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Pay Inequality, Access to Work, and Discrimination

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CHAPTER INTRODUCTION: PAY INEQUALITY, ACCESS TO WORK, AND DISCRIMINATION

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At the half-century anniversary of Title VII of the Civil Rights Act of 1964, it is high time to address the pervasive and well-entrenched pay inequity women face in American workplaces. As the presenters on the “Pay Inequality, Access to Work, and Discrimination” Panel observed, progress on the gender wage gap is at a standstill. For full-time, year-round workers in 2012, the median salary for women was 76.5% of the median salary for men—nearly identical to the gap reported in 2001.¹ Moreover, today’s workforce is filled with part-time female workers who are at the mercy of their supervisors for their pay (e.g., the number and scheduling of hours they work). The number of part-time workers has steadily increased over the last decade, with the total number of part-time workers exceeding twenty-seven million.² Two-thirds of part-time workers are women, and as the Congressional Joint Economic Committee has recognized, the gender pay gap is partly driven by the earning penalty for part-time work, which pays less per hour than the same or equivalent work done by full-timers.³ Most commentators agree that if the overall rate of change from 1964 to today remains the same going forward, women in today’s labor market will never experience gender wage parity during their working lives.⁴

Professor Martha Chamallas set the backdrop for our discussion on America’s persistent wage inequality by reminding us of the revisionist history of Title VII. Professor Chamallas is best known for her work on the intersection of anti-discrimination and tort law, but her 1986 article on pay inequality based on the predominance of women in part-time work was groundbreaking in this field of study. In her talk titled “Vicarious Liability under Title VII: A Vanishing Act,” Professor Chamallas

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1. See Ben Penn, *Gender Pay Gap Won’t Close Until 2058, IWPF Projects, as Democrats Push for Law*, 181 DAILY LAB. REP. A-12 (2013) (“While women have made tremendous strides in their earnings relative to men since 1960, none of that progress has taken place since 2000 . . .”).

2. See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Economic News Release Table A-8: Employed persons by class of worker and part-time status*, (July 03, 2014), <http://www.bls.gov/news.release/empsit.t08.htm>.

3. See Staff of Joint Econ. Comm., 111th Cong., *The Earnings Penalty for Part-Time Work: An Obstacle to Equal Pay 1-2* (2010), available at http://www.jec.senate.gov/public/?a=Files.Serve&File_id=74203874-3821-44e4-b369-4efbe14d8745.

4. See Penn, *supra* note 1; see also Jillian Berman, *Gender Pay Gap Likely Won’t Go Away Until After You Retire: Study*, HUFFINGTON POST, Sept. 23, 2013, http://www.huffingtonpost.com/2013/09/23/gender-pay-gap-close_n_3975638.html.

reminded us that who is held responsible for workplace harms is a vital inquiry to address the inequalities faced by working women. As yet another example of inappropriate incorporation of tort doctrines into anti-discrimination protections, agency principles that limit the reach of responsible parties impair anti-discrimination efforts by shielding accountable parties, including co-workers. Professor Chamallas left the audience with a glimpse into a future where we revive a modern day Civil Rights Restoration Act to address the courts' continued dismantling of Title VII protections.

Professor Melissa Hart focused attention on one particular case of wage inequality in the legal academy's own backyard as a vehicle to analyze key issues surrounding the gender pay gap. In her talk titled "Missing the Forest for the Trees: Gender Pay Discrimination in Academia," Professor Hart told the story of University of Denver Professor Lucy Marsh's wage-discrimination litigation against her law-school employer to address gender disparities amongst tenured male and female professors, as well as to get access to pay data (a hidden trove of evidence in private institutions). By looking closely at the narrative surrounding Professor Marsh's lawsuit, Professor Hart unpacks the system justification relied upon by employers for individual difference in pay. As seen in other areas of discrimination law, the gender pay-gap debate ignores structural causes, such as biased evaluation systems and unfair gender stereotyping, because "the pull of individual explanations is overwhelmingly strong." Professor Hart concludes that to meet Title VII mandates and adequately address the persistent gender pay gap, employers must resist resorting to individual explanations for each pay decision and instead, look closely at the structural differences that undergird such decisions.

This proved a perfect segue to Professor Gowri Ramachandran's presentation on "Pay Transparency," which squarely addressed how to achieve procedural and substantive justice for women caught in the pay gap. As the Lilly Ledbetter case proved, women too often have to rely upon happenstance and luck in discovering that they are paid unfairly in relation to their male counterparts. Forcing employers to reveal salaries publically would uncover the oft-hidden disparities. Professor Ramachandran convincingly showed us that the defenses to such pay transparency are nothing but a straw man set up by resistant employers. By addressing such myths as women's weaker negotiation skills and the need to preserve the status quo, Professor Ramachandran concludes that pay transparency can pave the way to closing the pay gap that continues to allude us.

Addressing business concerns in order to most effectively close the pay gap was also at the center of Professor Nancy Reichman's talk on "Equal Pay for Equal Work: Some Observations and Worries." As the Chair of Colorado's Pay Equity Commission, as well as an empirical

socio-legal scholar, Dr. Reichman relied upon her experience negotiating treacherous political waters to share insights into how to best collaborate with employers to reach compromise on critical issues for low-wage working women. As employers prioritize containing labor costs over cultivating employees, many workers in low-wage jobs are forced to adapt to non-standard, often chaotic scheduling made possible because of advances in scheduling technologies. Dr. Reichman convincingly argued that it is time to change the way we think about pay equity. Workplace fairness between women and men should no longer be framed merely by total disparities in pay, but also by disparities in hours given to women seeking as much work as their male counterparts. Doing so recognizes the realities of many female workers in today's workplace and addresses the shortfalls thus far absent from the civil rights conversation about pay equity. Dr. Reichman made the business case for gender pay equity by addressing how deterrence and diversity improve the bottom line.

Provocative and compelling, our final presenter was Professor Michelle Travis, who challenged the causal narratives that sustain our gender compensation divide in her talk, "Disabling the Gender Pay Gap: Lessons from the Social Model of Disability." Many social commentators encourage women to "lean in" and take responsibility for their second-class employment status by exhaustively working to "fix" themselves and their situations. Professor Travis explains that the resilience of the gender pay gap has been fueled in part by simplified and strategic causal narratives (such as "women don't ask") that move responsibility away from the employers that have built and sustained gender pay inequality as a standard feature of the American workplace. To combat this, we should take cues from the disability rights movement—a movement that effectively provided a new causal narrative that shifted both the public's attention and the law's focus from a medical model of difference to the role of employer practices and structures in producing inequality for individuals with impairments, which are not themselves inherently limiting. By changing the narrative to center on the shortcomings of employers' structured employment practices, instead of inadequacies of women in these structures, Professor Travis argues effectively that the equal pay movement can make better strides towards parity in pay.

Those in attendance to these excellent presentations agreed that our five panelists provided a thorough and thought-provoking framework by which to re-conceptualize pay equity in today's varied workplaces. This civil rights anniversary should have been celebrated by congratulating ourselves on achieving gender pay parity. Instead, we must galvanize for the next fifty years to ensure that pay equality is a reality for the next generation of female workers.

