Title
A Road Map for Law Schools: Changing Problematic Faculty Compensation Practices that Perpetuate the Gender Pay Gap

Journal
JOURNAL OF LEGAL EDUCATION, 73(3)

ISSN
0022-2208

Author
Robinson-Dorn, Trilby

Publication Date
2025

Peer reviewed

A Road Map for Law Schools: Changing Problematic Faculty Compensation Practices that Perpetuate the Gender Pay Gap

Trilby Robinson-Dorn*

Table of Contents

***Trilby Robinson-Dorn,** Vice Dean, Professor of Lawyering Skills, and Director of The Pay Equity Project, University of California, Irvine School of Law. I would like to thank the UC Irvine Law Library for its excellent research assistance, particularly Jessica Pierucci for her extensive work, as well as Christina Tsou, Divya Seth, Jeff Latta, and Jessica Whytock. I would also like to thank Swethaa Ballakrishnen, Mario Barnes, David Cohen, Marisela Galindo, Bryant Garth, Ariane Hegewisch, and Song Richardson for helpful feedback, conversations, and support. Thanks also to the Whiteley Center at University of Washington's Friday Harbor Laboratories for giving me the opportunity to serve as a Whiteley Scholar, which provided the focused time to work on this article. Finally, thank you to my husband Michael both for his willingness to repeatedly discuss this topic and for his extra child and dog-care during my needed writing solitude.

The gender pay gap in the United States is pervasive, impacting women in all occupations.[1] Despite law schools' purported commitment to equity, legal academia is no exception. As the important recent analysis of Meghan Dawe and Christopher Ryan demonstrates:

> Our investigation of a rich and unique dataset of tenured law professors reveals gender stratification in the legal academy, clearly demonstrated by our finding that tenured women law professors – and especially women of color – receive lower compensation than their male colleagues. We find evidence that women law professors are very likely to earn lower salaries and income than men even when they both enjoy the same protection of tenure.[2]

In short, even women law professors with the *highest* status - tenured law faculty - still earn significantly less than their comparable tenured male law faculty colleagues. Although it is admirable that a few individual female professors have stepped forward to sue their law schools for pay discrimination, lawsuits

1 U.S. Department of Labor Women's Bureau Issue Brief, Mar. 2023, p.3 (on file with author) ("[w]hen comparing more than 300 detailed occupations, there are none where women have a statistically significant earnings advantage over men, but hundreds where men have significantly higher earnings than women. These gendered differences in pay are common across both high and low-paid occupations.")

2 Christopher J. Ryan, Jr. & Meghan Dawe, *Mind the Gap: Gender Pay Disparities in the Legal Academy*, 34 Geo. J. Legal Ethics 567, 611 (2021).

and individually-negotiated pay adjustments have simply not been enough to close the law faculty pay gap. Nor do law school pronouncements touting the importance of equity and diversity appear to have made a difference for underpaid women law faculty, who are subjected to pay inequities that only compound over the course of their academic careers.

Some of the structures that contribute to pay inequity in legal academia, such as the occupational segregation of faculty into differentially valued and paid "doctrinal," "clinical," and "legal writing" lines and legal academia's subjective emphasis on scholarly productivity, are deeply embedded parts of traditional legal education.[3] Unfortunately, there are too many budgetary and other barriers at most law schools for Deans to easily remedy these structural issues in the short term. This is disheartening, but not the end of the story.[4]

Although structural contributors to law faculty pay gaps have been well identified, there has been little focus in the academic literature to date on the specific *compensation practices* law schools use to set faculty pay. Certain common practices - for example, using a lateral faculty hire's salary at her prior university to set her new salary - are well known to perpetuate gender pay gaps. Some of these traditional law school pay practices have been outlawed under a recent explosion of state pay equity laws. This article focuses on proposing immediately feasible changes to law school faculty compensation practices

3 For example, Melissa Hart argues that "much of the explanation for gender pay inequity in academia today is structural..." and that prior scholarship has taken aim at "invisible law school structures and practices that have a disparate effect on women faculty members." *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 Denv. U. L. Rev. 873, 877 (2014) (citing Ann McGinley, *Reproducing Gender on Law School Faculties,* 2009 BYU L. Rev. 99, 105). Hart identifies occupational segregation, "scholarly excellence" metrics that privilege men, bias in evaluations, and heavier teaching and service loads as the "structural attributes of legal academia [that] are very likely to be major contributors to gender pay disparities." *Id.* at 877-882. Law schools should examine each of these structures and practices and think carefully about what they can do to improve them.

4 As a strong supporter of the need for robust clinical and skills training, I remain troubled by legal academia's low compensation and devaluation of lawyering skills and clinical faculty. Legal writing and clinical faculty are disproportionately and increasingly female. *See, e.g,* Robert Kuehn, *An Empirical Analysis of Clinical Legal Education at Middle Age*, 71 J. Legal Educ. 622, 637 (2023) (67% of clinical faculty and 70% of legal writing faculty were female in 2019; women constituted fewer than 38% of full-time law faculty members using ABA counts after excluding these groups of faculty). There is a significant body of scholarship detailing the gendered occupational segregation of law school faculties, in which majority female clinical and lawyering skills faculty have long been viewed as lower status, told that their "market value" is less-than, and paid lower salaries than doctrinal faculty. *See, e.g.*, Ann C. McGinley, *Discrimination in our Midst: Law Schools' Potential Liability for Employment Practices*, 14 U.C.L.A. Women's L.J. 1 (2005); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 Wm. & Mary J. Women & L. 551 (2001); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 Berkeley Women's L.J. 1 (2001); *See, e.g.,* Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. Ass'n Legal Writing Directors 12 (2008); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professor*s, 73 UMKC L. Rev. 467 (2004); Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 Idaho L. Rev. 867 (2016); Kuehn, *supra* at 646.

that do not require fundamental restructuring of law faculties, are not difficult to implement, and will improve gender and racial pay equity across the board for doctrinal, clinical, and lawyering skills faculty.

Law schools are very slow to adapt to change and may not have examined or changed their faculty compensation practices for decades. As Jennifer Reisch, former Legal Director of Equal Rights Advocates, pay equity expert, and counsel for the lead woman law professor plaintiff in a successful and high-profile lawsuit against University of Denver Sturm College of Law, noted in a 2020 interview with *The Chronicle of Higher Education*:

> One of the things that I've seen about these university cases is that there are a lot of hiring and compensation and evaluation practices that have been in place for years without much critical examination of who they are systematically disadvantaging.[5]

Mary Jo O'Neill, Regional Attorney for the Phoenix District Office of the EEOC, has highlighted that law faculty pay inequity goes well beyond the University of Denver, and that the equal pay lawsuit against Denver was:

> …really about all the female full professors. We view this as a systemic problem – and we think [University of Denver Sturm College of Law] isn't the only law school where there's this pay differential between male and female professors. And equal-pay issues don't only affect the person when it first happens, but during their whole careers.[6]

This article identifies law school compensation practices that contribute to gender and racial faculty pay inequities and recommends specific steps law school Deans and administrators should take to change or eliminate them. By doing so, law schools will make strides in closing their stubborn gender and race-based faculty pay gaps, even without fundamental restructuring of faculty classifications or duties. Although law schools aspire to serve many functions in society, they should not forget that one of their core legal statuses is that of employer, with corresponding legal obligations to their employees, including faculty. Like for-profit and non-profit corporations, law schools must at a bare minimum comply with pay equity and other employment laws. And as institutions that strive to make the world a better place, including by training a diverse group of tomorrow's lawyers, law schools also have an ethical obligation to take prompt action to close their gender pay gaps.

5 Megan Zahneis, *A Raft of Pay Gap Lawsuits Suggests Little Progress for Academic Women. Why is That?*, Chronicle of Higher Educ., Oct. 19, 2020, https://www.chronicle.com/article/a-raft-of-pay-gap-lawsuits-suggests-little-progress-for-academic-women-why-is-that (last visited Apr.25, 2025).

6 Michael Roberts, *DU Won't Apologize for Underpaying Female Law Profs, But It Will Pay Millions*, Westword, May 18, 2018, https://www.westword.com/news/university-of-denver-pays-266-over-female-law-professor-discrimination-10326915 (visited Apr. 25, 2025).

Law school deans and administrators who are still reading this article may feel defensive at this point. Some may be thinking that they care about faculty gender equity, have never intentionally made a discriminatory compensation decision, or perhaps that they inherited any pay equity issues from prior administrations. These thoughts may all be accurate. However, intent is largely irrelevant under equal pay law. If a law school compensation practice leads to unequal pay between comparable male and female faculty, not only does that specific pay inequity need to be corrected, the compensation practice that created the liability for the law school also needs to be changed.[7]

Instead of placing the burden on female law faculty to determine that they are being inequitably paid (often not an easy task), complain about this inequitable pay, and when that fails, sue, law schools should act proactively, reviewing compensation practices and making changes where needed. If private companies such as Starbucks, American Express, Target, Microsoft and many others have taken steps to adopt better compensation practices in order to erode the gender pay gap, so should law schools.[8]

This article creates a road map for law school Deans and administrators to follow in order to advance gender and racial faculty pay equity through better compensation practices. The article proceeds in three parts. Section I briefly summarizes what we know about gender pay gaps, particularly the gender pay gap on law school faculties. Section II focuses on important recent developments in pay equity law that apply to American law schools and require changes to historic compensation practices. Section III outlines the specific steps law schools should take to change their compensation practices in order to close the gender pay gap, as well as to comply with recent pay equity laws. Section III also responds to the decanal and administrative pushback that certain of these recommendations may invite. I approach these recommendations from the intersection of my experience as a former law firm employment lawyer, a law school faculty member who teaches employment and pay equity law, and my position as a law school administrator.[9]

7 Deans may argue that they do not have the funds to correct specific gender and race-based pay inequities on their faculties, but this is not a legitimate defense under equal pay law. In addition, a meritorious equal pay lawsuit would likely be more expensive for the law school than the required salary adjustment and would cause significant reputational harm. Although budget issues create challenges for many law schools, budgeting also involves prioritization. Law schools and universities should not place faculty pay equity at the bottom of their list of priorities.

8 *See, e.g.,* Arjuna Capital, *Racial and Gender Pay Equity Scorecard*, (7th ed., Mar. 2024) at 4, https://static1.squarespace.com/static/5bc65db67d0c9102cca54b74/t/65fcc6841fdf522e897d8aa2/1711064710066/Arjuna+Capital+-+Racial+and+Gender+Pay+Scorecard+2024.pdf (last visited Apr.25, 2025).

9 I currently serve as UCI Law's Vice Dean. I previously served as Senior Associate Dean for Academic Affairs and Associate Dean of Lawyering Skills. In each of these roles, I have been involved in faculty hiring.

I. Overview of the Gender Pay Gap

Overall progress in closing the stubborn gender pay gap has slowed substantially in recent decades.[10] In 2002, American women earned 76.6 cents for every dollar earned by American men.[11] Twenty years later in 2022, this earnings ratio had only improved to 84 cents.[12] And the most recent census numbers show that the earnings ratio actually *decreased* between 2022 and 2023 to 82.7 cents. At the anemic rate of the last two decades, it will take three more decades for women to achieve pay equity with men.[13] The gender pay gap is largest for women of color. The median pay for Black women compared to white men in 2023 was just 66.5 cents per dollar, while Latina women earned on median only 57.8 cents per dollar compared to white men.[14]

The significant gender pay gap persists despite American women's increasingly high levels of education.[15] Women first earned more than half of the bachelor's degrees awarded in the U.S. over forty years ago, in the 1981-82 academic year.[16] The number of college-educated women in the United States surpassed the number of college-educated men in 2007.[17] As of 2019, women earned approximately 57% of bachelor's degrees awarded.[18] As the U.S. Department of Labor has noted:

10 These pay gap numbers compare American women working full-time, year-round to American men working full-time, year-round. Institute for Women's Policy Research, *Gender and Racial Wage Gaps Worsened in 2023 and Pay Equity Still Decades Away*, https://iwpr.org/wp-content/uploads/2024/09/IWPR-National-Wage-Gap-Fact-Sheet-2024.pdf, p. 1 (last visited December 6, 2024).

11 *Id*. at 7.

12 *Id.* at 8.

13 *Id.* at 1, 8.

14 *Id.* at 4. Thus, the term "gender pay gap" used throughout this article refers to a pay gap that impacts white women but is even wider and more harmful for women of color.

15 Arguments to explain away the gender pay gap based on women's supposed "choices" such as having children are flawed. For example, a number of studies have demonstrated that just one year after college graduation, when the majority of those with bachelors' degrees are young, single, and childless, women college graduates already earn on average only 82 cents per dollar compared to male college graduates. *See, e.g.*, Christianne Corbett & Catherine Hill, Graduating to a Pay Gap – The Earnings of Women and Men One Year after College Graduation (2012); Xueqing Fan & Michael Sturman, *Has Higher Education Solved the Problem? Examining the Gender Wage Gap of Recent College Graduates Entering the Workplace,* 51 Compensation and Benefits Review, Jan. 2019, at 12. ("[A]lthough advanced education contributes to pay levels and despite women's representation in higher education, it remains evident that even recently graduated women are earning less than men.").

16 Richard Fry, *U.S. Women Near Milestone in the College-Educated Labor Force*, Pew Research Center, June 20, 2019, https://www.pewresearch.org/short-reads/2019/06/20/u-s-women-near-milestone-in-the-college-educated-labor-force (last visited Apr. 25, 2025).

17 *Id.*

18 *Id*.

> …the fact that women are more educated than men is still not enough to bring them to parity. Gender norms, stereotypes, and discrimination mean that women's returns on degree attainment are not equal to those of men and men with lower levels of educational attainment typically are paid more than more highly educated women even when working similar hours.[19]

Indeed, there is evidence that, as women's educational levels increase, the gender pay gap may actually grow.[20] For example, in 2022, women with a college degree earned 79 cents on the dollar compared to college educated men – while women with a high school degree earned 81 cents on the dollar compared to men with a high school degree.[21] And the pay gap between college educated men and women widens dramatically over the course of a career. As Nobel Prize-winning economist Claudia Goldin and others determined after review of Census data:

> We find that the earnings gap between college-educated men and women at the start of their careers is small, but by the time these individuals reach their career peak the gender pay gap is very large. *The average male college graduate by his early forties earns roughly 55% percent more than the average college graduate female.*[22]

A. *The Gender Pay Gap in the Professions*

Women in the United States consistently earn less than men for full-time work in every occupational group.[23] Women currently earn 82.7 cents per dollar compared to men when the pay gap is examined across occupations.[24] However, census data demonstrate that the pay gap between women and men in the professions has often been larger than the gap in other occupations.

19 U.S. Department of Labor Women's Bureau Issue Brief, *supra* note 1, at 3.

20 Rakesh Kochhar, Pew Research Center, *The Enduring Grip of the Gender Pay Gap*, Mar. 1, 2023, https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/(last visited Apr. 25, 2025). This trend calls into question traditional human capital theory, which posits that a worker's earnings are correlated to the worker's investment in education and training. *See* Gary S. Becker, Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education(1964). Sociologists have shown that women actually receive lower returns on similar investments in their own education than men. *See, e.g., supra* note 2, at 611.

21 Kochhar, *supra* note 11.

22 Erling Barth, Claudia Goldin, Sari Pekkala Kerr & Claudia Olivetti, *The Average Mid-Forties Male College Graduate Earns 55% More Than His Female Counterp1arts*, Harvard Business Review, June 12, 2017 (emphasis added).

23 Anthony P. Carnevale, Nicole Smith & Artem Gulish, *Women Can't Win: Despite Making Education Gains and Pursuing High-Wage Majors, Women Still Earn Less Than Men*, Georgetown University Center on Women and the Workforce, 2018; Ariane Hegewisch, , *Women Earn Less Than Men Whether They Work in the Same or in Different Occupations*, Institute for Women's Policy Research, Mar. 2023.

24 *Gender and Racial Wage Gaps, supra* note 10, at 1.

Furthermore, the gender pay gap in a specific profession often increases at what are perceived as the highest levels of that profession. For example, in 2022, a female law firm partner in the U.S. earned on average only 66 cents for every dollar earned by the average male partner, a startling 34% pay gap.[25]

The stubborn gender pay gap between male and female full-time faculty members is also well documented.[26] This gap persists despite the fact that faculty are a relatively homogeneous group compared to other professionals, with similar education levels and teaching, research, and service duties. The American Association of University Professors (AAUP) reported that the average salaries of full-time women faculty nationwide were approximately 82.3% of those for full-time male faculty in the 2022-23 academic year.[27] The AAUP has also reported that "[w]omen earn less than men, on average, at each faculty rank and at all types of institutions. In each case, the most remunerative category is where women fare the worst."[28]

Pay discrimination in academia has led to numerous equal pay lawsuits against universities and colleges.[29] Most recently, University of Colorado

25 2022 Partner Compensation Survey, Major, Lindsey & Africa, https://www.mlaglobal.com/en/insights/research/2022-partner-compensation-survey (last visited Apr. 25, 2025); *see also* Debra Cassens Weiss, *Pay Gap Between Male and Female Partners Narrows to 34%; What is Their Average Compensation*, ABA Journal, Oct. 20, 2022.

26 *See, e.g.*, American Association of University Professors, *The Annual Report on the Economic Status of the Profession, 2022-23,* June 2023, 7-8, https://www.aaup.org/file/ARES-2022-23.pdf (last visited Apr. 25, 2025); Glenn Colby & Ziyan Bai, *A Path Toward Equity for Women Faculty in Higher Education,* TIAA Institute, 1 https://www.tiaa.org/content/dam/tiaa/institute/pdf/insights-report/2023-03/tiaa-institute-a-path-toward-equity-for-women-faculty-wvoee-colby-bai-march-2023.pdf (last visited Apr. 25, 2025) ("[w]omen faculty members are not only more likely than men to hold appointments in lower-paying academic ranks and types of institutions but are also paid less than men within the same academic ranks and institutions, on average. Researchers have shined the light on these and other gender inequities for years, but progress has been slow for women faculty, particularly women faculty of color.").

27 American Association of University Professors, *supra* note 26, at 7.

28 John W. Curtis, *Persistent Inequity: Gender and Academic Employment,* American Ass'n U. Professors (prepared for Equal Pay Day, Apr. 11, 2011), at 4, https://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent_inequity.pdf (last visited Apr.25, 2025).

29 *See, e.g.*, *Freyd v. University of Oregon et al.*, No. 19-35428, 9th Cir. 2021 (Ninth Circuit reversed summary judgment dismissal of equal pay claims of preeminent woman psychology professor where department's own analysis showed women faculty were paid on average $25,000 less than male faculty, primarily as result of retention raises awarded to men); *EEOC et al. v. University of Denver Consent Decree* (lawsuit in which seven female law professors were paid less than male comparators settled for $2.66 million; University also agreed to implement numerous changes to compensation practices moving forward); *Early Resolution Conciliation Agreement Between the U.S. Department of Labor Office of Federal Contract Compliance Programs and The Trustees of Princeton University*, Sept. 30, 2020 (preliminary OFCCP investigation showed 106 female Full Professors at Princeton University were paid "lower salaries than those paid to male Full Professors," in violation of federal law. Princeton agreed to pay female faculty $925,000 in back pay and at least $250,000 in future salary increases, and to conduct further review of its faculty pay equity); *Hart et al. v. Northern Michigan University* (four female faculty

Boulder agreed to pay 386 female faculty members $4.5 million in order to settle an equal pay lawsuit against it, including up to $50,000 in back pay for certain faculty members.[30] As part of the settlement, the university also agreed to conduct pay equity reviews every three years.[31] A lawsuit against Vassar College filed in August 2023 alleges that Vassar, originally founded as one of the country's preeminent women's colleges, pays its male full professors on average $154,200 per year, while female full professors earn on average only $139,300.[32] The plaintiff women professors allege that they have been underpaid every year for the past two decades, and that Vassar's gender pay gap has actually widened over time, from 7.6% in 2004, to 10% in 2022, in violation of federal and state equal pay law.[33]

B. *The Gender Pay Gap in Legal Academia*

Legal academia's faculty gender pay gap persists despite substantial progress in recent decades in the gender composition of law school faculties, administrations, and student bodies. Women have comprised the majority of law school graduates at ABA-accredited law schools since 2016.[34] Today, approximately 55.7 percent of law school graduates nationwide are women, up from only three percent in 1960.[35] Women constituted 45% of law school

settled claims of pay discrimination for $1.46 million); *Mullenix v. University of Texas* (case settled in 2022 after law professor Linda Mullenix sued University of Texas twice alleging gender pay discrimination and retaliation; among other things Professor Mullenix alleged Dean told her she "would never be able to work anywhere again" after she came forward with pay equity concerns); *AAUW et al. v. Rutgers* (2020) (five female professors sued Rutgers for its failure to correct significant gender pay inequities with comparable male faculty).

30 Jenny Brundin, *A $4.5 Million Settlement Means CU Boulder Female Faculty Will Receive Back Pay,* CPR News, Nov. 15, 2024.

31 *Id.*

32 Genevieve Carlton, *Professor Gender Pay Gap: Colleges Haven't Fixed It. Will Courts?,* Best Colleges, Sept. 15, 2023, www.bestcolleges.com/news/analysis/professor-gender-pay-gap-colleges-haven't-fixed-it-will-courts (last visited Aug. 25, 2024).

33 Second Amended Class Action Complaint, *Graham et al. v. Vassar College*, No. 23-cv-7692, (S.D.N.Y. Jan. 30, 2024) (plaintiff professors allege that Vassar's pay gap has been caused by "substantial differences in the starting salaries of men and women, a subjective merit ratings system that is biased against women, and a discriminatory promotion system that systematically prevents or delays the advancement of women professors relative to their male counterparts." *Graham et al. v. Vassar College* could be an important test case for New York's new state pay equity law. New York amended its equal pay statute in 2019 to require equal pay not only for equal work, but also for "substantially similar" work, opening the door to additional claims. See Danielle Douglas-Gabriel, *Female Professors Sue Vassar College, Alleging Wage Discrimination*, Wash. Post, Aug. 30, 2023.

34 *ABA Profile of the Legal Profession*, A.B.A., 2023, https://www.abalegalprofile.com (last visited Aug. 25, 2024).

35 John W. Curtis, *Persistent Inequity: Gender and Academic Employmen*t, Am. Ass'n of U. Professors (report prepared for Equal Pay Day, Apr.11, 2011), page 1; *Profile of the Legal Profession*, *supra* note33.

faculty members as of 2021.[36] And the percentage of women law school deans has risen dramatically from only 10% in 2010 to 43% in October 2023.[37]

However, the *After Tenure* survey and subsequent analysis clearly demonstrate the continued pay gap between female and male tenured law professors.[38] This pay gap persists despite the fact that many law schools promote themselves as incubators of progress, and despite law faculties' liberal politics compared to those in other professions.[39] *After Tenure* was a national survey of over one thousand tenured law faculty (phase one), followed by a subset of interviews with survey respondents (phase two), supported by the American Bar Foundation and the Law School Admissions Council.[40] The survey gathered information about:

> … the experiences of post-tenure law professors, with attention paid to their perceptions of teaching and research, the missions of law schools, diversity within the legal academy, and many other issues.[41]

Section 7 of the *After Tenure* report focuses on data the survey gathered on gender, with comparative data gathered on men and women tenured law faculty salaries highlighting the continued gender pay gap in legal academia:

> In a comparison of tenured men's and women's 9-month salaries, differences were apparent in the low- and high-ends of the salary scale. A greater number of tenured women than men reported earning less than $125,000. At the other end of the spectrum, a greater number of tenured men than women reported earning median salaries of $150,000 or greater….Tenured men were much more likely than tenured women to report receiving higher salary increases or perks from their law school.[42]

36 Elizabeth D. Katz, Kyle Rozema, and Sarath Sanga, *Women in U.S. Law Schools. 1948-2021*, J.Legal Analysis, 48-78, 2023).

37 *Profile of the Legal Profession*, *supra* note 40.

38 *See* Ryan & Dawe, *supra* note 2; Maghan Dawe & CJ Ryan, *Toward Equal Pay in the Legal Academy*, 44 Women's Rights L. Rep. 163 (2023).

39 *See, e.g,* Adam Bonica, Adam Chilton, Kyle Rozea, and Maya Sen, *The Legal Academy's Ideological Uniformity*, 47 J. Leg. Studies 1, 3 (2018).

40 Elizabeth Mertz, Frances Tung, Katherine Barnes, Wamucii Ngoju, Molly & Joanne Martin, *After Tenure: Post Tenure Law Professors in the United States,* Am. Bar Foundation, 2011. Elizabeth Mertz and a team of researchers conducted the After Tenure survey, with support from the American Bar Foundation and the Law School Admission Council. The survey's response rate was very high with 63% of eligible professors participating. *See , supra* note 2*,* at 579. The author is not aware of a national study of untenured faculty pay equity, although such a study would be extremely useful.

41 *See* Mertz et al., *supra* note 40*,* at 11.

42 *Id*. at 53.

Section 6 of the *After Tenure* report focuses on the data gathered on race and ethnicity. The data gathered highlight the continued pay gap between white tenured professors and tenured professors of color:

> Comparing the salaries of white professors and professors of color in this initial phase, we see differences in the median ranges on the lowest and highest ends of the scale. A higher percentage of minority professors reported making either less than $99,000 or between $100,000 and $124,999 than did white professors. On the other hand, a greater percentage of white professors reported making at least $125,000.....White professors were more likely to report receiving salary increases higher or comparable to others of their rank.[43]

American Bar Foundation researcher Megan Dawe and Professor Christopher Ryan used data from the *After Tenure* survey, as well as other sources, to conduct the most comprehensive analysis to date of the gender pay gap among tenured law faculty. Before Dawe and Ryan's articles on the topic, *Toward Equal Pay in the Legal Academy*, and *Mind the Gap: Gender Pay Disparities in the Legal Academy*, there "ha[d] not been systematic or empirical study of how law professors - and particularly tenured law professors - are compensated."[44] Ryan and Dawe note that *After Tenure* is "the most rigorous and detailed study of the U.S. legal academy to date,"[45] and that it is optimal for examining the tenured law faculty gender wage gap because it "allow[s] us to look within a similarly-situated segment of the legal profession and the legal academy - tenured law professors - which mitigates earnings differences that are attributable to the confounding effect of tenure status and line."[46] In addition, because *After Tenure* surveyed only tenured law faculty, Ryan and Dawe note that "our study allows us to limit the effect of occupational segregation by focusing on the highest echelon of the legal academy," in an "apples-to-apples comparison."[47]

Ryan and Dawe conclude that there is a significant gender and racial pay gap in the compensation of tenured law faculty:

> *Our investigation of a rich and unique dataset of tenured law professors reveals gender stratification in the legal academy, clearly demonstrated by our finding that tenured women law professors - and especially women of color - receive lower*

43 Mertz et al., *supra* note 40, at 43.

44 Ryan & Dawe, *supra* note 2, at 578.

45 *Toward Equal Pay* supra note 38 at 163 (2023).

46 Ryan & Dawe, *supra* note 2, at 595. In addition, Ryan and Dawe note that the *After Tenure* survey is "the only nationally representative survey of tenured law professors in the United States to date." *Id.* at 573. The survey's first phase had a high response rate with over 63% of eligible faculty participating. *Id.* at 579.

47 Ryan & Dawe, *supra* note 2, at 595-96.

> *compensation than their male colleagues*.... We find evidence that women law professors are very likely to earn lower salaries and income than men, even when they both enjoy the same protection of tenure.[48]

Ryan and Dawe's analysis demonstrates that both white tenured women law faculty and tenured women law faculty of color earned salaries of $150,000 "at far lower rates" than white tenured male faculty (nearly fifteen percent less for white women faculty and twenty-five percent less for women faculty of color).[49] The analysis further demonstrates that tenured women of color faculty earned $150,000 or more twenty-five percent less than white male tenured faculty.[50] Ryan and Dawe conclude that "[i]n fact, on average, women of color and white women earn more than $24,000 and nearly $14,000 less than white men, respectively."[51] Furthermore, as Ryan and Dawe note, the *After Tenure* survey likely *understates* the overall law faculty gender pay gap, since it includes only women at the highest rank- those who have received tenure- and excludes junior doctrinal faculty (as well as other categories such as clinical and lawyering skills faculty).[52] In addition, Ryan and Dawe also found that tenured women faculty "experience dramatically lower rates of additional earnings," and "have fewer opportunities for internal promotion within their law schools."[53] Ryan and Dawe conclude that an important reason for the tenured law faculty gender pay gap is "the different valuation of women's work in the legal academy."[54]

After Tenure and Ryan and Dawe's subsequent analysis examine tenured law faculty pay equity nationwide. Unfortunately, information on how a specific law school compensates its male and female faculty can be quite difficult to find because information asymmetry is alive and well in the legal academy. There is no federal law that requires law schools or other employers to disclose current employee salaries, either by category or individually. Some states require disclosure of state employee salaries, but none require broad disclosure of employee salaries. Some public law schools voluntarily disclose the salaries of their faculty and other employees.[55]

48 *Id.* at 611 (emphasis added).

49 *Id.* at 598.

50 *Id.*

51 *Id.*

52 *Id.* at 611.

53 *Id.* at 586-87, 607.

54 *Id.* at 611.

55 For example, "[a]s part of its commitment to transparency and public accountability," the University of California system voluntarily discloses annual faculty and other employee pay on a public website, https://ucannualwage.ucop.edu/wage. However, the information disclosed is not collected or categorized with sufficient detail to allow for a comprehensive analysis of a specific UC law school's compensation equity. For example, all faculty non-salary compensation is combined into a generic "other" category that obscures what the

This lack of law school pay transparency is very problematic for women. Knowledge is power with respect to an individual faculty member's ability to negotiate fair compensation. This is the precise reason why some states have passed laws requiring employers to provide applicants with a pay range for the position for which they are applying. Otherwise, how would an applicant know what others in her position earned? How would a woman know if she was underpaid compared to comparable men?[56]

Faculty compensation remains undisclosed at many law schools despite the growing body of research that indicates pay transparency reduces the gender wage gap because it increases the ability of workers to identify pay inequities and negotiate for higher pay.[57] Furthermore, national organizations that oversee and accredit law schools such as the Association of American Law Schools (AALS) and American Bar Association (ABA) have not studied the legal academy's faculty pay gap, have not mandated or called for disclosure of law faculty pay information, and have not made pay equity part of their review of law school accreditation.[58]

"other" pay is for (i.e. a research stipend, an administrative stipend, or a housing stipend). However, the University of California collects and publishes detailed information on all categories of compensation Dean and certain other administrators earn. Annual Report on Executive Compensation for Calendar Year 2023: Deans and Certain Full-Time Faculty Administrators, https://www.ucop.edu/institutional-research-academic-planning/content-analysis/employees/2023/annual-report-on-executive-compensation-2023.pdf (last visited Aug. 31, 2024). The UC system should collect and publish similarly detailed compensation information for its faculty as well to allow for more accurate comparisons.

56 *See, e.g.* Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity,* 120 Colum. L. Rev. 547 (2019).

57 *See, e.g.*, Michael Baker, Yosh Halberstam, Kory Kroft, Alexandre Mas, & Derek Messacar, *Pay Transparency and the Gender Gap*, 15 Am. Econ. J. : Applied Econ. 157 (2023) (examining the impact of Canadian pay disclosure laws on the salaries of university faculty and concluding that "on average, transparency laws significantly reduced the gender salary gap."); Danula Gamage, Georgios Kavetsos, Sushanta Mallick, & Almudena Sevilla, *Pay Transparency Initiative and Gender Pay Gap: Evidence from Research-Intensive Universities in the UK*, IZA Working Paper, No. 13635. https://www.iza.org/publications/dp/13635/pay-transparency-initiative-and-gender-pay-gap-evidence-from-research-intensive-universities-in-the-uk (2020) (examining pay transparency initiative in the U.K. and concluding that it significantly reduced the gender pay gap between male and female academics at certain top-tier U.K. universities); Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United State*s, 54 Industrial Relations 648 (2015) (comparing earnings of women with higher education levels in states that had outlawed pay secrecy with earnings of women in states that had not and concluding that the wage gap was reduced in the former states).

58 Professor Kristin K. Tiscione argues in *Gender Inequity Throughout the Legal Academy: A Quick Look at the (Surprisingly Limited) Data*, 69 J. Legal Educ. 116, 121 (2019) that the ABA and AALS:

> …need to compile and publish annual [salary] data on law faculty. With sole and ready access to this information, their failure to make it publicly available is a significant barrier to progress.

A 1995 Consent Decree between the American Bar Association and the Department of Justice prohibits law schools from sharing information about compensation with one another for antitrust reasons. *See* ABA Consent Decree. As Dean Darby Dickerson notes in *Finding the Goldilocks Zone: Negotiating Your First Employment Offer in Legal Academia*, this Consent

In contrast, litigation has brought certain law school pay discrimination to light. In 2012, University of Denver Sturm College of Law Professor Ann Scales asked her law school's administration whether there was a gender pay gap on the faculty.[59] The Dean investigated the law school's payment of law faculty and discovered that, after a recent round of raises, the median salary for its male full professors was $11,282 per year higher than that of its female full professors.[60] The discovery of this problem did not lead the law school to adjust the salaries of its female tenured faculty.[61] Instead, the Dean allegedly speculated at a meeting that certain female tenured faculty "may be paid less because they were not performing as well as male Full Professors."[62] The EEOC's complaint against University of Denver Sturm College of Law ultimately resulted in a 2018 consent decree under which the law school paid $2.66 million to seven female faculty members who had been victims of pay discrimination.[63] The law school was also ordered to increase the plaintiffs' salaries, publish faculty salary and compensation information annually, and hire a labor economist to conduct an annual compensation equity study.[64]

University of Texas School of Law Professor Linda Mullenix also sued her law school - twice - for pay discrimination. The 2011 settlement of Professor Mullenix's first lawsuit reportedly included a $250,000 forgivable loan and a $20,000 increase in her pay.[65] The settlement also required UT to provide Professor Mullenix with a "salary array at the beginning of each academic year in order for her to monitor UT Law's continued compliance with its equal pay obligations."[66] A 2014 Texas Attorney General investigation also revealed UT's problematic practice of granting certain law faculty large undisclosed forgivable loans as compensation.[67] The Texas Attorney General's report

---

Decree has made it more difficult for faculty applicants to determine faculty salaries at private law schools, or to compare salaries at different law schools.

59 John Herrick, *Seven Female Law Professors Win $2.6 Million Settlement from DU In Equal Pay Lawsuit*, The Colorado Independent, May 17, 2018.

60 *Id.*

61 Complaint, *EEOC v. University of Denver*, (Case 1:16-cv-02471), at 7-8; Colleen Flaherty, *Closing the Pay Gap*, Inside Higher Ed, May 17, 2018.

62 *Id.*

63 Consent Decree, *EEOC v. University of Denver*, (No. 16-cv-02471-WYD-MJW) (included a requirement that the law school disclose individual law faculty "salaries and other forms of compensation" on a password-protected website which faculty could access), at 3; *University of Denver to Pay $2.66 Million and Increase Salaries to Settle EEOC Equal Pay Lawsuit*, EEOC Press Release, June 1, 2018.

64 *Id.* at 3-12. In 2019, another law professor, Rashmi Goel, brought a second equal pay lawsuit against University of Denver, which was settled in 2020.

65 Lynn LaRowe, *U. of Texas Settles Second Gender Pay Suit with Prof*, Law 360, Nov. 10, 2022.

66 *Id.*

67 *See* Attorney General of Texas Report, Dec. 31, 2014, https://static.texastribune.org/media/documents/Haurwitz_et_al___Redacted_Report_for_Release.PDF (last visited Aug. 29,

revealed that between 2003 and 2010, the law school had awarded twenty-seven forgivable loans to law faculty.[68] These loans ranged from $75,000 to the $500,000 loan the Dean himself received.[69] Twenty-four of these forgivable loans – over 88% - were awarded to male law professors.[70] Female law faculty received only three of the twenty-seven loans, and one was the loan awarded to Professor Mullenix in the settlement of her first pay discrimination lawsuit.[71]

Professor Mullenix brought a second lawsuit against UT in 2019, alleging that she was paid $134,449 per year less than a male faculty member with fewer years of teaching experience and fewer publications.[72] The lawsuit also alleged that UT's tenured female law professors had on average been paid $20,000 less than tenured male professors for at least three years. [73] The second lawsuit settled confidentially.

Although certain female faculty have brought successful lawsuits, without any type of required disclosure of law faculty pay, it will continue to be very difficult overall for female law faculty to discover pay disparities, especially at private law schools.

II. Significant Recent Developments in Pay Equity Law Relevant to Law Schools as Employers

At present, state legislatures are the sites of significant pay equity innovation. Over the past few years, there has been an explosion in the enactment of state pay equity legislation.[74] At the urging of advocates for pay equity, state legislatures have stepped into the gaps created by federal equal pay law and enacted state laws that provide further protections to women workers. These new state statutory provisions include laws that ban the use of salary history;

2024), at 23-24 and Exhibit C (noting that all involved considered the forgivable loans to be employee compensation and that it was "critical to the proper decision making process relating to how much of the public's money should be paid to professors is the need to know the professors' entire compensation package").

68 *Id.,* Exhibit C.

69 *Id.*

70 *Id.*

71 *Id.*

72 Complaint at 1, *Mullenix v. University of Texas at Austin*, Civil No. 1:19-cv-1203 (December 12, 2019) (W.D. Tex.); Megan Menchaca, *UT Professor Amplifies Suit Accusing School of Sex Discrimination, Violating Equal Pay Act*, Austin American-Statesman, Sept. 30, 2021; Lynn La Rowe, *U of Texas Settled Second Gender Pay Suit with Law Professor*, Law 360, November 10, 2022.

73 *Id.*

74 *See, e.g., Progress in the States for Equal Pay*, National Women's Law Center, Oct. 6, 2023, https://nwlc.org/resource/progress-in-the-states-for-equal-pay/ (last visited Aug. 30, 2024) ("[i]n the past few years, lawmakers have introduced equal pay legislation in over two-thirds of states and many of these bills have become law."*); see also* Trilby Robinson-Dorn, *Fifty-State Pay Equity Law Summary*, The Pay Equity Project at UC Irvine School of Law, https://www.law.uci.edu/centers/pay-equity-project/images/50-state-law-chart.pdf, (comprehensive list of state pay equity laws as of 2021).

laws that require disclosure of salary ranges; laws requiring the collection and reporting of pay data; laws that narrow employer defenses; and laws that allow fairer comparison of "equal" work.

Law schools are inherently conservative institutions that can be slow to adapt to change. Regardless, many law schools are located in states with new pay equity statutes that provide their female faculty with new and strengthened protections. This section will address relevant recently-enacted state pay equity statutes, as well as two recent important pay equity decisions interpreting the Equal Pay Act and Title VII that impact how law schools within the Ninth Circuit pay their female faculty.

Law school Deans and administrators should take particular note of these recent statutes and cases because they prohibit or call into question certain common law school compensation practices. Although it is of course important to comply with applicable law, the author hopes that law schools, which strive to model and teach equitable practices to an increasingly diverse group of future lawyers, will aim higher than simply doing the bare legal minimum.[75]

A. Numerous Jurisdictions Now Prohibit the Use of Salary History in Setting Pay

The practice of relying upon a job applicant's prior salary to set her salary at a new employer perpetuates gender pay inequities.[76] It is well documented that women, and especially women of color, face discrimination in pay.[77] When an employer relies on a woman job applicant's previous salary - perhaps offering a bit more to induce her to leave her job - the employer is essentially anchoring the applicant's new pay to prior pay that may well have been the result of discrimination, and that is on average less than that of similarly situated

75 Although law schools at times seem to take an exceptionalist viewpoint regarding their own legal obligations, the author is not aware of any provision in a state or federal pay equity statute that exempts universities or law schools from their coverage. And in light of high-profile lawsuits involving university pay discrimination (against University of Denver Sturm College of Law, Vassar College, University of Oregon, and numerous others), law schools act at their peril if they proceed as if these laws do not apply to them.

76 *See, e.g.*, *Equal Pay in the United States: Salary History Bans*, Amy Dalrymple, U.S. Dep't of Labor, Mar. 2023 ("[u]sing salary history to determine pay contributes to and reinforces the persistent gender wage gap at every job transition for working women, and particularly women of color, over the course of their working lives, including by affecting women's subsequent raises, bonuses, and retirement savings."); *Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, National Women's Law Center, Mar. 2022.

77 There is significant data evidence of gender pay discrimination across American industries and occupations. *See, e.g.,* U.S. Department of Labor Women's Bureau Issue Brief, *supra* note 1; https://iwpr.org/equal-pay-day-2024/#:~:text=or%20Different%20Occupations-,Women%20Earn%20Less%20than%20Men%20Whether%20They%20Work%20in%20the,the%20dollar%20paid%20to%20men (last visited Sept. 1, 2024). One recent experiment involved two applicants with identical resumes applying for a lab manager job. The applicant named John was offered nearly $4,000 more for the job than the applicant named Jennifer. *See* Corrine Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students,* Proceedings of the Nat'l Acad. of Science of the United States of America, Aug. 2012.

men.[78] This has long-lasting impacts on women's earnings, since subsequent percentage increases in salary, bonuses, and retirement are typically based upon the employee's starting salary. Thus, initial pay discrimination that resulted from reliance on a woman's past salary will compound and grow over the history of her employment.

1. Many States Have Recently Banned Employer Use of Salary History

In recent years, state lawmakers have acted decisively, relying upon the growing body of evidence on the discriminatory impacts of using salary history to set pay to enact state legislative bans on the use of salary history.[79]As of August 2024, sixteen states had enacted state salary history bans.[80] Washington, D.C., and Puerto Rico have also enacted salary history bans.[81] Numerous cities and counties have also done so.[82] In addition, Governors in several more states have signed Executive Orders prohibiting the use of salary history in setting

78 *See, e.g.*, *Equal Pay in the United States,*, *supra* note 76 ("[u]sing salary history to determine pay contributes to and reinforces the persistent gender wage gap at every job transition for working women, and particularly women of color, over the course of their working lives, including by affecting women's subsequent raises, bonuses, and retirement savings."); James Bessen, Chen Meng & Erich Denk, *Perpetuating Inequality: What Salary History Bans Reveal About Wages,* (June 2020, BU), *available at* https://scholarship.law.bu.edu/faculty_scholarship/1140/.

79 As the California legislature found in prohibiting use of salary history in 2016: The problematic practices of seeking salary history from job applicants and relying on prior salary to set employees' pay rates contribute to the gender wage gap by perpetuating wage inequalities across the occupational spectrum. Women are paid less than men in 99.6 percent of occupations and are more likely to face financial penalties for taking time out of the paid workforce due to childbearing and family caregiving responsibilities…*When employers make salary decisions during the hiring process based on prospective employees' prior salaries or require women to disclose their prior salaries during salary negotiations, women often end up at a sharp disadvantage and historical patterns of gender bias and discrimination repeat themselves, causing women to continue earning less than their male counterparts*.

80 The states with salary history bans that apply to all employers as of August 2024 are: California (Cal. Labor Code §432.3 (2018)), Colorado (Colo. Rev. Stat.. § 8-5-101 et seq (2021), Connecticut (Conn. Gen. Stat. Ch. 557, §§31-40)(2019)), Delaware (Del. Code Ann. tit. 19, §709B)(2017)), Hawaii (Haw. Rev. Stat. §378 (2018)), Illinois (820 Ill. Comp. Stat 112/10 (2019)), Maine, (Me. Rev. Stat. Ann. tit. 26, § 628-A (2019)), Maryland (Md. Code Ann., Lab. & Empl. § 3-304.2), Massachusetts (Mass. Gen. Laws ch. 149, §§ 105 a-d (2018)), Minnesota (Minn. Stat. § 363A.08(8)), New Jersey (N.J. Stat. Ann. §§ 34:6B-20 (2019)), Nevada (Nev. Rev. Stat. § 613.133 (2021)), New York (N.Y. Lab. §194-a (2020)), Oregon (Or. Rev. Stat. §§ 659A.001 - 659A.990 (2019)), Rhode Island (28 R.I. Gen. Laws § 28-6-22), Vermont (Vt. Stat. Ann. tit. 21 § 495m (2018)), and Washington (Wash. Rev. Code §§49.58.020; 49.58.100-110 (2019)). Several additional states, and numerous other counties and cities, have passed salary history bans that apply to state and city agencies as employers. *See Progress in the States for Equal Pay*, National Women's Law Center, October 2022, https://nwlc.org/wp-content/uploads/2022/10/Equal-Pay-Progress-in-the-States-10.28.22v2.pdf (last visited August 31, 2024).

81 Chris Marr, *D.C. to Require Pay Range in Job Ads, Ban Salary History Queries*, Bloomberg L., Jan. 12, 2024; D.C. Act 25-367 (2024); Puerto Rico Equal Pay Act, Act. No. 16 (2017).

82 *See, e.g., Asking for Salary History Perpetuates Pay Discrimination from Job to Job,* National Women's Law Center, Mar. 2022, https://nwlc.org/wp-content/uploads/2020/12/Asking-for-Salary-History-2022.pdf (last visited Aug. 31, 2024).

pay for state employees.[83] Although details vary, these state and local salary history bans generally prohibit employers, including universities and law schools, from seeking information or relying on an applicant's prior salary in setting her salary at the new employer.[84]

The four states that contain the largest number of ABA-accredited law schools – California (eighteen), New York (sixteen), Illinois (ten), and Massachusetts (eight) – all have state salary history ban laws in place.[85] The California Equal Pay Act broadly prohibits employers from seeking salary history information or relying upon it in setting salaries.[86] This bars California law schools not only from asking questions about a faculty applicant's salary, but also from asking questions about other forms of compensation and benefits the faculty member has received, including bonuses, retirement benefits, and health benefits.[87] California law schools and other employers are prohibited from asking these questions orally or in writing.[88] However, California law allows law schools and other employers to ask applicants what their "salary expectations" are.[89]

83 These states include Michigan, North Carolina, Pennsylvania, and Virginia. *Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, National Women's Law Center, Dec. 2020, *available at* https://nwlc.org/wp-content/uploads/2020/12/Asking-for-Salary-History-2022.pdf. Although law professors are not federal employees, it is worth noting that momentum to prohibit use of salary history at the federal level is also building.

84 A number of large private employers have also announced that they will no longer ask applicants for salary history information (regardless of state law), including Amazon, Bank of America, Facebook, Google, Starbucks, and Wells Fargo. Madison Alder, *Amazon, BofA Join Employers that Won't Ask for Pay History*, BNA, Jan. 30, 2018.

85 *ABA Schools by State*, https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/schools_by_state/ (last visited Aug. 31, 2024); *see supra* note 76 (citations to state laws).

86 Cal. Labor Code section 432.3:

87 Cal. Labor Code 432.3 provides that :
(a) An employer shall not rely on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.
(b) An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment.

88 *Id.*

89 Cal. Labor Code § 432.3. "Nothing in this section shall prohibit an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer." However, given the real risk that the employer will use any salary history information disclosed in a manner that perpetuates pay inequity, employers like my own, the University of California, advise against any use of such voluntarily disclosed salary information. The University of California's Systemwide Human Resources department has issued FAQs on the topic, recommending that "[to] ensure UC continues to advance pay equity, it is recommended that hiring managers do not rely on volunteered salary history information when making hiring decisions or setting salaries." University of California's Systemwide Human Resources department has issued FAQs on compliance with California's

New York's salary history ban statute similarly prohibits employers from seeking, requesting, requiring, or relying upon wage history from a former or current employer.[90] As the New York Attorney General has written, "[t]his protection helps to ensure that even if you were not paid a fair wage in a previous position, that unfair wage will not limit your compensation in a new position."[91]

The Illinois Equal Pay Act was amended in 2019 to prohibit the use of prior salary.[92] It prohibits an employer from requesting or requiring applicants to disclose wage or salary history, and also prohibits employers from seeking this information from any current or former employer.[93] The Massachusetts Equal Pay Act prohibits employers from "seek[ing] the wage or salary history of a prospective employee from the prospective employee or a current or former employer or … requir[ing] that a prospective employee's prior wage or salary history meet certain criteria."[94]

The California, New York, Illinois, and Massachusetts salary history ban laws are provided as examples, since these four states contain the greatest number of ABA-accredited law schools. However, as of August 2024, 42% of ABA accredited law schools (83/197) are located in states with salary history bans or in Washington, D.C., which also bans the use of salary history.[95] In light

salary inquiry and pay history laws, https://ucnet.universityofcalifornia.edu/working-at-uc/your-career/talent-management/talent-acquisition-employment/faqs-ca-pay-transparency-and-applicant-salary-inquiry-restrictions-uc-staff-employee-position.pdf (last visited Sept. 2, 2024).

90 Under New York's State's salary history ban law, no employer shall:
a. rely on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual.
b. orally or in writing seek, request, or require the wage or salary history from an applicant or current employee as a condition to be interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion.
c. orally or in writing seek, request, or require the wage or salary history of an applicant or current employee from a current or former employer, current or former employee, or agent of the applicant or current employee's current or former employer, except as provided in subdivision three of this section.
N.Y. Lab. § 194-a (2020).

91 *Equal Pay: Know Your Rights*, Office of the New York State Attorney General Letitia James, located at https://ag.ny.gov/sites/default/files/equalpay-trifold-english.pdf (last visited Aug. 31, 2024).

92 820 Ill. Comp. Stat 112/10 (2019).

93 *Id.*

94 Mass. Gen. Laws ch. 149, §§ 105 a-d (2018).

95 The following is a list of the states which have enacted salary history ban laws as of August 2024, with the number of ABA-accredited law schools located within each state indicated in parentheses: California (18), Colorado (2), Connecticut (3), Delaware (1), Hawaii (1), Illinois (10), Maine (1), Maryland (2), Massachusetts (8), Minnesota (3), Nevada (1), New Jersey (3), New York (16), Oregon (3), Rhode Island (1), Vermont (1), and Washington (3). Washington, D.C., in which six law schools are located, has also enacted a salary history

of the increasingly well-recognized data regarding the discriminatory impact of prior salary and the recent boom in state and local salary ban legislation, it is likely that the number of jurisdictions that prohibit employers from using prior salary to set salaries will only increase.

2. *Salary History Can No Longer Justify a Gendered Wage Disparity in the Ninth Circuit Under the Equal Pay Act, with Other Circuits Varying in Their Approaches to this Issue*

The Equal Pay Act, the primary federal statute mandating equal pay, does not explicitly prohibit the use of salary history. Proposed amendments to the Equal Pay Act via the Paycheck Fairness Act that would ban the use of salary history at the federal level have not advanced in Congress.[96] However, the U.S. Equal Employment Opportunity Commission has, since 2000, taken the position in written administrative agency guidance that salary history alone cannot justify paying women less.[97] In January 2024, the U.S. Office of Personnel Management (OPM) also released a final regulation prohibiting the use of prior non-federal salary history in establishing pay for new federal employees.[98]

In the recent decision of *Rizo v. Yovino*, the Ninth Circuit held that an employer may not rely upon its use of prior salary as a "factor other than sex" to defeat a plaintiff's Equal Pay Act claim.[99] When California's Fresno County hired Plaintiff Aileen Rizo as its only female math consultant, it set her starting salary by increasing her prior salary by five percent.[100] After discovering at a

ban. *See supra* note 83 (citations to these laws); American Bar Association, *ABA Schools By State*, https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/schools_by_state/ (last visited Aug. 31, 2024).

96 The Paycheck Fairness Act (PFA) contains the following salary history ban: "It shall be an unlawful practice for an employer to rely on the wage history of a prospective employee in determining the wages for such prospective employee, or seek from a prospective employee or any current or former employer the wage history of the prospective employee…"
President Biden urged Congress to pass the PFA, which was first introduced twenty-seven years ago in 1997 and has been regularly introduced since. If the PFA were enacted, relying upon or seeking prior salary would become illegal nationwide. H.R. 17, 118th Cong. section 9 (2023).

97 EEOC Compliance Manual, No. 915.003 section 10 iv.F.2.g, Dec. 2000 ("[p]rior salary cannot, by itself, justify a compensation disparity. This is because prior salaries of job candidates can reflect sex-based compensation discrimination. Thus, permitting prior salary alone as a justification for a compensation disparity "would swallow up the rule and inequality in compensation among genders would be perpetuated.") (internal citations omitted).

98 *OPM Finalizes Regulation to Prohibit Use of Non-Federal Salary History*, Jan. 29, 2024, https://www.opm.gov/news/releases/2024/01/release-opm-finalizes-regulation-to-prohibit-use-of-non-federal-salary-history, (last visited Aug. 30, 2024).

99 *Rizo v. Yovino*, 950 F.3d 1217, 1229 (9th Cir. 2020) (en banc).

100 *Id.* at 1220.

lunch with colleagues that male math consultants with less experience were all paid more than she was, Ms. Rizo filed a complaint with the County, and subsequently sued.[101] Ms. Rizo asserted violations of the federal Equal Pay Act, Title VII, and California law.[102]

The Equal Pay Act mandates equal pay for "equal work." [103] Under the Equal Pay Act, an employer may not discriminate:

> …between employees on the basis of sex by paying wages to employees of the opposite sex … at a rate less than the rate at which he pays wages to employees of the opposite sex … for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.[104]

The Equal Pay Act contains four affirmative defenses, including a broad and much-critiqued defense under which a pay differential is not illegal if it is "based on any other factor other than sex."[105] Fresno County moved for summary judgment dismissal of Ms. Rizo's Equal Pay Act claim, arguing that it set Ms. Rizo's salary based on her prior pay, and that this constituted a valid

101 *Id.*

102 *Id.*

103 Equal Pay Act, 29 U.S.C. § 206(d)(1) (1963). It is broadly recognized that the Equal Pay Act has not fulfilled its promise as a tool to close the gender pay gap. *See, e.g., The Paycheck Fairness Ac*t, www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/ (last visited Sep. 1, 2024) ("[t]he EPA has proven ineffective in eradicating gender-based wage discrimination for several reasons."); Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17 (2010); Testimony of Former EEOC Chair Jenny Yang, House Committee on Education and the Workforce, Joint Subcommittee Hearing on Paycheck Fairness Act, Feb.13, 2019 ("...courts have interpreted provisions of the Equal Pay Act in ways that are unjustifiable and that have made it extraordinarily difficult for employees to prevail."). Numerous federal courts have interpreted the Equal Pay Act's operative provisions and affirmative defenses narrowly. Judicial constraints on the ability of women to proceed with Equal Pay Act claims include: (1) decisions that require the plaintiff's male comparator to work in the same physical facility as the plaintiff in order for the plaintiff to state a prima facie case; (2) narrow interpretations of "equal work" that lead to dismissal of claims based on small differences in job duties between the plaintiff and her male comparator; and (3) broad interpretations of the "factor other than sex" affirmative defense that allow employers to prevail by arguing that the plaintiff's pay was lower than a male comparator due to factors tainted with gender bias such as salary history and success in pay negotiations. Advocates and certain Congresswomen have attempted for years to pass the Paycheck Fairness Act, which would amend the Equal Pay Act to address some of its limitations. Although the House of Representatives has passed the Paycheck Fairness Act multiple times, it has stalled in the Senate.

104 Equal Pay Act, 29 U.S.C. §206(d)(1) (1963).

105 *Id.*

"factor other than sex" excusing the pay differential between Ms. Rizo and her male colleagues.[106]

> In an *en banc* opinion, the Ninth Circuit rejected the County's argument:
>
> We agree with Rizo and the EEOC that setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination. …The EPA's fourth exception allows employers to justify wage disparities between employees of the opposite sex based on any job-related factor other than sex. *Because prior pay carries with it the effects of sex-based pay discrimination, and because sex-based pay discrimination was the precise target of the EPA, an employer may not rely upon prior pay to meet its burden of showing that sex paid no part in its pay decision.* For purposes of the fourth exception, we conclude that the wages associated with an employee's prior job does not qualify as a factor other than sex that can defeat a prima facie EPA claim.[107]

The *Rizo* en banc opinion is clear and unequivocal. Use of prior salary alone, or in combination with other factors, to set a woman's salary is *not* a "factor other than sex," and thus cannot justify a wage differential under the Equal Pay Act within the Ninth Circuit.[108] Four other circuits also limit the circumstances in which employers may rely upon use of prior salary as a defense to an Equal Pay Act claim, although they do not hold as the Ninth Circuit has that reliance on prior salary may never constitute a "factor other than sex." In the Tenth and Eleventh Circuits, an employer cannot rely solely upon prior salary to justify a gendered pay disparity – an additional factor must exist that, together with prior salary, explains the wage disparity.[109] In the Second and Sixth Circuits, salary history can only justify a pay disparity if it is "job-related" and based upon "legitimate business-related considerations."[110] On the other hand, the Seventh Circuit has more broadly ruled that prior salary can constitute a "factor other than sex" under the EPA.[111] The U.S. Supreme Court declined to resolve this circuit split when it denied certiorari in the *Rizo* case.

106 *Rizo*, 950 F.3d at 1220.

107 *Rizo*, 950 F.3d at 1229 (emphasis added).

108 *Id.*

109 *See, e.g., Riser v. QEP Energy,* 776 F.3d 1191, 1199 (10th Cir. 2015); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("[w]e have consistently held that 'prior salary alone cannot justify pay disparity under the EPA.").

110 *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006).

111 *Lauderdale v. Ill. Dept. of Human Svcs.*, 876 F.3d 904, 908 (7th Cir. 2017) ("[t]his court has repeatedly held that a difference in pay based on the difference in what employees were previously paid is a legitimate 'factor other than sex.'") (citing *Dey v. Colt Constr. & Dev't Co.*, 28 F.3d 1446 (7th Cir. 1994), *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987), and *Covington v. S. Ill.*

Based on recent legal developments summarized in this section, a law school located within one of the sixteen states that prohibits the use of salary history, or one of the cities or counties that do the same, must immediately stop relying upon salary history in setting faculty salaries. In addition, any law school located within one of the three states within the Ninth Circuit that do not have a state salary history ban – Arizona, Idaho, and Montana - will not be able to defend an Equal Pay Act lawsuit with an argument that reliance upon prior salary caused or contributed to a gender pay inequity. If a law school is not located in a state or city that bans salary history use, and is located within the Second, Sixth, Tenth, or Eleventh Circuits, the law school may only legally rely upon salary history to justify a gendered pay disparity in certain limited circumstances. If a law school is not located in a salary history ban state or city and is within the Seventh Circuit, the practice of using salary remains problematic, but is not yet legally prohibited.

B. *Numerous State Statutes Now Require Employers to Disclose the Salary Range for a Position to Applicants*

Pay transparency advances gender pay equity. Pay disclosures provide women with information about what comparator male employees earn, which is critical to identifying gender-based pay inequities. Information about a job's pay range also provides historically underpaid women with leverage in salary negotiations. Without such salary information, advocating to one's employer for fair treatment or bringing a pay equity lawsuit would be difficult or impossible. Many studies and analyses support the importance of pay transparency in combatting the gender pay gap, and numerous private employers such as Microsoft, Google, and CitiGroup have voluntarily committed to posting job salary ranges. [112] However, federal equal pay and other antidiscrimination laws still do not mandate pay transparency.

Once again, states are stepping into the gap created by federal law. Over the past three years, a wave of state pay transparency statutes have been enacted. These new state laws require employers to disclose a position's compensation or compensation range to job applicants in thirteen states: California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New York, Rhode Island, Washington, and Vermont.[113] The Washington,

Univ., 816 F.2d 317 (7th Cir. 1987)). The Fourth Circuit has also suggested in dicta that it may broadly allow reliance on prior salary as a defense to an EPA claim. *See, e.g., Spencer v. Virginia State University*, 919 F.3d 199, 202-03 (4th Cir. 2019).

112 Cora Lewis, *Pay Transparency is Spreading. Here's What You Need to Know*, Associated Press, Mar. 20, 2023.

113 Cal. Lab. Code § 432.3 (2023); Colo. Rev. Stat. Ann. § 8-5-201 (2024); Conn. Gen. Stat. § 31-40z (2021); Haw. Rev. Stat. Ann. § 378-2.3 (2023); Ill. Comp. Stat. Ann. 112/10; Md. Code Ann. Lab. & Empl. §§ 3-301, 3-04.2; Mass. Gen. Laws ch. 149, § 105F (eff. Oct. 29, 2025); Minn. Stat. § 181.173 (effective January 1, 2025); Nev. Rev. Stat. § 613.133 (2) (2021); N.Y. Lab. § 194-B (2022); R. I. Gen. Laws § 28- 6-22 (2023); Vt. Stat. Ann. tit. 21. § 4950 (effective July 1, 2025); Wash. Rev. Code § 49.58.010(1)(2023).

D.C., Council also recently passed a salary range disclosure bill.[114] As of June 2023 (before Maryland, Massachusetts, Minnesota, Vermont, or Washington, D.C. enacted their new statutes), the protections of these pay transparency laws extended to roughly one quarter of American workers.[115] In addition, numerous additional states are currently considering adopting their own salary range disclosure laws.[116]

These state salary range disclosure laws vary in detail regarding which pay information employers must disclose, when employers must disclose the information, and how they must disclose it. For example, the California, Colorado, Illinois, Hawaii, and Massachusetts statutes require employers to disclose in the job posting itself the hourly or salary compensation/range for the position.[117] The statutes in other states require salary range information to be provided to applicants either upon request, after an interview, or before the employer makes a salary offer.[118] In addition to salary ranges, Colorado, Washington, and Illinois also require employers to disclose any *other* benefits associated with the position in the job posting, including bonuses, stock options, and other incentives.[119] Several of these laws also require employers to provide salary ranges to current employees for their own positions upon request.[120] And Colorado's law goes even farther and requires employers to make internal promotional opportunities available to all current employees at the same time and before the employer decides who to promote.[121]

In order to prevent employers from posting overly broad salary ranges, defeating the purpose of the wage disclosure laws, some states have further defined what "pay range" means. For example, in Massachusetts, the salary range or hourly wage must be the range "that the covered employer reasonably and in good faith expects to pay" at the time of posting.[122] In Illinois, employers must provide the wage scale they "reasonably expect to pay" for the position.[123]

---

114 District of Columbia Wage Transparency Omnibus Amendment Act of 2023; Chris Marr, *D.C. to Require Pay Range in Job Ads, Ban Salary History Inquiry Queries*, Bloomberg L., Jan. 12, 2024.

115 Jennifer Liu, *More Than 25% of U.S. Workers are Covered Under Pay Transparency Laws – That Could Soon Be Near 50%,* CNBC, https://www.cnbc.com/2023/06/21/more-than-25percent-of-us-workers-are-now-covered-under-pay-transparency-laws.html. (last visited Sept.1, 2024).

116 *See, e.g.,* Samantha J. Prince, *Benefits Transparency*, 108 Marquette L. Rev. 37, 95-99 (2024).

117 *See supra* note 113.

118 *Id.*

119 *See supra* note 113

120 *Id.*

121 *Id.*

122 *Id.* Note that the Massachusetts statute does not prohibit an employer from paying an employee above the stated range, but does require that the range be established in good faith at the time of the job posting.

123 *Id.*

In Hawaii, the range must "accurately reflect" what the employer expects to pay for the position.[124]

Additional states are currently considering whether to adopt pay transparency laws.[125] Even if none of them end up doing so, the current state pay transparency laws on the books in states that include California, New York, Illinois, and Massachusetts mean that many law schools are already required to disclose salary ranges or rates, and in some cases other forms of compensation, when hiring new faculty. There is no doubt that the national trend is toward pay scale disclosure.

C. *After Freyd v. University of Oregon, Giving a Faculty Member a Retention Raise Without Adjusting the Pay of Comparable Faculty May Be a Discriminatory Practice*

Retention raises are a common practice in academia.[126] They typically involve a current faculty member engaging in negotiations with another university, receiving an offer from that university with a salary higher than his current one, and then approaching his home school to use the outside offer as leverage to obtain a raise. However, the recent Ninth Circuit decision of *Freyd v. University of Oregon* calls into question the common academic practice of granting retention raises to faculty who seek out offers with higher pay from other universities.[127] In 2017, Jennifer Freyd, a Professor of Psychology described by her colleagues as "one of the most esteemed members in the Psychology Department," sued University of Oregon in federal court for pay discrimination under the Equal Pay Act, Title VII, Title IX, and Oregon law.[128] Professor Freyd earned between $14,000 and $42,000 per year less than four male colleagues of similar rank and tenure, which she learned when she unintentionally received salary information.[129] Professor Freyd's Title VII disparate impact claim challenged her university's employment practice "of awarding retention raises without also increasing the salaries of other professors of comparable merit and seniority."[130]

124 *Id.*

125 These jurisdictions include Alaska, D.C., Georgia, Hawaii, Illinois, Iowa, Kentucky, Maine, Massachusetts, Missouri, Montana, New Jersey, Oregon, South Dakota, Vermont, Virginia, West Virginia, and the District of Columbia. Jim Wilson, *More Than 1 in 4 U.S. Workers Covered by Pay Transparency Laws*, Human Resources Director, June 29, 2023.

126 *Freyd v. Univ. of Or.*, 990 F.3d 1211, 1224 (9th Cir. 2021).

127 *Id.* at 1227-28.

128 *Id.* at 1214-1218.

129 *Id.* at 1216. An economist Professor Freyd retained subsequently ran a regression analysis on the Psychology Department's salary data, and concluded with a 99 percent degree of confidence "that female full professors earned, on average, approximately $15,000 less than their male counterparts, controlling for years in rank and time trends." *Id.* at 1218.

130 *Id.* at 1224. To establish a prima facie case of disparate impact discrimination, a plaintiff "must show that a facially neutral employment practice has a significantly discriminatory impact upon a group protected by Title VII. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17; *Freyd*, 990 F.3d at 1124 (quoting *Paige v. California*, 291 F.3d 1141,

Professor Freyd's Psychology Department had conducted an annual self-study in 2016 that revealed "a significant equity problem with respect to salaries at the Full Professor level," with an annual difference in salary between male and female full professors of $25,000." The self-study concluded:

> [T]his state of affairs appears to have emerged mostly as a result of retention raises playing a central role in Full Professors achieving competitive salaries. Faculty who have not pursued multiple outside offers across time, have fallen progressively and significantly behind in salary. In fact, when we control the number of years since the last major hiring/retention negotiation, the gender different completely disappears.[131]

Although Professor Freyd's department was comprised of roughly equal numbers of male and female faculty, between 2006 and 2016, the University engaged in retention negotiations with sixteen male psychology professors, but only four female psychology professors.[132] This resulted in nine male psychology faculty members receiving retention raises, while only one female psychology professor received a retention raise.[133]

Professor Freyd introduced evidence that female faculty members are less willing to respond to interest expressed by other universities since they are less willing to move, for gender-related reasons – and that this disadvantages female faculty.[134] Notably, Professor Freyd did not argue that the practice of granting retention raises was per se discriminatory, but rather that when the University of Oregon granted a male psychology professor a retention raise, it should also have similarly raised the salaries of all faculty members of the same rank with comparable seniority and merit, including her own salary, to prevent gender pay inequities.[135]

The District Court dismissed Professor Freyd's Title VII disparate impact claim, holding that as a matter of law the statistical evidence presented on retention negotiations within the Psychology Department was insufficient.[136] Alternately, the District Court held that even if Professor Freyd had established

1144 (9th Cir. 2002)). The plaintiff must also demonstrate that the pay practice at issue is either "(a) not job related or (b) [in]consistent with business necessity." *Id.* If the defendant university establishes that the practice is job related and consistent with business necessity, the plaintiff may still prevail "by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs." *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009)).

131 *Id.* at 1217.

132 *Id.* at 1224.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.* at 1219.

a prima facie case of disparate impact, the University had a "business necessity" for its retention offer practice – "retaining top talent in its Psychology Department" - so summary judgment would still be appropriate.[137]

The Ninth Circuit, in what is likely to be a significant decision for universities, reversed the District Court on Professor Freyd's Title VII disparate impact claim. First, the Ninth Circuit held that a reasonable jury could have found a prima facie case of disparate impact discrimination based on the statistical retention raise evidence Professor Freyd presented from her department.[138] Second, the court held that "there is conflicting evidence about the need for retention raises and whether the retention raises are job-related."[139] In short, the court rejected the District Court's conclusion that retention raises were a "business necessity" as a matter of law.

Furthermore, the Ninth Circuit found that even if University of Oregon had a business necessity to use retention raises, Professor Freyd put on evidence of a "viable alternative practice that would serve the University's needs… ."when [the University] gives a retention raise to a Psychology professor, it should evaluate the resulting salary disparity with others in the same rank with comparable merit and seniority, and give affected individuals a raise."[140] The Ninth Circuit allowed Professor Freyd's Title VII claim that the practice of granting faculty retention raises without also similarly increasing the salaries of comparable faculty constituted disparate impact discrimination to proceed to a jury.[141]

Just a few months after the Ninth Circuit issued its opinion allowing both Professor Freyd's Title VII and Equal Pay Act claims to proceed to a jury trial, the case settled out of court.[142] According to published reports, University of Oregon agreed to pay Professor Freyd $450,000.[143] Thus, neither of these claims went to trial. However, *Freyd* establishes two very important equal pay precedents for universities. First, *Freyd* calls into serious question the academic practice of granting retention raises without simultaneously increasing the salaries of comparable faculty. As Professor Freyd stated after settling her case,

137 *Id.*

138 *Id.* at 1226.

139 *Id.* at 1227. The Ninth Circuit also explained that the trial court had assessed the wrong employment practice. Professor Freyd did not challenge the practice of awarding retention raises. She challenged "the practice of awarding retention raises to some professors without increasing the salaries of other professors of comparable merit and seniority." *Id.*

140 *Id.*

141 *Id.* at 1228.

142 Meerah Powell, *Retired professor and University of Oregon settle longstanding lawsuit,* Oregon Pub. Broadcasting (July 17, 2021), https://www.opb.org/article/2021/07/17/university-oregon-professor-settle-equal-pay-lawsuit/.

143 Jordyn Brown, *UO settles equal pay case with retired professor Jennifer Freyd for $450,000*, The Register-Guard (July 17, 2021), https://www.registerguard.com/story/news/2021/07/16/uo-settles-equal-pay-case-retired-professor-jennifer-freyd-350-000/7998810002/.

"[t]he Ninth Circuit opinion also affirms that when employer practices like retention raises result in lower salaries for women, these practices may violate the law, even if the discriminatory outcome was unintentional."[144]

Second, *Freyd* is a clear statement that the Equal Pay Act continues to apply to faculty jobs. Some universities have argued, like University of Oregon did in this case, that faculty jobs - even in the same department and at the same seniority level - are so dissimilar and unique that female professors cannot produce appropriate male comparators.[145] Had that argument been accepted, it could have been the death knell of the Equal Pay Act for women professors. However, the Ninth Circuit rejected University of Oregon's argument, holding that a reasonable jury could find "that Freyd [and her comparator male faculty] all share the same 'overall job.' As full professors in the Psychology Department, Freyd and those three comparators all conduct research, teach classes, advise students, and "serve actively on departmental, college, and university committees and in other roles in service to the institution." Courts that take the Ninth Circuit's approach examine whether the faculty jobs being compared share a common core of tasks such as teaching, research, and service – and not the minutiae of each professor's work such as comparative grant funding or specific courses taught, as University of Oregon attempted to argue.[146]

144 Powell, *supra* note 142.

145 University of Oregon argued that relatively minor differences in specific work, including in the centers Professor Freyd and her comparator male professors ran; the grant money each brought in; and the research that they conducted, rendered their jobs unequal. The Ninth Circuit rejected this argument.

146 *Freyd v. Univ. of Or.*, 990 F.3d 1211, 1220 (9th Cir. 2021). Under the Equal Pay Act, a female faculty member must establish that she was paid less than a male comparator faculty member for "equal work." The jobs being compared must be "substantially equal" rather than identical, and the proper comparison is between the jobs being compared themselves rather than between the individuals performing the jobs. Some courts have taken a pragmatic approach to determining whether the jobs are substantially equal, examining whether they share a "common core" of tasks. However, other courts have taken a strict approach, in which differences in the daily tasks of the plaintiff and her male comparator may lead to a finding that the jobs are not substantially equal – and thus that the plaintiff cannot establish her prima facie case under the Equal Pay Act. Some university defendants have attempted to argue that the jobs of a professor plaintiff and her male comparator are not, in fact, "substantially equal." *Id.* However, as Paula Monopoli has noted, "[n]o profession is more suited to equal pay [law] than the job of law professor" due to the similarity in professors' job duties of teaching, research, and service. Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 Idaho L. Rev. 867, 867-68 (2019) ("[i]n terms of 'equal work on jobs the performance of which requires equal skill, effort and responsibility,' we are all required to teach the same number of courses per semester and we serve on the same number of committees. While there may be a variance in terms of the number of articles and books published and where they are placed, that is often reflected by a separate summer research stipend that rewards those who publish more. There may be administrative roles that are in addition to teaching, scholarship, and service roles but that additional work, too, is typically reflected in an additional administrative stipend. So the basic professorial salary covers almost exactly the same work.").

III. Concrete Steps Law Schools Should Take Now To Change Compensation Practices And Improve Faculty Pay Equity

As Section II outlines, state legislatures and federal courts have increasingly relied on the growing body of research on the discriminatory nature of certain compensation practices to prohibit or call into question certain compensation practices law schools have historically used. In short, the relevant laws and best compensation practices have changed in recent years. However, little has been written about specific steps law schools can and should take to change their compensation practices in light of these recent developments.

Section III outlines the evidence-based, achievable changes law schools can and should make to their own compensation practices to improve their faculty pay equity. After briefly summarizing how law schools should conduct compensation equity studies in Section IIIA, Sections III B-E will focus on several proactive measures a law school should take to change its compensation practices and therefore interrupt bias. The goal of Section III is to provide a compensation practice checklist for law school Deans and administrators, who should take practical steps now to close their faculty gender pay gaps given the nationwide evidence of persistent pay inequities.

A. Law School Should Conduct an Internal Compensation Equity Study to Analyze Its Faculty Compensation and Practices

Law schools must first evaluate their own compensation practices in order to identify and correct gender pay inequities. As gender and public policy scholar Iris Bohnet writes in *What Works: Gender Equality By Design*, "[a]ny organization that hopes to learn and improve needs to base its decisions on evidence. This is particularly true when confronting problems that are the result of systemic unconscious bias."[147] Renowned gender scholar Deborah Rhode has similarly written in the context of law firms that "…self-assessment must be a critical part of all diversity initiatives. Quantitative and qualitative data are necessary to monitor matters such as advancement, retention, assignments, satisfaction, mentoring, and work-family conflicts."[148] Workplace equity scholar Professor Joan Williams has also written extensively about how employers can reduce racial and gender bias in the workplace, especially in light of the lack of success of traditional diversity trainings and similar programs.[149] As Williams writes, "the solution is not to 'fix the women,' but to fix the business systems."[150]

147 Iris Bohnet, What Works: Gender Equality by Design, 103 (2016).

148 Barbara Kellerman & Deborah L. Rhode, Women and Leadership, 90 (2017) (internal citation omitted).

149 *See, e.g.*, Joan C. Williams, *Bias Interrupted: Creating Inclusion for Real and For Good*, Harvard Business Review Press (2021) [hereinafter Williams, *Bias Interrupted*]; Joan C. Williams, Marina Multhaup, Su Li, & Rachel Korn of the Center for Worklife Law at the University of California, Hastings College of the Law, *You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession*, (ABA and Minority Corporate Counsel Association, 2018) [hereinafter Williams, *You Can't Change What You Can't See*]; Joan C. Williams & Rachel Dempsey*; What Works for Women at Work: Four Patterns Working Women Need to Know* (2014).

150 Williams, *You Can't Change What You Can't See*, at 68.

Williams' bottom-line advice to CEOs, which applies equally to law school Deans:

> …if you really want to make progress toward your DEI goals….[j] ust use the same tools you would use to solve any business problem. Begin with the evidence, use metrics to establish baselines and measure progress, and keep at it in a disciplined manner, using an iterative process until you achieve your goals.[151]

To advance pay equity in legal academia, *law school compensation practices and systems* need changing, not women themselves or their negotiation skills. This requires: (1) using metrics, (2) implementing concrete bias interrupters, and (3) repeating these steps as needed.[152] In Williams' framework, a bias interrupter is an "evidence-based, metrics driven tool[]" to combat bias in the workplace.[153]

Law schools, many of which purport to care deeply about gender and racial equity, should not bury their heads in the sand on issues of faculty compensation equity. It is clear that law school faculties across the country suffer from an entrenched gender pay gap.[154] There is a moral and cultural imperative for law schools, which train tomorrow's lawyers to advocate for justice, to examine their own faculty compensation and compensation practices and remedy any inequities.

The first step each law school should take to ensure that its female faculty and faculty of color are being paid equitably is to conduct a comprehensive internal compensation equity study.[155] Compensation equity studies are now widely considered a best practice for closing the gender pay gap.[156] Simply

---

151 Williams, *Bias Interrupted*, at 147.

152 Williams, *You Can't Change What You Can't See*.

153 Williams, *You Can't Change What You Can't See*, at 2 ("[w]e've all been looking for the grand gesture to solve the problem [of workplace bias]. It doesn't exist. What does exist is a series of 1 percent changes that, with persistence, can help root out the bias that too often subverts our ideals of meritocracy.").

154 *See, e.g,* Ryan & Dawe, *supra* note 2.

155 Compensation equity studies are also called "compensation equity audits" and "pay equity audits" in the literature. I refer to them as "compensation equity audits" to signal that all forms of compensation should be included.

156 *See, e.g.*, *The Simple Truth About the Gender Pay Gap*, *2022 Update*, Am. Ass'n of Univ. Women, https://www.aauw.org/app/uploads/2022/12/SimpleTruth_12.22_2.1-002.pdf (last visited Mar. 31, 2025) (recommending that employers "conduct regular pay audits, post salary ranges for jobs, eliminate the use of salary history in setting wages and prohibit retaliation against employees for discussing, disclosing or inquiring about their wages. These actions will increase pay transparency and minimize pay gaps based on previous inequalities."); Constance Z. Wagner, *Change from Within: Using Task Forces and Best Practices to Achieve Gender Equity for University Faculty*, 47 J.L. & Educ. 295, 350 ("[t]he best way to assess whether there is a disparity in faculty salaries attributable to gender in a particular college or university is by conducting a gender pay equity study…"); Lori L. Taylor et al., *How to Do a Salary Equity Study: With an Illustrative Example from Higher Education*, 49 Public Personnel Management 57,

put, a law school committed to closing its faculty gender pay gap must first examine how it compensates its own faculty in order both to reveal what needs fixing and to investigate the causes of any pay disparities.[157] A well-conducted compensation equity study will provide a law school with necessary internal metrics on whether similarly situated male and female faculty are being paid equitably, after which a law school should move to "implement bias interrupters" if inequities are identified.[158] As Joan Williams has written :

> [c]ompensation bias is an easy problem to check for: it's just a math problem. Look at whether there are demographic patterns in compensation that are not explained by seniority and ratings…. Plenty of companies have done the math, and the more courageous ones are completely open about it.[159]

The recommendation that universities conduct a compensation equity study as a best practice for rooting out gender and racial pay discrimination is not a new one. The American Association of University Women (AAUW) has recommended for years that universities "conduct regular pay audits."[160] Although the author is not aware of comprehensive data on the number of law schools that have conducted their own compensation equity studies, hundreds of U.S. universities have conducted pay equity studies.[161] Many of these studies have revealed faculty gender pay gaps.[162]

---

58 (2019) ("regular pay analysis can be a best practice among employers committed to salary equity.").

157 A law school's compensation equity study should be designed to (1) determine whether there are gender or racial pay disparities between similarly situated law school faculty, (2) enable the law school to correct any such disparities, and (3) identify the law school compensation practices or systems that created the disparities in the first place so the law school can change them. Organizations "need to think about the HR processes that led to the gender pay gap arising in the first place." David Anderson, et al., *Why Companies' Attempts to Close the Gender Pay Gap Often Fail*, Harv. Bus. Rev. (Jan. 21, 2019), https://hbr.org/2019/01/why-companies-attempts-to-close-the-gender-pay-gap-often-fail.

158 *Id.*

159 Williams, *Bias Interrupted*, at 107.

160 *The Simple Truth About the Gender Pay Gap*, *supra* note 156 at 19-20.

161 *See, e.g.,* Wagner, *supra* note 156.

162 *Id.* Many private companies have conducted pay equity studies as a recommended best practice for years. One of the key components of the Obama administration's White House Pay Equity Pledge was a commitment by signatories to "conducting an annual company-wide gender pay analysis across occupations; reviewing hiring and promotion processes and procedures to reduce unconscious bias and structural barriers; and embedding equal pay efforts into broader enterprise-wide equity initiatives." White House Equal Pay Pledge, https://obamawhitehouse.archives.gov/webform/white-house-equal-pay-pledge (last visited Mar. 31, 2025). A survey conducted by the Society for Human Resources Managers demonstrated that by 2021, 58% of the companies surveyed had voluntarily conducted pay equity audits with 83% of these companies subsequently making adjustments to their employees' pay. Stephen Miller, *Pay Equity Audits and Transparency Foster*

While a university or law school Dean might understandably be apprehensive about whether and how to conduct a compensation equity study, law schools that do not assess and redress compensation equity issues are making a choice to accept what is likely to be the inequitable status quo, as well as opening themselves up to potential legal liability for pay discrimination under federal and state equal pay laws. It is well-established that there is a significant faculty pay gap among American law schools.[163] And as Section II established, the law and evidence on certain commonly used law school compensation practices have changed in recent years. Thus, any law school that has not recently examined its own faculty compensation practices is essentially turning a blind eye to a pervasive problem, as well as acting against its own interests.[164]

Although a detailed description of how to conduct a compensation equity study is beyond the scope of this article, it is generally recognized that there are a few important overall steps in conducting such a study. First, a law school should examine its current faculty compensation practices to determine which pay factors are used as part of the decision-making process, both in setting initial faculty pay and in determining merit or other increases. A law school should then make a good faith effort to summarize information about the pay factors it uses in an electronic format. Second, a law school should

Trust, SHRM Research Shows, Oct. 15, 2021, https://www.shrm.org/topics-tools/news/benefits-compensation/pay-equity-audits-transparency-foster-trust-shrm-research-shows. The Racial and Gender Pay Scorecard, which includes the 100 largest American companies based on market capitalization, recommends that "[c]ompanies must first analyze their current pay structures and determine if there is a racial and/or gender pay gap." Natasha Lamb, *Racial and Gender Scorecard Seventh Edition*, Arjuna Capital et al., https://static1.squarespace.com/static/5bc65db67d0c9102cca54b74/t/65f0b24549f03056f8edb5b9/1710273095112/Arjuna+Capital+-+Racial+and+Gender+Pay+Scorecard+2024.pdf (Mar. 2024). Shareholders often expect companies to audit and fix gender and racial pay disparities. *Id.* (noting that, over the last ten years, at least 93 companies have faced 175 shareholder resolutions regarding their racial and gender pay gaps). A Society for Human Resource Managers' survey also demonstrated that organizations with a female owner or CEO were more likely to conduct pay equity studies. Stephen Miller, *Pay Equity Audits and Transparency Foster Trust*, SHRM (Oct. 15, 2021), https://www.shrm.org/topics-tools/news/benefits-compensation/pay-equity-audits-transparency-foster-trust-shrm-research-shows.

163 Ryan & Dawe, *supra* note 2.

164 A few states, such as Oregon, Massachusetts, and Colorado have included "safe harbor" provisions in their state pay equity laws. These provisions are intended to encourage employers to conduct compensation equity studies. The Oregon Equal Pay Act, for example, provides Oregon employers who have conducted a compensation equity study within a three-year period before the filing of an equal pay lawsuit to "disallow an award of compensatory and punitive damages" if the employer can demonstrate by a preponderance of the evidence that it:

(a) Completed, within three years before the date that the employee filed the action, an equal-pay analysis of the employer's pay practices in good faith that: (A) Was reasonable in detail and in scope in light of the size of the employer; and (B) Included a review of practices designed to eliminate unlawful wage differentials; and (b) Has made reasonable and substantial progress toward eliminating unlawful wage differentials for the employer's employees Or. Rev. Stat. § 652.235(1).

collect relevant faculty data.[165] Next, the law school should make sure that the faculty data it will be using, including faculty members' law school graduation dates, years working/teaching, merit actions, and demographic information, is accurate and complete. There may be errors in employee data that could impact the analysis if they are not corrected.[166]

The law school can then turn to running the compensation equity study. In doing so, a law school should use valid techniques and conduct the study in a manner that is consistent with applicable law, so that faculty and other stakeholders will have confidence in the accuracy of study's conclusions.[167] Some law schools, or the universities in which they are located, may already have the in-house expertise to conduct a compensation study.[168] Others law schools do not have such expertise and should consider hiring an expert consultant to conduct their study. A law school may also want to engage campus counsel, in which case the attorney-client privilege or work product doctrine may apply.[169] Compensation equity studies often benefit from the involvement of an expert consultant and an attorney.[170]

After relevant data is assembled and updated, a well-developed compensation equity study should combine employees into similarly situated employee groups (referred to in the compensation literature as "SSEGs").[171] The faculty grouped for comparison should be broadly similar in terms of their overall work and responsibilities (e.g. research, teaching, and service

165 Lois Haigniere, *Paychecks: A Guide to Conducting Salary-Equity Studies for Higher Education Faculty*, Am. Ass'n of Univ. Professors (2d ed. 2002).

166 *Id.* ("[e]ven data that appear to be complete and accurate commonly have anomalies that need to be explained or corrected.").

167 *See, e.g.,* Michael G. Aamodt, David B. Cohen, Lisa D. Grant Harpe, & Murray S. Simpson, *The Science, Art & Whimsy of Making Salary Adjustments Following a Proactive Pay Equity Study*, DCI Consulting, Oct. 2017.

168 Your law school may have already conducted a compensation equity study. Alternately, your university may have conducted such a study that purported to include law school faculty. The current law school administration should critically review such prior studies since they may be outdated or may not have followed best practices. For example, university compensation equity studies may not include an assessment of *all* forms of faculty compensation. The "pay" equity studies my own school, University of California, Irvine, has conducted have only examined law faculty salary, excluding all other forms of compensation including summer money and other stipends. Such studies therefore do not provide a comprehensive or accurate analysis of total faculty compensation equity. *See, e.g., 2023 Faculty Salary Equity Study, School of Law*, UCI Office of Academic Planning & Institutional Research, https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/1/1819/files/2023/10/2023DownloadableReport-Law.pdf (last visited Apr. 8, 2025).

169 Kayo Sady, Micheal G. Aamodt & David Cohen, *Compensation Equity: Who, What, When, Where, Why, and How*, *in* Practitioner's Guide to Legal Issues in Organizations, 260 (2015).

170 *Id.*

171 Sady et al., *supra* note 169.

for full-time faculty).[172] Although there is no bright-line rule, the Office of Federal Contract Compliance Programs (OFCCP) recommends that a pay analysis group contain at least thirty employees.[173] If a law school has a large enough faculty pay analysis group, the law school should consider conducting a statistically meaningful regression analysis.[174] Those conducting the study would perform the regression analysis to account for legitimate reasons for any faculty pay differentials.

A law faculty that does not have a pay analysis group large enough for a regression analysis should instead conduct its compensation equity study using a cohort analysis.[175] A cohort analysis involves listing faculty by compensation amount and years of experience and examining the list to:

> …determine if the salary rank for an employee seems appropriate for his/her standing on variables such as experience of performance. If the ranking is not appropriate, salary adjustments are made.[176]

After the compensation equity study has been conducted, the law school or the expert it hired will need to interpret and report the results of the data.

One important topic related to the scope of compensation equity studies: *all* components of faculty compensation should be included and examined in the law school's study. Although it is not uncommon for an employer to conduct a compensation equity study that examines salary only, doing so leads to incomplete and misleading results. The Equal Pay Act, Title VII, and other equal pay laws apply to non-salary forms of compensation.[177] As noted in the *Racial and Gender Pay Scorecard* in the context of private companies:

172 *Id.*

173 Whether a faculty pay analysis group is large enough to conduct a statistically sound regression analysis will also depend upon the number of control variables used. Generally speaking, there should be ten employees or more per variable. Thus, a pay group of thirty faculty or more would generally suffice for a law school with a three-variable analysis. *See* Office of Federal Contract Compliance Programs (OFCCP), *Analysis of Contractor Compensation Practices During a Compliance Evaluation Frequently Asked Questions,* https://www.dol.gov/agencies/ofccp/faqs/compensation (last visited Dec. 5, 2024); discussion with compensation analysis expert David Cohen, President DCI Consulting Group Inc. (notes on file with author). *See, e.g.,* Connie N. Bertram, *OFCCP Issues Long-Awaited Guidance Concerning Compensation Audits*, 15 The National Law Review 98 (Nov. 5, 2018), https://natlawreview.com/article/ofccp-issues-long-awaited-guidance-concerning-compensation-audits (identifying that the OFCCP recommends at least thirty employees per pay analysis group); *Pay Equity: Grouping Employees, Coverage, and Best Practices*, Berkshire, https://www.berkshireassociates.com/blog/pay-equity-grouping-employees-coverage-and-best-practices (last updated Nov. 8, 2022) (same).

174 *Id.*

175 *See* Aaomdt et al., *supra* note 167, at 35. (noting that whether an SSEG will be large enough for regression analysis depends on both the number of total employees (in this case faculty members), and on the number of faculty members in each sex or race category).

176 *Id.*

177 Lobel, *supra* note 63.

> Full pay gap analysis should not be limited to base salary alone, as more bias can be reflected in bonus and equity incentive pay. For many industries, like technology, equity awards can represent an outsized portion of a pay package. The same is true for senior management pay, which is heavily influenced by bonus pay and equity awards.[178]

Law school Deans and university administrators often have discretion to grant faculty various non-salary forms of compensation including summer research funding, stipends, and housing assistance. Such non-salary compensation, when combined with a law professor's member's salary, constitutes her total compensation. A meaningful law school compensation equity study must examine *total faculty compensation*, including both faculty salaries and all additional non-salary forms of compensation such as summer research and other stipends, bonuses, and housing loans or other assistance.[179] A faculty member's overall compensation may be inequitably low even if her salary alone is not, for example, if she is denied research stipends when similarly situated male faculty are receiving them.[180] There is no principled reason for a law school to examine faculty salary only when conducting a compensation equity analysis; a study that only examined faculty salary would be both misleading and incomplete. This is not a new concept; any law school that does not maintain yearly data on non-salary compensation and assess that data should begin doing so.[181]

178 *Racial and Gender Pay Gap Scorecard*, *supra* note 8, at 23 (explaining that companies that include all components of compensation in their compensation equity analyses receive higher scores on the scorecard).

179 This section accordingly refers to the study the law school should do as a "compensation equity study" rather than using the narrower term "pay equity study." A study of only law faculty salaries would not provide a complete compensation equity picture since law schools also compensate faculty economically via research and other stipends, housing grants, loans, and other means. These should all be included in the law school's compensation study.

180 There are, of course, various legitimate nondiscriminatory reasons for granting some but not all faculty certain forms of compensation, such as compensation for additional administrative duties on top of the normal faculty duties. However, law schools should study their own practices to make sure their decisions regarding other forms of compensation are fair, evenhanded, and legally defensible.

181 For example, twenty years ago, Stanford Provost's Advisory Committee on the Status of Women, charged with increasing the representation of women faculty, recommended that Stanford continue its annual review of faculty salaries, as well as adding evaluation of non-salary compensation. *Resources for Faculty Salary Equity and Transparency*, Stanford, https://facultydevelopment.stanford.edu/faculty-engagement/faculty-womens-forum/resources-faculty-salary-equity-and-transparency (last visited Apr. 8, 2025) ("The [Provost Advisory Committee on the Status of Women] was charged with examining material or monetary compensation and support for Stanford faculty, to identify possible areas of gender disparity for further study, and, where appropriate, to propose strategies for amelioration.").

A law school's decision to grant or withhold various forms of non-salary compensation can create or exacerbate gender pay inequities.[182] For example, the University of Texas School of Law for years provided some faculty members with forgivable loans that did not have to be repaid if the faculty member stayed at the law school for a certain amount of time.[183] A Texas Attorney General investigation demonstrated that twenty-four male UT law school faculty received these forgivable loans, while only three female faculty members received them.[184]

One can easily imagine a situation in which a Dean's decisions regarding individual allocations of research funding to faculty create gender or racial pay disparities, especially where a Dean retains significant discretion in such decisions during the faculty recruitment process. Law school deans often have such discretion, and research stipend and similar decisions may not be subject to disclosure or guided by a formal law school policy or other oversight mechanism.[185] Where compensation decisions are made in an individualized, non-transparent manner without oversight, pay inequities are more likely to result.

Finally, if a law school is aware that it has previously used problematic compensation practices, even if it no longer does so, it should audit its current faculty compensation to determine and mitigate the impacts of these historic practices. For example, many law schools in California and other states that currently ban the use of prior salary in setting pay previously relied upon prior salary to set faculty salaries. This past practice will likely still be contributing to compounding gender pay inequities over the years of a woman professor's career, unless the law school's administration has already audited and corrected

182 Unfortunately but not surprisingly, the *After Tenure* survey and subsequent analysis by Ryan and Dawe demonstrated that tenured women law faculty receive "dramatically lowered" rates of non-salary compensation than tenured male law faculty:

> Finally, given the example at the University of Texas School of Law that began this article, we know that a law professor's annual salary is a critical measure of a law professor's compensation but is often an incomplete picture of the professor's earnings…*[W]e find that women – regardless of their race – experience dramatically lowered rates of additional earnings*.

Ryan & Dawe, *supra* note 2, at 607 (emphasis added).

183 Ryan & Dawe, *supra* note 2, at 571 (citing Office of the Attorney General of Texas Greg Abbott Report (2014) (concerning purpose and terms of the loans)).

184 *See* Attorney General of Texas Report, *supra* note 67.

185 Although law school faculty salaries within the University of California system are disclosed on a public website (https://transparentcalifornia.com), research stipends and all other forms of non-salary compensation are combined into a generic "other pay" category that makes it impossible to determine what a specific faculty member is being compensated for beyond salary (which is a separate category). This imprecise reporting makes it very hard for female UC faculty to assess whether a comparator male faculty member is getting research funding and at what level, for example.

for the impacts of its previous use of prior salary. The recent $43 million dollar settlement of a gender pay equity lawsuit against Disney in California demonstrates that past compensation practices – in that case, Disney's use of prior salary to set a new employee's salary – can continue to create systemic inequity and employer liability.[186] Although a law school's current Dean or university administration may not be the cause of poor past compensation practices, they should nonetheless be proactive in taking action to examine and mitigate their impacts.

B. *After Conducting Its Compensation Equity Study, a Law School Should Make Necessary Adjustments Both to Individual Faculty Compensation and to Its Compensation Practices*

A law school's compensation equity study may well identify gender or race-based inequities for which individual faculty pay adjustments are needed. If the compensation equity study demonstrates that certain women faculty are being underpaid in comparison to similarly situated male faculty, it will be critical for the law school to take remedial action to address these pay inequities. A law school in this situation would be required to increase the impacted women faculty members' pay to the level of their comparator male faculty. Using the framework of Joan Williams, the law school must institute a "bias interrupter" – here, increasing the compensation of any female faculty member who the equity study reveals has been underpaid compared to a similarly situated male faculty member.[187]

Unfortunately, some Deans may not be inclined to immediately correct pay disparities uncovered in an equity study. Some may take the position that they are not in a budgetary position to fully and immediately remedy specific faculty pay inequities. Others may focus only on the most egregious cases, or even require female faculty members to negotiate individually with the administration.[188] The author fears that some law school Deans may take the position that they cannot fix compensation problems reflexively without thoroughly exhausting options. Budgeting is in part an exercise in priority setting, and correcting pay discrimination should be a high priority for a law school. Could the Dean redeploy money that was set aside for another purpose, including salary savings from faculty departures? Could the law

186 *See* Kim Elsesser, *Disney's $43 Million Gender Pay Settlement Highlights Need for Salary History Bans,* Forbes (Nov. 26, 2024, 4:38 PM), https://www.forbes.com/sites/kimelsesser/2024/11/26/disneys-43m-gender-pay-settlement-highlights-need-for-salary-history-bans/. According to economist David Neumark, Disney's gender pay gap "significantly decreased" after 2017, when California enacted its 2018 law prohibiting employers from using prior salary to set salary. Before this point, Disney had allowed its new employees' salaries to be set based on their prior salaries. The company also based annual employee raises on percentages, perpetuating initial pay disparities over time. As Kim Elsesser writes, "[t]he Disney settlement not only highlights the systemic challenges women face in achieving pay equity but also underscores the importance of continued efforts to address and rectify seemingly benign compensation practices that result in disparate pay."

187 *See Bias Interrupted, supra* note 151.

188 *See* Wagner, *supra* note 161, at 354.

school turn to main campus for financial help, asking for equity funds and explaining the potential legal liability, PR, ethical and other repercussions of leaving a pay inequity uncorrected? If budgetary constraints remain after creative exploration of options and advocacy to main campus, a law school could implement a plan to increase underpaid female faculty members' salaries incrementally over a few years until they reach the appropriate level, likely while freezing male comparator faculty members' salaries so that inequities do not persist. The law school should do what it can to remedy the situation quickly, however. An argument that the law school lacks sufficient funds to correct pay discrimination under will not be a defense in court under federal or state equal pay statutes.

A law school's compensation equity study may also identify an overpaid faculty member. If so, the law school should determine whether there is a legitimate reason for this faculty member's overly high salary, such as a demotion without an associated reduction in pay.[189]A law school presented with an unexplainable overpaid outlier most likely should not bump the salaries of all comparable faculty up to the same level as that of the overpaid individual – and many law schools likely could not afford to do so. However, the law school should take action to remedy the problem of the overpaid outlier in order to remedy gender-based pay inequities. Doing nothing is not a legally defensible option once a law school knows there is a pay equity problem. As Aaomdt et al. explain in *The Science, Art & Whimsy of Making Salary Adjustments Following a Proactive Pay Equity Study*, there are several approaches an employer in this situation could take including freezing the outliers' pay or slowing his pay increases until similarly situated faculty catch up.[190] Another option would be reducing the overpaid outlier faculty member's salary, but it is unlikely most law schools would do so given the backlash and potential legal challenge the school would likely receive from the individual.

Finally, if a law school's compensation equity study reveals that there are women faculty who have been underpaid, it will be very important to identify the flawed compensation practices and systems that allowed these compensation inequities to occur, in order to avoid their recurrence. It is possible that a compensation practice the law school used may have caused or contributed to the pay inequity, in which case the law school should discontinue or modify this practice. Problematic compensation practices could include the law school's past use of prior salary information to set a faculty member's initial salary or the granting of a retention raise to a comparable male faculty

189 Aaomdt et al., *supra* note 167, at 28-29. For the purposes of this discussion, assume that the overpaid outlier faculty member is male, a likely scenario given the persistent gender pay gap on law school faculties. This male faculty member's supposed excellent salary negotiation skills, or a Dean or administrator's mistake in offering him such a high salary, would not be considered legitimate reasons justifying an overly high salary in comparison to comparable female faculty under equal pay statutes.

190 *Id.*

member, two compensation practices known to negatively impact women faculty as discussed in Section II.

A law school's Dean and other administrators should work with Human Resources both to modify compensation practices as needed, and to monitor the revised practices on an ongoing basis moving forward. Conducting "spot checks" annually, with more in-depth review of compensation practices every few years, has been identified as a best practice.[191]

C. A Law School Should Set New Faculty Members' Initial Salaries Without Relying on Information About Their Prior Salary

As discussed in section II, it is now well recognized that employers should not ask for, or rely upon, information about a job candidate's prior salary to set her new salary. Doing so perpetuates gender-based pay discrimination. As Orly Lobel has explained, anchoring bias also creeps in when prior salary is disclosed; "merely stating the figure of an applicant's previous salary can impede rational decision-making."[192] Research demonstrates that salary history bans can narrow the gender wage gap, primarily by increasing women's earnings.[193] State salary history bans are on the rise, with at least sixteen states and numerous cities and counties now outlawing this practice.[194] If a law school is located in one of the sixteen states with a salary history ban, in a city or county with a salary history ban, or within the Ninth Circuit, it may no longer legally use or rely upon a faculty applicant's prior salary to set her new salary.

When a law school relies upon a faculty member's prior salary to set her new salary, it can set the faculty member up for pay inequity that will only increase over her tenure with the school. Annual cost of living and merit salary increases are often calculated as a percentage of a law professor's initial salary. Thus, year-over-year percentage salary increases will be permanently anchored to the faculty member's starting salary, widening any pay gap created by the initial use of past salary each time a percentage increase is given. This

191 Amii Barnard-Bahn, *How to Identify – and Fix – Pay Inequality at Your Company*, Harvard Business Review (Nov. 3, 2020), https://hbr.org/2020/11/how-to-identify-and-fix-pay-inequality-at-your-company.

192 Orly Lobel, *supra* note 56 at 571-572

193 *See, e.g.,* James Bessen, Erich Denk, &Chen Meng, *Perpetuating Inequality: What Salary History Bans Reveal About Wages*, Bos. Univ. Sch. L., 29, June 2020 (finding that "wages of job-changing workers subject to [salary history bans] rose 3.9% on average compared to equivalent job changers in other states[]", and that salary history bans have "particularly strong effects… on groups subject to historical discrimination"); Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban* 16, Nat'l Bureau of Econ. Research, Working Paper No. 27054, 2020; (conducting an early study focusing on California concluded that "female earnings are increasing relative to male earnings in states adopting [salary history bans]."); Sourav Sinha, *Salary History Ban: Gender Pay Gap and Spillover Effects*, Yale Univ. 1 (2019) (concluding that state salary history bans "reduce gender gap by 4.2% points in hourly wages, and by 4.5% points in weekly earnings.").

194 *See* list from *supra* note 80.

exacerbates gender inequities between comparable faculty as the years pass.[195] To compound the problem, women faculty members' pensions and other retirement benefits will be smaller than those of comparable male faculty to the extent that pensions and retirement savings are based on salary levels.

Salary history bans are a relatively recent development, and law schools may not be on the cutting edge of compliance with employment laws. Some involved with faculty hiring at law schools located within jurisdictions with salary history bans may be unaware of these restrictions, and may still be asking faculty candidates questions about their salary history as part of the process of setting a proposed salary at their own law school.[196] The new salary history ban laws, which were enacted to promote gender pay equity, require law schools within these jurisdictions to change their practices immediately.

Deans in jurisdictions with salary history bans should ensure that faculty members, Appointments committee members, Human Resources personnel, and all others involved in faculty hiring stop asking faculty applicants any questions about their salary history.[197] A law school's decision to stop using faculty salary history information will constitute another pay "bias interrupter."[198] Deans in jurisdictions that have not yet adopted salary history bans should also so instruct their faculty and staff, since it is well documented that salary history questions embed pay inequities. Deans should not assume that those involved in hiring faculty already know prior salary history questions are off limits – training will very likely be necessary. There is no reason to expect that all members of a law school community are fully up to date with employment law and best compensation practices.[199]

195 *See, e.g.*, Barbara Reskin, Deana Liddy, Lois Haignere, & Lesley Lee Francis, *Salary-Setting Practices That Unfairly Disadvantage Women Faculty*, 78 ACADEME 32 (1992).

196 UC Irvine School of Law hired me in 2011. I was a new professor, joining the law school from a law firm partnership, and was told that new faculty were paid lockstep starting salaries. However, several colleagues have informed me that UCI Law generally anchored the salaries of lateral faculty hired at that time (before California enacted its state salary history ban in 2018) to what the lateral faculty members earned at their prior schools. In short, the law school would find out what a lateral faculty member earned at her prior law school and then offer a salary that exceeded the current salary by a small percentage. This is similar to what Aileen Rizo's employer did, which led to the important Ninth Circuit decision of *Rizo v. Yovino*, 950 F.3d 1217, 1219 (9th Cir. 2020) (en banc), establishing that prior salary cannot justify paying a man more than a woman for the same work under the Equal Pay Act.

197 Law schools should carefully check the details of their state's specific salary history ban law. For example, California's salary history ban, Labor Code section 432.3, prohibits employers from asking any questions about both salary and any other form of compensation the faculty member has previously received, including bonuses, retirement benefits, and health benefits. CAL. LAB. CODE § 432.3.

198 *See* Williams, *Bias Interrupted, supra* note 151.

199 The author has had conversations with law school employees involved in faculty hiring in past who did not know that such questions were prohibited. Those involved in faculty hiring should receive training on the specific parameters of their jurisdiction's salary history ban

In addition to training those involved in hiring regarding what they can and cannot ask applicants related to salary history, law schools should also review their job application forms and postings, as well other components of their hiring processes, for compliance with state salary history ban laws.[200]

D. A Law School Should Use - and Disclose- Pay Ranges in Hiring New Faculty

How *should* law schools set a new faculty member's salary since it is well established that they should not take prior salary into account in doing so? With respect to entry-level faculty hires, it is likely that most law schools already have either a specific starting salary or a relatively narrow starting salary range that would apply to new law faculty hired through the AALS' Faculty Appointments Register (FAR) or similar processes.

With respect to lateral faculty hiring, however, Deans often maintain significant discretion in setting pay. Some may take the position that knowing a lateral faculty member's salary at her prior law school is helpful in setting her new salary. A Dean may argue that it would be best to find out what the lateral faculty candidate currently earns and then offer to exceed that salary by a small percentage, in order to incentivize her to leave her current school while not "overpaying" her. First, as discussed above, even if a Dean believes it is helpful to his or her hiring efforts and budget to engage in this practice, it is illegal to do so in an increasing number of jurisdictions, for the precise reason that the practice perpetuates gender and racial pay inequities. This should be a compelling reason for Deans in jurisdictions with salary history bans to stop using prior salary information immediately.

Law schools should instead establish and use salary *ranges* for lateral law faculty hires based on experience, years of teaching/practice, and academic rank. A salary range represents the minimum and maximum that a law school will pay someone in a faculty position at a specific level. These salary ranges should apply both to a law school's current faculty at a specific level and to comparable newly hired faculty, for equity purposes. Reasonably tailored salary ranges foster pay equity, and also allow a Dean discretion to pay lateral faculty near the top or bottom of the range as the situation warrants. Paying a male lateral faculty member more than the top of the range paid to similarly situated female faculty members at the new law school may seem like a good

law.

200 As New York State has advised in a guidance document on its salary history ban:

What should an employer do to comply with the new Section 194-a of the Labor Law?

All employers should review their job applications and related processes and train hiring personnel to ensure compliance. For example, an employer should eliminate questions seeking an applicant's current or past salary from all job applications, unless required by law. Additionally, an employer may wish to proactively state in job postings that it does not seek salary history information from job applicants.

New York State – Salary History Ban – What You Need to Know - https://www.ny.gov/salary-history-ban/salary-history-ban-what-you-need-know (last visited Sept. 1, 2024). The California Department of Industrial Relations provides similar advice to employers. https://www.dir.ca.gov/dlse/california_equal_pay_act.htm (last visited Sept. 1, 2024).

strategy to a Dean seeking a successful hiring season in the moment, but could create a legally actionable pay equity problem under federal or state law.[201]

E. A Law School Should Disclose Faculty Compensation, Including Forms of Compensation Other than Salary Such as Research Stipends and Housing Allowances

Research demonstrates that pay transparency reduces the gender pay gap.[202] For example, a study of the impact of new public sector pay disclosure laws in Canada on university faculty salaries showed that these laws "significantly reduced the gender salary gap."[203] There are different levels and types of pay transparency. As discussed above in Section II, a number of law schools are now required to disclose faculty salary *ranges* to comply with their states' recently enacted salary range disclosure laws. A few of the new state pay disclosure laws specify that all forms of compensation associated with the position must be disclosed in job postings, which would include law school research stipends and other forms of non-salary compensation noted above.[204] Law schools located in states with salary range disclosure laws already need to establish and disclose salary ranges for their faculty positions. Law schools located in states that do not yet have such laws should also consider disclosing salary ranges for faculty positions, in order to provide faculty applicants with more accurate pay information to use in salary negotiations, increasing the likelihood of equitable results.

Although there are numerous state *salary range* disclosure laws, some of which also require law schools to disclose other forms of compensation, there are currently no federal or state laws that broadly require disclosure of *individual* employee compensation, including that of individual faculty members. There is no doubt that such information would benefit women faculty in identifying pay equity issues. If a faculty member has no way to know what her comparator male faculty earn, it will be very difficult for her to identify inequities in her own pay, perpetuating the gender pay gap on law faculties.

The salaries of state employees are a matter of public record. This means that law faculty at public law schools, like my own law school within the

201 It is also legally problematic for a Dean to offer certain lateral faculty forms of non-salary compensation like extra research money or loans that are not offered to comparable female faculty. These are considered compensation under equal pay law – it is not only salary that could form the basis of a pay discrimination claim.

202 For example, Susan Fiorentino and Sandra Tomkowicz note that "[r]esearch across disciplines strongly supports the finding that pay transparency policies reduce the gender wage gap." Susan R. Fiorentino & Sandra M. Tomkowicz, *Can Millenials Deliver on Equal Pay? Why the Time is Finally Right for Pay Transparency*, 39 Hofstra Lab. & Emp. L.J., 253, 277 (2021) (*citing* Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, 54 Indus. Rels. 648, 664 (2015); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. Irvine L. Rev. 781, 796 (2014).

203 Michael Baker et al., *Pay Transparency and the Gender Gap*, 15 Am. Econ. J. Applied Econ. 157 (2023).

204 *See supra* text accompanying notes 177-86.

University of California system, are often publicly disclosed in a searchable online database. These databases vary in their ease of access and in the detail provided, but can be a useful tool for public law school faculty members to obtain information about comparable faculty members' pay. It would be even better for pay transparency if public law schools released individual faculty compensation information in one comprehensive list each year, broken down in more detail by specific type of compensation.[205]

However, individual salary and other compensation information for law faculty at *private* law schools is not available in any database or other form. As noted above, research shows that pay transparency improves pay equity. Thus, although there is not yet a legal mandate to do so, private law schools should adopt pay transparency policies under which they affirmatively disclose individual compensation information to their faculty.[206] Private law schools could share compensation information internally, disclosing individual faculty salaries as well as faculty compensation for research stipends and other compensation "side deals" to the faculty itself. It is noteworthy that the EEOC required University of Denver Sturm College of Law to publish its faculty salary and other compensation annually for six years as part of the settlement of the EEOC's equal pay lawsuit against the law school.[207] Other private law schools could also decide to publicly disclose individual faculty compensation information, although it is difficult to imagine a school doing this without a legal mandate.

Currently, unless a law professor works for a state law school, or sues her school for wage discrimination and obtains pay information through

205 For example, a University of California system database provides law faculty at UC schools with access to comparator faculty salaries *See* https://transparentcalifornia.com. However, *total compensation* including non-salary compensation must be examined to make a fully accurate pay equity comparison between two faculty members, yet the California database does not detail additional faculty compensation such as summer research stipends, administrative stipends, or mortgage assistance. It instead lumps these type of faculty compensation together into an "other" category that renders the information almost useless for faculty hoping to make a true comparison of their compensation to that of another faculty member. The information is also always a year or more old, so even in California it would be very difficult to obtain current comparator pay information absent a lawsuit.

206 Some private companies, including Whole Foods, now voluntarily disclose their employees' compensation. *See* Tanza Loudenback, *More tech companies have stopped keeping employee salaries secret – and they're seeing results*, Bus. Insider, May 3, 2017, https://www.businessinsider.com/why-companies-have-open-salaries-and-pay-transparency-2017-4#:~:text=Whole%20Foods%20co-CEO%20John,'%20rights%20to%20discuss%20salaries (last visited May 20, 2025).

207 The Consent Decree requires the Sturm College of Law to:

> … post on a password-protected website a written publication of salary and compensation data for tenured and tenure-track faculty and long-term contract faculty with governance rights, employed at the Law School. The publication shall include: A table listing the salaries and other forms of compensation provided to each faculty member, position held, date of hire, and EEO reporting categories (including race, national origin, and gender) but without any disclosure of faculty names.

Consent Decree, *EEOC et al. v. University of Denver*, May 18, 2018.

discovery, individual faculty compensation information will likely remain inaccessible to her. Law schools should take action to make their individual faculty compensation information transparent.

F. A Law School Should Either Stop Granting Faculty Retention Raises, or Commit to Using Them Only in Connection with Subsequent Adjustments to the Salaries of Comparable Faculty

Retention raises appear to be common in legal academia.[208] This compensation practice often works as follows: an individual faculty member seeking a salary increase applies for a faculty position at another law school, receives a job offer from that law school, and then asks the current law school to meet or exceed the other school's salary offer as a condition of the faculty member remaining at the law school. The faculty member's home law school may decide to give a faculty member who has done this a "retention raise" - essentially an offer of an increased salary - in order to induce that faculty member to stay.[209]

Law school retention raises create warped incentives. In essence, faculty who engage in this practice spend significant amounts of time (that they might otherwise have spent doing scholarship or other productive work for the home school) applying to another law school for a position that many know they will not take. When a law school rewards a faculty member for doing so by raising his salary, it is essentially incentivizing inefficiency and disloyalty.

However, the bigger problem with retention raises is that they are gendered. The *After Tenure* survey data revealed that pre-tenure women law professors received on average one fewer permanent lateral offer than pre-tenure male faculty.[210] And workplace equity scholars have critiqued law schools for granting raises to faculty who have the ability to move geographically, which is, as Paula Monopoli notes, "a practice that disproportionately adversely affects women."[211] Numerous studies conducted in other academic disciplines

208 I am not aware of data on the number of law schools that engage in the practice of retention raises. However, I have spoken with several former law school Deans, all of whom confirmed both that retention raises are a common practice in law schools, and that they themselves made retention raises while serving as Dean to induce specific faculty members to stay.

209 This article refers to the practice as a "retention raise." The practice may alternately be called a "retention offer," an "outside offer," or a "retention bonus." One former law school Dean noted that retention raises may come about in a few different ways, including : 1) when a faculty member affirmatively seeks out and obtains a job offer from another law school after going through that law school's regular hiring process, and then comes back to his own school to negotiate higher pay; 2) when a faculty member is recruited by another law school and approaches his own Dean in an attempt to leverage a raise before going through the other school's formal process; or 3) when another law school recruits a faculty member, who is interested, goes through the other school's hiring process, receives an offer, and then comes back to his own Dean to negotiate higher pay.

210 Ryan & Dawe, *supra* note 2.

211 *See supra* Section II. *See* also Paula A. Monopoli, The *Market Myth and Pay Disparity in Legal Academia*, 52 Idaho L. Rev. 867, 873 (2019); *see also* Joan Williams, *What Stymies Women's Academic Careers? It's Personal,* Chron. Higher Educ. (Dec. 15, 2000).

where retention raises are also common demonstrate that male faculty are more likely to receive retention raises from their home schools than female faculty.[212] For example, a report on the status of women faculty in MIT's School of Humanities, Arts, and Social Sciences concluded that:

> …the acquisition of salary increases, chairs, research support, etc., partly depends on obtaining outside offers from other universities, and such outside offers have become increasingly important drivers at MIT over the last decade. To the extent that women are less willing to entertain outside offers, or are less mobile than their male counterparts for personal or family reasons, this trend must inevitably lead to gender discrimination in salaries and working conditions.

A study of UK academic economists found a significant gap in the promotion of women, focusing in part on the role of outside offers :

> We find important gender differences in outside offers and the earnings effect of outside offers. For given productivity, individual and workplace characteristics, men receive more outside offers than women. For men, but not for women, more outside offers are associated with higher earnings…..we find that academics who perceive discrimination have an objective basis for their beliefs and behave in a way consistent with their perceptions…
>
> The results are consistent with the 'loyal servant' hypothesis that women are believed to be less likely to leave their current employment, perhaps due to family commitments. According to this hypothesis, if employer job search is costly, protective new employers are less likely to make offers to women than to comparably qualified men. If an offer is made, the current employer – believing that the woman is a loyal servant – is less likely to match the offer.[213]

212 *See, e.g.*, KerryAnn O'Meara, John Fink & Damani Khary White-Lewis, *Who's Looking? Examining the Role of Gender and Rank in Faculty Outside Offers*, NASPA J. About Women in Higher Educ., 64-79, 2017 (study found that male faculty at a large U.S. public university were more likely to receive outside offers than female faculty); *Reports of the Committees on the Status of Women Faculty at MIT*, 2002, p.18 (study found that salary increases of faculty in MIT's School of Humanities, Arts, and Social Sciences were tied to outsides and raised concerns regarding the gendered nature of these outside offers); David Blackaby, Alison Booth & Jeff Frank, *Outside Offers and the Gender Pay Gap: Empirical Evidence from the UK Academic Labour Market*, 115 The Economic J. 81, 97 (Feb. 2005) (study of UK academic economists found that "women in our sample not only get lower returns to outside offers, they are less likely – for given characteristic including productivity – to get outside offers."); *see also* External Review of the Department of Psychology, University of Oregon, Exhibit 16 in support of Plaintiffs' Opposition to Motion for Summary Judgment, Freyd (noting when discussing pay equity problem at University of Oregon that it is "widelyrecognized that there is a difference between the genders in terms of seeking outside offers").

213 David Blackaby, Alison Boot & Jeff Frank, *Outside Offers and the Gender Pay Gap: Empirical*

Deans of law schools within the Ninth Circuit who engage in the practice of granting retention raises to faculty should pay close attention to the Ninth Circuit decision of *Freyd v. University of Oregon*, discussed above in section II.[214] The Ninth Circuit's opinion supports an argument in a subsequent university pay equity case that the practice of granting professors retention raises "without also increasing salaries of other professors with comparable merit and seniority" disparately impacts women faculty in violation of Title VII One of University of Oregon's arguments in defense of Professor Freyd's Title VII claim was that granting retention raises which resulted in higher pay for male Psychology Department faculty was a "business necessity" for the university. The Ninth Circuit rejected this argument on summary judgment, stating not only that there was conflicting evidence about the University's alleged need for retention raises, but also that it was unclear these retention raises were "job-related."[215] Furthermore, the court found that the practice Professor Freyd challenged was not retention raises alone, but granting them without also increasing the salaries of comparable faculty.[216]

Of significant note to other universities, the Ninth Circuit went further, finding that even if the University's retention raise policy was a business necessity, Professor Freyd had introduced evidence of a "viable alternative practice that would serve the University's needs":

> ... when [the University] gives a retention raise to a Psychology professor, *it should evaluate the resulting salary disparity with others in the same rank with comparable merit and seniority, and give affected individuals a raise*."[217]

After *Freyd*, law schools within the Ninth Circuit should certainly examine their own retention raise practices to ensure legal compliance. And given the numerous studies demonstrating that universities grant retention raises disproportionately to male faculty, law schools outside the Ninth Circuit should also consider examining their retention raise practices. Scholars have hypothesized that women may not be as mobile given childcare responsibilities, may be perceived as more loyal to their home school, may not be as comfortable

---

Evidence from the UK Academic Labour Market, 115 The Economic Journal 81, 82 (Feb. 2005).

214 *Freyd*, 990 F.3d 1211.

215 *Freyd*, 990 F.3d at 1227. The former head of University of Oregon's Psychology Department testified that retention raises were counterproductive, essentially punishing other faculty for not going on the job market, encouraging faculty to game the system, and costing the department time and resources. *Id.* at 1227 n.15. In addition, the Department's self-study noted that "it is not obvious that the frequency of retention negotiations is a strong indicator of overall productivity. Rather, it is important to acknowledge that there is strong evidence of a gender bias both in the availability of outside offers and the ability to aggressively respond to such offers." Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 18, *Freyd v. Univ. of Or.,* 384 F. Supp. 3d 1284 (D. Or. 2018) (No. 6:17-cv-00448-MC), 2018 WL 9440213.

216 *Freyd*, 990 F.3d at 1227.

217 *Id.* (emphasis added).

with the negotiation "game" that retention negotiation entails, or may be the victims of discrimination.[218]

An examination of a law school's retention raise practices would best be done as part of the comprehensive compensation equity study recommended above in section III A. If a law school's study demonstrates that the school has used retention raises, and that, like MIT, University of Oregon, and other universities, these retention raises have been granted disproportionately to male faculty, creating gender pay inequities, the law school should correct the inequities with individual female faculty and implement a "bias interrupter."

The most effective and straightforward step a law school could take would be to stop using retention raises altogether as a compensation practice moving forward. Some Deans might balk at doing so, however, perceiving retention bonuses as a tool to keep "star" faculty. These Deans might, however, want to think critically about whether faculty members' willingness and ability to jump through the hoops of applying for a job elsewhere actually correlates to these faculty members' merit as compared to the merit of faculty who have not sought retention raises. Doing away with the practice of granting retention raises would not only improve pay equity, it would save a law school and its faculty the time and resources that would otherwise have been invested in the retention raise negotiation game. This may lead to a few faculty members leaving over time, but it would also allow the home law school to use funds that would episodically have been spent on retention raises for other, and more beneficial, purposes.[219] It may also lead to better morale among faculty who otherwise resent those who angle for a raise in this manner.

As an alternate approach, a law school could decide to interrupt its bias by granting retention raises only where, in each case a retention raise is granted, the law school also "evaluate[s] the resulting salary disparity with others in the same rank with comparable merit and seniority, and [gives] affected individuals a raise," as the *Freyd* court stated.[220] The Ninth Circuit has now ruled that reviewing and adjusting comparator faculty salaries after every retention raise is a viable, nondiscriminatory alternative practice.[221] However, such a practice would essentially mean that a law school would need to do an equity assessment each time it granted a retention raise, increasing the salaries of comparable faculty to the same level as that of the faculty member who negotiated the retention raise (and possibly adjusting other salary bands to avoid compression). This could be time consuming and expensive, since it would in some instances mean raising the pay of multiple faculty each time one

218 *See supra* notes 211 and 212.

219 For a critique of retention raises based on their significant cost and the large expenditure of time for both schools involved, *see* Heather Dubrow, *The Counteroffer Game,* Inside Higher Ed. (Aug. 25, 2013) https://www.insidehighered.com/advice/2013/08/26/essay-calling-end-counteroffer-strategies-academic-hiring (last visited Apr. 20, 2025).

220 *Freyd*, 990 F.3d at 1227.

221 *Id.*

faculty member successfully negotiated a retention raise. Although the author is unaware of any study examining university or law school retention raise pay equity practices, there is evidence that at least one university, the University of Washington, has a policy of considering pay equity when deciding whether to grant a retention raise. [222]

Some Deans may prefer to stop using retention raises altogether, instead rewarding faculty who are truly excellent performers through the law school's existing internal merit review process. A law school in the Ninth Circuit that continues to grant retention raises to faculty without corresponding adjustments to comparator faculty salaries will be acting at its peril after *Freyd*. If a female law professor can establish a prima facie case of pay discrimination under Title VII and a law school then attempts to argue that the pay disparity was caused by retention raises granted to other faculty, the law school may not be able to avail itself of the "business necessity" defense after *Freyd*.

Conclusion

It is troubling that there is still a significant gender pay gap on law school faculties. Law schools should do what they can to close this gap, including by focusing on making the achievable changes to their outdated compensation practices outlined in this article. This is both the right thing to do, and in many jurisdictions, also required by law. The six key steps a law school committed to faculty pay equity should take are: (1) conduct a comprehensive compensation equity study; (2) adjust faculty pay and compensation practices as needed after analyzing the study's results; (3) stop relying on prior salary in setting the salary of new and lateral faculty members; (4) instead, set new faculty pay based on established and disclosed pay ranges; (5) disclose individual faculty compensation (including salary, stipends, and other forms of compensation), and (6) either stop using retention raises, or use them only together with examination of and adjustments to the pay of comparable faculty after each retention raise is awarded.

222 Univ. of Wash., *Retention Salary Adjustments*, https://hr.uw.edu/comp/retention-payment (last visited Apr. 20, 2025) ("Departments are responsible for ensuring compliance with retention incentive payment requirements including: [r]eviewing the request for pay equity.").