jul. 20, 2011, 2:40 PM), <http://www.theatlantic.com/business/archive/2011/07/the-case-for-making-wages-public-better-pay-better-workers/242238/>; Alex Williams, *Not-So-Personal Finance*, N.Y. TIMES (Apr. 27, 2008), <http://www.nytimes.com/2008/04/27/fashion/27salary.html?pagewanted=all>.

108. The *Ledbetter* decision can perhaps be best understood as an example of social norms insulating certain acts of discrimination from judicial intervention.

109. See, e.g., CHARLOTTE FORD & JACQUELINE DEMONTRAVEL, 21ST-CENTURY ETIQUETTE 224 (2003) ("Discussing your salary is gauche. In the workplace, it's simply senseless."); *Is it Wrong to Discuss Salaries at Work?*, QUICK & DIRTY TIPS (Jan. 18, 2012),

norm against discussing salary information as “the last taboo in American life” and states that “[f]or people old enough to remember phone booths, a blunt reference to salary in a social setting still represents the height of bad manners.”¹¹⁰ Professor Ed Lawler, of University of Southern California’s Marshall School of Business, who has studied pay secrecy extensively, describes the social norm against discussion of salary as a middle-class phenomenon and when asked why people are secretive about pay answered:

In the middle class, kids get told that it’s not polite to talk about pay. It’s either bragging or embarrassing. It’s never something you win by talking about. It’s just not nice. We don’t do that.

In the United States, where we supposedly have pay for performance, you are revealing something potentially that’s a bit personal about yourself. You’re letting people know, maybe, how well the organization thinks you performed, how much the organization values you, and that may be something that’s just uncomfortable.¹¹¹

When people discuss their salaries, they may feel uncomfortable and anxious about the social repercussions.¹¹²

Title VII cases are replete with references to accidental discovery of pay information before the plaintiff decides to bring a Title VII case, even where the employer does not explicitly forbid salary discussion.¹¹³ In one case, the plaintiff “inadvertently

<http://manners.quickanddirtytips.com/discussing-salaries.aspx> (“The fact of the matter is that if you actually knew what your coworkers made, it would probably create a bad situation. Whether bitterness or pride, neither is a good idea and each will create tension in the workplace.”).

110. Williams, *supra* note 107 (describing how many young people are comfortable discussing their salaries with their friends and reporting that “[ninety] percent of those over 35 . . . agreed with the statement “you should never let your co-workers know how much you make,” while 84 percent of subjects under 35 agreed”).

111. Liz Wolgemuth, *Why Do You Keep Your Salary Secret?*, U.S. NEWS & WORLD REP. (June 19, 2008), <http://money.usnews.com/money/careers/articles/2008/06/19/why-do-you-keep-your-salary-secret>.

112. *See id.*

113. *See, e.g.*, Meeks v. Computer Assoc. Int’l, 15 F.3d 1013, 1014 (11th Cir. 1994); Butler v. N.Y. Health & Racquet Club, 768 F. Supp. 2d 516, 523 (S.D.N.Y. 2011); EEOC v. Grinnell Corp., 881 F. Supp. 406, 408 (S.D. Ind. 1995).

learned the salaries of her three co-workers.”¹¹⁴ In another, the plaintiff “saw a pay rate sheet as she was signing in before teaching a class. . . . Butler thus came to believe that she was being undercompensated in comparison to [her co-workers] who were younger, male, or non-African American.”¹¹⁵ One plaintiff learned of a pay discrepancy after looking at her co-worker’s pay stub.¹¹⁶ In another, the plaintiff, a department head, did not learn that she was making significantly less than the male department heads until their respective salary information was published in a newspaper.¹¹⁷ These employees likely did not ask their employers or co-workers for comparative salary information for fear of “rocking the boat” because of the strong social norms dictating silence on all matters relating to pay.¹¹⁸

The social norm against salary discussion is reinforced in some instances by employer policies (called “pay-secrecy and confidentiality rules” (PSC rules)) that forbid discussion among co-workers about salaries.¹¹⁹ In fact, Goodyear, Lilly Ledbetter’s employer, had such a policy.¹²⁰ Another pay-discrimination case, *Goodwin v. General Motors Corporation*, from the Tenth Circuit, provides an illustration of how PSC rules operate.¹²¹ In that case, the court credited the employer’s confidentiality policy as preventing the plaintiff from learning of pay discrimination earlier, and rejected the defendant’s statute of limitations defense on that basis.¹²² In fact, the plaintiff did not know about pay discrepancies for certain until “a printout listing the 1997 salaries of each of the four representatives somehow appeared on Goodwin’s desk and on the desks of some co-workers.”¹²³ Approximately one-third

114. *Meeks*, 15 F.3d at 1014.

115. *Butler*, 768 F. Supp. 2d at 523.

116. *Grinnell*, 881 F. Supp. at 408.

117. *McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998).

118. Cf. Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 388 (2011) (discussing “signaling problems” associated with employee requests for more information from their employers).

119. Leonard Bierman & Rafael Gely, “Love, Sex and Politics? Sure. Salary? No Way”: *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 170–71 (2004).

120. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 649–50 (Ginsburg, J. dissenting (discussing Goodyear’s practice of keeping salaries confidential)).

121. 275 F.3d 1005, 1008–09 (10th Cir. 2002).

122. *Id.*

123. *Id.* at 1008.

of workplaces have some form of PSC rule.¹²⁴ These rules work in concert with social norms to conceal comparative salary information.

Because of this social norm against salary discussion, in order for Title VII to be harnessed to successfully combat pay discrimination, employees must sometimes engage in norm-defying behavior, or social norms must be altered so that behavior required by Title VII no longer submits employees to social sanction. Part III.B will explore a theory of social norms and social change.

B. A THEORY OF SOCIAL NORMS

This Note argues that pay inequality is supported by pay secrecy, which, as examined above, is perpetuated by social norms. As a result, the law must intervene to create greater pay transparency in order to eliminate pay discrimination and close the gender pay gap. This Part will examine how social norms can be influenced or changed by legal interventions.

Professor Cass Sunstein has explored social norms and their interaction with the law, and has put forward a framework for analyzing social norms.¹²⁵ Professor Sunstein asserts that preferences do not represent individual choices free from social context; rather, an individual's choice to act in particular way is bound up in social norms, roles, and meaning.¹²⁶ The law also affects individual behavior by shaping (or attempting to change) social roles and by mediating conflict between social roles.¹²⁷ But the law may be in tension with social norms, as where the law may sanction individuals who conform to social norms when the resulting behavior is illegal.¹²⁸

Professor Sunstein's work highlights this tension and investigates how law, or other government interventions, can be used to change social norms, so that social sanctions reinforce, rather

124. Bierman & Gely, *supra* note 119, at 168.

125. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

126. *Id.* at 910 ("People's choices are a function of norms, which operate as "taxes" or "subsidies"; and the content of norms depends on context.").

127. *Id.* at 947-53 (describing ways in which law influences social roles).

128. *Id.* at 925.

than contradict, legal sanctions.¹²⁹ Government tools to change harmful social norms include education and persuasion, as well as economic instruments (taxes or subsidies on certain norm-driven or non-norm-driven behavior) or time, place, and manner restrictions.¹³⁰ The most direct and restrictive tool available for a government to alter social norms is coercion, such as fining an individual for littering or failing to pick up after his or her dog.¹³¹ In some cases, however, the law serves an expressive function that may channel behavior or shape norms even in the absence of a credible threat of legal sanctions.¹³² For example, some criminal prohibitions (falling into the “coercive” realm of norm regulation) are rarely, if ever, used to prosecute actual violations.¹³³ Instead, these criminal prohibitions create positive norms and change individual behavior through the expressive function of law.¹³⁴ Examples of expressive criminal prohibitions include laws against littering or laws that forbid smoking in certain areas — social sanctions against littering are arguably more effective than criminal prosecutions in preventing littering.¹³⁵ In sum, social norms enable a society to function; in fact, as one commentator has argued, “gaining control over dysfunctional societies might depend more upon using or manipulating social norms than upon enforcing the law.”¹³⁶

In response to the argument that laws enacted to destroy social norms are paternalistic or interfere with personal autonomous choices, Professor Sunstein argues that, when social norms perpetuate an unjust system, “it is appropriate to alter norms.”¹³⁷ Professor Sunstein argues that legal intervention to alter “bad” social norms both promotes individual autonomy and solves a

129. *Id.*; see also *id.* at 946 (“If we know how laws affect behavior, we can more accurately generate laws that target norms. And if law generates a change in norms, behavior may change too.”).

130. *Id.* at 951–52.

131. *Id.* at 952.

132. *Id.*

133. *Id.* at 958.

134. *Id.*

135. *Id.*

136. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1537 (2000) (relying on Professor Sunstein’s work to evaluate the role of social norms in law).

137. Sunstein, *supra* note 125, at 954.

collective-action problem.¹³⁸ First, where so-called “bad” social norms exist, any given individual may wish to diverge from that norm-prescribed behavior, but she may not be able to do for fear of social sanction.¹³⁹ If the law intervenes to destroy the social norm, the individual may be able to act in a way that she had always preferred, without threat of social sanction.¹⁴⁰ Thus, legal intervention that seeks to alter these “bad” social norms actually serves to increase autonomy.¹⁴¹ Second, legal intervention is necessary to alter “bad” social norms because individuals, acting alone are faced with collective-action problems and cannot change deleterious social norms.¹⁴²

As Professor Sunstein’s work illustrates, social norms constrain behavior and address problems that cannot be wholly remedied by legal rules enforced in court. Ending pay inequality will require both changes in social norms and continued Title VII litigation. Positive social norms have the power to reinforce the goals of anti-discrimination law.

C. TRANSFORMATIVE LAW: LEGAL INTERVENTIONS THAT CREATE SOCIAL CHANGE

“Transformative law” has the potential to alter such “bad” norms. A transformative law, as Professor Linda Hamilton Krieger has discussed in connection with the Americans with Disabilities Act (ADA), is one that conflicts with existing harmful social norms and attempts to alter or displace them, as opposed to law that seeks to reinforce existing social norms.¹⁴³ Not all law is transformative; many legal rules strengthen or reinforce norms

138. Sunstein, *supra* note 125, at 954.

139. Sunstein, *supra* note 125, at 954.

140. Sunstein, *supra* note 125, at 954.

141. Sunstein, *supra* note 125, at 954.

142. Sunstein, *supra* note 125, at 954 (“[M]any women believe on reflection that the social meaning of being a woman is bad for them and that it should be changed. These women face a collective action problem that may be solved best via law. In any case a caste system tends to deny autonomy to lower caste members. Thus we have a particular reason for legal intervention: to overcome the obstacles that cannot be overcome by individual agents.”).

143. Linda Hamilton Krieger, *Afterward: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & L. 476, 477 (2000) (noting that some law is “designed to enforce existing social norms” and transformative law is “enacted to displace them”).

already in place.¹⁴⁴ For example, a law passed to combat fraud would not conflict with any social norms, as social norms already hold that fraud is bad and should be punished. Law is transformative not because it uses any particular means to achieve its objective, but rather because its objective is to create social change by altering social norms.¹⁴⁵ The ADA is illustrative: the ADA redefined the terms “disability” and “qualified” (as in, qualified for a particular job) in a way that conflicted with their ordinary definitions, giving the terms new social meaning.¹⁴⁶ The ADA imposes an obligation on employers to find reasonable accommodations for disabled individuals; a person is qualified for a job if they can perform it with a reasonable accommodation for their disability.¹⁴⁷ After the passage of the ADA, the social meaning of “qualified” changed from “qualified as is” to “qualified with reasonable accommodation” and many more people were able to be included in the workforce.¹⁴⁸

Transformative law is not normal law; it is law that tries to transform social reality and cuts against the status quo, rather than reinforce the status quo. The LLFPA is not transformative law because it does nothing to address the root causes of Ledbetter’s failure to discover that she was discriminated against in her pay for her entire career. In order to truly combat pay inequality, transformative law must be harnessed to deconstruct social norms that forbid salary discussion at work; non-legal based social movements to displace the social norm face substantial collective-action problems. Part III.D will explain why pay secrecy is a “bad” social norm necessitating legal intervention to destroy it so that individuals may be free to discuss salaries without threat of social sanctions.

144. *Id.*

145. *Id.*

146. *Id.* at 481 (“In recasting the concept of qualification in this way, the drafters of the ADA sought to transform the institution of disability by locating responsibility for disablement not only in a disabled person’s impairment, but also in ‘disabling’ physical or structural environments.”).

147. *Id.*

148. *Id.*

D. PAY SECRECY IS A “BAD” NORM AND PAY TRANSPARENCY IS NEEDED

While the federal government, through the Equal Employment Opportunity Commission (EEOC), can investigate employment discrimination and bring enforcement actions against employers who do not comply with the mandates of Title VII, Title VII is also enforced when individuals, through their own initiative, file charges with the EEOC.¹⁴⁹ Moreover, the EEOC relies mainly on employee complaints in order to initiate its own enforcement actions against employers.¹⁵⁰ Private citizens, therefore, must be equipped with information necessary to challenge illegal employment actions if Title VII is to be successfully used to challenge pay discrimination.¹⁵¹ The social norm against salary discussion necessarily interferes with the goals of Title VII and the LLFPA.¹⁵²

The social norm against pay secrecy may promote some employer interests, but this Part proceeds from the baseline assumption that neither an employer's desire not to disclose potentially damaging information about its employees' salaries nor an employee's discomfort with discussing salary information with his or her co-workers provide a compelling basis for confidentiality in the face of stubborn pay inequality.¹⁵³ Beyond desiring not to ex-

149. *Filing a Charge of Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://eeoc.gov/employees/charge.cfm> (last visited Mar. 28, 2013).

150. *About EEOC*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://eeoc.gov/eeoc/index.cfm> (last visited Mar. 3, 2013).

151. *See supra* Part II.A.

152. *See generally* Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 *NEW ENG. L. REV.* 229 (2012) (arguing that mandatory pay transparency would encourage employers to make efforts to remedy pay inequality); Eisenberg, *supra* note 2 (arguing the full information is necessary for fully efficient markets and a compensation market shrouded in secrecy promotes inequality); O'Neill, *supra* note 101 (noting that PSC Rules interfere with the goals of the LLFPA); Ramachandran, *supra* note 46 (arguing that the LLFPA “responds to public outrage, but changes little because it does nothing to improve the chances of employer and employee discovering the problem at a time it can be fully addressed,” and for a pay transparency affirmative defense to Title VII claims).

153. *Accord* Estlund, *supra* note 118, at 392 (“Even under existing law of the workplace, the notion that employers are entitled to keep employment-related information collides with employees' right under the NLRA to discuss wages and working conditions with each other and with potential allies among the public. That collision points to a deeper tension between employers' proprietary claims to information and the interests of employees in learning about, discussing, and fostering debate over their terms and condi-

pose illegal pay discrimination, employers may not wish to have to explain why some employees are paid more than others and would likely have to do so if the norm did not exist. However, there are several reasons why this interest should not be credited and why the social norm is still a “bad” one because of its ability to hide pay inequality. First, pay transparency may encourage employers to set pay more rationally in the first place.¹⁵⁴ Second, if an employer sets pay in an irrational way, whether or not because of discrimination, employees might speak up in a way that leads to a positive change and encourages the employer to align pay with productivity and skill.¹⁵⁵ Both of these arguments in favor of pay transparency are supported by the research of Professor Lawler, which suggests that pay secrecy actually contributes to employee dissatisfaction with pay and shields poor pay administration from challenge.¹⁵⁶ The defense of pay secrecy is also in conflict with the maxim “sunlight is the best disinfectant” that guides regulation in many other areas.¹⁵⁷

Furthermore, some studies have shown that pay secrecy actually creates discord in the workplace and causes employees to

tions of employment. When legislatures seek to advance those interests by mandating public disclosure, employers should bear a heavy burden of persuasion in contending for their right to keep such information confidential.”)

154. Eisenberg, *supra* note 2, at 1017–18 (noting the purpose of transparency would be to encourage employers to spend more time and resources thoughtfully making compensation decisions); Eisenberg, *supra* note 152, at 263–66.

155. Eisenberg, *supra* note 152, at 263–66; *see also* Deborah Eisenberg, *Money, Sex and Sunshine: In Favor of Pay Transparency*, QUOTH THE RAVEN: THE MARYLAND LAW FACULTY BLOG (June 17, 2010, 2:50 PM), <http://umlaw.typepad.com/quoth/eisenberg-deborah/> (arguing that when secrecy hides inequality, employers are “never pressured to fix the disparity.”). *Cf.* Rabin-Margalioth, *supra* note 25, at 848.

156. Wolgemuth, *supra* note 111 (“[University of Southern California Business Professor Ed Lawler states:] You want people to challenge your pay system, because maybe they’re right. Maybe you really are doing a bad job and getting that feedback directly — and based on valid data — is a good thing because it can stimulate you to improve.”); Edward E. Lawler, III, *Pay Secrecy: Why Bother?*, FORBES (Sept. 12, 2012, 1:00 PM), <http://forbes.com/sites/edwardlawler/2012/09/12/pay-secrecy-why-bother> (noting that employers sometimes prefer pay secrecy because they would have trouble defending bad pay decisions and that when pay is secret, managers “are often tempted to make and do make indefensible decisions.”).

157. Eisenberg, *supra* note 2, at 991 (“[T]he compensation market is deeply flawed and allows divergent rates for similar work because it lacks one of the key components of a properly functioning market: full information.”); Estlund, *supra* note 118, at 352–55 (cataloguing the range of regulatory interventions relying on public disclosure, including securities regulation and food- and drug-safety rules).

feel undervalued.¹⁵⁸ Without full information, employees assume that their co-workers are paid more than they actually are and that they are paid less in comparison.¹⁵⁹ Accurate information may therefore lead to higher job satisfaction rather than workplace discord.¹⁶⁰ Pay secrecy is a “bad” norm because it shields discriminatory pay-setting decisions from challenge through Title VII; none of the reasons advanced in favor of pay secrecy are persuasive.

IV. PAY-SECRECY SOCIAL NORMS AND LEGAL INTERVENTION

This Part advocates for a social change-oriented legal intervention — transformative law — that will serve to weaken and ultimately dismantle the social norm against salary discussion in order to fulfill the promise of the LLFPA and provide attainable remedies for victims of pay discrimination. As such, the law must intervene to both invalidate existing PSC rules and affirmatively encourage individuals to discuss salary information in the work place, thereby destroying the “bad” social norm of pay secrecy. If a legal intervention successfully disrupts current social norms, the LLFPA would fulfill its purpose: employees would discover pay inequality and be able to challenge it where they believe it is the result of discrimination by bringing a timely charge to the EEOC. Furthermore, employees would be able to negotiate more effectively with employers regarding desired salaries and employers would be forced to compensate employees on the basis of articulable work-related reasons.¹⁶¹ Just as transparency has been used to correct markets in other areas where litigation has

158. Eisenberg, *supra* note 2, at 1011–12; Lawler, *supra* note 156; David A. Logan, *The Perils of Glasnost*, 38 U. TOL. L. REV. 565, 570 (2007) (drawing from a study that found the secrecy can actually create “the very discontent and bitterness,” that secrecy is thought to protect against because in a secrecy regime, employees may become paranoid that they are underpaid).

159. Eisenberg, *supra* note 2, at 1011–12.

160. Eisenberg, *supra* note 2, at 1011–12.

161. See Eisenberg, *supra* note 2, at 1005 (“In sum, the regulation of executive compensation teaches us that wage transparency — although not a panacea — can be used to make companies more deliberate and thoughtful about their compensation schemes. Rather than setting pay based on the accident of prior salaries and “anything goes” discretionary regimes that can disadvantage women’s wages, transparency will focus attention on the need to pay based on performance and the ‘skill, responsibility and effort’ required for the job.”).

been unsuccessful,¹⁶² so too would pay transparency contribute to closing the gender salary gap, and, as described above, might lead to more rational pay-setting regimes in workplaces generally.

This transformative law could take many shapes, but it should start with rendering all PSC rules illegal and unenforceable as void and against public policy; this would serve a largely expressive function because PSC rules are not in place in many if not most workplaces. Beyond simply outlawing PSC rules, though, the transformative legal regime must also recast pay as a legitimate subject of discussion within the workplace.

The Paycheck Fairness Act (PFA) is a proposed piece of legislation that would amend the Equal Pay Act of 1963.¹⁶³ Although passed by the House of Representatives, it has not been passed by the Senate.¹⁶⁴ One of the PFA's most important provisions is its anti-retaliation provision that would make it illegal for employers to retaliate against employees who disclose or discuss their salaries with co-workers.¹⁶⁵ Like Title VII before it, the PFA is a transformative law that could remake social norms by shifting rights and prerogatives from the employer to the employees.¹⁶⁶ Because the movement for transparency has already taken off in other contexts, the PFA, if passed, would reconstruct social norms regarding salary discussion in the workplace by encouraging employees to inquire about salary information and urging them to act on that information through negotiation.¹⁶⁷

However, the PFA is necessary but not sufficient to fully deconstruct social norms that shroud salary information in secrecy. In order to remedy pay discrimination by facilitating discovery of pay inequality, transformative, norm-destroying law in the form of a prophylactic rule must also be adopted. Regulations must be adopted that mandate disclosure of salary information to new

162. Eisenberg, *supra* note 2, at 1005 (describing how disclosure is a tool used to regulate executive compensation).

163. Paycheck Fairness Act, S. 182, 111th Cong. (2009).

164. Jennifer Steinhauer, *Senate Republican Again Block Pay Equity Bill*, N.Y. TIMES, (June 5, 2012), <http://www.nytimes.com/2012/06/06/us/politics/senate-republicans-block-pay-equity-bill.html>.

165. S. 182.

166. *See, e.g.*, Eisenberg, *supra* note 145, at 266; Ramachandran, *supra* note 46, at 1066 n.87.

167. *The Paycheck Fairness Act: The Next Step in the Fight for Fair Pay*, NAT'L ORG. FOR WOMEN, www.now.org/issues/economic/022709pfa.html (last visited Mar. 3, 2013).

hires. This information could be included with routine new-hire paperwork. The list of salary information need not provide names for each corresponding salary, but should be detailed enough so that the new hire can identify the range for her particular job function. The regulations should also provide that employees may ask for and receive detailed salary information for employees at least once per year.

Mandated disclosure would operate outside of the Title VII litigation regime.¹⁶⁸ Furthermore, automatic disclosure would make it possible for employees to talk about salary with each other and understand how their work is valued within their workplaces. In short, automatic disclosure would encourage productive dialogue about pay inequality or discrepancies rather than hushed gossip premised on inaccurate data. If every employee were given pay data for their employer, this would go a long way towards destroying the pay-secrecy social norm detailed above by serving an “expressive function” that pay is a legitimate topic of conversation at work, and overcoming the collective action problem faced by individuals who wish to talk about their salaries but cannot do so because of threats of social sanction.

V. CONCLUSION

The LLFPA failed to codify a discovery rule or provide a way for victims of discrimination to discover salary information before filing lawsuits. Social norms and explicit employer policies make the path towards effective use of Title VII to rectify pay discrimination even more challenging. The legislative history and *Led-better* dissent both expressly recognized the challenges associated with uncovering pay discrimination but the statute fails to offer a workable solution beyond providing a potential plaintiff more time in which to file a lawsuit. This Note highlights the problem of widespread pay secrecy, which hinders Title VII enforcement and may contribute to pay inequality generally. This Note concurs with the body of scholarship that advocates for pay transparency and contributes to it by exploring how social norms, rather than solely litigation-based solutions or explicit employer practic-

168. Cf. Ramachandran, *supra* note 46, at 1073 (arguing for a pay-transparency defense).

es, create pay secrecy, and looks to social norms scholarship in order to understand the role of the law in altering social norms. Finally, this Note calls on Congress to pass the Paycheck Fairness Act. Furthermore, regulations must mandate disclosure of pay information as a mechanism for smashing the social norms that discourage salary discussion. Until pay is transparent, inequality, and discrimination will persist.