

# DISCRIMINATION WITHOUT DISCRIMINATING? LEARNED GENDER INEQUALITY IN THE LABOR MARKET AND GIG ECONOMY

*Arianne Renan Barzilay\**

*The “sharing” economy, and in particular the exchange of labor and services within it, is generating wide-spread attention from scholars. It has been celebrated as a disruption to current forms of labor and consumption. This depiction suggests a new, sui generis form of economy, which can and should be understood in and of itself, or at most, by its contrast with the current labor market in which workers are employees. Yet, I argue, emerging research on gender discrimination in the gig economy suggests that this understanding occludes a major feature of the gig economy—its operation in the shadow of the labor market and antidiscrimination law. In this Article, I argue that we should begin to consider the deeper relationship between the gig economy, the labor market, and antidiscrimination law. More specifically, I contend that inequality is learned: the labor market teaches gender inequality, these lessons are internalized by workers and reappear in the context of working in the gig economy. Therefore, I suggest that if we wish to mitigate gender discrimination for taskers in the gig economy, we must enhance antidiscrimination law for employees in the traditional labor market.*

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\* Associate Professor, University of Haifa Faculty of Law. I am grateful to Stephanie Bornstein, Naomi Cahn, Tamar Kricheli-Katz, Faina Milman-Sivan, Guy Mundlak, Sofia Rachordas, Noya Rimalt and Ilan Talmud for helpful thoughts and to the participants of the Sharing Economy: Markets and Human Rights International Workshop, the LLRN 2017 Conference, and the Israeli Labor Law Forum. Thanks to Ilana Ataron and Veronica Lion for research assistance and to Katherine Van Bramer and the staff of the *Cornell Journal of Law and Public Policy* for editorial support.

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## INTRODUCTION

The sharing or gig economy,<sup>1</sup> and in particular the exchange of labor and services within it, is generating wide-spread attention from scholars, policymakers, and the media.<sup>2</sup> Specifically, the crowdsourcing of work—the practice of obtaining labor and services by soliciting contributions from a large group of people via an online platform—has been hailed as a sharing revolution,<sup>3</sup> a disruption to traditional forms of labor,<sup>4</sup> and a paradigmatic shift in the way we work.<sup>5</sup> The sharing economy has been celebrated as enabling “micro-entrepreneurs” to enjoy greater flexibility and autonomy by taking on gigs, rides, or tasks while work-providers benefit from the ease, convenience, and affordability of work-on-

<sup>1</sup> The sharing economy is a diverse sector as demonstrated by Schor & Fitzmaurice’s analysis. I refer to one category from their typology: labor and service exchanges sites. See Juliet B. Schor & Connor J. Fitzmaurice, *Collaborating and Connecting: The Emergence of the Sharing Economy*, in HANDBOOK OF RESEARCH ON SUSTAINABLE CONSUMPTION 410–25 (Lucia A. Reisch & John Thøgersen eds., 2015). Regarding gender discrepancies in selling goods, see Tamar Kricheli-Katz & Tali Regev, *How Many Cents on the Dollar? Women and Men in Product Markets*, 2 SCI. ADVANCES 1, 1, 4, 6 (2016) (asserting that women receive less money than men when selling the exact same merchandise on eBay).

<sup>2</sup> See, e.g., Thomas E. Perez, Sec’y of Labor, Remarks at the Department of Labor Future Of Work Symposium, Washington, D.C., December 10, 2015, [https://votesmart.org/public-statement/1032922/remarks-at-the-department-of-labor-future-of-work-symposium-washington-dc-december-10-2015#.W\\_GPFXdfzD5](https://votesmart.org/public-statement/1032922/remarks-at-the-department-of-labor-future-of-work-symposium-washington-dc-december-10-2015#.W_GPFXdfzD5); Benjamin Sachs, *Uber: Employee Status and “Flexibility”*, ONLABOR (Sept. 25, 2015), <https://onlabor.org/2015/09/25/uber-employee-status-and-flexibility>; Noah Zatz, *Is Uber Wagging the Dog With Its Moonlighting Drivers?*, ONLABOR (Feb. 1, 2016), <https://onlabor.org/is-uber-wagging-the-dog-with-its-moonlighting-drivers/>. See also Mary L. Gray, *Your Job is About to get ‘Taskified’*, L.A. TIMES, Jan. 8, 2016, <http://www.latimes.com/opinion/op-ed/la-oe-0110-digital-turk-work-20160110-story.html> (explaining how instead of hiring employees, firms can now post tasks on the web thus fragmenting jobs; such “online piecemeal” represents a “radical shift in how we define employment itself.”).

<sup>3</sup> See JEREMAS PRASSL, HUMANS AS SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY 11 (2018).

<sup>4</sup> See Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 89–90, 95, 132 (2016) (“Millions of people are becoming part-time entrepreneurs, disrupting established business models and entrenched market interests . . . all while turning ideas about consumption, work, risk, and ownership on their head . . . [M]any platform companies . . . involve people working in time frames and ways that posit a challenge to traditional modes of employment.”). *Id.* at 90, 132. Of course, what is traditional can be widely contested, so for the purposes of the Article when referring to ‘traditional’ forms of labor, I mean employment in the workplace rather than online platform-facilitated labor.

<sup>5</sup> See *id.* at 89.

demand.<sup>6</sup> Yet some argue that there is nothing new here at all, labeling this economy as a “share-the-scrap economy.”<sup>7</sup> They argue that the narrative of “disruptive innovation” and “micro-entrepreneurship” obscures the realities of highly precarious work that has existed for centuries.<sup>8</sup> Under this reading, algorithmic technologies, common to the gig economy, perform what other mechanisms and low-tech technologies have long done. Both of these depictions hold truths, of course. The gig economy is using innovative technology to invent new applications of mediating labor, on the one hand, and, on the other hand, these transformations in how we work nonetheless preserve a long history of labor exploitation among disempowered workers by using ever-changing mechanisms and technologies. However, both of these depictions neglect an important feature of the gig economy: its operation in the shadow of the general labor market.

While scholars are becoming more aware of discrimination in the gig economy,<sup>9</sup> the horizontal effects, dynamics and relationships between the gig economy and the labor market in the context of gender

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<sup>6</sup> See PRASSL, *supra* note 3, at 8; ARUN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM 11, 173 (2016).

<sup>7</sup> Robert Reich, *The Share the Scraps Economy*, ROBERT REICH (Feb. 2, 2015), <http://robertreich.org/post/109894095095>. See also TOM SLEE, WHAT’S MINE IS YOURS: AGAINST THE SHARING ECONOMY 10–11 (2016); GUY STANDING, THE PRECARIAT: A NEW DANGEROUS CLASS 10–12 (2011); TREBOR SCHOLZ, UBERWORKED AND UNDERPAID: HOW WORKERS ARE DISRUPTING THE DIGITAL ECONOMY 42 (2017). These assertions receive support from a recent MIT report showing that Uber and Lyft drivers earn less than minimum wage. See Stephen M. Zoepf, Stella Chen, Paa Adu & Gonzalo Pozo, *The Economics of Ride Hailing: Driver Revenue, Expenses and Taxes*, 16 MIT Ctr. for Energy & Env’tl. Pol’y Res. (CEEPR, Working Paper No. 2018-005), [https://orfe.princeton.edu/~alaink/SmartDrivingCars/PDFs/Zoepf\\_The%20Economics%20of%20RideHailing\\_OriginalPdfFeb2018.pdf](https://orfe.princeton.edu/~alaink/SmartDrivingCars/PDFs/Zoepf_The%20Economics%20of%20RideHailing_OriginalPdfFeb2018.pdf).

<sup>8</sup> See generally Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 COMP. LAB. L. & POL’Y J. 603 (2016) (situating the gig economy in historical perspective). See also Eric Biber, Sarah E. Light, J.B. Ruhl & James Salzman, *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561, 1561, 1626 (2017).

<sup>9</sup> See Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig Economy*, 47 SETON HALL L. REV. 393, 394 (2017); Anikó Hannák et al., *Bias in Online Freelance Marketplaces: Evidence from TaskRabbit and Fiverr* 1, <http://www.ccs.neu.edu/home/ancsaaa/files/CSCW17.pdf>; Larry Kim, *Gender Bias in Online Marketing: Data Shows Women Are Undervalued by 21%*, WORDSTREAM (Apr. 3, 2015), <http://www.wordstream.com/blog/ws/2014/05/13/gender-bias> (explaining that customer satisfaction ratings, important tools for users on various platforms, overwhelmingly favored men over women). Scholars have posited that one of the main reasons for discrimination in the sharing economy is that this economy with its use of online names and photos heightens stereotypes. See Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 FORDHAM URBAN L.J. 1023, 1037 (2016). Uber has recently claimed that gender pay discrepancies found among its drivers are a result of women’s different preferences and styles of work. See generally Cody Cook et al., *The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers* (2018), <https://web.stanford.edu/~diamondr/UberPayGap.pdf>.

discrimination have not yet been considered.<sup>10</sup> In this Article, I consider these dynamics. I contend that the gig economy, while seemingly unregulated at all, is operating in the shadow of the labor market and employment antidiscrimination law. Further, I argue that employment discrimination law in recent years both has stalled the achievements made in earlier decades and is currently enfeebled, sending problematic messages specifically to those who comprise a significant part of gig economy taskers, namely women with caregiving responsibilities. Specifically, I maintain that three features of the labor market may teach gender inequality: (1) the gender pay gap; (2) ideal worker norms; and (3) the practice of salary history interrogations. Finally, I contend that workplace inequality is learned and has permeated the gig economy.

Thus, while most scholarly fervor has been devoted to extending the laws and protections that apply to employees to task-workers, I turn the focus elsewhere.<sup>11</sup> I argue that without addressing discrepancies in the traditional labor market, the labor market's shadow will continue to color interactions within the gig economy. I suggest that if we seek to mitigate gender discrimination in platform-facilitated labor in the gig economy, we must strengthen and enhance antidiscrimination law in the traditional labor market, regardless of the outcome of the debates over gig economy worker classification,<sup>12</sup> and regardless of whether antidiscrimination law will apply de jure to the gig economy.

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<sup>10</sup> Schoenbaum, however, has hinted at the fear that the breakdown in non-discrimination norms in the sharing economy will have a spill-over effect that will alter gender equality norms more generally, and subvert the significant progress made over the past decades. See Schoenbaum, *supra* note 9, at 1051.

<sup>11</sup> It is important, of course, nonetheless to apply correct worker status for gig economy workers, yet for the limitations in applying current antidiscrimination law to mitigate pay discrepancies in online platforms, see Renan Barzilay & Ben-David, *supra* note 9, at 422–31.

<sup>12</sup> In the U.S., participants are usually classified as independent contractors or 1099. See Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015* at 8, 10 (Nat'l Bureau of Econ. Research, Working Paper No. 22667, 2016); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1675 (2016); Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 557, 581–82 (2016); Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowd Work and Labor Protection in the "Gig-Economy"*, 37 COMP. LAB. L. & POL'Y J. 471, 478 (2016); Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 67 (2017); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1511, 1513 (2016); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 479–80 (2016). Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 100 (2015). See also Guy Davidov, *Guest Post: The Status of Uber Drivers- Part 1: Some Preliminary Questions*, ONLABOR (May 17, 2016), <https://onlabor.org/2016/05/17/guest-post-the-status-of-uber-drivers-part-1-some-preliminary-questions>.

## I. THE PUZZLE

Previous research I conducted with Anat Ben-David on gender pay discrepancies in the gig economy<sup>13</sup> began to empirically examine gender pay gaps in this growing segment of the economy. Through an empirical case study focusing on workers on one global platform, the study observed gender discrepancies in platform-facilitated online labor. The empirical findings demonstrated that women's average hourly requested rate was significantly lower than men's, averaging about 2/3 of men's rates.<sup>14</sup>

That study employed a computational approach that automatically extracted profile data from the platform's Application Programming Interface (API): rather than relying on answers or data reported by users through surveys, it was able to extract data directly from the API, capturing a snapshot of the actual user profiles that were utilized on the platform.<sup>15</sup> That study analyzed over 4,600 U.S.-based online taskers' requested rates, occupations, and work-hours.<sup>16</sup> Using statistical analysis, its findings illustrated a dramatic gender gap in the hourly rate requested by men and women who were seeking work in various occupational categories through the platform. It showed that, although the overall number of male and female profiles in the dataset was equally distributed, as was the average feedback score, and women worked more hours than men, on average, women's hourly requested rate was 37% lower than men's: the overall average hourly rate was \$28.20 per hour for women, compared with an average hourly rate of \$45.07 for men. Such gaps in hourly requested rates persisted even after controlling for feedback score, experience, occupational category, hours of work, and educational attainment.<sup>17</sup>

These findings raise two questions. First, since the method studied "requested rates," were there actual discrepancies in pay? The study maintained that in all likelihood there were.<sup>18</sup> The second, which will be the focus here, concerns women's self-depiction and self-undervaluation in the gig economy. How might the fact that women requested signifi-

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<sup>13</sup> See generally Renan Barzilay & Ben-David, *supra* note 9.

<sup>14</sup> See *id.* at 394.

<sup>15</sup> See *id.* at 405.

<sup>16</sup> See *id.* at 406.

<sup>17</sup> See *id.* at 394, 398, 407–08.

<sup>18</sup> *Id.* at 421–22 (the actual payment received by users per hour was not available for extraction from the Platform's API, thus it was not possible to systematically analyze payment received by users per hour for similar tasks and occupations, compared to their hourly rate. Despite this limitation, the study argued, it is most likely that gender differences in pay remained, as pay is likely derivative of the requested rates. It contended that while it is theoretically possible that during negotiation men's hourly rates go down, and women's rates increase, thus making the actual pay more equitable, it seems more likely that some gender discrepancy remains, especially in occupational categories where vast differences in requested hourly rates was observed.). *Id.* at 421.

cantly lower pay be explained? Are they discriminating against themselves? And what responsibility, if any, does the law bear for perpetuating inequality in this context?<sup>19</sup>

In this short Article, I cannot address all explanations concerning women's self-depiction and undervaluation, and thus do not purport to comprehensively explain the multidimensional problem of gender pay inequity. Rather, I will briefly examine one common explanation to the undervaluation puzzle—namely, women's abilities in conducting negotiations—and will suggest another explanation centering on the relationship between the labor market and gig economy taskers, and what I call “learned inequality.”<sup>20</sup>

## II. POSSIBLE EXPLANATIONS

### A. *Gender and Negotiation*

What are the possible explanations for the gender disparities in requested pay? One likely retort (which has recently been sounded by gig economy industry leaders) to the query puts the responsibility and blame for gender pay gaps on women.<sup>21</sup> Bluntly put, it argues that women's unassertiveness and poor negotiation abilities are the cause of gender gaps in pay. Women's alleged incompetence to negotiate has long been offered to explain the gender wage gap in the labor market more generally.<sup>22</sup> And, recently, women have been publicly urged to “lean-in”<sup>23</sup> and to demand higher pay.

Some literature on women and negotiations has identified a significant difference between men and women in their propensity to negotiate for wages and an a priori lowering of salary expectations among women to avoid conflict.<sup>24</sup> It has shown that on average, women fare worse than men in competitive negotiations' outcomes under certain circum-

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<sup>19</sup> As for platforms' responsibilities, that study argued that platforms are in a focal position to mitigate this phenomenon by Equality-By-Design (EbD) techniques. *Id.* at 427–31.

<sup>20</sup> Other explanations for women's inequality in the context of the gig economy may be connected to technology and to women's position as caregivers. See Renan Barzilay & Ben-David, *supra* note 9 at 429; see also Abigail Adams and Janine Berg, *When Home Affects Pay: An Analysis of the Gender Pay Gap Among Crowdworkers*, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3048711](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048711). For discussion of women's possible greater need for money, see Renan Barzilay & Ben-David, *supra* note 9 at 420. Such greater need for money is derivative of women's position in the labor market more generally. See *infra* Part IIIA.

<sup>21</sup> See Tomer Michelson, *Who Will Catch You If You Fall?* THE MARKER, Dec. 2017.

<sup>22</sup> See Andrea Schneider, *Negotiating While Female*, 70 SMU L. Rev. 695, 697 (2017).

<sup>23</sup> See generally SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013) (explaining how women should “lean in” to achieve success in their careers).

<sup>24</sup> See LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 130–34 (2003).

stances.<sup>25</sup> Nonetheless, new research suggests that requesting higher pay is not always beneficial for women. This research shows that when women are not sure what is expected in negotiations, namely when those expectations are murky, asking for more money does not always work as well for women as it does for men, and it may actually hurt women both financially<sup>26</sup> and socially.<sup>27</sup> Such studies often suggest organizational strategies that may be helpful in overcoming the disparity.<sup>28</sup> Other studies dispute the myth that women lack negotiation skills and argue that such misconceptions contribute to minimize employers' and organizations' roles in perpetuating the gender pay gap.<sup>29</sup> Finally, still other studies support debunking the connection between gendered negotiation and the gender pay gap by demonstrating that when selling the same merchandise as men, women receive less pay, regardless of negotiation.<sup>30</sup>

### B. *Taking A Broader Look: The Gig Economy as Operating in the Shadow of the Labor Market*

My exploration focuses on the relationship between employment in the labor market and working in the gig economy. It looks to shift the causal focus away from the way in which women negotiate, towards some of the institutional practices of the labor market that end up reproducing inequality. But first, it is important to glean a picture of who is working in the gig economy and why.

The gig economy constitutes an increasing share of the American economy.<sup>31</sup> The Pew Research Center recently concluded that 8% of

<sup>25</sup> See Julia B. Bear & Linda Babcock, *Gender Differences in Negotiations*, in THE NEGOTIATOR'S DESK REFERENCE 596, 603 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017) (surveying empirical research showing gender differences in negotiations, but also showing circumstances under which such differences are mitigated).

<sup>26</sup> See *id.* See Christine Exley, Muriel Niederle & Lise Vesterlund, *New Research: Women Who Don't Negotiate Might Have Good Reason*, HARV. BUS. REV. (Apr. 12, 2016), <https://hbr.org/2016/04/women-who-dont-negotiate-their-salaries-might-have-a-good-reason>; Christine L. Exley, Muriel Niederle & Lise Vesterlund, *Knowing When to Ask: The Cost of Leaning-in* (Harv. Bus. Sch., Working Paper No. 16-115, 2016), <https://hbswk.hbs.edu/item/knowing-when-to-ask-the-cost-of-leaning-in>. See also Hannah Riley Bowles, Linda Babcock, & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. OF PERSONALITY & SOC. PSYCHOL., 951 (2005) (arguing that reducing situational ambiguity constrains the influence of gender on negotiation).

<sup>27</sup> See Emily T. Amanatulla & Catherine H. Tinsley, *Punishing Female Negotiators for Asserting too Much . . . or not Enough: Exploring Why Advocacy Moderates Backlash Against Assertive Female Negotiators*, 120 ORG. BEHAV. & HUM. DECISION PROCESSES 110, 110 (2013); Bear & Babcock, *supra* note 25, at 600.

<sup>28</sup> See Bear & Babcock, *supra* note 25, at 601-03.

<sup>29</sup> See Schneider, *supra* note 29, at 697-98.

<sup>30</sup> See Kricheli-Katz and Regev, *supra* note 1 ("By analyzing auctions (where sellers do not interact with buyers), differences in the negotiation skills of women and men sellers also become irrelevant.").

<sup>31</sup> See Aaron Smith, *Gig Work, Online Selling and Home Sharing*, PEW RES. CTR. (Nov. 17, 2016), <http://www.pewinternet.org/2016/11/17/gig-work-online-selling-and-home->

Americans had already earned money through work they found on platforms,<sup>32</sup> and other studies suggest this number is likely to grow.<sup>33</sup> Graphic designers, accountants, construction workers, drivers, cooks, computer engineers, lawyers, and medical professionals have all participated in gig labor.<sup>34</sup> Work is typically performed on a contingent basis, with workers taking on short-term, discrete tasks, although some have ongoing relationships with the platforms.<sup>35</sup>

Gig economy workers typically fall into one of two categories: those who are reliant on their gig work for basic income, and those who perform it for additional earnings.<sup>36</sup> Those who are reliant on gig work for basic income are more likely to be young and non-white.<sup>37</sup> They are also more likely to have lower income and education levels, and to perform physical tasks, such as driving or cleaning.<sup>38</sup> Those working for additional earnings are more likely to be white, have higher income and education levels, and perform online tasks rather than physical labor.<sup>39</sup> Studies found that such providers of labor in the gig economy are often highly educated and have full-time jobs or other gainful employment.<sup>40</sup> Many earned less on platforms than in their relevant paid employment.<sup>41</sup> Yet, studies show that most people enter the gig economy not by choice, but are impelled by the lack of opportunities in the formal labor market and are thus on a quest for sufficient or additional means of livelihood.<sup>42</sup>

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sharing/; Alex Rosenblat, *What Motivates Gig Economy Workers*, HARV. BUS. REV. (Nov. 17, 2016), <https://hbr.org/2016/11/what-motivates-gig-economy-workers>. The discussion in this Article is primarily based on the U.S. because the puzzle concerned data relevant to U.S.-based user profiles. See Renan Barzilay & Ben-David, *supra* note 9, at 398. Of course, platform users may come from different nationalities. See Christofides et al., *infra* note 54, at 93.

<sup>32</sup> See Smith, *supra* note 31.

<sup>33</sup> See Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 116 (2015).

<sup>34</sup> *Id.*; Renan Barzilay & Ben-David, *supra* note 9, at 408; Hunter Jensen, *6 Medical Apps Revolutionizing Healthcare*, SITEPOINT (Dec. 6, 2016), <https://www.sitepoint.com/6-medical-apps-revolutionizing-healthcare/>.

<sup>35</sup> See Alex Rosenblat, Solon Barocas, Karen Levy & Tim Hwang, *Discriminating Tastes: Customer Ratings as Vehicles for Bias*, DATA & SOC'Y 1, 3 (Oct. 2016) [https://datasociety.net/pubs/ia/Discriminating\\_Tastes\\_Customer\\_Ratings\\_as\\_Vehicles\\_for\\_Bias.pdf](https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf) (stating that Uber has high overall turnover rates, but that half of drivers remained active with the platform a year after joining).

<sup>36</sup> See Smith, *supra* note 31.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See Juliet B. Schor, *Does the Sharing Economy Increase Inequality Within the Eighty Percent? Findings from a Qualitative Study of Platform Providers*, 10 CAMBRIDGE J. OF REGIONS, ECON. & SOC'Y 263, 265 (2017); Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, CONDITIONS OF WORK & EMP. SERIES 1, 5 (2016).

<sup>41</sup> See Schor, *supra* note 40, at 272.

<sup>42</sup> See INTERNATIONAL LABOUR ORGANIZATION, WOMEN AT WORK: TRENDS (2016).



Specifically, research has found that for women crowd-workers, the motivation for laboring in the gig economy rested on their caregiving responsibilities—online gig work enables them to work flexible, short-term schedules from home, while providing care for family members: either ill parents or small children.<sup>43</sup> Flexible work typical of the gig economy is often seen as desirable especially to those with significant family care responsibilities, overwhelmingly women.<sup>44</sup>

In the U.S., such task-workers are not considered employees of platforms. Rather, they are considered independent micro-entrepreneurs who contract directly and ad-hoc with clients, and set their own working hours, using the platform as a virtual middleman. Independent contractor status means that these workers forfeit the benefits of labor laws, including antidiscrimination legislation such as the Equal Pay Act of 1963 (EPA)<sup>45</sup> and Title VII of the Civil Rights Act of 1964 (Title VII).<sup>46</sup> That is perhaps why the discussion on the sharing economy has considered it as *sui generis*, as separate, new and different, even disruptive to the labor market.

However, the gig economy actually operates in the shadow of the labor market and in the shadow of employment antidiscrimination law. First, with regards to its operation in the shadow of the labor market, platforms' abilities to recruit task-workers to participate in the gig economy to begin with, and to perform platform-facilitated labor, are related

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<sup>43</sup> See Berg, *supra* note 40, at 7. See also OECD, *Going Digital: The Future of Work for Women*, <https://www.oecd.org/employment/Going-Digital-the-Future-of-Work-for-Women.pdf>.

<sup>44</sup> See Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES, Aug. 16, 2014, <http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-anduncertainty.htmlr=0>; Johnathan V. Hall, & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (Princeton Univ. Indus. Rel. Sec., Working Paper No. 587, 2015), available at [http://dataspace.princeton.edu/jspui/handle/88435/d\\_sp010z708z67d](http://dataspace.princeton.edu/jspui/handle/88435/d_sp010z708z67d). Uber has also called out to women to become its drivers by pointing out that such a gig is a convenient way to combine work with caretaking responsibilities. Uber stated:

[F]reedom is helping (literally) drive another wave of women's empowerment: the opportunity to fit work around life, rather than the other way around. Around 20 million Americans work fewer hours than they would like for "non-economic reasons," according to the Bureau of Labor Statistics. These include personal commitments, in particular child care, that can make full-time jobs so difficult. . . . It's one of the reasons Uber last year announced a commitment to get one million women drivers using our app by 2020. Because driving a car isn't just a way to get to work—it can be the work. For women around the world, Uber offers something unique: work on demand, whenever you want it. Drivers can make money on their own terms and set their own schedules.

Blaire Mattson, *This International Women's Day, Women Take the Wheel*, UBER NEWSROOM (Mar. 7, 2016), available at <https://newsroom.uber.com/driven-women>.

<sup>45</sup> Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (2012)).

<sup>46</sup> Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

to participants' opportunities in the labor market. Less-than-needed opportunities provided by the labor market often *impel* participation in the gig economy.<sup>47</sup> Moreover, because task-workers often participate in the labor market while simultaneously working in the gig economy, they may *carry* with them to the platform the ideas, habits, practices, and norms of the labor market. By working in the labor market, workers encounter, experience, and learn. Considering the self of workers as an embedded-self, workers may therefore carry over the lessons learned in the labor market to the gig economy. Interactions in the gig economy are thus cultivated in relation to the labor market. Second, the gig economy is operating in the shadow of antidiscrimination law. Despite the fact that task-workers are not considered employees and employment law does not apply to them directly, the gig economy is not operating in a legal void. Rather, because task-workers operate in the shadow of the labor market, they are also operating in the shadow of the legal regulation of employment, and specifically employment discrimination law.

### III. LEARNED INEQUALITY

It follows then that it would be instructive to look at the labor market to try to make sense of the question posed above, and to understand how experiences in the labor market may become lessons for workers in the traditional labor market or the gig economy. I contend that inequality (much like many other things) is something that is *learned* in the labor market. Much like we may learn the virtues of civic participation and democracy in the workplace through trade union membership,<sup>48</sup> and much like we may learn the value of inclusiveness through participation in a racially-diverse workplace,<sup>49</sup> we also *learn gender inequality* in the workplace.

Lessons workers experience in the workplace are noteworthy. Scholars note that the workplace sets the conditions and context for learning, and the reciprocal interaction between the workplace and individuals determines what is learned.<sup>50</sup> Scholars also note that workers' subjectivities are produced through workplace culture.<sup>51</sup> For example,

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<sup>47</sup> See INT'L LABOUR ORG., *supra* note 42.

<sup>48</sup> See Faina Milman-Sivan, *Freedom of Association as a Core Labor Right and the ILO: Toward a Normative Framework*, 3 L. & ETHICS HUM. RTS. 110, 136 (2009).

<sup>49</sup> See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 5 (2003).

<sup>50</sup> See Amelia Manuti et al., *Formal and Informal Learning in the Workplace*, 19 INT'L J. OF TRAINING & DEV. 2 (2015).

<sup>51</sup> See PAUL DU GAY, *CONSUMPTION AND IDENTITY AT WORK* (1996); Richard Edwards, *Flexibility, Reflexivity and Reflection in the Contemporary Workplace*, 17 INT'L J. OF LIFE-LONG EDUC. 377 (1998); John Garrick and Robin Usher, *Flexible Learning, Contemporary Work and Enterprising Selves*, 5 ELECTRONIC J. OF SOC. 1 (2000). See NICKY SOLOMON, *Culture and Difference in Workplace Learning*, in UNDERSTANDING LEARNING AT WORK 119

gender career preferences are often shaped through experiences cultivated in the workforce.<sup>52</sup> Namely, scholars have shown that dead-end jobs lead to less prestigious career preferences.<sup>53</sup> Especially pertinent is recent scholarship arguing, specifically, that women's experiences in the workplace shape their expectations for compensation.<sup>54</sup> This research shows that experiences inform self-evaluation, and that women's salary expectations (as compared to men's) decline with experience.<sup>55</sup> This means that women's second-class status<sup>56</sup> in the workplace is continuously reproduced. In other words, women's experiences in the workplace and the norms that are learned in the workplace contribute to constituting women as devalued workers. As long as women earn less than men in the market, and as long as they are perceived as less-than-ideal workers, these experiences may create and reproduce self-undervaluation and low compensation expectations. In the following, I describe three features of the labor market, which seem relevant to learning inequality: gender pay gaps; ideal worker norms; and salary history interrogation, and explain the possible lessons derived from each.

#### A. *Gender Pay Gap is Learned*

In the U.S. labor market, gender pay gaps persist.<sup>57</sup> After considerable headway made in earlier decades, progress towards closing the gender pay gaps has now stalled.<sup>58</sup> Despite narrowing consistently since the 1950s, advancement halted around the turn of the millennium, subsequently ensuing in no meaningful shrinking of the gender pay gap in

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(David Boud & John Garrick eds., 1999). See also Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation on the Job in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

<sup>52</sup> See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 5 (1977).

<sup>53</sup> See *id.* at 158–59.

<sup>54</sup> See Uri Shwed & Alexandra Kalev, *How Do Salary Expectations Acquire Gender: The Roles of Social Relationships and Experiences at Work*, 15 LAB., SOC'Y & L. 119 (2018) (in Hebrew).

<sup>55</sup> See *id.*

<sup>56</sup> Women's second-class status is reflected for example in the gender pay gap and ideal work norms explained *infra* Part III.

<sup>57</sup> It is noteworthy that the gender pay gap exists to different degrees in many countries. See, e.g. Louis N. Christofides et al., *Gender Wage Gaps, 'Sticky Floors' and 'Glass Ceilings' in Europe*, 21 LAB. ECON. 86, 86–87 (2013).

<sup>58</sup> Ariane Hegewisch & Emma Williams-Baron, *The Gender Wage Gap by Occupation 2016; and by Race and Ethnicity*, INST. FOR WOMEN'S POL. RES., <https://iwpr.org/people/ariane-hegewisch-m-phil/>; See Ariane Hegewisch & Heidi Hartmann, *Occupational Segregation and the Gender Wage Gap: A Job Half Done*, SCHOLAR'S PAPER TO COMMEMORATE THE 50TH ANNIVERSARY OF THE PUBLICATION OF THE REPORT OF PRESIDENT KENNEDY'S COMMISSION ON THE STATUS OF AMERICAN WOMEN (U.S. DEP'T OF LABOR ed. 2014), <http://www.dol.gov/asp/evaluation/reports/WBPaperSeries.pdf>; See also Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* (NBER WORKING PAPER No. 21913, 2016).

approximately two decades.<sup>59</sup> The U.S. Bureau of Labor Statistics notes that most of the growth in women's earnings relative to men's occurred in the 1980s and 1990s, and that since 2004, the women-to-men's earning-ratio has remained in a constant range of between 80%–83%.<sup>60</sup> Studies agree that there is a gender pay gap although some questions arise around how large of a gap exists.<sup>61</sup> According to some accounts, today, women's median weekly earnings in the labor market amount to 81% of men's earnings while working the same hours in the same occupations.<sup>62</sup> When contrasting the median full time earnings of American women to men, data shows that annually, women earn 80 cents for every dollar earned by men, and 83 cents hourly.<sup>63</sup> When taking into account variables such as experience, education, and geographic region, the gender pay gap decreases.<sup>64</sup> Yet, even among employees performing similar jobs with the same education and experience level, there is a documented pay gap between men and women.<sup>65</sup> Within the same industries, women

<sup>59</sup> See Stephanie Bornstein, *Equal Work*, 77 MARYLAND L. REV. 581, 586 (2018).

<sup>60</sup> See U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2017 (2017), available at <https://www.bls.gov/opub/reports/womens-earnings/2016/pdf/home.pdf>.

<sup>61</sup> See Elise Gould, Jessica Schieder & Kathleen Geier, *What is the Gender Pay Gap and Is It Real? The Complete Guide to How Women are Paid Less Than Men and Why It Can't Be Explained Away*, ECON. POL'Y INST. (Oct. 20, 2016) ("The presence of alternative ways to measure the gap can create a misconception that data on the gender wage gap are unreliable. However, the data on the gender wage gap are remarkably clear and (unfortunately) consistent about the scale of the gap. In simple terms, no matter how you measure it, there is a gap.").

<sup>62</sup> The figure is lower (meaning the gap is higher) among minority groups, especially African Americans and Hispanics. See U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK (2015) <https://www.bls.gov/opub/reports/womens-databook/2016/home.htm>.

<sup>63</sup> See Bornstein, *supra* note 59.

<sup>64</sup> See *id.* Women are often segregated in jobs and industries that are least well paid (personal care services and secretaries are paradigmatic examples). See generally MARIA CHARLES & DAVID GRUSKY, OCCUPATIONAL GHETTOS: THE WORLDWIDE SEGREGATION OF WOMEN AND MEN (2004) (reporting that men and women still work in significantly segregated occupations); Katherine T. Bartlett, *Feminism and Economic Equality*, 35 L. & INEQ. 265, 269 (2017).

<sup>65</sup> For the persistent existence of the wage gap, see generally NAT'L WOMEN'S LAW CTR., FACT SHEET: THE WAGE GAP IS STAGNANT IN THE LAST DECADE (2013), available at [http://www.nwlc.org/sites/default/files/pdfs/wage\\_gap\\_is\\_stagnant\\_2013\\_2.pdf](http://www.nwlc.org/sites/default/files/pdfs/wage_gap_is_stagnant_2013_2.pdf). The National Women's Law Center data is only on full-time earners. The wage gap is even more severe for the many women who are relegated to part-time, temporary, contingent work. See U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, <http://www.bls.gov/cps/aa2014/cpsaat37.htm> (last visited May 1, 2019) (revealing that women's median wages for full-time, year-round work were 82% of their male counterparts' wages); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LAB., HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008, at 1–2 (2009), [http://www.bls.gov/opub/reports/womens-earnings/archive/womensearnings\\_2008.pdf](http://www.bls.gov/opub/reports/womens-earnings/archive/womensearnings_2008.pdf) (showing occupational segregation and generally lower earnings for women than men); *On Pay Gap, Millennial Women Near Parity—For Now*, PEW RESEARCH CTR. (last updated, Dec. 11, 2013), <http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now> (showing young women are making progress and starting their working lives earning nearly the same as young men). See also DEBORAH L. RHODE, WHAT WOMEN WANT: AN AGENDA FOR THE WOMEN'S MOVEMENT 7, 25–38 (2014) (discussing a

are overrepresented in lower paying job categories.<sup>66</sup> Pay gaps are highest mid-career,<sup>67</sup> at a time when most women carry considerable familial care responsibilities.

Such prevalent inequality means that when women are laboring in the gig economy, they are likely to be in a position in which they have an increased need for money, which would make them work for less pay than men would work for. Moreover, because of negative beliefs and stereotypes about women workers,<sup>68</sup> women may need to lower their wage requests to make themselves more attractive to the market. Online hourly rates thus operate in the shadow of the labor market, in which women often earn less than men.

But even in a more profound way, the gig economy is operating in the shadows of the labor market. Labor market norms are constructed through practices, laws, and relationships. What women have been *accustomed to* in the labor market may become what we *expect* in the gig economy. Workers learn inequality not only through exposure to the depressing statistics shown above, but also through mundane observations and informal processes: by looking at the gender hierarchies of almost every institution—lower level workers tend to be disproportionately female, particularly mothers and women of color, and those occupying lucrative and authoritative positions in the highest echelons of corporate, government, medical, legal, and educational institutions tend to be disproportionately male.<sup>69</sup> We implicitly learn that the labor market is willing to reward women less for similar qualifications. Pay inequality becomes both normalized and internalized.

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persistent gender gap in leadership); Christianne Corbett & Catherine Hill, *Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation*, AM. ASS'N OF UNIV. WOMEN (Oct. 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> (reporting that women earn less than men already one year after graduation, across different occupations). *But cf. On Pay Gap, Millennial Women Near Parity—for Now*, PEW RESEARCH CTR. (last updated, Dec. 11, 2013), [http://www.pewsocialtrends.org/files/2013/12/gender-and-work\\_final.pdf](http://www.pewsocialtrends.org/files/2013/12/gender-and-work_final.pdf) (noting that young women are making progress and starting near men's earnings). *See also* INTERNATIONAL LABOR ORGANIZATION, PAY EQUITY: A KEY DRIVER OF GENDER EQUALITY, available at [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/briefingnote/wcms\\_410196.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/briefingnote/wcms_410196.pdf).

<sup>66</sup> See Catalyst, *Pyramid: Women in S&P 500 Companies* (November 20, 2017), <http://www.catalyst.org/knowledge/women-sp-500-companies>.

<sup>67</sup> See EMILY LINER, A DOLLAR SHORT: WHAT'S HOLDING WOMEN BACK FROM EQUAL PAY? 14–15 (2016), available at <http://www.thirdway.org/report/a-dollar-short-whats-holding-women-back-from-equal-pay> (relying on U.S. Bureau of Labor Statistics, Highlights of Women's Earnings 2015, table 12).

<sup>68</sup> See Corrine A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. NAT'L ACAD. SCI. U.S. 16474, 16477 (Oct. 9, 2012).

<sup>69</sup> See Catalyst, *supra* note 66.

### B. *Long Hours are Inscribed as Ideal Worker Norms*

In the U.S., scholars note the workplace culture and practice of working extremely long hours, even in comparison with other industrialized countries.<sup>70</sup> Joan Williams has famously argued that the workplace is designed around an “ideal worker,” a worker unencumbered by family caretaking responsibilities and completely available at the employer’s service.<sup>71</sup> American job structures are largely premised on the “ideal worker” model, assuming a caregiver at home.

The Equal Employment Opportunity Commission recently addressed the ramifications of long work hours, concluding that women, who still do the lion’s share of familial caretaking, are severely penalized in the workforce as a result of this norm. For low-wage women, caretaking often entails dismissal from jobs, while professional women with caretaking responsibilities still face “glass ceilings” and “maternal walls” due to their familial responsibilities.<sup>72</sup> Part-time work and flexible work are severely penalized financially, often unaccompanied by benefits, and unavailable for many rewarding jobs.<sup>73</sup>

The “ideal worker” norm equates the amount of *time* spent at work with one’s *value* as a worker. Scholars note that workplace culture “constitutes the patterns of meaning, beliefs, and values through which subjects understand their experience and forge their sense of identity.”<sup>74</sup> Workers understand themselves through workplace culture. Since the workplace most values workers who are unencumbered by family responsibilities, workers who are constrained by familial caregiving might devalue their own work.

Since most caretaking is still done by women, workplace norms designed around such an “ideal worker” have been argued to discriminate against women caregivers.<sup>75</sup> More profoundly, “ideal worker” norms teach us that those workers who do not live up to the ideal of long work-

<sup>70</sup> See JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK, POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 59 (2003); see also OECD, *Hours Worked*, OECD DATA (last visited Nov. 18, 2018), <https://data.oecd.org/emp/hours-worked.html>.

<sup>71</sup> See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S J.L. & GENDER 77, 88, 114 (2003); see also Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC’Y 139, 152 (1990).

<sup>72</sup> See EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, at 3 (May 25, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

<sup>73</sup> See JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK, POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 153–55 (2003).

<sup>74</sup> Robin Usher & Nicky Solomon, *Experiential Learning and the Shaping of Subjectivity in the Workplace*, 31 STUD. IN THE EDUC. OF ADULTS 153, 158 (1999).

<sup>75</sup> Of course, these norms have a detrimental effect on men, as well. See JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 80 (2010) (noting how gender discrimination and employment problems are not unusual among men

ing hours are less desired. “Ideal worker” norms send a strong, albeit implicit, message about who qualifies as a worthy worker. The “ideal worker” norm implicitly teaches workers with caregiving responsibilities that they are sub-par workers. It marks those with caretaking responsibilities as devalued in the labor market. This devaluation is learned.

### C. *Salary History as a Continuous Lesson*

Finally, one could argue that even if the lessons about pay inequality and what it takes to be a treasured worker are relevant to the labor market, they are not relevant in the new and different gig economy. Yet, one last lesson challenges this assumption. Consider the workplace practice of relying on salary history to determine pay. In the labor market, when candidates are interviewed for employment, employers typically ask their interviewees about their salary history. However, salary history is not a neutral factor: it often reflects the historical, social, and market forces which value the work of one gender over the other.<sup>76</sup> Scholars have long noticed that this practice perpetuates the gender pay gap, and actually may compound and magnify it by basing the new salary on a prior salary.<sup>77</sup> Such practice extends past inequality even when moving to a new job or position. It implies a message that circumvents pay change despite workplace transition. The use of salary history interrogations teaches us that we cannot break free from past pay inequality.

In sum, the labor market teaches women workers a few noteworthy lessons<sup>78</sup> about pay inequality and undervaluation, about what it takes to be a treasured worker, and about the continuation of past discriminations. Women workers are likely to carry the lessons learned in the labor market to work found in the gig economy. Of course, some women may be able to fight-off these learned lessons, pick themselves up by their bootstraps, and defy these acquired teachings. But, rather than assisting women in challenging the trainings of the labor market, antidiscrimination law largely fails to intervene, and thus contributes to perpetuating these lessons.

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deemed effeminate); *see also* Williams & Segal, *supra* note 71, at 79 (“the maternal wall does not penalize people of a certain sex; it penalizes anyone who plays a certain sex role.”).

<sup>76</sup> *See* National Women’s Law Center, *Asking for Salary History Perpetuates Pay Discrimination from Job to Job* (June 2017), available at <https://nwlc.org/wp-content/uploads/2017/06/Asking-for-Salary-History-Perpetuates-Discrimination.pdf>.

<sup>77</sup> *See* Bear & Babcock, *supra* note 25, at 603.

<sup>78</sup> The labor market may teach additional lessons as well, of course. Importantly, the workforce may teach positive lessons of inclusion. *See* ESTLUND, *supra* note 49, at 13–15. Yet, while questions of inclusion may be important in considering physical tasks or trade in intimate settings, the problem faced in platform-facilitated online labor is not so much a problem of lack of access and overt exclusion, as it is a question of usability. *See* Renan Barzilay & Ben-David, *supra* note 9, at 427–28.

## IV. OPERATING IN THE SHADOW OF ANTIDISCRIMINATION LAW

In this section, I consider the ineptitude of current U.S. antidiscrimination law to contend with the problematic practices and messages explored above. Some scholars have argued that since its enactment, antidiscrimination law has been an important tool in enhancing women's opportunities and inclusion in the labor market.<sup>79</sup> Others, however, have stressed that the progress initially made has halted.<sup>80</sup> With respect to the three practices identified above—pay inequality, long hour norms, and salary history interrogations—the laws' current interpretation fails to sufficiently intervene in the harsh lessons the labor market teaches, and thus enables the reproduction of gender inequality, both in the labor market and in the gig economy.

A. *Title VII's Interpretation Limits Workplace Equality*

In this subpart, I point out some of the ways in which Title VII's interpretation has entrenched gender inequality in the workforce. Indeed, Title VII bans discriminatory treatment on account of sex in the labor market and yet it is premised on proving discriminatory intent, which is often difficult to establish.<sup>81</sup> Under disparate treatment theory, an employee could be successful if she shows that the employer harbored sex-based animus and intentionally paid her less because of her sex.<sup>82</sup> Disparate impact claims, showing that a gender-neutral policy had an adverse impact on sex, are available in theory, but are quite challenging in practice. Judicial interpretation in cases such as *Wards Cove*,<sup>83</sup> *Ricci*,<sup>84</sup> and

<sup>79</sup> See Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1006 (2015).

<sup>80</sup> See Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U. L. REV. 893, 894 (2014).

<sup>81</sup> Discriminatory intent is virtually impossible to prove in the gig economy context, under the access-to-all, gender agnostic, no paper-trail, platform-facilitated labor. See Renan Barzilay & Ben-David, *supra* note 9, at 428. *But see* Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALABAMA L. REV. 519 (2018).

<sup>82</sup> See Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 232 (2012).

<sup>83</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656–57 (1989) (raising the bar on successful disparate impact claims). Despite Congressional attempts to strengthen civil rights post-*Wards Cove*, through an amendment to the Civil Rights Act of 1991, see Pub. L. No. 102–166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.), the effects of *Wards Cove* were significant. See George I. Lovell, Michael McCann & Kristine Taylor, *Covering Legal Mobilization: A Bottom-Up Analysis of Wards Cove v. Atonio*, 41 L. & SOC. INQUIRY. 61, 62 (2016). Disparate impact remains an underutilized doctrinal tool. See Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good for? What Not?*, 42 BRANDEIS L.J. 597, 598 (2004) (noting that disparate impact cases are difficult, if not impossible, for private plaintiffs to undertake).

<sup>84</sup> *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (emphasizing the importance of the business necessity defense to disparate impact liability). For commentary on how the *Ricci* decision “whitens” discrimination and “races” test fairness, see generally Cheryl I. Harris &



*Wal-Mart*<sup>85</sup> has resulted in a neglect of the structural and institutional dimensions of the workforce that reinforce sex discrimination.<sup>86</sup>

While scholars have noted that today's discrimination is subtle, entrenched, and systemic in nature, many agree that Title VII jurisprudence is currently "depleted."<sup>87</sup> Scholars have lamented current jurisprudence's hostility toward disparate impact theory, which significantly diminishes Title VII's potential to address workplace norms that disadvantage subordinated classes.<sup>88</sup> Katherine Bartlett recently noted that "[t]he barriers courts have imposed to the enforcement of Title VII's prohibition of disparate impact discrimination also limit the obligation of both online and

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Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. Rev. 73, 85 (2010).

<sup>85</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 357 (2011); see also Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011); Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455 (2011) (lamenting the court's myopic focus on individual harms rather than systemic wrongs); Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 518 (2011) (claiming *Wal-Mart* was a feature of a long line of cases corroding antidiscrimination law); Michael J. Zimmer, *Wal-Mart v. Dukes, Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012) (arguing that anti-classification rather than anti-subordination rationales dominate Title VII's jurisprudence). Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 940, 990–91 (claiming the courts have "dismantled the systemic discrimination edifice. By rejecting the statistical proof offered in the *Wal-Mart* case and treating the city of New Haven's actions in *Ricci* as a form of intentional discrimination, the Court has largely turned its back on these systemic discrimination claims, and at present, it is unclear what kind of proof the Court might accept as indicative of discrimination. It is certainly possible that it would be open to a straightforward disparate impact claim . . . those claims are both rare and increasingly difficult to establish because courts are now willing to accept most employer justifications for the disparate impact").

<sup>86</sup> See Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1095, 1134–51, 1153–54 (2009) (claiming that employment discrimination claims are usually more successful when they focus on eradicating discriminatory animus towards identity-based protected groups and not when they challenge the structures of work, despite the latter's importance).

<sup>87</sup> Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 728 (2011); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (claiming that structures and dynamics of workplaces and other environments can effectuate exclusion of non-dominant groups but are difficult to trace directly to intentional, discrete actions of particular actors); see also Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 854 (2007) (describing and defending structural discrimination theory); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 629 (2005) (claiming that discriminatory work cultures are too complex and intertwined with valuable social relations to be easily regulated by Courts).

<sup>88</sup> See Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 252–56 (2011) (discussing the crisis of disparate impact theory, the importance of disparate impact theory and its historical roots); Recently, however, the Supreme Court held that racial disparate impact claims are cognizable under the Fair Housing Act in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2508 (2015).

traditional businesses to avoid practices that have a discriminatory impact on their employees or customers.”<sup>89</sup>

Title VII’s antidiscrimination jurisprudence has thus been heavily criticized for its inability to provide equality for women.<sup>90</sup> The U.S. Supreme Court’s decision in *Wal-Mart* is a case in point.<sup>91</sup> In that case, plaintiffs produced statistical evidence showing significant gender gaps in pay after controlling for hours of work and performance evaluations.<sup>92</sup> The Court, however, held that the estimated 1.5 million female Wal-Mart employees in that suit could not challenge discriminatory pay as a national class action, holding that the employees had failed to prove sufficient “commonality” among their claims.<sup>93</sup> While the decision rests on procedural difficulties, many argue it was underlined by Title VII’s remedial scheme, which centers on the intent requirement, and the showing of common reasons for discrimination.<sup>94</sup> Commentators noted that the decision “reflected the failure of federal law to provide an effective litigation remedy for systemic pay discrimination.”<sup>95</sup>

Another obstacle hindering women’s workplace equality is the “ideal worker” norm, which also rests on the enfeeblement of disparate impact jurisprudence and has a detrimental effect on workers with care-taking responsibilities.<sup>96</sup> Over the past decade, there have been important efforts to enhance Title VII’s interpretation, and to include under its

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<sup>89</sup> Katharine T. Bartlett, *Sharing Sexism*, 43 FORDHAM URB. L.J. 1163, 1167 (2016).

<sup>90</sup> See Deborah Dinner, *Beyond “Best Practices”*: *Employment-Discrimination Law in the Neoliberal Era*, 92 INDIANA L. J. 1059, 1105 (2017).

<sup>91</sup> Scholars note that “even before Wal-Mart, most plaintiffs lost disparate impact cases. [But] by holding that the discretionary pay system at issue in Wal-Mart could not be a ‘general policy of discrimination’ sufficient to establish commonality, the Court has raised the bar for class certification of disparate impact claims.” Eisenberg, *supra* note 82, at 259.

<sup>92</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 346 (2011).

<sup>93</sup> *Id.* at 357.

<sup>94</sup> See Eisenberg, *supra* note 82, at 252 (“the majority in Wal-Mart implicitly imported the intent requirement from Title VII disparate treatment theory into the commonality requirement.”); The court rejected disparate impact because it was not convinced that the policy allowing managers’ discretion in pay determinations was really a common policy. Showing that the policy produced pay discrepancies did not suffice according to the Court. *Id.* at 252–53.

<sup>95</sup> *Id.* at 232. For an analysis of the post-Wal-Mart future of employment discrimination class certification, see generally Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After Wal-Mart v. Dukes*, 48 AKRON L. REV. 803 (2015). For assessments and critiques of this decision, see *supra* note 85.

<sup>96</sup> See JOAN C. WILLIAMS, UNBENDING GENDER, WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 902 (2000); see also Williams & Segal, *supra* note 71, at 80; Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT. L. REV. 1605, 1613 (2001) (noting that a profound restructuring of social institution is required to resist marginalization of complex understandings of care and arguing that law can be viewed as making possible such practices and explorations); Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J. L. & FEMINISM. 55, 66, 99–100 (2016) (noting the connection between disparate impact limitations and family responsibilities discrimination).

scope discrimination based on family responsibilities.<sup>97</sup> Scholars have suggested that workplace norms premised on an “ideal worker” model, which idealizes time and availability as the hallmarks of the desired employee, discriminate on the basis of sex and are therefore prohibited by Title VII.<sup>98</sup>

They argue that motherhood—the most prominent form of caregiving—is most likely to trigger gender stereotypes at work today,<sup>99</sup> and that these stereotypes arise because the workplace is currently designed around the “ideal worker” model.<sup>100</sup> Since most caretaking is still done by women, they argue that workplace norms designed on this model discriminate against women.<sup>101</sup> Scholars have initiated and documented a growing body of law,<sup>102</sup> namely “family responsibilities discrimination,” that addresses cases in which employers treat employees with caregiving responsibilities in accordance with stereotypical attitudes about how that employee will behave, rather than on the employee’s individual interests and capabilities.<sup>103</sup> Studies, in fact, show that supervisors often describe female employees as experiencing greater family-work conflict than men, regardless of women’s actual caregiving duties, causing supervisors to view women’s job fit, performance, and promotional opportunities more negatively.<sup>104</sup> While many of these cases are primarily concerned with biases against caregivers, the larger project of “family responsibilities discrimination” argues that designing good jobs around men’s traditional gender roles is discrimination that actually raises gender stereotypes in everyday interactions.<sup>105</sup> Scholars have encouraged the lit-

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<sup>97</sup> See CYNTHIA THOMAS CALVERT, JOAN C. WILLIAMS & GARY PHELAN, *FAMILY RESPONSIBILITIES DISCRIMINATION* 43 (2014); see also EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007), <http://www.eeoc.gov/policy/docs/caregiving.html>; *About FRD*, UC HASTINGS COLL. LAW, CTR. FOR WORK-LIFE LAW, <http://www.worklifelaw.org/frd> (last visited May 1, 2019) (explaining Family Responsibilities Discrimination).

<sup>98</sup> Williams & Segal, *supra* note 71, at 80, 108.

<sup>99</sup> See Joan C. Williams & Stephanie Bornstein, *The Evolution of “FRd”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1326 (2008).

<sup>100</sup> See Williams & Segal, *supra* note 71, at 80.

<sup>101</sup> See *id.*

<sup>102</sup> See Williams & Bornstein, *supra* note 99, at 1313; Catherine Albiston, Kathryn Burkett Dickson, Charlotte Fishman & Leslie F. Levy, *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1285–87 (2008).

<sup>103</sup> Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006).

<sup>104</sup> See Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 273–76 (2003); Sue Shellenbarger, *The “Maternal Wall”: Employer Bias Against Working Women*, WALL ST. J. (Dec. 3, 2009), available at <https://blogs.wsj.com/juggle/2009/12/03/the-maternal-wall-employer-bias-against-working-women/>.

<sup>105</sup> Williams & Bornstein, *supra* note 99, at 174.

igation of such cases in the hopes of deterring employers from engaging in role-based discrimination and ultimately changing such work patterns.<sup>106</sup>

Yet, the facially gender-neutral long hour norms are not only problematic because they are likely to trigger stereotypes against women who would conform to “ideal worker” norms, they are also problematic because long hours have a disparate impact on workers who do perform caregiving, who cannot conform to the “ideal worker” norm, who are in fact suffering from work-family conflict (disproportionality women), and for whom these norms significantly affect their employment opportunities in systemic ways. While some scholars insist that Title VII family responsibilities discrimination litigation claims should expand the meaning of sex discrimination to include challenges to policies premised on workers without familial responsibilities, such as long work hours,<sup>107</sup> others have maintained that antidiscrimination law provides little solace for working caregivers, except in the most extreme and overt cases.<sup>108</sup> The difficulty in succeeding on disparate impact claims significantly constrains the law’s ability to intervene in challenging “ideal worker” norms of long hours in the labor market. Such inability perpetuates the message that devalues workers with caregiving responsibilities.

### B. *The Equal Pay Act’s Unequal Ramifications*

The EPA requires employers to provide equal pay for equal work.<sup>109</sup> Employers’ intent is unnecessary to prove because the EPA imposes a form of strict liability on employers who pay female workers less than males for performing the same work.<sup>110</sup> Under the EPA, an employee needs to show that an “employer pays different wages to employees of opposite sexes ‘for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.’”<sup>111</sup> Once the employee makes this

<sup>106</sup> See Williams & Segal, *supra* note 71, at 80–82.

<sup>107</sup> See Joan C. Williams & Amy J.C. Cuddy, *Will Working Mothers Take Your Company to Court?* 94 HARV. BUS. REV. 3, 8 (2012) (explaining that working mothers are now more likely to sue for caregiver discrimination than in the past and the potential liability is significant and arguing that employers should design scheduling systems that take into account the fact that all employees have a personal life).

<sup>108</sup> See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT. L. REV. 1495, 1517 (2001); see also Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 330–31; Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 414–15 (2001); see also Noya Rimalt, *The Maternal Dilemma*, 103 CORNELL L. REV. 978, 1015 (2018).

<sup>109</sup> See 29 U.S.C. § 206(d)(1) (2006).

<sup>110</sup> See *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1310–11 (10th Cir. 2006).

<sup>111</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1) (1974)).

prima facie showing, the burden of proof is shifted to the employer to demonstrate that the pay gap is justified based on one of four affirmative defenses: seniority, merit, the quantity or quality of production, and a catch-all defense (“any factor other than sex”).<sup>112</sup> Scholars note that the catch-all defense has become a loophole for justifying pay discrepancies.<sup>113</sup> Not surprisingly, they argue, EPA cases have recently floundered in courts.<sup>114</sup>

The EPA does not ban salary history interrogations.<sup>115</sup> As a consequence, one of the defenses raised in courts as a “factor other than sex” pertains to the use of salary history in pay determinations. When faced with prima facie evidence of unequal pay, employers have often argued that gender pay gaps are a result of policies that base pay determinations on prior salary history and that these policies constitute a factor other than sex.<sup>116</sup>

The Equal Employment Opportunity Commission has instructed that reliance on salary history does not, by itself, legally justify paying women less.<sup>117</sup> Some courts have determined against the use of salary history as “a factor other than sex,”<sup>118</sup> while other courts have permitted employers to rely on employees’ salary history to justify paying women less for the same work.<sup>119</sup> Recently, a panel of judges on the Ninth Cir-

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<sup>112</sup> 29 U.S.C. § 206(d)(1) (2006).

<sup>113</sup> See Eisenberg, *supra* note 82, at 261; see also Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17, 59 (2010).

<sup>114</sup> See Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 562 (2017).

<sup>115</sup> In 2016, Massachusetts became the first state to prohibit employers from asking job applicants for salary history. S. 2107, 189th Gen. Ct. (Mass. 2016) (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151). Some cities have enacted similar bans. See e.g., New York (N.Y. City Exec. Order No. 21 (Nov. 4, 2016), available at [http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2016/eo\\_21.pdf](http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2016/eo_21.pdf)); Philadelphia (Philadelphia Ordinance No. 160840 (Jan. 23, 2017), available at <https://phila.legistar.com/LegislationDetail.aspx?ID=2849975&GUID=239C1DF9-8FDF-4D32-BACC-296B6EBF726C>); New Orleans (New Orleans Exec. Order No. mJl 17-01 (Jan. 25, 2017), available at <https://www.nola.gov/mayor/news/archive/2017/20170125-pr-mayor-issues-executive-order-to-address/>).

<sup>116</sup> See *Rizo v. Yovino*, 854 F.3d 1161, 1164–65 (9th Cir. 2017).

<sup>117</sup> See Equal Employment Opportunity Comm’n, Compliance Manual No. 915.003 § 10-iv.F.2.g (Dec. 2000), available at <https://www.eeoc.gov/policy/docs/threshold.html>.

<sup>118</sup> See, e.g., *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (prior salary alone cannot justify a pay disparity); *Faust v. Hilton Hotels Corp.*, No. 88-2640, 1990 U.S. Dist. LEXIS 10595, at \*16 (E.D. La. 1990) (reliance on prior salary as a factor other than sex would “allow employer to pay one employee more than an employee of the opposite sex because that employer or a previous employer discriminated against the lower paid employee.”).

<sup>119</sup> See, e.g., *Lauderdale v. Ill. Dep’t of Human Servs.*, 876 F.3d 904, 909 (7th Cir. 2017); *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) (citing *Dey v. Colt Constr. & Dev’t Co.*, 28 F.3d 1446 (7th Cir. 1994), *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987), and *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987)); *Sparrock v. NYP Holdings, Inc.*, No. 06 Civ. 1776(ShS), 2008 U.S. Dist. LEXIS 125889, at \*41 (S.D.N.Y. Mar. 4, 2008) (pay differential based on salary matching is permitted under the Equal Pay Act).

cuit Court of Appeals held that unequal salary determinations, which are based on salary history alone, are legitimate and constitute an affirmative justification against employers' liability for gender pay discrepancies.<sup>120</sup> In that case, Aileen Rizo, a math teacher at a California school, learned that her male counterparts were receiving significantly higher pay for the same work. The school conceded the pay discrepancy, but claimed it was not liable under the EPA because it based its salary determination on Rizo's salary history. The school explicitly set its pay policy as a function of salary history, offering new recruits, like Rizo, 5% above their former pay.<sup>121</sup> A three-judge panel affirmed the school's argument and granted summary judgment, citing a former ruling holding that employers could use previous salary information as long as they applied it reasonably and had a business policy that justified it.<sup>122</sup> Such a decision essentially allows prior discriminatory salary settings to justify future ones, perpetuating the gender pay gap, and sending a message to workers that they cannot break free from past discrimination. Indeed, in reviewing that decision, the Ninth Circuit Court of Appeals held en banc, that that school's pay policy of basing salary determinations on past salary history cannot count as "a factor other than sex," and that the affirmative defense is limited to "legitimate, job related factors."<sup>123</sup> It also noted nonetheless that its ruling does not ban past salary from playing a role in individual salary negotiations and determinations.<sup>124</sup> Yet, even this rather progressive ruling has been vacated by the Supreme Court most recently (on procedural grounds)<sup>125</sup>, leaving the legitimacy of basing salary on past history largely in place unless prohibited by specific law.<sup>126</sup>

## CONCLUSION

Taking a look at gender inequality in platform-facilitated labor, through the prism of the relationship between the gig economy and the traditional labor market, sheds light on lessons learned at work, in the traditional workplace and beyond. Today, gender discrimination in the gig economy seems to be perpetuated through legal doctrines pertaining

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<sup>120</sup> See *Rizo v. Yovino*, 854 F.3d 1161, 1167 (9th Cir. 2017).

<sup>121</sup> See *id.* at 1163.

<sup>122</sup> See *id.* at 1167.

<sup>123</sup> See *Rizo v. Yovino*, 887 F.3d 453, 460 (9th Cir. 2018).

<sup>124</sup> See *id.* at 461 ("We do not decide, for example, whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation."). California has since enacted Labor Code 432.3 which prohibits employers from seeking salary history information.

<sup>125</sup> *Yovino v. Rizo*, 586 U.S. (2019). See Part II of the decision.

<sup>126</sup> *Id.* The Supreme Court vacated the judgment of the United States Court of Appeals for the Ninth Circuit and remanded the case for further proceedings consistent with its opinion. For commentary see Benjamin Sachs, *Major Equal Pay Act Case Vacated by Supreme Court*, available at <https://onlabor.org/major-equal-pay-act-case-vacated-by-supreme-court/>.

to the traditional labor market, as these largely fail to intervene in discrimination that transcends time and workplaces. Workplace norms and current antidiscrimination law thus indirectly contribute to discrimination in the gig economy—discrimination that supposedly occurs “without” discriminating.

Enabling class action litigation concerning pay discrepancies, invigorating disparate impact liability with regards to long hours of work, and explicitly excluding salary history interrogations during interviews could alter the structural features of the workplace that entrench gender inequality and could disrupt the detrimental messages the labor market now conveys to women workers, both within the traditional labor market and beyond.

