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WHAT DOES THE MINIMUM WAGE HAVE TO DO WITH REPRODUCTIVE RIGHTS?

*Terry O'Neill**

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I. INTRODUCTION

In January of this year, I had the honor of delivering remarks at the AALS Section on Socio-Economics annual luncheon. The subject of my talk, What does the minimum wage have to do with reproductive rights?, undoubtedly struck many in the audience as attempting the impossible—linking two issues that, while each important and timely, are entirely separate. Surely, the argument goes, a woman’s right to choose abortion simply does not occupy the same analytical or policy space as a worker’s right to fair wages and terms of employment.

In this Essay, however, I will sketch out my reasons for claiming that these issues are inextricably interwoven—that in fact, the minimum wage issue is a women’s issue, while reproductive justice is an economic issue, not only for women but for their families as well. In Part II, I explore the link between the minimum wage issue and reproductive rights issues, and in Part III of this Essay, I explore the effects of the minimum wage on women’s access to reproductive health services.

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The most immediate reason I hold this view, of course, is that I lead the National Organization for Women (NOW), which has long taken up economic justice and reproductive rights as “core issues” that are both intertwined and equally salient. Indeed, the organization’s bylaws declare its purpose as leading societal change through “intersectional grassroots activism,”¹ and it has long identified six core issues, the four in addition to the two named above being: to end racism; win lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights; end violence against women; and amend the U.S. Constitution to include equality for women.² Not only are these core issues viewed as deeply linked, but under NOW’s internal policies, one may not be prioritized over the others. As a result, should you ask any longtime NOW leader what the minimum wage has to do with reproductive rights, your most likely answer would be, “Well . . . that’s obvious!”

II. THE LINK BETWEEN MINIMUM WAGE AND REPRODUCTIVE RIGHTS

I do not claim that the linkage is entirely obvious. It bears mentioning, however, that feminist activists are not the only ones who understand intuitively the connections among sexism, racism, classism, homophobia, and violence. Conservative politicians do as well. A quick glance at recent federal legislation reveals that, in the main, the same legislators who vote to restrict women’s access to abortion care can also be relied on to oppose or withhold support for such ideas as restoring the Voting Rights Act, making the Violence Against Women Act more inclusive, outlawing employment discrimination against LGBTQ people, reviving the Equal Rights Amendment, or increasing the minimum wage.³ This might reflect nothing more than knee-jerk opposition to any kind of change. But it is worth considering the possibility that a deeper, more intentional ideology drives conservative resistance to social

1. National Organization for Women, *NOW Bylaws*, NATIONAL ORGANIZATION FOR WOMEN, <http://now.org/about/structure-and-bylaws/bylaws/>.

2. *Id.*

3. This was determined using information publicly available on www.congress.gov. A list was compiled of the co-sponsors of anti-choice bills including the 20-week abortion ban, the defunding of all Title X family planning clinics, bills aimed at shutting down Planned Parenthood, the so-called sex-selection abortion ban, the Teen Endangerment Bill, and others. The voting records of those co-sponsors was analyzed to determine whether those legislators also co-sponsored or voted for the following legislation: to undo *Shelby County v. Holder* where the Supreme Court gutted the Voting Rights Act; to reauthorize the inclusive version of the Violence Against Women Act which includes provisions aimed at protecting Native American women, immigrant women, and LGBTQ victims of domestic violence; to increase the minimum wage; and to revive, pass, and ratify the Equal Rights Amendment.

progress toward equality. In that case, progressives would do well to examine the connectedness among these issues. If we really want to achieve social justice, we cannot afford to keep assuming that these aspects of the progressive agenda exist in separate spheres.

When we think about economic justice for women, we immediately think about laws like the Equal Pay Act, which requires employers to pay men and women the same wages for doing the same work.⁴ We also think of Title VII's prohibition on sex discrimination in the workplace and the Pregnancy Discrimination Act. Those laws, after all, are directly aimed at narrowing the gender and gender-race wage gaps. And the laws have, in fact, narrowed the gaps over the last half-century. In the 1960s, on average, women were paid just 59 cents to the dollar paid to their male counterparts.⁵ Nowadays, looking at full-time, year-round workers, white women are paid about 82 cents, while Asian women are paid 92 cents, African American women about 68 cents, and Latinas 61 cents to the dollar paid to white men.⁶ Other policies aimed principally at women's workplace experience include paid family leave and paid sick days, which would reduce the economic penalties imposed on unpaid caregivers—the vast majority of whom are women.⁷

However, in contrast to these issues of pay equity and work-life balance, the minimum wage is most often thought of as an issue for workers, not women. And while “worker” is on its face a gender-neutral term, the truth is that when we think about the minimum wage as a worker's rights issue, we are usually thinking about male workers. After all, the struggle for workers' rights in the 1930s was led by and for “the working man.” Moreover, the working man was clearly understood to be white. The first iteration of the Fair Labor Standards Act establishing a minimum wage and overtime protections applied primarily to mining and manufacturing industries but not agriculture, railway, or domestic

4. The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (West, Westlaw through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) 2015).

5. Ariane Hegewisch et al., *The Gender Gap: 2014 Earning Differences by Race and Ethnicity*, INST. FOR WOMEN'S POLICY RESEARCH, <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2014-earnings-differences-by-race-and-ethnicity>; Heidi Hartmann et al., *How Equal Pay for Working Women would Reduce Poverty and Grow the American Economy*, INST. FOR WOMEN'S POLICY RESEARCH, <http://www.iwpr.org/publications/pubs/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy>; Heidi Hartmann et al., *Equal Pay for Working Families*, INST. FOR WOMEN'S POLICY RESEARCH, <http://www.iwpr.org/publications/pubs/equal-pay-for-working-families?searchterm=Equal+Pay+for+Working+Families>.

6. Hegewisch, *supra* note 5.

7. *Tipped Over the Edge—Gender Inequality in the Restaurant Industry*, THE RESTAURANT OPPORTUNITIES CENTERS UNITED, 22 (2012) [hereinafter *Tipped Over the Edge*].

workers, disproportionately excluding men and women of color.⁸

Nonetheless, the minimum wage today is very much a women's issue, one that affects women of color disproportionately.⁹ Two-thirds of minimum wage workers in the United States are women.¹⁰ Some 70% of tipped workers, whose federal minimum wage is just \$2.13 per hour, are women.¹¹ Domestic workers, who are still excluded from the FLSA's protections, are overwhelmingly women.¹² Women of color are over-represented in all of these low-wage job categories.¹³ The gender and gender-race wage gaps are explained in part by women's over-representation in personal service and retail job categories, which pay far less than science, technology, engineering, and math (STEM) occupations, where men predominate.¹⁴ Viewed from this perspective, it is easy to see that raising the minimum wage is an essential component of eliminating the gender and gender-race wage gaps.¹⁵ By one estimate, raising the minimum wage to \$10.10 per hour would reduce the overall

8. Linda Burhan & Nik Theodore, *Home Economics—The Invisible and Unregulated World of Domestic Work*, NATIONAL DOMESTIC WORKERS ALLIANCE, CENTER FOR URBAN ECONOMIC DEVELOPMENT, UNIVERSITY OF ILLINOIS AT CHICAGO AND DATACENTER 8-9 (2012), available at, <http://www.domesticworkers.org/sites/default/files/HomeEconomicsEnglish.pdf>; see generally Hegewisch et al, *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap* (2010), <http://www.iwpr.org/publications/pubs/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap>.

9. *Tipped Over the Edge*, *supra* note 7.

10. Hegewisch, et al, *supra* note 8; Maxwell Matite et al., *Quantifying Women's Labor Market Experiences: How a Gender Lens Changes the Conversation about the Economy*, INST. FOR WOMEN'S POLICY RESEARCH (2013), http://www.iwpr.org/publications/pubs/the-truth-in-the-data-how-quantifying-women2019s-labor-market-experiences-changes-the-conversation-about-the-economy/at_download/file (with a peer research organization, the Economic Policy Institute (EPI), to provide information on the composition and experiences of the low-wage workforce. Researchers found that women and people of color were disproportionately represented within this group . . .); see also Dave Jamieson, *White House: Minimum Wage Hike Will Help Close The Gender Wage Gap*, THE HUFFINGTON POST (March 26, 2014, 11:59 AM), http://www.huffingtonpost.com/2014/03/26/white-house-minimum-wage_n_5030973.html.

11. *Tipped Over the Edge*, *supra* note 7; Jamieson, *supra*, note 10.

12. Burhan & Theodore, *supra* note 8.

13. *Id.*; *Tipped Over the Edge*, *supra* note 7, at 9.

14. Burhan & Theodore, *supra* note 8, Matite et al., *supra* note 10.

15. Deborah M. Figart & June Lapidus, *How women Can Earn a Living Wage: The Effects of Pay Equity Remedies and a High Minimum Wage*, INST. FOR WOMEN'S POLICY RESEARCH, <http://www.iwpr.org/publications/pubs/how-women-can-earn-a-living-wage-the-effects-of-pay-equity-remedies-and-a-higher-minimum-wage>; National Economic Council et al., *A Year of Action: Progress Report on Raising the Minimum Wage*, https://www.whitehouse.gov/sites/default/files/docs/minimum_wage_report2.pdf; Julie Vogtman & Katherine Gallagher Robbins, National Women's Law Center, *Higher State Minimum Wages Promote Fair Pay for Women*, INST. FOR WOMEN'S POLICY RESEARCH, http://www.nwlc.org/sites/default/files/pdfs/higher_state_minimum_wages_promote_fair_pay_for_women_may_2015.pdf; Jamieson, *supra*, note 10.

gender wage gap by five percentage points.¹⁶ Raising it to a livable wage, or at least \$15 per hour, would narrow the wage gap even further.¹⁷

III. MINIMUM WAGE EFFECTS ON ACCESS TO REPRODUCTIVE HEALTH SERVICES

Raising the minimum wage would also increase women's access to essential reproductive health services.¹⁸ There is a particularly cruel irony that compounds the struggles of minimum wage workers who, as already noted, are predominantly female: they not only have less money coming in the door, but also have higher living expenses (specifically in the form of health care costs) than their middle- and higher-income counterparts. The latter are far more likely to be covered by employer-based health care plans. But minimum-wage workers rarely have health benefits.¹⁹ If they do not qualify for government-sponsored health insurance like Medicaid, they must pay out of pocket the full cost of their own health care—including reproductive health care services like contraception and abortion care, to which they have a constitutionally-protected right. A federally mandated livable wage would dramatically increase their ability to exercise those constitutional rights.²⁰

Women's rights advocates, thus, are well advised to lift up the minimum wage as a vehicle for helping to advance the goal of women's equality—both because it plays an important role in narrowing the gender and gender-race wage gaps and because low-wage women workers must rely on their cash wages in order to have access to their constitutionally-protected right to contraception and abortion care.

The obverse is equally important: advocates for workers and working families are well advised to lift up women's reproductive rights as an essential part of helping to advance the economic interests of workers. Women, who comprise nearly half the workforce in the United States, have become the constituents of workers' rights organizations on

16. Jamieson, *supra* note 10; *see also* National Economic Council et al., *supra* note 15.

17. Jamieson, *supra*, note 10.

18. *See, Tipped Over the Edge*, *supra* note 7.

19. *Id.*

20. Joan Entmacher et al., *Insecure & Unequal—Poverty and Income Among Women and Families*, NATIONAL WOMEN'S LAW CENTER, <http://www.nwlc.org/resource/insecure-unequal-poverty-and-income-among-women-and-families-2000-2013>; Burhan & Theodore, *supra* note 8; Annalyn Kurtz, *America's Fastest Growing Job Pays Poorly*, CNN MONEY (March 11, 2013 6:33 AM), <http://money.cnn.com/2013/03/11/news/economy/fastest-growing-job/index.html?iid=EL>; Annalyn Kurtz, *Why Grandma's Aid Earns So Little*, CNN MONEY (March 12, 2013), <http://www.iwpr.org/press-room/press-clips/why-grandmas-aide-earns-so-little>.

an equal footing with men. In fact, women are the sole or primary breadwinners in approximately 40% of all U.S. households, and women's wages are an essential part of their family's finances in more than half of U.S. households.²¹ To meet their obligations as workers and providers for their families, the imperative for women to be able to control their reproductive lives is as important as the imperative for women's livable wages and pay equity.

An innovative collaboration between workers' rights and women's rights organizations occurred in 2014 with the "Respect the Bump" campaign. Originated by OUR Wal-Mart, an employee association, and led by the United Food and Commercial Workers with the participation of NOW and other progressive and women's groups, Respect the Bump called on Wal-Mart to institute simple accommodations for pregnant workers like temporary light duty, more frequent bathroom breaks, or drinking water on the job to stay hydrated.²² It featured powerful testimonials of women who were forced onto unpaid leave during their pregnancies, just when they needed a steady paycheck more than ever.²³ Other women, denied accommodations, experienced accidents that created pregnancy complications, and even miscarriages on the job.²⁴ The coalition created sufficient public pressure that within less than six months Wal-Mart announced it would allow some pregnant women (those with complications) to receive on-the-job accommodations.²⁵

A year later, in March 2015, the Supreme Court addressed pregnancy accommodations in *Young v. UPS*.²⁶ Peggy Young was a UPS driver whose job description included lifting up to 70 pounds.²⁷ When she became pregnant, her midwife advised her not to lift anything over 20 pounds.²⁸ It would have been laughably easy for UPS to accommodate this modest restriction; the company already provided light-duty assignments for drivers injured on the job, drivers with

21. Wang et al., *Breadwinner Moms*, PEW RESEARCH CENTER (May 29, 2013), <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>.

22. Ellen Bravo, *Respect the Bump Gets Results as Well as Respect*, THE HUFFINGTON POST (Nov. 29, 2014), http://www.huffingtonpost.com/ellen-bravo/respect-the-bump-gets-res_b_5881338.html; Lydia DePillis, *Under Pressure, Wal-Mart Upgrades its Policy for Helping Pregnant Workers*, THE WASHINGTON POST (April 5, 2014), <http://www.washingtonpost.com/news/wonkblog/wp/2014/04/05/under-pressure-walmart-upgrades-its-policy-for-helping-pregnant-workers/>.

23. Bravo, *supra* note 22; DePillis, *supra* note 22.

24. Bravo, *supra* note 22; DePillis, *supra* note 22.

25. Bravo, *supra* note 22; DePillis, *supra* note 22.

26. 135 S. Ct. 1338 (2015).

27. *Id.* at 1344.

28. *Id.*

conditions covered by the Americans with Disabilities Act, even drivers whose licenses were suspended after a DUI conviction. But because Young did not fit into any of these categories, she was refused accommodation and forced onto unpaid leave. As a result, she lost her health benefits—at the very juncture in her life when she needed them most. She sued, claiming UPS had violated the Pregnancy Discrimination Act by not giving her the same kinds of accommodations given to her colleagues.²⁹

In a partial victory for pregnant workers, the Supreme Court allowed Young's claim to proceed to trial. The Pregnancy Discrimination Act prohibits employers from treating pregnant workers differently than other workers with similar abilities, but does not explicitly require reasonable accommodations for pregnancy.³⁰ The Court's ruling in *Young* allows pregnant workers to prevail in a Pregnancy Discrimination Act suit if (but only if) they jump through a series of evidentiary hoops—showing that they were denied the same accommodations given to similarly-abled, non-pregnant workers, that the proffered reasons were pretextual, and that accommodating the pregnant worker would not unduly burden her employer. Although women's and workers' rights celebrated the outcome, there is a still better solution, embodied in the Pregnant Workers Fairness Act. If passed, that measure would simply require employers to make reasonable accommodations for all pregnant workers rather than requiring individual women to navigate the thicket of proofs outlined in *Young*. A coalition of women's rights, civil rights, and labor organizations are now working to pass the Pregnant Workers Fairness Act at the federal level, and some states have already enacted similar legislation.³¹

Women's and workers' rights organizations were also united in condemning the Supreme Court's decision in *Burwell v. Hobby Lobby*, which ruled that regulations requiring contraception coverage to be included in employer-based health plans violated the Religious Freedom Restoration Act by substantially burdening the employers' "exercise" of their religious objection to birth control.³² Considering the decision

29. Emily Martin, National Women's Law Center, *Pregnant Workers Look to Congress to Strengthen Supreme Court Win*, NATIONAL WOMEN'S COURT CENTER, <http://www.nwlc.org/our-blog/pregnant-workers-look-congress-strengthen-supreme-court-win> (last visited Mar. 8, 2016); Wang et al., *supra* note 21.

30. *Young*, 135 S. Ct. at 1344-45.

31. Martin, *supra*, note 29; Wang, *supra* note 29.

32. *See generally* *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

purely from the perspective of women's health, advocates rightly decried giving employers a green light to use religion as an excuse to withhold basic health care from their female employees.³³ That birth control is basic reproductive health care is evidenced by the well-known close correlation between rates of unintended pregnancy and rates of infant mortality, maternal mortality, and maternal morbidity.³⁴ Unintended pregnancy, in other words, entails high health risks for women. It can also be deadly, as it is a leading risk factor for domestic violence homicide.³⁵ In my view, "gender bigotry" is not too strong a term to describe withholding basic health care from the female half of the population.

The *Hobby Lobby* decision was equally deplorable, however, from the perspective of women as workers. In effect, the Supreme Court majority allowed employers to reduce their women employees' compensation packages in the name of their professed Christian beliefs.³⁶ An employee's total compensation includes health, retirement, and other non-cash benefits in addition to their cash wages. Withholding contraceptive coverage dramatically reduces the value of health benefits to women employees.³⁷ The cost of oral contraceptives ranges from \$20 to \$50 per month, and the cost of long-acting reversible contraception, such as the IUD, can cost as much as \$800,³⁸ which, as Justice Ginsburg noted in her dissent, is "nearly equivalent to a month's full-time salary for workers earning the minimum wage."³⁹ Moreover, women workers who become pregnant because they could not afford contraception may have to miss work to obtain an abortion—often without pay—or, if they decide to continue the pregnancy, may experience complications and (as discussed above) be forced onto unpaid leave, losing both their wages and their health benefits at a time when they are particularly vulnerable.⁴⁰

33. Terry O'Neill, *Religion Is No Excuse for Bigotry Against Women*, THE HUFFINGTON POST (May 21, 2014), http://www.huffingtonpost.com/terry-oneill/religion-is-no-excuse-for_b_5008347.html; *Burwell v. Hobby Lobby Stores, Inc.*, WIKIPEDIA, https://en.wikipedia.org/wiki/Burwell_v._Hobby_Lobby_Stores,_Inc. (last visited Nov. 9, 2015) (describing the *Burwell* case and implications).

34. O'Neill, *supra*, note 33.

35. *Id.*

36. *Hobby Lobby*, 134 S. Ct. at 2799-800 (Ginsburg, J. dissenting).

37. *Id.*

38. Kimberly Palmer, *The Real Cost of Birth Control*, ALPHA CONSUMER, U.S. NEWS & WORLD REPORT (March 5, 2012), <http://money.usnews.com/money/blogs/alpha-consumer/2012/03/05/the-real-cost-of-birth-control>.

39. COST HELPER PLUS, <http://health.costhelper.com/iud.html> (last visited Nov. 4, 2015).

40. Palmer, *supra* note 38; *How Much do Birth Control Pills Cost*, COST HELPER PLUS

IV. CONCLUSION

Despite the setback represented by *Hobby Lobby* and the half-measure represented by *Young*, there is some good news: progressives and feminists are working together out of their growing recognition of the interconnections between women's rights as workers and their reproductive rights. In the coming years, there will be more and more opportunities for such cross-movement collaboration. The category of "women's rights" must include such economic justice issues as establishing a livable wage for workers in all job categories. And by the same token, the category of "economic justice" must encompass women workers' rights to pregnancy accommodation as well as affordable access to the full range of reproductive health services, including contraception and abortion care.

<http://health.costhelper.com/birth-control-pills.html> (last visited Feb. 28, 2016); *How Much does an IUD Cost?*, COST HELPER PLUS, <http://costhelper.com/iud.html> (last visited Feb. 28, 2016).