Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*

tpavone@princeton.edu

April 3, 2015

1 Citation

McCann, Michael. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization.* Chicago, IL: University of Chicago Press.

2 Abstract

Via a case study of the pay equity movement's legal mobilization in the 1970s and 1980s, Michael McCann's *Rights at Work* demonstrates how litigation can provide empowering, identity-constituting experiences for social movement participants even when it fails to produce large-scale, top-down changes in public policy. Specifically, although the struggle for pay equity emerged following women's increasing participation in the labor market, within unions, and via the feminist movement, it was ultimately the turn to litigation that had the most profound and long-lasting impact on female workers. While early courtroom victories were quickly replaced by repeated defeats following the rise of the conservative legal movement in the 1980s, the beneficial legacy of legal mobilization was captured by its ability provide politicizing experiences for women workers, to legitimize their claims via a familiar rights discourse, to forge political opportunities for collective action by raising expectations, and to cultivate an enduring legal consciousness. Legal mobilization may seldom be able to foster large-scale, top-down policy changes, but it is extremely effective in providing a forum for the reconstitution of social relationships and identities. And while law may well represent an unprincipled source of priviledged power, it can simultaneously capture the aspirations of those most in need, thereby becoming a source of entitlement, inclusion, and empowerment.

3 The Origins of the Pay Equity Movement

3.1 The Emergence of Political Opportunities for Collective Action

McCann draws on the "political opportunity" and "resource mobilization" approaches to the study of social movements to discuss the genesis of the pay equity movement in the 1970s (McCann 1994: 93). First, the changing postwar work environment is highlighted as an important precondition for mobilization, as "the rapid and steady historical entry of women into the workplace... disrupted traditional expectations by and about women regarding their "proper" social roles" (Ibid: 97). Once part of the labor force, however, women found rampant discrimination and even gender-based segregation. These pernicious practices had the unintended consequence of forging solidarity amongst female workers: by "concentrat[ing] large numbers of women- clericals, key data operators, nurses, salespersons, social workers, librarians, teachers, even factory workers in similarly exploitative and physically proximate work situations," employers "encourag[ed] a greater group identity among women" (Ibid: 113).

3.2 Organizational Support and Resource Mobilization

Once solidarity ties had been forged and common grievances shared, women became increasingly active within labor unions. In fact, "the unionization of women was an essential precondition, as well as a result, of pay equity movement," and unsurprisingly unions became "the primary source of money for technical

research, formal legal action, lobbying efforts, and publicity around the [pay equity] issue" (Ibid: 118-119). Feminist groups, like the National Organization for Women (NOW), also became an important ally (Ibid: 120). Lawyers quickly became involved in the campaign as well, and the pay equity movement soon began to draw on the "rich legacy of rights-based legal reform within modern American political culture" (Ibid: 130; 100). In particular, "the the legacy of egalitarian rights embodied in antidiscrimination law provided a compelling conceptual frame for making sense of existing injustices and for demanding remedial action" (Ibid: 65).

4 Legal Mobilization for Pay Equity: Description of Events

4.1 Early Courtroom Successes

Legal mobilization for pay equity centered on two interrelated federal statutes: (i) the Equal Pay Act of 1963, which "prohibits employers from paying unequal ages to men and women who perform equal work;" (ii) Title VII of the 1964 Civil Rights Act, which includes provisions that might "not [be] explicitly limited to the equal work requirement [but] prohibit discrimination in compensation on the basis of race, religion, sex, or national origin" (Ibid: 35-36).

At first, pay equity advocates won what were perceived to be some important victories. Two examples in particular are worth mentioning. First, the Supreme Court's *Griggs v. Duke Power Co.* (1971) "provided new language that shifted the focus of fighting discrimination from discrete acts of individual "ill will" to systematic biases in institutional practices and policies... This judicial recognition of "systemic discrimination" provided a direct catalyst of unparalleled significance to new thinking and action on pay equity issues (Ibid: 50). Second, in *County of Washington v. Gunther* (1981) the Supreme Court "extended substantial support to the pay equity idea ... While refusing to explicitly endorse the comparable worth idea, the majority's willingness to extend Title VII provisions to cover discrimination among different jobs opened a potentially large crack in the door to future legal claims" (Ibid: 53). These courtroom cases generated a "tremendous amount of mainstream media attention," which tellingly focused disproportionately on litigation rather than other political actions by the pay equity movement, such as labor strikes, union negotiation battles, and electoral campaigns (Ibid: 58-59). In short, these court cases contributed to women's "perception of expanded opportunities for effective political challenge" (Ibid: 94).

4.2 The Closing of Political Opportunities for Litigation

Under the auspices of the Reagan Administration, in the mid-1980s the conservative legal movement had begun to permate American jurisprudence, and "the courts began closing the door of access to gender-based comparable worth claims" (Ibid: 84). It seemed that "all employers had to do to win judicial vindication in most cases during the 1980s ... was simply to invoke a "free market" defense at every turn... and, if all else fails, to justify discriminatory policies as a legitimate business practice even where a prima facie case has been made" (Ibid: 41). Short of "smoking gun" evidence that "employers consciously designed action to exploit women," judges were increasingly hostile to the claims of the pay equity movement (Ibid: 39). Hence in the final analysis the pay equity movement achieved "only limited success in federal courts," and McCann's interviewees recalled "much bitterness about the palpable conservative turn of the judiciary and government generally," along with a sense that legal mobilization had been "sapped of its earlier energy" (Ibid: 47; 279). Once courtroom defeats became frequent, movement-associated lawyers were "quick to halt or revise their reliance on the courts" (Ibid: 294).

5 The Constitutive Power of Legal Mobilization for Pay Equity

Despite the short-lived, and ultimately minor, courtroom successes obtained by the pay equity movement, McCann argues that litigation strategies had a series of profound - and ultimately beneficial - effects, to which we now turn.

5.1 Providing Politicizing Experiences

Activists are not born - they are forged by social experience. Most of the pay equity activists interviewed by McCann "recounted... remarkably parallel stories about specific politicizing experiences that transformed them into committed activists" (Ibid: 132). In particular, McCann found that a "large majority" of his interviewees "credited the [*County of Washington v. Gunther*] decision and other early cases as primary educational cues that generated their own initial personal interest and involvement in the cause" (Ibid: 56).

5.2 Legitimizing Claims via Rights Discourse

Drawing from previous litigation efforts by the civil rights movement, pay equity activists drew upon a rich and empowering legal discourse. "Rights discourse," argues McCann, "empowered women workers by enabling them to "name" - i.e. to identify and criticize - hierarchical relations in familiar, "sensible" ways" (Ibid: 65). Hence the pay equity movement was able to strategically draw on a language imbued with legitimacy to advance its claims. As economist and pay equity advocate Heidi Hartmann noted, "once the idea of comparable worth or pay equity could be framed by lawyers in terms of rights against wage discrimination, it took on a lot of credibility and power" (Ibid: 51).

5.3 Forging Political Opportunities and Raising Expectations

Early courtroom victories enabled pay equity activists to reference litigation "as a tactical resource to raise expectations among women workers that wage reform was possible. As a result, legal action greatly enhanced the opportunities for effective political organizing around the pay equity issue" (ibid: 48). Rights discourse empowered women to re-imagine the real, or to "imagine an act in light of rights that have not been formally recognized or enforced" (Ibid: 7). This, in turn, expanded the structure of political opportunities for further legal mobilization, as "new hopes and possibilities opened up by early litigation were translated into a generative force at the grassroots level" (Ibid: 58).

5.4 Cultivating an Enduring Legal Consciousness

What may have originated as the tactical referencing of courtroom victories to raise expectations and legitimate the pay equity movement eventually provoked a profound identity transformation. McCann's interviewees "repeatedly emphasized... that perhaps the single most important achievement of the movement has been the transformations in many working womens understandings, commitments, and affiliations - i.e., in their hearts, minds, and social identities" (Ibid: 230). In particular, union activists repeatedly spoke "in enthusiastic and expansive terms" about how the benefits of legal mobilization for pay equity "transcended "mere" economic redistribution" (Ibid: 258). This "legal consciousness" was instilled not so much via "abstract intellectual inquiry" but from the "practical experience in political struggle for new rights" that followed initial courtroom victories (Ibid: 272). Importantly, this identity-transformation endured the closing of opportunities for litigation in the 1980s.

6 Concluding Remarks

6.1 Against "Neo-realist" Portrayals of Litigation as a "Hollow Hope"

At its core, McCann's is a rebuke of Gerald Rosenberg's skeptical analysis of courts' ability to provoke social change due to their impotence to autonomously bring about large-scale, top-down public policy revisions. First, such a "neo-realist approach... tends to discount the reciprocal, interactive, relational terms of laws constitutive power. By reducing legal agency to judicial elites, the top-down approach obscures the subtle but significant ways that judicial actions shape the strategic landscape within which citizens (including elites) negotiate relations with each other as legal subjects... Likewise, the neo-realist model of impact greatly privileges attention to direct over indirect effects of courts... [as well as a] tendency... to isolate and compare tactics in zero-sum terms" (Ibid: 291). Second, by focusing solely on public policy outcomes rather than the identity-forging experiences, neo-realist scholars ignore an important potential outcome of legal mobilization, and "without directly examining those various meanings, tactics, and goals - i.e. the

legal consciousness - of activists themselves, it is rather presumptuous to judge the relative effectiveness of their actions" (Ibid: 292). Finally, neo-realist accounts greatly "exaggerate" the "ideological cooptation of movement activists by law" and the demobilization resulting from litigations strategies: In fact, "there is little evidence that litigation did in fact undermine grassroots activation anywhere to any significant degree" (Ibid: 232; 83).

6.2 The Inner Tensions and Duality of Law

McCann's study is meant to showcase how "there is no essential reality of law to discover independent of multiple partially constitutive social practices" that are oftentimes in tension with one another (Ibid: 15). Law is not a tool for settling disputes as much as it is a "terrain of conflict" or an "arena of struggle:" Indeed, "the very idea of settled law itself is something of an oxymoron in this sense. Legal norms and rights rarely persist uncontested, but are subject to constant battles over official enforcement, extension to different relational contexts, and substantive reformulation by variously situated citizens" (Ibid: 304). These inner conflicts within the law incentivize social movement actors to adopt a dual perspective: "People at the "bottom" are used to seeing law in two ways at once. From an "outsider" perspective, they view law critically as an unprincipled source of privileged power. From an "insider" perspective, they adopt an "aspirational" view of law as a potential source of entitlement, inclusion, and empowerment" (Ibid: 233). It is precisely the thickness and ambiguity of law, then, that allows it to simultaneously serve as a resource to constrain and enable social change.