

THE MARKET MYTH AND PAY DISPARITY IN LEGAL ACADEMIA

PAULA A. MONOPOLI

FULL CITATION:

Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867 (2016).

This article Copyright © 2016 *Idaho Law Review*. Except as otherwise expressly provided, permission is hereby granted to photocopy this article for classroom use, provided that: (1) Copies are distributed at or below cost; (2) The author of the article and the *Idaho Law Review* are properly identified; (3) Proper notice of the copyright is affixed to each copy; and (4) Notice of the use is given to the *Idaho Law Review*.

THE MARKET MYTH AND PAY DISPARITY IN LEGAL ACADEMIA

PAULA A. MONOPOLI*

TABLE OF CONTENTS

I. INTRODUCTION	867
II. THE EQUAL PAY ACT AND MARKET DEFENSES	869
III. APPLYING MARKET EXCUSES TO LEGAL ACADEMIA.....	872
A. The University of Denver Case	873
B. The University of Texas Case	875
C. Lessons Learned	879
IV. SOLUTIONS	882
A. Legal Solutions	882
B. Voluntary Solutions	884
V. CONCLUSION	886

I. INTRODUCTION

The Equal Pay Act provides that, “No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . 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.”¹

No profession is more suited to equal pay than the job of law professor.² In 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.

* Professor of Law and Founding Director, Women, Leadership & Equality Program, University of Maryland Carey School of Law, J.D. University of Virginia School of Law (1983), B.A. Yale College (1980). The author would like to thank Susan G. McCarty and Michael Tennison for their research assistance.

1. 29 U.S.C. § 206(d)(1) (2012) (quoted in Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 160 (2011)).

2. Note that my colleague, Professor Deborah Thompson Eisenberg has done excellent work on the fact that in professional positions, the pay gap is larger than in lower-paid, less professional jobs. The more subjective evaluation process explains some of this and her article, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17 (2010), is one of the most persuasive arguments for reform in this area.

So the basic professorial salary covers almost exactly the same work. How, then, did the following situation occur?

The federal commission that investigates discrimination in the workplace has threatened to sue the University of Denver's law school over what the commission calls a "continuing pattern" of paying female professors less than their male colleagues.

In a letter sent to the university on Friday, the director of the Equal Employment Opportunity Commission's office in Denver wrote that an EEOC investigation found a gender pay gap among the school's legal faculty dating back to at least 1973. The commission concluded that the university knew about the gap by 2012, "but took no action to ameliorate this disparity, in effect intentionally condoning and formalizing a history of wage disparity based on sex."

The EEOC's investigation came after longtime DU law school professor Lucy Marsh filed a complaint with the commission more than two years ago. Marsh's attorney on Monday provided a copy of the letter to *The Denver Post*.

Marsh said the law school could have to pay as much as \$1.2 million in total damages to its female law professors, in addition to paying them salaries going forward equal to what their male colleagues in similar positions are paid.³

After Professor Marsh filed her complaint with the EEOC in 2013:

The university hired a consultant to evaluate the law school's pay structure in 2014. According to the university's statement, the consultant concluded there is no evidence that gender plays a role in setting pay and that pay disparities result from a combination of a professor's rank, duties, age and performance scores.

But Melissa Hart, a University of Colorado law professor who specializes in employment law, said that type of structure can create exactly the problem the EEOC identified. Federal law requires a school to take action if its pay structure creates gender inequality, even if the discrimination isn't intentional, she said.

3. John Ingold, *EEOC Accuses DU Law School of Discriminating Against Women Professors*, DENVER POST, Aug. 31, 2015, http://www.denverpost.com/news/ci_28735459/eec-accuses-du-law-school-discriminating-against-women. The article goes on: "In 2012, Marsh, who has worked at DU's law school since 1973, was the school's lowest-paid full professor, making \$109,000 a year. The school's median salary that year for full professors was \$149,000." *Id.*

“That’s what the Equal Pay Act says,” Hart said. “If you see it, you have to fix it.”⁴

This wage gap in academia—even when controlling for rank—has been clearly documented.⁵ This paper will focus on the affirmative defenses to the Equal Pay Act that play a central role in perpetuating this pay gap in legal academia. These include exceptions for prior salary, competing offers, and negotiation. These affirmative defenses fall under the rubric of “market excuses” and their existence eviscerates the very law that was meant to make the practice of paying men and women differently illegal.

The paper will describe case law that interprets these affirmative defenses and applies the analysis in those cases to two recent, high-profile cases in the legal academic workplace. It will describe the current state of play in legal academia in terms of compensation decisions and the disparate impact that these practices have on women faculty and possible solutions, including the Paycheck Fairness Act.⁶

II. THE EQUAL PAY ACT AND MARKET DEFENSES

The Equal Pay Act was enacted in 1963 to remedy pay discrimination based on sex.⁷ But even if a female professor can make a *prima facie* case that her pay is less than that of a similarly situated male professor who teaches the same number of classes, sits on the same number of committees, and publishes the same number of articles, the law school can raise an affirmative defense based on “any other factor other than

4. *Id.* Professor Hart has written an excellent article on pay disparity in academia and the Lucy Marsh case in particular, Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENV. U. L. REV. 873 (2014). This paper will focus on how that case and a recent case at the University of Texas School of Law illustrate the holes in the Equal Pay Act as it applies to female faculty in the legal academy and the norms used to determine on compensation. It will not address pay discrimination actions under Title VII which, unlike the Equal Pay Act, is generally construed to require intentional discrimination.

5. MARTHA S. WEST & JOHN W. CURTIS, AM. ASS’N UNIV. PROFESSORS (AAUP), AAUP FACULTY GENDER EQUITY INDICATORS 12 (2006), <http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf>. This author has explored pay and other gender disparities in legal academia in two previous articles, Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745, and Paula A. Monopoli, *In a Different Voice: Lessons from Ledbetter*, 34 J. COLL. & U. L. 555 (2008).

6. Paycheck Fairness Act, S. 862, 114th Cong. (2015).

7. Pub. L. No. 98-38, 77 Stat. 56 (1963). See Porter & Vartanian, *supra* note 1, at 160 (citing 29 U.S.C. § 206(d)(1) providing that “No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . 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.”).

sex.”⁸ The institution can argue that the pay differential is not based on sex but rather it is based on the market which is allegedly free from bias. Known as the “fourth affirmative defense” in Equal Pay Act cases, a number of scholars have questioned the assumption that the market is in fact free from bias and have made an empirical case that using market-based factors like prior salaries and competing offers is infected with the bias that existed when those prior salaries were set or those competing offers were formulated.⁹

In their article, *Debunking the Market Myth in Pay Discrimination Cases*, Nicole Porter and Jessica Vartanian make the case that the market is not neutral in two ways. First, employers are subject to implicit bias that causes them “to value male employees more than female employees for reasons unrelated to skill or productivity.”¹⁰ A subsequent employer then uses that “erroneous valuation” to either match the higher salary of an incoming male recruit or when an existing male employee uses a competing offer to ratchet up their existing salary. “Therefore, prior salaries and outside offers do not represent a “neutral” market system”¹¹ Second, the same unconscious bias that creates this “erroneous valuation” of women’s worth also affects the way in which employers react when women respond to an initially low offer with a counteroffer.¹² Women are reluctant to negotiate, in part, due to social norms against it and in part because even when they do, “employers take a much tougher stance against female employees who negotiate than male employees who negotiate.”¹³ Accordingly, employers’ reliance on “willingness to negotiate” should not be allowed to justify paying women less than a man.”¹⁴

Porter and Vartanian note that prior salary appears to be the most frequently deployed market defense.¹⁵ For example, in *Wernsing v. Department of Human Services*:

[T]he plaintiff stated a prima facie case by demonstrating that she and a male co-worker received disparate starting monthly

8. 29 U.S.C. § 206(d)(1)(iv). (Once a plaintiff establishes that a pay disparity exists, the burden shifts to the employer to establish that the difference is attributable to a seniority system, a merit system, a system which is based on quantity or quality of production or that “(iv) a differential was based on any other factor other than sex.” *Id.*)

9. See, e.g., ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY IN AMERICA* (1999); Porter & Vartanian, *supra* note 1, at 163; see also Sharon Rabin-Marglioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807 (2010); Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579 (2001); Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. STATE L. J. 951 (2011); Deborah Brake, *Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889 (2016).

10. Porter & Vartanian, *supra* note 1, at 164.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 176.

salaries (\$2,478 compared to \$3,739) for substantially the same work. In defense, the Department alleged that the disparity was justified as a “factor other than sex” because the two employees’ salaries, like all other employees in the Department, were set pursuant to its company policy to “give lateral entrants a salary at least equal to what they had been earning” previously. Although the court did not deny the possibility that a prior salary could be discriminatory, it reasoned that discrimination “is something to be proved rather than assumed.” Because the plaintiff failed to even suggest that her or her male colleague’s prior salary was discriminatory, the court affirmed the lower court’s grant of summary judgement in the Department’s favor.¹⁶

And competing offers have successfully been used as a defense as well. In *Winkes v. Brown University*:

[T]he First Circuit upheld the defendant’s decision to match a competing offer as a valid “factor other than sex.” The case involved art instructors in a two-person department at Brown University, Rudolf Winkes and Catherine Zerner, both earning \$18,000 a year. When Zerner received a competing offer from Northwestern University for \$25,000, the defendant matched it in an effort to retain her, increasing Winkes salary to just \$19,500. . . . [T]he court upheld the defendant’s market excuse despite the finding that such an extensive raise would not have been offered to a man and testimony from a university chairperson that Winkes and Zerner were equals in virtually every respect other than sex.¹⁷

Finally, Porter and Vartanian note that the market defenses include the ability of an employer to use the fact that a male employee negotiated for more compensation as a defense to paying a male employee who does the same work more than his female counterpart.¹⁸ In one case:

The plaintiff was receiving \$7500 annually as a physical education instructor for the defendant. Shortly after hiring the plaintiff, the defendant offered a male physical education instructor the standard \$7500, but the male instructor was unwilling to accept less than \$9,000. The court accepted salary negotiation as a factor other than sex, stating “an employer may consider the

16. *Id.* at 177 (citing *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 467 (7th Cir. 2005)).

17. *Id.* at 177–78 (citing *Winkes v. Brown Univ.*, 747 F.2d 792 (1st Cir. 1984), and noting that the University had entered into a consent decree to “cure claims of discrimination under Title VII, a fact that went a long way to persuade the court in finding the defendant’s actions to retain a valued female instructor reasonable.”).

18. *Id.* at 178–79 (citing *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980)).

market place value of the skill of a particular individual when determining his or her salary.”¹⁹

Porter and Vartanian note that several lower courts have made similar determinations and cite a North Dakota District Court case in which the court, “found that an employer paying a male employee a higher salary than a female performing the same job does not violate the EPA where the male demanded more pay during salary negotiation.”²⁰ And the District Court for the District of Maryland, “in a reverse EPA claim also accepted salary negotiation as a defense to a sex-based wage disparity saying that the “only difference was that McNierey accepted the \$33,000 while Ms. Inglesh . . . negotiated and received an extra \$2,000.”²¹ Finally, a similar result obtained in New York where the employer argued the male employee refused to work for less and that was a factor other than sex.²²

III. APPLYING MARKET EXCUSES TO LEGAL ACADEMIA

The definition of merit in academia is highly subjective, based in large part on the rank of the journal one publishes in and how often one publishes.²³ It also turns on the field one publishes in, with constitu-

19. *Id.*

20. Porter & Vartanian, *supra* note 1, at 179 (citing *Walter v. KFGO Radio*, 518 F. Supp. 1309, 1318 (D.N.D. 1981)).

21. *Id.* at 179 (citing *McNierney v. McGraw-Hill, Inc.*, 919 F. Supp. 853, 860 (D. Md. 1995)).

22. *Id.* at 179 (citing *McHenry v. One Beacon Ins. Co.*, 2005 U.S. Dist. LEXIS 46573 at *36 (E.D.N.Y. 2005)).

23. To the degree that teaching is valued at all, there is also substantial evidence that teaching evaluations are skewed by gender bias as well. *See, e.g.*, Anne Boring et al., *Student Evaluations of Teaching (Mostly) Do Not Measure Teaching Effectiveness*, SCIENCEOPEN RES. (Jan. 7, 2016), <https://www.scienceopen.com/document/vid?id=0bc459de-6f8f-487f-b925-863834a74048>. *See also* Joey Sprague & Kelley Massoni, *Student Evaluations and Gendered Expectations: What We Can't Count Can Hurt Us*, 53 SEX ROLES 779, 791 (2005). The authors write:

Note that students' memories of their worst-ever teachers appear to be more emotionally charged than their memories of their best-ever teachers and that the most hostile words are saved for women teachers. The worst women teachers are sometimes explicitly indicted for being bad women through the use of words like bitch and witch. Students may not like their arrogant, boring and disengaged men teachers, but they may hate their mean, unfair, rigid, cold, and “psychotic” women teachers. These findings are substantiated by the observations of other feminist researchers who have reported incidents of student hostility toward women instructors who are perceived as not properly enacting their gender role or who present material that challenges gender inequality. . . . That is, women teachers may be called on to do more of what sociologists call emotional labor, labor that is frequently invisible and uncounted. Thus, if teachers are being held accountable to, and are attempting to meet, gendered standards, then women and men may be putting out very different levels of effort to achieve comparable results. If it takes more for a woman to get a 5 and she nearly kills herself to do it, that difference in effort will not be measurable on student rating scales.

tional law at the top of the hierarchy and family law and gender-related issues at the bottom.²⁴ And pay is often tied to the ability to move laterally, with visiting positions often required, a practice that disproportionately adversely affects women, who are less likely to have spouses who will follow them.²⁵ Compounding these subjective evaluation processes is that fact that courts have historically been more reluctant to intervene in higher education discrimination cases, including race and gender cases, giving even more deference to university and colleges than other types of employers.²⁶

There have been two high profile cases in legal academia in the past several years that present useful illustrations of why amending the “any other factor other than sex” defense with an alternative like “bona fide factor other than sex, such as education, training or experience” can make the Equal Pay Act more effective. The first case is that of Professor Lucy Marsh, noted above, of the University of Denver Sturm College of Law. Marsh was the lowest paid faculty member at the school after forty years of teaching. The second case involved the release of documents pursuant to a Texas Public Information Act request by faculty members at the University of Texas School of Law documenting previously undisclosed compensation in the form of six-figure forgivable loans to certain faculty members, very few of whom were women. A discussion of the two cases, and how the “any other factor other than sex” defense is an exception that swallows the rule, illustrates why market excuses are so pernicious in terms of gender pay disparities in legal academia.

A. The University of Denver Case

In the first case, Professor Lucy Marsh was at a private school that did not publish faculty salaries.²⁷ In an effort to discover whether female faculty members were paid less across the board, Professor Marsh became aware that she was in fact the lowest paid faculty member at the institution.²⁸ She persisted in asking the dean to correct the salary disparity.²⁹ However, in making raises from the pool given by the universi-

Id. at 791 (internal citations omitted).

24. See Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483 (2012) (ranking constitutional law articles among the most cited of all time).

25. See, e.g., Joan Williams, *What Stymies Women's Academic Careers? It's Personal*, THE CHRON FOR HIGHER EDUC., Dec. 15, 2000, at B10.

26. Barbara A. Lee et al., *Implications of Comparable Worth for Academe*, 58 J. HIGHER EDUC. 609, 618–20 (1987).

27. See Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENV. U. L. REV. 873, 890 (2014) (“[T]he University of Denver is like most private employers in maintaining secrecy about salaries.”).

28. Professor Lucy Marsh: Attachment to EEOC Intake Questionnaire, <http://www.scribd.com/doc/152792415/EEOC-addendum>.

29. *Id.*

ty, he stated in a memo that those raises were made without correcting for gender disparities.³⁰

In her article *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, Professor Melissa Hart explores the structures that contribute to gender pay disparity in academic work and looks closely at the Lucy Marsh case.³¹ Hart's article astutely points out the recurring strategic "move" of changing the focus from the institution to the individual in these cases, some of which is driven by the very structure of the statutes themselves.³² After Lucy Marsh decided to file a complaint with the EEOC, the law school responded by noting that her performance was "sub-standard", despite her having received teaching awards and accolades from the state supreme court for her experiential teaching.³³

But perhaps the most salient fact was that the dean stated in his memorandum explaining how he had allocated the funds received as part of a university-wide "Faculty Salary Competitiveness Initiative":

I want to briefly reference gender-based equity considerations, as I know that our late colleague Ann Scales had asked about this issue and others have expressed interest in it as well. In this round of the Initiative, funds were limited to the top 25 performers without regard to trying to correct potential inequities. . . . For Full Professors (excluding the former dean), females constitute 32% of the group and receive 30% of the salary dollars, both before and after this round of raises. The median salary for female Full Professors was \$7,532/year less than that for males before this round of raises and \$11,282/year less than that for males after this round of raises. The mean salary for female Full Professors was \$14,870/year less than that for males before this round of raises and \$15,859/year less than for males after this round of raises.³⁴

The dean went on to argue that the figures calculated could not be understood in a vacuum and that there were three reasons for the differentials including (1) different starting salaries due to variations in

30. Ingold, *supra* note 3 (quoting Memo from Dean of Univ. of Denver Sch. of Law to Tenured, Tenure Track, and Long Term Contract Law Faculty (Dec. 13, 2012), "In the 2012 memo, which explained how \$1.5 million in raises was awarded that year, [the] law school dean noted the gender pay disparity but said raises would be given 'without regard to trying to correct potential inequities.' After the raises, female full professors on average made nearly \$16,000 a year less than their male counterparts.").

31. See Hart, *supra* note 27.

32. *Id.* at 877.

33. Ingold, *supra* note 3 ("In a statement, the law school defended its merit-based pay structure and blamed Marsh for her lower salary, saying she showed 'sub-standard performance in scholarship, teaching and service.'").

34. Memo from Dean of Univ. of Denver Sch. of Law to Tenured, Tenure Track, and Long Term Contract Law Faculty (Dec. 13, 2012), <http://www.scribd.com/doc/152790023/DU-Faculty-Competitiveness>.

teaching and legal experience “as well as any special circumstances or deals that may have affected that number,” (2) differences in merit raises over many years and (3) different circumstances in salary histories including “offers from other schools or lasting salary effects from holding administrative positions.”³⁵ The dean concludes by offering to do an individual analysis of any one salary and argues that only through such an analysis can one determine if an inequity exists.³⁶ However, he warns that “unless I have strong evidence to the contrary, I will need to assume that all of my predecessors’ merit raises were accurate reflections of performance.”³⁷ Much like Hart notes in her article, the move is toward an individualized rationale and away from systemic gender bias in pay.

The lack of transparency at a private law school contributed in a significant way to the female faculty’s difficulty in even being able to document that pay disparity existed.³⁸ Denver University Law Professor Ann Scales began the quest for this information.³⁹ Her untimely death and Lucy Marsh’s admirable decision to continue the work of uncovering the data was the only way for the disparity to begin to be ameliorated. That is hardly a way to create an incentive for the law to work without enforcement and litigation. In addition, the explicit reliance on past merit decisions illustrates nicely the point Porter and Vartanian make about past salaries and other compensation decisions not being the product of a neutral market but rather being infected with gender bias themselves. Relying on these decisions going forward and being able to rely on these as a defense to the Equal Pay Act seems an enormous exception that consumes the rule itself. Similarly, the lack of transparency in pay makes it impossible for women to negotiate equal compensation, similarly a defense to an EPA claim. This, too, seems like a vast exception to the rule that threatens to make the rule toothless. So how do women faculty fare when they are at public universities in states that require public employee compensation be made public each year? As we shall see, still not so well.

B. The University of Texas Case

Even when a faculty member works at a public institution that requires publication of all faculty salaries, she may still be the victim of pay disparity. In 2011, a group of faculty members filed a Texas Public

35. *Id.* at 4.

36. *Id.*

37. *Id.*

38. See Hart, *supra* note 27, at 890 (“Only when the dean of the law school, in an effort to be more transparent, circulated a memo to the faculty identifying a significant difference in median pay for male and female full professors did the possibility of a direct challenge to that disparity become evident.”).

39. Professor Lucy Marsh, Attachment to EEOC Intake Questionnaire, <http://www.scribd.com/doc/152792415/EEOC-addendum>.

Information Act request that revealed the existence of a non-public program, funded by the law school's Foundation and used to compensate certain faculty members.⁴⁰ This additional compensation came largely in the form of "forgivable loans" that need not be paid back if certain terms involving length of stay were met.⁴¹ The rules in Texas required that faculty member salaries be published every year since the institution is a state school.⁴² These "loans" were not included in the published salaries of the faculty who received them.⁴³ When the loans were made public, the dean justified them on the basis of recruiting star faculty from around the country and retaining them.⁴⁴ This would presumably meet the "any other factor other than sex" market defense under the Equal Pay Act.⁴⁵

The December 2014 Report of the Texas Attorney General gives an inside view of how faculty hiring really works and it is not a system favorable to women.⁴⁶ Using dominantly masculine terms like "free agent" to describe the legal hiring market and having a "war chest" to recruit the "very best faculty," the former dean who began the program (not the dean in place when it was revealed) yields a glimpse of a system of faculty hiring suited more to professional baseball than to law schools.⁴⁷ Allowing such decisions to be essentially exempt from the Equal Pay Act because of market excuses completely vitiates any real protection for female faculty. It belies any idea of fair and equal consideration on the merits.

At Texas, a separate law school foundation raised and managed funds used for this additional compensation.⁴⁸ The foundation was housed in the law school and it shared staff with the law school at one point in its existence.⁴⁹ The board deferred to the dean's view of who was a valuable faculty member, worthy of paying a premium to recruit

40. Ralph K. M. Haurwitz, *AG's Office Wraps Up Investigation of Forgivable Loans at UT Law School*, STATESMAN (Jan. 16, 2015), <http://www.statesman.com/news/news/state-regional-govt-politics/ags-office-wraps-up-investigation-of-forgivable-lo/njqR5/> ("Until a 2011 open-records request by three UT law professors, it wasn't publicly known that about 20 of their colleagues had received forgivable loans from the Law School Foundation . . .").

41. *Id.*

42. TEX. GOV'T CODE ANN. § 552.022(a)(2) (West 2011) (listing government employee salary as a category of public information).

43. See Haurwitz, *supra* note 40.

44. Univ. Tex., Report and Recommendations on the Relationship Between the University of Texas at Austin School of Law and the University of Texas Law School Foundation 19 (Oct. 15, 2012), https://static.texastribune.org/media/documents/FINAL_Report_and_Recommendations_date_d_10-15-2012_2.PDF.

45. 29 U.S.C. § 206(d)(1) (2012).

46. OFFICE OF THE ATTORNEY GENERAL OF TEXAS GREG ABBOTT, REPORT (2014), <https://www.utsystem.edu/sites/utsfiles/documents/board-regents/attorney-general-report-ut-austin-law-school-foundation/report-release-redacted.pdf>. [hereinafter Attorney General Report].

47. *Id.* at 16.

48. *Id.* at 4.

49. *Id.* at 8.

or retain.⁵⁰ The faculty budget committee was not told about the amounts of the additional compensation.⁵¹

These forgivable loans were given disproportionately to male faculty.⁵² One of the few female faculty members who had received such a loan had to threaten a lawsuit to get one.⁵³ A well-known legal scholar, she sent a demand letter to the dean stating that the law school was not in compliance with the Equal Pay Act with regard to her compensation.⁵⁴ According to the findings of the Attorney General in his Report, the dean settled the matter.⁵⁵ The settlement included increased state compensation and a \$250,000 forgivable loan.⁵⁶

In the wake of the Public Information Act request and the disclosure of the loan program, the president of the university asked the dean for his resignation citing deep divisions at the law school.⁵⁷ The local papers noted that one aspect of the controversy was gender pay disparity: “The resignation comes after three UT law professors made an open records request for financial information. The records show several sex discrimination complaints by women and a possible “gender pay gap,” the Texas Tribune says.”⁵⁸

50. See Ralph K. M. Haurwitz, *UT's Powers, Law Dean Differ on Circumstances of \$500,000 Loan*, STATESMAN, Dec. 14, 2011, <http://www.statesman.com/news/news/local/uts-powers-law-dean-differ-on-circumstances-of-500/nRh3J/> (“Marilyn Phelan, a former general counsel for the Texas Tech University System and the author of a book on nonprofit organization law, ... described the foundation’s role as little more than rubber-stamping the dean’s recommendations.”).

51. *Id.* at 22.

52. See Attorney General Report, Exhibit C, http://s3.amazonaws.com/static.texastribune.org/media/documents/Haurwitz_et_al_Redacted_Report_for_Release.PDF (listing twenty-one faculty members who received forgivable loans, only three of whom were female).

53. Attorney General Report at 23.

54. *Id.*

55. *Id.*

56. *Id.*

57. Haurwitz, *supra* note 50.

58. Debra Cassens Weiss, *UT Law Dean Asked to Resign over ‘Divided Atmosphere’ Caused by Faculty Largesse*, A.B.A. JOURNAL, Dec. 9, 2011, http://www.abajournal.com/news/article/ut_law_dean_asked_to_resign_over_divided_atmosphere_caused_by_faculty_large/. The outgoing dean established a Gender Equity Task Force as one of his last acts that was charged with examining “all tenure and tenure-track faculty compensation information, including loan agreement information, to determine whether [the] compensation structure raises gender equity concerns” Letter from Dean to Colleagues, http://static.texastribune.org/media/documents/Letter_to_My_Colleagues.doc (last visited April 28, 2016). The dean noted that the Task Force might consider “the temporary freezing of some group of salaries” as one means of correcting any inequities found. See *id.* Note that the current dean says that such loans are no longer given but certain, more modest funds are still used to recruit and retain faculty. Those amounts are included in the published compensation numbers. Reeve Hamilton & Morgan Smith, *UT President Asks Law School Dean to Resign Immediately*, TEX. TRIB., Dec. 8, 2011, <http://www.texastribune.org/2011/12/08/dean-ut-law-signs-letter-resignation/>; See Haurwitz, *supra* note 50.

The documents released as a result of the Public Information Act request include a letter from a female professor that illustrates the problem with not knowing—even in a public system that requires the information to be published—the total amount of compensation of colleagues due to off-the-books compensation.⁵⁹ In several meetings with the dean which she documents in a subsequent letter to him, this professor communicates her view that she was being undercompensated vis a vis a male colleague. She states that in her first meeting with the dean about this view, she was asked to take on an additional committee assignment:

Thank you for meeting with me recently to discuss my concerns about gender equity in pay and institutional governance assignments at the law school in general, and gender-based inequities in my salary in particular. . . .

In our first meeting, . . . I explained to you it is my belief that my salary is substantially lower than identifiable male faculty members who perform substantially equal work on jobs requiring equal skill, effort and responsibility, and that there are no factors other than gender that explain this pay gap. I also reiterated my request that you appoint more women to the Budget Committee, in light of serious questions about gender pay inequities at the law school and the charge to the Budget Committee to constitute a gender equity subcommittee. As I said during our meeting, women are underrepresented on all the major governing committees at UT law school. With respect to the Budget Committee in particular, I cannot see how a committee comprised of eight men and one woman can put together a credible gender equity committee.⁶⁰

The female professor then memorializes what the dean said in response, in terms of historical factors that may have led to the salary gap and the budget limitations that he was dealing with that did not allow him to fix it.⁶¹ According to her letter, the dean would not share the salaries of other faculty members so they could have an informed discussion of whether there was a gender gap.⁶² Instead, she notes that he asked her to do more work by joining the budget committee.⁶³ Already teaching a heavy load and chairing the time-consuming tenure committee, the professor declined and recommended two other female faculty

59. See Letter from Professor to Dean, *Public Information Act disclosure, Open Records Request*, TEX. TRIB. (Oct. 10, 2011), http://static.texastribune.org/media/documents/ut_law_school_open_records.pdf (hereinafter Letter from Professor to Dean).

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.*

members, both of whom had consistently asked to serve on the budget committee but had not been appointed.⁶⁴

What is striking about the letter is that it asserts that the dean confirmed in a second meeting that at least one male faculty member made \$30,000 more than the female professor for:

[P]erforming substantially equal work on a job requiring equal skill, effort and responsibility. In fact of course, when you consider teaching load, institutional governance responsibility, and other measures of contributions to the law school mission, I perform substantially more work each year than that particular male colleague does. In light of this gender gap, you promised that you would seek a substantial raise for me during the current salary cycle.⁶⁵

It is not clear how effective this negotiation, documented in the letter she wrote after the meeting, was, since the salary data released in the Public Information Act request by faculty did not go beyond the 2010-2011 academic year. The professor received a verbal agreement to remedy the situation but was also asked to do even more institutional service work, which she declined.⁶⁶ This letter illustrates what many female faculty members already know; even if women do ask for appropriate pay, they are often asked to do more for the same pay.⁶⁷ And negotiating pay is behavior that is outside acceptable gender norms in our society, and women are often met with resistance.⁶⁸

C. Lessons Learned

So what do these two recent cases in academia and the attendant memoranda and letters that have been made public tell us about how the Equal Pay Act and its market defenses contribute to the slow progress of women's full pay equity in legal academia? First, they reveal a compensation game grounded in an arms race mentality for U.S. News Rankings as a measure of faculty quality, one replete with competitive masculine norms. As the Texas dean said to his faculty in an explanatory memorandum:

64. *See id.*

65. *See* Letter from Professor to Dean, *supra* note 59.

66. *See id.*

67. There is significant empirical data that shows that men are evaluated based on their future potential (because of gender schemas about competence), and women are judged only on actual achievements and this letter reflects a variation on that principle—more work for the same pay. *See* JOAN C. WILLIAMS & CONSUELA A. PINTO, FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS 19–21 (ABA 2d ed. 2008).

68. Yuki Noguchi, *Some Companies Fight Pay Gap by Eliminating Salary Negotiations*, NPR (Apr. 23, 2015), <http://www.npr.org/2015/04/23/401468571/some-companies-fight-pay-gap-by-eliminating-salary-negotiations>.

Those [aggressive and generous compensation practices at Harvard, Yale and NYU] have become the norm, not the exception, among top twenty law schools. They are the practices with which we have had to contend in the course of our faculty building. I cannot speak with confidence of Yale's fabled offers in the \$500,000 to \$600,000 range, but in our own experience, candidates whom we have wished to hire have been offered more than \$400,000 a year, along with other substantial emoluments of the sort I will describe below.

. . . .

. . . We, too, have frequently included non-salary commitments, in the form of one-time loans. These have been accompanied with a promise on our part to defray the costs of repaying the loan in annual installments of five or seven years, provided that the recipient of the loan remains on our faculty. . . .

Many of our lateral hires have received such loans. In some cases, I was responding directly to one-time bonus offers by other schools. In other cases, I was trying to meet generous offers made on other terms by competing schools. These other terms included, in addition to a high annual salary, substantial housing assistance, generous college tuition benefits, massive programmatic funds, and the prospect of university professorships. . . .

During the same period, some of our own colleagues came to be at immediate risk of departure. . . . The loan arrangements [to existing faculty] were intended to make it attractive for our colleagues and their partners to back away from the brink and renew their commitment to remain members of our community.⁶⁹

Second, they reveal a lack of transparency even in public law schools that were by law mandated to reveal salary information. Not only were the loans at issue in Texas not reflected in published salary data, for many years they were not revealed to the faculty members on the budget committee:

Parallel to these events has been the question of the openness of our compensation commitments to faculty review. When I became Dean, at least three categories of compensation were not available for review by the Budget Committee: summer research stipends; most other salary supplements described in various ways, including "housing" supplements; and the loan arrangements described above. At the outset of my deanship, the Budget Committee urged me to make information about all aspects of our compensation available. I declined to do so. I was accus-

69. See Letter from Dean to Colleagues, *supra* note 58, at 1-2.

tomed to a law school compensation environment typical of almost every elite American law school—an environment in which faculty members could and did engage with the Dean about their own compensation packages, but did not know how that package compared to their colleagues' compensation. This is true even in a number of state schools, where the official reported compensation excludes key compensation arrangements, arrangements most typically associated with large-ticket housing support.⁷⁰

If women are not aware that such kinds of additional “salary supplements” are something that is being offered to others, how fair is the defense that they did not negotiate for them? As noted above, one female professor in the Texas case sent a demand letter arguing a violation of the Equal Pay Act.⁷¹ So her negotiation was accompanied by threat of legal action. That kind of litigation is expensive and it takes a terrible toll.⁷² This complete lack of transparency and information is fatal to any effective negotiation, even in the rare case that women ask and are met with positive result.

Finally, the cases pull the curtain away to expose the practices that have been used to set faculty pay and additional compensation since women joined the legal academy in significant numbers. The Denver dean and the former Texas dean both relied on justifications grounded in past decisions about merit.⁷³ They illustrate one of the most significant issues identified by scholars who criticize the “other factor other than sex” defense. It reifies past salary decisions which were themselves infected with gender bias.⁷⁴ It is problematic but not atypical that both deans pointed at these past decisions and then proceeded to suggest that they had neither the obligation nor the means to correct them. And perhaps legally they did not, if employers who use prior salary as a means to justify paying male employees more are protected by the “market excuses defense” as it currently exists.

70. *Id.* at 4–5.

71. See Attorney General Report, *supra* note 46, at 23.

72. AAUW Educ. Found. & AAUW Legal Advocacy Fund, Tenure Denied: Cases of Sex Discrimination in Academia 1, 63 (2004), <http://www.case.edu/president/aaction/TenureDenied.pdf> [hereinafter AAUW, Tenure Denied].

73. See Ingold, *supra* note 3; Letter from Dean to Colleagues, *supra* note 58, at 1–3 (stating that forgivable loans were offered to attract and retain highly-valued faculty members, whose value was presumably determined, in part, on prior merit-based pay decisions).

74. Porter & Vartanian, *supra* note 1.

IV. SOLUTIONS

A. Legal Solutions

Legal solutions include an amendment to the Equal Pay Act via the Paycheck Fairness Act which would “replace the current fourth affirmative defense language—“any other factor other than sex”—with “a bona fide factor other than sex, such as education, training or experience.”⁷⁵ That Act has languished in Congress, failing to get the support of the Senate for a number of years. In its current version it would also state that the “bona fide factor” shall only apply if the employer demonstrates that such factor satisfied the following: “is not based upon or derived from a sex-based differential in compensation, is job related with respect to the position in question’ and is consistent with business necessity.”⁷⁶ Furthermore, this defense will not apply if the employee can demonstrate that an alternative employment practice exists that would serve the employer’s business needs without producing the pay differential.”⁷⁷

In the case of a male faculty member who brings an outside offer to the dean, this amended language would:

[O]nly allow the use of [an outside offer] if the employer could demonstrate that the factors were job-related and consistent with business necessity. Taking the job-related requirement first, it seems difficult to make an argument that . . . an outside, competitive offer is job-related. . . . [A]n outside offer if related to the job of another employer. An employer might try to argue that an outside competitive offer is job-related if the employee is threatening to leave his job if the employer does not match the offer. However, that is not the proper interpretation of job-related. The language of the “job-related” and “consistent with business necessity” requirements is identical to the language of . . . Title VII.⁷⁸

Thus, the proper test is whether meeting the male employee’s competitive offer is necessary for its business. If the employer decides that it is, it can meet the terms of the statute by raising the salaries of female

75. Paycheck Fairness Act, S. 862, 114th Cong. (2015). *See also* BENJAMIN COLLINS & JODY FEDERAL, CONG. RES. SERV., RL31867, PAY EQUITY: LEGISLATIVE AND LEGAL DEVELOPMENTS 9 (2013) (noting that the bill would revise the exception to the prohibition for a wage rate differential based on any other factor other than sex. It would limit such factors to bona fide factors, such as education, training, or experience. The bill would state that the bona fide factor defense shall apply only if the employer demonstrates that such factor: (1) is not based upon or derived from a sex-based differential in compensation, (2) is job-related with respect to the position in question, and (3) is consistent with business necessity. Makes such defense inapplicable where the employee demonstrates that: (1) an alternative employment practice exists that would serve the same business purpose without producing such differential, and (2) the employer has refused to adopt such alternative practice).

76. Porter & Vartanian, *supra* note 1, at 165.

77. Porter & Vartanian, *supra* note 1, at 165.

78. Porter & Vartanian, *supra* note 1, at 198.

employees who are doing similar work.⁷⁹ If the employer argues that is too expensive, that “cost defense” should rarely be accepted by courts, given the clear legislative intent to have employers bear some of the burden in meeting the goals of the Equal Pay Act.⁸⁰ In academia, if a male recruit has neither more years of teaching experience nor an additional degree than a current female faculty member, the Paycheck Fairness Act amendments would require such a result if, after looking at these bona fide factors other than sex, a university decided to go forward and hire that male recruit.

In the Texas case, this analysis applied would mean offering similar forgivable loan salary supplements to female faculty who were doing the same work but who might not be able to solicit competitive offers due to family considerations that kept them in Austin. At the very least, it would make the program so expensive that it might have brought it to an end without a major controversy that brought negative publicity to the institution, undermining the program’s arguable rationale—improving the law school’s reputation. This is particularly true in light of the *Sauceda v. University of Texas*.⁸¹ In her article for this symposium,⁸² Professor Deborah Brake notes that in *Sauceda*, “[T]he court rejected “salary compression”—in which the university paid more to attract new hires from an outside university while paying less to existing faculty members—as a factor other than sex, equating the employer’s “supply and demand” argument to the kind of stereotyped, sex-based assumptions embedded in the employment market that Congress sought to correct through the EPA.”⁸³

In the Denver case, it would have meant adjusting salaries so that the law school might have been able to argue to the central campus that the differential in mean/median had to be remedied by law and that the central campus should provide the funds to do so. If the effort to amend the Equal Pay Act through the Paycheck Fairness Act described above were eventually successful, female faculty members “should be able to make a convincing argument that prior salary and outside offers are not “job related with respect to the position in question” but rather refer to former and potential positions.”⁸⁴ And even without enactment, the provisions of the Paycheck Fairness Act have had an effect on judicial approaches to the factor-other-than-sex defense. Professor Brake notes that the nascent trend to narrowly construe market defenses, as the Paycheck Fairness Act would require if enacted, is apparent not only in *Sauceda* but also in *Drum v. Leeson Electric Company*⁸⁵, in which, “the

79. Porter & Vartanian, *supra* note 1, at 198–99.

80. Porter & Vartanian, *supra* note 1, at 199.

81. *Sauceda v. Univ. of Tex.*, 958 F. Supp. 2d 761 (S.D. Texas 2013).

82. Brake, *supra* note 9, at 889.

83. Brake, *supra* note 9, at 899.

84. Porter & Vartanian, *supra* note 1, at 166.

85. *Drum v. Leeson Elec. Co.*, 565 F.3d 1071 (8th Cir. 2009).

Eighth Circuit took a similarly dim view of reliance on market value to set pay . . . cautioning that courts must take care to ensure that they do not permit employers to pay women lower wages simply because the market will bear it. The *Dreves* court, . . . in granting summary judgment to the employee, was particularly scathing about the employer's reliance on the comparator's negotiation skill to justify his higher pay, admonishing that a pay disparity is no more justified when it is the result of a single negotiation than when it is the result of a market-wide phenomenon in a market that differently values the work of men and women."⁸⁶

B. Voluntary Solutions

Even without the Paycheck Fairness Act amendments to the Equal Pay Act, law school deans can implement voluntary solutions.⁸⁷ These include implementing pay transparency, banning negotiation and matching competitive offers, ignoring prior salaries and using more rigor in setting pay.⁸⁸ In January 2016, President Obama announced that by federal rule all companies with more than 100 employees would have to break down and report pay data by race, ethnicity and gender in an effort to increase transparency and close the pay gap.⁸⁹ As we have seen above, pay transparency may exist at public institutions in academia. But even then, private donor endowments for chairs and soft money for program director stipends or additional compensation to secure a hire from funds other than law school funds, e.g. president and central campus funds, can still make it difficult for female faculty to discover that they are being paid less for doing exactly the same job.

And deans could ban negotiation in dealing with faculty recruits. Women tend to negotiate less and get punished more than their male

86. Brake, *supra* note 9, at 900 (citing *Dreves v. Hudson Grp. Retail*, 2013 U.S. Dist. LEXIS 82636 (D. Vt. 2013) in which, "the Court rejected several factors commonly asserted under the FOTS defense, prior salary, inducement, and negotiation.").

87. Note that even if the Paycheck Fairness Act is enacted, it will not be a panacea. As Professor Deborah Brake notes in her article for this Symposium, "Even if the anything-goes approach to the FOTS defense were replaced with a job-relatedness and business necessity standard, however, the problem would remain that many courts will never reach the defense because of the strict approach to the similarity required to make out a prima facie case of unequal pay for substantially equal work. Doctrinally, increasing judicial scrutiny of the strength of the employer's reason will not help clear this hurdle. And yet, shifting the equal pay claim away from a search for deliberate discriminatory intent may, indirectly, lead courts to view this threshold issue differently." Brake, *supra* note 9, at 910.

88. See Eisenberg, *supra* note 9.

89. Laura Putre, *The Lowdown on Obama's New Equal Pay Rule*, INDUSTRY WEEK (Feb. 10, 2016), <http://www.industryweek.com/labor-employment-policy/lowdown-obamas-new-equal-pay-rule>.

counterparts when they ask for salary increases.⁹⁰ Moving to a flat offer would have a significant effect on closing the gender gap.⁹¹

Another answer is to ban pay negotiation completely. That is what Ellen Pao did when she was chief executive of Reddit. The company established pay ranges based on roles and experience and gave applicants nonnegotiable offers. “We put the onus on the company to pay fairly instead of on candidates to negotiate fair pay,” Ms. Pao wrote in *The Hollywood Reporter*. . . .⁹²

Deans could also conduct comprehensive reviews of the existing salary array. Women fare far worse when prior salaries are considered that already reflect a biased market, either too low for the woman herself or too high in a colleague coming in as a lateral hire.⁹³ Such studies could yield important information in salary distortions that were likely the result of such bias:

If women can lose millions over their careers because they get job offers based on pay that is already low, one way to stop the pattern is to ignore their past salaries. Google has said it does this and instead makes offers based on what a job is worth. In August, the federal Office of Personnel Management said government hiring managers could no longer rely on an employee’s previous salary when setting his or her new one. The acting director, Beth Cobert, explained that the practice particularly disadvantaged women who had taken time off to raise children. Women are also more likely to have worked in the lower-paying public or nonprofit sectors.” “Don’t ask about salary history for new hires, and it really reduces the impact of previous discrimination,” Ms. Babcock said. “I think that is the most effective thing organizations can do.”⁹⁴

Paying for the job and not the person is the right thing to do in academia. Men and women who are of the same rank should be paid the same. They teach the same number of credits, have the same publication expectations and do the same committee work. In fact, there is substantial evidence that women actually do more invisible work than men who hold the same rank in academia.⁹⁵

90. Margaret A. Neale & Thomas Z. Lys, *More Reasons Women Need to Negotiate Their Salaries*, HARV. BUS. REV. (June 29, 2015), <https://hbr.org/2015/06/more-reasons-women-need-to-negotiate-their-salaries>.

91. Linda Babcock & Sara Laschever, *Women Don’t Ask: Negotiation and the Gender Divide* 1–2 (2003).

92. Claire Cain Miller, *How We Can Bridge that Stubborn Pay Gap*, N.Y. TIMES, Jan. 15, 2016, at BU6 (citation omitted).

93. *Id.*

94. *Id.*

95. Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 150–51 (2009) (citing, among other sources, Nancy Levit, *Keeping Feminism in Its*

V. CONCLUSION

Legal education is in crisis. The *New York Times* and the *Wall Street Journal* continue their drumbeat that it is overpriced and underperforming in terms of jobs for its graduates.⁹⁶ That critique has been refuted by some,⁹⁷ but it generally resonates with the public and much of the professoriate itself. The arms race for U.S. News rankings has had much to do with distorting the functions of the law school itself. The heart of that enterprise sits in the classroom but the clamor to move up the rankings, a dominantly masculine form of competing for status within hierarchy, has brought legal education to its knees.

I have argued in the past that the undervaluation of teaching at the expense of certain kinds of scholarship is linked to that arms race.⁹⁸ I have also argued that it is connected to the influx of women into the legal academy in significant numbers and the association of teaching with feminine norms.⁹⁹ In this piece, I have argued for amending one of the major legislative enforcement mechanisms available to remedy pay discrimination based on gender. I would go one step further and predict that if the Equal Pay Act market defense were amended, we would see a healthier, more robust focus on the heart of the law school enterprise—

Place: Sex Segregation and the Domestication of Female Academics, 49 U. KAN. L. REV. 775, 777, 786–87 (2001); Kristen Monroe et al., Gender Equality in Academia: Bad News from the Trenches, and Some Possible Solutions, 6 PERSP. POL. 215, 220, 229–30 (2008)). *Id.* at 151–52 (“Another study of forty professors (twenty men and twenty women) at four major research universities found that sixteen of the twenty women (eighty percent of the female subjects), as opposed to five of nineteen men (twenty-six percent of the males), noted that they had experienced significant increases in institutional service responsibilities that detracted from their “scholarly learning.”) (citing Aimee LaPointe Terosky et al., Shattering Plexiglas: Continuing Challenges for Women Professors in Research Universities, in UNFINISHED AGENDAS: NEW AND CONTINUING GENDER CHALLENGES IN HIGHER EDUCATION 52, 61 (Judith Glazer-Raymo ed., 2008)).

96. See, e.g., Elizabeth Olson, *Study Cites Lower Standards in Law School Admissions*, N.Y. TIMES, Oct. 26, 2015, at B1; The Editorial Board, *The Law School Debt Crisis*, N.Y. TIMES, Oct. 24, 2015, at SR8; Steven J. Harper, Opinion, *Too Many Law Students, Too Few Legal Jobs*, N.Y. TIMES, Aug. 25, 2015, at A15; Elizabeth Olson & David Segal, *A Steep Slide in Law School Enrollment Accelerates*, N.Y. TIMES, Dec. 18, 2014, at B3; Jennifer Smith, *U.S. Law School Enrollments Fall*, WALL ST. J., Dec. 18, 2013, at B1; Jennifer Smith, *Law-School Professors Discover Their Jobs Less Secure*, WALL ST. J., Aug. 12, 2013, at B1; see also BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

97. See Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014).

98. Monopoli, *supra* note 5, at 1759–60.

99. Monopoli, *supra* note 5, at 1759 (“To this day, in American universities teaching and service is often associated with the feminine and research with the masculine.”) (citing Shelley M. Park, *Research, Teaching, and Service: Why Shouldn't Women's Work Count?*, 67 J. HIGHER EDUC. 46, 51 (1996)). Monopoli, *supra* note 5, at 1759 n.86 (“In treating teaching and service as undifferentiated activities, the argument for prioritizing research utilizes a technique commonly used to devalue women's work and, thus, rationalize the unpaid or underpaid status of that work. It assumes that there is no difference between good and bad teaching (and service) or, that if there is, this difference is unaccounted for by levels of skill, because these are activities that are instinctual or natural for those who perform them.”) (quoting Park, *supra* note 99, at 51).

the classroom. No one is being given six-figure salary supplements in legal academia because they have won teaching awards. Such supplements are linked to perceived value of certain kinds of scholarship in the narrow market of law schools themselves.

The U.S. News distortion of that market is in large part to blame for this odd world where a degree from one particular law school and fewer years of practice experience are valued more highly than more years of such experience when faculty hiring is at stake. And where scholarship alone has become the singular measure of value in terms of faculty compensation.¹⁰⁰ If we look at whether scholarship alone has much to do with “performing the job” as the Equal Pay Act requires, I think the argument is clear that it does not. If we moved away from such singular measures of value and toward a more holistic approach to defining what it means to perform the job of a law professor, legal education as a whole would begin its long, slow climb back to health and students, most faculty members and the public as a whole would be the beneficiaries. Both women and men in academia should support the Paycheck Fairness Act amendments as a means to that end.

100. This is not a singular phenomenon of American law schools. Monopoli, *supra* note 5, at 1759 n.87 (quoting Park, *supra* note 99, at 50) (“Why should research be the primary criterion for tenure and promotion? One line of argument, which focuses on research as an indicator of faculty merit, goes something like this: ‘Research separates the men from the boys (or the women from the girls). Teaching and service won’t serve this function because everyone teaches and does committee work.’ A variation on this theme argues that ‘[t]eaching and service won’t serve this function because there is no satisfactory way of evaluating teaching and service.’ According to the first line of reasoning, research performance is the only factor that differentiates faculty presumed to be equal in other respects. According to the second line of reasoning, research performance is the only factor by which faculty members can be objectively evaluated, even if they are unequal in other respects.” (footnote omitted)). Monopoli, *supra* note 5, at 1760 n.88 (quoting Park, *supra* note 99, at 50) (The author writes: “Current working assumptions regarding (1) what constitutes good research, teaching, and service and (2) the relative importance of each of these endeavors reflect and perpetuate masculine values and practices, thus preventing the professional advancement of female faculty both individually and collectively. A gendered division of labor exists within (as outside) the contemporary academy wherein research is implicitly deemed “men’s work” and is explicitly valued, whereas teaching and service are characterized as “women’s work” and explicitly devalued.”).