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RIGHTS LAWYER ESSENTIALISM AND THE NEXT GENERATION OF RIGHTS CRITICS

Alan K. Chen*


INTRODUCTION

Richard Thompson Ford¹ does not care much for the current state of civil rights. In his provocative new book, Rights Gone Wrong: How Law Corrupts the Struggle for Equality, Ford lends an original, if often misdirected, voice to the chorus of contemporary critics of the American legal regime of rights.² Situating himself among “second generation” rights critics (p. 259), Ford lays out a comprehensive indictment of current approaches to civil rights litigation as well as civil rights activism. His work is both intriguing and provocative, and it raises a number of issues that are surely worth serious consideration and discussion. As I argue in this Review, however, while his goals are laudable, his project is ultimately unsuccessful.

Ford's critiques of the contemporary civil rights system can be broken down into three distinct, but related, themes.³ His first charge is that civil rights are an anachronism, a once powerful tool to address first-generation civil rights issues, but now outdated and not up to the task of tackling contemporary social problems. While some forms of racial and gender subordination remain serious issues, he argues that many of the fundamental battles for equality have been largely won. Ford claims that the civil rights system today has been captured, and to a large extent exploited, by

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². In describing the themes of Ford's work, I map his ideas onto a structure that I interpret his work as reflecting. As such, the description of his book is not in the same order as his text's arguments, which I found at times did not follow a clear organizational path.
self-indulgent individuals seeking to invoke the law (or in the case of activists, the moral high ground of civil rights) not to achieve justice, but to pursue their idiosyncratic, opportunistic desires for personal gain. On this account, civil rights have outlived their usefulness and accordingly need to be completely reconceived.

The second central theme of Ford’s critique is that the civil rights regime lacks nuance. Its mechanisms are formalistic and rigid and are therefore insufficiently adaptable to account for the complex, entrenched issues that face today’s society. Formal antidiscrimination rules not only forbid base forms of discrimination founded on racist and sexist attitudes, but also are routinely invoked to attack more benign forms of race and sex classifications, from the serious (affirmative action) to the banal (“ladies’ nights” at bars). But that same system of rights has not proved adaptable to deal with the more entrenched and unresolved issues that continue to challenge marginalized communities, such as residential segregation and lack of economic opportunity. Similarly, he attacks the current structure of remedies as being too rigid and inflexible to address the subtle nature of contemporary civil rights dilemmas. Instead, Ford offers a new vision for civil rights that relies on an administrative enforcement scheme that he argues will be both more adaptable and more effective in promoting equality.

Ford’s third important theme is a common one among rights critics—he lays much of the blame for the problems of the civil rights system at the feet of the lawyers who populate it. Though the book is a broadside attack on that system, it implicitly—and sometimes quite explicitly—argues that contemporary rights lawyers are responsible for many of the system’s abuses. Like the clients they represent, civil rights lawyers “deserve much of the blame for twisting and perverting the legacy of civil rights” (p. 11). Among the charges he makes are that lawyer-driven rights litigation accomplishes little (and may even be more harmful than helpful), that the role of civil rights litigation in achieving equality has been overstated, and that lawyers have created unjustified hope and reliance on civil rights law at the expense of more effective solutions to contemporary social problems.

In this Review, I critique Ford’s approach and analysis and argue that his work is unsuccessful in sustaining any of these major themes. Specifically, I argue that Ford’s sweeping assertions about the civil rights system are flawed because he bases them on a selective, nonsystematic study of civil rights that reflects neither the complexity nor the importance of the work still being done by civil rights law, activism, and lawyers. His approach calls into serious question the generalizability of his claims. My critique employs three separate but related examples of the shortcomings of Ford’s claims, in increasing order of importance. First, I suggest that his book’s indictment of the current regime as anachronistic extrapolates only from marginal exam-

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4. See infra Section I.A.
5. See infra Section II.A.
6. Id.
7. See infra Section III.A.
ples of contemporary civil rights litigation and activism. These examples fail to provide a fair representation of what remains an important and relevant mechanism for the enforcement of equality and public mobilization. As illustrated below, much of his narrative is a catalog of selective anecdotes about relatively obscure legal claims and atypical protests. Drawing broad conclusions about the entire civil rights system from these outlier examples is both unfair and invalid.

A second, related limitation of Ford’s book is that its broad-strokes attack on formal antidiscrimination rules and civil rights remedies suffers to a great degree from the same lack of nuance that he argues plagues the civil rights system. For example, he asserts that bright-line antidiscrimination rules against race and gender classifications can have undesirable and unintended consequences when stripped from the central goals of antisubordination. But he does not recognize that those same rules play an important role in deterring discrimination and ensuring fundamental equality. Similarly, Ford examines individual civil rights remedies in isolation and concludes that they are rigid and ineffective. But this critique fails to account for how different types of remedies work together in subtle and complementary ways to enhance their contribution to the enforcement of civil rights as called for by the particular context. By disaggregating remedies rather than envisioning them as part of a larger scheme of rights enforcement, Ford trivializes their collective value. In contrast to what he argues, the availability of multiple, alternative forms of remedies systemically increases the nuance of the rights system.

Finally, and most importantly, I contend that Ford’s work follows a long tradition of rights scholars who have criticized civil and other rights enforcement by employing what has essentially become a caricature of rights lawyers. Virtually all rights critics such as Ford premise their attacks on a view of contemporary rights lawyers as elitist, singularly minded litigation hawks who care little for their clients or the subtleties of the dialectic political process. This approach, which I call “rights lawyer essentialism,” permeates much of the literature, but is based on stereotypes and obsolete understandings of contemporary public interest practice. It simplistically suggests that all rights lawyers fit this insulting profile. While litigation has been a dominant focus of public interest lawyering, closer examination of the history of American public interest law reveals that lawyers involved in rights campaigns have always been mindful of the matrix of tools available to them and the relationship of litigation to other critical forms of social

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10. See infra note 72 and accompanying text.
reform advocacy. Moreover, as this Review illustrates, attention to nonlitigation options has become even more important in contemporary public interest practice.

Critical examinations of the system of legal rights are valuable. It is important not to allow our biases or nostalgia for past successes to blind us to a frank consideration of our present. To that end, by raising skepticism about the current regime, Ford’s work is an important contribution to the discourse. But his argument that the civil rights system is anachronistic and lacks nuance is itself blunt and unrefined, and his critique of civil rights lawyers is, at the same time, anachronistic.

WHAT’S WRONG WITH RIGHTS GONE WRONG

Rights Gone Wrong is a sweeping critique of what Ford depicts as the current regime of civil rights in the United States. Ford’s commentary is both broad and ambitious, his insights thought provoking and challenging. He expresses his view that rights have indeed gone wrong eloquently and passionately. Moreover, Ford’s critique of rights resonates across the political spectrum. It is dangerously seductive to those on the right, who are already hostile to civil rights enforcement through litigation and fed up with large-scale, modern civil rights protests. Its disregard for the atomistic nature of individual rights claims and its call for a collaborative, administrative approach to complex social issues appeals to the moderation embraced by communitarians. And it is attractive to those on the left, who have long disputed the value of lawyers and litigation in achieving social change.

At the same time, Ford’s book is deeply troubling and is justifiably controversial given its broad swipes at an important aspect of the American legal narrative. The limitations of his claims derive not from his boldness in taking on the rights shibboleth, but in his methodology, which calls into serious doubt many of his conclusions and prescriptions. It is exceedingly difficult to argue for the dismantling of a multifaceted legal regime designed to address inequality across a wide range of contexts, and Ford’s attempt, while ambitious, is ultimately unsuccessful. I argue that while his three major themes might at first glance seem powerful, they all suffer from important shortcomings that substantially undermine their persuasiveness.

I. THE FAULTY CASE FOR CIVIL RIGHTS AS AN ANACHRONISM

I first address Ford’s claim that the civil rights system is no longer suited to address the most intractable problems of contemporary society. After summarizing an account of his arguments, I show that his main contentions about civil rights as an anachronism are substantially flawed because they are premised on an unfair extrapolation of themes from fringe cases that do not represent the core of modern civil rights.

11. See Deborah L. Rhode, Public Interest Law: The Movement at Midlife, 60 STAN. L. REV. 2027, 2028 (2008) (“Contrary to critics’ frequent claims, the organizational leaders profiled here have been acutely aware of the limits of litigation in securing social change.”).
Ford acknowledges that rights played an important role in an earlier generation. Defining a right as "a distinctive type of legal, political, social, and moral claim" (p. 18), he accepts that "rights can provoke needed social change and prevent expedient capitulation to powerful agents of injustice and exploitation" (p. 19). He contends, however, that the outdated nature of the civil rights regime is reflected by the fact that its structure is both too narrow and too broad. It is too narrow because although Ford concedes that civil rights were effective in responding to "outright discrimination and overt prejudice" (p. 9), the current system cannot effectively address the more complex and entrenched causes of social inequality that continue to haunt our society today, such as residential segregation and lack of economic opportunity (p. 10).

The system is too broad, he says, because opportunistic parties have appropriated civil rights laws to achieve ends that have little to do with equality or social justice. He provides two illustrations of this phenomenon. First, he argues that civil rights have evolved into a system for validating individuals' claims to personal entitlement. Rather than addressing real social problems, civil rights are frequently exploited by self-indulgent, fringe claimants with personal bones to pick. "If you try," he concludes, "you can make a case that some kind of bigotry—animus, stereotypes, or selective sympathy and indifference—is behind almost any inequality" (pp. 81–82). Ford supports his argument with a number of examples that he views as abuses of civil rights laws. But he focuses on trivial claims, such as men invoking public accommodations statutes to challenge a baseball team's Mother's Day promotion and "ladies' nights" at bars as forms of gender discrimination (pp. 84–88).

In another somewhat confusing narrative, he criticizes a new mother's effort to seek longer breaks during her medical licensing exam in order to pump breast milk. While Ford ultimately concludes that the accommodation was justifiable, his disdain for the organized movement to protect breastfeeding mothers from discrimination is clear. It turns out that Ford's real problem with the woman's claim is that on top of the request for breastfeeding breaks, she also sought more time on the exam because she suffered from Attention Deficit Hyperactivity Disorder ("ADHD") (p. 40). He argues that unlike accommodations for physical disabilities such as blindness or paraplegia, special considerations for persons with ADHD and other types of diagnosable learning disabilities—such as large blocks of extra time for school or licensing exams—give these persons an unfair advantage over the average student or job applicant. He also observes that there is disagreement about whether ADHD is actually a disability or whether it simply lies on a
continuum with "garden-variety poor concentration," suggesting that these accommodations may not be warranted at all. As he puts it, "It's a conceptual sleight of hand to define one person's inability to answer questions quickly and accurately as a disability that society must accommodate in order to reach the merits, when the same inability is considered a lack of merit for other people" (p. 49).

Similarly, he contends that most age discrimination claims do not focus on real discrimination, but rather are brought by current employees who are fired or denied promotions, turning the law into an "age-based spoils system" (pp. 73–74). He argues that age discrimination is more complicated than discrimination based on race or gender because there are economically rational reasons for hiring younger workers, who earn less and have a longer window to provide a return on employers' investments in their professional development (pp. 68–73). He also suggests that to the extent there are serious age discrimination issues, they involve employers' refusals to hire older workers rather than the types of claims that are typically filed (pp. 68–73).

Ford makes similar assertions about the individuated focus and narcissism of contemporary civil rights activism. On his account, rather than mobilizing to address serious social problems or injustices in the tradition of the civil rights movement, activists today are often directionless rebels without a cause. Mass protests—such as Louis Farrakhan's Million Man March, the similar event held by the conservative religious men's group, the Promise Keepers, and the demonstrations supporting the Jena 6—serve as a form of "therapy," reflecting a nostalgia for the past and seeking an outlet for self-righteous indignation, but not advancing important causes (one can imagine that Ford had little patience for the Occupy Wall Street movement and its offshoots) (pp. 175–81). Another target of Ford's critique is Critical Mass, a movement of bicyclists' rights advocates that organizes mass rides in major cities to call attention to concerns about bicycle-friendly traffic laws and automobile drivers' unwillingness to share the roads (pp. 182–84). But the movement, he argues, has itself become violent and aggressive toward drivers, in addition to causing huge traffic problems at great inconvenience to other citizens (p. 183). Instead of advancing its cause, he suggests, Critical Mass has simply generated public resentment toward its protestors' selfish conduct for engaging in what he views as thuggish behavior without giving serious attention to legal or policy reform (pp. 182–84). Contemporary civil rights activism loses its capacity to inspire, he says, because of its selfish mentality (p. 185).

According to Ford, a second way in which contemporary plaintiffs abuse the breadth of the system is by drawing into the law many claims of discrimination that do not belong in the civil rights arena at all. He contends that

13. Pp. 36–37. In fact, while there is some disagreement about this issue, at least in the context of the bar examination there is already a great degree of skepticism about those who request accommodations based on ADHD. See Neha Sampat & Esmé Grant, Research Project: Bar Examination Accommodations for ADHD Graduates, 19 AM. U. J. GENDER SOC. POL'y & L. 1211 (2011) (cataloging the enormous barriers that law graduates with ADHD face when seeking accommodations for taking the bar examination).
Rights Lawyer Essentialism

Civil rights laws have produced unintended consequences by allowing the application of legal claims to disputes that do not implicate subordination. For example, he contends that some plaintiffs have hijacked rights laws to challenge matters of personal taste or preference rather than to dispute serious injustices or prejudice. To illustrate this, he discusses legal challenges to sex-specific grooming and hiring policies, such as standards imposed on female television news anchors and waitresses in casinos (pp. 101–07). Sometimes, he says, image and glamour are essential to a business model. While it would be unfortunate if such grooming standards were applied to jobs where "aesthetics" are not relevant, litigation is not the way to sort out such differences.14

Similarly, he complains that sex discrimination laws such as Title VII have been expanded to validate challenges against virtually all forms of sexual conduct or expression, transforming the law into a "general civility code that potentially outlaw[s] any expression with sexual or erotic content" (p. 164). The law has been stretched to prohibit not just sex discrimination, but also "sexual" discrimination. This has resulted in making "any sexually charged encounter, image, or statement a target of legal prohibition, whether it reinforced male privilege and sex segregation or not."

Ford suggests that such laws have led to overreactions by employers and schools, and he mocks reactions such as zero-tolerance policies, "love" contracts, and the widely publicized verbal consent requirements for all stages of physical contact between students at Antioch College as examples of a civil rights system gone out of control (pp. 163–66).

In sum, Ford uses all of these examples to support his claim that the American civil rights system is outdated. On his account, most first-generation civil rights problems have largely been addressed by this point in our history. But exploitative plaintiffs, lawyers, and activists have picked up the remnants of the laws and applied them to problems that should not, in his view, fall under the umbrella of civil rights at all.

14. Pp. 101–02. The dismissive treatment of these grooming policies trivializes the pernicious effects they can have on the women who challenge them, particularly when their claims are reviewed by male judges who may be disconnected from the experiences of women in the workplace. See Eric Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts, 1989 Wis. L. Rev. 237, 283–85. For thoughtful reflections on the serious discriminatory effects of sex-specific grooming standards, see Deborah L. Rhode, The Injustice of Appearance, 61 Stan. L. Rev. 1033, 1048–59 (2009); Yofi Tirosh, Adjudicating Appearance: From Identity to Personhood, 19 Yale J.L. & Feminism 49 (2007).

15. Pp. 166–67. It is unclear on what he bases this conclusion. It is well documented that as the lower courts are applying Title VII, even serious sexual harassment claims are difficult to sustain precisely because courts are wary of expanding suits to the type of conduct Ford describes. See, e.g., Theresa M. Beiner, Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing, 75 S. Cal. L. Rev. 791, 805–19 (2002).
The power of Ford’s claims is substantially diluted by his tendency to extrapolate broad conclusions from anecdotal cases, many of which are hardly representative of the contemporary civil rights system. Although he does not claim his work to be empirical, surely it is fair to call him to account for his selective sampling of what he regards as civil rights abuses.

While some of Ford’s arguments are based on systemic or structural issues, such as his analysis of the complexity of age discrimination (pp. 64–80), many others are based on idiosyncratic and episodic claims that arguably do not fit within the framework of civil rights. Are we really supposed to believe that the civil rights system is broken because a few plaintiffs with marginal rights claims file lawsuits that do not fall within the core issues of justice and equality? (Spoiler alert: Not all of them even win.) Ford complains about discrimination suits challenging Mother’s Day promotions at ball games and longer waiting lines for women’s public restrooms than men’s to illustrate how far bans on gender discrimination can be stretched. But there is no evidence that these cases are representative of contemporary gender equality litigation, or even that they occur very much at all. He has little sympathy for those diagnosed with ADHD who seek extra time on school assignments and professional exams because he believes that little separates them from sufferers of “garden-variety poor concentration” (p. 37). Even if he were correct, this argument would support his broader indictment of antidiscrimination law only if these claims were representative of disability rights claims. But in fact, less than 2 percent of all claims brought under the Americans with Disabilities Act are based on learning disabilities.16

Ford’s generalizability problems are also evident in his scathing critique of today’s brand of civil rights activism. As discussed above, he argues that mass demonstrations today are no longer compelled by a genuine cause or outrageous events or policies. His impatience with modern civil rights activism stems from his view that it has evolved into an aimless form of therapy for those nostalgic for the heyday of the civil rights movement. Protests are aimless appeals for attention, not sincere efforts at social change (pp. 175–86). But among his principal examples is the protest surrounding the so-called Jena 6, a reaction to a troubling set of events in which the multiple and conflicting accounts of what actually occurred can only be described as Faulknerian.17 It is difficult to imagine that those events serve as an object lesson for all contemporary civil rights activism.


17. See WILLIAM FAULKNER, ABSALOM, ABSALOM! (1936). In this classic of Southern literature, Faulkner conveys the story of three families during the Civil War era as told from the perspective of multiple characters who offer a range of different, often contradictory, accounts of the same events.
As with his litigation examples, it is unfair for Ford to paint all modern rights activism with this broad brush. Even if he accurately characterizes some of these demonstrations and leaders, other core civil rights activism clearly has specific causes, direction, and focus and involves serious attempts at political mobilization. In 2008, tens of thousands of demonstrators took part in a coordinated national demonstration for marriage equality after California voters enacted Proposition 8, which overturned the state supreme court's decision legalizing gay marriage.\textsuperscript{18} Hundreds of thousands of protestors turned out to angrily oppose President Bush's decision to invade Iraq in 2003.\textsuperscript{19} Wisconsin citizens showed up in huge numbers to protest Governor Scott Walker's retrograde labor policies.\textsuperscript{20} At the other end of the political spectrum, whatever one thinks of the Tea Party's efforts, it is hard to dispute that it has a concrete purpose and political agenda, which it has advanced in part through activism.

What is more, not all activism takes place on a national stage. Indeed, public demonstrations may be more effective when community organizing advances discrete causes at the local level. The labor movement, for example, has effectively engaged in mobilization campaigns to raise awareness of unfair labor practices by nonunion employers.\textsuperscript{21} Organizations such as the Association of Community Organizations for Reform Now ("ACORN") have conducted successful local campaigns to prevent exploitation of low-income communities.\textsuperscript{22} Ford completely overlooks this type of activism.

In addition to the overall generalizability problem, like other analyses that focus only on reported cases or even filed litigation, Ford's arguments are limited by what is known as the "selection effect." It is widely understood that the sample of cases that reach the trial or appellate stage of litigation is not representative of the overall body of cases in the legal

\textsuperscript{18} See Jesse McKinley, Across U.S., Big Rallies for Same-Sex Marriage, N.Y. TIMES, Nov. 16, 2008, at A25, http://www.nytimes.com/2008/11/16/us/16protest.html. To be sure, Ford acknowledges that immigrants and gays and lesbians are groups for which the civil rights movement still has much work to do. Pp. 245–46. But that again raises the question why he would want to abandon the civil rights regime for all groups because of the misdirection of a few.


\textsuperscript{21} See Jon E. Pettibone, Bannering Neutrals—Coercive Secondary Boycott or Free Speech?, 18 LAB. LAW. 349 (2003).

The selection effect limits the conclusions that one can draw from observations about a particular legal regime because the sample of cases does not include legal disputes that are resolved without litigation—either because the clearer cases never arise due to the law's prophylactic effect or because those that are filed are quickly settled. Ford's conclusions about the civil rights system, based on a few cherry-picked cases, quite possibly distort his view of that system since much of what occurs happens beneath the surface. If, as Ford himself surmises, many of the core civil rights problems have been overcome, it is likely that much overt discrimination is subdued by the existence of the very legal regime that he seeks to dismantle.

In short, Ford's selected examples could easily persuade those who pay little attention to the civil rights system that the system has indeed become an anachronism. But even Ford concedes that "[m]ost of the time, people pressing for new legal rights have good intentions and are addressing serious social problems" (p. 89). He ignores those claims, and instead builds his thesis on a foundation of fringe examples. Challenging the regime of civil rights litigation based on what many may regard as frivolous cases is somewhat like Ronald Reagan famously calling for the dismantling of the social safety net based on anecdotes about "welfare queens," who purportedly abused the system to avoid working. Like Reagan, Ford's problem is that he wants to throw out the entire system because of the alleged abuses of a few.

Finally, even if these examples were somehow more representative of current civil rights cases, they would not necessarily reflect a system in crisis. First, some of Ford's arguments are simply based on his own skepticism about specific types of claims and his normative assertion that they are not legitimate concerns of the law. For instance, his critique of disability rights suits by persons diagnosed with ADHD questions whether these plaintiffs are getting a special advantage over others rather than simply gaining a level playing field. While Ford suggests that these claims involve a "conceptual sleight of hand" (p. 49), what he's really arguing about is the application of two well-established principles of disability discrimination law that are designed to calibrate the system to ensure fairness—the requirement that, in the employment context, the disabled person is otherwise "qualified" to do

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23. Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. LEGAL STUD. 337, 337 (1990) (stating that cases reaching formal adjudication are not "a random sample of the mass of underlying cases").

24. Richard A. Posner, The Problems of Jurisprudence 78 (1990) ("A sample of cases litigated to judgment will be biased in favor of uncertainty because when the outcome is clear the parties will usually settle the case before trial.").


the work required, and that the employer or other institution need only provide "reasonable" accommodations, not limitless ones. Perhaps what he is actually troubled by is the misapplication of these standards, rather than the underlying antidiscrimination principles that they advance.

Second, even if novel legal claims are the norm rather than the exception, there is still great value in allowing those claims to proceed. The law is enhanced in important ways through the assertion of new rights claims, even if they are not all accepted. Indeed, as I discuss below, one of the principal changes that rights lawyers have had to make is adapting their practices to a contemporary legal and political regime that is almost universally hostile to the pursuit of new constitutional rights, including equality rights, through traditional litigation campaigns.

One of the biggest impediments to the evolution of constitutional rights is the ossifying impact of legal doctrines that prevent the development of new constitutional rules across a variety of procedural contexts. Over the past generation, the Supreme Court and Congress have established a menu of judicial and statutory barriers that impede much of the law-pronouncing function of the federal courts. Some examples of these pervasive restrictions include the Court’s decision in *Teague v. Lane*, which established that prisoners cannot assert claims based on novel constitutional rights in collateral attacks on state law convictions and sentences, even if they properly asserted such rights in their original appeals; Congress’s endorsement, or arguably expansion, of the *Teague* new-law rule in the Antiterrorism and Effective Death Penalty Act, which establishes an extraordinarily deferential standard that federal courts must apply when reviewing state court decisions in a manner that also impedes the law’s evolution; the Court’s trend toward

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27. *See* 29 C.F.R. § 1630.2(m) (2012) ("The term ‘qualified,’ with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.").

28. *See* id. § 1630.9 (failure to provide reasonable accommodation constitutes discrimination absent undue hardship).

29. Admittedly, the issue of whether a person with ADHD is disabled under federal antidiscrimination law is complex and fact specific. The law does require, however, that plaintiffs show that their disability causes them to perform below the ability of the average person. *See* Craig S. Lerner, "Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043, 1086–90 (2004).


widening the "good-faith" exception to the exclusionary rule;\textsuperscript{34} and the Court's continuing expansion of the official immunity doctrines, especially qualified immunity,\textsuperscript{35} which effectively makes it impossible to assert novel constitutional rights claims through damages suits against officials under 42 U.S.C. § 1983.\textsuperscript{36} Together, these rules operate in a severe manner that narrows the available forums in which constitutional evolution can occur.\textsuperscript{37} And these impediments don't even include the panoply of federal court decisions that also prevent constitutional evolution—the Court's expansive sovereign immunity doctrine,\textsuperscript{38} narrow conceptions of justiciability, particularly in the area of standing,\textsuperscript{39} and the abstention doctrines.\textsuperscript{40} Ford argues that the civil rights system has led to the proliferation of new and unworthy types of anti-discrimination claims, and therefore advocates a new system in which such claims could not be readily asserted. But cutting off novel civil rights claims in that way risks imposing the same type of barriers to innovation in civil rights and the courts' ability to pronounce new law that these other doctrines have wrought.\textsuperscript{41}

What is more, new rights claims also may serve values beyond the litigation context in which they are asserted. For example, Ford's attacks on cases challenging sex-specific grooming standards are based on his assertion that civil rights should address base forms of gender subordination, but

\textsuperscript{34} Herring v. United States, 555 U.S. 135, 147–48 (2009) (expanding the good-faith exception to the exclusionary rule and allowing the admissibility of evidence obtained during an unlawful arrest that occurred because of a clerical mistake reporting an outstanding warrant from an adjoining county).

\textsuperscript{35} Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

\textsuperscript{36} See 42 U.S.C. § 1983 (2006); Alan K. Chen, The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests, 81 IOWA L. REV. 261, 327 (1995) (arguing that qualified immunity creates uncertainty about the meaning of constitutional law and thereby impedes the law-pronouncing function of constitutional adjudication). Even the efforts by some members of the Court to ameliorate the effects of qualified immunity by requiring lower courts to decide the merits of new-law claims before resolving the immunity question were short-lived. See Pearson v. Callahan, 555 U.S. 223, 232–36 (2009) (abandoning the requirement that courts in constitutional damages cases first determine the merits of the case before deciding the defendant's entitlement to qualified immunity).

\textsuperscript{37} See Pamela S. Karlan, Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century, 78 UMKC L. REV. 875, 887 (2010) (noting that Pearson "paradoxically throws the process of constitutional elaboration right back into the criminal process from which the Court's decisions in Hudson [v. Michigan, 547 U.S. 586 (2006)] and Herring expelled it").


\textsuperscript{40} See, e.g., R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (requiring federal courts to abstain from deciding federal constitutional questions where the case might be resolved on the basis of state law that is unsettled).

\textsuperscript{41} Arguments against use of litigation to assert new rights typically have been invoked to chill public interest litigation. See David Luban, Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers, 91 CALIF. L. REV. 209, 237–40 (2003) (recounting efforts by conservative groups to attack Tulane Law School's environmental law clinic for asserting "novel" theories of legal liability against small businesses).
should not be an arena where society debates matters of taste and aesthetics. As he says, "Those who oppose all such grooming policies complain that they reflect 'stereotypes,' but one person's sex stereotype is another's sensible distinction." Setting aside for a moment the fact that his assertion itself begs the question of what constitutes gender discrimination, he also completely ignores the fact that these lawsuits may contribute not only to the growth of legal doctrine but also to a broader public discourse that could inspire cultural reexamination of the very gender stereotypes that underlie these policies. Litigation can not only accomplish growth in the law through judicial decisions but can also serve an important educative and deliberative function.

II. AN UNNUANCED CRITIQUE OF CIVIL RIGHTS

A related, but slightly different, theme of Ford's work is that even if civil rights are not anachronistic, the restrictions and remedies the law puts into place are not sufficiently adaptable or flexible to address contemporary problems. That is, the civil rights regime lacks sufficient nuance. He supports this assertion, first, by focusing on the consequences of having bright-line antidiscrimination rules and, second, by claiming that the traditional remedies of damages and injunctive relief are ineffective, and even counterproductive.

A. Rigid Rules, Inflexible Remedies, and Nuance

One way in which Ford makes the case that civil rights lack nuance is by focusing on the inflexibility of formal civil rights rules barring discrimination and describing how they can be misapplied. Constitutional and statutory protections against discrimination typically forbid all explicit or intentional forms of discrimination based on a protected category, such as race or gender. Ford condemns the rigidity of antidiscrimination law for opening the door to more frivolous applications challenging relatively benign forms of discrimination, such as claims by women that they suffer from disproportionately long lines for public restrooms as compared to men (pp. 89–92). He also blames formal antidiscrimination rules for being so broad that they can be used to attack business practices that people may find distasteful, but that may not be the product of bias, as in the case of the sex-specific

42. P. 105. One wonders what civil rights law would look like if the defendants could simply assert a defense that their discrimination was a sensible distinction to them. The "sensible distinction" defense ironically also resonates with Herbert Wechsler's claim that it is not clear, applying neutral principles, how African American students' interests in desegregated public schools are superior to the claims of segregationists, or vice versa. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 32–33 (1959).

grooming requirements discussed earlier (pp. 95–107). As he says, "There are reasonable arguments for careful and limited racial profiling, sex-specific dress codes, and sex-segregated bathrooms, but to make them, one must reject categorical rules against discrimination and turn to more fact-specific, nuanced judgments" (p. 122).

In a more serious and legitimate complaint, he contends, as have many other critics, that a race-blind application of antidiscrimination laws has had the perverse effect of invalidating government and private efforts to eradicate the effects of past discrimination against people of color. He draws on examples such as the Supreme Court's decision in *Ricci v. DeStefano,* which struck down the New Haven fire department's decision to set aside the results of a promotion exam because they had led to the promotion of no racial minorities and the city was concerned that using those results might lead to a civil rights suit. The Court held that the city's express consideration of race as a factor in throwing out the test was itself discriminatory against the white firefighters who otherwise would have qualified for promotion. A similar example of antidiscrimination law being turned on its head is *Parents Involved in Community Schools v. Seattle School District No. 1,* in which the Court held that public school districts could not carry out a student-assignment plan based on race even when that plan was designed to enhance racial balance in their schools (pp. 154–58).

Another important way in which Ford suggests that the legal regime lacks nuance is through the system of remedies for civil rights violations. He argues that a major flaw in the current civil rights scheme is that the availability of individual damages remedies for violations of antidiscrimination laws creates perverse incentives for opportunistic plaintiffs to bring claims in the pursuit of personal gain. "Because we've defined social justice in terms of rights, it's natural to assume that some sort of individual restitution is the ultimate goal. But perhaps individual compensation shouldn't be the main objective; maybe it is a means that has become confused with the end." He even goes so far as to suggest that a damages regime may create "desegregation bounty hunters," out for a quick buck rather than (or at least in addition to) social justice (p. 225).

Ford is no more benevolent toward two critical features of the civil rights enforcement system—class action lawsuits and structural injunctions. He is highly critical of the *Wal-Mart Stores, Inc. v. Dukes* litigation, a class action suit that was recently rejected by the Supreme Court. *Dukes* was a nationwide class action Title VII claim brought on behalf of female Wal-Mart employees alleging that the company's practices had resulted in lower pay and fewer promotions for women workers than male workers. Ford

44. 557 U.S. 557 (2009).
47. P. 225. Ford does not address the fact that damages awards in civil rights cases are often relatively small, which raises doubts about the extent of such incentives.
agrees with the Supreme Court's decision, which accepted Wal-Mart's argument that because of the decentralized nature of its management policies, the plaintiff class could not establish that the claims of the women were sufficiently common to justify bringing a class action claim. He suggests that the *Dukes* decision exposes a flaw in the civil rights system—class actions do not have the capacity to address massively complicated social controversies by large groups of plaintiffs who have suffered many different types of injuries (and provide a windfall for many who have not suffered at all) (pp. 210–17). While he acknowledges that class actions have been important civil rights tools because of their capacity to deter widespread, overtly discriminatory employment practices, he suggests that they are not flexible enough to address the more complex management practices that are common in the modern workplace (pp. 212–14, 218).

On Ford's account, structural injunctions suffer from similar problems of inflexibility that make them ill suited to adapt to modern civil rights challenges. Here, he recounts the argument laid out by so many others before him about the ineffectiveness of the remedies implemented by lower courts to desegregate public schools in the wake of *Brown v. Board of Education.* Ford laments the manner in which *Brown* has been lionized as a bellwether for civil rights advancement, when in fact the complexities of implementing desegregation remedies have perplexed and frustrated judges and civil rights advocates alike for years. For instance, he points out that busing and other injunctive remedies were ineffective because of the resulting movement of white families to outlying suburbs and because these remedies did not really address the intransigence of residential segregation, the underlying cause of much of the racial separation in schools (pp. 145–54). Reliance on injunctions to fix the problems of segregation, he suggests, also resulted in the downplaying of economic justice issues and the need for more resources for public schools in predominantly black neighborhoods (pp. 136–44). To anyone who has paid attention to the literature critiquing *Brown* over the past couple of decades, none of this will be a surprise.

All of this leads Ford to call for a complete overhaul of the civil rights system to set aside these outmoded and rigid tools. Instead, he suggests, we should think about civil rights not as an entitlement system but as a regulatory problem, susceptible to a broad, policy-based approach to solving the technical and multidimensional problems that confront today's society (although he does not actually map out the full extent of his administrative solution) (pp. 230–36). Instead of individual damages claims, we could have regulations in place that promote better civil rights policies and impose fines for noncompliance (pp. 224–25). After all, he says, monetary payments can achieve deterrence without regard to who gets the dollars. We should discard the clunky devices of class actions and large-scale injunctions in favor of a regulatory scheme that takes into account the competing interests of the relevant constituencies and crafts solutions that effectively respond to the

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structural problems causing the harms we want to eradicate. For example, citing a federal judge who was frustrated with monitoring post-Brown school decrees, Ford suggests that desegregation might have been better accomplished by making it a condition of receiving federal education spending rather than the object of court orders. Similarly, establishing government rewards for those who hire more workers from underrepresented groups could encourage employers to promote workplace diversity. Racial disparities in the criminal justice system could better be handled by a careful reexamination of the effect of the war on drugs on minority communities rather than through individual discrimination claims (pp. 236–37). Governments could create incentives for police departments to collect data about the impact of their “stop and frisk” policies to evaluate whether those policies have disparate racial impacts. Ford claims that only by completely rethinking the way the law approaches civil rights can we begin to effectively address these serious social issues.

B. Rights, Remedies, and Nuance

Like his claims about the anachronistic nature of civil rights, Ford’s suggestion that the entire system is broken because some parties seek to exploit bright-line antidiscrimination rules suffers from a problem of gener-

50. Pp. 153–54. This point seems pretty fanciful. First, although Title VI of the Civil Rights Act has been in effect since 1964, there is no evidence suggesting that this type of federal funding cutoff as a means of enforcing civil rights is frequently invoked. See, e.g., Marjorie A. Silver, The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement, 55 Geo. Wash. L. Rev. 482, 512 n.188 (1987). This may be a product of lack of resources for enforcement agencies, see Eileen Kaufman, Discrimination Cases in the 2000 Term, 18 Touro L. Rev. 1, 7 (2001), administrative discretion, see Myrna E. Friedman, Note, Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of “Program”, 52 Ind. L.J. 651, 664 n.68 (1977); Note, Enforcing a Congressional Mandate: LEAA and Civil Rights, 85 Yale L.J. 721, 724–25 (1976), or disincentives to take the extreme step of a funding cutoff that may have other adverse consequences for the recipients and the people they serve, see Arthur R. Block, Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries, 18 Harv. C.R.-C.L. L. Rev. 1, 36–38 (1983); see also Eloise Pasachoff, Special Education, Poverty, and the Limits of Private Enforcement, 86 Notre Dame L. Rev. 1413, 1430 (2011) (observing that the power of the U.S. Department of Education’s Office of Civil Rights to cut off all federal funding to school districts for noncompliance with special education regulations is an “option so dramatic that its threat is rarely credible”).


alizability. While the structure of that system is by no means ideal, Ford’s frustration with its abuse inspires him to want to throw the whole system out—or at least important parts of it. To some degree, Ford’s critique of civil rights rules seems like little more than an elementary illustration of the limits of legal formalism. Laws that prohibit overt discrimination against protected classes are inherently overinclusive, as are all legal rules (in contrast to open-ended legal standards). But it is unclear how Ford’s prescription of administrative regulations would be preferable. Administrative regulation also requires rules or at least a set of parameters that bureaucrats must enforce or implement. To guard against discrimination based on race and gender, those identities must be defined in some way as protected. Unless Ford envisions a civil rights administrative agency that simply enforces regulatory standards against “unfairness” or “acts that subordinate,” it’s hard to see how his system would be any more flexible than the existing regime.

Moreover, his critiques of color-blind scrutiny of affirmative action laws are nothing new. By now, it is obvious that such laws are caught up in a world in which the majority of the Supreme Court views them as no less suspect than laws that are designed to harm racial minorities. That is a value judgment that, like Ford, I believe is wrong. As Justice Blackmun pronounced nearly a generation ago, “In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.” But even the outcomes in the Court’s affirmative action cases do not justify eliminating lawsuits to challenge race discrimination against subordinated groups. Again, much of this line of Ford’s criticism seems to offer little more than a basic attack on legal formalism.

Ford’s critique of civil rights remedies as insufficiently nuanced or calibrated is similarly flawed. As described above, one of his biggest quibbles is with individual damages claims, a form of “entitlement” that he blames for often distorting incentives and failing to address systemic problems that demand a more measured, technocratic policy solution. Thus, Ford argues that damages suits do little of the work they are supposed to do—they both incentivize and reward the wrong parties (though he does not suggest that they don’t also incentivize victims of core discrimination), and they do not address systemic barriers to equality. Class actions and structural injunctions cannot be sufficiently tailored to produce balanced, context-sensitive solutions to the complex and entrenched nature of the underlying causes of major social problems.

To some degree, Ford seems to want it both ways. He criticizes damages suits for being too individualized and failing to address systemic issues of discrimination. Yet he criticizes structural remedies and class action suits as overbroad and lacking adaptability to individualized harms or problems. But administrative solutions, which Ford embraces, may suffer from many of the

same limitations. He is correct that administrative, policy-based approaches may be more adaptable and creative, and can address the underlying issue from a broad, problem-solving perspective. But they also cannot be tailored to individual injustices. That is, administrative regulations and enforcement may be more adaptable at a metalevel, but it is hard to imagine anyone arguing that a large federal bureaucracy would be more sensitive to the wide range of civil rights disputes than the individualized consideration of discrimination claims available only through adjudication.55

As just one example, Ford singles out learning disability claims as a category of civil rights claims that are problematic because they sometimes result in providing special advantages to people who seek accommodations, rather than remediying unfair, burdensome practices. In other words, these claimants are better off than the average person because of disability rights law. A more effective approach, he suggests, would be to reconsider from a systemic level whether educators and employers rely too heavily on standardized tests (p. 237). If Ford is right, some discrimination claims are justified and some are not. The answer to that is not a categorical, administratively produced policy solution but an individually tailored consideration of specific disability claimants. And that is exactly what civil rights claims can offer—an individualized assessment of a person’s specific disability, whether he or she is “otherwise qualified” to perform the job or task at hand, and whether a “reasonable accommodation” can remove the disadvantage caused by the disabling condition.56 Individual civil rights claims contribute to nuance—they don’t detract from it.

Another flaw in Ford’s argument is that his critique disaggregates civil rights remedies. As I have argued elsewhere, civil rights remedies must be viewed not as isolated, self-contained solutions but as part of a larger set of tools to address rights violations and systemic social challenges.57 Damages may be more suitable to address some social issues than injunctions or class actions; other times, the situation may be reversed. In the realm of constitutional litigation, the Supreme Court has sometimes established impediments to specific remedies to protect structural constitutional concerns, but has typically provided an alternative remedy to ensure that rights do not go unenforced.58 This complementary structure of remedies has served the goals of constitutional enforcement well and is a critical aspect of the architecture of rights. The current structure permits the legal system to accommodate varying concerns about remedies in specific contexts and tailor them to specific rights problems. Ford’s suggestion that the system should focus solely

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55. Moreover, Ford does not address the potential dilemma of having administrative officials who are part of the political system dealing with controversial civil rights issues, rather than (at least theoretically) independent courts that may counteract majoritarian impulses that foster discrimination.
56. See supra text accompanying notes 26–29.
57. Chen, supra note 8.
58. Id. at 889.
on administrative regulation and policy-based solutions would completely undermine the careful balance of the constitutional remedies scheme.\textsuperscript{59}

Moreover, like litigation, civil rights activism should be viewed not in isolation but as part of a broader set of actions that may influence social movements. Critical Mass, for example, may inconvenience large numbers of San Francisco commuters (incidentally, the same complaints were made about the Selma-to-Montgomery civil rights marches).\textsuperscript{60} But Critical Mass has also had tremendous organizing and mobilization effects, both nationally and internationally.\textsuperscript{61} And the overarching social issue—road and traffic design to facilitate commuting by non-fossil-fuel vehicles—is concrete (although Critical Mass, like other examples of activism that Ford singles out, might not even be viewed as a movement for "rights" in the same sense as earlier forms of activism). Moreover, since the advent of the Critical Mass protests, in many cities there has been greater cooperation between the protest leaders and police departments, which frequently provide police escorts to ride with each demonstration to ensure better communication and safety while also protecting the rights of protestors.\textsuperscript{62}

A final consideration that Ford does not account for is the concept that remedies shape rights. That is, the substantive definition of rights may be materially different depending on the context in which the rights are adjudicated.\textsuperscript{63} As Nancy Leong observes, rights that are adjudicated only in one procedural context may be shaped by features unique to that context, which may limit the consideration of relevant interests and facts in ways that distort the meaning of those rights.\textsuperscript{64} The evolution of the law is enhanced by having rights defined in multiple contexts. Thus, another cost of abandoning the current civil rights regime and placing rights policy solely in the hands of administrative bureaucracies is that there will no longer be opportunities to shape rights across such contexts.

\textsuperscript{59} To be fair, I have argued that the Court itself has already begun tinkering with this balance in ways that also threaten constitutional enforcement. \textit{Id.} at 910–16.

\textsuperscript{60} See Protesting Whites Heckled in Selma, \textit{DALL. MORNING NEWS}, Mar. 7, 1965, § 1, at 1 ("[Alabama Governor George C. Wallace] said at a special news conference in Montgomery that such a march is not 'conducive to the orderly flow of traffic and commerce within and through the state of Alabama. The additional hazard placed on highway travel by such actions cannot be countenanced'.").

\textsuperscript{61} Indeed, the movement has reached global proportions. See S.F. CRITICAL MASS, http://www.sfcriticalmass.org/ (last visited Aug. 19, 2012).


\textsuperscript{64} \textit{Id.} at 462–63.
III. RIGHTS LAWYER ESSENTIALISM

A. Ford's Reproach of Rights Lawyers

Ford's critique of lawyers is consistent with the critiques of a generation of rights critics preceding him. Conservative critics offer well-rehearsed, normative critiques of public interest litigation based on their view of the illegitimacy of antidemocratic social change (what they refer to pejoratively as "social engineering") through the courts. But attacks on rights lawyers from the left have been even more damning. Critics from the left have leveled claims at public interest litigation that suggest, like Ford, that public interest law practice does not advance social causes in meaningful, sustainable, and effective ways (though, unlike Ford, most of these critics reserve their most severe antipathy for litigation). They have argued that rights lawyers cannot achieve sustainable progress because there is often backlash that causes regression from initial success, and because courtroom victories frequently mask real change, which occurs through the political process. Accordingly, they suggest that rights litigation is a waste of time, both because it is not actually successful in achieving social change and because it detracts attention and resources from more meaningful and sustainable forms of work such as mobilization, political lobbying, and community organizing. In this sense, the critics claim that rights lawyers offer nothing but "hollow hope" and create false expectations of sustainable social transformation. Finally, the assault on rights lawyers has focused on the concern that they are self-righteous litigation hawks who care for their own causes but not much for either their clients or the subtleties of the dialectic political process. Such critiques have not only influenced legal scholarship; they have had an impact on the allocation of resources for public interest lawyering and the priorities of organizations engaged in social change work.

Ford's book embraces many of these critiques. His claim that rights ought to be viewed more as policy questions resonates with the conservative critique that rights lawyering is antidemocratic. His repeated suggestion that rights litigation does more harm than good; his argument that the role of law and litigation in accomplishing the goal of equality has been exaggerated;

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65. See, e.g., David Luban, Lawyers and Justice 303 (1988) (summarizing such arguments).

66. See, e.g., McCann, supra note 2, at 200; Rosenberg, supra note 2, at 425.

67. See, e.g., Michael J. Klaman, From Jim Crow to Civil Rights (2004); Rosenberg, supra note 2, at 425.

68. Rosenberg, supra note 2, at 427. A more radical version of this critique claims that the rights-based litigation approach legitimizes and perpetuates the existing social order and thereby impedes social progress. Peter Gabel & Paul Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. Rev. L. & Soc. Change 369, 375 (1983); see also Scheingold, supra note 2, at 5–7, 204.

69. See, e.g., López, supra note 9.

70. See, e.g., p. 158 ("Civil rights litigation has never been the main engine of social justice in the United States.").
his assertion that rights litigation rarely changes public opinion but usually only follows it (pp. 127–29); and his contention that civil rights have not offered a clear prescription for social change but offer false hope to social justice advocates and the public (p. 21), are all consistent with the progressive critique of rights.

Ford’s disdain for civil rights lawyers is patent. At one point, he even suggests that

[like a group of drunken fraternity brothers competing to perform the most dangerous and outrageous stunt, lawyers, legal scholars, and civil rights activists strive to outdo each other in developing the most extreme and expansive interpretations of legal entitlements. Too many activists and lawyers attack unobjectionable customs and sensible practices that offend only the most expansive and uncompromising interpretation of the law. (p. 23)]

My final response to Ford’s work addresses these claims.

B. The Real Rights Lawyers of the Twenty-First Century

Like the contentions of past rights critics, Ford’s argument suffers from an incomplete understanding of the transformations that have occurred in public interest lawyering in recent years. As with his sweeping claims about civil rights litigation, his generalizations about rights lawyers are flawed because they simply are not representative. The cause-lawyering literature is replete with examples of this unrelenting attack on public interest lawyers, frequently depicting them as self-righteous and hell-bent on reforming the law from the top down, with sea-shifting Supreme Court decisions as their ultimate goal. Gerald López’s “Teresa” is the paradigmatic “bad” public interest lawyer who condescends to her clients, sees litigation as the only solution to social problems, and is dismissive of community involvement.71 Numerous rights critics have echoed this sentiment. I call this practice “rights lawyer essentialism,"72 because it attributes to all rights lawyers the characteristics or qualities of a select few. It is a critique built on a caricature of public interest lawyers that diminishes and devalues much of the important work they have done and continue to do.

71. López, supra note 9, at 13–17. In López’s pathbreaking book, he critiques what he argues is a common practice described as “regnant” lawyering, through which lawyers, among other things, exploit power over clients, control decisions about litigation, fail to learn about or understand the communities they represent, and disregard their subordinated clients’ ability to help themselves. Id. at 23–24. To support his claims, he includes a series of fictional narratives that he based on lawyers he has observed as well as “imagined characters and storylines,” including one about Teresa, the fictional director of an impact litigation group. Id. at 8.

72. For an explanation of the concept of essentialism, see Teresa Robertson, Essential vs. Accidental Properties, STAN. ENCYCLOPEDIA PHIL. (Apr. 29, 2008), http://plato.stanford.edu/entries/essential-accidental/. The concept of essentialism has also been used extensively in critical feminist and race literature focusing on the attribution of supposedly common or universal experiences to define marginalized groups. See, e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 588–89 (1990).
My critique of Ford and these other scholars rests on a couple of claims. First, these depictions of rights lawyers were probably never entirely accurate to begin with. While litigation has always played an important role in rights lawyering, closer examination of the history of American public interest law reveals that lawyers involved in rights campaigns have always been mindful of other tactical options and the relationship of litigation to other forms of social reform. Even stretching back to the early part of the twentieth century, lawyers for the leading national civil rights organizations seriously debated the role of litigation and questioned its efficacy. They engaged in political as well as litigation tactics to serve both their short- and long-term goals.

Second, to the extent these caricatures of rights lawyers were ever descriptively accurate, they are no longer true, or are at least much less true than they once were. In part as a reaction to increasing barriers to the establishment of new rights through more traditional impact litigation, public interest practice has undergone a substantial transformation in recent years. These challenges have compelled lawyers to retool their tactical arsenals and pay much more acute attention to a broader way of thinking about social reform. Public interest lawyers’ roles have expanded to include a range of tactics that remain central to the pursuit of rights but comprise a practice that is broader, richer, and ultimately more sustainable than the traditional model of rights litigation. Lawyers are still central to the pursuit of rights, but litigation now typically represents only one piece of a larger mosaic of approaches—a practice described in the cause-lawyering literature as “tactical pluralism.”

Some examples of the more complex, richer, and subtler role that lawyers play can be drawn from some contemporary social change campaigns.


74. Tushnet, supra note 73, at 8–9 (describing NAACP leadership’s debate over whether to spend resources on organizing the black community and addressing economic issues rather than on litigation).

75. See, e.g., Rhode, supra note 11, at 2046–49.

76. Chen & Cummings, supra note 43, at 518; Barbara L. Bezdek, Alinsky’s Prescription: Democracy Alongside Law, 42 J. Marshall L. Rev. 723, 748 (2009); Scott L. Cummings, Law in the Labor Movement’s Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight, 95 Calif. L. Rev. 1927, 1932 (2007). In addition, it should be noted that rights lawyers have had to adapt to the changing political climate as well and sometimes play an important role in stemming the tide against a regression in substantive rights. As Deborah Rhode’s 2008 survey of public interest organizations and lawyers reflected, “[P]rogressive lawyers frequently saw their mission less as gaining new ground than as holding on to what they had.” Rhode, supra note 11, at 2036.

77. See, e.g., Cummings, supra note 76, at 1985 (lawyers in a local campaign to stop siting of Wal-Mart superstore in a community viewed litigation as only one tool in their repertoire); Scott L. Cummings & Douglas NeJaime, Lawyering for Marriage Equality, 57 UCLA L. Rev. 1235, 1312 (2010) (lawyers in the marriage equality movement expressly prioritized nonlitigation strategies).
Lawyers in these campaigns have demonstrated a clear understanding that litigation is neither the only tactic available to them nor something to be completely discarded. The nature of these campaigns also reflects two increasingly common phenomena in rights lawyering. First, attorneys are more prone to work directly on nonlitigation, public advocacy approaches to social change employing nontraditional legal skills such as lobbying, public education, and community organizing. Second, to the extent that rights lawyers turn to litigation, it is often not as the central tactical choice but as a device to support and complement nonlitigation tactics.

1. Nonlitigation Lawyering Tactics

In modern social reform campaigns, lawyers are willing and able to design campaigns that incorporate lobbying in relation to legislative reform and popular ballot initiatives. This occurs both offensively, in the context of actively pursuing new rights or legal duties, and defensively, through lobbying against the adoption of regressive legislation or referenda. For example, in the California marriage equality campaign, rights movement lawyers made a conscious decision to pursue a nonlitigation strategy and de-emphasize marriage, instead focusing on legislative changes to promote civil unions and extend benefits to domestic partners. This action triggered marriage equality opponents' efforts to preemptively block the state from recognizing same-sex marriages from other states through a ballot initiative. As the struggle evolved, however, events beyond the control of the marriage equality lawyers sparked litigation challenging San Francisco Mayor Gavin Newsom's decision to authorize the issuance of marriage licenses to same-sex couples. But even that litigation, in which the California Supreme Court invalidated laws prohibiting same-sex marriage, immediately led movement lawyers back into the political arena, as they coordinated efforts to defeat Proposition 8, a new ballot initiative that was designed to overturn that decision. After that lobbying effort failed, lawyers outside the movement brought the currently pending litigation challenging Proposition 8 against the advice of those who had been coordinating the marriage equality strategy.

Similarly, lawyers have focused on lobbying to stop or slow the expansion of Wal-Mart superstores in low-income communities out of concern for the company's labor practices. These campaigns have emphasized legislative reform: lawyers and activists have lobbied for and helped draft local laws banning the location of such stores, requiring local employers to pay a living

78. Cummings & NeJaime, supra note 77, at 1251–56.
79. Id. at 1260.
80. See id. at 1276–78.
82. Cummings & NeJaime, supra note 77, at 1293–94.
83. Id. at 1298–99; see Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. Hollingsworth v. Perry, 133 S. Ct. 786 (2012).
wage, and conditioning the granting of development permits on large retail investors' agreement to ameliorate the negative environmental and economic impacts their superstores will have on the local community. Lawyers representing the community's interests have also lobbied against pro–Wal-Mart legislation, which has sometimes been pressed by the company through community groups that it has financed.

Contemporary public interest lawyers have also embraced public education and community mobilization as central to their advocacy mission. Lawyers in the marriage equality movement have focused on laying the groundwork for wider public acceptance of marriage equality. For example, they have put a human face on the legal battle by showing the general public that gay and lesbian couples, many of whom already had children together, are simply people trying to form families. Similarly, lawyers working with a local community campaign against a Wal-Mart store in Inglewood, California engaged in a public relations outreach effort to show the net negative impact Wal-Mart stores could have on the community. In addition, they coordinated outreach techniques that included public presentations about Wal-Mart, phone banks, press conferences, and other media and community education techniques designed to build public support.

These public education tactics are closely linked to mobilization efforts. For example, after California voters adopted the anti–same-sex marriage provision, Proposition 8, movement leaders coordinated a widespread effort to mobilize the community, including coordinating a national day of protest and utilizing new informational websites and social media. And the Inglewood Wal-Mart campaign was successful in part because of the conscious connection the lawyers drew between the public education tactics and a get-out-the-vote effort to mobilize opposition to a pro–Wal-Mart local ballot initiative.

The incorporation of these public advocacy tactics answers rights critics who have long argued for the need to establish broader public acceptance through political mobilization before judicial decisions could be meaningful. And much of the work has been highly successful. Litigation is still a valuable tool, but as a potential alternative to mobilization and as an important complement to public advocacy.

2. Litigation as Complement

Lawyers retain more traditional professional roles in social campaigns by providing legal advice in direct support of these nontraditional tactics, as
well as engaging in litigation that facilitates the tactics' success. In this way, contemporary rights lawyers help social movements pursue equality, constitutional rights, and economic opportunity. While litigation is often no longer the first option that rights lawyers turn to, it still plays an important role as part of a menu of tactics that they may choose from, and it is increasingly called into service not as an alternative to public advocacy work but to complement such efforts. For example, lawyers work closely with mobilization campaigns—such as when legal teams provide criminal defense and First Amendment litigation work to support public demonstrations—both on a national scale, such as the recent Occupy Wall Street protests, and at the local level.91

Rights lawyers also work closely with political activists in support of, or in opposition to, popular ballot initiatives at the state and local level. In addition to performing nonlitigation roles—such as researching and drafting language for the initiatives themselves and helping constituent groups navigate the often complex procedures required under many state laws for placing a measure on the ballot—these attorneys also litigate the often highly technical state law issues, such as whether initiatives are properly titled, limited to a single subject, or have satisfied other procedural requirements.92 In this manner, they find themselves on the frontlines of rights protection, even though the cases they bring are not rights claims. At the same time, when their political allies find themselves on the losing side of an initiative fight, contemporary rights lawyers may file lawsuits arguing either that the adverse measures are unconstitutional or that they were not properly adopted under state or local law.93 Conversely, rights lawyers may coordinate with government lawyers to defend legislative gains that have been achieved through other lobbying or mobilization efforts against the backlash of counter-mobilization or counter-litigation.94

Another example of rights lawyers using litigation to support other social change tactics is when they pursue legal claims under the federal Freedom of Information Act95 and state open-records laws to increase

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92. See, e.g., Steadman v. Hindman (In re Title, Ballot Title and Submission Clause and Summary for 1999–2000), 992 P.2d 27, 28–29 (Colo. 2000) (challenging the titling of a popularly initiated abortion referendum); Kerr v. Bradbury, 89 P.3d 1227, 1228–30 (Or. Ct. App. 2004) (successfully challenging a state ballot initiative that would have prohibited teaching about sexual orientation in public schools because the petition did not include the full text of the proposed amendment).

93. See, e.g., Cummings, supra note 76, at 1966.

94. See, e.g., Cummings & NeJaime, supra note 77, at 1279–80 (describing preparations to defend San Francisco’s issuance of marriage licenses to gay and lesbian couples).

95. 5 U.S.C. § 552 (2006 & Supp. 2012); see, e.g., Elec. Privacy Info. Ctr. v. Dep’t of Justice, 511 F. Supp. 2d 56, 62–64 (D.D.C. 2007) (examining the claim that the Department of Justice wrongfully withheld records regarding a federal policy of conducting surveillance of
transparency in government decisionmaking and expose issues for public discourse, such as information about department discipline against police officers for excessive force, or use of law enforcement personnel to gather information about political groups. This information can then be used to formulate policy solutions and pressure local officials to hold hearings and initiate legislative reform.

3. New Governance and Rights

Finally, I emphasize that my critique is not based on normative disagreement with Ford's prescription for widespread administrative and regulatory solutions to the challenging civil rights problems confronting today's society. First, such efforts are welcome as part of the broad set of options available to pursue social reform and should be fully embraced. However, they should not replace other effective tactics but should work alongside them. Second, the type of comprehensive, collaborative, and creative approach to problem solving Ford advocates is already taking place, but in the context of litigation rather than through administrative bureaucracies. We have seen such efforts under way in an approach to social reform litigation that incorporates concepts of "new governance." New governance approaches still focus on litigation, but do not rely on the typical command-and-control implementation of remedies accomplished by the hammer of a court order. Rather, they pursue a collaborative effort to develop a negotiated remedy to a social problem that includes the involvement and input of all stakeholders in the controversy.

Thus, for example, the implementation stage of prison conditions litigation may be more effective if government officials are directly involved in developing the reforms, setting goals and timetables, and mediating disputes over compliance. While this approach still takes place in the context of litigation, it resembles the type of nuanced approach that Ford advocates through the administrative state. Collaborative and balanced solutions to such problems need not emerge only from an administrative process.

CONCLUSION

While there is much to be learned from Richard Thompson Ford's provocative new book, there is good reason to be cautious about accepting many of its prescriptions. The rights regime is complicated and multifaceted.


98. Sturm, supra note 97, at 724–32.
ed, as are the many types of problems it seeks to address. Though we ought to welcome Ford's original take on the limits of the system and embrace new approaches to addressing the sometimes intractable problems of achieving equality, abandoning the rights enforcement system that has served us well for generations would be a great leap backwards. The rights system and the contemporary public interest lawyers who operate within its structure are more effective and adaptable than an essentialized view of their work suggests. As Ford continues his scholarly agenda to extend his theories to constitutional rights, he should be mindful of this concern.

99. P. 240 (suggesting that his future work may develop a similar critique in the context of constitutional rights).