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Bias and Sexism: The Racial and Gender Wage Gap Affecting Black Women

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BIAS AND SEXISM: THE RACIAL AND GENDER WAGE GAP AFFECTING BLACK WOMEN

*Kadean Wilson*¹

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INTRODUCTION

Black women have economically contributed to American society since slavery. Yet, they are still plagued by the gender and racial wage gap. Although the Federal Government passed the Civil Rights Act of 1964, it was not enough to mend the racial wage gap that Black women face. The Federal Government should be more assertive in applying anti-discrimination laws by adopting a uniform mandatory Equal Pay Act like Washington’s Equal Pay and Opportunities Act² and allowing Black women to bring a discrimination claim based on gender *and* race. Although the wage gap applies to Black men and all

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2. See WASH. STAT. § 49.58 (2022) (equal pay and opportunities act).

women generally, it affects Black women more due to their double status of being Black *and* a woman. Research on the wage gap that Black women face has been neglected and buried between discussions of Black men and White women.³ Without adequately addressing the wage gap, the issues that Black women face cannot be properly solved. If Black women do not know that they are being paid less than their White female counterparts, they cannot report the disparity in pay. Today, Black women in the United States are paid thirty-nine percent less than White men and twenty-one percent less than White women.⁴ Yet, there is not a lot of data explaining the disparities in wages between White and Black women. In fact, fifty-three percent of Americans are not aware of the pay gap between Black women and White women.⁵ The discrimination in wages leads to a higher rate of poverty for Black women which translates to less money for their families and childcare, fewer opportunities, and an overall subpar quality of life.

Many argue that addressing gender discrimination in wages will fix the issue that Black women face. However, that is only half the problem since Black women have two statuses in society: being *Black* and being a *woman*.⁶ Legislation at the federal level provides that employers should not discriminate on the basis of race *or* gender, but it does not address the unique issues that Black women face in this society which is a race *and* gender issue.⁷ It does not require mandatory wage disclosures, which prevents Black women from learning that they are being discriminated against.

3. JULIANNE MALVEAUX, *Employment Issues Section Introduction*, in *Slipping Through the Cracks: The Status of Black Women* 8 (Margaret C. Simms & Julianne Malveaux eds., 1986).

4. Ariane Hegewisch, *The Gender Wage Gap: 2017; Earnings Difference by Gender, Race, and Ethnicity*, INST. FOR WOMEN'S POL'Y RSCH. (2018), https://iwpr.org/wp-content/uploads/2020/08/C467_2018-Occupational-Wage-Gap.pdf.

5. *Black women aren't paid fairly*, LEAN IN, <https://leanin.org/data-about-the-gender-pay-gap-for-black-women> (last visited Aug. 15, 2022).

6. BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY (Gerda Lerner ed., 1972); see also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F., 139 (1989) (crenshaw argues that Black women have been theoretically erased. She argues that Black women are discriminated in ways that do not fit within one category of race or sex but are discriminated against based on a combination of both racism and sexism. Yet, when addressing sex discrimination, the legal system lumps Black women into the category with White women. When it comes to race discrimination, Black women are included in the category with Black men. Ultimately, Black women are legally "invisible" and without legal recourse).

7. See Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)); see also Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C.S. § 2000(e)).

The objective of this Article is to address the racial wage gap between Black and White women and provide a solution. Part I of this Article will discuss the history of Black women and White women in the workforce. Part II will discuss the gender wage gap as it applies to Black and White women in the 21st century. Part III will discuss how Title VII of the Civil Rights Act of 1964 and the Equal Pay Act has failed to address the gender *and* race issues that Black women face when it comes to work wages. Part IV will discuss the reasons that studies and scholars have given for the wage gap. Part V discusses the benefits and costs of mandatory wage disclosure as well as Washington's Equal Pay and Opportunities Act. Part VI discusses the benefits of allowing Black women to sue based on their gender *and* race. Finally, Part VII concludes that the Federal Government should be more assertive in applying anti-discrimination laws by adopting a uniform mandatory wage disclosure law like Washington's Equal Pay and Opportunities Act and allowing Black women to sue based on their gender *and* race.

I. FROM SLAVERY TO THE WORKFORCE

Women's rights activist, Maria Stewart once said "we have pursued the shadow, they have obtained the substance, we have performed the labor, they have received the profits, we have planted the vines, they have eaten the fruits of them."⁸ This quote echoes the voice of most Black women during and after slavery. The exploitation of Black men and women began in America in 1619 when the privateer, The White Lion, brought twenty African slaves ashore in the British colony of Jamestown, Virginia.⁹ This sparked a cruel phenomenon of using African slaves as a cheaper source of labor throughout the seventeenth and eighteenth century.¹⁰ Although Black men and women were exploited for free labor, Black women were exploited both as *slaves and women*.¹¹

Because they were Black, female slaves worked in the field alongside the men, but because they were women, they were forced to do domestic work in the homes of their slave masters and take care of

8. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 3 (2d ed. 1991).

9. *Slavery in America*, HISTORY.COM, <https://www.history.com/topics/black-history/slavery>.

10. *Id.*

11. MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA* 64 (1983).

white children.¹² Female slaves did the washing, cleaning, and the childcare.¹³ Training female slaves for skilled work was not profitable compared to training men because a female slaves work was usually interrupted for childbearing.¹⁴ Female slaves were used for their reproductive abilities to produce more Black slaves which was crucial to the economic survival of their slave masters.¹⁵ Black women labored inside and outside of the home, yet they did not reap the benefits for the added burden of their labor.¹⁶

While Black women were being exploited because of their race and gender, White women were viewed as elite, financially supported, and protected from dangerous Black men that they were taught to fear.¹⁷ White women were allowed to buy, sell, and own slaves. They were active participants in slavery and benefited economically.¹⁸ White women were considered mothers, daughters, wives, and sisters of White men. They were viewed as “true women” that were pure and

12. Cecilia A. Conrad, *Book Reviews: When and Where I Enter and Labor of Love, Labor of Sorrow*, in *SLIPPING THROUGH THE CRACKS: THE STATUS OF BLACK WOMEN* 63, 64-5 (Margaret C. Simms & Julianna Malveaux eds., 1st ed. 1986).

13. *Id.*

14. *Id.*; see also Wilma King, *Suffer With Them Till Death: Slave Women and Their Children in Nineteenth Century America*, in *MORE THAN CHATTEL: BLACK WOMEN AND SLAVERY IN THE AMERICAS* 147 (David Barry Gaspar & Darlene Clark Hine eds., 1996) (discussing Thomas Jefferson’s statement “I consider a woman who brings a child every two years as more profitable than the best man on the farm . . . what she produces is an addition to the capital . . . [while a male slave’s labor disappears] . . . in mere consumption.”).

15. *Id.*; see also Pamela Bridgewater, *Ain’t I a Slave: Slavery, Reproductive Abuse and Reparations*, 14 *UCLA Women’s L.J.* 89, 115-16 (2005), <https://escholarship.org/content/qt6vt8x3jj/qt6vt8x3jj.pdf?t=MLqppv>, (“[A]lthough female slaves endured intense and extreme physical labor, they were also vulnerable to a gender-specific form of slavery—sexual abuse. Given their social and legal status as property, they were without means to deny their owners, or their owner’s agents, sexual access to their bodies. Socially, there was no available shelter for sexually abused female slaves, nor were there moral sanctions against owners who sexually abused or allowed sexual abuse of their female slaves. Legally, enslaved women had no standing under civil or criminal law to accuse their owners of rape.”).

16. *Id.*; see also Sojourner Truth, *Ain’t I A Woman?* Women’s Convention, Akron, Ohio 1 (1851), https://thehermitage.com/wp-content/uploads/2016/02/Sojourner-Truth_Aint-I-a-Woman_1851.pdf, (“I ploughed and planted and gathered into barns and no man could head me! And ain’t I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain’t I a woman? I have bourne thirteen children and seen them all sold off to slavery, and when I cried out with my mother’s grief, none but Jesus heard me! And ain’t I a woman?”).

17. Angie Maxwell, *Why Southern White Women Vote Against Feminism*, *WASH. POST* (Sep. 10, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/09/10/why-southern-white-women-vote-against-feminism/>.

18. Anna North, *How White Women’s “Investment” in Slavery has Shaped America Today*, *Vox* (Aug. 19, 2019, 11:30 AM), <https://www.vox.com/2019/8/19/20807633/slavery-white-women-stephanie-jones-rogers-1619>.

domestic.¹⁹ Most importantly, they gave birth to and raised future slave owners.²⁰

After the Civil War, Black women entered the workforce as sharecroppers, domestic workers, and other unskilled, service jobs.²¹ Black women were usually assigned to the most dangerous and strenuous tasks and horrible working conditions such as standing in rooms filled with toxic gas.²² White women were given jobs that allowed them to sit in well-ventilated rooms.²³ Black domestic workers would be paid as low as three dollars a week.²⁴ In the early nineteenth century, White women entered into the factory market, but Black women were denied access to factory employment until World War I.²⁵ However, Black women were allowed to work in the Southern tobacco and textile industries, where they continued to do unskilled factory work that they had done ever since slavery.²⁶

In 1900, less than three percent of all Black working women were engaged in manufacturing, whereas twenty-one percent of foreign-born, and thirty-eight percent of native-born White working women were in the manufacturing industry.²⁷ By 1930, the comparable figures were less than six percent (5.5%) for Black women engaged in manufacturing, twenty-one percent of foreign born, and thirty-eight percent of native born women engaged in manufacturing.²⁸ This was due to World War I where Black women worked in factories as meat packers, sweepers, cleaners, pressers, stamping, etc.²⁹ Black women worked long hours, but their median earnings were six dollars a week.³⁰ Native-born White women left the factory jobs for more professional, higher paying, clerical and sales positions, while Black women

19. Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151-52 (1966).

20. See Margaret Washington, *Introduction*, in NARRATIVE OF SOJOURNER TRUTH (Margaret Washington ed., 1993) ("White women, on the other hand, gave birth to those who controlled property: they 'reproduced the children who strengthened patriarchal order and inherited its power.' In this way, white women served as a conduit for the transmission of property and thus stood in a different relationship to property and to power.").

21. Conrad, *supra* note 12, at 65-7.

22. Osa A. Benson, Note, *The Intersection of Race, Sex, and Parental Status: Employment Discrimination Against Single Black with Children*, 4 HOWARD SCROLL. SOC. JUST. L. REV. 41 (1999).

23. *Id.*

24. BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY, *supra* note 6, at 226.

25. Conrad, *supra* note 12, at 65-7.

26. *Id.* at 238.

27. Conrad, *supra* note 12, at 66.

28. *Id.*

29. BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY, *supra* note 6, at 238.

30. *Id.* at 239.

were excluded from those positions.³¹ Unfortunately, the temporary gains of the war period were just that, temporary.³² Black women were the first to be fired and forced back into low-paying, domestic and unskilled work after the war.³³

In 1965, the median yearly earnings of nonwhite women who worked full-time was sixty percent of what White women earned: \$2,642.00 compared to a White women's salary of \$3,744.00.³⁴ In 1966, there were 6,273,000 Black women over the age of eighteen in the United States.³⁵ Of those groups of Black women, fifty percent were working compared to thirty-nine percent of White women in the same group.³⁶ The unemployment rate was almost two times higher for Black women at 9.3 percent versus 5 percent for White women.³⁷ Thus, more Black women began working at a younger age hence for a longer period of time compared to White women. Yet, Black women's wages were lower, and unemployment rates were greater.³⁸ Black women's work was viewed as valueless, and they were segregated into low-paying jobs. The wage gap between Black and White women continued to grow throughout the twentieth century and well into the twenty-first century.

II. THE RACIAL WAGE GAP IN THE 21ST CENTURY

Black women's work history includes steady labor force participation, low wages, and unstable work in the service sector.³⁹ Recently, August 22, 2019 was designated as Black Women's Equal Pay Day.⁴⁰ That day highlighted the unfortunate truth that Black women had to work all of 2018 and until April 2019 to make what White women earned in 2018 alone.⁴¹ Only thirty-four percent of White women think that non-white women are paid less than White women for doing similar work.⁴² However, sixty-six percent of White women acknowledge

31. Conrad, *supra* note 12, at 66.

32. BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY, *supra* note 6, at 239.

33. *Id.* at 220.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY, *supra* note 6, at 220.

39. Malveaux, *supra* note 3, at 9.

40. *Black women aren't paid fairly*, *supra* note 5.

41. *Id.*

42. Bonnie Chiu, *Invisibility of Race in Gender Pay Gap Discussions*, FORBES (June 13, 2019 6:36 AM), <https://www.forbes.com/sites/bonniechiu/2019/06/13/invisibility-of-race-in-gender-pay-gap-discussions/#18d5be285664>.

that women are generally paid less than men.⁴³ This shows that White women see a gender pay gap but not a racial pay gap among women.⁴⁴ In fact, White Americans acknowledge that there has been discrimination in the past but overestimate how much progress has been made over the decades.⁴⁵

The gender wage gap for Black women grew markedly from 2004 to 2014.⁴⁶ In fact, Black women's median earnings declined by five percent, which was more than three times as much as women's earnings overall. Black women's earnings fell almost seven percent (6.9%) percent while White women's earnings fell by just three percent during this same time period.⁴⁷ In 2016, Black women still participated in the U.S. workforce at a higher rate than any other women, 59.2 percent compared to 57 percent.⁴⁸ Nevertheless, Black women still earned eighty percent of what White women earned each week.⁴⁹ This trend stems all the way back to slavery for Black women. Although there is research explaining the wage gap between men and women generally, there is not a lot of research explaining the wage gap between Black and White women.

III. HOW LEGISLATION HAS FAILED BLACK WOMEN

More than fifty years after the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 made compensation discrimination illegal, a gender and sex wage gap still exist today. Congress enacted the Equal Pay Act of 1963 to eliminate sex discrimination in the payment of wages by employers engaged in commerce or in the production of goods for commerce.⁵⁰ Later, Title VII was enacted as an extension to the Equal Pay Act to eliminate race, color, religion, sex, or national origin discrimination in the workplace.⁵¹ However, both of these acts have failed to remedy wage discrimination when it comes to Black wo-

43. *Id.*

44. *Id.*

45. Tom Jacobs, *Black-White Wage Gap Grows as Americans Remain in Denial*, PAC STANDARD MAG. (Sep. 18, 2017), <https://psmag.com/economics/black-white-wage-gap-grows-as-americans-remain-in-denial>.

46. Michelle Chen, *The Wage Gap is Worse for Black Women*, THE NATION.COM (Aug. 29, 2016), <https://www.thenation.com/article/the-wage-gap-is-worse-for-black-women/>.

47. *Id.*

48. *Id.*

49. *Id.*

50. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)).

51. *Id.*

men due to the lack of wage disclosure laws and the failure to allow Black women to enforce a claim based on being Black *and* a woman.

A. *Equal Pay Act of 1963*

The Equal Pay Act of 1963 prohibits discrimination on the basis of sex by paying wages to employees for equal work which requires equal skills, effort, and responsibility, and which are performed under similar work conditions.⁵² The Act provides an exception when payment is based on: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex.⁵³

First, the Equal Pay Act fails because it does not provide Black women with a remedy to sex and gender discrimination since it is limited to sex-only discrimination claims. Second, it allows exceptions based on seniority, a merit system, and the catch all exception of “any other factor other than sex.” Since the act limits suits to sex discrimination only, the statute fails to remedy Black women’s wage problem. For example, a Black woman would have no recourse under the Equal Pay Act if she and a White woman applied for the same position with the same qualifications, and the position was given to the White woman. Since the employer hired a woman, although White, it cannot be shown that the employer discriminated on the basis of sex.⁵⁴

Further, seniority systems govern the order of layoffs, promotions, wages, and other benefits.⁵⁵ However, seniority systems perpetrate discriminatory policies. When the Equal Pay Act was passed, Black women were the last to be hired and the first to be fired.⁵⁶ Thus, a seniority system benefited them in no way since they had fewer years of service. The seniority system encourages an employer to engage in discriminatory hiring policies. Using the same example above, if the White woman is hired first, she has more seniority and is entitled to better pay and more benefits. The cycle continues and Black women are prohibited from moving forward.

52. *Id.*

53. *Id.*

54. *See Adams v. Reed*, 567 F.2d 1283, 1287 (5th Cir. 1978) (holding that because the person promoted was a woman, sex discrimination did not exist against the plaintiff, a Black female).

55. *Seniority System (Labor) Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/s/seniority-system-labor/> (last visited Aug. 15, 2022).

56. BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY, *supra* note 6, at 220.

Moreover, a merit system focuses on promoting and rewarding employees based on their ability and competence.⁵⁷ However, the merit base system also perpetrates discrimination. Supervisors and managers evaluate employees and ultimately make the decision of who to promote. Unfortunately, supervisors and managers may favorably evaluate people that they look like or are “friends” with.⁵⁸ Thus, the merit system may not accurately reflect a person’s ability to do the job. Likewise, the catch-all exception of “differential based on any other factor other than sex” also fails to eliminate discrimination when it comes to Black women because it allows employers to discriminate on the basis of race since it only excludes sex as another factor without defining what “any other factor other than sex” means.

Overall, the Equal Pay Act fails to remedy the wage discrimination that Black women face because it is limited to sex and allows three exceptions that all perpetrate bias in the hiring process. Congress attempted to remedy these shortcomings with Title VII of the Civil Rights Act of 1964, however, Title VII also fails for various reasons outlined in the next section.

B. *Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 provides that employers shall not discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s race, color, religion, sex, or national origin.⁵⁹ Title VII applies to federal, state, and local governments with fifteen or more employees.⁶⁰ It also applies to public colleges and universities and employment agencies.⁶¹

Title VII falls short, by: (1) failing to provide disclosure requirements for employers, (2) refusing to recognize a sex *and* race discrimination claim, and (3) limiting application of the statute to employers with fifteen or more employees. Under Title VII, a person has 180 days from the date of the unlawful discrimination to report it to

57. *Merit system*, DICTIONARY.COM, <https://www.dictionary.com/browse/merit-system> (last visited Aug. 15, 2022).

58. Emilio J. Castilla, *Bringing Managers Back In: Managerial influences on Workplace Inequality*, 76(5) AM. SOCIO. REV. 667-68 (Sep. 20, 2011), https://journals.sagepub.com/doi/pdf/10.1177/0003122411420814?casa_token=PQE0YWe3jqIAAAAA:lBuGq70lfM0R938Caw6KFav_N_kIPfSQ7Y6a7QoaxFLKjaV13BtXFaug9fTuTHTh7q7szzjFmj5d.

59. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C.S. § 2000(e)).

60. *Id.*

61. *Id.*

the Equal Employment Opportunity Commission (EEOC).⁶² However, if a Black woman is unaware that she is being discriminated against, how can she enforce her right to file a charge with the EEOC? Thus, there is a need for disclosure requirements. In America, there is this “code of silence” when it comes to discussing one’s salary.⁶³ Many people do not discuss their salary with co-workers. In fact, employers encourage and even mandate that employees should not discuss salary with their fellow co-workers.⁶⁴

The Institute for Women’s Policy Research (IWPR) demonstrated the extent of pay secrecy at workplaces on a national level.⁶⁵ Nineteen percent of employees reported that they work in a setting where discussions about wages and salaries are “formally prohibited or could be punished.”⁶⁶ Thirty-one percent stated that wage and salary discussion is discouraged by managers.⁶⁷ Unfortunately, the idea of pay secrecy is much more common in the private sector.⁶⁸ Sixty-one percent of employees reported that they were either discouraged or prohibited from discussing wage and salary information versus fourteen percent of employees in the public sector.⁶⁹ Although there are existing laws that require disclosure of wages, those laws only apply to public sector jobs and about ninety percent of Americans work in the private sector.⁷⁰ Mandatory wage disclosure would provide Black women the opportunity to enforce their rights and discourage wage discrimination in the workplace. It would also encourage the elimination of the “code of silence” when it comes to work wages.

Second, Title VII fails to protect Black women as a separate group from discrimination based upon both their sex *and* race. Some courts have been reluctant to allow Black women to bring a claim based on both sex and race. Thus, if a Black woman is successful in her claim, it is either because of sex or gender, but she is left with no remedy for being discriminated against for both her Blackness and womanhood. In the seminal case of *Degraffenreid v. General Motors*,

62. *Id.*

63. *Pay Secrecy and Paycheck Fairness: New Data Shows Pay Transparency Needed*, INST. WOMEN’S POL’Y RSCH. (Nov. 15, 2010), <https://iwpr.org/media/press-releases/pay-secrecy-and-paycheck-fairness-new-data-shows-pay-transparency-needed/>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Pay Secrecy and Paycheck Fairness: New Data Shows Pay Transparency Needed*, *supra* note 63.

69. *Id.*

70. *Id.*

five Black women brought an employment discrimination suit against General Motors (hereinafter GM), alleging that the ‘last-hired-first-fired’ policy discriminates against Black women.⁷¹ The plaintiffs sought relief based on the fact that they were Black woman, combining a race and sex discrimination claim under Title VII.⁷² The court ruled in favor of GM reasoning that the plaintiffs could not assert a combined claim but only separate claims of race and sex discrimination.⁷³ The Court reasoned that allowing the plaintiffs to combine two causes of action would create a “super-remedy.”⁷⁴ Thus, prohibiting the five Black women to pursue a recourse to redress their unique issue in the workplace.

Despite the decision in *Degraffenreid*, the Fifth Circuit in *Jefferies v. Harris County Community Action Association* found that the plaintiff was entitled to a remedy under Title VII for being Black *and* a female.⁷⁵ In *Jefferies*, a black female employed with Harris County Community Action Association (hereinafter HCCAA) applied several times for promotions to various positions but her efforts were unsuccessful.⁷⁶ Jefferies eventually applied for a field representative position but they were given to one Black male and one White female.⁷⁷ Jefferies filed suit under Title VII alleging discrimination as a Black female.⁷⁸ The lower court denied her claim reasoning that she failed to prove a prima facie case for either race or sex discrimination since HCCAA hired a Black male and White female to fill the vacancies.⁷⁹

The Fifth Circuit departed from *Degraffenreid* and reversed the lower court’s decision.⁸⁰ The Court agreed with the plaintiff that discrimination against Black females can exist even in the absence of discrimination against Black men or White women.⁸¹ The Court reasoned that failing to recognize Black women as a separate and distinct class would leave them with no remedy under Title VII.⁸² Further, the court analyzed the legislative intent and history behind Title VII and

71. *Degraffenreid v. Gen. Motors Assembly Div.*, St. Louis, 413 F.Supp. 142, 144 (E.D. Mo. 1976).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1029 (5th Cir. 1980).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Jefferies*, 615 F.2d at 1030.

81. *Id.* at 1032

82. *Id.*

found that Congress's use of the word "or" evidences the intent to prohibit employment discrimination based on any or all of the listed characteristics.⁸³ Further, the House of Representatives refused to adopt an amendment which would have added the word "solely" to modify the word "sex."⁸⁴ Ultimately, the Court found that analyzing the sex and gender separately would leave Black women without a viable Title VII remedy.⁸⁵

Unfortunately, courts have not agreed upon a uniform approach to address Black women's gender *and* race claims. Some courts, like the Fifth Circuit in *Jefferies*, recognize such claims, but other courts are unwilling to accommodate gender and race claims and choose to analyze the two separately under Title VII.⁸⁶ Thus, Black women are left without a remedy in those latter cases. Furthermore, Title VII fails because it only applies to those employers with fifteen or more employees. Employers with less than fifteen employees are more likely to discriminate since they are not regulated by Title VII.

IV. THE RACIAL WAGE GAP EXPLAINED

Black women are unable to separate their Blackness from their sex and they have literally paid for it. Many scholars' reason that Black women are paid less than men is because Black women are less educated and experienced, work less, and are segregated into low paying jobs. However, no one addresses the wage gap between Black and White women and unfortunately there is very little research explaining the wage gap between the two. This section will discuss the historical and traditional justifications for paying Black women less than men and how education, experience, less work history, and occupational segregation fail to fully explain the racial wage gap between Black and White women. It will then move on to discuss how discrimination and bias against Black women in the workforce explain the racial wage gap.

83. *Id.*

84. *Id.*

85. *Jefferies*, 615 F.2d at 1032.

86. See *Moore v. Hughes Helicopter Inc.*, 708 F.2d 475, 475 (9th Cir. 1983); see also *Chaddah v. Harris Bank Glencoe-Northbrook, N.A.*, 42 F.3d 1391, 1391 (7th Cir. 1994); see also *Adams v. Reed*, 567 F.2d 1283, 1283 (5th Cir. 1978).

A. *Education and Experience*

From slavery and through decades of de jure and de facto segregation, the educational opportunities for Black women have either been forbidden or constrained.⁸⁷ Employers were able to pay Black women less due to the very fact that they were less educated or not educated at all. But, today, Black women are graduating college at a much higher rate. However, they are not shielded from the racial wage gap.⁸⁸ Between 2009 and 2010, Black women earned sixty-eight percent of all associate degrees awarded to Black students, sixty-six percent of bachelor degrees, seventy-one percent of master degrees, and sixty-five percent of all doctorates awarded to Black students.⁸⁹ Further, 9.7 percent of Black women were enrolled in college compared to 7.1 percent of White women.⁹⁰ Education is viewed as the great equalizer but Black women are still paid less despite being more educated.⁹¹ Black men and women with at least some college education make \$11,000 compared to \$18,000 earned by White men and women with less than a high school education.⁹² Thus, the wage gap widens as Black women obtain a college education.⁹³ The unemployment rate for Black women with a bachelor degree was equal to the unemployment rate of White women with only a high school diploma.⁹⁴ Therefore, the notion of having less education and experience does not fully explain the racial wage gap between Black and White women.

B. *Women Work Less*

The idea that women work less is a corollary to the idea that women are paid less because they are less educated and less exper-

87. Brian Arao, *Roles of Black Women and Girls in Education: A Historical Reflection*, in LISTENING TO THE VOICES: MULTI-ETHNIC WOMEN IN EDUCATION 137 (Betty Taylor ed., 2016).

88. Angela Bronner Helm, *Black Women Now the Most Educated Group in U.S.*, THE ROOT.COM (June 5, 2016, 1:48 PM), <https://www.theroot.com/black-women-now-the-most-educated-group-in-us-1790855540>.

89. *Id.*

90. *Id.*

91. Raina Nelson, *Black Women and the Pay Gap*, AAUW.ORG (Aug. 1, 2019), <https://www.aauw.org/article/black-women-and-the-pay-gap/>.

92. Amy Traub et al., *The Asset Value of Whiteness: Understanding the Racial Wealth Gap*, DEMOS, (Feb. 6, 2017), https://www.demos.org/sites/default/files/publications/Asset%20Value%20of%20Whiteness_0.pdf.

93. Kevin Miller et al., *The Simple Truth About the Gender Pay Gap* (2018), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=the_Simple_Truth.

94. Traub et al., *supra* note 92.

enced, as explained above.⁹⁵ Scholars reason that women in general, work less due to curtailed hours and family responsibilities.⁹⁶ While the idea that women work less due to family responsibilities holds substantial weight when it comes to Black women, it does not fully explain the wage gap between Black and White women.⁹⁷ Since slavery, Black women have participated in the labor force at much higher rates than white women.⁹⁸ Despite Black women's high level of participation in the labor force, Black women that work full-time, year-round, earn on average \$6,000 less than their White female counterparts.⁹⁹ Accordingly, Black women have worked longer, hence have more experience in the labor market, but are still paid less than their White counterparts. Part of this is because Black women disproportionately work in service jobs but ultimately Black women experience lower wages due to discrimination.¹⁰⁰

C. Occupational Segregation

Occupational segregation is the concentration of women in one set of jobs, and men in another.¹⁰¹ It is one of the main factors that contributes to the wage gap that Black women face.¹⁰² Black women are more likely to work in service occupations including personal care aides, maids, and housekeeping cleaners, nursing assistants, cooks, and food service staff.¹⁰³ Black women's labor market position is the result of employer practices and governmental policies that disadvantaged Black women relative to White women and men.¹⁰⁴ For example, in the twentieth century, employers excluded Black women from better-paying, higher-status jobs which forced Black women to perform private domestic service work for White families.¹⁰⁵ Laws such as Jim

95. Asha DuMonthier et al., *The Status of Black Women in the United States* (2007), http://statusofwomendata.org/wp-content/uploads/2017/06/SOBW_report2017_compressed.pdf.

96. *Id.*

97. *Id.*

98. *Id.* at 21.

99. *Id.* at 22.

100. DuMonthier et al., *supra* note 95, at 28.

101. *Id.*

102. *Id.*

103. *Id.* at 28-29.

104. Nina Banks, *Black Women's Labor Market History Reveals Deep-seated Race and Gender Discrimination*, ECON. POL'Y INST. (Feb. 19, 2019, 2:11 PM), <https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/>.

105. *Id.*

Crow, made employment discrimination legal. Even after the Jim Crow era, Black women still face the consequences of being segregated into care and food service jobs.¹⁰⁶ Negative representations of Black womanhood have reinforced these discriminatory practices and policies.¹⁰⁷ Since slavery, the dominant view of Black women has been that they should be low-paid workers and this view is reflected in Black women's occupational and labor status today.¹⁰⁸

Although Black women make up the majority of domestic workers they are still paid the least when compared to White women, earning on average \$10.99 an hour compared to a White women's earnings at \$12.13 an hour.¹⁰⁹ In addition to low wages, domestic workers are excluded from coverage by most labor protection laws and are vulnerable to exploitation and abuse by employers.¹¹⁰ The poor treatment that Black domestic workers experience, combined with their omission from many labor protections, place them at a sharp disadvantage within the U.S. economy, and deepen gender and racial inequities.¹¹¹

D. *Discrimination and Bias*

Overall, education, experience, occupational segregation, and the contention that women work less fail to fully explain the racial wage gap between Black and White women.¹¹² However, Black women's labor market position is a reflection of discriminatory employer practices and government policies that have disadvantaged Black women compared to White women.¹¹³ Beginning with the Jim Crow laws, Black people were faced with a sharp disadvantage.¹¹⁴ Jim Crow laws were strict laws that regulated what work Black people could do and how much they would be paid.¹¹⁵ Often referred to as "Black codes", these harsh laws were used as a way to keep Black people as indentured servants and maintained by the idea of "equal but separate."¹¹⁶

106. *Id.*

107. *Id.*

108. *Id.*

109. DuMonthier et al., *supra* note 95, at 31.

110. *Id.*

111. *Id.*

112. *Id.* at 1-192; Helm, *supra* note 88; Traub et al., *supra* note 92; Banks, *supra* note 104.

113. Banks, *supra* note 104.

114. *Jim Crow Laws*, HISTORY, <https://www.history.com/topics/early-20th-century-us/jim-crow-laws>. (Jan. 11, 2022).

115. *Id.*

116. *Id.*

Throughout this era, Black women remained at the lower end of the socio-economic spectrum.¹¹⁷ Those that attempted to stand against Jim Crow were met with violence and even death.¹¹⁸

In the early 20th century, welfare policies such as the Social Security Act of 1935 and the Mother's Pension, which enabled White women to stay at home while Black women worked, discriminated against Black women.¹¹⁹ Caseworkers excluded most poor Black women from receiving cash assistance, reinforcing the view that Black women should work and White women should be able to be "housewives."¹²⁰ The government ensured that Black women would have to work in low-wage jobs by denying Black women access to these welfare programs.¹²¹ The government was so against Black women receiving cash assistance that the program eventually ended, and the enactment of Temporary Assistance for Needy Families (TANF) was implemented—a program with strict work requirements that almost always requires a single-parent home to receive assistance.¹²²

Black women have always been expected to work hard and to work for little to nothing. This expectation stems all the way back to the racial and gender biases that were perpetrated in the labor market, beginning with slavery.¹²³ Today, those discriminatory practices continue to affect Black women in a major way. Black women face unfair expectations, unique challenges, and most of all, bias. Many times employers will use a person's previous salary history when making employment offers which reinforces the stigma that Black women should be paid less for their work.¹²⁴ Once and if a Black woman is hired, she is subjected to discrimination.¹²⁵ For example, a study found that 35.6 percent of Black millennial women reported experiencing employment discrimination based on race and gender compared with 13.9 percent of White women.¹²⁶ Another study found that Black women are held to a much higher standard than their White counterparts and are

117. See Judy Scales-Trent, *Black Women and the Constitution: Finding our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L.L. REV. 9, 27 (1989).

118. *Id.*

119. Alma Carten, *The Racist Roots of Welfare Reform*, THE NEW REPUBLIC (Aug. 22, 2016), <https://newrepublic.com/article/136200/racist-roots-welfare-reform>.

120. *Id.*; see also Banks, *supra* note 104.

121. Banks, *supra* note 104.

122. *Id.*

123. *Id.*; see also Malveaux, *supra* note 3, at 8.

124. Elizabeth Warren, *Valuing the Work of Women of Color*, MEDIUM, (July 5, 2019), <https://medium.com/@teamwarren/valuing-the-work-of-women-of-color-c652bf6ccc9a>.

125. *Id.*

126. DuMonthier et al., *supra* note 95, at 33.

presumed to be less qualified despite their credentials, work product, or business results.¹²⁷ Overall, the stigma that a Black woman's work is valueless creates a social norm that Black women should be appreciative for the wages that they do receive.¹²⁸ It creates discrimination and a racial wage gap between Black and White Women. Mandatory wage disclosure will help mend the wage gap between Black and White women.

V. MANDATORY WAGE DISCLOSURE

The federal government already provides that the wages for its employees shall be available publicly.¹²⁹ Due to this mandatory wage disclosure, women that work in the public sector face a smaller margin of wage discrimination.¹³⁰ However, only about ten percent of people work in the public sector.¹³¹ Thus, there is still a need for wage disclosure when it comes to the private sector. Mandatory wage disclosure is a great solution when it comes to closing the racial wage gap between Black and White women.¹³² It gives Black women an opportunity to realize that they are being discriminated against and allows them to

127. Marcel Schwantes, *Why Women of Color Get Less Support at Work*, *Research Confirms*, INC.COM (May 7, 2019), <https://www.inc.com/marcel-schwantes/why-women-of-color-get-less-support-at-work-research-confirms.html>.

128. See Patricia A. Broussard, *Black Women's Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systematic Racism—Who Will Tell Her Stories?*, 16. J. GENDER RACE & JUST. 373, (2013). (Broussard explains that the idea that Black people “should just get over slavery and Jim Crow and stop using them as excuses for the current status of the Black psyche” is flawed. Broussard further explains that “the flaw in that logic is that a wound that is not treated may fester, form a keloid, become infected, or cause the entire body to become septic. It can be argued that because, metaphorically speaking, no medical attention has been administered to the psyches of Blacks in the United States, four-hundred-year-old injuries continue to infect the collective body. If this in fact is the case, the question becomes who bears the responsibility for the original injury and what remedy will render the injured parties whole again?” That applies here, the federal government is responsible for mending discrimination against Black women in wages. If there is no treatment, the gap continues.)

129. *Pay Secrecy and Paycheck Fairness: New Data Shows Pay Transparency Needed*, *supra* note 63.

130. *Id.*

131. *Id.*

132. Samantha Cooney, *Should You Share Your Salary with Co-Workers? Here's What Experts Say*, TIME (Aug. 14, 2018, 4:15 PM), <https://time.com/5353848/salary-pay-transparency-work/>; Susan Kelly, *Gender Pay Gap Shrinks When Companies Disclose Wages*, CORNELL CHRONICLE (Feb. 27, 2019), <https://news.cornell.edu/stories/2019/02/gender-pay-gap-shrinks-when-companies-disclose-wages>; Morten Bennesen et al., *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them*, HARV. BUS. REV. (Jan. 23, 2019), <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them>.

enforce their legal rights.¹³³ Secondly, it encourages the elimination of the “code of silence” when it comes to wages since employers will have to disclose the wage information. Third, it discourages discrimination when it comes to wages because employers will have to provide a wage or salary scale to applicants of any race or gender.¹³⁴ Lastly, wage disclosure will reveal wage discrimination and aid in the enforcement of antidiscrimination law.¹³⁵

Despite these benefits, some employers still object to mandatory wage disclosure. Employers argue that mandatory wage disclosure would lead to a hostile work environment and make it more difficult to hire skilled people for lower wages.¹³⁶ Employers argue that employees may be jealous because wage disclosure “triggers a process of social comparison.”¹³⁷ This jealousy would lead to a hostile working environment.¹³⁸ However, companies like Whole Foods provide full wage transparency and have reported a more productive work environment and competition among employees.¹³⁹ In fact, an empirical study found that not only does wage transparency narrow the wage gap, but it also increases the number of women being hired, promoted, and lowers a company’s overall wage bills.¹⁴⁰

Oftentimes employers are able to hire talented people at lower wages because the employee does not know that they are being paid less.¹⁴¹ However, the need to eliminate wage discrimination against Black women outweighs the argument that wage disclosure creates a hostile environment and prevents employers from hiring people at lower wages. Particularly, acts like the Washington Equal Pay and Opportunities Act, provides a solution to eliminating the racial wage gap between Black and White women.¹⁴²

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Cooney, *supra* note 132.

138. *Id.*

139. Allison Griswold, *Here’s Why Whole Foods Lets Employees Look Up Each Other’s Salaries*, BUS. INSIDER (Mar. 3, 2014, 5:45 PM), <https://www.businessinsider.com/whole-foods-employees-have-open-salaries-2014-3>.

140. Morten Bennedsen et al., *supra* note 132.

141. *Id.*

142. H.R. 1696, 66th Leg., 2019 Sess. (Wash. 2019).

A. *Washington Equal Pay and Opportunities Act*

In April of 2019, the Washington State legislature passed the Washington Equal Pay and Opportunities act.¹⁴³ The first part of the act provides in pertinent part that an employer may not: (1) seek the wage or salary history of an applicant for employment from the applicant or a current or former employer, or (2) require that an applicant's prior wage or salary history meet certain criteria.¹⁴⁴ However, the act does provide that an employer may confirm an applicant's wage or salary history if the applicant voluntarily discloses it or after the employer has already negotiated and made an offer of employment with compensation to the applicant.¹⁴⁵ The second part of the act provides: (1) upon request of an applicant for employment after the employer has already offered the applicant the position, the employer must provide the minimum wage or salary for the position, and (2) if an employee is offered an internal transfer to a new position or promotion, the employer must provide the wage scale or salary range for the new position.¹⁴⁶ If there is no salary or wage scale, the employer must provide the minimum wage or salary expectation set by the employer prior to posting the position, making a position transfer, or making the promotion.¹⁴⁷

The legislature made several key findings in deciding to pass the act: (1) existing equal pay laws do not remedy the wage gap against women;(2) policies that encourage discipline towards workers who discuss or inquire about compensation prevent workers from moving forward;(3) the business practice of inquiring about salary history creates earning inequalities, (4) women have been offered lower pay than men for the same jobs even where their levels of education and experience are the same; and (5) lower starting salaries translate into lower pay, less family income, and more children and families in poverty.¹⁴⁸

The Washington Equal Pay and Opportunities Act provides a step in the right direction towards mending the racial wage gap between Black and White women. First, it prohibits employers from inquiring about past salaries and wages. This is very significant because oftentimes employers will use the salary or wage history of an applicant in determining what to pay them. In particular, Black wo-

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. H.R. 1696, 66th Leg., 2019 Sess. (Wash. 2019).

148. *Id.*

men are often segregated into lower paying jobs, thus if an employer is constantly relying on a Black woman's past salary, then there will never be any room for a raise in wages or salary. Further, if an employer must confirm an applicant's wage or salary, they must do so after they have already offered the applicant a position with compensation already determined. Thus, an employer cannot go back and rely on salary history to change the compensation that they have already offered the applicant.

Secondly, by requiring employers to provide the minimum wage or salary to an applicant after they have been offered the position, the act allows employees to be aware of what they should be paid. The federal government, however, should take it a step further and require employers to provide a wage or salary scale based on race, ethnicity, national origin, and gender. Although the Washington Equal Pay Act provides that an employer must provide the wage scale or salary scale, it is not specific as to what category of persons falls at the bottom or top of the scale. For example, if a Black female applicant is provided with the wage scale for the position that they are applying for, how will the applicant know if they are being discriminated against as a *Black woman* or as a woman in general if there is no information as to gender, race, ethnicity, and national origin? Taking the Equal Pay act a step further would allow Black women to see if they are being discriminated against compared not only to their White female counterparts but also to men. As well as allow Black women to determine how they are being discriminated against. Furthermore, It would allow Black women and other employees to assert their rights under the Equal Pay Act and Title VII of the Civil Rights Act of 1964. However, mandatory wage disclosure is just one piece of the puzzle. The federal government should allow black women to sue based on their double status.

VI. FILING A SUIT AS A *BLACK WOMAN*

In addition to providing mandatory wage disclosure, the federal government should allow Black women to bring a suit based on discrimination against their race *and* sex. First, a Black woman does not have a remedy under Title VII if it is shown that an employer hired a woman in general or even a Black man. Thus, a Black woman has to choose between gender or race when filing a claim under Title VII. Ultimately, this leaves her with no viable remedy for being discriminated against as a *Black woman*. Title VII provides a remedy based on discrimination against an employee's "race, color, religion, sex, or national

origin.”¹⁴⁹ Hence, Congress intended to allow a suit based on one or all of the characteristics by including “or.”¹⁵⁰ Even more, the House of Representatives refused to adopt an amendment which would have added the word “solely” to modify the word “sex.”¹⁵¹

In *Jefferies*, Justice Randall reasoned that it is pivotal that Black women have a remedy under Title VII due to their double status and provided that:

“Black females represent a significant percentage of the active or potentially active labor force. In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black women without a viable Title VII remedy. If both black men and white women are considered to be within the same protected class as black females for purposes of the McDonnell Douglas prima facie case and for purposes of proof of pretext after an employer has made the required showing of a legitimate, non-discriminatory reason for the adverse employment action, no remedy will exist for discrimination which is directed only toward black females.”¹⁵²

Additionally, the plain language of Title VII states “or” after each classification. This signals that a person may bring a claim under one or all classifications.

VII. CONCLUSION

More than fifty years after the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 made compensation discrimination illegal, a gender *and* race wage gap still exist between Black and White women today. It is time for the federal government to act to remedy this wage gap. The federal government should be more assertive in applying anti-discrimination laws by adopting a uniform mandatory Equal Pay Act similar to Washington’s Equal Pay and Opportunities Act and allow Black women to file a claim based on their double status.

First, a mandatory wage disclosure law will eliminate discrimination in the hiring process since employers will be required to disclose a salary or wage scale to applicants. Consequently, it is less likely that they will discriminate in wages. Moreover, wage disclosure will allow

149. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C.S. § 2000(e)).

150. *Jefferies*, 615 F.2d at 1032-33 (1980).

151. *Id.*

152. *Id.* at 1032.

Black women to be aware of wage discrimination at the moment it happens to them. As a result, Black women will have the opportunity to file a Title VII claim within the requisite 180 days. Also, the "code of silence," when it comes to wages in the workplace, will be discouraged which will correspondingly bring awareness to those Black women who are being discriminated against in the workplace.

Second, allowing Black women to sue as a *Black* woman, will provide them with an adequate remedy. Although, Black and White women share many common concerns, Black women cannot receive a viable remedy if they are forced into the category with White women and/or Black men. Thus, Black women should be allowed to sue as such. Moreover, Congress intended to allow Black women to sue based on their gender and race by including "or" after each classification. In fact, the House of Representatives refused to adopt "solely" when passing Title VII. In effect, the plain language of Title VII calls for a claim based on one or all of the classifications.

In conclusion, the federal government has not done enough to mend the wage gap between Black and White women. It is time for the federal government to act, to be more assertive when applying anti-discrimination laws and adopt a uniform mandatory Equal Pay Act like Washington's Equal Pay and Opportunities Act and allow Black women to file a claim based on their double status. Mending the wage gap is so important to the status of Black women in this society. It will allow Black women to enjoy a better quality of life, pursue better opportunities, and provide for their family members and children. Overall, it is morally right, it is legally right, and it is constitutionally right.¹⁵³

153. 110 Cong. Rec.7054 (1964) (statement of Sen. John Pastore: "[t]hat is why we need Title VI of the Civil Rights Act, H.R. 7152—to prevent such discrimination where Federal funds are involved . . . Title VI is sound; it is morally right; it is legally right, it is constitutionally right.").