REVISITING SEX: KEYNOTE ADDRESS

# MONEY, SEX, AND POWER: GENDER DISCRIMINATION AND THE THWARTED LEGACY OF THE 1964 CIVIL RIGHTS ACT

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## INTRODUCTION

It seems entirely fitting at this point in time to hold a conference to assess the legacy of Title VII of the 1964 Civil Rights Act, which was animated by an effort to extend antidiscrimination civil rights law to the private workplace, among other settings. The initial goal was to reduce racial discrimination—although the meaning of race discrimination was unclear and the stipulated private, litigation-based regulatory mechanisms expressed at best a modest commitment to change. The fact that "sex" was added as a secondary cause of action, ostensibly for mixed motives, made gender discrimination the "orphan" of civil rights law, and discrimination against LGBT persons was not publically acknowledged at all. Given all that, we might wonder why there was any legacy

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of change at all. But I come here not to praise the Civil Rights Act so much as to reflect on the reasons for its limited impact and to speculate about the future of civil rights law, policy, and politics.

At the outset, I want to recognize the challenge for me, a straight white guy, to talk about the legacy of legislation, litigation, and related struggles to combat race and sex discrimination. I ask myself, "why me?" and it's a fair question. I should also recognize at the outset that I am not an attorney. I don't have a J.D., and that puts me in a very distinct minority in this room. Moreover, I have the unenviable task of following all of the great speakers who have preceded me today and yesterday. This has left me with a strong sense that everything has been said, and I already mentioned in one of my questions to a previous panelist that I need to change the name of my talk to "Summing Up," because I'm not sure I have a whole lot that's new to say, although I think there will be a little bit of a change in focus. And, finally, I have to recognize that I appear as someone who hails from Seattle, the land of the Seahawk, and I find myself in a world of the Bronco . . . .

So let me state at the outset the standpoint from where I do speak and what I'm going to try to bring to this talk. I grew up in the American South during the 1960s. I went to schools that did not begin to desegregate until over a decade after *Brown v. Board of Education*.[1] I worked in the construction industry, while a teen, which lead me to involvement in labor activism in the building trades and later among farm workers in northern Florida, during the same years that the EEOC was aggressively working with citizen groups to file lawsuits under Title VII of the 1964 Civil Rights Act. People yesterday talked about being nearly as old as the Civil Rights Act; well, I'm a lot older than the statute. I eventually moved to California, partly to get out of the South, but mostly to study political science at UC Berkley, where I became a sociolegal scholar interested in issues of class, gender, and race, with a focus in particular on the history of labor in American society and the contrast between the different trajectories of nation states in the U.S. and Europe. My primary interest since then has been to understand how law shapes relationships of hierarchical power, contests over asymmetric power, and the possibilities for change in power relations affecting ordinary working people. I have tried to balance my interest in class, gender, and race as a legal scholar, as a political analyst, and as a labor activist, much of it from various groups I've been associated with, but since 1991 as an affiliate of the Harry Bridges Labor Center, at the University of Washington, which in many ways is my proudest professional affiliation. Those commitments were evident in the book that I wrote about gender-based pay equi-

1. 349 U.S. 294 (1955).

ty, entitled *Rights at Work*.[2] It has been a great opportunity preparing for this talk because I have not worked directly on gender-based pay equity for a long time, although my scholarship has continued to address discrimination, civil rights, and the various ways in which law provides opportunities and constraints for struggles over social equality.

I have chosen as the title of my talk: *Money, Sex, and Power*. I really like that title, but it is not original. It owes to a good friend of mine, Professor Emeritus Nancy Hartsock at the University of Washington.[3] She wrote a classic book on feminist theory in the 1980s, and I thought it fit what I wanted to talk about. My focus will emphasize the lost potential of the 1964 Civil Rights Act for improving the capacities of women and people of color to earn good incomes, find good jobs, exercise a voice in the workplace, enhance their roles as providers for themselves and their families, and take on roles as active citizens. My address will focus to some degree on wage equity, but it will transcend that to talk about other related issues as well.

## I. SOME FRUSTRATING FACTS ABOUT CONTINUING GENDER INEQUALITY

I begin by recognizing some important facts. I start with a graph that I take from a study by Laura Beth Nielsen and Bob Nelson that has been mentioned before by other speakers.[4] What this shows is the amount of employment-based civil rights litigation over the last forty years. Whatever we might say about the legacy of the 1964 Civil Rights Act, there has not been a shortage of litigation. There were tens of thousands of cases that have been pursued each year, especially with a big spike in the 1980s. And I will come back to that in just a moment.

With this legacy of litigation in mind, I turn to some frustrating facts about the status of women's income and earnings.[5] We all know that the earnings of women in 2012 working full-time, year-round were about 76.5 cents to every dollar paid to male counterparts. The wage gap was even larger for women of color. Black women who were working full-time, year-round made only sixty-four cents to the white male stand-

2. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

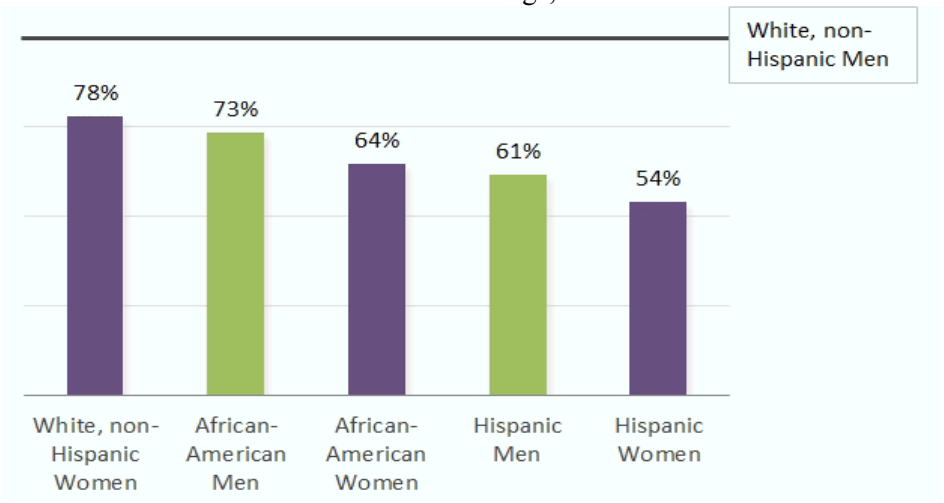
3. *See* NANCY C.M. HARTSOCK, MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM (1983).

4. A longitudinal bar graph was displayed in the talk, derived from a study by Laura Beth Nielsen and Robert Nelson. *See generally* LAURA BETH NIELSEN ET AL., CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987–2003, at 3 (2008), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf .

5. The data referred to in the section on "frustrating facts" is primarily derived from the Bureau of Labor Statistics and is widely available. I relied on several web-based sources to obtain these findings. *See, e.g.*, *Women's Earnings and Income*, CATALYST (Mar. 24, 2014), http://www.catalyst.org/knowledge/womens-earnings-and-income.

point. Hispanic women made only fifty-four cents for every dollar paid to their white, non-Hispanic male counterparts. Median annual earnings for full-time, year-round women workers in 2012 were $37,791 compared to men's $49,398.

Figure A: Wage Gap as Compared to White, non-Hispanic Men's Earnings, 2012[6]



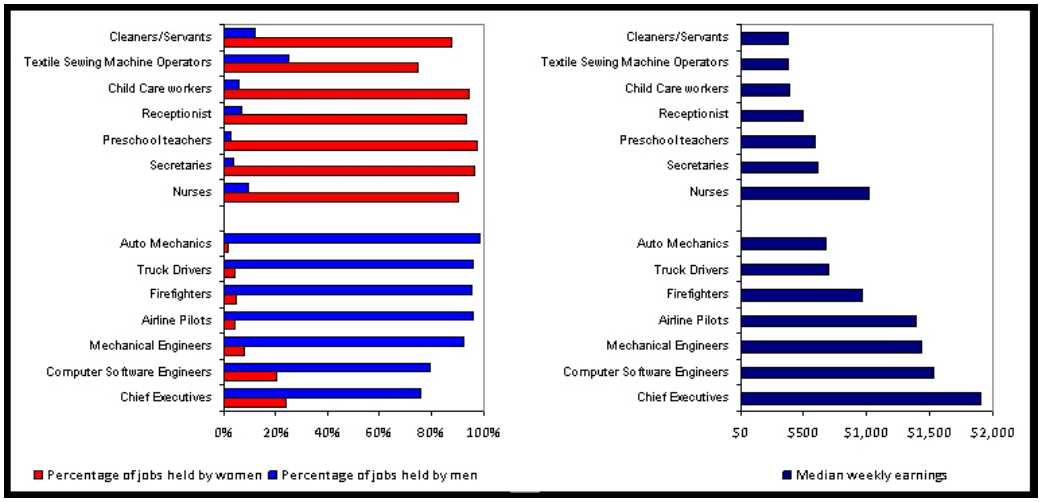

Now in some ways we can see this as a glass half full. When one compares these earnings ratios to the 1960s, when women made fifty-nine cents to every dollar that men made, the increase to nearly 77% is significant. But I want to suggest that the apparent gains in equity not only still fall far short, but they are less than simple aggregate ratios suggest. For one thing, the reasons for that decrease in the wage gap between men and women resulted partly from the advances of the roughly 15% of women who made it into the upper management positions where the pay is very good. If you take those increases out of the overall picture and look at the bottom two-thirds of women, then the data look a lot more discouraging and depressing. I think it is important to see that if we take out that upper crust, we see that women represent nearly two-thirds (61%) of minimum-wage workers. Nearly four in ten of these female minimum-wage workers are women of color. Women are, moreover, nearly two-thirds of workers in occupations that depend largely on tips; it is worth mentioning that the federal minimum cash-wage for tipped workers is $2.31 an hour. Moreover, data on full-time earners, as Nancy Reichman pointed out very appropriately, obscures the fact that a large percentage of women do not work full-time, but rather are relegated to part-time, temporary, contingent work, so that the earnings gap reflects

6. NAT'L WOMEN'S LAW CTR., FACT SHEET: THE WAGE GAP IS STAGNANT IN LAST DECADE tbl.2 (2012), *available at* http://www.nwlc.org/sites/default/files/pdfs/poverty_day_wage_gap_sheet.pdf.

not just unequal wages but the different number of hours that women tend to work.

Now there are many reasons that can be provided for why there is this gender-based wage gap, but labor economists tell us that certainly one of the primary reasons has to do with occupational segregation. Now that actually has not been talked about that much in this conference, so maybe everyone just took it for granted. The key point is that women historically have tended to be channeled into certain kinds of occupations. Those occupations tend to be paid less, even when the value of the work and the criteria for entering those jobs are comparable to men who are paid at much higher rates. The graph displayed (Figure B) is a little bit complicated, but on the left side you see different kinds of occupations; the red bars reflect level of female participation in those occupations, while the blue bars capture the levels of male participation in different jobs. This clearly captures the gender-intensive character of many occupations. On the right side you can see the earnings for the different occupations. You can see a direct correlation: the more red they are, the lower paid they are, the more blue they are, the higher paid they are. This is a classic comparison of occupational segregation and the ways in which wages tend to follow that split.

Figure B: Occupational Sex Segregation[7]




[7] *One of Twenty Facts About U.S. Inequality that Everyone Should Know: Occupational Sex Segregation*, STANFORD UNIV., http://www.stanford.edu/group/scspi/cgi-bin/fact6.php (last visited Aug. 1, 2014) (citing U.S. DEP'T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008: REPORT 1017 (2009), *available at* http://www.bls.gov/cps/cpswom2008.pdf).

Job segregation has surprisingly not changed that much since the 1960s. A recent study by labor economist Francine Blau, at Cornell, and her colleagues found that there was a significant change in the occupational segregation in the 1970s.[8] They found about a 6.1% decline in occupational segregation, and with that, women moving into higher paying jobs. But that rate of decline fell in the 1980s to 4.3%, and since then it's been nearly flat, with only 2% decline in occupational segregation in the 1990s; there has been virtually no change in occupational segregation in the 2000s. So that, in part, gives us a handle on the problem, as we can also see that moments of declining occupational segregation correlated directly with the declining wage gap. As the declining occupational segregation has slowed, so too has the decrease in the wage gap.

The larger picture is also complicated by the fact that the increase in wage equity has reflected in part the overall stagnation of wages since the 1970s. In particular, while women's wages went up some, part of the reason for the declining gap was that men's wages have been declining since the 1970s. So one of the problems with just focusing on wage equity is that equity is just about the comparison, either racial comparison or gender comparison. But if everyone in the bottom half or even two-thirds of wage earners is doing worse, then equity is actually a mixed cause for celebration at best. This has led to some interesting dynamics among married couples. The Pew Research Center looked at earnings data for married women and men in the United States aged thirty to forty-four in 2007. The study found that recent economic gains usually associated with marriage "have been greater for men than for women," and that is because women are making more money, and men are making less money.[9] So what used to be the benefit for women of marrying a man with a lot of money has actually been reversed, at least in a small kind of way.

Finally, the future does not look very encouraging. The projected job growth in the next decade is disproportionately in low-wage, female-dominated occupations. Of the thirty predicted high growth occupations in Bureau of Labor statistics, those occupations that are projected to grow the most tend to be female-intensive and low-paid. Disproportionately, 60% of the workers in the thirty jobs that are expected to grow most are female, and they are concentrated in low-wage occupations. Nearly two-thirds of the thirty high-growth jobs are female-dominated, within workforces that are 60% or more male. Almost half of those jobs that are projected for growth typically pay less than $13.50 an hour. Five of those job classes are very low-wage, typically paying less than $10 an

8. Francine D. Blau et al., *Trends in Occupational Segregation by Gender 1970–2009: Adjusting for the Impact of Changes in the Occupational Coding System* 4, 26–27 (Nat'l Bureau of Econ. Research, Working Paper No. 17993, 2012), *available at* http://www.nber.org/papers/w17993.

9. RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE 1 (2010), *available at* http://www.pewsocialtrends.org/files/2010/11/new-economics-of-marriage.pdf.

hour. Among the thirteen lowest wage high-growth jobs, twice as many are female-dominated compared to male-dominated jobs. So not only do things look grim now, but they are not going in the direction we would like for the great majority of working women. Twenty-five years ago we might have thought things were getting better.

With low wages, also, it is important to realize there are fewer opportunities for upward mobility, for higher education skill development, and especially for voice and choice over the terms of work at the workplace. These are the jobs, low-paying jobs, that are often the most difficult to organize and to unionize, and they are the jobs that afford workers the least control over the terms of the work they perform. They are the most vulnerable jobs, not only in terms of income, but in almost all the ways we think about work as an important part of life. Add all that—low wages, low return, low opportunities—to the fact that female workers have to contend with costs in the U.S. that are greater than in many parts of the world, especially in the global north. The U.S. is far behind the world in paid family leave, guaranteed healthcare, daycare for children, and after-school programs. Single mothers are the most disadvantaged, but a great majority of women are still the primary caregivers in society and thus are negatively affected.

So that is just a quick trot through data suggesting the degree of continued injustice. And this prompts the question: Why, fifty years after the 1964 Civil Rights Act and after the Equal Pay Act, has there not been more change in the wages of women and decreases in occupational segregation and the other manifestations of gender and race-based discrimination in the workplace? As I mentioned, it's not for the lack of lawsuits. There have been tens of thousands of lawsuits filed alleging gender and racial-based discrimination in the workplace. So why has civil rights litigation made so little difference, and what can we expect in the future?

## II. CRITICAL FEMINIST THEORY ON THE LIMITS OF RIGHTS-BASED STRATEGIES FOR CHANGE

One place to look for an answer is the abundant amount of scholarship on rights and rights-based litigation. Feminist theorists in particular offer many reasons why perhaps this rights-based, litigation-oriented strategy of challenging discrimination and producing social justice was very limited. I will just run through a couple of those arguments, although I am sure you are already familiar with many of the points.

One very basic argument, going back to Marx, is that rights at best are a "political lion's skin."[10] Rights tend to be useful for limiting arbitrary forms of harm, but are not very useful for challenging and transforming the structural hierarchies created by capitalist societies. Much of

10. KARL MARX, ON THE JEWISH QUESTION 13 (Helen Lederer trans., 1958) (1844).

feminist theory builds on that basic argument. Moreover, rights like those guaranteed by the 1964 Civil Rights Act enable victims of invidious wrongs to challenge injuries of discrimination, harmful exclusion, or marginalization, but such rights claiming arguably only compounds the problems. Scholars like Wendy Brown have argued that rights claiming ends up reinforcing and reifying the subordinate identity of the injured victim who needs the state's support and thus lacks the independence and social power of the fully entitled, rights-bearing individual.[11] Rights don't make people whole but rather institutionalize the stigmatized status of the claimant. This dynamic is supported by some empirical sociolegal studies of ordinary people in workplaces who have experienced discrimination. These studies show that women and people of color are very reluctant to even name the fact of discrimination or to claim rights, much less to call a lawyer and initiate a formal action.[12] This is very important. I have heard a couple times over the last day that existing law is pretty good at dealing with routine forms of overt, explicit discrimination. Well that may be true when cases get into the courtroom; the problem is that very little of the discrimination that actually occurs is ever challenged in the courtroom because people are very reluctant to demand their rights. Part of the reason is the stigma for rights-bearing individuals. Claiming rights is a way to mark oneself as less than fully independent and less than fully deserving of the rights that one claims: this is one of the great paradoxes of rights.

Moreover, as Wendy Brown further argues, even when rights grant momentary redress, inclusion, or even empowerment, they may "become at another time a regulatory discourse—a means of obstructing or co-opting more radical political demands or simply the most hollow of empty promises."[13] It is not surprising that, historically, the conception of the rights-bearing subject has been based on demonstrating discipline and orderly conformity, and we have heard a lot at this conference about all the pressures that are increasing on people to go along with whatever their employers want in the workplace. That is going to be a theme that I come back to in a moment.

Other feminist theorists like Nancy Fraser offer a slightly different but related critique.[14] Her work has very clearly shown that struggles for equal rights often pursue along two different kinds of lines. One is a demand for respect, for *recognition*, to be recognized for one's difference in a way that is nonstigmatizing. This is what she calls "the politics of recognition." But another demand often goes along with claims of rights,

11. Wendy Brown, *Rights and Identity in Late Modernity: Revisiting the "Jewish Question," in* IDENTITIES, POLITICS, AND RIGHTS 85, 87–89 (Austin Sarat & Thomas R. Kearns eds., 1995).

12. KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 1–4 (1988).

13. Brown, *supra* note 11, at 87.

14. Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 107–09 (2000).

which is demand for redistribution, in order to repair the injuries that are longstanding in society and which provide remedy for those harms; it is a demand for substantive material justice. But what Fraser argues is what often happens, and did happen in second-wave feminist politics in particular, is that the focus on recognition, on winning respect as a rights-bearing citizen, and not being treated in a differential way that stigmatizes, often trumps the focus on redistribution. The material claims for money or for a transformation in material relations often get lost in a claim of identity politics. It is easy to see that as a partial explanation for the lack of focus on economic justice for women. Lots of other critical arguments have been advanced about the limits and problems of rights. One is that rights inherently individualize claims in the workplace, so they divide workers in the workplace against each other. Workers have little in common, and rights encourage them to pursue their own claims for themselves in a way that diminishes the potential for solidarity and collective action. Fraser specifically links this dynamic to the splintering of the women's movement. The individualizing rights claiming impact has something to do with the loss of solidarity over time.

One of the interesting points Nancy Fraser made in one of her more recent books is a way in which feminism has become co-opted by, or merged comfortably with, neoliberalism. The propensity for claiming rights fits right in with the individualizing tendencies and even entrepreneurial ethic of neoliberalism. Moreover, the feminist attack on the old family-wage idea was not really matched with an alternative conception of living wages or minimum wages or minimum income to which people should be entitled. The state and state policies were attacked as being paternalistic, but with that went reliance on voluntarism and individualism again which prevented the kind of collective action that was necessary to challenge hierarchical organized power. Whereas in Europe and Canada women often aimed to infiltrate the state to influence state policy and state regulatory enforcement mechanisms dealing with questions of inequality at work, women in the United States and feminists in particular pursued rights-based strategies that were more individualistic and less transformative in the aggregate.

Partly for these reasons, I think there is some reason to believe that we are witnessing a cultural exhaustion with civil rights in America. We often think that the United States is a land where rights trump other kinds of claims,[15] but rights claims do not seem to carry the same kind of nor-

15. *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 131 (1974).

mative authority or faith that they once did. In fact, there is a palpable frustration with invoking civil rights types of claims.[16]

I offer one recent example supporting this claim. I am sure that many of you have read the recent Shriver Report, *A Women's Nation Pushes Back from the Brink*, sponsored by the Center for American Progress.[17] A lot of the economic data presented in that report matches the kind of frustrating facts that I just cited here and that has been talked about at this conference, and a lot of the report's policy prescriptions track those that have been talked about here as well. What I found really interesting about that pamphlet, though, is that there is virtually nothing about the Civil Rights Act, nothing about rights, nothing about law, and no lawyers anywhere in the text. You see a bunch of celebrities: Beyoncé, Eva Longoria, and even LeBron James! But there's nothing about the legacy of the Equal Pay Act, Civil Rights Act, litigation, lawyers, or framing these issues in terms of basic rights to deal with the problems of discrimination. I found that interesting and, perhaps, revealing about where we are politically.

Now I think there is much truth in all of kinds of claims about the limits of rights talk that I just listed briefly. But I want to suggest that this frustration and disenchantment with rights, and even with litigation, is a bit overblown. There should be no doubt that rights are a limited discourse, and they are linked to a history of constructing subjects in ways that individualize aspirations and actions. But that is not the only way to think about rights and how they work in social practice. Likewise, litigation by itself is a very limited kind of reform strategy, but litigation can also often be a part of broader-based movements and, when joined to other tactics, can be a very effective tactic. I understand critiques of rights—I gave a presidential talk for the Law and Society Association, where I made the case for the limitations and problems of rights as a resource for social change. I also used to be a part of a group of theoretically inclined empirical sociolegal scholars with the informal name the "Rights Suck" group. All that said, my primary point here is we shouldn't give up on rights, and we shouldn't give up on litigation, but we need to rethink why civil rights law has not been more consequential.

## III. A DIFFERENT EXPLANATION: POWER AND POLITICS OF LAW

I want to offer a simpler explanation for what I think happened, for why I think the civil rights legacy was not more transformative than it was. My account is going to be a much more political story. It is a story

16. *See* George I. Lovell, *The Myth of the Myth of Rights*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 59, SPECIAL ISSUE: THE LEGACY OF STUART SCHEINGOLD 1, 8 (Austin Sarat ed., 2012).

17. MARIA SHRIVER, A WOMAN'S NATION PUSHES BACK FROM THE BRINK, SHRIVER REP. (Jan. 12, 2014), http://shriverreport.org/special-report/a-womans-nation-pushes-back-from-the-brink/.

about the politics that Title VII facilitated and which flourished for a particular moment, but then which was killed off by powerful opponents and forces. In some ways what I want to do is try and present a short story recovering the memory of what was killed off, not to urge repeating that history, but to learn from it and think about how we can reproduce it in new forms today.

First of all, we must recognize that it is arguably not rights or litigation per se, but the limitations of the Civil Rights Act in particular, that have been part of the problem. The Civil Rights Act was built to achieve at best modest change; it was designed to be a very limited resource for social transformation. The Act was vague about the terms of what counts as discrimination, as I mentioned at the outset. If we go back to the record of debates, we see that discourses about discrimination are all over the place and often no place at the same time. Moreover, the Act relied on private litigation as a mechanism of enforcement and deterrence, which puts the burden on victims to become plaintiffs and develop a legal claim.[18] The EEOC, the regulatory body authorized to enforce the Act, was given few resources, very little state capacity; it originally could not sue, it had a very small staff, and so forth. This was a new kind of social regulatory experiment and one that we know was designed not to disrupt the status quo a great deal. It also became a model for later forms of social regulation like the Environmental Policy Act. Finally, the inclusion of sex discrimination was an afterthought. There are many stories of how that happened. But by all accounts, in the early years, both in terms of the Act itself and the EEOC, the issue of sex discrimination was taken at best to be a marginal concern. The Act was primarily focused on racial discrimination. So it is not surprising that an Act that was designed not to have much impact did not lead to radical change. Again—to come back to my opening words—it is surprising that it's much of a legacy to talk about at all.

The second thing that I want to say is that a lot of critiques of rights only focus on the most limited, narrow, negative versions of rights grounded in the proprietarian, contract-based tradition of liberalism. But other conceptions of rights have more positive, transformative possibilities, and those rights have actually been recognized in our liberal tradition, and in fact were connected to some of the activism after the Act was passed. Everyone knows—it has been talked about at this conference—about the two basic standards for demonstrating discrimination in the 1964 Civil Rights Act. One is the disparate treatment standard; the other is disparate impact. Several people said that I would be talking about impact theory, and that is what I'm going to do now.

18. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 85, 94–95 (2010).

Disparate treatment depends on, for the most part, a showing of willful, intentional, or at least foreseeable indifference to harm against victims. It can be shown by "pattern or practice," but it generally goes to the logic of causation and demonstrated intent. Intentional discrimination is at the core of the disparate treatment test. It best fits cases where employers, or those working under employers, engage in a certain kind of hostile action that causes harm, usually to discrete, targeted individuals. So it is grounded in a very individualized model of harm and of redress. It tends to be very personalized and expressive of individual animus. The important implication of that model is that it presumes that discrimination—whether it's sexual discrimination, gender discrimination, or race discrimination—is anomalous in an otherwise just, market-based society. It at least implicitly enforces the view that markets for the most part work to ensure fairness, and we need a mechanism to deal with those anomalous moments when some sort of racial or gender animus is displayed. There's an overall kind of ideological trap that I want to suggest that goes hand-in-hand with that logic of discrimination. Again, I want to emphasize that such logic of individualized action, of individualized modes of discrimination and redress, are ones that are available still, and courts are often pretty good on those types of simpler issues we might say. However, again, we know from studies of individuals that women and people of color are very reluctant to make claims in the workplace out of fear of retaliation; even if you win a claim and get momentary change, it's going to cost you in the long run. Especially in increasingly difficult work conditions, where jobs are scarce and wages are low, the assumption of risk that claiming and naming rights against intentional discrimination in the workplace imposes is not something that many people seize upon very quickly.

But I want to talk mostly about the other logic under the Civil Rights Act, that of disparate impact, and to some degree the logic of "pattern or practice," which I've always thought bridges the disparate treatment and disparate impact, so I will include that under the broader logic of impact here. I want to suggest that disparate impact is not just a different standard of demonstrating discrimination; it's a whole different theory of discrimination. It is, moreover, linked at least potentially to wholly different repertoires of action demanding change. This conception of discrimination and response to discrimination was grounded in a legacy of going back to early in the century, well before the Civil Rights Act. It was embraced by many of the initial activists in the EEOC during the late 1960s and was embraced by many groups that seized upon the 1964 Civil Rights Act and tried to make it work. Many people identify disparate impact with the *Griggs*[19] decision, and I think that is right, but I want to move beyond the narrow legalist understanding of this precedent

19. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

to talk about what activists did in expanding the logic of harm and remedy much further than what courts actually fully recognize. Creative progressive activists could always point to court decisions to justify this way of thinking about action, but, nevertheless, it would be wrong to say that this expansive vision was settled law at any particular moment. We might say that the EEOC and *Griggs* opened a door, but the room of possible workplace political actions beyond the door was very large.

I want to suggest that there are seven features that distinguish disparate impact, as imagined by worker activists in and beyond the pay equity movement, which is where I engaged in a lot of scholarly and activist work in the 1980s.[20] These key features were common in both gender- and race-based disparate impact claims from the late 1960s until the late 1980s.[21]

### *A. Discrimination Is Structural*

The first and most important feature that distinguishes disparate impact from disparate treatment theory is in understanding discrimination not as anomalous and unusual in a market society, but rather that discrimination—race-based, gender-based, and sexuality-based discrimination—permeates institutionalized processes and practices. Race and sex and sexuality discrimination is structurally embedded; it is all over the place. That is the norm. The norm is not fairness and equal treatment; racial, gender, and sexual hierarchy is the norm. Discrimination is not a matter of individual, personal animus necessarily, but it permeates a host of norms, practices, and relationships, both within the employment sphere and beyond in broader social relations that channel women and people of color into some jobs rather than others. Those structural forces impede mobility up ladders and across to other job ladders, to occupations that are grounded in assessments that undervalue female and racial minority workers' worth in those jobs and what women and people of color want and deserve from work. These discriminatory norms are reproduced often unconsciously by practices, expectations, and assumptions that are reproduced over time. And they are rationalized by a host of ideological constructs that are largely on their face blind to gender and to race—ideological rationales about markets, merit, supply-and-demand, and efficiency. So that is the basic premise of disparate impact claims.

20. *See generally* MCCANN, *supra* note 2.

21. This discussion of disparate impact doctrine, its key features, and its demise is outlined in greater detail in an unpublished paper on file with the author. Michael McCann et al., Executing "Good" Civil Rights Law: A Political History of *Wards Cove v. Atonio* 1–2 (unpublished manuscript) (on file with author).

*B. Dispensing with Demonstrations of Intent*

The structural impact is important because in many ways it dispenses with the formality of having to prove intentional discrimination. First of all, intent is not the basis of disparate impact claims. The challenge is not trying to prove that there are some bad people who mean to harm other people. The focus instead is on institutionalized practices and protocols that reproduce hierarchy. Good people often reproduce gender and race discrimination. The focus is on identifying oppression, not oppressors.

*C. Enhanced Empirical Evidence*

Moreover, proving intent is very difficult. That is the other really important point here. The case for disparate impact is often empirically much stronger than that for disparate treatment. It is often harder to prove intentional discrimination, which focuses on a person's cognitive processes. But it is often somewhat easier to prove disparate impact, largely because lots of large organizations have elaborate job charts that enable comparing wages to what people in different occupations make and show that ladders from one job to another job do not connect to other jobs. There are many types of institutional data that show the ways in which work organization is unequally structured and the ways in which wages of women in particular and people of color are systematically produced by that job segregation. Plaintiffs can put those data together with testimony of workers in depositions and on the stand at trial, thus providing quite a compelling account about the reasons why there are disparities in wages and limited opportunities for mobility within and among organizations.

*D. Loosening Standards of Direct Causality*

To empirically demonstrate patterns of discrimination is not only easier, but it is often grounded in a logic that loosens the positivist causal connection that is often demanded in law. If discrimination is a product of a whole variety of interrelated practices and norms and relationships, trying to find a single specific practice that accounts for the unequal outcome is rather futile. The disparate impact logic invites a much more holistic, complex, institutional way of understanding things. And in one of the cases in which I was a part of in the 1980s, that was exactly the way in which the cases were presented—days and days of testimony of women's experience, along with charts of all the ladders among jobs that can be put that next to the wages, enabling plaintiffs to paint a much more complicated but compelling, convincing story. And it is very important that it was empirically easier to demonstrate, but it does not require that causal connection to a specific business practice. Some federal court decisions in the 1970s supported this inclination to loosen that causal link between specific practices and discriminatory impact.

*E. Structural Solutions for Structural Problems*

If the problem is defined in structural terms, then, the solution has to be structural. If the problem is comprehensive and built into all of these interrelated practices, norms, and relationships, the solution has to be multidimensional and comprehensive, and it probably will take a long time to implement. In discussions about pay equity and comparable worth, those terms are often used together, but I think it's very important to distinguish them. Comparable worth is a technocratic fix. Most of the campaigns for pay equity that I learned about did not seek a technocratic fix, which the experts and consultants often wanted. As advocates used to say, it will take at least fifty years to undo what took hundreds of years to happen. And the solution is going to require lots of different reforms proceeding concurrently. Activists in most cases did not look for or expect or even want a one-time fix.

*F. Facilitating Collective Worker Action*

Meaningful structural reform not only adopts the victim's perspective,[22] as we often say, but the victims themselves have to be part of naming the problem and shaping the reforms themselves. One of the things that's distinctive about the pay-equity movement, and a lot of other race-based movements about which I am researching now, is that it was critical not only to organize workers at the level of filing claims and then at the discovery process and then at building the case in court, but it was especially important in building worker participation into the implementation of negotiated remedies. Remedies meant that workers had to have more of a role in forming committees that would engage in long-term monitoring processes and deal with all the connected issues of wage equity, hiring, job promotion, building new ladders among jobs, and so forth.

*G. Expanding the Rights Agenda*

And then, finally, once women and workers generally organize to deal with those issues, they often begin to recognize other rights-based issues that they share in common: the need for family leave, the lack of health benefits, the lack of good retirement benefits, the lack of daycare. A key part of the story I tried to tell about pay equity in *Rights at Work* is that, once women organize, they not only become less reluctant to begin to claim rights, but they began to think about a lot of other issues in terms of rights that badly needed to be addressed. That was a central point I was trying to make in the book—I interviewed hundreds of women around the country who were involved in these campaigns, and I doc-

22. The "victim's perspective" is a concept developed in Alan Freeman's classic essay. Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 285, 287–88 (David Kairys ed., 1998).

umented what often is called a developing "rights consciousness." A lot of women said: "I never really thought about rights, I never took them that seriously. I never considered myself a feminist; that is what white, college-educated women do. I never considered myself a union activist. But now I do, I consider myself a feminist union activist demanding rights, after going through the struggle for fair pay." The political process of claiming rights and shaping remedies changed the way they looked at their work lives, and how they viewed themselves; it reconstructed their subjectivities.

## IV. THE EXECUTION OF GOOD CIVIL RIGHTS LAW

So we saw this explosion of workplace activity around institutional racism and sexism around the country, starting in the late 1960s with black construction workers and taking off more broadly in the 1970s. When I was researching about pay-equity politics, I documented at least 100 campaigns at workplaces at local and/or state levels around the country. Now much of this was below the radar of social scientists and of law professors, because in most of these cases, lawsuits were filed and they often settled. And that was the point—not to have to go to trial, or at least to a judgment, but to get the trial, leverage for settlement or collective bargaining success, and then let the organized women workers take over. And then continue to say we will go back and refile the lawsuit or pursue a new lawsuit if necessary. So all this politics did not make a big impact on case law, but it did depend on a perception that the courts were open to these types of claims. So now we must ask: what happened? The story I will relate now is fairly simple and tragic: if the advances that were made during this time were due to a politics of rights at the local level, it was also politics that undid all of this. It was macro-politics at the national level.

The key case that I would pinpoint as a turning point in ending the collectivist politics challenging institutional sexism and racism was *Wards Cove Packing Co. v. Atonio*[23] in 1989.[24] I ended my 1994 book, *Rights at Work***,** long ago by recognizing the impact of that case, and I am writing a book about the actual *Wards Cove* case now, twenty-five years later after I did that original work. Our[25] focus is on the social history of *Wards Cove*. *Wards Cove* developed from a lawsuit that was filed by Filipino activists who worked in the Alaskan salmon canneries, where work conditions were structured on a modified race-based plantation model that had been around for hundreds of years. This plantation model was adapted from southern slavery and reproduced around the Pacific Rim canneries in Hawaii and Alaska, as well as in the agricultural sectors

23. 490 U.S. 642 (1989).

24. *See* McCann et al., *supra* note 21, at 1.

25. The developing book and related articles are co-authored with my colleague, George Lovell, also at the University of Washington. The book will be titled *A Union by Law*.

of seasonal work in California, Oregon, and Washington. The Filipino American plaintiffs challenged the fact that the entire workforce was segregated—that Filipino workers and Native Americans were the only ones who worked in the factory line doing all the cleaning and cutting up of the fish in very dangerous and unhealthy conditions. Whereas all of the lower level jobs were held by Asian American and Native American workers, jobs in the middle to higher levels were all held almost exclusively by white workers. Workers lived in different quarters, ate different food, assumed very different risks, lived in different worlds. This was a quasi-slave-based kind of system. And the plaintiffs challenged that system as invidiously discriminatory.

The *Wards Cove* case was one of three cases that the Filipino cannery workers filed. The first two won at the trial level and then settled. These cases advanced very important efforts by the plaintiffs to not only change workplace conditions, but also to take over a union from corrupt, unresponsive leaders who slipped into control during the McCarthy Era, and who had brought in gambling rings and prostitution rings that were basically exploiting the workers when they would go up to Alaska. The strategy of organizing rank-and-file workers around the lawsuits worked. As a result of filing these lawsuits, the dissident workers formed the Alaska Cannery Workers Association, kicked out the old leaders, and enabled a group of young, radical Filipinos and a multiracial group of allies to take over the union.

A third prong of what the strategy, believe it or not, was to bring down Ferdinand Marcos, the autocratic Philippine leader. The plaintiffs were young democratic socialists and part of a broad alliance in the Puget Sound area fighting against American imperial activities around the world, including the support for Marcos. Their ambitious venture incurred great risks for the activists. Two of the leaders who planned the three cases, Gene Viernes and Silme Domingo, were murdered in 1981 by Filipino gang thugs in Seattle. A later civil trial for wrongful death showed that the thugs worked for the corrupt union boss—his gun was the murder weapon—and that the money came from Ferdinand Marcos, most likely with some CIA knowledge. That is a very interesting side story—please read the book when it comes out.

Nevertheless, the minority plaintiffs of color, which included some females, challenged the conditions at work in ways similar to legions of black construction workers before them and women demanding pay equity after them. But what happened was that the *Wards Cove* claim, the third lawsuit, unexpectedly ended up before the U.S. Supreme Court and marked a turning point in the history of disparate impact doctrine and the collectivist workplace politics that it facilitated.[26] It was a turning point

26. *See Wards Cove*, 490 U.S. at 656–60.

for a lot of things we've talked about today. Case law was all over the place in the 1970s and '80s in interpreting disparate impact. Nevertheless, demonstrations of statistical disparities and remedies that were proportional to the violation were upheld in some cases.

What the majority said in *Wards Cove* was stunning. The first thing they did was erase basic precedents. It was mentioned the other day that some of the precedents from the 1970s still exist. What was interesting about the majority decision is that it did not recognize that they were ignoring or overturning any precedents. The majority just disregarded them in defining new standards. In fact, that is what the dissenting minority Justices, Stevens and Blackmun, said: Justice Stevens, writing for four justices, referred to the "majority's facile treatment of settled law"[27] and stated that their "casual—almost summary—rejection of the statutory construction that developed in the wake of *Griggs* is most disturbing."[28] Stevens added that the majority was "[t]urning a blind eye to the meaning and purpose of Title VII" and lamented the conservative majority's "latest sojourn into judicial activism."[29]

Specifically, one thing that the majority did was to change the burden of proof. The majority ruling put the burden of persuasion on the plaintiffs from start to end, which was a change in law. Moreover, the majority demanded a clear showing of a direct causal link between specific business practices and the alleged discriminatory impact. As such, they required a disaggregation of interrelated, historically developed institutional relations into discrete elements of the labor supply line in ways that implicitly gutted the structural logic of disparate impact claims. The majority also expanded the "business necessity" defense to the point where, as Justice White implies at one point, the prerogatives of employers almost always will and should prevail. And the majority expanded the market defense in the process, so that, as one female pay equity activist whom I interviewed long ago put it, "discrimination is all right if everyone else does it."

Another key point was the allegation that the workers did not show sufficient interest in the better jobs because they could not demonstrate that any one worker engaged in protracted efforts to move out of the line jobs into the management jobs. This is in an industry where for eighty years, only Asian-Americans and Native Americans worked on the floor processing fish, and only whites were hired in the other jobs! The plaintiffs were blamed because they did not try hard enough to break that historically rigid barrier. The Court held that each aggrieved worker would have to bring an individual lawsuit, and each lawsuit would have to show that the plaintiff made a strong effort to break into those jobs. The prob-

27. *Id.* at 664 (Stevens, J., dissenting).
28. *Id.* at 671–72.
29. *Id.* at 663.

lem is that the workers needed to be more entrepreneurial, as neoliberals put it. We've heard this about workers, right? This is the new model that Nancy Reichman was talking about. That is what the majority of Justices reasoned in *Wards Cove*. It is an interesting claim for lots of reasons, not least that one of the "unskilled" plaintiffs went on to become an architect and another a graduate student in public administration. In dismissing the plaintiffs' claims, Justice White made clear whose interests should be the base line: "Courts are generally less competent than employers to restructure business practices; consequently, the judiciary should proceed with care before mandating that an employer must adopt a[n] alternative . . . hiring practice in response to a Title VII suit."[30] The dissenters again questioned these claims by the majority about legal justification for judicial deference to employer prerogatives.

In short, this case erased both precedents and critical social facts.[31] And in the pay-equity movement in 1989, everybody saw this ruling as the death of pay-equity claims. If these were the new standards articulated by the highest court in the land, then the possibilities for those elements of disparate impact that were critical to the structural challenge to discrimination in the workplace were now erased history. Many of the activists in the pay-equity movement joined the *Wards Cove* plaintiffs and other activists to push for the 1991 Civil Rights Act. As many of you know, that Act did make some changes that were favorable to certain elements of disparate treatment cases, but the Act did little to restore those elements that were favorable to disparate impact. We know the outcome of this. If you look historically at legal activity after 1991—here I'm using the Nielsen and Nelson data—there was a dramatic increase from 1987 to 2003 in the amount of employment litigation under the Civil Rights Act. But what they show is that almost all of the legal action was individualized disparate treatment cases. To refer to their data, only 6% of the cases included between two and ten plaintiffs. Only .05% of cases had more than ten plaintiffs, which is a minimum for any meaningful class action. "Collective legal mobilization is rare," they conclude.[32] That's a dramatic change from the 1970s, when studies show that far more civil rights cases were class action cases.

So how did this dramatic change occur? I think this was a pivotal moment when the Court begins to take apart structural challenges in a number of rulings. And we've seen other cases that have been talked about over the last two days where this has continued on in various other

30. *Id.* at 661 (majority opinion) (citation omitted) (internal quotation marks omitted).

31. Justice Blackmun's dissent speaks to the erasure of social facts: "One wonders whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was." *Id.* at 662 (Blackmun, J., dissenting).

32. Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 189 (2010).

elements: undercutting capacity for class action, for challenging vicarious liability, the *Ricci*[33] and *Walmart*[34] cases—all of which were outcomes of rulings making structural challenges and collectivist kinds of remedies difficult if not impossible.

I should mention—and this is the part of the book that we're writing—that this was certainly not a matter of just the courts acting alone; this shift was part of a concerted coalitional strategy. Big business began to organize in the early 1970s with the Business Roundtable, and the Chamber of Commerce began to make a concerted effort to take away these efforts of workers to regain voice and position and to challenge systematic discrimination and empower unions in the workplace. They developed sophisticated strategies to achieve those ends, and that included working through the Reagan Administration. We see in the beginnings of the Reagan Administration that one of the key tools was the claim about racial and gender "quotas." Disparate impact claims, it was claimed, were all about installing quotas. This is interesting because the briefs in the *Wards Cove* case that mentioned quotas were from the Chamber of Commerce, from the U.S. government, and other business interests. However, the plaintiffs in the case never asked for quotas as remedies. We went back through the whole history of the case, and they never mention quotas once. Then the Supreme Court comes along and says that the case was about quotas, even while the majority never talks about actual conditions in the workplace. Instead they wrote along the lines of "Let's imagine that if we granted plaintiffs what they requested in this case, what would employers do? They'd have to create quotas. We have said quotas are not appropriate responses to the problem of discrimination, so therefore the employers would become discriminators if they used quotas." This is curious logic not only because it is ungrounded in the case history and purely hypothetical, but also because many scholarly studies have shown that employers almost never create quotas in response to these kinds of problems.[35] It's all fantasy.

And that is, I think, the situation we find ourselves in today. All of what we've seen is that we're dealing with a context in which big business has been very, very effective in preventing collective action by workers, both through unions and through class action litigation. I coauthored a book called *Distorting the Law*,[36] which is about the attempt of big business to undercut tort litigation, and to create the stigma of the individual tort litigant as being frivolous, filing frivolous lawsuits and being selfish and greedy, and the tort lawyer as just a greedy, self-

33. Ricci v. DeStefano, 557 U.S. 557 (2009).

34. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

35. Robin Stryker, *Disparate Impact and the Quota Debates: Law, Labor Market Sociology, and Equal Employment Policies*, 42 SOC. Q. 13, 29–36 (2001).

36. WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004).

interested thug. The same thing has gone on in workplace discrimination cases. There's been massive public campaign to stigmatize those who would speak up about discrimination and injustice in the workplace. And that is one key part of what we usually talk about with regard to the neoliberal era. Neoliberalism is the reassertion of the priority of markets, of property ownership, contracts, and competition over the premises of equality.

This development requires us to reconsider the basic promises of legal equality and rights in a liberal society. On one hand, we have a tradition of property-based, market-based, contractarian rights about ownership and about the power and prerogative of private business owners. But we also have rights to equality, to equality as citizens to participate together in collective governance. In the simplest or broadest terms, those equality rights have always been the key normative resource for subaltern groups—people of color, women, immigrants, low-income workers, the poor—to challenge the persistent material reality of social inequality. But what has happened now is that the language of equality has been eviscerated so that the whole political realm is permeated by practices and premises that are grounded in contractarian, proprietarian, market-based logics. The worker is now imagined as the entrepreneur in competition with everyone else for scarce, low-paying jobs, individualizing struggle in ways that only make it more difficult for collective challenge to hierarchical power. Key legal resources that enabled such collective challenges have been erased, or at least eroded, in civil rights law. And in the process, the older structural logics of discrimination have been forgotten. As Robert Cover once argued, the legal system systematically "forgets" a lot of visions of rights and justice, because only the winners of lawsuits continue on as part of the story, and those who either settle or maybe lose are just forgotten in history.[37] And that is what happened in these struggles to a large extent. So again, my interest as a sociolegal scholar is to recover that part of history**.**

## CONCLUSION

To sum up, I want to say that the problem is not the intrinsic limitations of rights. It's not necessarily the limitations of litigation. The problem is in the killing of those legal resources of specific rights constructions and litigation opportunities that once supported collective workplace politics, what Robert Cover called "jurisgenetic" politics of visionary social justice from below.[38]

I put up on the screen before my talk a picture of Tyree Scott. Scott was an African-American who fought as a marine in Vietnam, came back

37. *See* Robert M. Cover, *The Supreme Court, 1982 Term–Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 47–49 (1983).

38. *See id.* at 11.

home, but could not find work as an electrician with his father because they were squeezed out of the building trades in Seattle, which were controlled by all-white unions. Tyree formed his own all-black union. He set up a public interest law firm of nonlawyers, called LELO (Labor and Employment Law Office). The LELO leaders were the architects of the *Wards Cove* case. The picture I put up before was a letter from LELO worker activists that expressed some disagreement with their lawyer over continuing to litigate under the 1991 Civil Rights Act. Their whole argument was that law is not neutral and apolitical. Law is simply a site of the contestation between the haves and the have-nots. We have to view law in that way, Tyree always stressed, as in denying it we will miss what is really going on. His aim was not to dismiss law and rights as meaningless, but rather to raise the bar for figuring out how to make rights real.

And that is how I think about that moment of political activism around workplace discrimination in the 1970s and 1980s. Again, it was not just around gender-based wage pay equity; a lot of activism was around race, by blacks and Asian-Americans and Latinos. The trio of cases that included *Wards Cove* was part of a broad, diffuse, largely uncoordinated movement involving legal cases by minority and female workers—all expressing similar political aspirations for equality and justice, from the bottom up, each mobilizing around lawsuits and Title VII claims just like we see in pay equity cases.

So where does leave us now? One strategy might be to imagine how can we reclaim the 1964 or 1991 Civil Rights Acts or write a new Civil Rights Act. The plaintiffs in the *Wards Cove* case, immediately after what they thought was a failure of the 1991 Civil Rights Act, formed a national campaign and went around trying to build support for what they called the Third Reconstruction of Civil Rights. Their goal was a new Civil Rights Act that restored disparate impact and related challenges to institutionalized inequality. However, they gave up after a number of years, as even during the Clinton years there was no support for the cause. They could not find a sympathetic public, the labor unions gave up, women's groups focused on other issues, and there was no one in federal government paying attention. I do not want to rule out the vision of restoring a new civil rights act, but I am skeptical.

I think, at the very least, what we need to do instead is to draw on the power and importance of the structural challenges—structural logics of inequality—in a host of new, more disaggregated ways. I tend to think that antidiscrimination, despite the ongoing radical success of LGBT advocates, is exhausted as a framework for challenging systemic economic inequality that most affects people of color and women. I am not urging abandoning intent-based civil rights advocacy, but we need to move beyond it. If we want to take the next step forward, we need to focus directly on the bottom two-thirds of society, which is radically

underpaid, exploited, and insecure. We need to think about a menu of different but interrelated ways that we can bring empowerment through wages and work opportunities to them. Then we can continue to deal with the other manifestations of race, gender, and sexual discrimination. If we really want to deal with the economic issues, with money, sex, and power, we need to think and talk about it differently. Change can happen, but it is going to have to come from below.

This means that we need to build stronger bonds among progressive groups committed to social justice. At the policy level, I suggest several priorities. First, we need to raise dramatically minimum wage standards, both at local levels and at the national level. The struggle to raise the state minimum wage in Washington to $15, which has already succeeded in some local levels, is a place to begin. I also propose that we go back to the Fair Labor Standards Act and begin to think about various ways to build on that. Maybe go back to the old protective legislation model, which paved the way for a variety of the 1930s reforms that were not gender-specific, and think about what we might do about issues with hours, what we need to do with family-leave policies, and the like. I will be honest that I don't have the answers, except that I think we need to look for new angles to deal with the big problems.

In short, we need a comprehensive set of reforms. The 1964 Civil Rights Act did not offer that, but many people took inspiration from the Act to think broadly, and we should take inspiration from that past. But even if we shift focus away from the logic of antidiscrimination, we should not give up on rights. Rights are very important resources. Our legacy of liberal rights authorizes claims of equal citizenship, and jobs, work activity, and work income are very important preconditions for becoming a respected, active citizen in public life. We find ourselves in a period where those claims of equality have been significantly diminished and overpowered by the claims of markets and property ownership and private prerogative. But, I think that is where we have to resume the struggles—back on the core terrain of making equal rights mean something again. Let us not abandon that part of the fight.

One last, closely related point: I think that we must make the important move to begin to appeal much more to positive socioeconomic rights embedded in international human rights traditions. The United States is woefully behind the world in taking human rights seriously. When I look around and say, "what discursive resources can be a lever for change?" I repeatedly come back to the human rights principles of positive socioeconomic rights. This tradition animated A. Philip Randolph and Martin Luther King, a host of feminist activists including today Martha Nussbaum, and the Filipino cannery worker activists who were defeated by the neoliberal logic of the U.S. Supreme Court. Making human rights discourse a reality is not going to happen tomorrow in the United States; it is not going to happen even in my lifetime. But I do

believe it is among the most promising routes for progressive, egalitarian, democratic change. Social rights fits well with claims of higher living wage, gender- and race-based wage equity, accessible health care for all, family leave, and a host of other causes that we have discussed at this conference. Framing claims as human rights will not guarantee a better world, but it is one of the most promising normative strategies for making equal rights a real, meaningful agenda for social transformation.