


In Plain Sight: A History of Discrimination in Labor and Employment Laws

By Iris Halpern and Azra Taslimi

More than a year after we witnessed some of the most widespread racial justice protests the country has seen, little has been done to precipitate a more equitable society, and this is particularly true in the American workplace notwithstanding the widespread rhetoric of a racial reckoning. Indeed, if the Covid-19 pandemic has accomplished nothing else, it has exposed the structural inequities of our work world. While "white collar" or "professional" workers were allowed the safety of remote work, "essential workers," disproportionately Black and Brown employees, bore the brunt of illness and death as the pandemic raged.[1] Incidents of racial hate crimes and animus rose sharply.[2] Domestic violence spiked and women have been forced to exit the workforce disproportionally as a result of their caregiving obligations.[3] At the same time, in the United States,

> [t]he past year had been the best time in history to be one of America's 745 billionaires, whose cumulative wealth has grown by an estimated 70 percent since the beginning of the pandemic even as tens of millions of low-wage workers have lost their jobs or their homes. Together, those 745 billionaires are now worth more than the bottom 60 percent of American households combined[.][4]

We were asked by *Trial Talk* to author a piece about how to maximize justice for one's clients through the lens of diversity. As attorneys with a significant practice in employment discrimination, answering that question proves difficult—our entire role, in theory, is to help our clients vindicate their rights against more powerful and well-capitalized forces in society. But this pandemic has starkly elucidated the limitations of pursuing justice exclusively on a case-by-case basis, particularly when, as in our field of practice, some of the very injustices we seek to fight are also found deeply embedded in the laws we rely on, not only perpetuating inequality more broadly but ultimately harming many of our clients as well. Thus, instead of focusing on our day-to-day court room battles, maximizing justice may also require a more structural approach: one that recognizes and addresses the prejudices inhering in our laws even as we use them to advocate for individual clients.

Discriminatory Social and Economic Stratification of the Labor Force

Inequality can be found at every level of American life, but the organization of our economy and labor markets, as well as the laws that regulate them, are inextricably intertwined with historic notions of race, gender, and other endemic cultural fault lines. It is because of the deep-seeded nature of these notions that so little progress has been made at the widespread level, rather than individual cases. That, and because law deemphasizes historical context, most of us do not think about these other angles in our legal practices. A majority of our labor and employment laws seem drafted without reference to race, gender, or other historically marginalized populations. But despite facially neutral language, an adverse impact on these groups not only arose as a consequence of the choices of the language and provisions in these laws but were consciously intended.

Not incidentally, the way law is practiced and talked about deemphasizes history and social, cultural, and political context. This results in further entrenching inequality, just as a corollary exists between an increase in hate crimes and the rise to teach whitewashed history in our schools[5] or the banning of books in our libraries including such books as the Holocaust exploration of *Maus*[6] to works by Toni Morrison, Ta-Nehisi Coates, and Margaret Atwood.[7] The comparison is not to imply that the two are identical phenomenon, but rather, to demonstrate the importance of recognizing and acknowledging the impacts of racial, gendered, and other demographic hierarchies on our systems if we are to truly to attack inequality across our economy, workforce, and society.

Importantly, the very laws we use to combat inequality in the work world oftentimes perpetuates it with respect to different demographic groups, and this is so despite the facial neutrality of such laws. Legislation such as the Fair Labor Standards Act, Social Security Act, National Labor Relations Act and others make no mention of perpetuating racist or sexist labor divisions but were nevertheless drafted to do just that. Likewise, although overtly discriminatory language is not found expressly in our laws, we have conceptualized our labor market around a false dichotomy of skilled and unskilled labor that significantly tracks discriminatory employment practices of the past. Society has adopted this discourse of skilled versus unskilled labor in order to justify the current organization of our economy. Skilled labor entitles one to high wages, good healthcare insurance, generous benefits, power to enforce those legal protections. Unskilled labor, however, provides the opposite: low wages, little if any access to quality healthcare, few benefits, fewer legal protections, and more obstacles to pursuing justice. These distinctions have little to do with whether the work is essential to the functioning of our society, or even its value to the overall economy, and much more to do with our histories of oppression.

In our economy, as in all else, power and wealth have been distributed along historical fault lines, in no small part because of the operation of the laws we rely on to protect workers and vindicate their rights. An example illustrating this dynamic is the country's response to the Covid-19 pandemic and its treatment of "essential workers." In May of 2020, for instance, Congressional Republicans sought to introduce legislation that would have completely shielded the meat and poultry-packing industries from lawsuits for Covid-related illness or death. While national leaders abandoned "unskilled" workers, Colorado workers felt the impacts close to home. A massive coronavirus outbreak occurred at the JBS meatpacking facility in Greeley. At least 294 workers had been infected with Covid-19, and six had died.[8] The workforce in the meatpacking industry is almost 35% Hispanic or Latino and 21.9% Black compared with 16.8% and 11.3% of the general workforce, respectively. Immigrants comprise approximately 37.5% of all meatpacking workers, in contrast to 17.1% of all workers across all economic sectors. For poultry-processing workers, 26.5% are Hispanic or Latino; 37.2% are Black, and immigrants comprise 28.1% of the workforce.[9] Across the country, by April and May of 2020, at least 16,233 workers across 239 meat and poultry preparation facilities had become infected with the virus, resulting in at least 86 deaths. Of those, 87% occurred among racial or ethnic minorities.[10]

The treatment of meatpacking workers illustrates several key points. Work pivotal to not only our economy but also the continuing functioning of society is routinely subjected to exceptions from legal protections and benefits, while at the same time populated with a workforce that is almost entirely comprised of minority workers. These legal exclusions coupled with the widespread funneling of workers by racial or gendered characteristics into certain occupations results in the economic poverty with which communities of color continue to grapple, and impacts female-headed households especially hard. "Unskilled" jobs not only pay less, but are less likely to provide paid leave, subsidized health insurance, and other benefits. These ills have manifested in enduring inequalities across many aspects of life, from mortality and health outcomes to educational access and housing, particularly Black and Brown communities. Our laws have been intentionally structured to maintain a permanent labor class, largely delineated on race, gender, and other such factors.

Systemic Racism Embedded in Labor and Employment Laws

After emancipation, agriculture continued to serve as the cornerstone of Southern society and economy. As a result, white plantation owners sought to replicate the previous labor and wealth hierarchies. After the Civil War, the Thirteenth Amendment prohibited slavery and servitude in all circumstances "except as a punishment for crime." In the South, Black Codes were soon enacted, criminalizing activities like "vagrancy" that made it easy to imprison and effectively force Black workers back into the fields and homes, creating a lawfully sanctioned servant class.[11] These and the other forces from discrimination, lack of access, and inadequate opportunities to perform other types of work

largely recreated the pre-war division of labor in the South. It is estimated that of the four million newly freed individuals, nearly half, some two million of those, worked on farms with the remaining half working in domestic households.[12] And while Black Codes were soon after dismantled by the Supreme Court, the legal regime of Jim Crow kept the same work structures in place.

Throughout history, the types of work relegated to Black workers limited their wealth while maximizing the wealth of others. Overrepresented in manual labor, farming, or domestic work, Black and Brown workers gained little if any wealth, prestige, or power while creating the foundations of our economy, wealth, and functioning of society. Although the Black Codes seem harsh, much of that philosophy remains entrenched in laws still in use today. Take the Fair Labor Standards Act ("FLSA") —when Congress passed the groundbreaking FLSA in 1938, the racially stratified regimes of the agricultural South gave rise to the wholesale exclusion of domestic and agriculture workers from the Act's protections. The omissions of these occupations were not accidental. Congress excluded these categories of workers as a result of Southern pressures to deny Black workers the opportunity for economic empowerment. According to Gardner Jackson, Volunteer Executive Secretary of the National Committee on Rural and Social Planning during hearings on passage of the FLSA, the motive for the exclusion was evident: "You, Mr. Chairman, and all your associates on this Committee know as well as I do that agricultural laborers have been explicitly excluded from participation…for the simple and effective reason that it has been deemed politically certain that their inclusion would have spelled death of the legislation in Congress."[13]

Not only after the Civil War, but as late as the 1930s, Black employment in the South was highly concentrated in unskilled agricultural and domestic labor, and Southern profits and the cultural and political order highly depended on keeping it so. Thus, to get legislation like the FLSA enacted, President Franklin Roosevelt was required to appease segregationists. The impacts of this unholy tradeoff continue to reverberate today. Although historically populated by Black workers the agricultural workforce today is as much as 83% Hispanic or Latino, and heavily immigrant, including as much as 53% of workers who are unauthorized to work in the United States.[14] Thus, statutory exclusions that were intended to keep Black workers and families poor in the South now keep Latino farm and domestic workers disproportionally impoverished. Employment laws today perpetuate in new form racist hierarchies of the past.

The exclusion of agricultural and domestic workers continues to remain in many of the ostensibly progressive laws we use today to help workers enforce their rights. While the FLSA was finally amended to guarantee farmworkers a basic minimum wage in 1966, such workers are still not guaranteed overtime.[15] Farmworkers engage in backbreaking work, often times for long hours, and yet are mired in poverty. About 100 agricultural workers suffer a lost-work-time injury every day, yet few receive paid time off.[16] The annual average income for a farmworker is between $15,000 and $17,499.[17] For migrant farmworkers, the median annual salary is about $7,500.[18] These wages do not reflect the actual value of agricultural work to our economy or society, for in the end, we all need to eat. As with meatpacking workers, President Trump recognized these workers as "essential," issuing an executive order in April of 2020 declaring farmworkers "critical to the food supply chain," and entitling them, including those not authorized to work in the United States, to letters of safe passage from the Department of Homeland Security.[19]

Women of Color Suffer from both Racial and Gender Exploitation

It is not by chance that the occupations we deemed essential for purposes of the pandemic are otherwise some of the lowest paying, most dangerous jobs in America. They originated from a history of idealizing certain types of work while intentionally devaluing others. In agriculture this took one form; in domestic work, the intersection of race and gender collide, impacting most acutely women of color and their families. Our conceptions of work have long distributed wealth and power along gendered lines as well but did so by invoking a different discourse than racial

subordination. For instance, the United States Supreme Court in *Frontiero v. Richardson* discussed the impact of separate spheres ideology on laws that kept women's caregiving labor in the domestic, "private" sphere both invisible and free in contrast to male labor which was paid and took place in the "public" sphere. That public sphere was then made off-limits to women both because society deemed them incapable of performing such work, and at the same time, because society redefined the labor that takes place in the domestic sphere as merely a "benign destiny and mission,"—in other words, not work at all. According to the Court:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:
>
> 'Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
>
> '. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.'[20]

Thus, at the intersection of historic gender and race fault lines falls domestic workers. During slavery, Black women raised food, watched children, cooked, and cleaned homes, amongst other labors, at no salary. After emancipation, they did so for barely much more. Gendered and racialized notions of work have intersected to create one of the most enduring populations of working poor in this country – those fulfilling society's domestic and caregiving needs.

These histories of exploitation are not alone. Workers with disabilities, for example, remain to this day frequently excluded from basic legal protections under our employment laws,[21] but these are the two histories we focus on here. The mark of racial and gendered economic exploitation can be found on other laws from the New Deal Era still in use today. Not only were agricultural and domestic workers excluded from minimum wage, overtime and maximum hours protections of the FLSA, but exclusions for agricultural workers and domestic workers are found in nearly all legislation from that time period including the National Labor Relations Act ("NLRA"), which to this day excludes any "individual employed as an agricultural laborer, or in the domestic service of any family or person at his home…"[22] In analyzing the omission of agricultural and domestic workers from the NLRA, Leon Keyserling, the principal drafter of the Act, described in an interview that, "[t]he Senator [Wagner] originally left out agricultural workers for purely political reasons. The difficulty of getting the bill through the Senate with such a disproportionate representation of rural people, allied to management and not to agricultural labor, would have increased beyond all reason the odds against getting the Act passed."[23]

Likewise, according to a policy paper issued by the Social Security Administration, the racist and sexist exclusions from the Social Security Act of 1935 ("SSA")[24] have become so "epigrammatic that it has passed over from historical narrative to background historical fact." Accordingly,

> [t]he Social Security Act was also racially coded—in part because of the power of Southern Democrats in the New Deal coalition. Southern politicians, reported one architect of the new law, were determined to block any 'entering wedge' for federal interference with the handling of the Negro question. Southern employers worried that federal benefits would discourage black workers from taking low-paying jobs in their fields, factories, and kitchens. Thus, neither agricultural laborers nor domestic servants—a pool of workers that included at least 60 percent of the nation's black population—were covered by old-age insurance.[25]

As we can see, the tradeoff in enacting the New Deal legislation was no small secret–Southern politicians were willing to support such legislation only so long as it did not threaten Jim Crow. The widespread and endemic disparate impact of this trade off remains in effect to this day even though the language in these laws is facially neutral and little mention of race or sex was ever explicitly discussed by most legislators or drafters. Our laws have been designed to funnel minority and female workers into certain essential occupations, while withholding material benefits from those same jobs.

Conclusion

We were asked about maximizing justice for our clients and asked to do

so with the theme of diversity in mind. Sometimes, the work of obtaining justice takes place in the courtroom. But sometimes, it must take place outside of the courtroom, at the macro level. The effect of exclusionary law-making during the modern era has resulted in decades and decades of job and wealth inequality which continues to persist and expand today, despite individual victories in court. As Covid-19 hopefully ebbs, we talk about how "essential workers" saved society, extolling them for their heroic virtues. But platitudes don't fix systemic racial or gender inequality across society and our economy; changes in law might. We must use the tools we have to advocate for our clients as ably as possible, but we must also be mindful of the broader impact that discrimination in our laws plays on those self-same individuals and on all. ▲▲▲

Iris Halpern is a partner at Rathod | Mohamedbhai LLC, whose practice areas focus on employment discrimination and civil rights. She previously served as the Acting Supervisory Trial Attorney and Senior Trial Attorney in the Denver Office of the Equal Employment Opportunity Commission. She has lectured and written widely on employment discrimination topics and taught employment discrimination as an adjunct faculty at the University of Colorado School of Law.

Azra Taslimi is an attorney at Rathod | Mohamedbhai. She began her legal career at the Innocence Project in New York, working with incarcerated individuals on exoneration through DNA testing. The experience helped her understand the criminal justice system, but more specifically exposed her to the shortcomings and inequities inherent in the process. She went on to become a Public Defender in New York and thereafter in Denver, working to protect and enforce the rights of people being shuffled through the system. She now focuses on enforcing civil rights and rights of individuals in the workplace.

Endnotes:

[1] *Disparities in Death Over COVID-19*, CDC, (Dec. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-deaths.html.

[2] Brendan Lantz & Marin Wenger, *Bias and Hate Crime Victimization During the COVID-19 Pandemic*, FSU Ctr. for Criminology & Pub. Pol'y Rsch. (2020), https://criminology.fsu.edu/sites/g/files/upcbnu3076/files/2021-03/COVID-19-Hate-Crime-Report_Final.pdf.

[3] Bobby Caina Calvan & Christopher Rugaber, *Many women have left the workforce. When will they return*?, AP News (Nov. 4, 2021), ttps://apnews.com/article/coronavirus-pandemic-business-lifestyle-health-careers-75d3b0ab89baffc5e2b9a80e11dcf34.

[4] Eli Saslow, *The moral calculations of a billionaire*, Wash. Post (Jan. 30, 2022), https://www.washingtonpost.com/nation/2022/01/30/moral-calculations-billionaire/ .

[5] Including in Colorado, *see Editorial: Dogging critical-race theory, DougCo board members oust a superintendent, equity and equality*, Denver Post (Feb. 9, 2022), https://www.denverpost.com/2022/02/09/douglas-county-corey-wise-schools-critical-race-theory/; Jessica Seaman, *Douglas County school board votes to change equity policy over student objections*., The Denver Post. (Jan. 26, 2022), https://www.denverpost.com/2022/01/26/douglas-county-school-board-vote-to-change-equity-policy/; Isaac O'Dell, *Colorado Springs advocacy group joins battle for public education,* Gazette (Feb. 8, 2022), https://gazette.com/premium/colorado-springs-advocacy-group-joins-battle-for-public-education/article_c2507822-88ea-11ec-84aa-af9c66cdeda1.html.

[6] Sara Smart, *Comic book store owners are offering to ship banned Holocaust "Maus" to Tennessee students for free*, CNN Website. (Feb. 1, 2022), https://www.cnn.com/2022/02/01/us/comic-store-owners-shipping-maus-trnd/index.html; Elizabeth Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S*, N.Y. Times (Jan. 30, 2022), https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html.

[7] Nicole Daniels, *In Texas, a Battle Over What Can Be Taught, and What Book Can Be Read*. N.Y. Times (Dec. 16, 2021), https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html.

[8] Colo. Dept. of Pub. Health & Env't, Outbreak Data, https://covid19.colorado.gov/covid19-outbreak-data.

[9] Angela Stuesse & Nathan T. Dollar, *Who are America's meat and poultry workers*, Econ. Pol'y Inst. (Sept. 24, 2020), https://www.epi.org/blog/meat-and-poultry-worker-demographics/.

[10] CDC, *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April-May 2020* (July 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm.

[11] Cecil J. Hunt II, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 U. Balt. L. Rev. 313, 326 (2020).

[12] R. R. Wright, *The Negro in Unskilled Labor*, The Annals Am. Acad. of Pol & Soc. Sci., vol. 49 at 19 (1913).

[13] Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L.J. 95, 114 (2011), https://lawecommons.luc.edu/facpubs/151/.

[14] *Id.*

[15] U.S. Dept. of Labor, Fair Labor Stds. Act in Agric., https://www.dol.gov/agencies/whd/agriculture/flsa.

[16] CDC, Agric. Safety, https://www.cdc.gov/niosh/topics/aginjury/default.html.

[17] SB 1121 Sen. Bill, Bill Anal., http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1101-1150/sb_1121_cfa_20100625_150353_asm_comm.html.

[18] Perea, *supra* note 13 at 127.

[19] Miriam Jordan, *Farmworkers, Most Undocumented, Become 'Essential' During the Pandemic*, N.Y. Times (updated April 10, 2020), https://www.nytimes.com/2020/04/02/us/coronavirus-undocumented-immigrant-farmworkers-agriculture.html.

[20] *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973).

[21] Both federal and state wage and hour laws permit the paying of sub-minimum wages to individuals with disabilities. *See* Jillian Guilfoyle, *Coming Out of the Shadows of Sheltered Workshops and Subminimum Wage: Exploring the Exploitation of Disabled Workers Under Section 214(c) of the Fair Labor Standards Act*, (2015), https://scholarship.kentlaw.iit.edu/louis_jackson/53; 7 CCR 1103-1, Colorado Overtime and Minimum Pay Standards Order (COMPS ORDER) # 37 (effective Jan. 1, 2021). https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-1%20COMPS%20Order%20%2337%20ADOPTED%20%28Clean%29.pdf (Reduced Minimum for Certain People with Disabilities and Minors. The minimum wage may be reduced by 15% for (a) non-emancipated minors and (b) persons certified by the Director to be less efficient in performance of their job duties due to a physical disability); *see also* Colorado Department of Labor and Employment, Division of Labor Standards and Statistics, *Memo: Minimum and Sub-Minimum Wages for Coloradans with Disabilities* (Dec. 14, 2020). https://cdle.colorado.gov/sites/cdle/files/Compliance%20Assistance%20Letter%2C%20Sub-Minimum%20Wages%20for%20Coloradans%20with%20Disabilities%20%2812-14-20%29%20%281%29.pdf.

[22] 29 U.S.C.A. § 152.

[23] Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. Miami L. Rev. 285, 334 (1987).

[24] Laurence E. Norton II & Marc Linder, *Down and Out in Weslaco, Texas and Washington, D.C.: Race-Based Discrimination Against Farm Workers Under Federal Unemployment Insurance*, 29 U. Mich. J.L. Reform 177, 197 (1996) (discussing history of farmworker exclusions in New Deal legislation); *see also* Juan F. Perea, *Destined for Servitude*, 44 U.S.F. L. Rev. 245, 248 (2009) (discussing history behind exclusion of farmworkers and domestic workers from the Social Security Act), https://lawecommons.luc.edu/facpubs/152/.

[25] DeWitt, Larry, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, Soc. Sec. Bull., Vol. 70, No. 4. (2010), https://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p49.html.