

NOTE

UNBINDING WORKING WOMEN IN A “BINDERS-FULL-OF-WOMEN” NATION: HOW THE UNITED STATES CAN LEARN FROM SWEDISH, NORWEGIAN AND ICELANDIC SUCCESSES IN GENDER PAY GAP LEGISLATION

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I. INTRODUCTION TO GLOBAL GENDER-RELATED POLICY, CULTURE AND EQUAL PAY WITH A FOCUS ON THE U.S., SWEDEN, NORWAY AND ICELAND

And so we took a concerted effort to go out and find women who had backgrounds that could be qualified to become members of our cabinet . . . I went to a number of women's groups and said, can you help us find folks? And I brought us whole binders full of—of women.¹

Most Americans recognize this statement from Mitt Romney, the

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¹ Eyder Perlata, *Presidential Debate Spins 'Binders Full of Women' Meme, Fact Checks*, THE TWO-WAY: BREAKING NEWS FROM NPR (Oct. 17, 2012), <http://www.npr.org/blogs/thetwo-way/2012/10/17/163071667/presidential-debate-spins-binders-full-of-women-meme>.

2012 Republican Presidential nominee.² It was said during a Presidential debate when the former Massachusetts governor answered an equal pay question.³ The phrase “binders full of women” inspired an instant Internet viral phenomenon: within a day, almost 300,000 people had supported a Facebook page devoted to the political vacuity of the statement.⁴ Romney’s answer prompted up to 104,704 Tweets-per-minute during that part of the debate.⁵ The “phrase ‘binders full of women’ became an instant Internet meme” and entire websites mocking Romney’s debate answer were born.⁶

In all fairness, Romney’s off-putting comment was more than likely a slip of the tongue.⁷ However, it contributed to a perception that Romney has a “true lack of understanding, knowledge and comfort level on women’s equality.”⁸ In this day and age, one might presume that a savvy businessman and American presidential nominee would not expect to be glorified for looking for potential female cabinet members. However, the reality of women’s vulnerable position in the U.S. legal system highlights the need for “substantive, lasting cultural change in attitudes towards women” if working women can successfully battle employment discrimination through reliable judicial and legislative processes.⁹ Moreover, women across the globe face challenges in employment disparities: nearly every country in the world experiences a gender pay gap (GPG).¹⁰

Women comprise almost fifty percent of the world’s population.¹¹ They also outlive men in every global region.¹² However, the “glass ceiling” has hindered female access to leadership positions in

² Perlata, *supra* note 1; *see also* Maria Cardona, *Romney’s Empty ‘Binders Full of Women’*, CNN (Oct. 18, 2012), <http://www.cnn.com/2012/10/17/opinion/cardona-binders-women>.

³ Perlata, *supra* note 1.

⁴ Cardona, *supra* note 2.

⁵ Perlata, *supra* note 1.

⁶ Cardona, *supra* note 2; Perlata, *supra* note 1.

⁷ Cardona, *supra* note 2.

⁸ *Id.*

⁹ *See* Vicky Lovell, *Evaluating Policy Solutions to Sex-Based Pay Discrimination: Women Workers, Lawmakers, and Cultural Change*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 45, 57 (2010).

¹⁰ U.N. DEP’T OF ECON. & SOC. AFFAIRS, *THE WORLD’S WOMEN 2010: TRENDS AND STATISTICS*, at 97, U.N. Doc. ST/ESA/STAT/SER.K/19, U.N. Sales No. E.10.XVII.11 (2010); *see also* *OECD Gender Initiative*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/els/family/oecdgenderinitiative.htm#Browser> (last visited Feb. 17, 2014); Hugo Ñopo et al., *Gender Earning Gaps in the World* (Inst. for the Study of Labor (IZA), Discussion Paper No. 5736, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1855188.

¹¹ U.N. DEP’T OF ECON. & SOC. AFFAIRS, *supra* note 10, at 2.

¹² *Id.* at 1

business.¹³ This is an especially noteworthy phenomenon in the world's largest corporations, which remain overwhelmingly male-dominated.¹⁴ For example, of the 500 largest corporations in the world, only thirteen have female chief executive officers.¹⁵ Furthermore, across the developed world, women earn sixteen percent less than men when employed in fulltime jobs.¹⁶

Although inequality between sexes is certainly a global reality, some countries are the undeniable leaders of progressive gender-equalizing culture and policies, while others lag behind.¹⁷ Each year, the World Economic Forum (WEF) conducts a study that benchmarks the "gender gap" in around 135 countries using gender-related data.¹⁸ Since 2006, The Global Gender Gap Index (GGGI) has been utilized as a tool to capture gender-based disparities and track their progress on a country-by-country and global scale.¹⁹ The GGGI compares statistics between selected countries and "assesses countries on how well they are dividing their resources and opportunities among their male and female populations, regardless of the overall levels of these resources and opportunities."²⁰

For the past seven years—the entirety of the time period over which this study has been conducted—Iceland, Finland, Norway and Sweden have been among the top four places.²¹ Saadi Zahidi, one of the study's authors, explains that "Nordic countries have consistently been in the top 10,' . . . [though] their economies have struggled in recent years . . . '[and] the region continues to be No. 1 in political empowerment and economic participation as well.'"²² According to Zahidi, low wage inequality between and high numbers of women in the

¹³ *Id.* at 124.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *OECD Gender Initiative*, *supra* note 10; Catherine Rampell, *The 'Mommy Penalty,' Around the World*, N.Y. TIMES: ECONOMIX (Dec. 17, 2012), <http://economix.blogs.nytimes.com/2012/12/17/the-mommy-penalty-around-the-world/>.

¹⁷ RICARDO HAUSMANN, ET AL., THE GLOBAL GENDER GAP REPORT 2013 16 (2013), available at <http://www.weforum.org/reports/global-gender-gap-report-2013> [hereinafter GENDER GAP REPORT 2013].

¹⁸ *Id.* at 6.

¹⁹ *Id.* at v; Meghan Casserly, *The Global Gender Gap is Closing, but the U.S. is Still Failing its Women*, FORBES (Oct. 24, 2012), <http://www.forbes.com/sites/meghancasserly/2012/10/24/the-global-gender-gap-is-closing-but-the-u-s-is-still-failing-its-women/>.

²⁰ Cathrine Tømpté, *'Return to Gender': Gender, ICT and Education*, ORG. FOR ECON. CO-OPERATION AND DEV. 2 (2008), <http://www.oecd.org/edu/ceri/40832766.pdf>.

²¹ GENDER GAP REPORT 2013, *supra* note 17, at 16.

²² Casserly, *supra* note 19.

workforce and in leadership positions (whether enforced by a quota system or done voluntarily) is one of the propelling forces behind the Nordic countries' low gender gap; childcare and taxation policies are perhaps even more important factors.²³

Minimizing inequality in wages is one of the most important gender equality concerns today. According to the Organization for Economic Cooperation and Development (OECD), every OECD country currently has a GPG,²⁴ although virtually every OECD country has also enacted an equal pay law.²⁵ Expunging the GPG is important not just for the sake equality, but also for more palpable reasons. The OECD reported in 2012 that gender equality is influential on a country's economic growth.²⁶ According to the OECD, "[i]nvestment in gender equality yields the highest returns of all development investments . . . Gender inequality means not only forgoing the important contributions that women make to the economy, but also wasting years of investment in educating girls and young women."²⁷

Furthermore, "[t]he impact of pay inequality is dramatic over a woman's lifetime."²⁸ For example, since many women carry out significant unpaid work at home instead of engaging in formal employment, they are more likely to retire on lower pensions and to spend their final years in poverty.²⁹ Accordingly, although women live on average nearly six years longer than men, women over sixty-five

²³ *Id.*

²⁴ *OECD Factbook 2013: Economic, Environmental and Social Statistics*, OECD iLibrary (2013), <http://www.oecd-ilibrary.org/sites/factbook-2013-en/13/02/02/index.html?itemId=/content/chapter/factbook-2013-106-en>.

²⁵ Francine D. Blau & Lawrence M. Kahn, *Understanding International Differences in the Gender Pay Gap*, J. LABOR ECON (2003) 106, 110, available at <http://info.worldbank.org/etools/docs/library/230114/JOLE%20gender%20pay%20gap.pdf>.

²⁶ Greg Keller, *Workplace Gender Gap: OECD Says Reduce Pay Difference to Lift Economic Growth*, HUFF. POST CANADA (Dec. 17, 2012), http://www.huffingtonpost.ca/2012/12/17/workplace-gender-gap-economy-oecd_n_2314191.html.

²⁷ *Id.*

²⁸ *Lack of Support for Motherhood Hurting Women's Career Prospects, Despite Gains in Education and Employment*, says OECD, ORG. FOR ECON. CO-OPERATION AND DEV. (Dec. 17, 2012),

<http://www.oecd.org/newsroom/lackofsupportformotherhoodhurtingwomenscareerprospectsdespitegainsineducationandemploymentsaysoced.htm> [hereinafter "OECD NEWSROOM"]; see CHRISTIANNE CORBETT & CATHERINE HILL, *GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 5* (2012), available at <http://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf>.

²⁹ OECD NEWSROOM, *supra* note 28; see U.N. DEP'T OF ECON. AND SOC. AFFAIRS, *supra* note 10, at 168.

years old are one-and-a-half times more likely to live in poverty than men of that age.³⁰

The Nordic countries inarguably lead the world in gender equality.³¹ For example, according to the WEF's global gender gap rankings for 2013, Iceland was given "the top spot for the fifth consecutive year and . . . continues to be the country with the narrowest gender gap in the world."³² Even so, Nordic countries also experience a GPG, although to a lesser extent than most other countries.³³ For example, according to OECD data, both Norway, which is ranked third in gender equality by the WEF,³⁴ and Sweden, the WEF's fourth best country for gender equality,³⁵ have GPGs lower than the OECD average.³⁶ Furthermore, the GPGs in Norway and Sweden are reportedly narrowing.³⁷

In stark contrast, falling below Nicaragua, South Africa, the Philippines, Lesotho, Latvia, Cuba and Burundi, the U.S. is ranked twenty-third in gender equality out of the 136 countries that were sampled by the WEF in 2013.³⁸ Not only does the U.S. fall behind Sweden, Norway and Iceland, as well as most European countries in terms of gender equality, the U.S. GPG is also higher than that of Slovakia and the Czech Republic.³⁹ In 2012, women working full time in the U.S. were paid just seventy-seven percent of what men were paid.⁴⁰ This highlights a perplexing paradox:

³⁰ OECD NEWSROOM, *supra* note 28.

³¹ GENDER GAP REPORT 2013, *supra* note 17, at 16.

³² *Id.*

³³ *See id.* at 20.

³⁴ *See id.* at 16.

³⁵ *Id.*

³⁶ *See* PWC UK, INTERNATIONAL WOMEN'S DAY PWC WOMEN IN WORK INDEX 5 (Mar. 2014), *available at* <http://preview.thenewsmarket.com/Previews/PWC/DocumentAssets/321173.pdf>.

³⁷ *See* EUROFOUND, ADDRESSING THE GENDER PAY GAP: GOVERNMENT AND SOCIAL PARTNER ACTIONS 8 (2010), *available at* <http://www.eurofound.europa.eu/pubdocs/2010/18/en/1/EF1018EN.pdf>.

³⁸ GENDER GAP REPORT 2013, *supra* note 17, at 12.

³⁹ *See* PWC UK, *supra* note 36, at 5.

⁴⁰ AM. ASS'N FOR UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 3 (2013), *available at* <http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/> [hereinafter "THE SIMPLE TRUTH"].

[W]hile the relative qualifications of American women are high as compared with those of women in other countries and the United States has had a longer and often stronger commitment to antidiscrimination laws than most economically advanced nations, the United States has traditionally been among the countries with the largest gender gaps.⁴¹

The purpose of this Note is to compare Nordic⁴² and American gender policy with the goal of determining the ways in which the U.S. could narrow its GPG through Nordic-inspired laws. In doing so, this Note will compare gender-related policies in the U.S., Sweden, Norway and Iceland, focusing on the influence of each country's laws on its respective GPG. It will analyze Swedish, Norwegian and Icelandic gender-related laws and will explore the legal plausibility of adopting similar gender-related policies in the U.S. It will explain the ways in which the American political and social climates, as well as the U.S. Constitution, act as an inherent limit to the U.S. adopting similar laws. It will conclude with a theoretical analysis of how the U.S. could close its GPG through laws inspired by Nordic gender policy.

II. SWEDISH, NORWEGIAN AND ICELANDIC GENDER LAW: AN OVERVIEW AND ANALYSIS OF THEIR IMPACTS ON THE GENDER PAY GAP AND INFLUENCE ON GENDER EQUALITY IN THE WORKPLACE

Despite the differences between American and Nordic political environments and cultures, the U.S. could learn from the Nordic success at narrowing its gender gap through policy. Like the U.S., Nordic countries are industrialized democracies. The WEF also groups America, Sweden, Norway and Iceland into its category of high-income countries.⁴³ In addition, these countries are among a group of "that have made investments in women's health and education and generally see returns on this investment in terms of women's economic and political participation."⁴⁴ But unlike the U.S., Nordic countries are consistently ranked top globally in terms of gender equality.⁴⁵

⁴¹ Blau & Kahn, *supra* note 25, at 108.

⁴² Although Denmark and Finland are typically considered Nordic countries as well, this note focuses on Sweden, Norway and Iceland. These countries were chosen because of the breadth of their respective gender laws, and based on their high gender equality rankings. Therefore, for purposes of this Note, they are referred to collectively as "Nordic," though some of the points in this Note may or may not apply to Denmark and Finland as well.

⁴³ WEF's "[i]ncome classifications are taken from the World Bank, which classifies economies into four categories based on GNI per capita: high income, upper-middle income, lower-middle income and low income." GENDER GAP REPORT 2013, *supra* note 17, at 17.

⁴⁴ *Id.* at 31.

⁴⁵ *See id.* at 16; *see also* Casserly, *supra* note 19.

Likewise, Nordic countries have different types of family policies than those in the U.S., a factor that may impact gender equality in the workplace.

A. *Family-Friendly Policies*

1. *Parental Insurance*

There are unique aspects to Swedish, Norwegian and Icelandic gender policies, but these policies also overlap. According to the WEF, high gender equality rankings, perhaps most importantly, stem from “childcare and taxation policies that have made it possible for both women and men to combine work and family.”⁴⁶ While the majority of men in all age groups receive a “child wage premium,” one study conducted across 28 countries reveals a “child wage penalty” for women in all age groups.⁴⁷ This means that for women around the world, having a child is directly correlated to a decrease in wages, while fatherhood entails an opposite correlation for men in the workplace.⁴⁸ “This indicates that in many countries childrearing is much more detrimental to female wages compared to male wages, thereby contributing to the GPG.”⁴⁹ Policies that facilitate women in their childrearing tasks thus may decrease the GPG.⁵⁰ Accordingly, Nordic countries are considered forerunners in family-friendly policy.⁵¹

Statutorily governed parental insurance is an example of one such policy; Nordic paid parental leave schemes are the most generous in the world.⁵² Sweden was the first country to finance parental insurance,⁵³

⁴⁶ *Id.*

⁴⁷ K. G. TIJGDENS & M. KLAVEREN, FROZEN IN TIME: GENDER PAY GAP UNCHANGED FOR 10 YEARS 38 (2010), available at http://www.ituc-csi.org/IMG/pdf/pay_gap_en_final.pdf.

⁴⁸ *Id.* See also CHARLOTTA MAGNUSSON, MIND THE GAP: ESSAYS ON EXPLANATIONS OF GENDER WAGE INEQUALITY 18 (2010), available at su.diva-portal.org/smash/get/diva2:284166/FULLTEXT01.

⁴⁹ TIJGDENS & KLAVEREN, *supra* note 47, at 38; see THE SIMPLE TRUTH, *supra* note 40, at 9.

⁵⁰ TIJGDENS & KLAVEREN, *supra* note 47, at 38; see Trond Petersen et al., *From Motherhood Penalties to Husband Premia: The New Challenge for Gender Equality and Family Policy Lessons from Norway* 20 (Univ. of Cal. at Berkeley, Inst. for Research on Labor & Employment, Working Paper No. 154-07, 2007), available at <http://www.irle.berkeley.edu/workingpapers/154-07.pdf>.

⁵¹ Nabanita Datta Gupta et al., *Child Care and Parental Leave in the Nordic Countries: A Model to Aspire to?* 2 (Inst. for the Study of Labor (IZA), Discussion Paper No. 2014, 2006), available at <http://www.econstor.eu/bitstream/10419/33292/1/509195180.pdf>; see, e.g., Matti Alesalo et al., *The Nordic Model: Conditions, Origins, Outcomes, Lessons* 27 (Hertie Sch. of Governance, Working Paper No. 41, 2009), available at http://www.hertie-school.org/fileadmin/images/Downloads/working_papers/41.pdf.

⁵² *Id.* at 30.

which provides paid leave from work to the family unit, instead of the more common practice of giving paid leave to one parent, usually a mother.⁵⁴ Norway adopted a similar parental insurance policy shortly thereafter; Iceland then enacted a comparable scheme several years later.⁵⁵ One of the main arguments for parental insurance is that its provision of paid leave to both parents promotes equality in caregiving⁵⁶ and leads to a more equal division of household work.⁵⁷ Due to the “impact of care responsibilities on women’s employment”⁵⁸ policies that reconcile household and employment obligations may lead to gender equality.⁵⁹ In fact, a recent Swedish study shows that “a mother’s future earnings increase on average 7 percent for every month the father takes [parental] leave.”⁶⁰

Nordic countries have also introduced mandatory fathers’ quotas to further encourage the equal share of leave between parents.⁶¹ Fathers’ quotas effectuate this goal by assigning a certain amount of parental leave specifically to fathers and mandating that this time cannot be

⁵³ CHRISTIANA CHRISTIANSSON, RESPONSE REPORT: SWEDEN (ORGANISATION OF EXCHANGE OF GOOD PRACTICES ON GENDER EQUALITY, THE PARENTAL LEAVE SYSTEM IN ICELAND SEMINAR REPORTS: 22-23 OCTOBER 2008, REYKJAVIK), VT/200/054 153, 155; Ann-Zofie Duvander et al., *Family Policy and Fertility: Fathers’ and Mothers’ Use of Parental Leave and Continued Childbearing in Norway and Sweden* 5, n.3 (Stockholm Univ. Linnaeus Center on Social and Family Dynamics in Europe, Working Paper 2008:2), available at http://www.su.se/polopoly_fs/1.18720.1320939636!/WP2.pdf.

⁵⁴ See Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 36 (2010); see also, Christina Bergqvist, *Childcare and Parental Leave Models*, in EQUAL DEMOCRACIES? GENDER AND POLITICS IN THE NORDIC COUNTRIES 121, 135 (1999).

⁵⁵ See Johanna Lammi-Taskula, *Nordic Mothers and Fathers on Leave: Towards Equal Sharing?*, in PARENTAL LEAVE, CARE POLICIES AND GENDER EQUALITIES IN THE NORDIC COUNTRIES 21, 22 (Erla Sigurðardóttir ed., 2009), available at http://eng.velferdarraduneyti.is/media/acrobat-enskar_sidur/TemaNord-2010539.Parental_leave.pdf; see also Gupta et al., *supra* note 51, at 6-8.

⁵⁶ HUMAN RIGHTS WATCH, FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE U.S. 1, 2 (2011), available at <http://www.hrw.org/sites/default/files/reports/us0211webcover.pdf>.

⁵⁷ See CTR. FOR GEND. EQUAL. IN ICELAND, GENDER EQUALITY IN ICELAND: INFORMATION ON GENDER EQUALITY ISSUES IN ICELAND 24 (2012), available at http://eng.fjarmalaraduneyti.is/media/Gender_Equality_in_Iceland_012012.pdf.

⁵⁸ EUROPEAN COMM’N DIRECTORATE-GENERAL FOR EMP’T, SOC. AFFAIRS & EQUAL OPPORTUNITIES, GENDER MAINSTREAMING OF EMPLOYMENT POLICIES: A COMPARATIVE REVIEW OF THIRTY EUROPEAN COUNTRIES 8 (2007), available at <http://ec.europa.eu/social/BlobServlet?docId=2059&langId=en> [hereinafter “GENDER MAINSTREAMING”].

⁵⁹ See *id.*

⁶⁰ Katrin Bennhold, *In Sweden, Men Can Have It All*, N.Y. TIMES (June 9, 2010), <http://www.nytimes.com/2010/06/10/world/europe/10iht-sweden.html?pagewanted=all>.

⁶¹ See Lammi-Taskula, *supra* note 55, at 22.

transferred to mothers.⁶²

For example, prior to the enactment of Iceland's fathers' quota law in 2001, Icelandic fathers' rate of participation had been very low, and Icelandic fathers took only about three percent of all parental leave days taken by parents.⁶³ In 2007, only six years after Iceland authorized its fathers' quota (which allows for the provision of eighty percent of a father's wages for up to three months), studies showed that Icelandic fathers took one third of all parental leave days.⁶⁴ In fact, ninety-one percent of Icelandic fathers now take their guaranteed independent parental leave.⁶⁵ Sixty percent of eligible Norwegian men now take advantage of their four weeks of guaranteed parental leave.⁶⁶ On top of the four weeks of guaranteed leave, couples in Norway may share another twenty-nine weeks between parents.⁶⁷

Swedish parental leave policy is arguably the most generous; it ensures eighty-percent compensation of wages for 480 days.⁶⁸ Each parent must take sixty days or the days are lost.⁶⁹ Further, parents who share the leave allowance equally receive a daily bonus.⁷⁰ Further, the

⁶² Arnlaug Leira, *Caring as Social Right: Cash for Child Care and Daddy Leave*, 5 SOC. POL. 361, 370 (1998).

⁶³ See ANITA HAATAJA, FATHERS' USE OF PATERNITY AND PARENTAL LEAVE IN THE NORDIC COUNTRIES 16 tbl.3.

⁶⁴ *Id.*; Cara Rutten, *Parental Leave in Europe and Social [sic] of Women from the Labour Market* 3 (The Inter Univ. Ctr., Dubrovnik, Croat., 2012), available at http://www.inclusionexclusion.eu/site/wp-content/uploads/2012/07/RuttenCara_2012.05.25_paper.pdf.

⁶⁵ RAY BROOMHILL & RHONDA SHARP, AUSTRALIA'S PARENTAL LEAVE POLICY AND GENDER EQUALITY: AN INTERNATIONAL COMPARISON 2 (2012); Karin Wall & Anna Escobedo, *Parental Leave Policies, Gender Equity and Family Well-Being in Europe: A Comparative Perspective*, in FAMILY WELL-BEING EUROPEAN PERSPECTIVES 103, 107 (Almudena Morenoa Minguez ed., 2013), available at <http://www.fesweb.org/uploads/files/modules/congress/11/papers/1217.pdf>.

⁶⁶ The lower level of use by Norwegian fathers may be attributed to their dependency on the mother's labor market status. Duvander et al., *supra* note 53, at 6.

⁶⁷ Anne Skevik & Aksel Hatland, *Family Policies in Norway* 18 (Norwegian Soc. Research (NOVA), Working Paper July 2003), available at <https://www.york.ac.uk/inst/spru/research/nordic/norwpoli.PDF>.

⁶⁸ Anita Nyberg, *Gender Equality Policy in Sweden: 1970s-2010s*, NORDIC J. WORKING LIFE STUD., Nov. 2012, at 67, 73-74; see also JANNEKE PLANTENGA & CHANTAL REMERY, EUROPEAN COMM'N'S EXPERT GRP. ON GEND. & EMP'T ISSUES, THE PROVISION OF CHILDCARE SERVICES: A COMPARATIVE REVIEW OF 30 EUROPEAN COUNTRIES 61 (2009), available at <http://ec.europa.eu/social/BlobServlet?docId=2803&langId=en>; Linling Weng, A Comparative Study of Gender Pay Gaps in Nordic Countries and Eastern European Countries 35 (Aug. 16, 2007) (Master thesis, Univ. of Oslo).

⁶⁹ James Savage, *How Does Swedish Parental Leave Work?*, THE LOCAL (Aug. 29, 2008), <http://www.thelocal.se/14022/20080829/#.UTPZ4Y5OTww>; Nyberg, *supra* note 68, at 74.

⁷⁰ *Gender Equality: The Swedish Approach to Fairness*, SWEDEN.SE (2013), <http://www.sweden.se/eng/Home/Society/Equality/Facts/Gender-equality-in-Sweden/>.

introduction of the fathers' quota has not only encouraged more Swedish fathers to take parental leave,⁷¹ but also may have helped to narrow the country's GPG. Studies show that in 1990, the GPG was 19.6 percent.⁷² Correcting for profession and work sector, Swedish women's monthly salaries are currently ninety-four percent of men's, marking a noticeable decrease in the GPG.⁷³

2. Affordable Childcare

Relatedly, studies show that affordable and readily available daycare facilitates greater participation of mothers in the workforce.⁷⁴ Accordingly, daycare is considered a social right in some Nordic countries.⁷⁵ The Nordic provision of childcare service is extensive, and according to the European Communities' Comparative Review of Childcare Services, the demand for childcare has generally been met through accessible and affordable options.⁷⁶

For example, with the exception of Iceland, Nordic countries mandate a maximum fee that parents can spend on childcare, helping to guarantee cost-effective childcare.⁷⁷ Depending on the number of children in a given family, between only one and three percent of the combined income of Swedish parents may be spent on childcare pursuant to Swedish maximum fee law.⁷⁸ In Norway, this maximum fee is set at 2,330 kroner (about \$434.60 as of March 17, 2014) per month, which also helps to lower the costs of balancing work and parenthood.⁷⁹ In addition, although there is no maximum fee policy in the Icelandic childcare system, it is still affordable: Icelandic parents pay only about twenty-five percent of childcare costs.⁸⁰

Further, parental leave legislation has minimized Nordic countries' need for childcare. There are virtually no children younger than the age

⁷¹ Nyberg, *supra* note 68, at 74.

⁷² TIJGDENS & KLAVEREN, *supra* note 47, at 21.

⁷³ See *Gender Equality: The Swedish Approach to Fairness*, *supra* note 70.

⁷⁴ Gunnar Andersson et al., *Do Child Care Characteristics Influence Continued Childbearing in Sweden? An Investigation of the Quantity, Quality, and Price Dimension 3* (Max Planck Institute for Demographic Research, Working Paper No. 2003-013, 2003), available at <http://www.demogr.mpg.de/papers/working/wp-2003-013.pdf>.

⁷⁵ PLANTENGA & REMERY, *supra* note 68, at 8, 32.

⁷⁶ *Id.* at 57.

⁷⁷ *Id.* at 8.

⁷⁸ Jenny Sundelin, *Play: The Swedish Way*, THE GUARDIAN (Mar. 11, 2008), <http://www.guardian.co.uk/society/2008/mar/11/children>.

⁷⁹ Audrey Andersen, *Norway Shows the Way in Childcare*, IRISH TIMES (Feb. 21, 2012), <http://www.irishtimes.com/newspaper/health/2012/0221/1224312112779.html>.

⁸⁰ PLANTENGA & REMERY, *supra* note 68, at 48.

of one year in Swedish and Norwegian public childcare facilities because their parents care for them while on parental leave.⁸¹ The same is not true in Iceland, where parental leave is shorter. However, the Icelandic “social right to childcare seems to translate into a high full-time coverage rate.”⁸² Further, “Iceland has the highest coverage rate of children 3 years old to the mandatory school age in formal care arrangement at 30 hours or more a week,” and ninety-seven percent of Icelandic children aged 3-5 are in governmentally funded childcare.⁸³

B. Boardroom Quotas

The global underrepresentation of women on corporate boards also shares an adverse relationship with the GPG because “[p]ay has symbolic value as a factor in career progression, and high pay represents individual achievement.”⁸⁴ Promotion decisions are often based on salary, and unequal pay can keep women from higher-ranked positions, which also provide an increase in pay.⁸⁵ Further, if women do not have access to higher-ranking jobs, they may lack power to negotiate equal pay.⁸⁶ Female board members are also important in further encouraging women’s equal participation in the workforce because they represent career opportunities for potential female employees.⁸⁷ In corporations that have female board members, these women often network with other female workers and may inspire female employees to seek senior management roles.⁸⁸

Despite progress for women in the corporate world, there are still barriers remaining that prevent women from obtaining high-level jobs. Women are often overlooked for executive positions because in comparison to men, they may be perceived as having more familial responsibilities that are perceived to hinder their commitment to their employers, as well as thought to lack equivalent ambition, confidence and leadership skills.⁸⁹ Other barriers are the result of gendered social systems in which patriarchy defines roles by gender, leading to discrimination and stereotyping.⁹⁰ Additionally, women may not be

⁸¹ *See id.* at 30-31.

⁸² *Id.* at 32.

⁸³ *Id.* at 35, 36; *see also* CTR. FOR GEND. EQUAL. IN ICELAND, *supra* note 57, at 2.

⁸⁴ Siri Terjesen, *Female Presence on Corporate Boards*, 83 J. OF BUS. ETHICS 55, 58 (2008).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 55.

⁸⁸ *Id.*

⁸⁹ *Id.* at 56.

⁹⁰ *Id.*

promoted because of employers' anticipation of maternity leave.⁹¹

As a response to these individual and social influences on the slow pace of change in boardroom gender representation, Norway was the first country to adopt a gender quota law that mandates a forty-percent female representation on company boards.⁹² Iceland in turn enacted a similar law in 2010, which began to take full effect in September 2013.⁹³ Norway's gender equality law "also supports mild positive discrimination: if two applicants of different gender are equally qualified, the applicant representing the underrepresented gender should be chosen."⁹⁴

It appears that Norwegian boardroom quotas have been effective.⁹⁵ By 2009, six years after the law was introduced, the percentage of women on the boards of publicly listed companies met the 40% target.⁹⁶ Norway's gender equality minister commented that "[t]his trend would not have happened without regulation. Business organi[z]ations have tried for 20 years to boost the number of women on boards, but they have been unsuccessful."⁹⁷

C. Transparency and Accountability

Accountability and transparency serve as primary goals for Nordic GPG policy, and are vital in enabling a worker to bring a successful equal pay claim.⁹⁸ Therefore, Sweden and Norway, like many other countries, mandate that employers administer anonymous reports which

⁹¹ *Id.*

⁹² *Id.* at 62.

⁹³ Mari Teigen, *Gender Quotas on Corporate Boards*, EUROPEAN COMM'N DIRECTORATE-GENERAL FOR JUSTICE 3 (May 2012), http://ec.europa.eu/justice/gender-equality/files/exchange_of_good_practice_no/no_discussion_paper_no_2012_en.pdf.

⁹⁴ Ira Malmberg-Heimonen, *Reducing the Gender Pay Gap* 5 (European Comm'n Directorate-General for Justice, Comment Paper, 2011), *available at* http://ec.europa.eu/justice/gender-equality/files/exchange_of_good_practice_de/no_comments_paper_de_2011_en.pdf.

⁹⁵ NEW ZEALAND HUMAN RIGHTS COMM'N, EXTRACT FROM NEW ZEALAND'S CENSUS OF WOMEN PARTICIPATION IN 2008 9 (2008), *available at* http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/28-Mar-2008_12-59-39_2008_Census_of_Womens_Participation.pdf.

⁹⁶ Siobhán Dowling, *Women on Board: Norway's Experience Shows Compulsory Quotas Work*, SPIEGEL ONLINE (July 8, 2010), <http://www.spiegel.de/international/business/women-on-board-norway-s-experience-shows-compulsory-quotas-work-a-705209.html>

⁹⁷ Gwladys Fouché Oslo, *Quarter of Norway's firms face shutdown as female directors deadline approaches*, THE GUARDIAN (Dec. 26, 2007), <http://www.theguardian.com/business/2007/dec/27/norway.female.director>.

⁹⁸ GENDER MAINSTREAMING, *supra* note 58, at 51.

detail salary dispersion among genders.⁹⁹ These laws also require employers to provide specific data regarding gender equality in their workplaces, such as statistics that reflect the gender composition of particular types of jobs.¹⁰⁰ Such reports may be examined by a monitoring body and sometimes must be published as well.¹⁰¹ Furthermore, large employers in Sweden, for example, are obligated to adopt policy instruments that survey and analyze pay differences between women and men performing work of equal value.¹⁰² Using this information, the employers must formulate plans that detail the adjustments and measures necessary to ensure equal pay in their workplaces.¹⁰³

Regarding work of equal value, many countries do not statutorily mandate the scope of comparison between genders in pay discrimination claims, thereby giving courts great leeway in measuring this comparison.¹⁰⁴ In Swedish and Norwegian courts, generally such comparisons can only be made within a company.¹⁰⁵ In comparing the pay between genders in the same company or sector, several countries allow comparisons between jobs of different occupational categories.¹⁰⁶ This may allow for a more equitable comparison, because jobs that women are more likely to pursue are often those that pay less than those which males generally choose.¹⁰⁷ For example, the Icelandic Supreme Court has held that a woman's position as manager in the social sector may be seen as having equal value to a man's position as manager in the technical sector in the same municipality.¹⁰⁸

Policies based on transparency and accountability, as well as boardroom gender quotas, require that Nordic employers take action in regards to the GPG. Meanwhile, Nordic family policies promote equity in both the homes and the offices of employees. This approach appears

⁹⁹ PETRA FOUBERT, EUROPEAN COMM'N DIRECTORATE-GENERAL FOR EMP'T, SOC. AFFAIRS & EQUAL OPPORTUNITIES, *THE GENDER PAY GAP IN EUROPE FROM A LEGAL PERSPECTIVE* 15-16 (2010), available at http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/genderpaygapfromlegalperspective-nov2010_en.pdf.

¹⁰⁰ *Id.* at 16.

¹⁰¹ *Id.*

¹⁰² GENDER MAINSTREAMING, *supra* note 58, at 50.

¹⁰³ *Id.*; FOUBERT, *supra* note 99, at 16, 29; see also *Pay Equity Model: Sweden's Equal Opportunities Act (1991) and the Discrimination Act (2009)*, OREGON COUNCIL ON CIVIL RIGHTS, <http://www.oregon.gov/boli/docs/Pay%20Equity%20Model-%20Sweden.pdf> (last visited Feb. 23, 2014) [hereinafter *Pay Equity Model*].

¹⁰⁴ FOUBERT, *supra* note 99, at 21.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ THE SIMPLE TRUTH, *supra* note 40, at 15.

¹⁰⁸ FOUBERT, *supra* note 99, at 21.

to have contributed to success in achieving high female labor force participation rates as well as lowered GPGs.¹⁰⁹ This success is reflected in the fact that the Nordic countries' unadjusted mean female to male earnings ratios, which range between eighty and eighty-eight percent, are some of the highest in the world.¹¹⁰

III. AMERICAN GENDER LAW AND ITS EFFECT ON THE U.S. GENDER PAY GAP

In contrast to comparatively low Nordic GPG averages, American women make twenty-three percent less than American men.¹¹¹ In fact, American women are paid less than their male counterparts directly upon entering the workforce, even when controlling for other potential influences on the GPG, including occupational segregation.¹¹² Further, as a woman working in America grows older, the gap between her income and that of similarly situated men tends to simultaneously grow over the course of her career.¹¹³ When considering the aggregate effects of this discrepancy over a woman's lifetime, the impact is astronomical: because of the GPG, American women are less likely to contribute to retirement accounts and more likely to become a burden on national relief programs.¹¹⁴

Furthermore, the GPG is not just a women's issue. In a typical married household in the U.S., the wife's income accounts for thirty-six percent—an average share that has been rising over time—of the family's total earnings.¹¹⁵ Additionally, working mothers are their family's sole or primary breadwinners in four out of ten American

¹⁰⁹ Weng, *supra* note 68, at 4.

¹¹⁰ *Id.*

¹¹¹ THE SIMPLE TRUTH, *supra* note 40, at 3; Jordan Weissman, *Why are Women Paid Less?*, THE ATLANTIC (Oct. 17, 2012), <http://www.theatlantic.com/business/archive/2012/10/why-are-women-paid-less/263776/>.

¹¹² Other factors controlled for include college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institute, institution selectivity, age, geographical region, and marital status. Even after accounting for these factors, the seven percent difference in earnings between male and female college graduates one year after graduation was unexplained. CORBETT & HILL, *supra* note 28, at 20.

¹¹³ *Do Men Really Earn More than Women?*, PAYSACLE, <http://www.payscale.com/gender-lifetime-earnings-gap> (last visited Feb. 23, 2014).

¹¹⁴ Diann Douglas et al., *Women and Money: Unique Issues—Money Issues Across the Life Cycle*, UNIV. OF FLA. IFAS EXTENSION (Mar. 2013), <http://edis.ifas.ufl.edu/pdf/files/FY/FY135200.pdf>.

¹¹⁵ THE SIMPLE TRUTH, *supra* note 40, at 4.

households with children.¹¹⁶ Therefore, the GPG inevitably has a negative impact on many working mothers' husbands and children. However, despite the American GPG, and despite its likely damage to the economy and families, legislators in the U.S. have long proven reluctant to enact substantive gender pay-equalizing statutes.¹¹⁷

A. Equal Pay Laws of the 1960s: The Equal Pay Act and Title VII

The early 1960s were monumental in American GPG legislation. In 1963, the Equal Pay Act (EPA) was enacted, and in 1964, Title VII of the Civil Rights Act of 1964 (Title VII) was passed.¹¹⁸ The EPA and Title VII are federal employment laws that regulate private employers with the aim of preventing sex-based discrimination against employees or potential employees.¹¹⁹ The EPA, an amendment to the Fair Labor Standards Act (FLSA), prohibits employers from providing unequal pay to women and men in comparable jobs if the reason for the inequitable pay is based on sex.¹²⁰ Title VII prohibits employers from choosing not to hire prospective employees and from terminating or discriminating against current employees on the basis of race, color, religion, national origin or sex.¹²¹ However, claims against employers under the EPA and Title VII are difficult to prove and provide little compensation for plaintiffs who successfully sue.

Under the EPA, when an employee alleges pay inequity because of his or her sex, the employer may use the EPA's exceptions as an affirmative defense, making it more difficult for the plaintiff to succeed in court.¹²² If an employer proves that the unequal pay was based on a seniority system, merit system, system that measures earnings by

¹¹⁶ See *id.*; Wendy Wang et al., *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted about the Growing Trend*, PEW RESEARCH CTR. 1 (May 29, 2013), http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf.

¹¹⁷ See THE SIMPLE TRUTH, *supra* note 40, at 20-21; Jennifer Steinhauer, *Senate Republicans Again Block Pay Equity Bill*, N.Y. TIMES (June 5, 2012), http://www.nytimes.com/2012/06/06/us/politics/senate-republicans-block-pay-equity-bill.html?_r=0.

¹¹⁸ See Andrew Brenton, *Overcoming the Equal Pay Act and Title VII: Why Federal Sex-Based Employment Discrimination Laws Should Be Replaced With a System for Accrediting Employers for Their Antidiscriminatory Employment Practices*, 26 WIS. J.L. GENDER & SOC'Y 349, 350 (2011).

¹¹⁹ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (current version at 29 U.S.C. § 206(d) (2012)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (current version at 42 U.S.C. §§ 2000e-2000e-17 (2012)).

¹²⁰ 29 U.S.C. § 206(d)(1) (2012).

¹²¹ 42 U.S.C. § 2000e-2(a)(1) (2012).

¹²² 29 U.S.C. § 206(d)(1) (2012); Brenton, *supra* note 118, at 353.

quality or quantity of factors, and/or any factor other than sex, the employer has asserted a successful exception, and a plaintiff's claim is considered defeated.¹²³ Furthermore, because the EPA is an amendment to the FLSA, a violation of the EPA is a violation of the FLSA's minimum wage or unpaid overtime laws, and accordingly, the available remedies are governed by the FLSA.¹²⁴ Therefore, like other FLSA claims, successful plaintiffs in EPA suits are not entitled to punitive or compensatory damages.¹²⁵ This, along with the fact that plaintiffs must mitigate damages—thereby subtracting any back pay of money earned at a substitute job from the recovery—limits available redress for the harmed party when an employer violates the EPA.¹²⁶

On the other hand, unlike available remedies under the EPA, Title VII's remedies are equitable in nature and subject to the court's discretion.¹²⁷ However, although the statute authorizes reinstatement and any equitable relief the court deems appropriate, the most common form of redress in successful Title VII suits is back pay.¹²⁸ In addition, a plaintiff may be awarded punitive and compensatory damages only if she proves that her employer discriminated with malice or reckless indifference to the federally protected rights, a difficult standard for plaintiffs to meet.¹²⁹

There are two exceptions or defenses to Title VII: "instances . . . where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," and the Bennett Amendment, which provides that unlawful sex-based wage discrimination may be rendered lawful if the EPA authorizes it.¹³⁰ The Supreme Court has interpreted the Bennett Amendment to incorporate the EPA's four affirmative defenses into Title VII.¹³¹ Thus, employer-defendants may defeat plaintiffs' Title VII claims just as easily as they may defeat EPA claims.¹³²

Besides the limited available recovery under these statutes and the heavy burden they impose on plaintiffs, another overarching, glaring problem with these statutes is that they have not proven highly effective. Almost fifty years since the EPA was signed, women still

¹²³ 29 U.S.C. § 206(d)(1) (2012).

¹²⁴ Brenton, *supra* note 118, at 353.

¹²⁵ *Id.* at 353-54.

¹²⁶ *Id.*

¹²⁷ *Id.* at 367.

¹²⁸ *Id.* at 357.

¹²⁹ *Id.* at 357.

¹³⁰ *Id.* at 355.

¹³¹ *Id.* at 355-56.

¹³² *See id.* at 356.

make seventy-seven cents to every dollar earned by men, which translates to more than \$10,000 in lost wages per year for the average American female worker.¹³³ This is only an increase of seventeen cents on the dollar from the 1960s when the statutes were initially enacted.¹³⁴ Although this change demonstrates an ascertainable increase, at this rate, it would take around forty-five more years to eliminate the GPG.¹³⁵ When President Kennedy signed the EPA into law, he called it a “first step.”¹³⁶ While there has certainly been progress, more substantive legislative action should be taken to narrow the GPG at a speedier rate.

B. Recent Equal Pay Laws: The Lilly Ledbetter Fair Pay Act and the Paycheck Fairness Act

In 2009, Congress passed the Lilly Ledbetter Fair Pay Act (Ledbetter Act), which overturned the U.S. Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*¹³⁷ The Ledbetter Act changed the statute of limitations in an equal-pay lawsuit to run from the most recent day that a woman has received a discriminatory paycheck, instead of from the day that the employer makes the initial discriminatory payment decision.¹³⁸ “The plaintiff’s possible compensatory recovery is still limited to two years of back pay from the time a charge is filed, but the Ledbetter Act allows plaintiffs who would have been time-barred under the [Supreme Court’s] *Ledbetter* decision to file suit much later, provided that they have received a ‘tainted’

¹³³ Jenna Goudreau, *Today, Women Need to Demand Equal Pay*, FORBES (Apr. 17, 2012), <http://www.forbes.com/sites/jennagoudreau/2012/04/17/today-women-need-to-demand-equal-pay/>; Elizabeth Warren, *Viewpoint: It’s Time to Adopt Paycheck Fairness Act*, THE REPUBLICAN (June 10, 2013), http://www.masslive.com/opinion/index.ssf/2013/06/viewpoint_its_time_to_adopt_pa.html.

¹³⁴ *Id.*

¹³⁵ Sarah Jane Glynn & Audrey Powers, *The Top 10 Facts About the Wage Gap: Women Are Still Earning Less than Men Across the Board*, CTR. FOR AM. PROGRESS (Apr. 16, 2012), <http://www.americanprogress.org/issues/labor/news/2012/04/16/11391/the-top-10-facts-about-the-wage-gap/>.

¹³⁶ John F. Kennedy, *Remarks Upon Signing the Equal Pay Act, June 10, 1963*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=9267#ixzz1OiOHBvqX> (last visited Feb. 24, 2014).

¹³⁷ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at scattered sections of 29 and 42 U.S.C.) (reversing the Supreme Court’s holding in *Ledbetter v. Goodyear Tire & Rubber Co.* that the statute of limitations for an equal pay lawsuit under the EEOC begins on the date of the initial discriminatory paycheck, not at the date of the most recent paycheck. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)).

¹³⁸ *Lilly Ledbetter Fair Pay Act*, NAT’L WOMEN’S L. CTR. (Jan. 29 2013), <http://www.nwlc.org/resource/lilly-ledbetter-fair-pay-act-0>.

paycheck within the limitations period.”¹³⁹ However, the Ledbetter Act has not yet appeared to have a strong positive influence on the GPG.¹⁴⁰

During each Congressional session since the EPA was passed, bills have been introduced—and sometimes voted on—that would update the EPA.¹⁴¹ However, instead of strengthening existing GPG laws, Congress’s most recent GPG action—or rather, inaction—was its rejection of the Paycheck Fairness Act (PFA) in 2013, when Republican congressmen blocked the vote on it.¹⁴² In fact, Congress has rejected the PFA every year since it was initially introduced—and since the House of Representatives passed it—in 2009.¹⁴³

Like Nordic legislation, the PFA would have given women the right to share salary information without employer punishment so that women would be able to ascertain whether they were facing discrimination before pursuing available remedies.¹⁴⁴ It also would have opened pathways for female employees to sue for compensatory and punitive damages in the case of paycheck discrimination and served to enforce and expand the scope of the EPA.¹⁴⁵ Additionally, the Act would have limited employers’ expansive affirmative defense so that an employer would have to “show that the differential is truly caused by something other than sex and is related to job performance and consistent with business necessity.”¹⁴⁶

However, even if the proposed PFA were passed, it would share some problems with the Ledbetter Act. Both acts concern only the narrow subject of paycheck litigation, which is an oversimplification of gender discrimination in the workplace, because there are other forms of workplace pay discrimination, such as, discriminatory raises, bonuses and firings.¹⁴⁷ Another problem with American pay equality statutes in general (including the EPA and Title VII) is that they only protect against pay inequity between genders insofar as the plaintiff proves that

¹³⁹ Jeremy A. Weinberg, *Blameless Ignorance? The Ledbetter Act and Limitations Periods for Title VII Pay Discrimination Claims*, 84 N.Y.U. L. REV 1756, 1762 (2009).

¹⁴⁰ *OECD Gender Initiative*, *supra* note 10.

¹⁴¹ THE SIMPLE TRUTH, *supra* note 40, at 21.

¹⁴² See Laura Bassett, *Paycheck Fairness Act Vote Blocked by House GOP*, HUFF. POST (Apr. 11, 2013), http://www.huffingtonpost.com/2013/04/11/paycheck-fairness-act_n_3063804.html.

¹⁴³ THE SIMPLE TRUTH, *supra* note 40, at 21.

¹⁴⁴ NAT’L WOMEN’S L. CTR., FACT SHEET: HOW THE PAYCHECK FAIRNESS ACT WILL STRENGTHEN THE EQUAL PAY ACT 2 (May 2012), available at <http://www.pay-equity.org/PDFs/PFA-FactSheet-2012.pdf>; Heather Boushey, *Why Women Need the Paycheck Fairness Act*, SLATE (Sept. 23, 2010), http://www.slate.com/articles/double_x/doublex/2010/09/mind_the_gap.html.

¹⁴⁵ NAT’L WOMEN’S L. CTR., *supra* note 144, at 1.

¹⁴⁶ *Id.*

¹⁴⁷ Weinberg, *supra* note 139, at 1766.

discrimination caused the inequity.¹⁴⁸ Thus, these statutes do not account for other inequities that contribute to the GPG.¹⁴⁹

C. Family Laws: the Family Medical Leave Act and the Pregnancy Discrimination Act

Although discrimination is one probable contributing factor to the wage gap, the narrow GPG in Nordic countries with family-friendly policies shows that men and women's different roles in family and work spheres also influence the GPG.¹⁵⁰ Therefore, this component should also be taken into account when analyzing gender pay discrepancies. Furthermore, this consideration is important specifically in regard to a discussion of American GPG policy, as researchers studying the GPG in industrialized countries have determined that the negative impact of motherhood on the GPG is largest in the U.S. and United Kingdom, the countries with the least extensive family policies.¹⁵¹ In fact, wage penalties for American mothers are up to fifteen to twenty percent for two or more children, as compared to two to ten percent in Nordic countries.¹⁵² Similar to U.S. equal pay provisions, American family policies are also substantially inferior to those in Nordic countries in terms of scope.

1. The Family Medical Leave Act

Parental leave coverage is one of the most globally widespread laws designed to protect working mothers and fathers. It is also an effective policy in terms of raising women's pay.¹⁵³ This is primarily because parental leave increases the likelihood that a working mother will return to her prior employer after childbirth.¹⁵⁴ This in turn allows for her subsequent pay raise.¹⁵⁵ The U.S. is tied with Switzerland in terms of industrialized countries with the shortest periods of parental leave.¹⁵⁶ The U.S. is also the only OECD country without a national

¹⁴⁸ Brenton, *supra* note 118, at 361.

¹⁴⁹ *Id.*

¹⁵⁰ Petersen et al., *supra* note 50, at 2-3.

¹⁵¹ *Id.* at 4.

¹⁵² Wage penalties for mothers are equivalent to the difference in earnings between women without children and women with children. *Id.*

¹⁵³ Jane Waldfogel, *Understanding the "Family Gap" for Women with Children*, J. ECON. PERSP., Winter 1998, at 137, 151.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 140-41.

paid parental leave policy for either mothers or fathers.¹⁵⁷ Universal, paid maternity leave is offered in at least 178 other countries; the only two states in the U.S. with paid leave are California and New Jersey.¹⁵⁸

The U.S. did not have a parental leave policy until 1993, when the Family Medical Leave Act (FMLA) was enacted.¹⁵⁹ The FMLA provides for just twelve weeks of leave, and does not include any income replacement or pay during the leave.¹⁶⁰ As a result, many workers eligible for relief under the FMLA do not take this leave at all.¹⁶¹ Furthermore, the FMLA applies only to parents who have worked full time and for over a year for an employer that employs at least fifty employees.¹⁶² These qualifying conditions make it so that less than one-half of the nation's private sector workers are eligible for leave.¹⁶³

2. *The Pregnancy Discrimination Act*

Minimizing discrimination against pregnant women in the workplace is another important family policy in terms of equal pay law, as women may be fired or not hired because employers are concerned about paying for, and losing work during these employees' maternity leaves. Therefore, in 1978, after the Supreme Court's decisions regarding pregnancy discrimination in *General Electric Co. v. Gilbert*¹⁶⁴ and *Nashville Gas Co. v. Satty*,¹⁶⁵ Congress amended Title VII to "expand[] the contours of actionable sex-based discrimination . . ."¹⁶⁶ In enacting this amendment—known as the Pregnancy Discrimination Act (PDA)¹⁶⁷—the federal government first recognized pregnancy and pregnancy-based conditions as classes that Title VII protects against discrimination.¹⁶⁸ The PDA requires that "women affected by

¹⁵⁷ ORG. FOR ECON. CO-OPERATION AND DEV., CLOSING THE GENDER GAP: UNITED STATES (2010) [hereinafter "CLOSING THE GENDER GAP: U.S."].

¹⁵⁸ HUMAN RIGHTS WATCH, *supra* note 56, at 2.

¹⁵⁹ Jane Waldfogel, *International Policies toward Parental Leave and Child Care*, CARING FOR INFANTS & TODDLERS, Spring-Summer 2001, at 99, 106.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

¹⁶⁵ *Nashville Gas Co. v. Satty*, 434 US 136 (1977).

¹⁶⁶ Thomas H. Barnard, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 109 (2005).

¹⁶⁷ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (current version at 42 U.S.C. § 2000e(k) (2012)).

¹⁶⁸ *Id.*

pregnancy, childbirth, or related medical conditions shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work”¹⁶⁹

Consequently, the protections provided for under the PDA are limited because of its promise of equal, but not special, treatment.¹⁷⁰ Women requesting maternity leave are not immune from termination, and pregnant women can be terminated if the conditions of their pregnancy or if their leave interferes with the employer’s ability to perform.¹⁷¹ The same principle applies to “failure to hire” claims. Case law shows that although an employer may not refuse to hire a pregnant job applicant solely based on her pregnancy, an employer may refuse to hire her if the decision is based on her inevitable absence from work due to childbirth (rather than on the basis of her pregnant condition itself).¹⁷²

This means “if all employees taking a leave under similarly disabling circumstances face the same adverse employment action, a court will likely find that proscribed pregnancy-based discrimination did not motivate the adverse action.”¹⁷³ Likewise, in *Stout v. Baxter Healthcare Corp.*, the Fifth Circuit held that a challenge to an employer’s strict “no leave” policy failed to present a disparate treatment claim, although the policy affected all—or nearly all—pregnant women.¹⁷⁴ In fact, courts have held that it is a Title VII violation to protect pregnant women by keeping them on the job when they are not as capable as other employees.¹⁷⁵

Although Congress has enacted equal pay legislation over the last fifty years, the laws have been substantially lacking, especially in comparison to more effective and expansive Nordic counterparts. Furthermore, American policy regarding equal pay and gender employment discrimination burdens plaintiffs, as well as limits the recovery it avails to these potential plaintiffs.

¹⁶⁹ 42 U.S.C. § 2000e(k).

¹⁷⁰ Barnard, *supra* note 166, at 105.

¹⁷¹ *Id.* at 111.

¹⁷² *Id.* at 112.

¹⁷³ *Id.* at 111.

¹⁷⁴ *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861 (5th Cir. 2002).

¹⁷⁵ Barnard, *supra* note 166, at 117-18.

IV. LIMITATIONS OF ADOPTING NORDIC-INFLUENCED GENDER LAW IN THE U.S.

Although Nordic-style equal pay initiatives appear to be desirable potential solutions to the American GPG problem, there are intrinsic restraints to a complete adoption of Nordic gender laws in the U.S. These restraints relate to the smaller role of government in American society as well as the greater emphasis on individual choice and freedom in the U.S. First, the contrast between Nordic countries' status as social-democratic welfare states and the liberal welfare model in the U.S. inevitably allows for variations in social policy. Second, the Constitution serves as an inherent limit on a theoretical American adoption of Nordic maternity leave policies and similar boardroom quotas to those of Norway and Iceland.

A. *Welfare State Classification and its Effect on Family Law*

1. *Childcare as an Example*

Nordic countries are social-democratic welfare states, which means that their governments are responsible for ensuring the welfare of their citizens irrespective of market forces and the citizens' own market activities.¹⁷⁶ The Nordic countries' welfare regimes thus aim to buffer individuals from market uncertainties and fate inequalities.¹⁷⁷ In contrast, the American liberal welfare regime is based on notions of market dominance and private provision.¹⁷⁸ In a liberal welfare regime, the state provides limited social insurance and only interferes with private market activities when the market fails.¹⁷⁹

In the U.S., market criteria determine who works and who takes care of children.¹⁸⁰ Since American men generally have a stronger market position and are less burdened by childcare responsibilities, they are expected to allocate more of their time to labor activity, while women are more constrained in their time allocation decisions.¹⁸¹ Mothers are compelled to weigh the costs and benefits of market activity against household responsibilities, while American fathers do

¹⁷⁶ Haya Stier & Noah Lewin-Epstein, *Welfare Regimes, Family-Supportive Policies, and Women's Employment along the Life-Course*, 106 AM. J. SOC. 1731, 1733 (2001).

¹⁷⁷ *Id.* at 1733-34.

¹⁷⁸ *Id.* at 1734.

¹⁷⁹ *Id.* at 1733.

¹⁸⁰ *Id.* at 1734.

¹⁸¹ *Id.*

not face the same social expectation.¹⁸² In contrast, social democratic regimes encourage female economic independence through implementing family policies and equalizing labor participation.¹⁸³

One way that Nordic social democratic regimes seek to equalize work conditions and bolster female work participation is through policy that balances the home/work divide between genders. The provision of public childcare arrangements is an example of one such equalizing policy, as childcare frees mothers to allocate more of their time to the labor force.¹⁸⁴ In the U.S., where three-out-of-five working mothers work more than thirty hours per week, childcare is an important consideration in regard to the GPG.¹⁸⁵ The contrast between Nordic and American childcare systems is also a marker of their respective welfare regimes and the impact these social structures may have on family policies.

Due to the independence of the marketplace from the government, the inevitable result of America's liberal welfare model is that childcare is subject to market ebbs and flows.¹⁸⁶ Consequently, high childcare expenses may dissuade women from joining the market. Childcare in the U.S. is certainly pricey: the average annual cost for infant childcare is higher than a year's in-state tuition, plus related fees, at four-year public colleges in nearly two-thirds of the country.¹⁸⁷ Furthermore, in all fifty states, center-based childcare costs for two children (an infant and a four year old) exceed annual average rent payments.¹⁸⁸ "[C]hild care . . . is simply unaffordable for too many (American) families."¹⁸⁹

Clearly, if one parent's entire paycheck goes to these expenses, it may be more sensible for that parent to personally care for the family's children rather than using outside childcare. Of course, that parent is likely to be the mother: "In all industrial countries, women still bear the major responsibility for child rearing, independent of welfare regime

¹⁸² *Id.*

¹⁸³ *Id.* at 1735.

¹⁸⁴ *Id.*

¹⁸⁵ *Mothers in the Workforce*, NAT'L ASS'N CHILDCARE RES. & REFERRAL AGENCIES (2012), http://www.naccrra.org/sites/default/files/default_site_pages/2012/ccgb_mothers_workforce_jan2012.pdf.

¹⁸⁶ See Stier & Lewin-Epstein, *supra* note 176, at 1735.

¹⁸⁷ Melanie Hicken, *Childcare More Expensive Than College In Many States*, CNNMONEY (Nov. 4, 2013), <http://money.cnn.com/2013/11/04/pf/child-care-costs/>.

¹⁸⁸ *Id.*

¹⁸⁹ Chris Morran, *Child Day Care Now More Expensive Than College in Most States*, CONSUMERIST (Aug. 16, 2012), <http://consumerist.com/2012/08/16/child-day-care-now-more-expensive-than-college-in-most-states/>.

and specific family and child policies.”¹⁹⁰ In contrast, in Nordic countries, “child care is seen as a public responsibility and a public good, like elementary and secondary education.”¹⁹¹ Therefore, if the U.S. were to implement a childcare system comparable to those of Nordic countries, it would be necessary to provide universal and publicly funded programs for young children as well as to expand U.S. leave policies.

2. *Social-Democratic versus Liberal and Corresponding Cultural Differences*

One reason that Americans are so resistant toward social democratic reform is because generally, Americans—perhaps more than the citizens of any other country—believe individual success in life mostly depends on the personal efforts of the individual.¹⁹² Therefore, Americans are likely to believe that the needs of individuals should be provided through large-scale government social programs.¹⁹³ Additionally, “the American [federal] system is unusual, even among nominally federal countries.”¹⁹⁴ Not only does the U.S. consist of fifty states, making federal coordination more difficult than in other countries with fewer divisions, but also, state elections also control the democratic process.¹⁹⁵ Furthermore, state governments maintain their own separate sources of revenue.¹⁹⁶ Therefore, it is difficult for any universal federal law that requires higher taxes to appear nonintrusive in the U.S.

A recent example of Americans’ resistance to such laws is the general public reaction to the Patient Protection and Affordable Care Act of 2010 (ACA), of which the majority of Americans did not approve.¹⁹⁷ Some of the resistance to the ACA “seems to reflect the realization that . . . [w]hatever else it does, the new healthcare law constrains the choices of individuals.”¹⁹⁸ Americans might be even more resistant to a national public childcare system and paid parental leave than to the ACA, because although almost all Americans need

¹⁹⁰ Stier & Lewin-Epstein, *supra* note 176, at 1734.

¹⁹¹ Waldfogel, *supra* note 159, at 106.

¹⁹² See Jeremy Rabkin, *American Exceptionalism and the Healthcare Reform Debate*, 35 HARV. J.L. & PUB. POL’Y 153, 154 (2011).

¹⁹³ See *id.*

¹⁹⁴ *Id.* at 156.

¹⁹⁵ *Id.* at 156-57.

¹⁹⁶ *Id.* at 157.

¹⁹⁷ See *id. passim*.

¹⁹⁸ *Id.* at 156.

healthcare, fewer Americans need childcare and parental insurance. Likewise, the Constitution also limits potential adaptations to American gender law.

B. Constitutional Limitation: Boardroom Quotas

A constitutional limit to America's potential adoption of Nordic gender laws is the probability that gender boardroom quotas like those in Norway and Iceland would be held unconstitutional in the U.S.¹⁹⁹ Since the U.S. Constitution makes no explicit reference to gender, constitutional analysis of issues of gender equality in the U.S. are generally based on interpretations of the U.S. Constitution's Equal Protection clauses.²⁰⁰

According to the Court in *United States v. Virginia* ("VMI"),²⁰¹ gender classifications may not be used to place or maintain women in an inferior position in society.²⁰² The VMI Court, however, made it clear that benign gender classifications (classifications intended to benefit a certain gender) are technically subject to a level of scrutiny that approaches strict scrutiny analysis: "a State must show 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"²⁰³

Consequently, it is possible that Nordic boardroom quotas may not meet the VMI level of scrutiny and therefore would violate the Equal Protection Clause.²⁰⁴ Because of the heightened level of review, the result in this case would undoubtedly depend on the Court's interpretation of the importance of gender equality laws for the workplace as a state interest, as well as the effectiveness of the quotas.

V. HOW THE U.S. CAN ADOPT NORDIC-INFLUENCED GENDER POLICIES IN FURTHERANCE OF THE GOAL TO DECREASE THE GENDER PAY GAP

Due to inherent differences between the U.S. and Nordic countries, it is improbable that a large extent of the potentially GPG-reducing legislation explored in this Note would be carbon-copied onto an

¹⁹⁹ *Id.*

²⁰⁰ U.S. CONST. amend. XIV, § 5; Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 BERKELEY J. INT'L L. 27, 52 (2012); see U.S. CONST. amend. V.

²⁰¹ *U.S. v. Virginia*, 518 U.S. 515, 532-33 (1996).

²⁰² Totten, *supra* note 200, at 52.

²⁰³ *U.S. v. Virginia*, 518 U.S. at 532-33.

²⁰⁴ Totten, *supra* note 200, at 52-53.

American platform. However, it is certainly possible that some Nordic policies could be tailored to fit America's political climate and its Constitution. First, the U.S. should work toward gender equality in the labor force by making it easier for women to pursue equal pay claims and by expanding the scope of gender and family legal analysis. This, coupled with governmental advocacy for equal pay, would not only encourage women to strive for more significant roles in the labor force, but also prioritize gender equality in an unprecedented manner. It would allow for more plaintiff-friendly pay discrimination litigation, and would also influence the attitudes of legislators, employers and employees alike. Additionally, it would encourage the enforcement of existing equal pay laws.

A. Reformation of the Family Medical Leave Act and Pregnancy Discrimination Act

Nordic countries experienced a decline in wage penalties for mothers that coincided with an extensive expansion of family-friendly policies.²⁰⁵ Although it is difficult to establish the closeness of the causal link between the expanded policies and the vanishing penalties, as there were undoubtedly concurrent changes in gender culture and discrimination, the correlation is likely not entirely coincidental.²⁰⁶ Similar changes in family culture occurred in the U.S. at the time, but with no comparable change in family policies, and no comparable decline in penalties.²⁰⁷ Thus, considering what appears to be its clear beneficial effect on GPGs, one specific Nordic legal adaptation that the U.S. should adopt is parental insurance.

1. Constitutionality

Though there are constitutional limits to enacting parental insurance identical to the Swedish, Norwegian or Icelandic schemes, it does appear that some sort of paid parental insurance is plausible in the U.S. In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court explained that Congress' intent in enacting the FMLA was to remedy states' Equal Protection Clause violations, which occurred when states granted maternity leave benefits to women but not to men.²⁰⁸ Thus, the Court reasoned, Congress' enactment of the

²⁰⁵ Petersen et al., *supra* note 50, at 20.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Nev. Dep't. of Human Res. v. Hibbs, 538 U.S. 721, 540 (2003).

FMLA was valid because it prevented discrimination against men by allowing leave for both sexes.²⁰⁹ Therefore, it follows that state-sanctioned parental leave is constitutionally valid if it is provided for both men and women. The Court further noted that under *LeFleur* and *Roe*, intrusions into family decisions are deemed unconstitutional only if the government mandates them on private actors; thus, it seems that non-mandatory leave schemes would also be upheld.²¹⁰

For dual-earner households, and from a purely non-discriminatory basis, it makes sense to provide equal opportunity for both mothers and fathers to work and share parenthood responsibilities. Also, if both mothers and fathers were given the opportunity for parental insurance, it would be fiscally beneficial for both parents to take the leave. This would help to ensure that working mothers would not forgo the opportunity to take their leaves due to concerns over falling behind male coworkers, as fathers would be in the same position as mothers.

2. *Compensation*

Compensation is important in positively influencing the American parental leave scheme. With the offer of compensation, employees otherwise dissuaded by economic concerns would be encouraged to take the leave. However, Nordic parental insurance schemes of eighty to ninety percent pay might be too ambitious in the U.S. liberal welfare regime. This is especially of concern because the American population and its legislators, who are generally not yet familiar with the depth of the GPG issue, would presumably view a transition from no pay to eighty to ninety percent compensation both shocking and excessive. Thus, a more prudent scheme would compensate for fifty percent of lost wages. Although this would be a burden to taxpayers, some of these concerns may subside after broader equal pay initiatives have communicated the national economic problem that the GPG brings. Additionally, to account for possible American resistance to substantial changes in existing policy, the FMLA's allotted time off of twelve weeks should remain the same.

3. *Applicability*

Alongside this parental insurance scheme, the FMLA should be reformed to apply to all American employees, not just to full-time employees. Also, it should be expanded to apply to more than just those

²⁰⁹ *Id.* at 539.

²¹⁰ *Id.* at 540 (internal citations omitted).

employees who have worked over a year at a job with at least fifty co-workers. Thus, all workers in the U.S. would be eligible for leave, which could help to reduce the GPG because the FMLA would be more encompassing.

In addition, the FMLA and the PDA should be reformed so that a new child is considered its own reason for leave and basis for a discrimination claim independent of disability law. This could be accomplished without discrimination towards one gender (and without discrimination towards adoptive or otherwise not physically pregnant parents) if it applied to all new parents, instead of being based on the physical aspects of pregnancy and giving birth.

A separate class would also allow the burdens of proof to be reformed and to make available damages in equal pay litigation. Having a child is not an illness or a disability, and therefore should not be treated as such. It is dissimilar to illnesses or disabilities that make employees eligible for FMLA leave; although childbirth and early childhood naturally demand time from parents to take care of their children, having a child does not always physically inhibit employees from working (especially after birth) the way that disability does. Moreover, if status as a new parent were its own protected class, it would promote the PDA's stated purpose "[t]o guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."²¹¹

B. Part-time Workers as a Title VII Protected Class

Title VII should also be amended to designate part-time workers as a protected class. In industrialized countries, including the U.S., the proportion of part-time work is especially high among women, presumably at least partially due to the need of working mothers to balance work with family responsibilities.²¹² This has been attributed to the need of working mothers to balance work with family responsibilities.²¹³ However, the U.S. currently has no antidiscrimination law that protects part-time workers.

Studies suggest that the diminished physical presence of part-time employees may decrease employer esteem because employers tend to

²¹¹ 123 CONG. REC. 29,658 (1977).

²¹² *Part-Time Work*, INT'L LABOUR OFFICE (June 2004), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_170717.pdf.

²¹³ Barnard, *supra* note 166, at 109.

associate long hours at the office with work, dedication, and commitment.²¹⁴ Furthermore, discrimination against part-time workers can be seen as a form of gender discrimination.²¹⁵ Some researchers attribute discrimination against part-time female employees to employers viewing them more like homemakers than working women.²¹⁶

In contrast to Nordic countries, American courts have been hesitant to accept Title VII claims that women are more likely to work part-time, and that part-time discrimination is thus a form of gender discrimination.²¹⁷ Although the U.S. has been reluctant to accept these sorts of gender classifications thus far, some commentators argue that motherhood must be taken into account as an inevitable difference between men and women.²¹⁸ Accordingly, part-time work should be seen for what it is: a female-dominated job force.²¹⁹

Thus, if Title VII were expanded to treat part-time workers as a separate class, it would provide for a discrimination cause of action for part-time worker plaintiffs, and could benefit both women's pay and the way female employees are treated at work. Furthermore, antidiscrimination laws for part-time workers could encompass discrimination against workers who take parental leaves by preventing discrimination against those who work fewer hours for statutory-supported reasons. Therefore, antidiscrimination laws for part-time workers could encourage both male and female workers to actually take their parental leaves, because this would help ensure that they would not be discriminated against for taking said leave.

C. Increasing the Minimum Wage

Globally, women are more likely to work in agriculture, service and sales and as clerical workers, teachers and nurses.²²⁰ These sectors are also characterized by low value added and low growth potential, meaning females' choice in jobs could be a link to the GPG.²²¹ Nordic

²¹⁴ *Id.*

²¹⁵ Suk, *supra* note 54, at 61.

²¹⁶ Barnard, *supra* note 166, at 142.

²¹⁷ See Suk, *supra* note 54, at 61-62.

²¹⁸ *Id.* at 62.

²¹⁹ *Id.*

²²⁰ WORLD BANK, WORLD DEVELOPMENT REPORT 2012: GENDER DIFFERENCES IN EMPLOYMENT AND WHY THEY MATTER 207 (2012), available at <http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/chapter-5.pdf>.

²²¹ *Id.*; Brenton, *supra* note 118, at 366.

countries minimize this “employment segregation by gender”²²² through collective bargaining agreements and trade unions.²²³ However, since the inauguration of Ronald Reagan, American labor unions have weakened in membership, leadership, organization and political strength.²²⁴ Furthermore, the U.S. has had one of the lowest union densities out of economically strong countries for over twenty years.²²⁵ Thus, it is unlikely that the U.S. could develop similar collective agreements to those negotiated in Nordic countries.

However, the U.S. can work on the GPG from an occupational sex segregation standpoint by increasing its minimum wage. Because the female wage distribution tends to lie below the male distribution, studies show that wage institutions that consciously raise minimum wage levels tend to lower female-male wage differentials.²²⁶ Additionally, although the U.S. has federal and state minimum wage laws, its minimum wage is lower than in most other Western countries.²²⁷ Though arguments against raising the minimum wage include higher prices and higher costs for employers, it appears that the federal minimum wage might already be on its way to an increase. President Obama proposed raising the minimum wage from \$7.25 to \$10.10 in his February 2013 State of the Union address.²²⁸ Furthermore, a poll of economic experts says the benefits of raising the

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[T]he term employment . . . segregation by gender refer[s] to differences in the kind of jobs men and women do . . . [t]his term is most frequently used to talk about differences in the distribution of male and female wage and salaried workers across industries and occupation.

WORLD BANK, *supra* note 220, at 206.

²²³ See, e.g., EUROFOUND, *supra* note 37, at 12; KATRÍN ÓLAFSDÓTTIR, EFFICIENCY OF COLLECTIVE BARGAINING: ANALYSING CHANGES IN THE WAGE STRUCTURE IN THE PUBLIC SECTOR IN ICELAND, 19 (2010), *available* at www.eale.nl/Conference2009/PapersB/Olafsdottir.pdf; JANNEKE PLANTENGA, THE GENDER PAY GAP: ORIGINS AND POLICY RESPONSES, A COMPARATIVE REVIEW OF THIRTY EUROPEAN COUNTRIES 36 (2006), *available* at ec.europa.eu/social/BlobServlet?docId=2007&langId=en.

²²⁴ MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 6, 19, 25, 50 (1987).

²²⁵ *Id.* at 11-15.

²²⁶ FRANCINE D. BLAU & LAWRENCE M. KAHN, AT HOME AND ABROAD: U.S. LABOR MARKET PERFORMANCE IN INTERNATIONAL PERSPECTIVE 232 (2002). See TIJGDENS & KLAVEREN, *supra* note 47, at 36; EUROFOUND, *supra* note 37, at 12; Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, J. ECON. PERSP., Autumn 2000, at 75, 93 [hereinafter J. ECON. PERSP.]; Francine D. Blau & Lawrence M. Kahn, *Wage Structure and Gender Earnings Differentials: An International Comparison*, 63 *ECONOMICA* S29, S37 (1996) [hereinafter “ECONOMICA”].

²²⁷ *ECONOMICA*, *supra* note 226, at S38; J. ECON. PERSP., *supra* note 226, at 93.

²²⁸ *Economists Say Raising the Minimum Wage is Worth It: Poll*, HUFF POST BUS. (Feb. 28, 2013), http://www.huffingtonpost.com/2013/02/28/economists-minimum-wage_n_2782488.html.

minimum wage outweigh the possible negative effects.²²⁹ According to the National Women's Law Center, a raise in the minimum wage could increase the earnings of about 15.4 million American women, thereby decreasing the GPG between female and male dominated jobs.²³⁰

D. Transparency and Accountability

Transparency of wage data and the promotion of employer accountability are a necessary precondition for pursuing an equal pay claim, as well as significant in raising awareness of the GPG problem.²³¹ Therefore, these goals are also important in tackling the GPG, and essential in Nordic countries, where large employers are obliged to publish wage and job classification reports and create plans aimed at decreasing the GPG.²³² In contrast, half of all American workers are either forbidden or strongly discouraged from discussing their pay with co-workers.²³³

1. Transparency

The correlation between transparency and the GPG is demonstrated in the American federal job sector. Federal employees have access to a public website that publishes earnings of all employees, making it easy to compare their wages with others.²³⁴ The GPG is also lower for federal employees: a 2009 report shows that the GPG for federal workers is eleven percent, as compared to the national average, which is twenty-two percent.²³⁵ Thus, if greater wage transparency was mandated in all U.S. job sectors, the overall GPG could also decrease.

"Transparency does not mean that everyone must know everyone else's salary."²³⁶ Rather, the Department of Labor should mandate that employers make salary ranges for each job title available for all employees.²³⁷ This would help to put employees' wages in context and allow them to assess the fairness of their earnings.²³⁸ Moreover, it

²²⁹ *Id.*

²³⁰ *6 Real Steps the President Can Take to Close the Gender Wage Gap*, FORBES MAG. (Nov. 6, 2012), <http://www.forbes.com/sites/learnvest/2012/11/06/6-real-steps-the-president-can-take-to-close-the-gender-wage-gap/2/>.

²³¹ FOUBERT, *supra* note 99, at 15-16; GENDER MAINSTREAMING, *supra* note 58, at 51.

²³² FOUBERT, *supra* note 99, at 15; GENDER MAINSTREAMING, *supra* note 58, at 50.

²³³ CORBETT & HILL, *supra* note 28, at 27.

²³⁴ *Id.* at 27-28.

²³⁵ THE SIMPLE TRUTH, *supra* note 40, at 19.

²³⁶ CORBETT *supra* note 28, at 28.

²³⁷ *Id.*

²³⁸ *Id.*

would help to remedy past and prevent future EPA and Title VII violations.

2. Accountability

Another way that the U.S. should hold employers accountable for providing equal pay is by mandating anonymous reports that provide details of job placement between men and women, analyze job classifications, and show pay differential statistics.²³⁹ These compulsory reports, like those in Nordic countries, should be accompanied with action plans for how the employers will address any gender pay differences they find.²⁴⁰ These reports could be examined by an agency such as the U.S. Department of Labor.

The state of Minnesota already provides this type of accountability; public sector employers are required to conduct a pay equity study every few years and make necessary salary adjustments if there are pay differentials between genders for equal value work.²⁴¹ Although measuring the comparable value of work can be difficult, Minnesota public employers use a job evaluation tool to “compare the complexity of issues encountered, the depth and breadth of knowledge needed, the nature of interpersonal contacts required, and the physical working conditions” in order to determine the comparable skill levels required while removing occupational sex segregation from its analysis.²⁴²

Requiring these reports and plans not only provides employees with proof for litigation purposes, but also demands that employers consciously investigate their pay practices in a substantive way. These reports should be required on a national level because they would provide transparency and accountability, as well as an increased awareness of the GPG issue.

E. Governmental Advocacy for Gender Equality in the Workplace

1. Comparison with Nordic Countries

After the Republican filibuster of the Paycheck Fairness Act in 2012, Senate Minority Leader Mitch McConnell defended his party’s actions by expressing concern that the bill would have opened the door to more lawsuits against employers: “We don’t think America suffers

²³⁹ See FOUBERT, *supra* note 99, at 15-16.

²⁴⁰ See *id.* at 16; see also CORBETT & HILL, *supra* note 28, at 28.

²⁴¹ CORBETT & HILL, *supra* note 28, at 28; THE SIMPLE TRUTH, *supra* note 40, at 20.

²⁴² CORBETT & HILL, *supra* note 28, at 28.

from a lack of litigation. We have a jobless problem. We have a debt problem. We got a lot of problems. Not enough lawsuits is not one of them.”²⁴³

McConnell’s statements minimized the GPG issue by essentially saying that the GPG is not as important as other problems the U.S. faces. He also seemed to surmise that any benefits from such legislation would not be worth extra litigation. McConnell’s comments, like Romney’s during the debate, demonstrate perhaps the most significant difference between Nordic and American gender law. While Nordic governments devote substantial resources and attention to the GPG issue, American politicians appear clueless to it. The U.S. Congress has blocked the vote on the same gender equality bill—one that simply expands transparency and allows for easier equal pay litigation—three times over the past four years.²⁴⁴ By contrast, Nordic countries devote entire governmental agencies to gender equality and the enforcement of discrimination laws.

Iceland’s response to the 2008 financial crisis also serves as a specific and concrete example of the Nordic approach to gender. When the market collapsed, many in Iceland blamed it on the largely male banking elite, thus focusing criticism on male risk-taking in the failed financial sector.²⁴⁵ Some commentators theorized that women could perhaps be trusted to be less individualistic and more risk-averse.²⁴⁶ The population then elected a parliament consisting of a forty-three percent female membership and its first female prime minister in response to the crisis.²⁴⁷ But in the U.S., where the individualism and risk taking of mostly men in the financial sector also contributed to its recession, no similar initiatives towards gender equality were seriously discussed.

2. Proposed Actions

Although an American adaptation of substantive gender equality laws would certainly help to close the GPG, enforcement and

²⁴³ Nia-Malika Henderson, *Obama, Democrats Put Spotlight On Gender Pay Gap. Will It Matter?*, WASH. POST (Jan. 29, 2014), http://www.washingtonpost.com/blogs/she-the-people/wp/2014/01/29/obama-democrats-put-spotlight-on-gender-pay-gap-will-it-matter/?tid=up_next.

²⁴⁴ Bassett, *supra* note 142; Henderson, *supra* note 243.

²⁴⁵ CTR. FOR GEND. EQUAL. ICELAND, *supra* note 57, at 9-10; *see also* Jill Rubery, *Salvaging Gender Equality Policy*, in *AFTER THE CRISIS: TOWARDS A SUSTAINABLE GROWTH MODEL* 84, 85 (Andreas Botsch & Andrew Watt eds. 2010).

²⁴⁶ *Id.* at 85.

²⁴⁷ *Id.*

acceptance of these laws could only come with non-legislative action.²⁴⁸ Though an agency devoted to gender equality might be too farfetched in the U.S. today, it still appears that in the absence of an employer-driven movement to ensure equal opportunities for both genders, the federal government must have a role in promoting equal pay initiatives.²⁴⁹ Thus, the government should plan an active role in providing research, outreach, technical assistance, and information about model programs and incentives for equal pay.²⁵⁰ Perhaps the Secretary of Labor, working with unions and diverse groups of employers, employees and workers, could initiate a campaign for equality in the workplace with an emphasis on spreading knowledge about gender inequality and setting it as a prime policy goal.

America's status as a liberal social welfare state is a representation of Americans' tendency to favor the market over social programs. Therefore, market advantages should be channeled when promoting equal pay legislation: the effect that the GPG has on dual-earner incomes; the burden of women relying on national programs; women's inability to pay off student loans as fast as men; the waste of resources that the education of women in unprecedented rates of higher education brings if they cannot earn as much money as men—all of these factors are detriments to the American economy as a whole, and are at least partially the result of the GPG.

In the education system, women should be further encouraged to pursue careers in male-dominated fields such as engineering or the sciences. Additionally, more private resources should be assigned to teaching women negotiation skills and to improve women's confidence—a lack of which have been shown to prevent effective equal pay negotiation.²⁵¹ These types of educational initiatives would not only encourage equality between sexes, but also serve to accomplish the same goals as those accomplished by Nordic boardroom quotas and collective agreements, which are not plausible in the U.S.

Additionally, if the U.S. focused on strengths that women may bring to the workplace, as Iceland did, both men and women may be more open to the idea of females as high-ranking workers; likewise, female confidence in their working abilities may be boosted. All of these initiatives taken together would likely decrease the American GPG.

²⁴⁸ See Lovell, *supra* note 9, at 57.

²⁴⁹ See *id.* at 58.

²⁵⁰ See *id.*

²⁵¹ Terjesen, *supra* note 84, at 58.

VI. CONCLUSION

Despite similarities between Nordic countries and the U.S., Sweden, Norway and Iceland have shown substantial progress in gender equality and minimizing their GPGs, while the U.S. has trailed behind. The Nordic successes in decreasing their GPG can at least partially be attributed to their development of gender equality policy, the hallmarks of which include parental insurance, expansive childcare systems, and boardroom quotas.²⁵²

In pursuit of decreasing its GDP, the U.S. should enact those policies—and amend those already existing—which are related to women in the workplace. Though there are challenges to the U.S. adopting boardroom quotas, publicly funded childcare systems and widespread collective bargaining agreements, U.S. policy proposals inspired by Nordic law that would be both practical and beneficial to the GPG include: paid paternal insurance; status as a new parent and part-time worker as separately protected classes under equal rights statutes; a minimum wage raise; and new or additional provisions for mandates of wage/hiring transparency and employer accountability.

Although these proposals might initially be unpopular as a result of political inexperience with GPG legislation and concern about impedance on liberal welfare state values, such proposals could be promoted by governmental advocacy for equal pay. This could be accomplished by promoting awareness of the GPG and through the encouragement of equalization of women in the work and education forces, with a focus on the economic benefits of minimizing the GPG.

The history of seatbelt legislation serves as an example of the influence that laws can have on culture and attitudes. In the early 1980s, the National Highway Traffic Safety Administration revoked a rule that would have required car manufacturers to equip all new cars with automated seatbelts.²⁵³ The revocation was based on a belief that consumers would dismantle the seatbelts because of a cultural resistance to them.²⁵⁴ The Supreme Court reversed the revocation in 1983,²⁵⁵ and

²⁵² See *supra* Part II.

²⁵³ See Michael deCourcy Hinds, *Court Says 1984 Cars Must Have Air Bags or Automatic Seat Belts*, N.Y. TIMES, Aug. 5, 1982, <http://www.nytimes.com/1982/08/05/us/court-says-1984-cars-must-have-air-bags-or-automatic-seat-belts.html>.

²⁵⁴ *Motor Vehicle Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 40 (1983).

²⁵⁵ *Id.* at 45; deCourcy Hinds, *supra* note 253.

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by 1997, all but one state had enacted a seatbelt law.²⁵⁶ By June 1997, sixty-one percent of registered voters in the U.S. supported seatbelt legislation, which was a nine percent increase from just four months earlier.²⁵⁷ Furthermore, Americans in states with stricter seatbelt laws also show higher rates of seatbelt use.²⁵⁸

The same sort of influence found in seatbelt legislation is plausible with regard to the American GPG and gender equality via Nordic-inspired policies. These laws, coupled with adequate advocacy, would symbiotically bring about an increase in compliance and acceptance. With these initiatives, it is possible that the phrase “binders full of women” will be looked back upon not as representative of current American gender equality law, but instead symbolic as a turning point in U.S. gender history.

²⁵⁶ Alma Cohen & Liran Einav, *The Effects of Mandatory Seat Belt Laws on Driving Behavior and Traffic Fatalities* 1 (Harvard Law Sch., John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 341, 2001), available at http://www.law.harvard.edu/programs/olin_center/; see *Seat Belt Use in 2010—Use Rates in the States and Territories*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. 1 (July 2011), <http://www-nrd.nhtsa.dot.gov/Pubs/811493.pdf> [hereinafter *Seat Belt Use in 2010*].

²⁵⁷ *State Legislative Fact Sheet: Strengthening Seat Belt Use Laws—Increase Belt Use, Decrease Fatalities and Injuries*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Jan. 2000), http://www.nhtsa.gov/people/injury/alcohol/Archive/Archive/safesobr/21qp/html/fact_sheets/Seat_Belt_Use.html.

²⁵⁸ Cohen & Einav, *supra* note 256, at 20; *Seat Belt Use in 2010*, *supra* note 256, at 1.