Denver Law Review

Volume 91
Issue 4 *Symposium - Revisiting Sex: Gender and Sex Discrimination Fifty Years after the Civil Rights Act Part I*

Article 8

January 2014

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DISABLING THE GENDER PAY GAP: LESSONS FROM THE SOCIAL MODEL OF DISABILITY

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ABSTRACT

As we celebrate the fiftieth anniversary of Title VII's prohibition against sex-based compensation discrimination in the workplace, the gender wage gap remains robust and progress toward gender pay equity has stalled. This Article reveals the role that causal narratives play in undermining the law's potential for reducing the gender pay gap. The most recent causal narrative is illustrated by the "women don't ask" and "lean in" storylines, which reveal our society's entrenched view that women themselves are responsible for their own pay inequality. This causal narrative has also embedded itself in subtle but pernicious ways in antidiscrimination doctrine, which helps shield employers from legal liability for gender pay disparities.

The disability civil rights movement has faced a similar challenge, and its successful response provides a potential path forward on gender pay issues. The causal narrative that erected barriers for disability rights was engrained in the medical model of disability, which also identified internal deficits as the source of individuals' own limitations. The disability rights movement responded with a reconceptualized "social model," which explains disability instead as the result of the environment in which an individual's characteristics interact. The social model of disability provides an alternative causal narrative: one that shifts focus onto the role played by employer practices and organizational norms in producing inequality. This Article explores how a social model approach to women's compensation could help shift the causal focus away from the manner in which women negotiate and onto the institutional practices that produce unequal results. In doing so, the social model may help resuscitate Title VII's disparate impact theory to allow challenges to employment practices that base compensation on employees' individual demands, thereby moving us toward more effective structural solutions to the gender pay divide.

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† Associate Dean for Faculty Scholarship and Professor of Law, University of San Francisco School of Law. I would like to thank the University of Denver Sturm College of Law for organizing the symposium on "Revisiting Sex: Gender and Sex Discrimination Fifty Years after the Civil Right Act," which provided a valuable forum for discussion. Thanks are also due to Tristin Green, Nicole Porter, and Gowri Ramachandran for their insights, to Alyse Pacheco for her research assistance, and to Richard Dickson for his support.

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INTRODUCTION

For the past decade, progress on the overall gender wage gap has come to a virtual standstill.[1] For full-time, year-round workers in 2012, the median salary for women was 76.5% of the median salary for men—a gap that was nearly identical to the gap reported in 2001.[2] Gender pay disparity is much larger for some women than others, particularly for women of color,[3] and it exists even after controlling for factors such as education, skill level, and hours worked.[4] If the overall rate of change from 1960 to 2012 remains the same in the future, most women in the paid labor market today will never experience gender wage parity during their working lives.[5] At the same time that we are celebrating the fiftieth anniversary of Title VII's prohibition against sex discrimination in the workplace,[6] experts are actually extending their projections for the length of time that it will take to eventually close the gender pay gap.[7]

Although designing successful legal tools to combat the gender pay gap does not necessarily require a complete understanding of why the

1. *See* Meghan Casserly, *The Geography of the Gender Pay Gap: Women's Earnings by State*, FORBES (Sept. 19, 2013, 8:30 AM), http://www.forbes.com/sites/meghancasserly/2013/09/19/the-geography-of-the-gender-pay-gap-womens-earnings-by-state/ ("For more than a decade now, the comparison between the median earnings of full-time employed men and women in the U.S. has remained a stubborn 77% . . . ."); Ben Penn, *Gender Pay Gap Won't Close Until 2058, IWPF Projects, as Democrats Push for Law*, DAILY LAB. REP., Sept. 18, 2013, at A-12 ("While women have made tremendous strides in their earnings relative to men since 1960, none of that progress has taken place since 2000 . . . .").

2. *See* Penn, *supra* note 1, at A-12.

3. *On Pay Gap, Millennial Women Near Parity—for Now*, PEW RES. CENTER (Dec. 11, 2013), http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now/ (providing details about the gender wage gap based on survey data from October 2013).

4. *See* Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1049–51 (2012) (summarizing the "great deal of evidence that women . . . still experience large pay gaps," even when controlling for other factors).

5. *See* Penn, *supra* note 1, at A-12; *see also* Jillian Berman, *Gender Pay Gap Likely Won't Go Away Until After You Retire: Study*, HUFFINGTON POST (Sept. 23, 2013, 11:42 AM), http://www.huffingtonpost.com/2013/09/23/gender-pay-gap-close_n_3975638.html.

6. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

7. *See* Berman, *supra* note 5.

gap exists, causal narratives have played an enormously influential role in Title VII's relative lack of success in the arena of sex-based wage discrimination. Because both our social and our legal assessments of responsibility typically follow our attributions of causation, causal narratives are powerful tools for shaping the law's effect, whether or not our causal assessments are accurate, sufficiently nuanced, or legally relevant.[8] According to social scientists who study causal attribution theory—i.e., the cognitive processes by which we arrive at explanations for social events[9]—we are not exceptionally skilled at this task. Although our causal attribution process is efficient, often unconscious, and highly adaptive, it is also systematically biased.[10]

One causal attribution bias is toward oversimplification, which often shows up when several causes are necessary for an event or outcome to occur.[11] Tort law refers to this scenario as one involving "multiple necessary causes."[12] In such a scenario, we tend to single out and identify one of the multiple necessary circumstances as *the* cause, which then becomes the target for placing responsibility, be it credit or blame.[13] The gender pay gap is just such a multi-causal social phenomenon. The resilience of the gender pay gap has been fueled in part by simplified—and strategic—causal narratives that have directed responsibility away from the employers that have built, entrenched, and sustained gender pay ine-

8. *See* Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 YALE J.L. & FEMINISM 51, 53–54 (2009); *see also* STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE 232 (2007) ("Our concept of causation is indispensable to our attribution of credit and blame in everyday life.").

9. *See* Travis, *supra* note 8, at 54 ("Causal attribution theory is the branch of social cognition theory that studies the process by which people arrive at explanations for social events."); *see also* MILES HEWSTONE, CAUSAL ATTRIBUTION: FROM COGNITIVE PROCESSES TO COLLECTIVE BELIEFS 37–38 (1989) (describing causal attribution theory); Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* COGNITIVE THEORIES IN SOCIAL PSYCHOLOGY 337, 338–39, 348–49 (Leonard Berkowitz ed., 1978) (same); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481, 509–10 (2002) [hereinafter Travis, *Perceived Disabilities*] (same).

10. Travis, *supra* note 8, at 54; *see also* HEWSTONE, *supra* note 9, at 61 (describing the adaptive but biased nature of our causal attribution processes); Travis, *Perceived Disabilities*, *supra* note 9, at 509–42 (summarizing the social science research on causal attribution biases).

11. *See* PINKER, *supra* note 8, at 213.

12. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §§ 26 cmts. c, i, 27 cmts. d, e (2010); *see also* John D. Rue, Note, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2709 & n.232 (2003) (describing the Restatement's distinction between multiple necessary causes, which are "members of a causal set which are in themselves necessary to cause the harm, even if they are insufficient to do so by themselves," and multiple sufficient causes, which "occur where there are two forces, operating independently, and each is sufficient to cause the harm"); Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual "But For" and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions*, 64 LAW & CONTEMP. PROBS. 241, 251–52 (2001) (distinguishing multiple necessary cause situations in which several causes "are necessary but neither alone is sufficient," from multiple sufficient cause situations in which either of two causes would be sufficient by itself to produce the outcome but "neither alone is necessary").

13. *See* PINKER, *supra* note 8, at 213–14 ("People somehow distinguish just one of the necessary conditions for an event as its *cause* and the others as mere *enablers* . . . even when all are equally necessary.").

quality as a standard feature of the American workplace. This Article explores this important role that causal narratives play in sustaining the gender compensation divide.[14]

Social psychologists generally characterize causal attributions as either "internal" or "external."[15] Internal attributions are ones that identify the primary cause of a social event as some characteristic, feature, or trait of an actor involved in the event, while external attributions are ones that identify the primary cause as some aspect of the situation or environment in which the event took place.[16] When an observer concludes that a particular outcome was caused by an actor's effort, intelligence, ability, attitude, personality, emotions, or physical or mental condition, the observer is making an internal attribution.[17] If the observer instead deems the cause to be the weather conditions or the difficulty of the task, for example, an external attribution is being made.[18] In other words, internal causal attributions focus on "something about the person," while external causal attributions focus on "something about the situation."[19]

Under this taxonomy, internal causal attributions for the gender pay gap focus on characteristics of the women who are being paid less than men for their work. External causal attributions, in contrast, focus on aspects of either of the two environments in which women are interacting: aspects of the particular employer that is compensating women less than men, or aspects of the broader labor market within which all employers and employees operate. When an employer is charged with sex-based compensation discrimination, the employer thus has two targets for shifting causal attribution away from itself: either to the labor market or to the women who are being underpaid.

In Title VII's early years, employers successfully sold a narrative that identified "the market" as *the* cause of the gender pay gap. Employers portrayed themselves as passive price-takers who simply set wages based on external market forces, which resulted in lower pay for women than for men.[20] Courts readily accepted this single, external causal attribution as a basis for shifting legal responsibility away from employers for

14. *Cf.* Travis, *supra* note 8 (analyzing the role of causal attribution narratives in combating pregnancy discrimination in the workplace).

15. *See* HEWSTONE, *supra* note 9, at 30–31. This causal attribution dimension has also been referred to as the "person" versus "environment" dimension, or the "dispositional" versus "situational" dimension. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See* Christopher Peterson et al., *The Attributional Style Questionnaire*, 6 COGNITIVE THERAPY & RES. 287, 288 (1982).

20. *See* Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 596 (2001) (reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA (1999)) (describing the causal narrative "of employers as passively paying the going rate for labor"—i.e., employers' assertion that "the 'market made me do it'").

sex-based compensation disparities.[21] In 1999, however, two sociologists, Robert Nelson and William Bridges, published an influential empirical analysis debunking that oversimplified causal narrative and revealing the additional, necessary role played by employers' own wage scales, personnel bureaucracies, and other organizational practices that decouple individual employers' wages from labor market prices.[22] Feminist legal scholars quickly leveraged this research to help reveal the multi-causal nature of the gender pay gap and to challenge employers' market-based defenses to gender pay discrimination claims.[23] Nelson and Bridges' research provided an empirical basis for undermining the causal narrative that the market dictates employers' pay decisions, thereby making more salient the necessary causal role of individual employers in sustaining the gender pay gap.[24]

Employers then seized upon another oversimplified—and even more strategic—causal narrative: one that focused instead on women themselves. Early on, this causal narrative was framed in terms of women's "lack of interest" in and "choice" not to pursue high-paid positions and job opportunities.[25] Courts also readily accepted this internal causal attribution, once again allowing employers to evade legal responsibility for sex-based compensation disparities.[26] But although the lack of interest causal narrative effectively shifted blame for between-job pay differ-

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21. *See* Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 348–49 (2003) (compiling case law allowing employers to use a market defense to Title VII disparate impact claims alleging gender pay discrimination).

22. *See* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 2–3, 8, 9, 14, 51, 76, 310, 313–15 (1999) (using in-depth case studies to show that much of the between-job gender pay gap cannot be explained by external market forces); *see also* Chamallas, *supra* note 20, at 580 (describing how Nelson and Bridges demonstrated that employers are not "merely following the market," but rather that "a sizeable portion of the pay differential—resided in the employers' own actions in setting internal pay scales to suit their organizations' needs and values").

23. *See, e.g.*, Chamallas, *supra* note 20, at 581, 600, 607, 612 (arguing that evidence identifying a causal role for the gender pay gap within organizations "paves the way for disparate impact theory under their new analysis of the causes of gender wage disparities").

24. *See* NELSON & BRIDGES, *supra* note 22, at 51 (concluding from case study analysis that a significant portion of the gender wage gap "arises inside or is perpetuated by employing organizations"); *see also* Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 819 (2010) (arguing that because "[t]he market defense draws its strength from the assertion that wages are determined by external forces," employers should no longer be able to use that defense once that premise is "questioned by empirical analysis"); Travis, *supra* note 21, at 352 (explaining how Nelson and Bridges "provided a factual basis for undermining courts' causation analysis" through case studies "identifying specific organizational practices that help generate gender pay differences").

25. *See* Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1750 (1990); *see also* Nicole Buonocore Porter, *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*, 8 F.I.U. L. REV. 447, 449–50 (2013) (demonstrating how the "blame game" and the "autonomy myth" about women making unconstrained choices that are free from gender stereotypes and norms contributes to our failure to scrutinize structural discrimination in the workplace (internal quotation marks omitted)).

26. *See* Travis, *supra* note 21, at 348–49 (summarizing case law allowing employers to defend gender pay discrimination claims by raising a "choice" or "lack of interest" defense (internal quotation marks omitted)). *See generally* Schultz, *supra* note 25 (analyzing case law).

entials, it could not address the gender pay gap that exists within the same jobs and for employees with the same skills and education. That is where the "women don't ask" causal narrative stepped in to fill the void.

The women don't ask narrative identifies women's inability or unwillingness to negotiate for wage parity as *the* cause of the gender wage gap. This internal causal attribution focusing on women as a source of their own pay inequality has become deeply entrenched in our society, internalized by women, and built into our antidiscrimination law in subtle and pernicious ways. Moreover, unlike the external market narrative, internal causal attributions are typically more difficult to disrupt. Actors generally are more salient than the situations in which they act, so we are biased toward overestimating the causal role of people's internal characteristics and underestimating the causal role of situational factors that constrain behavior and dictate outcomes.[27] This bias is so pervasive that social scientists call it the "fundamental attribution error."[28]

This bias will make it difficult to launch a simple empirical attack on the accuracy of the women don't ask causal narrative, in part because a simple reading of the social science research does indeed demonstrate differences in women's and men's wage negotiation approaches and results.[29] The research also demonstrates, however, that women's wage negotiation approaches are constrained by biased employment practices and that women's wage negotiation results are negatively affected by gender stereotypes,[30] which certainly should be highlighted as part of a strategy for disrupting the women don't ask causal story. But the depth and pervasiveness of this narrative makes it unlikely that a major shift will result solely from a more nuanced reading of the negotiation research.

Combatting the causal attribution to women as the responsible agents for the gender pay gap will require a broader theoretical tool. That tool may be borrowed from the disability civil rights movement, which has successfully achieved a very similar goal of disrupting a pervasive internal causal narrative. That narrative was housed within the medical model of disability, which—like the women don't ask narrative—identified internal deficits within impaired individuals as the primary source of employees' limitations.[31] But unlike in the gender context, where this type of internal causal narrative remains entirely acceptable,

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27. *See* HEWSTONE, *supra* note 9, at 50; *see also* Travis, *Perceived Disabilities*, *supra* note 9, at 519–20 (describing the causal attribution bias by which we "overestimate the role of an actor's internal, dispositional characteristics and . . . underestimate the power of the situation in controlling the actor's behavior").

28. *See* Ross, *supra* note 9, at 348–49 (coining the term and noting that this robust bias "has been noted by many theorists" and "disputed by few").

29. *See infra* notes 56, 134–35 and accompanying text.

30. *See infra* notes 75–78, 136–40 and accompanying text.

31. *See infra* notes 47–51 and accompanying text.

the disability civil rights movement has effectively shifted the causal focus of inequality onto the workplace itself.

Disability theorists achieved this success by reconceptualizing disability under the "social model," which understands disability as the result of the environment in which an impairment interacts.[32] The social model of disability provided a new causal narrative that shifted both the public's attention and the law's focus onto the role of employer practices and structures in producing inequality for individuals with impairments, which are not themselves inherently limiting.[33] In the same way, a social model approach to women's compensation could shift the causal focus away from women's own negotiation techniques and onto the institutional practices that render those non-inherently limiting approaches "disabling" with respect to women's pay. In this way, the social model has the potential to move us toward more effective structural solutions to gender pay inequality, including resuscitating Title VII's disparate impact theory to allow challenges to facially neutral practices that base compensation on employees' individual wage demands or requests.

Part I begins by exploring the common ground that is shared by the women's rights movement and the disability rights movement—both of which must actively resist internal causal attributions that place responsibility for workplace inequality onto their own members. While recognizing the historic ambivalence of many feminists to join forces with the disability rights community, this Part explains how the women don't ask narrative presents an analogous hurdle to that presented by the medical model of disability. Part II discusses the potential benefits of borrowing the social model approach from disability civil rights to reframe the discussion about women's pay. The social model is best understood as a theory of causation that identifies employers as one of the multiple necessary causes in workplace inequality, which is a critical move that has been missing in attempts to combat the gender pay gap.

I. COMMON GROUND: RESISTING INTERNAL CAUSAL ATTRIBUTION

Despite facing many similar obstacles and sharing many similar goals, the women's rights movement generally has been reticent to join forces with the disability rights movement in their shared quest for workplace equality.[34] This reticence is in part a vestige of the equal treatment side of the "equal treatment vs. special treatment" debate,

32. *See infra* notes 121–25 and accompanying text.

33. *See infra* notes 121–25 and accompanying text.

34. *See* Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC'Y 1, 16 (2012) (explaining that "feminist legal advocates historically have been hesitant to ally with the disability rights movement").

which historically divided the feminist legal community.[35] This debate arose when making difficult strategic decisions about whether women's workplace equality would be advanced more effectively by highlighting women's and men's similarities and seeking formal equality, or by acknowledging women's and men's differences and seeking gender-specific policies or workplace restructuring that takes those differences into account.[36] The equal treatment approach distanced the women's rights movement from the disability rights movement, which expressly embraces a difference approach to equality that is now reflected in the accommodation mandate of the Americans with Disabilities Act (ADA).[37]

The focus on accommodations for individuals with disabilities lead many feminists to fear that aligning women with the disabled might magnify gender stereotypes of women as weak, incapable, and in need of paternalistic legal protections.[38] Although this fear itself reflects disability bias and comes with the cost of inhibiting women's access to valuable workplace accommodations,[39] it is also understandable given the "special treatment stigma" that attaches to marginalized groups that are perceived to be in need of extra assistance or care.[40] This resistance to aligning the women's movement with the disability rights movement is illustrated by many feminists' opposition to characterizing pregnancy as a disability.[41] Even under the recently expanded ADA, the Equal Employment Opportunities Commission (EEOC) continues to take the position that pregnan-

35. *See id.* at 17 (internal quotation marks omitted) (describing how this historic "fissure" in the feminist community has affected contemporary legal advocacy for women's workplace equality).

36. *See generally* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

37. *See* 42 U.S.C. § 12112(b)(5) (2012).

38. *See* Alemzadeh, *supra* note 34, at 17–18, 25–26 (arguing that the backlash against the ADA raised concerns that linking women's rights to disability rights might evoke the same type of protectionist and paternalist responses that the women's movement was trying to attack). A similar dynamic has taken place within the transgender community. *See* Zach Strassburger, Note, *Disability Law and the Disability Rights Movement for Transpeople*, 24 YALE J.L. & FEMINISM 337, 349–50 (2012) (explaining how some activists have recognized "that transpeople are hesitant to identify as disabled because they see disability as a flaw").

39. *See* Alemzadeh, *supra* note 34, at 21, 24 (arguing that "[f]eminist disavowal of pregnancy as a disability has the potential to reinforce discriminatory attitudes towards both disabled people and women," and that when feminist legal advocates "steer[] clear of disability discourse," they effectively "engag[e] in the same discriminatory attitudes they have been subjected to").

40. *See* Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1108–15 (2014) [hereinafter Porter, *Mutual Marginalization*]; *see also* Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 802–03 (2010) [hereinafter Porter, *Synergistic Solutions*] (describing the "special treatment stigma" that attaches to accommodation recipients and that is manifested by "both co-employee resentment as well as employers' reluctance to hire or promote" (internal quotation marks omitted)).

41. *See* Alemzadeh, *supra* note 34, at 3, 16, 21, 29 (describing the "historical reticence in the feminist community to advocate for a pregnancy rights framework grounded on the premise that pregnant women are disabled persons," which has led to a "[f]eminist disavowal of pregnancy as a disability").

cy is not an impairment for purposes of disability discrimination law,[42] so many feminists purposely work around that characterization when seeking to advance pregnant women's rights.[43]

Now that both movements have achieved some level of success in combatting stereotypes and employment discrimination in their respective spheres, however, some scholars and advocates have begun to argue that the potential benefits of joining forces outweigh the potential risks.[44] This is particularly true in the context of pregnancy, where there is a move to bring pregnancy under the disability umbrella.[45] This shift has also been fueled by work/family scholars, who recognize that the shared interest in workplace flexibility is a unifying objective for many individuals with disabilities and workers with caregiving responsibilities.[46]

This increasing willingness of women's advocates and feminist legal scholars to leverage successful aspects of the disability civil rights movement provides an opportunity to make progress with the seemingly

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42. *See* EEOC, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 FED. REG. 16,978, 17,007 (March 25, 2011) (revising 29 C.F.R. § 1630.2(h) to reiterate that "conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments").

43. *See, e.g.*, Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 110, 114–19 (2013) (accepting that pregnancy itself is not a disability but arguing that "a broad range of pregnancy-related conditions" are disabilities under the amended ADA); *see also* Alemzadeh, *supra* note 34, at 24–25 (explaining "why feminist legal advocates may fear inheriting ADA backlash if they use the ADA to obtain accommodations for pregnant women").

44. *See* Alemzadeh, *supra* note 34, at 35 (urging greater examination of "the intersections of disability theory and feminist legal theory"). Members of the transgender community have grappled with a similar question of whether "gender-variant" individuals should or should not seek protection under disability law. *See* Strassburger, *supra* note 38, at 338. Advocates recently have been arguing that the benefits of doing so outweigh the potential risks. *See id.* at 338–39, 375 (arguing that "both transsexuals and the existing disability rights movement will benefit from the cooperation" and by "[f]orming a strong partnership").

45. *See, e.g.*, Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 443 (2012) (arguing that pregnancy should be deemed a disability under the ADAAA); *see also* Alemzadeh, *supra* note 34, at 21, 24 (arguing that "the bifurcation of pregnancy from disability rights discourse ignores critical junctures at which feminist and disability theories converge, " and urging pregnancy rights advocates to "band with the disability rights movement to dismantle stereotypes about the able-bodied worker"). A similar movement is taking place within the transgender community. *See* Strassburger, *supra* note 38, at 350 (explaining that "the disability and trans communities have already begun to work together on issues largely ignored in broader LGB activism, such as gender-neutral public restrooms").

46. *See, e.g.*, Porter, *Mutual Marginalization*, *supra* note 40, at 1102 (arguing that the distinctions between caregivers and individuals with disabilities "pale in comparison to the experiences that these two groups share in common," and arguing to extend the right to reasonable accommodations to cover caregivers); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 353 (2009) (highlighting the potential for coalition-building between work/family advocates and disability rights advocates); *see also* Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 621–22 (2004). *See generally* Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 306–07, 327–28 (2004) (discussing working parents' need for flexibility and accommodation in their work life); Kelly Timmerman, Note, *Accommodating for the Work/Family Conflict: A Proposed Public Policy Exception*, 8 J. GENDER RACE & JUST. 281, 283 (2004).

intractable gender wage gap that still remains robust even fifty years after Title VII's enactment. Moreover, unlike in the pregnancy and work/family contexts in which the use of disability theory typically seeks to advance accommodation rights with all of their attendant "special treatment" baggage, disability rights theory has the potential to help reframe the gender wage debate in ways that may move women forward even within the confines of a very conventional antidiscrimination framework. The starting point for such leveraging is identifying a common source of inequality against which the disability rights movement has made more headway than have advocates for women's rights. That common source of inequality is the shared need to resist and unsettle an internal causal attribution for inequality. For individuals with disabilities, an internal causal attribution was entrenched within the medical model of disability, while an internal causal attribution for women implicitly resides in the women don't ask narrative that pervades discussions of the gender wage gap.

A. The Medical Model of Disability

Although the disability rights movement is a pluralistic endeavor with diverse participants and goals,[47] one objective became both a unifying force and a critical catalyst for achieving legal change for individuals with disabilities: dismantling the medical model of disability.[48] The medical model conceptualized disability as a personal and intrinsic deficit that needed to be fixed or cured.[49] By locating the causal source of disability within individuals, the medical model made it easy to deflect responsibility for employment inequality away from employers, and it implicitly blamed individuals with disabilities for their own lack of success in the workplace.[50] Rather than empowering courts, the medical model bestowed tremendous power upon medical "experts," who were needed both to identify the deficits and to suggest a treatment or deliver a cure.[51] Over time, it became clear to members of the disability rights movement that meaningful social and legal progress would not be made without

47. *See* Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 943 (2012).

48. *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 13 (2009).

49. *See id.* at 18; Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 185–87 (2008); Tom Shakespeare, *The Social Model of Disability*, *in* THE DISABILITY STUDIES READER 266, 268 (Lennard J. Davis ed., 3d ed. 2010); Travis, *supra* note 47, at 943.

50. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649–53 (1999) (describing the societal effects of the medical model).

51. *See* Alemzadeh, *supra* note 34, at 22 (explaining that the medical model "places disabled individuals in a unique power dialectic with the medical community, where presenting certain symptoms is essential to attain the diagnosis that legitimizes the individual's claim to disability entitlements"); Areheart, *supra* note 49, at 186 (explaining how the medical model frames social responses "either as rehabilitation efforts to enable the individual to overcome the effects of the disability, or medical efforts to find a cure"); Travis, *supra* note 47, at 975–76 (describing how the medical model of disability "abdicat[es] . . . control to medical professionals").

first dismantling the medical model of disability and shifting the causal focus of employment inequality to the workplace structures, practices, and norms that rendered various physical and mental characteristics limiting in their effects.

B. Gender and the "Women Don't Ask" Narrative

An internal causal attribution for the source of inequality similarly has entrenched itself in debates about the gender wage gap. In the gender context, the internal causal attribution resides within the women don't ask narrative. Like the medical model of disability that locates the cause of inequality within impaired individuals themselves, the pervasive women don't ask narrative locates the causal source of the gender pay gap within women, who purportedly lack the ability or the will to negotiate effectively for wage parity. By implicitly blaming women for their own income inequality—and linking the source to an internal deficiency that is assumed to be even more within the victim's control than most physical or mental impairments—this narrative has been extraordinarily effective at deflecting employers' responsibility for gender wage inequality.[52] As with the medical model of disability, the internal causal theory for the gender wage gap implicitly bestows power upon "experts"—in this context, social psychologists and negotiation skills trainers—who become necessary to help identify and fix women's deficiencies.

The internal causal narrative is deeply ingrained in public rhetoric, as women in the workforce are inundated with messaging about the role that their own behavioral failings play in their unequal pay and career advancement. Women are told to "lean in," to "pushback," to "stand up," to "take charge," to be a "go-getter," to take a "place at the table," and to just "ask for it."[53] This narrative gained widespread prominence with the 2003 book by Linda Babcock and Sara Laschever titled *Women Don't Ask: Negotiation and the Gender Divide*.[54] The book was reprinted in 2007 under the title, *Women Don't Ask: The High Cost of Avoiding Negotiation—and Positive Strategies for Change*.[55] Using interviews and other data from psychology, sociology, and economics, the authors revealed women's lower propensity relative to men to initiate negotiations

52. *See* Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a "Factor Other Than Sex" Under the Equal Pay Act*, 10 GEO. J. GENDER & L. 1, 9 (2009) ("The more society blames women for their own reluctance to negotiate, the less culpable employers appear for paying women less than their male counterparts."); Porter, *supra* note 25, at 447, 458–60 (analyzing how women are blamed for the gender wage gap by characterizing women's lower pay as a "[c]hoice" and an "unwillingness to negotiate on their own behalf" (internal quotation marks omitted)).

53. These phrases all come from popular book titles. *See infra* notes 54–70.

54. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (Princeton U. Press) (2003) [hereinafter BABCOCK & LASCHEVER, WOMEN DON'T ASK I].

55. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE (Random House Publ'g Grp. 2007) [hereinafter BABCOCK & LASCHEVER, WOMEN DON'T ASK II].

on their own behalf.[56] A year after the reprinted version was published, the same authors wrote a follow-up book titled, *Ask for It: How Women Can Use the Power of Negotiation to Get What They Really Want.*[57] This follow-up book claims to provide "the action plan that women all over the country requested."[58] According to the book's description on Amazon, this book "teaches [women] how to ask effectively, in ways that feel comfortable to you as a woman."[59]

Although *Women Don't Ask* provided a catchy phrase for encapsulating the internal causal attribution for the gender wage gap, it was by no means an isolated work. Another example with a similar (albeit less catchy) title showed up on the bookstands just after Babcock and Laschever's first book: *Why Women Earn Less: How to Make What You're* Really *Worth.*[60] Women who read the book's description on Amazon will likely agree that "[u]nder-earning is an insidious problem," but they may be surprised to learn that it is a problem "with psychological roots that run deep."[61] But the book's description also provides ready (if demeaning) reassurance, along with an expert plan for women to cure their ills:

> Luckily, there's help. This book is a practical, step-by-step guide for under-earning women who are ready to turn their lives around. It demystifies the process of under-earning, explores its underlying psychological and emotional issues, and offers practical advice and strategies to help overcome it. *Why Women Earn Less* explains how you can be better paid for the work you do. It maps out, on a practical level, how to overcome the bad habits that contribute to earning less than you deserve. As you do so, you will find yourself not only benefiting from an improved bottom line, but also enjoying a renewed sense of optimism and personal satisfaction.[62]

On the heels of *Women Don't Ask* followed a wealth of other self-help books, all from "experts" who purport to have diagnosed the internal causes for women's unequal pay and who provide treatment plans for

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56. *See* BABCOCK & LASCHEVER, WOMEN DON'T ASK I, *supra* note 54, at 1–4, 17–129.

57. LINDA BABCOCK & SARA LASCHEVER, ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT (2008) [hereinafter BABCOCK & LASCHEVER, ASK FOR IT].

58. *See Ask for It: How Women Can Use Negotiation to Get What They Really Want*, AMAZON, http://www.amazon.com/Ask-For-It-Negotiation-Really-ebook/dp/B0013TTLBQ (last visited Apr. 5, 2014) (describing BABCOCK & LASCHEVER, ASK FOR IT, *supra* note 57).

59. *Id.*

60. MIKELANN R. VALTERRA, WHY WOMEN EARN LESS: HOW TO MAKE WHAT YOU'RE *REALLY* WORTH (2004).

61. *Why Women Earn Less: How to Make What You're Really Worth*, AMAZON, http://www.amazon.com/gp/product/B004SPD94C/ref=s9_wish_co_d99_g351_i1 (last visited Apr. 5, 2014) (describing VALTERRA, *supra* note 60).

62. *Id.*

women to narrow the gap.[63] In *Nice Girls Don't Get the Corner Office: 101 Unconscious Mistakes Women Make that Sabotage Their Careers*, women can learn how to fix the "girlish behaviors" that "[s]abotage [t]heir [c]areers."[64] In *Pushback: How Smart Women Ask—and Stand Up—for What They Want*, a leadership consultant provides women with the "self-advocacy" tools to get "what is rightlfully yours."[65] The authors of *Hardball for Women* show women "how to break patterns of behavior that have put them at a disadvantage in the business world of men."[66] And for women who still remain uncured, there are many other expert treatments to try, such as *See Jane Lead: 99 Ways for Women to Take Charge at Work*,[67] and *Her Place at the Table: A Woman's Guide to Negotiating Five Key Challenges to Leadership Success*.[68] For women who care both about the gender wage gap and about their appearance, there is even a guide for addressing deficits in both arenas simultaneously: *The Go-Getter Girl's Guide: Get What You Want in Work and Life (and Look Great While You're at It)*.[69]

This internal causal narrative reached even loftier heights and greater perceived legitimacy when Facebook's Chief Operating Officer, Sheryl Sandberg, began promoting her new book, *Lean In: Women, Work, and the Will to Lead*.[70] Now women's personal deficits have a packaged sound bite to go with them—the failure to lean in. In two sentences in the

63. *See* Elzer, *supra* note 52, at 3 (describing the emergence of books and websites over the past decade that "teach[] women to be better negotiators," and arguing that they depend upon an "underlying premise . . . that women are not as good at negotiating as men are").

64. *Nice Girls Don't Get the Corner Office: 101 Unconscious Mistakes Women Make that Sabotage Their Careers*, AMAZON, http://www.amazon.com/Nice-Girls-Dont-Corner-Office/dp/0446693316/ref=pd_sim_b_2 (last visited Apr. 5, 2014) (describing LOIS P. FRANKEL, NICE GIRLS DON'T GET THE CORNER OFFICE: 101 UNCONSCIOUS MISTAKES WOMEN MAKE THAT SABOTAGE THEIR CAREERS (2010)).

65. *Pushback: How Smart Women Ask—and Stand Up—for What They Want*, AMAZON, http://www.amazon.com/Pushback-Smart-Women-Ask-Up/dp/1118104900/ref=pd_sim_b_13/ (last visited Apr. 5, 2014) (describing SELENA REZVANI, PUSHBACK: HOW SMART WOMEN ASK—AND STAND UP—FOR WHAT THEY WANT (2012)).

66. *Hardball for Women*, AMAZON, http://www.amazon.com/Hardball-Women-Revised-Pat-Heim/dp/0452286417/ref=pd_sim_b_7 (last visited Apr. 5, 2014) (describing PAT HEIM & SUSAN K. GOLANT, HARDBALL FOR WOMEN (rev'd ed. 2005)).

67. LOIS P. FRANKEL, SEE JANE LEAD: 99 WAYS FOR WOMEN TO TAKE CHARGE AT WORK (2009).

68. DEBORAH M. KOLB, JUDITH WILLIAMS & CAROL FROHLINGER, HER PLACE AT THE TABLE: A WOMAN'S GUIDE TO NEGOTIATING FIVE KEY CHALLENGES TO LEADERSHIP SUCCESS (2010); *see also* DEBORAH M. KOLB & JUDITH WILLIAMS, THE SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS (2000); LEE E. MILLER & JESSICA MILLER, A WOMAN'S GUIDE TO SUCCESSFUL NEGOTIATING: HOW TO CONVINCE, COLLABORATE, AND CREATE YOUR WAY TO AGREEMENT (2002). A second edition of the Millers' book was published in 2010 sporting a book cover telling women to "never be taken advantage of again." *See* LEE E. MILLER & JESSICA MILLER, A WOMAN'S GUIDE TO SUCCESSFUL NEGOTIATING (2d ed. 2010) (cover photo *available at* http://www.amazon.com/Womans-Successful-Negotiating-Second-Edition/dp/0071746501).

69. DEBRA SHIGLEY, THE GO-GETTER GIRL'S GUIDE: GET WHAT YOU WANT IN WORK AND LIFE (AND LOOK GREAT WHILE YOU'RE AT IT) (2009).

70. SHERYL SANDBERG WITH NELL SCOVELL, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013).

book's introduction, Sandberg acknowledges criticisms about the internal causal narrative upon which her advice is built: "I know some believe that by focusing on what women can change themselves—pressing them to lean in—it seems like I am letting our institutions off the hook," she notes, "[o]r even worse, they accuse me of blaming the victim."[71] But rather than engaging those critiques, she brushes them aside, saying "I have heard these criticisms in the past and I know that I will hear them . . . in the future."[72] "The time is long overdue," she proceeds undaunted, "to encourage more women to dream the possible dream."[73] The dream is "possible," according to Sandberg—despite the fact that the gender wage gap still exists fifty years after the enactment of Title VII—because women themselves are a cause of their own workplace inequality and therefore should be able to implement a cure. "We move closer to the larger goal of true equality," she proclaims, "with each woman who leans in."[74]

To Sandberg's credit, she is one of the few self-designated experts advising women on negotiation skills to acknowledge the flawed assumption that women will narrow the gender pay gap simply by negotiating to the same degree and in the same manner as men. "[W]e need to recognize that women often have good cause to be reluctant to advocate for their own interests," Sandberg wisely cautions, "because doing so can easily backfire."[75] "For men," she explains, "there is truly no harm in asking," because society expects men to advocate on their own behalf.[76] "But since women are expected to be concerned with others," Sandberg explains, "when they advocate for themselves or point to their own value, both men and women react unfavorably."[77] Sandberg is correct. Research reveals that evaluators resist working with a woman colleague if they know she has negotiated for higher pay because the mere act of self-advocacy violates female gender norms, which results in the woman being perceived as too demanding and less likeable.[78]

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71. *Id.* at 10–11.
72. *Id.* at 11.
73. *Id.*
74. *Id.*
75. *Id.* at 45. This statement is well supported by social science research. *See infra* notes 136–40.
76. SANDBERG, *supra* note 70, at 45.
77. *Id.*
78. *See* Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 84–95 (2007) (describing findings from a series of empirical studies); Hannah Riley Bowles & Linda Babcock, When Doesn't It Hurt Her to Ask? Framing and Justification Reduce the Social Risks of Initiating Compensation Negotiations 2 (Dec. 14, 2008) (unpublished conference paper), *available at* http://ssrn.com/abstract=1316162 (noting that "[i]n multiple studies, researchers have found evaluators to be significantly less inclined to work with a woman who attempts to negotiate for higher compensation as compared to one who does not"); Hannah Riley Bowles & Kathleen L. McGinn, *Untapped Potential in the Study of Negotiation and Gender Inequality in Organizations*, 2 ACAD. MGMT. ANNALS 99, 109 (2008) (summarizing research finding that "participants were significantly

But despite being aware of this research, Sandberg focuses her proposals neither on the employment decision makers (her peers) who act on these gender stereotypes, nor on the situational constraints in workplace negotiations that systematically disadvantage women. Instead she focuses on women themselves. Sandberg advises women to adopt a "communal approach" to their negotiations, which she analogizes to "cross[ing] a minefield backward in high heels."[79] She instructs women to "provide a legitimate explanation for the negotiation," to "invok[e] common interests, emphasiz[e] larger goals, and [to] approach[] the negotiation as solving a problem as opposed to taking a critical stance."[80] For this to be effective, Sandberg advises, women must "combine niceness with insistence" and be sure to "smil[e] frequently," while "expressing appreciation and concern."[81]

When a woman executive as successful as Sheryl Sandberg—who has access to such a powerful platform upon which to engage the public about issues of gender inequality in pay and career advancement—nevertheless uses that platform to advise women to "smil[e] frequently,"[82] it demonstrates the depths to which the internal causal narrative has been absorbed and accepted in our society. This is not to say that Sandberg is providing erroneous advice. In fact, it is well-founded in the psychological literature.[83] But the fact that researchers have been able to identify and document the situational constraints and the invidious gender stereotypes that affect employment decision makers' reactions to women in the workplace renders even less defensible the continued unwillingness to confront the institutional discrimination that underlies the gender wage gap.[84]

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less inclined to work with a woman who had attempted to negotiate as compared to one who had stayed mum, and male participants consistently penalized women more than men for attempting to negotiate"); *see also* Ramachandran, *supra* note 4, at 1060 (explaining that "even when [women] do stand up for themselves, they may be penalized for it").

79. SANDBERG, *supra* note 70, at 47–48.

80. *Id.*

81. *Id.* at 48.

82. *Id.*

83. *See* Hannah Riley Bowles & Linda Babcock, *How Can Women Escape the Compensation Negotiation Dilemma? Relational Accounts Are One Answer*, 37 PSYCHOL. WOMEN Q. 80, 91 (2012) [hereinafter Bowles & Babcock, *How Can Women Escape*] (concluding from two empirical studies "that female negotiators can reduce social resistance to their self-advocacy and improve their negotiation outcomes if they legitimize their requests in a manner that also communicates their concern for organizational relationships"); Bowles & Babcock, When Doesn't It Hurt Her to Ask?, *supra* note 78 (manuscript at 1) (finding in a series of empirical studies that women may reduce the social risks of initiating negotiations for higher pay by "using a communal frame to communicate concern for relationships" or "justifying the request with external validation," such as an external job offer).

84. If Sandberg had framed her advice differently, the immediate value that it may provide to women who are poised near the top of professional careers (and who therefore cannot wait for structural or legal reforms) might have outweighed the downside of publicly reinforcing the internal causal narrative of women's workplace inequality. Rather than suggesting that her book is a new "feminist manifesto," *see* SANDBERG, *supra* note 70, at 9, she could have explicitly recognized the necessary role that employers play in sustaining women's inequality and the illegitimacy of placing

While the pervasiveness of the internal causal narrative in our society is pernicious enough on its own, even more disappointing is the way in which Title VII has invited this narrative into legal doctrine. In doing so, Title VII reinforces rather than disrupts this powerful source of pay inequality. Title VII prohibits covered employers from discriminating on the basis of sex, race, color, religion or national origin in hiring, firing, compensation, or other "terms, conditions, or privileges of employment."[85] However, § 703(h) of Title VII—known as "the Bennett Amendment"—carves out an exception that applies *only* to claims of compensation discrimination and *only* to the protected status of sex, thereby providing less legal protection *only* for sex-based discrimination in pay.[86]

The Bennett Amendment states that "[i]t shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the [Equal Pay Act]."[87] The Equal Pay Act (EPA), enacted prior to Title VII, prohibits employers that are covered under the Fair Labor Standards Act from paying women less than men for "equal work" on jobs requiring "equal skill, effort, and responsibility, and which are performed under similar working conditions."[88] The EPA contains four exceptions for pay differentials that are based on: (1) "a seniority system"; (2) "a merit system"; (3) "a system which measures earnings by quantity or quality of production"; or (4) "any other factor other than sex."[89] The Bennett Amendment incorporates these four defenses to gender-based compensation discrimination claims from the EPA into Title VII, which means that an employer will not violate Title VII by discriminating against women in their pay if the

causal responsibility on women, but then described her advice as an interim step that might provide some immediate assistance for those women in privileged situations that enable them to "lean in," while continuing to pursue the more important and longer-term task of changing the organizational norms that disadvantage women. For a similar book that successfully achieves this constructive balance, see JOAN C. WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW (2014).

85. 42 U.S.C. § 2000e-2(a)(1) (2012).

86. *Id.* § 2000e-2(h). Congress also grants differential protection levels against intentional discrimination by not subjecting race and color to the bona fide occupational qualification defense to disparate treatment claims, *see id.* § 2000e-2(e)(1), and by granting a modest accommodation right for religion, *see id.* § 2000e(j).

87. *Id.* § 2000e-2(h). The legislative history of the Bennett Amendment is very limited. *See* Pamela L. Perry, *Let Them Become Professionals: An Analysis of the Failure to Enforce Title VII's Pay Equity Mandate*, 14 HARV. WOMEN'S L.J. 127, 160 & n.140, 161 (1991) (summarizing the Bennett Amendment's legislative history). The protected status of sex was not added to Title VII until two days before the House vote, and it was not until the House version was on the Senate floor for final consideration that Senator Bennett offered his Amendment as a concern arose over possible inconsistencies between Title VII and the EPA. *See* County of Wash. v. Gunther, 452 U.S. 161, 171–73 (1981); 110 CONG. REC. 13310, 13647 (1964) (statement of Sen. Bennett).

88. 29 U.S.C. § 206(d)(1) (2012).

89. *Id.*

pay differences are based on seniority, merit, or production systems, or on "any other factor other than sex."[90]

Sex-based compensation discrimination claims are still cognizable under Title VII, which theoretically remains broader than the EPA because it does not limit antidiscrimination protection only to situations in which lower paid women are performing substantially similar work as higher paid men.[91] But the "any other factor other than sex" defense has dramatically undercut the efficacy of Title VII's protection against sex-based pay discrimination by opening the door to internal causal narratives that shield the gender pay gap from legal review. This is particularly true in the context of disparate impact claims, which otherwise would have the most potential for redressing employer pay practices that base compensation in full or in part on individual employee negotiations.[92]

A Title VII disparate impact claim requires proof that a facially neutral particular employment practice causes women to experience substantially different outcomes than men.[93] The employer must then defend the practice by demonstrating that it is "job related" and "consistent with business necessity."[94] If the employer meets that burden, the plaintiff may still succeed by showing that a less discriminatory alternative employment practice exists that serves the employer's business needs.[95] If a plaintiff succeeds in a disparate impact case, the plaintiff may receive back pay but is not entitled to compensatory or punitive damages, or to a jury trial.[96] The power of a disparate impact claim is that it enables a court to enjoin the illegal employment practice.[97] In a pay equity case, a court could force an employer to eliminate the challenged wage-setting

90. *See Gunther*, 452 U.S. at 167–80; *see also* Charles B. Craver, *If Women Don't Ask: Implications for Bargaining Encounters, the Equal Pay Act, and Title VII*, 102 MICH. L. REV. 1104, 1118–22 (2004) (describing how the Bennett Amendment affects Title VII claims); Porter, *Synergistic Solutions*, *supra* note 40, at 830–31 (same).

91. *See* Craver, *supra* note 90, at 1118; *see also* Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 180 (2011) (noting that unlike the EPA, "Title VII extends to pay discrimination involving dissimilar jobs").

92. *See* Perry, *supra* note 87, at 159 (describing how "the Bennett Amendment has proven to be a barrier to many sex-based wage discrimination cases that rely on the disparate impact doctrine of Title VII").

93. *See* 42 U.S.C. § 2000e-2(k) (2012).

94. *See id.* § 2000e-2(k)(1)(A)(i).

95. *See id.* § 2000e-2(k)(1)(A)(ii), (k)(1)(C).

96. *See id.* § 1981(b).

97. *See id.* § 2002e-2(k)(1)(A)(i); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that "[i]f an employment practice which operates to exclude [members of a protected class] cannot be shown to be related to job performance, the practice is prohibited"); *see also* Travis, *supra* note 21, at 373–74 (describing the remedy for a disparate impact claim); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1238 (2003) (explaining that "[t]he standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody").

practice and require the employer to set up an alternative method for establishing employees' pay.[98]

Unfortunately, courts have been very willing to allow employers to use the factor other than sex defense as a way to sidestep disparate impact law by shifting causal attention away from the employer's role in wage setting and onto other causal sources.[99] The Bennett Amendment's incorporation of the factor other than sex defense allows the law to ignore one of the necessary causes, i.e., the employer, in what is really a multiple-necessary-cause scenario. Employers have used this strategy effectively with external causal narratives that invoke a variety of market-related excuses for gender pay disparities, as well as with internal causal narratives that invoke women's own "choices" as the cause of their own pay inequality.[100]

As the women don't ask narrative gained prominence socially, employers also have seized upon this specific version of an internal causal narrative to continue shielding themselves from legal liability for sex-based pay discrimination claims. Many courts have rejected gender pay equity claims by accepting an employer's argument that women's failure to negotiate as successfully as men supports the factor other than sex defense.[101] Even the EEOC has bought into this causal narrative, as illustrated in its compliance manual that lists examples of gender wage disparities that it would not consider to be violations of the EPA.[102] One listed example is when an employer gave "the same opening offer" to both a male and female employee, but the female employee "ended up with a lower starting salary" because she "did not bargain as assertively as the male."[103] Not only does the term "assertively" itself reflect gender stereotypes, but the EEOC also ignores social science research demonstrating that a woman who negotiates in the same manner as a man is likely to be penalized for her efforts, both by obtaining less favorable

98. *See* Chamallas, *supra* note 20, at 581, 611 (describing a disparate impact remedy in the pay equity context).

99. *See* Travis, *supra* note 21, at 348 (explaining how employers "falsely dichotomiz[e]" the causes of women's workplace inequality and use causes outside the workplace to skirt the application of Title VII law); Travis, *supra* note 8, at 54 (observing that "courts often implicitly decide whether to view the employee or the employer as the 'cause' of the employment event at issue").

100. *See* Travis, *supra* note 21, at 348–49 (compiling case law allowing employers to use a "market," "choice," or "lack of interest" defense to Title VII disparate impact claims (internal quotation marks omitted)).

101. Elzer, *supra* note 52, at 10–21 (summarizing case law and finding that, "[a]lmost without exception, courts hold that salary negotiation is a valid 'factor other than sex' that justifies an employer paying a man more than a woman who performs substantially equal work"); *see* Rabin-Margalioth, *supra* note 24, at 807–23 (analyzing employers' legal success in justifying gender pay differentials on the basis of "market forces," including "individual pay demands" and "bargaining effectiveness"); Ramachandran, *supra* note 4, at 1047 (explaining how courts are "reluctant to hold employers liable for discrimination that results, in part, from . . . the socialization of women . . . to negotiate less aggressively").

102. *See* EEOC Compl. Man. (EEOC) No. 915.003 § 10 ex. 42 (Dec. 5, 2000), *available at* http:// www.eeoc.gov/policy/docs/compensation.html.

103. *Id.*

results in the wage negotiation and by suffering residual dislike by other workers who then perceive her as overly aggressive.[104]

While most of these claims have been formally styled as alleged EPA violations,[105] the Bennett Amendment incorporates this causal barrier into Title VII. Even though an employer's selection of a pay-setting practice that relies upon individual employee negotiation is, by definition, another necessary cause of the gender pay disparity, the Bennett Amendment effectively allows that practice to avoid scrutiny by blocking the claim before getting to the business necessity defense, which would require an employer to justify its practice.[106] This risk of undercutting Title VII's ability to address facially neutral but discriminatory pay practices through a broad application of the factor other than sex defense has been compounded by Supreme Court dicta suggesting that the Bennett Amendment may bar the use of the disparate impact theory altogether in the context of sex-based pay equity claims.[107] This dicta suggests that the legal gap is even wider between the protection that is provided for women's pay disparities and all other forms of status-based employment discrimination.

The women don't ask narrative has become so accepted that even legislators who have recognized the inadequacy of our existing legal tools for combatting the gender pay gap are willing to reinforce it and lend it credibility. The internal causal attribution has found its way into

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104. *See supra* note 78 and *infra* notes 136–40.

105. *See* Porter & Vartanian, *supra* note 91, at 174–75, 178–79 (summarizing cases in which employers successfully defended EPA claims by using the excuse that "the male has negotiated for more pay").

106. *See* Rabin-Margalioth, *supra* note 24, at 812 & n.24 (analyzing how employers have successfully argued under existing law "that there is no legal obligation to offer individual workers more than their initial pay demands, even if implementation of a wage scheme based on employee wage demands ultimately disadvantages women").

107. In *Smith v. City of Jackson*, the Supreme Court held that disparate impact claims are cognizable under the Age Discrimination in Employment Act. 544 U.S. 228, 232 (2005) (plurality opinion). In reaching that holding, the Court stated that "if Congress intended to prohibit all disparate-impact claims, it certainly could have done so," and it then used the EPA as an example. *Id.* at 239 n.11. "For instance, in the Equal Pay Act," noted the Court, "Congress barred recovery if a pay differential was based 'on any other factor'—reasonable or unreasonable—'other than sex.'" *Id.* (quoting 29 U.S.C. § 206(d)(1) (2012)). Many commentators have read this dicta as a potential bar on disparate impact claims for sex-based pay equity under Title VII, which incorporates the "any other factor other than sex" defense from the EPA. *See, e.g.*, William E. Doyle Jr., *Implications of* Smith v. City of Jackson *on Equal Pay Act Claims and Sex-Based Pay Discrimination Claims under Title VII*, 21 LAB. LAW. 183, 183–85, 188–90 (2005) (arguing that the "implication" from the *Smith* dicta "is that the disparate impact theory is ruled out as a basis for sex-based pay discrimination claims under Title VII"); Porter, *Synergistic Solutions*, *supra* note 40, at 831 (explaining that Supreme Court dicta has made it "unclear" whether disparate impact claims for sex-based wage discrimination are cognizable); Rabin-Margalioth, *supra* note 24, at 828 (describing the dicta in *Smith* as "a strong suggestion . . . that the EPA's fourth affirmative defense effectively rules out disparate impact" claims under Title VII). *But see* Perry, *supra* note 87, at 158–74 (arguing that courts have incorrectly interpreted the Bennett Amendment to constrain Title VII disparate impact claims); Mark B. Seidenfeld, Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083, 1088–95 (1982) (arguing that the Bennett Amendment should not preclude Title VII disparate impact claims for sex-based wage discrimination).

the text of one of the most progressive pieces of proposed legislation that is backed by some of the most progressive women in Congress: the Paycheck Fairness Act (PFA).[108] The PFA's goal is "to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex."[109] The bill recognizes the importance of eliminating the gender pay gap not only to "reduc[e] the number of working women earning unfairly low wages," but also to enhance "women's retirement security," to "reduc[e] the dependence on public assistance," and to "promot[e] stable families by enabling all family members to earn a fair rate of pay."[110] To achieve these goals, the bill seeks to expand the EPA's impact by narrowing the factor other than sex defense to apply only to "a bona fide factor other than sex, such as education, training, or experience."[111] The PFA also would require an employer to demonstrate that the factor is job-related and consistent with business necessity, and it would give employees the opportunity to demonstrate "that an alternative employment practice exists that would serve the same business purpose without producing such differential."[112]

If the bill stopped there, it could indeed go a significant distance toward restoring disparate impact claims in the context of gender-based compensation.[113] But the PFA includes an additional provision that implicitly endorses and entrenches the internal causal narrative that the bill is designed to dismantle. Section 5 of the PFA is titled, "Negotiation Skills Training for Girls and Women."[114] This section would authorize the Secretary of Labor, in consultation with the Secretary of Education, to establish a competitive grant program for selected public agencies, private nonprofits, and community-based organizations to "carry out an effective negotiation skills training program that empowers girls and women."[115] According to the Act, funded programs would "help girls and women strengthen their negotiation skills to allow the girls and women

108. Paycheck Fairness Act, S. 84, 113th Cong. (2013), *available at* http://www.govtrack.us/congress/bills/113/s84. A version of The Paycheck Fairness Act was first introduced by then-Senator Hillary Clinton and Representative Rosa DeLauro in 2005. *See* Paycheck Fairness Act, S. 841, 109th Cong. (2005). The most recent version was sponsored by Senator Barbara Mikulski, along with cosponsors Senators Barbara Boxer and Dianne Feinstein, among other prominent women democrats. *See* Paycheck Fairness Act, S. 84.

109. Paycheck Fairness Act, S. 84.

110. *Id.* § 2(3)(B), (4)(C)(ii)–(iii).

111. *Id.* § 3(a)(2) (internal quotation marks omitted).

112. *Id.* § 3(a)(3). The Paycheck Fairness Act would also prohibit employers from retaliating against employees for discussing wages with co-workers, *id.* § 3(b), would increase penalties, including compensatory and punitive damage awards, *id.* § 3(c), and would allow class actions, *id.* § 3(c)(4).

113. *See* Elzer, *supra* note 52, at 30–33 (analyzing the potential effect of the Paycheck Fairness Act on claims targeting negotiation); *see also* Porter & Vartanian, *supra* note 91, at 195–202 (analyzing how the PFA would affect EPA cases in which an employer invokes a market excuse to justify a gender pay disparity).

114. Paycheck Fairness Act, S. 84 § 5.

115. *Id.* § 5(a).

to obtain higher salaries and rates of compensation that are equal to those paid to similarly situated male employees."[116]

While empowering girls and women is certainly a laudable goal and one that is difficult to criticize in the abstract, this particular form of "empowerment" rests on the assumptions that women's negotiation skills are deficient, that experts can treat the deficiency, and that women themselves are responsible for moving their wages to an "equal" level with similarly situated men. Moreover, the PFA's validation of the relevance of gender-based negotiation skills may enable employers to successfully invoke differences in negotiation outcomes as a "bona fide factor other than sex,"[117] which would undermine the PFA's attempt to narrow that broad-based defense in the first place.[118]

The PFA highlights how little progress the women's rights movement has made in resisting the internal causal attribution that places responsibility for the gender pay gap within women themselves. The disability rights movement, in contrast, has made tremendous strides in dismantling the internal causal attribution narrative that historically prevented its members from holding employers responsible for the workplace inequality faced by individuals with disabilities. That success was achieved by replacing the medical model of disability with the social model of disability, which shifted the causal focus from individuals onto employers—a shift that is also needed in the context of the gender pay gap.

II. LEARNING FROM THE DISABILITY RIGHTS MOVEMENT: USING THE SOCIAL MODEL TO SHIFT CAUSAL ATTRIBUTIONS TO EMPLOYERS

The social model of disability provides a theory that might help overcome the common barrier that women who experience wage inequality share with individuals with disabilities. This model recognizes the socially constructed nature of a marginalized and therefore limiting

116. *Id.* § 5(a)(5).

117. *Id.* § 3(a)(2) (internal quotation mark omitted).

118. *But see* Elzer, *supra* note 52, at 33 (suggesting that the presence of the negotiation funding provision would improve plaintiffs' chances for success in an EPA claim challenging unequal pay resulting from individual negotiations because "courts would be more likely to account for [gender differences in negotiation] if a statute authorized government-funded negotiation training programs designed for the express purpose of teaching women and girls how to obtain higher salaries"). The PFA also includes a brief provision stating that the EEOC "shall provide training to . . . affected individuals and entities on matters involving discrimination in the payment of wages," Paycheck Fairness Act, S. 84 § 4, and a longer provision on "Research, Education, and Outreach," which would require the Secretary of Labor to "conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women," *id.* § 6. While these provisions are on the right track in attempting to combat the institutional sources of the gender wage gap, neither provision contains details about what such training, studies, and information would contain, nor does it identify any of the known sources of the gender wage disparity, including employers' stereotypic reliance upon and reactions to individual employee negotiations. It leaves open the possibility that employers will simply be educated about women's own deficient negotiation skills as a source of the gender pay gap.

status, and it uses that recognition as a tool to shift causal attributions both in society and in the law.

A. The Social Model of Disability

Members of the disability civil rights movement recognized that reducing stigma and achieving meaningful antidiscrimination protection would first require combatting the internal causal attribution that was entrenched in the medical model of disability.[119] The movement therefore unified around a central goal of reconceptualizing disability not as an inherently limiting individual trait but rather as a social construct created by the interaction between mental or physical characteristics and contingent aspects of our environment that impose restrictions.[120]

Under the social model, the term "impairment" is used solely to describe a mental or physical condition, which is not inherently limiting independent from the context and environment in which it interacts.[121] A "disability," in contrast, refers not to an internal attribute, but instead to the limitations that are socially "imposed on top of one's impairment."[122] The social model is thus best understood not as a normative stance or policy prescription, but rather as a causal attribution theory.[123] It provides a theoretical basis for shifting from an internal to an external causal attribution to explain the source of inequality for individuals with impairments.[124] The crowning achievement of the social model of disability was to shift causal responsibility for workplace inequality away from individuals' physical and mental impairments and onto the "architectural, social, and economic environment" that renders those impairments limiting.[125]

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119. *See* Travis, *supra* note 47, at 943; *see also* BAGENSTOS, *supra* note 48, at 13 (describing "the endorsement of a social rather than a medical model of disability" as "the one position that approaches consensus within the movement").

120. *See* Travis, *supra* note 47, at 943; *see also* BAGENSTOS, *supra* note 48, at 18 (describing the social model of disability); Crossley, *supra* note 50, at 653–55 (explaining that "the social model of disability sees disadvantages as flowing from social systems and structures"); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 100 (2000) (describing the social model's understanding that "actual limitations that flow from an individual's physical or mental impairment often result from the manner in which society itself is structured"); Shakespeare, *supra* note 49, at 268 (explaining that the social model views disability as "a relationship between people with impairment and a disabling society").

121. *See* Shakespeare, *supra* note 49, at 268; Travis, *supra* note 47, at 944; Shelley Tremain, *On the Government of Disability*, 27 SOC. THEORY & PRAC. 617, 620 (2001).

122. Tremain, *supra* note 121, at 620; Travis, *supra* note 47, at 944 (describing the social model's distinction between impairment and disability).

123. *See* Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1251, 1255 (2007); *see also* Travis, *supra* note 47, at 944 (describing the social model as a causal theory).

124. *See* Samaha, *supra* note 123, at 1255; Travis, *supra* note 47, at 944.

125. Samaha, *supra* note 123, at 1255; Travis, *supra* note 47, at 944 (internal quotation marks omitted).

The social model not only unified very diverse members of the disability rights movement, but it also provided the foundation for legal and policy change. The most significant result was congressional enactment of the ADA's reasonable accommodation mandate.[126] The accommodation mandate recognizes that both an individual's impairment and aspects of the workplace are multiple necessary causes of an individual's inability to perform essential job tasks. The accommodation mandate therefore obligates employers to make reasonable modifications to workplace practices, policies, structures, and norms in order to reduce the functional effects of impairments that otherwise are not inherently limiting. By rendering legally irrelevant the particular diagnosis, the specific source, or the potential treatments for an individual's impairment, the ADA also shifted power away from medical experts.[127]

The social model of disability has not achieved all of the goals of the disability rights movement, nor is it without shortcomings.[128] But it has achieved far more progress than the women's rights movement has achieved in delegitimizing the internal causal narrative for the gender pay gap and resting power away from negotiation "experts" who are being increasingly empowered to diagnose and cure women's deficiencies.

Social model theorists did not undertake this momentous shift all on their own. To the contrary, early social modelists actually borrowed from and leveraged certain aspects of feminist legal theory—in particular, theories about the socially constructed nature of gender—in order to develop and ground the social model of disability.[129] As Professor Carlos Ball has explained, it was feminist theory that led disability rights advocates "to grapple with the social contexts that often determine whether particular physical or mental impairments translate into disabilities."[130]

126. *See* 42 U.S.C. § 12112(b)(5) (2012).

127. *See* Strassburger, *supra* note 38, at 364 (explaining that "[i]n the social model of disability, doctors are no longer the center of the story"); Travis, *supra* note 47, at 975–76 (describing one goal of the social model of disability as trying to delegitimize "the medical model's abdication of control to medical professionals"). This shift was strengthened in the Americans with Disabilities Act Amendments Act of 2008, which clarified that one's disability status is assessed in an unmitigated state, rendering irrelevant the potential medical treatments that are available to ameliorate an impairment. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2), 122 Stat. 3553, 3554 (codified at 42 U.S.C. § 12101 (2012)).

128. *See, e.g.*, Areheart, *supra* note 49, at 192–225 (explaining the ways in which "the medical model remains firmly entrenched" in social and legal context, despite the movement's focus on the social model of disability); Travis, *supra* note 47, at 975–76 (explaining that one shortcoming of the social model of disability is that it left the definition of impairment in the hands of medical professionals, "which is precisely what the social model of disability had intended to undermine by replacing the medical model").

129. *See, e.g.*, Alemzadeh, *supra* note 34, at 22 (describing the work by early social model theorist Susan Wendell); *see also* Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 141–42 (2005) (explaining how disability discrimination law is built upon "the feminist position on difference and equality," and arguing that "[w]hat disability discrimination law demands is something much closer to the understanding of equality held by feminist theory, one sensitive and attuned to issues of difference").

130. Ball, *supra* note 129, at 134–35.

Such borrowing, however, has generally occurred in the direction of disability rights advocates seeking to align with gender theory, rather than the reverse.[131] At this important juncture fifty years after the enactment of Title VII, it is time for women's advocates to claim the social model as a tool with untapped potential for combatting the gender pay gap.[132]

B. A Social Model of the Gender Pay Gap

The women don't ask narrative is analogous to the medical model of disability in that it focuses on perceived deficiencies within the individuals who are experiencing workplace inequality, and it therefore looks to experts to provide a treatment or cure. In the disability context, the medical model viewed impairments as deficits and sought help from medical professionals, while in the gender context, the women don't ask narrative views women's approach to negotiation as a deficit and seeks help from psychologists and negotiation experts. Applying a social model to the gender pay gap would make explicit the fact that gender pay disparities are actually the result of the interaction between the way in which women negotiate and the environment in which that negotiation occurs. A social model would recognize that the use of an employment practice that sets wages based in whole or in part on individual bargaining without pay transparency is what renders "disabling" any unique aspects of women's negotiation style.

One critical result of the social model of disability was to reveal that physical and mental impairments are merely differences that are not inherently limiting outside of the context in which they interact. Applying a social model to the gender pay gap would similarly provide a way to push women's negotiation differences from the normative realm into the merely descriptive. A social model reveals that any unique aspects of women's approach to negotiation are not necessarily deficits outside of an environment that renders them limiting in obtaining equal pay. In other words, a social model prevents observers from ignoring context. It recognizes when a multiple-necessary-cause scenario exists, and it forces attention onto the situational cause that is otherwise overshadowed by the personal. Specifically, it focuses attention onto the aspects of an employer's compensation system that are necessary to produce the gender pay

131. *See* Alemzadeh, *supra* note 34, at 30 (observing that the recent move to characterize pregnancy as a disability has been launched by disability scholars, "rather than from an advocate focusing primarily on pregnancy rights"). A notable exception is scholars who have used the ADA's accommodation mandate to provide comparators for supporting broader accommodation rights under the Pregnancy Discrimination Act. *See, e.g.*, Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 27–38 (1995); Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1004–11, 1018–35 (2013).

132. *Cf.* Strassburger, *supra* note 38, at 338–39 (arguing that "transgender, transsexual, and otherwise gender-variant or genderqueer activists can benefit from gender identity protections informed by the social model of disability" because the social model provides "a stronger long-term theoretical construct" than those offered by sex discrimination law (footnote omitted)).

gap. In doing so, the social model would shift power away from "experts" who, under the current internal causal narrative, are needed to diagnose and treat women's negotiation deficiencies, which is a process that itself carries economic and psychological costs.[133]

Just as the social model of disability does not deny that physical and mental impairments exist, a social model of the gender pay gap does not need to reject the existence of general differences in the ways that women as a group and men as a group approach wage negotiations on their own behalf. The authors of *Women Don't Ask* persuasively demonstrate, for example, that women negotiate their starting salaries and ask for raises less frequently than men,[134] and a body of research supports that conclusion.[135] The social model merely reveals that those differences are only deficits because of the employment practices that render them so—in other words, the differences may be socially real but legally irrelevant.

The empirical research on the gender pay gap not only supports the social model's notion that limitations are produced by the interaction between internal differences and the social environment in which the different individuals are engaged, but it also reveals that this interaction is neither random nor neutral. To the contrary, this interaction is highly dependent upon gender stereotypes and bias.[136] The research demonstrates, for example, that employers react more negatively to and take tougher positions against women who attempt to negotiate their wages than employers do for men who engage in the same type of self-advocacy.[137] In addition, evaluators—both men and women—tend to

133. *Cf. id.* at 364 (arguing that the disability rights movement's shift "from a medical model of disability to a social model" can benefit other marginalized groups, like members of the trans community, to "avoid the economic and psychological costs" of using medical diagnoses "to secure protections").

134. *See* BABCOCK & LASCHEVER, WOMEN DON'T ASK I, *supra* note 54, at 1–4, 17–129.

135. *See* Bowles & McGinn, *supra* note 78, at 105–06 (summarizing research findings "suggest[ing] that male managers and professionals negotiate higher starting pay than their female peers"); Elzer, *supra* note 52, at 3–9, 34 (summarizing the social science research on gender differences in negotiation approaches and results, and concluding "that gender differences in negotiation are real"); Porter & Vartanian, *supra* note 91, at 184–92 (summarizing research documenting women's differential propensity to negotiate for higher compensation than men); Rabin-Margalioth, *supra* note 24, at 814–18 (summarizing research demonstrating that women as a group assess the economic value of their work lower than men do when pay-rate information is unavailable, and that there are "systemic differences in the way women and men approach and handle wage negotiation"); Ramachandran, *supra* note 4, at 1059–60 (summarizing research on the differential negotiation patterns of women and men and how that contributes to the gender pay gap). *See generally* Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299 (1999) (describing differences in women's and men's negotiation styles).

136. *See* Porter & Vartanian, *supra* note 91, at 164 (explaining that "when women do negotiate, gender schemas can and do influence the way employers react").

137. *See* Bowles & McGinn, *supra* note 78, at 108–09 (summarizing studies finding that women will achieve less successful pay negotiation results than men when they "take a stereotypically masculine approach and advocate assertively for their self-interest"); *see also* BABCOCK & LASCHEVER, WOMEN DON'T ASK I, *supra* note 54, at 87 (explaining that "an assertive woman, no matter how well she presents her arguments in a negotiation, risks decreasing her likeability and therefore her ability to influence the other side"); Elzer, *supra* note 52, at 2, 6–8 (summarizing research demonstrating that "employers may react more negatively to women who *do* attempt to

further penalize women for attempting to negotiate for higher pay by deeming them less likeable and overly aggressive, and therefore being less willing to work with them in the future.[138] Women's tendency not to negotiate for higher wages is thus a "rational decision" that correctly takes into account the fact that society "punish[es] women for being aggressive."[139] Gender differences in negotiation cannot meaningfully be extricated from social context—"namely that men and women 'face different social incentives' when deciding whether to initiate negotiation."[140] In other words, internal differences in women's and men's approaches to negotiation are caused in part by external realities of the workplace.

Social scientists have recognized the implications that this research has for crafting solutions and legal reforms. Because the research demonstrates that the differences in women's negotiation tendencies and results are contingent upon the gender-biased environment in which the negotiation takes place, social scientists have argued that we "should shift the discussion of prescriptive implications away from fixing the women to addressing the social conditions that motivate these gender differences."[141] The social model used in the disability context would provide a theoretical framework to help scaffold those views as advocates try to combat the causal narrative not just socially but doctrinally as well.

While the disability rights movement ultimately leveraged the social model of disability into the reasonable accommodation mandate in disability discrimination law, the women's rights movement has significant room to progress without yet needing to go that far. Applying the social model to the gender wage gap could provide the basis for the more modest step of jettisoning the Bennett Amendment and resuscitating the dis-

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negotiate than they do to similarly-situated men"); Porter & Vartanian, *supra* note 91, at 184–95 (summarizing research showing that employers "react less favorably to" and "take a much tougher stance against female employees who negotiate on their own behalf").

138. *See supra* notes 135–37; *see also* Elzer, *supra* note 52, at 7–9 (summarizing research showing that "employers sometimes react more negatively toward women who negotiate than they do towards male negotiators"); Porter & Vartanian, *supra* note 91, at 194 (concluding that "[s]elf-promotion is so important for negotiating on one's own behalf and yet women are penalized for such self-promotion").

139. Elzer, *supra* note 52, at 9.

140. *Id.* at 8–9 (quoting Bowles, Babcock & Lai, *supra* note 78, at 100); *see also* Bowles & Babcock, *How Can Women Escape*, *supra* note 83, at 80–81 (summarizing research showing "that women have good reason to be more reticent than men about negotiating for higher compensation because women pay a higher social cost than men for doing so"). *See generally* Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 PSYCHOL. WOMEN Q. 65 (2001) (describing the social and psychological costs that women pay for self-advocacy).

141. Bowles, Babcock & Lai, *supra* note 78, at 100; *see also* Iris Bohnet & Hannah Riley Bowles, *Special Section: Gender in Negotiation: Introduction*, 24 NEGOTIATION J. 389, 390 (2008) (explaining that "what recent research has shown is that gender effects on negotiation are contingent on situational factors"); Elzer, *supra* note 52, at 9 (arguing that the "shift in focus from internal motivations to external factors" to explain why women negotiate less successfully makes it harder for employers to "escape liability by claiming that their male employees are better negotiators").

parate impact doctrine in the context of sex-based wage discrimination claims.[142]

The social model is entirely consistent with conventional disparate impact doctrine. Disparate impact law always deals with situations involving a facially neutral employment practice, which interacts with some real difference that distinguishes the members of a protected group from others, thereby producing disproportionate results. *All* disparate impact claims involve multiple necessary causes—one cause being the employer's practice and another being something that differentiates the protected class members from others.[143] An employer's neutral practice could not disparately impact a particular group if the members of that group did not differ from the members of another group in some meaningful way.[144] Yet disparate impact doctrine does not care whether those distinguishing characteristics are "physical, social, or cultural in nature."[145] In fact, disparate impact doctrine deems those distinguishing characteristics irrelevant in assessing an employer's liability.[146] Disparate impact doctrine "treats the employer's criterion as *the* cause of a disparity," even though it is only one of the necessary factors for producing the outcome.[147] The defining feature of disparate impact doctrine—what makes this model "a distinct and powerful feature on the antidiscrimination landscape"—is its refusal to ignore the employer's causal role just because there is some feature about the members of a protected group that is also necessary to produce the disparate results.[148] Professors Ramona Paetzold and Steven Willborn describe this defining feature of disparate impact theory as "causation with blinders."[149]

This multi-causal reality has not created a stumbling block for courts in disparate impact claims based on statuses other than sex and in contexts other than compensation.[150] The Supreme Court's decision in

142. *See* Chamallas, *supra* note 20, at 581, 600, 606 (urging the need "to revive disparate impact theory for use in pay equity disputes"); Perry, *supra* note 87, at 137 (arguing that "[t]he judiciary's refusal to enforce pay equity as mandated by Title VII's disparate impact theory must be challenged"); Rabin-Margalioth, *supra* note 24, at 818 (arguing that an employer's use of individual negotiations to set salaries adversely affects women and should support a disparate impact claim).

143. *See* Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 353 (1996) ("[E]very disparate impact case depends on an adverse impact that is created jointly by social factors and the employer's employment practice."); Travis, *supra* note 21, at 349–50 (noting the multi-causal nature of all disparate impact claims).

144. *See* Travis, *supra* note 21, at 349–50.

145. *See id.*

146. *See* Paetzold & Willborn, *supra* note 143, at 354 (explaining that disparate impact doctrine "ignore[s] causes external to the employer that contribute to the impact," which means that "employers may be held legally responsible for impacts that are 'caused' in substantial part by factors external to the employers").

147. *Id.* at 353–54, 364 (emphasis added).

148. *See id.* at 364.

149. *Id.* at 353–54, 364.

150. *See* Travis, *supra* note 21, at 350.

Griggs v. Duke Power Co.,[151] in which the Court first recognized the disparate impact theory under Title VII, is a prototypic example.[152] In *Griggs*, the Court used the disparate impact doctrine to invalidate an employer's facially neutral practice of requiring applicants to have a high school diploma, which at the time excluded African-American applicants at a higher rate than white applicants.[153] The fact that the disproportionate results resulted both from the employer's hiring practice and from the social reality that a lower percentage of African-Americans than whites received high school diplomas did not prevent the Court from invalidating the hiring practice under the disparate impact doctrine.[154] The employer was not permitted to point to African-Americans' lesser success in completing high school as a way to shield itself from liability for its neutral hiring practice, which it could not lawfully retain unless it could demonstrate that it was job-related and consistent with business necessity.[155]

Yet that is precisely what the Bennett Amendment permits employers to do in the context of gender pay equity claims. By incorporating the EPA's factor other than sex defense into Title VII, the Bennett Amendment reverses the typical causation blinders in a disparate impact claim involving sex-based pay disparities. The factor other than sex defense not only allows contributing factors that reside outside the employer to become legally relevant, but it treats those factors as *the* cause of the gender wage inequity. The Bennett Amendment permits employers to point to women's lesser success in negotiation as a way to shield the employer from liability for its facially neutral hiring practice that bases compensation on individual negotiation without pay transparency, thereby allowing the employer's wage-setting practice to avoid scrutiny for business necessity because the case never gets to the defense stage.[156] There is no

151. 401 U.S. 424 (1971).

152. *Id.* at 431; *see* Paetzold & Willborn, *supra* note 143, at 352–53 (using *Griggs* to illustrate "the multiple causation present in all disparate impact cases"); Travis, *supra* note 21, at 350 (analyzing the multiple necessary causes in the *Griggs* case).

153. 401 U.S. at 436.

154. *Id.*; *see* Paetzold & Willborn, *supra* note 143, at 352–53 (explaining that the disparate impact in *Griggs* was "caused" both by "the social conditions that resulted in a lower proportion of blacks than whites with high school diplomas" and the employer's use of a high school diploma requirement to make hiring decisions (internal quotation marks omitted)); Travis, *supra* note 21, at 350 (describing the multiple causes of the disparate impact in *Griggs*).

155. *See* Paetzold & Willborn, *supra* note 143, at 393 (explaining that evidence of "causative factors" that have their source within the employees who are experiencing disproportionately negative employment outcomes are irrelevant in a disparate impact case).

156. *Cf.* Perry, *supra* note 87, at 128, 131, 136–37 (arguing that disparate impact doctrine should require courts to examine the business justification of any type of "pay-setting practice[]" that is "consequentially preferential to men"). Even if an employer could overcome the business necessity hurdle, women could still win a disparate impact claim by demonstrating a less discriminatory alternative pay-setting practice. Social science research could aid that endeavor by suggesting specific situational changes that reduce the potential effects of gender on negotiation outcomes. *See, e.g.*, Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 952–58, 962 (2005). One example is to decrease situational and structural ambiguity, which means specifying

legitimate reason to treat disparate impact claims differently in the context of sex-based compensation practices.[157] But the internal causal narrative of women's own responsibility for the gender wage gap—our failure to lean in, to speak up, and to just ask—is so pervasive and entrenched that it has rendered the employer's pay-setting practice invisible. Applying the social model of disability to the gender wage gap renders visible the multiple necessary causes of gender pay disparities and focuses attention on the employer's causal role.

The social model thus supports elimination of the Bennett Amendment from Title VII (or at least elimination of the factor other than sex defense from the four defenses that the Amendment currently incorporates). While this proposal is similar to the PFA and to other scholars' proposals for interpreting or applying the EPA's factor other than sex defense more narrowly,[158] eliminating the Bennett Amendment from Title VII would go further toward leveling the playing field for Title VII claims, and it would do so by directly addressing the source of the problem.

The PFA only amends the EPA, and it does so by narrowing but not eliminating the factor other than sex defense. The PFA would amend the EPA to allow the factor other than sex defense to apply only to "a bona fide factor other than sex, such as education, training, or experience."[159] The PFA then tracks the steps in a conventional Title VII disparate impact claim, by requiring an employer to demonstrate that the factor is job-related and consistent with business necessity, and allowing employees to demonstrate "that an alternative employment practice exists that

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more clearly "how parties are supposed to interact with one another," and making explicit the "economic structure of the negotiation," such as letting parties know "the limits of the bargaining range and appropriate standards for agreement." *Id.* (describing the results of two empirical studies). Based on that research, women could argue that a less discriminatory alternative pay-setting practice would structure wage negotiations to decrease situational and structural ambiguity in how the interaction should proceed and in the economic parameters of the bargaining range. *See id.*

157. *See* Perry, *supra* note 87, at 184 (arguing that "applying standard Title VII disparate impact doctrine to any claim of sex-based wage discrimination should result in analysis which is indistinguishable from that done in other disparate impact claims").

158. *See, e.g.*, Craver, *supra* note 90, at 1114–17 (interpreting the factor other than sex defense narrowly to conclude that "[i]f an employer were to succumb to male bargaining entreaties with respect to jobs that are substantially equal to those of women who do not ask about the possibility of more advantageous employment terms, the women would have claims under the EPA"); Elzer, *supra* note 52, at 2–3, 9, 21 (arguing that salary negotiation should not be deemed a valid factor other than sex in an EPA claim because "gender differences in negotiation arise out of unequal bargaining power"); Porter & Vartanian, *supra* note 91, at 165–66, 195–203 (proposing to adopt the PFA's amendment for limiting the "'any other factor other than sex'" defense, but to jettison the uncapped damage provision to make the bill more politically viable (internal quotation marks omitted)). The proposal for amending the EPA that is most analogous to this Article's proposal for amending Title VII is Professor Rabin-Margalioth's suggestion for changing the EPA so that mere proof that "a female employee is compensated at a lower rate than a comparable male employee for the same work" would "trigger[] the obligation to inquire whether this can be justified." *See* Rabin-Margalioth, *supra* note 24, at 808–09.

159. Paycheck Fairness Act, S. 84, 113th Cong. § 3(a)(2) (2013) (internal quotation marks omitted).

would serve the same business purpose without producing such differential."[160] Although this appears to be quite similar to a full revival of the disparate impact doctrine, it continues to violate the defining feature of disparate impact theory: the legal irrelevance of causal factors outside of the employer. Although the PFA narrows the non-employer causes that may be invoked to shield the employer from legal liability by ignoring the necessary causal role that is also played by the employer's neutral pay practice, that shield nonetheless remains. By leaving the Bennett Amendment intact—which would then incorporate the narrower factor other than sex defense into Title VII—the PFA would still allow room for employers to avoid the causation blinders that are the defining feature of the disparate impact doctrine in all other areas of Title VII law.

By focusing on the Bennett Amendment and reviving the disparate impact doctrine, leveraging the social model of disability may help the women's rights movement make headway on the gender pay gap without having to take on the special treatment stigma that attaches to an accommodation right. The social model merely provides the theoretical basis for delegitimizing the internal causal narrative of the gender pay gap, thereby revealing the illegitimacy of the Bennett Amendment's "second class treatment" of sex-based compensation discrimination claims.[161] Using the social model toward this end is thus consistent with an equal treatment and formal equality approach. Its objective is to bring Title VII's protection for sex-based compensation discrimination up to the same level as the protection that Title VII provides for all other statuses in all other types of employment discrimination claims.[162]

CONCLUSION

Causal narratives are enormously influential in directing not only our social assessments of responsibility but also our legal assessments of discrimination liability. The women don't ask narrative has been particularly powerful. This narrative holds women themselves responsible for the gender wage gap, and it buttresses a legal regime that allows employers to avoid liability for pay-setting practices that are built upon gender stereotypes and that entrench gender pay inequality. Although the social

160. *Id.* § 3(a)(3)(B).

161. *See* Perry, *supra* note 87, at 184 (describing Title VII's "unique and second class treatment" for gender-based pay equity claims).

162. *See id.* at 158 (noting that "[t]he Bennett Amendment, by its terms, singles out sex-based wage discrimination for different treatment under Title VII" (footnotes omitted)); *see also* Rabin-Margalioth, *supra* note 24, at 828 n.104 (arguing that reading the Bennett Amendment to rule out disparate impact claims under Title VII "would lead to an implausible situation where two similar claims of Title VII compensation discrimination, one claiming race or national origin base[d] discrimination and the other claiming sex based discrimination, would not be offered the same scope of protection"). The heightened protection for race and color in disparate treatment claims would still exist in Title VII's exemption of those statuses from the bona fide occupational qualification defense, *see* 42 U.S.C. § 2000e-2(e)(1), as would the modest accommodation right for religion, *see id.* § 2000e-2(e)(2).

science research itself reveals this reality by demonstrating the role that gender stereotypes play in creating and sustaining women's differential negotiation approaches and results, the women don't ask causal narrative is so pervasive that it needs a theoretical framework to help shift the internal causal attribution upon which the narrative rests. The social model is a causal attribution theory that achieved a similar objective for disability rights, by replacing the internal causal attribution of the medical model of disability with an external causal attribution that focused instead on the employment practices that render various characteristics disabling. As a causal attribution theory, the social model provides a useful tool for the women's rights movement, which needs a way to make salient the role that employers' wage-setting practices play in sustaining the gender pay gap.

Challenging the legal relevance of the women don't ask narrative in Title VII law is an important step, but it is likely only one of many steps that will be needed to eventually bridge the gender pay gap. Placing sex-based disparate impact compensation claims on par with all other types of disparate impact claims is a critical start, but there are many ways in which courts have undermined the transformative potential of the disparate impact doctrine more generally, which will also need attention. These general issues include, among others, courts' unwillingness to characterize deeply entrenched employment norms and organizational structures as "particular employment practices" that are subject to disparate impact review.[163] They also include courts' unwillingness to engage in deep scrutiny under the business necessity defense.[164] It is also hard to imagine the gender pay gap ever disappearing without a major shift toward pay transparency.[165] But none of these proposed reforms will likely move forward if we continue to allow the women don't ask causal narrative to dominate the gender wage debate. It is time for the women's rights movement to lean *out* by shifting our causal narrative away from women and onto the workplace practices that render women's negotiation less lucrative than men's.

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163. *See* Chamallas, *supra* note 20, at 609 (noting the problem of characterizing complex pay-setting systems as particular employment practices for purposes of a disparate impact challenge); Porter, *Synergistic Solutions*, *supra* note 40, at 806–20 (proposing EEOC guidance that would "redefine 'employment practice' to include workplace norms that often go unnoticed"); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 36–46, 77–91 (2005) (analyzing case law to reveal how courts treat default organizational structures as non-practices, thereby shielding them from a disparate impact challenge).

164. *See* Porter, *Synergistic Solutions*, *supra* note 40, at 806–21 (proposing EEOC guidance to "requir[e] a more searching business necessity inquiry"); Travis, *supra* note 21, at 360–68 (analyzing case law indicating that "courts increasingly have deferred to employers' business decisions" and urging a higher bar for the business necessity defense).

165. *See generally* Ramachandran, *supra* note 4, at 1046 (arguing for pay transparency—i.e., "the ability for employees to find out what other employees in their workplace make"—as a way to help address the gender pay gap).