Writing Labor and Law into Black Power History

In 2006 I presented a similar paper at a similarly fashioned academic gathering at the University of Illinois Urbana-Champaign. At the time of that meeting there had begun an emerging discourse questioning the length – and eventually, the depth and breadth - of the Black Freedom Struggle in the United States. Some years later I return to this paper and ask that same research question, as now scholars have made important strides in adding useful scholarly precepts to these very important questions into the ways to best frame, re-frame, periodize and more sophisticatedly consider African American demands for full equality. And, maybe most usefully, scholars have considered the difficulty and problems associated with such attempts. While I am not raising any challenges to current ideas and arguments stemming from recent debates, I do want to add one important component to it’s mix by again raising that question from 2006: Where do lawyers – in fact, civil rights lawyers - fit in the arena of Black Power? If they fit all… And, indeed, I do ask; with hopes that the “Q&A” might push this question into a reasonably cogent location upon which to build subsequent investigations.

I argued at the Urbana-Champaign meeting in 2006 that by the late sixties, a second generation of civil rights lawyers had emerged who – with the civil rights acts and a so-called “activist” Supreme Court at their disposal - pushed the limits of the legislation to not only recognize the current realities of discrimination, but to also address and do away with its remnants, which required some legally recognized consideration that prior discrimination indeed had residual effects. I also argued that this post-1965 legal activism is most accurately viewed as an extension and merger of successful civil rights legal activism and emerging Black Power militancy. These approaches toward Black equality I believe actually converged noticeably in the arena of employment/labor law radicalism and are represented in the legal jockeying that
produced significant improvements to the occupational status of Blacks and other groups protected under Title VII of the Civil Rights Act of 1964. I now return to the question after other projects have relinquished my curiosity. Today, I resubmit the significance of this convergence and go one step further in questioning whether this brand of activism, at that important juncture in the Black Freedom Struggle, is best positioned within Black Power scholarship? If there is any quibble then with our current scholarly debates on the long, deep and wide movement is that we have failed to properly position the legal architects of the movement since they too were a key part of the ever-evolving movement landscape.

In a previous book I authored titled, Race, Labor and Civil Rights: Griggs v. Duke Power and the Struggle for Equal Employment Opportunity,¹ I documented that as an outgrowth of the Griggs case and the Title VII campaign the spawned it and thousands of other cases challenging employment discrimination, blacks and other protected groups gained almost immediate improvements in their occupational status and in subsequent cases were awarded, among other previously denied benefits, back-pay for years of discriminatory labor practices. As with most legal histories of landmark Supreme Court decisions, I explored the role clients’ played in the process of heroically bringing cases to lawyers who used their legal acumen to argue on their clients’s behalf. Staying with the same scholarly approaches, I also considered the arguments lawyers made that swayed the federal courts in favor of expanding legal interpretations of discrimination and thus expanding the reach of Title VII and extending the authority of the Equal Employment Opportunities Commission (EEOC). In this particular case, Griggs emerged as an extension of the coordinated legal activism that led to important courtroom victories for over a generation: victories that supported and encouraged out-of-court challenges to segregation.

Beginning its trek through the federal courts in 1965 and decided in 1971, *Griggs* though winds through the courts during the years that witnessed more radical forms of agitation from and within the Black Freedom Struggle. Such expressions, and the more radical outbursts of the moment, certainly impacted demands for equality in the courtroom as evidenced by the very arguments espoused by lawyers who had also grown frustrated with the slow and deliberate pace of socio-economic change, and most directly were frustrated with the recalcitrance of industry in fairly hiring, promoting and paying black workers.\(^2\)

A subsidiary matter that is of some importance thus is the very question of where demands for fair employment and jobs fit more broadly in the scholarship on the Black Freedom Struggle. The following quote from Nancy MacLean helps contextualize this point. In her work *Freedom is Not Enough: The Opening of the American Workplace*, MacLean reinterprets the civil rights movement as one that indeed prioritized employment opportunities as a seminal component to the struggle for equality. MacLean writes, “For various reasons, beyond the ranks of labor historians, most progressive scholars lost whatever interest they once had in issues involving work and the labor movement. Those who studied social movements tended to focus on the young activists of the Student Non-Violent Coordinating Committee (SNCC), Students for a Democratic Society (SDS), and women’s liberation groups and largely wrote off the older members and staff of organizations such as the NAACP, the Urban League...etc. Nearly all American social studies and history students today learn of the student-led lunch counter sit-ins, yet few know anything of the quest for good jobs that was such an important part of the black

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\(^2\) Smith, *Race, Labor & Civil Rights*
freedom movement.” As a fellow historian whispered to me at this year’s OAH (2012) meeting in Milwaukee, “Doesn’t anyone care about jobs anymore?”

I submit today that when interrogating and reconsidering the monumental efforts to alter and abolish labor injustice, and thus economic apartheid in this country, the rising tide of Black Power militancy may have indeed provided the impetus for the Title VII campaign’s legally scripted demands to move beyond any token acceptance of industrial desegregation. Similarly, though this second generation of NAACP attorneys and their fellow association client-activists led the charge for employment inclusion, these southern militants have virtually disappeared from movement scholarship during the seminal years following the passage of the Civil Rights Acts of 1964 and 1965. Yet, NAACP lawyers and clients sought to energize Title VII of the Civil Rights Act of 1964 by boldly using the enfeebled employment law to challenge white supremacy in employment and labor institutions across the South, with those victories reverberating across the country. In short, it was this moment and this campaign that led to whatever versions of equal employment opportunity we now enjoy with quite a bit of entitlement.

It is in this rich history of labor radicalism where we see the two, Black Power militancy and civil rights legal activism, meet. Yet, as lawyers (and clients) voiced legally astute calls for altering and abolishing unfair labor practices, demanded retroactive application of the employment law to undue the legacies of employment bias, relied on class-action suits to impact mass numbers of workers and thus change institutions and institutional cultures more immediately, and demanded that the courts consider discrimination not as a narrowly defined

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4 While I have documented these efforts, Robert Belton, former LDF attorney and currently a law professor at Vanderbilt University has written extensively on the topic. Belton’s work has provided the dense, legal discussion of the seminal Title VII cases. See, Robert Belton, “Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcements and Judicial Developments,” *St. Louis University Law Journal*, 20 (1976).
question of individual treatment but as a broader definition that questions longstanding impact, scholars may very well find threads here that more closely resemble the radicalism of the late sixties than the integrationist approaches evidenced in earlier legal victories.

Such labor-spawned legal activism was no small movement. Supreme Court and industry records indicate that the Title VII campaign of the late 1960s was a direct attack on the privileged, economic supremacy to which white males particularly had grown accustomed. This carefully orchestrated movement relied on 1) the individual fortitude of black workers who bravely challenged the employment practices and procedures of powerful corporations, and 2) the legal ingenuity of civil rights attorneys who did battle in hostile southern courts and convinced federal judges to accept broader definitions of discrimination supported by congressional legislation. Both the lawyers and their client-activists assertively demanded the full recognition of their manhood, womanhood and individual identity as is predicated by one’s employment options. After all, our jobs define, often times over-defining, who we are and our existence as Americans. In these United States, from its inception, employment and the economic enterprise have been directly tied to fundamental ideas and definitions of citizenship.

As a means of furthering the movement for racial equality into stages where practical outcomes could be witnessed, courtroom protests supplanted direct action protests and a steady process of economic redistribution was underway through Title VII litigation, which I need mention, also helped mature a feeble EEOC. Frankly, there were few if any developments during the early stages of the modern civil rights era – or the early sixties even - that suggested rampant, racially motivated employment discrimination would end. The efforts of A. Phillip Randolph in the 1940s were thwarted by congressional acquiescence to Southern political power and the preservation of whiteness in the creation of a pathetic Fair Employment Practices Commission.
and its quick dissolution, which was in many ways the parent to the EEOC. But this was not a distant memory by the 1960s. The legal efforts to embolden Title VII with some bite came from the efforts of clients and lawyers who understood their role in demanding federal legislation do more than rest as lip-service, especially at a moment when the federal courts seemed amenable to supporting claims that would lead to practical and measurable improvements in workers’ daily lives and their wages. In many ways, this very idea was most evident in the careful cultivation of the Disparate Impact Theory of discrimination, which received judicial review and acceptance in 1971 in the landmark Title VII case *Griggs v. Duke Power*.

Disparate impact is a definition of discrimination that disregards intent to discriminate and instead critiques the impact, effect and outcomes of employment practices. Disparate impact discrimination, because of its effect standard, questions structural problems associated with discrimination because it ignores treatment. To help further bridge the link with Black Power philosophies, disparate impact calls for an appraisal of the entire institution and that institution’s relationship with the classes of employees it affects and not just the unitary experiences of individual versus individual. Disparate impact thus became the legally recognized standard that showed the most promise in eradicating egregious, pattern-centered discrimination, but also less obvious discrimination that had similar suffocating corollaries.5

As a caveat, employment law was not the only arena where civil rights attorneys negotiated an effect standard of discrimination. While there was no clear enunciation of a

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disparate impact theory until Griggs in 1971, as early as the Brown decision of 1954 the civil rights community and its allies had begun the task of convincing the courts to recognize an effect standard that would minimize intent-oriented doctrinal standards. Along with education and eventually employment, the civil rights bar also pushed for an effect standard in landmark voting cases such as Gomillion v. Lightfoot (1960). In every civil rights arena, the effect standard of discrimination was regularly the weapon of choice in the courtroom with the legal cultivation of the this standard progresses throughout the protest era of the sixties.

The disparate impact doctrine was a particularly important tool upon which the civil rights bar relied to outmaneuver employers who had begun to devise more cleverly concealed practices that further obstructed black employment progress. In the wake of the passage of Title VII, as trial records from a number of early Title VII cases indicate, many companies began using standardized tests and other seemingly neutral mechanisms to continue to disqualify black workers while meeting the statutory language of the new employment law. Some companies would even shift black workers out of Jim Crow departments to newly created jobs that offered no chance for advancement, but still preserved white supremacy in that workforce and met the muster of the law. While few black workers had ever heard the phrase disparate impact, they certainly knew it when they experienced it, especially on pay-day. But, those who took direct part in the Title VII campaign were prompted by NAACP headquarters and their Legal Defense Fund lawyers to be aware of these practices. Willie Boyd, the key plaintiff in the Griggs case affirmed these realities in this anecdote from 1966: “What they were doing,” he explained, “as one would come capable or qualified, they would pick some kind of a job to give him that was out of where you were, but wasn’t going any where. So you still couldn’t get no where. They’d
put you in the (position) and you didn’t go no further, you’d die right there. No more promotions, no more money, nothing.”6

As is also regularly the case with legal histories of landmark Supreme Court decisions, I tried to emphasize the role of the plaintiffs in the "The Title VII" campaign which was held in the South of the US. By the late sixties, civil rights activists remained engaged in the movement due to their longstanding efforts as NAACP members and black power champions in their local communities. Boyd was emblematic of this tradition because he was a local NAACP leader, like many plaintiffs in the Title VII Campaign, and he engaged with local lawyers to sue his employer Duke Power. A middle aged, black male southerner decided to sue one of the most powerful companies in the entire nation, in a region overly welcoming to business and excessively hostile to all workers, but especially egregious in their treatment of black workers. For decades the region's white opposition had silenced agitators with a range of violent reprisal that were oftentimes fatal. Boyd, however, from relatively isolated Reidsville, NC took his employer to court for better employment options with the weight of the Title VII Rights Act in his back pocket and the expertise of several highly skilled, though young, civil rights lawyers in nearby Charlotte, NC. I call Boyd and others engaged in such litigation black power champions because they went to court demanding not only better jobs and pay, but with the aid of their lawyers, sought structural changes in workplaces and companies that would significantly improve their life options. In many of the key Title VII Campaign cases, local NAACP leaders served as labor radicals in mobilizing fellow workers to push for employment changes, and thus realizing some forms of economic redistribution.7

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6 Willie Boyd interview by author, July 2001, Reidsville, NC; Smith, Race, Labor & Civil Rights.
7 See Smith, MacLean and Timothy J. Minchin, Hiring the Black Worker; The Racial Integration of the Southern Textile Industry, 1960-1980, (Chapel Hill: The University of North Carolina Press, 1999) –This works explores the racial integration of the textile mill industry in the Carolinas. Its significance is best represented by the reality that
Blatant and less obvious employment discrimination was commonplace until the *Griggs* opinion in 1971, a rather recent year to some of us. And while *Griggs* provided the legal authority to stem the tide of employment injustice, it was the first of many cases to move equal employment opportunity into a meaningful realm. An example of the ways civil rights lawyers argued, I believe, for more aggressive indeed radical interpretations of the employment law can be found in the trial records of the case. During proceedings at the District Court, Julius Chambers engaged the following debate with Judge Eugene Gordon. Regarding the question of whether discriminatory practices on the part of the company prior to Title VII were reviewable, Chambers and Gordon had this verbal spar.

*Mr. Chambers:* Your Honor, might I make one inquiry about the Court’s ruling? Is it the Court’s ruling that no act of a Company occurring prior to the effective date of the Civil Rights Act of ’64, is competent for any purpose?

*The Court:* I have ruled that it is not competent for what you are talking about in this complaint. You complained that they’re in violation of Title 7, specifically, Section so and so of the Act that we referred to as the Civil Rights Act. That’s what you said. You referred, Mr. Chambers, to a Section – that Section became effective in July of 1965. Now how could something without the issue as to whether they are in violation of that Act – how would something that happened prior to its effective date – tell me -

*Mr. Chambers:* Even what transpired prior to the effective date of the Act might still presently affect rights of the employees today, subsequent to the effective date of the Act?

*The Court:* Yes.

*Mr. Chambers:* If for instance, a Company discriminated in its initial hiring practice, prior to the effective date of the Act, which admittedly was not prohibited by Federal Statute, and put all Negro employees as Janitors and now it poses a criteria for Negro employees to become employed in positions that were formerly excluded.

*The Court:* Let’s lift it out of the context of Civil Rights for a moment, and say you have an Act that is passed or a law that is passed, and then a person is accused of violating that law. It is just inconceivable to me that it would have value in deciding the issue of whether he was violating the Act, after its effective date that you go back and show what he was doing prior to that date.

*Mr. Chambers:* Suppose we consider the school cases, where prior to 1954, it was not unconstitutional to discriminate and subsequent to 1954, it became unconstitutional to discriminate, and the Court then talked about the necessity for taking certain corrective steps to eliminate the discriminatory practices that the School Board followed prior to 1954. Now, wouldn’t practices that occurred prior to 1954 be competent evidence in pointing out what the Boards needed to do in order to disestablish –

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success in integrating mills came after the passage of Title VII and Civil Rights Act of 1964. In fact, a major jolt to this development came from the joint efforts of black mill workers and the NAACP
The Court: I don’t think that is analogous to the situation that we have here. As I mentioned, this action is pin-pointed and in a different aspect from that. I don’t think that would be a comparable situation.

The attorneys knew the importance of convincing the courts to consider pre-Act discrimination, and they knew the importance of introducing and thus preserving such arguments on the record for appeal. If the court ignored pre-Act practices and policies that relegated black workers to segregated department, and the effects of those past policies had present repercussions that maintained this segregated department, then the discrimination would of course continue. Especially, as in the case of Duke Power, when the present policies and practices did little to actually eradicate the long-standing practices of discrimination. The NAACP lawyers, the district court transcript shows, were carefully plotting their future legal strategies. Similarly, southern officials – Judge Gordon and Duke Power’s leadership – mimicked southern culture in their efforts to undermine the reach of the civil rights act and dismiss the federal government’s effort to dictate regional employment practices.

Highlighting the effectiveness with which the civil rights bar built its case regarding effect-oriented definitions of discrimination, Chief Justice Warren Burger wrote in his *Griggs* opinion, *Title VII proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation...good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability...the objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices,

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8 “Transcript of Hearing.” United States Supreme Court-Case File., 158-159. This section was quoted from the author’s book *Race, Labor & Civil Rights.*

9 Smith, 124.
procedures, or tests neutral on their face, and even in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices...What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”

The Chief Justice though did not arrive at this summary all his own. And his words seem far less radical today than they were in 1971, especially given the conservative backlash that sought to undermine these types of legal protections.\textsuperscript{11} NAACP-Legal Defense Fund lawyers had engineered a legal climate receptive to claims of equal employment opportunity. Congressional acts of the civil rights era were significant victories, but as many recognized immediately, the laws did little to revamp the proliferation of power equitably across racial and class lines in the United States. But what is clear from the study of civil rights case law during the late sixties and 1970s, civil rights lawyers were clearly engaged with the Black Power movement, if to only help with some of their personal struggles with local law enforcement. Nonetheless the Black Power Era had groomed legal practitioners in a cauldron of radicalism that ultimately impacted their craft. As attorney James Ferguson stated about his work as a civil rights attorney in cases like \textit{Griggs} and others, “We were part of a movement. We weren’t practicing law in the abstract. We were the legal arm of the civil rights movement in North Carolina, and when people wanted a better education for their students...they came to us and wanted to know what they could do...When people looked a the workplace and saw that there were no blacks above the rank of

\textsuperscript{10} \textit{Griggs v. Duke Power}, 401 U.S. 421?\textsuperscript{11} Title VII case law by the 1980s, barely a decade later had emerged hostile to the Disparate Impact doctrine and other tools used to uproot job discrimination.
janitor or chief clerical worker, they wanted to bring about some change...And we felt then that we had a judicial climate that was receptive to the claims we were making.”

The headquarters for the Title VII campaign was the Charlotte-based law firm Chambers, Ferguson, Stein and Lanning. The firm’s leaders Julius Chambers and James Ferguson were native to North Carolina and understood the complexities of southern race relations. They also had been mentored by the likes of Constance Baker Motley, Derrick Bell and other Legal Defense Fund staffers. Yet, they were young, energetic former sit-in leaders and participants who welcomed an increased level of radicalism many have understandably not attributed to the legal architects of the Black Freedom Movement.

The energy these and other civil rights lawyers displayed, alongside their client-activists, was remarkable. In the first year of the Title VII Campaign, Jack Greenberg (former general counsel of LDF) writes, “We filed 476 complaints with the Equal Employment Opportunities Commission (EEOC) in July 1965, right after the Act went into effect, and another 374 soon afterward.” Herbert Hill, NAACP Labor Director during the sixties, would occasionally stop by the EEOC headquarters in Washington, D.C. and dump “a suitcase full of complaints on the desk of the chairman,” demanding the federal commission respond to the needs of black laborer still suffering under the weight of discrimination.13

One important outgrowth of the Title VII project was its impact on litigation stemming from the Carolina based textile industry, which was funneled through the TEAM - the Textile: Employment and Advancement for Minorities. In turn, those cases arising out of the TEAM’s efforts within the textile community significantly propelled Title VII case law as well as the

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12 James E. Ferguson, interview, transcript, Southern Oral History Project, University of North Carolina, Chapel Hill Wilson Library.  
positive shaping of the law and of the EEOC. Black textile workers experienced the same glaring injustices on the job as did most other black industrial workers across the nation; and if theories of race and racism regarding working-class white southerners hold true, maybe even worse injustices. The histories of black textile workers, as chronicled by Timothy Minchin in his book *Hiring the Black Worker; The Racial Integration of the Southern Textile Industry, 1960-1980*, repeat the all too familiar employment narrative for African American laborers, particularly black southerners, as white workers and managers desperately fought to maintain segregated work environments in the textile industry.\(^\text{14}\)

In Charlotte, North Carolina, in January 1967, a textile forum was held and out of which the EEOC promised to make the textiles industry its first target “to win better jobs for Negroes.” “In the vast majority of the textile cases, the plaintiffs were represented by…Julius Chambers and James E. Ferguson. Their Charlotte law firm was at the forefront of a drive to represent black workers and make Title VII of the Civil Rights Act a reality” and as Ferguson put it, to do away with the “labor apartheid” that plagued the South and nation.\(^\text{15}\) Not coincidentally, Chambers’ home and the law offices were bombed in 1971 – the same year that *Griggs* and the landmark busing case *Swann v. Charlotte-Mecklenburg* made it to the Supreme Court. Both cases were engineered out of the Chambers and Ferguson law firm.

“Between 1965 and 1970, LDF brought the cases that cleared away the procedural obstacles to using the 1964 Equal Employment Opportunities Act (Title VII) effectively and later for some years, brought virtually all the cases that gave the law its bite.” And yet, this history of the opening of America’s workplace, borrowing from MacLean, remains virtually silent, not only in Black Power scholarship but also within movement scholarship in general. Maybe the

\(^\text{14}\) Minchin, *Hiring the Black Worker*.
\(^\text{15}\) Ibid.
cause of this slight is due to the complexities associated with this history. While the revolutionary union movements of Detroit, Michigan are clearly a labor response that employs the Black Power ethic, other significant labor movements such as the Title VII legal campaign need a scholarly home. I urge that we begin to re-conceptualize this crucial era of labor and legal jockeying as one where we see a coalescing of Black Power militancy and Civil Rights legal activism. And, one where the radicalism of the moment emerged in the courtroom, though the rhetoric was certainly legally nuanced.