A LOOK AT TITLE VII'S REGULATORY REGIME

Ronald Turner
A LOOK AT TITLE VII'S REGULATORY REGIME

RONALD TURNER*

INTRODUCTION

At a recent judicial conference, televised by C-SPAN, a panel of jurists discussed the problem of the burgeoning caseload facing the federal courts1 and possible responses to that problem. One panelist called for the creation of Article I courts2 and the use of administrative agencies to handle and decide certain cases, thus freeing the Article III judiciary3 to concentrate on the "important" cases (e.g., antitrust, securities, etc.). When asked to identify the type of cases that fell outside the "important" case category, Judge Stanley Sporkin identified social security cases and actions brought under Title VII of the Civil Rights Act of 1964 ("Title VII").4

* Assistant Professor of Law, The University of Alabama School of Law; J.D., 1984, The University of Pennsylvania Law School; B.A. Magna Cum Laude, 1980, Wilberforce University. I acknowledge and wish to thank Dean Kenneth C. Randall and the University of Alabama Law School Foundation for supporting my research leading to this and other works. I also acknowledge the ongoing patience, support, and encouragement of my spouse and best friend, Karen Faye Turner.


2. See U.S. Const. art. I, § 8, cl. 9 (Congress shall have the power "[t]o constitute Tribunals inferior to the supreme Court"). The Tax Court is an example of an Article I court. See Christopher F. Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy 247 (1990); Posner, supra note 1, at 26.

3. Article III of the Constitution provides that:
   The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 1. "Article III defines not only the judicial power of the United States but who may exercise it: judges who have lifetime tenure and are guaranteed against any reduction in salary." Posner, supra note 1, at 25-26.

In addition to Article I and Article III courts and judges, there are thousands of non-Article III federal judges, including administrative law judges, military judges, and federal magistrates. Id. at 26.


219
I am troubled by the view that Title VII cases are not as important as cases arising under other federal statutes, and I am concerned that acceptance of that view could relegate Title VII to a subordinate status. In enacting Title VII, Congress declared that the federal courts have jurisdiction over actions alleging conduct prohibited by that statute, that individuals who have been aggrieved by certain discriminatory practices have rights and remedies, and that one significant aspect of this nation's myriad laws and public policies is the prohibition of discriminatory conduct in the workplace.

On the Monday following my viewing of the conference, I made my way to work in a downtown Chicago law firm. Riding the El, I noticed that virtually all of the booth agents, conductors, drivers, and maintenance personnel were African-Americans. Stopping off in a fast food restaurant to purchase a breakfast sandwich, I observed that all of the workers behind the counter were African-Americans. When I arrived at work and stopped off in the mail room to pick up legal pads and sundry supplies, I saw what I had seen before and obviously knew—that virtually all of the mail room personnel were African-Americans. But a different picture emerged when I looked at the racial composition of the firm’s lawyers; of the hundreds of lawyers in the firm, the number of African-American attorneys could be counted on one hand (without using all of the fingers on that hand).

What accounted for the high level of African-American participation and representation in the transportation, fast food, and mail room jobs and the low level of representation in the ranks of the law firm’s attorneys? Were these representation levels reflective and indicative of the historical and ongoing reality of occupational stratification in the nation’s workplaces? What role does (or should) Title VII play in addressing such stratification?

As we mark the thirtieth anniversary of the enactment of Title VII, it is both timely and appropriate to take another look at the statute and its use. In this Article, I argue that, given the extant definitions of “discrimination” violative of Title VII and the governing concepts and principles pertinent to Title VII litigation, the statute, as currently interpreted, administered, and enforced, cannot have a substantial impact on the equal employment rights and

---

Rev. 751, 757 (1992) (stating that cases involving Title VII and other federal statutes are overloading the federal court system).

5. See infra notes 95-101 and accompanying text.
opportunities of many in the African-American community who are its intended beneficiaries. In making this point, I do not contend that Title VII has been completely ineffective relative to the employment opportunities of African-Americans. I do contend that an assessment of the real world impact of the statute reveals that Title VII's purposes and aspirations are not being met, perhaps cannot be fully met, and that absent a change in the approach to, and analysis of, antidiscrimination law, the impact of Title VII will continue to be limited.

Given that view, it is time to take another look at the assumptions that have become ingrained in our thinking, understanding, and expectations regarding the purpose and application of Title VII. As discussed below, our current conception of actionable "discrimination" must expand beyond the "I fired (or did not hire, or did not promote) her because she is black" paradigm. Few are the employers who are unsophisticated or brazen enough in this day and age to engage in such overt discrimination. Instead, present

6. While my focus here is on the impact of Title VII's regulatory regime on African-Americans, I recognize that other groups in America (women, African-American women, Latinos, Native Americans, and other people of color) have been and are subjected to discrimination. While it can be argued with some force that a focus on African-Americans does not and cannot address the question of discrimination in all its forms and dimensions, I have chosen to focus on African-Americans, knowing that the analysis and discussion may not fully apply to all groups protected by Title VII. See Mary E. Becker, Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment, 79 Geo. L.J. 1659, 1674-75 (1991) (suggesting that discrimination should not be discussed exclusively as an African-American problem).

7. In using the term "community," I recognize that the African-American community is not a monolithic entity. "[T]here has never been a monolithic black community or even a myth of one—ask Elijah Muhammad and Martin Luther King, Jr., or Dr. Du Bois, Booker T. Washington, and Marcus Garvey." Michael Thelwell, False, Fleeting, Perjured Clarence: Yale's Brightest and Blackest Go to Washington, in RACE-ing, JUSTICE, EN-gENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 86, 94-95 (Toni Morrison ed., 1992). "[W]hat there has been is massive and close agreement at the center." Id. at 95. See Anthony Cook, Critical Race Law and Affirmative Action: The Legacy of Dr. Martin Luther King, Jr., 8 Harv. Blackletter J. 61, 73 (1991); see also Toni Morrison, Introduction: Friday on the Potomac, in RACE-ing, JUSTICE, EN-gENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY vii, xxx (Toni Morrison ed., 1992) ("It is clear to the most reductionist intellect that black people think differently from one another; it is also clear that the time for undiscriminating racial unity has passed."); Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. Cal. L. Rev. 1769, 1817 (1992) (arguing that the black community is now more of an idea or ideal than a reality; while "the ubiquitous experience of racism provides the basis for group solidarity, differences of gender, class, geography, and political affiliations keep blacks apart").

8. See infra notes 130-257 and accompanying text.
and future discussions of Title VII and discrimination in the workplace must recognize and take account of the realities of subordination, subjugation, racial stratification, and the real world deficits in many African-Americans' exposure to and acquisition of human capital and job skills—realities shaped by and flowing from past and present discrimination. We must ask "how does race alter the contours of legal reality?" It is also imperative that we understand that the efficacy of antidiscrimination laws and the legal doctrines interpreting and applying those laws will be affected by other "people's policies" that generally shape the skill, dexterity, and judgment of those individuals comprising and participating in the labor pool.

This discussion will proceed as follows. Part I provides an overview of specific and significant events in the history of race and the law. Part II discusses the provisions of, and the procedures set forth in, Title VII and examines the way the statute is currently used in the workplace. In Part II, I discuss the view that the statute is now principally used to protect the rights of incumbent employees who allege that their employer has engaged in discriminatory conduct. While such use of Title VII is important, the protection of incumbent employees does not promote an acknowledged purpose of the statute—the opening of employment opportunities to African-Americans (and other groups). The prevailing use of Title VII falls far short of that statutory purpose. Part III addresses a "less

---

10. John T. Dunlop, To Form a More Perfect Union, 9 Lab. Law. 1 (1993). As stated by Professor Dunlop:

By "people's policies" is meant the following measures taken in combination that generally shape the "skill, dexterity and judgment" of labor that is applied: (1) primary and secondary education; (2) training and retraining; (3) health care; (4) family policies; (5) housing policies; (6) management methods in applying the labor force at the workplace; (7) relations between management and labor organizations; and (8) the quality of public service and government regulations as they relate to the work force. The list could be extended to include criminal justice, environment, economic development and a number of other topics . . . .

Id. at 1-2.
11. Again, my focus here is more specifically on African-Americans, the regulatory regime of Title VII, and the application of that statute to discrimination in the workplace.
familiar conceptual question—what do we mean by discrimination?"13

Part IV then examines and critiques two recent works which noted the ineffectiveness of antidiscrimination law and proposed provocative changes in the legal approach to discrimination. Professor David Strauss has proposed that every firm be required to employ minorities in proportion to their percentage in the national population, and that employers who do not comply with this requirement be sanctioned by fines.14 Professor Derrick Bell's most recent book discusses a "Racial Preference Licensing Act." Under that act, employers and others could obtain a license authorizing the license holder to exclude or separate persons on the basis of color if the holder paid "to a government commission a tax of [three] percent of the income derived from whites employed, whites served, or products sold to whites."15 Finally, I conclude that the current regime of Title VII, with its dependence on litigation and judicial interpretation, will have a limited impact with respect to increasing the employment and employment opportunities of African-Americans.

I. RACE AND THE LAW

The "problem of the color line"16 has been and continues to be one of the most pressing issues facing this nation.17 Beginning in August 1619 (when John Rolfe wrote into the journal of Jamestown, Virginia: "about the last of August, there came to Virginia a Dutchman of Warre that sold us twenty negers"),18 the presence of

17. If one somehow forgets the presence and reality of racism in this country, a reminder is sure to come in the form of a racial epithet, the denial of a promotion, incidents of racial harassment, or the savage beating of an African-American (Rodney King and many others) and the resulting riots.
individuals who are black ("them") on the soil of America ("our") and in the midst of whites ("us") raised fundamental questions relative to notions of equality, rights, antidiscrimination principles, and the like.

Throughout the history of this nation, the "problem of the color line" has arisen in various forms and contexts and has been accompanied by a corresponding set of assumptions and myths constructed by those in power to justify the subordination of blacks. Even though the Declaration of Independence declared, "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness,"19 the author of that document, Thomas Jefferson, owned approximately 175 slaves.20

Ten provisions in the original Constitution (which did not explicitly refer to slavery or race)21 directly or indirectly dealt with slavery.22 The Constitution prohibited any congressional interference with the slave trade before 1808,23 and blacks were described as "other persons"—to be considered three-fifths of a human being—in that most revered document.24 The "peculiar institution" of

21. I use the term "race" because that term is commonly used in discussions of discrimination, and for the sake of convenience and familiarity. I note, however, that the term "race" is a modern European construct. (see Cornel West, Keeping Faith: Philosophy and Race in America xii (1993)), and "that there is only one biological race and that is the human race." Darlene Clark Hine, "In The Kingdom of Culture": Black Women and the Intersection of Race, Gender, and Class, in Lure and Loathing: Essays on Race, Identity, and the Ambivalence of Assimilation 337, 338 (Gerald Early ed., 1993). The use of the word "race" in this culture actually refers to the "social construction of differences. Race, class, and gender are not only the only factors that shape identity, but they are, even more to the point, potent indicators of an individual's relation to power." Id. at 339.
24. See id. at § 2, cl. 3; Lively, supra note 22. See generally Robert A. Goldwin, Why Blacks, Women, and Jews Are Not Mentioned in the Constitution, and Other Unorthodox Views (1990).
American slavery was justified by paternalism and by a racialist theory of congenital inferiority which posited that blacks were genetically and intellectually inferior to whites and were "the less than human negro." This "mytho-narrative" view of African inferiority was not based on nor defended by "science" or a "philosophical case for the innate moral and intellectual inferiority of the black race." The view of African-American inferiority pre-dated the founding of this nation, slavery, and American apartheid.

Black persons were treated as non-humans under the law. In 1857, the Supreme Court of the United States held that blacks were property and were not citizens under the Constitution. Indeed, stated the Court, blacks had been "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations . . . and . . . they had no rights which the white man was bound to respect." And since the Civil War was fought to preserve the Union and not to free the slaves, the equal-

26. See William W. Fisher III, Ideology and Imagery in the Law of Slavery, 68 Chi.-Kent L. Rev. 1051 (1993). The paternalist theory, which I reject, depicted Southern society as a whole as patriarchal and humane. Social and economic relations in the region, so the argument went, are vertical and reciprocal. Inferiors obey and respect their superiors and are rewarded with support and sustenance. Slavery is just one component (albeit an important component) of this essentially feudal system. Masters enjoy the labor and obedience of their slaves, but provide them in return food, housing, moral and religious guidance, and care in their infancy and old age. The net result is a stable, familial, and mutually beneficial labor system—which contrasts favorably with the brutal and tumultuous wage labor system used in the industrializing North.

Id. at 1065 (footnote omitted).
27. See Bell, supra note 22, at 156; Derrick A. Bell, Jr., Race, Racism and American Law 11 (1980); John H. Franklin, Race and History: Selected Essays 1938-1988 325 (1989); Stampp, supra note 25, at 197-236; Fisher, supra note 26, at 1066.

30. Id.
31. Id.
34. Id. at 407; see Don E. Fehrenbacher, The Dred Scott Case: Its Significance in Law and Politics (1978).
35. As stated by President Lincoln: "My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union
ity and liberty of blacks was not the animating force in that conflict.

During the First Reconstruction (the period between 1863 and 1877), the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution, and Congress enacted civil rights legislation. But the First Reconstruction was unable to survive the politics of that time, and the Supreme Court invalidated the early civil rights laws. The First Reconstruction was ended by the Black Codes in the southern states and by the Supreme Court’s endorsement of the separate but equal doctrine in *Plessy v. Ferguson*, wherein the Court constitutionalized American apartheid. Lawful and constitutional segregation was justified by those imposing it on blacks by the myth of the “happy and contented negro.”

The Second Reconstruction (which commenced in either 1945 or 1954 and ended at some point during the period between 1976 and 1989), was a period of many significant developments. The

---


37. See U.S. CONST. amends. XIII-XV.


40. 163 U.S. 537 (1896).

41. The *Plessy* Court stated:

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

*Id.* at 551-52.


defeat of the racial superiority principle of the Nazis in World War II and the "revelations of Nazi atrocities created a more sympathetic environment for minority organizations and others who had long challenged racial discrimination in the United States." But African-American soldiers returned to the United States after fighting and risking their lives for their country to find continuing discrimination and violent, racist attacks in the South.

However, in the competition between the United States and the Soviet Union for the minds and allegiances of the Third World, American efforts to address discrimination within its borders provided this country with credibility in that ideological struggle. Rosa Parks refused to move to the back of the bus, the civil rights movement gained momentum, and the Supreme Court decided Brown v. Board of Education, overturning, at least as a matter of law, the doctrine of separate but equal.

Any discussion of discrimination on the basis of race, including this discussion of Title VII, must take account of the incontrovertible facts of two hundred and fifty years of slavery, eighty years of legally enforced subordination of African-Americans, and past and present social norms that have kept African-Americans "in the lowest status, least remunerative jobs, and [have] denied them the chance to move up the occupational ladder." A very large number of African-Americans "still suffer from the tragic sequelae of Plessy." The consequences of the history and the reality of racism are manifest; many African-Americans face ever worsening poverty, unemployment, serious illness, drug addiction, decreasing

---

46. Id.; see Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61 (1988).
47. "I had decided that I would have to know once and for all what rights I had as a human being and a citizen." See JAMES M. BURNS, THE AMERICAN EXPERIMENT: THE CROSSWINDS OF FREEDOM 348-49 (1990) (quoting Rosa Parks).
48. Repression of the civil rights movement was rationalized with the myth of the "violent and communist negro." Higginbotham & Francois, supra note 18, at 193.
life expectancy, increasing homicide rates, crime, incarceration, infant mortality, housing, toxic and hazardous environments, restricted access to mortgages and financing, and inadequate education.52

This last subject, education, is of particular importance to the issue of employment. The gap between the college attendance rates of blacks and whites has grown since 1980, the quality of schools attended by African-Americans has declined, and segregation has denied many blacks access to quality schools and valuable influences.53 “As a consequence, great numbers of blacks are prepared neither for college nor for the labor market. It seems likely that black wages will continue to lag behind white wages as long as black schooling lags behind white schooling.”54 To the extent that racial segregation or under-representation in the work force continues, they will “evoke strong images of an earlier racial hierarchy . . . [and can] ignite latent racism in some whites, particularly the young or inexperienced.”55

Can the law adequately address and rectify the consequences and ravages of de jure and de facto discrimination and subordination? More specifically, can federal employment discrimination law and public policy make or facilitate changes in the workplace which will address the status quo, and deter or remedy unlawful discrimination?

II. TITLE VII

The problem of the color line and the debate over the meaning of equality have important implications for the workplace.

Most of us work in order to live, and our standard of living and sense of self-worth are determined by the work we are able to do. Anything which limits employment options, whether by restricting our opportunities or expanding someone else’s at our expense, is a matter of deep concern.56


54. Id.


A. Pre-Title VII Social Indicators

The deteriorating economic well-being of African-Americans during the 1940s and 1950s (and, of course, in the period before and after those two decades) is a real, indisputable, and unfortunate fact of life. African-Americans did not share in this nation’s post-World War II economic surge,\(^\text{57}\) and were disproportionately laid off or demoted after the end of that war.\(^\text{58}\) By 1958, black unemployment had reached double digits and was generally double the rate of white unemployment.\(^\text{59}\) Deputy Secretary of Labor W. Willard Wirtz testified before congressional committees that the American work force was not employed efficiently or democratically; that in the years immediately following World War II the black unemployment rate was approximately sixty percent higher than the white unemployment rate; that in June 1963, the official white and black unemployment rates were 5.1% and 11.2%, respectively; and that black workers were increasingly vulnerable in an economy that was moving toward a technical and service-oriented base.\(^\text{60}\) In the summer of 1963, the federal Census Bureau released a study showing that black income was approximately fifty-five percent of white income; that in most states non-white males had the same occupational distribution relative to whites that the non-whites had in 1940 and 1950; and that in the South the earnings of non-whites were only one-third of those of whites with similar jobs and schooling.\(^\text{61}\)

B. The Enactment of Title VII

On July 2, 1964, Congress enacted many civil rights laws, including the Civil Rights Act of 1964 (the “Act”).\(^\text{62}\)

---

59. Id. at 43 n.98.
60. Id. at 101; see Hearings, Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., 443-57 (June 6, 1963) (Testimony of Secretary W. Willard Wirtz).
"[T]he plight of the Negro in our economy" was one of Congress' primary concerns. As stated by one senator, "[t]he rate of Negro unemployment has gone up consistently as compared with white unemployment for the past [fifteen] years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass."

Senator Humphrey, a key supporter of the Act, stated that the crux of the problem of discrimination was to open employment opportunities for blacks in occupations traditionally closed to them, "and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."

Title VII has been described as one of the most significant pieces of civil rights legislation ever enacted by Congress. One section of Title VII provides that:

It shall be an unlawful employment practice for an employer-

1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-

---

64. Id. (quoting 110 Cong. Rec. 7220 (statement of Sen. Clark)).
65. Id. at 203; see 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey); see also Local 28, Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421, 448 (1986) ("Congress enacted Title VII based on its determination that racial minorities were subject to pervasive and systematic discrimination in employment."); CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 3-4 (1992) ("[T]he provisions of the Civil Rights Act of 1964 that barred racial discrimination in employment were also meant to help equalize economic opportunity."); Ruther- glen, supra note 12, at 1465 (The laws against employment discrimination "were designed to open jobs to groups excluded from them.").
66. See generally BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 933-1185 (2d ed. 1983) (discussing various aspects of Title VII litigation).
cause of such individual's race, color, religion, sex, or na-
tional origin.68

Title VII also created an Equal Employment Opportunity
Commission ("EEOC" or "Commission").69 The Commission is
composed of five members, appointed by the President with the ad-
vice and consent of the Senate, for a term of five years. The Presi-
dent designates one commissioner to serve as the chairman and one
member to serve as the vice chairman. The President also appoints,
again with the advice and consent of the Senate, a general counsel
who serves a four-year term and has responsibility for the conduct
of litigation.70 Declining to grant cease and desist authority to the
EEOC, Congress decided that the federal courts would be responsi-
ble for enforcement of Title VII.71 However, Title VII does em-
power the EEOC to prevent any person from engaging in specified
unlawful employment practices.72

When a charge of unlawful discrimination is filed with the
EEOC by or on behalf of an aggrieved person alleging that an em-
ployer has engaged in an unlawful employment practice, the EEOC
serves notice of the charge on the respondent and investigates the
matter.73 If the EEOC determines that there is reasonable cause to
believe that the charge is true, the EEOC "shall endeavor to elimi-
nate any such alleged unlawful employment practice by informal
methods of conference, conciliation, and persuasion."74 On aver-
age, the time required for the investigation of a charge and the rea-
sonable cause determination is 280 days, with another 255 days for
conciliation efforts to obtain voluntary compliance and settlement

68. 42 U.S.C. § 2000e-2(a) (1988). Title VII also prohibits discrimination by em-
71. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974); Belton, supra
note 67, at 921-22. The 1972 amendments to Title VII authorized the EEOC to seek
72. See supra note 68 and accompanying text for the language of 42 U.S.C.
[TH]e [EEOC] or its designated representative shall at all reasonable times
have access to, for the purposes of examination, and the right to copy any
evidence of any person being investigated or proceeded against that relates to
unlawful employment practices covered by this subchapter and is relevant to
the charge under investigation.
42 U.S.C. § 2000e-8(a) (1988). The EEOC also has the power to issue subpoenas. 42
in reasonable cause determinations. If the Commission is unable to secure an acceptable conciliation agreement from the employer, the general counsel determines whether to recommend to the Commission that a civil action be brought against the employer (a process which takes approximately forty days). The Commission will then take another forty days to decide whether the matter should be litigated in federal court. The EEOC may bring a civil action against the employer in the appropriate district court, and the aggrieved party has the right to intervene in the action. “Thus, the average case spans more than 600 days from the filing of the charge until the case is referred to the General Counsel to prepare to bring suit. This is the average processing time; some stages may take twice as long.”

If, after the investigation, the EEOC determines that there is not reasonable cause to believe that the charge has merit, it “shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.” The matter may not end there, however, as EEOC enforcement of Title VII is not exclusive. A charging party may bring a civil action in federal court once a charge is dismissed. In addition, if the EEOC has not filed a civil action within 180 days from the filing of the charge or has not com-

---

76. Id.
77. During the debate on the 1972 amendments to Title VII, conservative and liberal members of Congress differed on the question whether Title VII should be enforced by EEOC court actions or by cease-and-desist orders like those issued by the National Labor Relations Board and enforced by the federal courts of appeals. See William B. Gould, Black Workers in White Unions: Job Discrimination in the United States 41 (1977). Proponents of EEOC court action urged, inter alia, that enforcement of Title VII could be sabotaged by the presidential appointment of unsympathetic and politically motivated commissioners. Id. Proponents of the cease-and-desist method argued, inter alia, that the expertise of the commissioners would be greater than that of the court, and that the commissioners would be more sympathetic to claimants. Id.

The 1972 amendments empowered the EEOC to pursue federal court actions, and also provided that individual plaintiffs have the right to sue if the EEOC dismissed their charge or took no action in their case. Id.
79. Summers, supra note 75, at 481 (footnote omitted).
80. Reasonable cause findings are issued in less than five percent of all Title VII charges filed with the EEOC. Donald R. Livingston & Samuel A. Marcosson, The Court at the Crossroads: Runyon, Section 1981 and the Meaning of Precedent, 37 Emory L.J. 949, 988-89 & nn.153-54 (1988).
pleted its investigation or filed a civil action, an aggrieved party may file a civil action.

A Title VII plaintiff complaining of intentional discrimination may request a trial by jury and may seek punitive and compensatory damages. Where a court finds that an employer has engaged in an unlawful employment practice, the court may enjoin the employer "from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate," including reinstatement of employees or hiring of applicants with or without back pay, or any other equitable relief as the court deems appropriate. In addition, a court may allow the prevailing party attorneys' fees (including expert fees) as part of costs.

C. The Impact of Title VII

There is general agreement that Title VII had a definite impact on the nation's workplaces in the decade immediately following its enactment. Following the passage of the Civil Rights Act of 1964, employers eliminated many longstanding employment practices that had limited opportunities for African-Americans and other minorities, and the relative income of black workers began to rise.

---

82. SCHLEI & GROSSMAN, supra note 66, at 946-47, 1168; Summers, supra note 75, at 481.
83. It should also be noted that Congress gave EEOC commissioners the power to file their own discrimination charges, as well as the power to file charges challenging a pattern or practice of discrimination. See 42 U.S.C. §§ 2000e-5(b),-6(e) (1988).
85. 42 U.S.C. § 2000e-5(g)(1) (1988). Backpay liability cannot accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. Id.
87. Id.
89. For a different view, see James Smith & Finis Welch, Black Economic Progress after Myrdal, 27 J. ECON. LITERATURE 519 (1989) (education and migration were the primary determinants of long-term black economic improvement).
sharply. Even Professor Richard Epstein (no fan of Title VII) acknowledges that a substantial increase in black participation in the labor force "followed quickly on the heels of the introduction of Title VII." According to Epstein:

Virtually all of that increase [in black participation] is attributable to the removal of formal barriers to entry, both public and private. The early enforcement efforts were relatively easy. Federal officials took on the most obvious targets which offered the greatest civil rights gains through direct administrative attacks on explicit discriminatory practices, public and private. Here the illegality of the conduct was so patent that most firms would desist without a real fight, seeing that it was one they could not win. . . . Large employers . . . whose formal rules were in violation of Title VII were the first to comply, for they offered big targets and had the resources to pay any fines and back pay orders that might be entered against them.

Professor Fran Ansley has pointed out that after the passage of Title VII, "traditionally excluded groups obtained relief in broad, aggressive litigation that for a time characterized the new era of antidiscrimination law." But, Professor Ansley notes, "the scale of overall progress made, and the amount of race and gender stratification still remaining are both serious disappointments."

While Title VII had a positive impact on the employment prospects of some African-Americans, and has been effective to the extent that employers no longer openly admit to excluding African-Americans, women, and other people of color in the manner and to the degree they did prior to Title VII, racial stratification in the nation's workplaces continued and continues to exist today. African-Americans are over-represented in certain occupations (includ-

---

89. Black earnings and wages relative to white earnings and wages increased beginning in the mid-1960s, with the South experiencing the greatest African-American advance during the period 1960-1970. Donohue & Heckman, supra note 88, at 1606.


91. Forbidden Grounds, supra note 90, at 252.

92. Id.


94. Id. at 1760 n.7.

ing nursing aides, orderlies, bus drivers, and correctional officers\textsuperscript{96} and are under-represented in others (including engineering, law, medicine, architecture, journalism, and waiters).\textsuperscript{97}

African-American rates of unemployment have historically been much higher, and labor-force participation lower, than the white rates of unemployment and labor-force participation.\textsuperscript{98} Many inner-city black males suffer from long-term joblessness. "An inner-city man may be jobless for a long time because he is profoundly discouraged about his employment prospects, or because he is dissatisfied with the quality of jobs he thinks he can get, or because he supports himself with illegal activities."\textsuperscript{99} African-American males also experience unemployment on a frequent basis.\textsuperscript{100}

The critical point is that the presence or absence of African-Americans in certain offices, businesses, and occupations is viewed as, and therefore becomes, "normal" in the sense that it is accepted and perhaps even expected by society. We should worry that the daily experiences of African-Americans, other people of color, and whites convey the message that African-Americans "belong" in certain so-called "lower level" positions, and that they do not or cannot hold the so-called "higher level" jobs and occupations. Can Title VII address, provide a remedy for, and change the stubborn reality of occupational stratification?\textsuperscript{101} In pondering that question,

\textsuperscript{96} African-Americans, who constitute 10.1% of the total work force, make up approximately 31% of nursing aides and orderlies, 23% of bus drivers, 23% of correctional officers, and 9.5% of hotel clerks and retail salespersons. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 111 (1992).

\textsuperscript{97} African-Americans make up 4% of reporters and editors, 3.6% of engineers, 3% of physicians, 3.2% of lawyers, 1% of architects, and 4.7% of waiters. Id. Professor Derrick Bell has noted that work as a waiter or waitress is not an elite occupation and does not require sophisticated training. BELL, supra note 22, at 6.

The suspicion arises that proprietors of restaurants and lounges may feel that their white clientele do not want their food and drinks handled by black employees. Or it could stem from the belief that if a place has "too many" blacks on its staff, it will drop to a lower status.

\textit{Id.}

\textsuperscript{98} Robinson, supra note 29, at 76. From 1973 through 1986, the average real earnings of African-American males under the age of 25 fell by 50%, and the percentage of black males aged 18 to 29 in the labor force and securing full-time employment fell from 44% to 35%. MANNING MARABLE, THE CRISIS OF COLOR AND DEMOCRACY: ESSAYS ON RACE, CLASS AND POWER 19 (1992).


\textsuperscript{100} \textit{Id.} at 2007.

\textsuperscript{101} See \textit{supra} notes 95-100 and accompanying text.
it may be helpful to focus on the extant use of Title VII in employment discrimination litigation.

D. Extant Use of Title VII

In 1966, charges of unlawful discrimination in hiring outnumbered charges of discriminatory discharge by fifty percent. By 1985, the relationship had been reversed, with termination charges outnumbering hiring charges by more than six to one.\textsuperscript{102} The ratio during the period 1989 to 1991 was approximately seven to one.\textsuperscript{103} During fiscal years 1982 through 1989, 61.9\% of all EEOC charges alleged discrimination in layoffs or terminations, and 10.3\% alleged discrimination in hiring.\textsuperscript{104} In fiscal year 1993, a record number of charges were filed with the EEOC. The agency received nearly 88,000 charges of employment discrimination, with race discrimination alleged most frequently\textsuperscript{105} (49.6\% of all charges).\textsuperscript{106}

These figures reveal that Title VII, originally envisioned as a tool for opening employment opportunities for African-Americans, women, and other people of color, is now overwhelmingly used to protect the existing positions of incumbent employees.\textsuperscript{107} Since that has become the principal use of the statute, employers face a diminished risk of Title VII hiring suits, and may have no real incentive to promulgate and implement employment practices that address possible discrimination in hiring.

What factors explain the declining use of Title VII in hiring matters? Some have argued that there is now less discrimination in hiring.\textsuperscript{108} Others point to the real world disincentives of suing an
employer. An applicant who has not been hired is less likely to sue an employer than an incumbent employee who has an established relationship with the company.\footnote{Donohue \& Siegelman, supra note 102, at 1024-25.} Further, an applicant who is not hired by a company may be less likely to suspect, and most likely will not be in a position to shape, and prove, a claim of discrimination. The applicant's contact with the employer may be limited to the filing of an application or a short interview, the applicant will not be familiar with the racial or sexual makeup of the employer's work force, the applicant may not know the reasons for the decision not to hire her or who made that decision, and the applicant will have to continue her job search. If she finds other employment, she may not wish to pursue an action against the company that rejected her application.\footnote{Yelnosky, supra note 103, at 412.} An applicant contemplating a Title VII charge and action must also consider the fact that such litigation can consume two or more years of her life, that she may not be able to afford legal counsel,\footnote{As stated by Professor Yelnosky: Because these [lower-skilled, entry-level] jobs typically pay lower wages, the plaintiff may have difficulty paying a lawyer. Relying on a contingent fee agreement also may be problematic because the lower wages used to generate a back-pay award may not compensate a lawyer adequately. Finally, attorneys' fees are available only to prevailing parties. The difficulty and expense of proving a discrimination claim involving hiring for a lower-skilled, entry-level position will deter many attorneys from relying on the possibility of recovering attorneys' fees to accept a case. Id. at 412-13 (footnotes omitted). As pointed out by Professor Yelnosky, it is "too early to tell whether the amendments to Title VII permitting awards of compensatory and punitive damages will tend to make attorneys more available in cases offering no hope of a substantial back-pay award." Id. at 412-13 n.35.} and that proving discrimination will be difficult to uncover and prove as a matter of law. As to the last point, it should be noted that African-Americans are not likely to win Title VII cases,\footnote{Culp, supra note 9, at 985.} particularly when such cases are tried before judges instead of juries.\footnote{Becker, supra note 6, at 1681.}

Another concern relative to using Title VII to protect incumbent employees is that the law may provide employers with a net disincentive to hire minorities and women.\footnote{Donohue \& Siegelman, supra note 102, at 1024.}

A worker who is not hired in the first place is obviously in no position to bring a future firing suit. Thus, an employer must
consider the increase in expected costs when he hires a female or minority worker, because some probability exists that the worker will be fired and will sue. . . . The greater the likelihood that the worker will ultimately be fired, and the higher the probability of a firing suit, the greater are the expected costs imposed by hiring. With the enormous increase in discharge cases, the probability that a worker will bring a discriminatory firing suit is now substantially higher than the probability that a worker will bring a failure to hire suit.115

On that view, the net effect of antidiscrimination litigation on the hiring of minorities and women may be negative,116 for an “applicant who is not hired is not in a position to bring a subsequent firing suit, and these cost savings must also be included in the employer’s calculation of the effect of failing to hire an applicant.”117 If this view is correct, the expected effects of Title VII would include a reduction in the number of African-Americans employed118 and a small increase (or even a decrease) in the average wages of African-American workers when the average includes those who are employed and those who are not employed.119

The notion that the probability of a discriminatory firing suit will act as a disincentive with respect to the employment of African-Americans (and presumably others protected by Title VII) should be examined more carefully. According to one study, only about one percent of those individuals who believed that they had been discriminated against even consulted a lawyer.120 Thus, instead of “too many” Title VII actions, the reality is that there may have been “too few” actions filed.121 Moreover, while the volume of federal employment discrimination litigation has increased many times faster than the overall federal caseload122 (indeed, between fiscal year 1970 and fiscal year 1989, the employment discrimination caseload rose by 2166%),123 this growth does not mean, as a general matter, that employers in general have experienced a significant

115. Id.
117. Donohue & Siegelman, supra note 102, at 1026.
119. Id.
120. Becker, supra note 6, at 1679 (citing B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 135-36 (1977)).
121. Id. at 1680.
122. Donohue & Siegelman, supra note 102, at 983-84.
123. Id. at 985.
surge in Title VII court litigation. Ninety-five percent of employers have never been sued in federal court, and in any one year less than one-half of one percent of firms covered by Title VII can expect to be sued in a federal court. In addition, the aggregate litigation costs for those firms sued under Title VII, when combined with the budgets of the EEOC and the Office of Federal Contract Compliance Programs, amounts to perhaps one billion dollars, a diminutive fragment of this nation’s multi-trillion dollar economy.

What about the current employee who is still working for her employer and is contemplating a discrimination claim? That employee must think twice. For instance, an employee who contends that she has been harassed or unlawfully denied a promotion may be legitimately concerned that the practical costs of bringing a claim do not outweigh the benefits available under the statute. The employee may also fear employer retaliation, or be concerned that her ongoing employment relationship will become strained as she continues to work with the very individuals who the employee has identified as alleged discriminators. Thus, “[i]n most cases, litigation is a viable option only when the employment relationship...
has been broken off (or never existed)."  

III. "DISCRIMINATION"

Title VII generally prohibits discrimination on the basis of race, color, religion, sex, or national origin. In discussing the meaning and concept of discrimination actionable under Title VII as part of the assessment of the impact of the statute, we must address a "less familiar conceptual question—what do we mean by discrimination?" More specifically, what do we mean by employment discrimination?

The term "discrimination" is not defined in Title VII; hence, the undefined statutory prohibition is "uninformative about the role of discriminatory effects, the appropriate burdens of proof and production, and the mechanisms for filtering out discriminatory treatment." In the absence of such express direction and information set out in the statute, courts will fill in the statutory gaps and open questions, through the norm-ridden exercise of developing gap-filling rules, and will fashion and implement devices responsive to the courts' view of how the statute should be read and understood. Thus, the judiciary has the discretion to define "discrimination" as it holds that certain acts are or are not discriminatory within the meaning of Title VII. What norms and concepts of discrimination have the courts utilized in making that determination?

As a general matter, racial discrimination may be overt or institutional. Overt discrimination occurs when "a harm is inflicted or a benefit withheld either because of the perpetrator's racial bias against the victim or because of that perpetrator's obliging the racial prejudice of others." Thus, an employer who refuses to hire

---

129. Donohue & Siegelman, supra note 102, at 1032 (footnote omitted).
131. Kelman, supra note 13, at 1159.
134. Id.
135. This discussion of concepts of discrimination is not intended to be exhaustive. In addition to the concepts addressed herein, the reader may wish to examine the four categories of discrimination set forth by Professor Mark Kelman in a recent article. See Kelman, supra note 13, at 1164-1204.
136. Gertrude Ezorsky, Racism & Justice: The Case for Affirmative Action 9 (1991); see also Alan Freeman, Antidiscrimination Law: The View from 1989,
African-Americans due to the employer's discriminatory bias, or because the employer is concerned with the reactions of her biased customers or employees, engages in overt discrimination.137

Institutional discrimination occurs when an employer uses practices that are ostensibly race-neutral but nevertheless have an adverse impact on African-Americans as a group.138 Suppose, for example, that an employer sets "neutral" qualification requirements for a particular position. If some or many African-Americans lack those qualifications or skills because of the past and present effects of *de jure* and *de facto* discrimination,139 purportedly neutral job requirements will disqualify African-Americans at a disproportionate rate relative to whites. In that circumstance, African-American unemployment and underemployment will result, even where the employer is not engaging in overt discrimination.

A. *Title VII* Discrimination Analyses

The two principal concepts and definitions of Title VII employment discrimination formulated by the Supreme Court are disparate treatment and disparate impact.140 Both concepts were discussed in *International Brotherhood of Teamsters v. United States*:

"Disparate treatment" ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or

---

137. EZORSKY, supra note 136, at 9.
139. Given the past and present discrimination against African-Americans, it is not surprising that many individuals who are black may not possess the educational background or the employment skills and experience that an employer may seek when selecting a work force. See David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 114-15 ("[C]enturies of discrimination explicitly based on race have forced some characteristics on blacks—on all blacks, simply because they are black, since that was the basis of the discrimination.").
140. There are four general categories or theories of discrimination relevant to the interpretation and application of Title VII: disparate treatment, disparate impact, policies or practices which perpetuate in the present the effects of past discrimination, and failure to make reasonable accommodations to an employee's religious observance or practices. SCHLEI & GROSSMAN, supra note 66, at 1 (footnote omitted). In this Article, I focus on disparate treatment and disparate impact.
national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory. Either theory may, of course, be applied to a particular set of facts.141

1. Disparate Treatment

Disparate treatment analysis takes a restrictive view of the question of discrimination and downplays the significance of outcomes.142 The analysis looks to individual justice, equality of opportunity, equal treatment, and equal process (the process of employer decision-making rather than the results reached through that process).143 On that view, the primary objective of antidiscrimination law is to "prevent future wrongdoing rather than to re-

---

141. 431 U.S. 324, 335-36 n.15 (1977) (citations omitted). The Teamsters Court also addressed the relevance of Title VII § 703(j) to the use of statistics as an evidentiary tool in employment discrimination cases. That section provides, in pertinent part:

Nothing in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1988). In Teamsters, the Court concluded that § 703(j) was irrelevant because statistical evidence was useful in discrimination cases and statistical disparities were often a "telltale sign" of intentional discrimination. 431 U.S. at 339-40 n.20.


dress present manifestations of past injustice.”144

Title VII disparate treatment theory requires proof of racial animus and discriminatory motive; thus, a plaintiff must show that an employer treats members of protected groups differently and less favorably than it treats others because of their race. Evidence of intentional discrimination may be difficult or impossible to secure, for few employers are brazen enough to express their discriminatory reasons and provide the plaintiff with “smoking gun” evidence when making employment decisions.145 Moreover, evidence of intentional discrimination is often difficult or impossible to secure, as discriminatory motives may be disguised as neutral acts.146

Given the substantial difficulty in obtaining direct evidence of disparate treatment discrimination, plaintiffs typically resort to the burden shifting framework set out by the Supreme Court in McDonnell Douglas Corp. v. Green147 and Texas Department of Community Affairs v. Burdine.148 To prevail under that methodology, a plaintiff must establish a prima facie case of disparate treatment discrimination by a preponderance of the evidence. Such a showing is "proof of actions taken by the employer from which discriminatory animus [can be inferred] because experience has proved that in the absence of any other explanation it is more likely than not those actions were based on impermissible considerations."149 If a plaintiff establishes a prima facie case, the court must then consider the employer's justification for the presumptively discriminatory practice or action. The burden then shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for its challenged actions. However, the employer need not prove that it was actually motivated by the proffered reasons.150 If the employer meets that burden, it has rebutted the inference of discrimination created by the

144. Crenshaw, supra note 142, at 1342.
150. Burdine, 450 U.S. at 254-55.
The plaintiff must then demonstrate that the employer's articulated reason for the employment practice or action is pretextual.\(^{152}\)

Given the relative ease in establishing the plaintiff's *prima facie* case and the employer's articulation of a legitimate, non-discriminatory reason, the vast majority of disparate treatment cases turn on the question whether the plaintiff can establish that the employer's articulated reason for its action was in fact pretextual.\(^{153}\) While it was generally presumed that the pretext inquiry was the final step of the *McDonnell Douglas/Burdine* framework, a recent Supreme Court decision called for an additional step. In *St. Mary's Honor Center v. Hicks*,\(^{154}\) the Court held that the trier of fact's rejection of the employer's asserted legitimate, non-discriminatory reason for its challenged actions did not entitle the plaintiff to judgment as a matter of law. Thus, a plaintiff who establishes that the employer's proffered reason was in fact pretextual must also establish that the employer intentionally discriminated against her on the basis of race or other protected status.\(^{155}\) The factfinder's disbelief of the reasons put forward by the employer may suffice to show intentional discrimination, stated the Court, but the rejection of the defendant's reasons does not compel judgment for the plaintiff since the plaintiff bears the ultimate burden of persuasion.\(^{156}\) Under the Court's "pretext-plus" approach,\(^{157}\) for example, a plaintiff could establish that the employer's assertion that the plaintiff was discharged for absenteeism was in fact not true, but the plaintiff would still fall short of proving disparate treatment. *Hicks* requires the plaintiff to go beyond establishing pretext. The plaintiff must also

\(^{151}\) Id. at 253.

\(^{152}\) Id. at 256. Professor Richard Epstein has argued that the *McDonnell Douglas* scheme reflects a dramatic shift in Title VII litigation and shifted the statute away from a color-blind orientation to a protected-class limitation. *FORBIDDEN GROUNDS*, supra note 90, at 177. However, as noted by Professor George Rutherglen, Epstein exaggerates the effect of *McDonnell Douglas* and fails to take into account the Supreme Court's decision in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 n.6 (1976), wherein the Court held that white employees can also bring discrimination claims under Title VII. See Rutherglen, supra note 12, at 1474.

\(^{153}\) SCHLEI & GROSSMAN, supra note 66, at 1155-56.

\(^{154}\) 113 S. Ct. 2742 (1993).

\(^{155}\) Id. at 2749.

\(^{156}\) Id.

introduce evidence that the basis for the challenged treatment was race or other protected status.

*Hicks* increases the plaintiff's burden in disparate treatment cases. As noted by Justice Souter in dissent, the Court's ruling "saddles the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."\(^{158}\)

By telling the factfinder to keep digging in cases where the plaintiff's proof of pretext turns on showing the employer's reasons to be unworthy of credence, the majority rejects the very point of the *McDonnell Douglas* rule requiring the scope of the factual enquiry to be limited, albeit in a manner chosen by the employer. What is more, the Court is throwing out the rule for the benefit of employers who have been found to have given false evidence in a court of law. There is simply no justification for favoring these employers by exempting them from responsibility for lies.\(^{159}\)

\(^{158}\) *Hicks*, 113 S. Ct. at 2758 (Souter, J., dissenting).

\(^{159}\) *Id.* at 2763 (Souter, J., dissenting) (footnote omitted). The point made by Justice Souter is best illustrated by an example found in Victoria A. Cundiff & Ann E. Chaitovitz, St. Mary's Honor Center v. Hicks: *Lots of Sound and Fury, but What Does It Signify?*, 19 EMPLOYEE REL. L.J. 147 (Winter 1993-94). An employer contends that an employee was fired because the employee was habitually late. The plaintiff establishes that this reason is pretextual by showing that employees not in the protected class had far worse records of tardiness but were not disciplined, let alone discharged. The employer actually discharged the plaintiff because its best customer asked the employer to give the plaintiff's job to the customer's son. *Id.* at 148. Under the pretext-only approach, the employer would lose because its proffered reason for the discharge—tardiness—was pretextual. Under the pretext-plus approach, the employer would lose only where the plaintiff proved that the tardiness reason was pretextual and presented additional evidence that the employer discharged the plaintiff because of the plaintiff's protected status. *Id.*

The discussion of the foregoing example does not capture the full dimension of the problems and issues raised by the pretext-plus approach. Assume that the employer's reason for the discharge was proffered during discovery, and was therefore set forth in sworn depositions and sworn responses to interrogatories. In that circumstance, the sworn testimony that tardiness was the reason for the discharge would be false testimony given under oath, and any rule of law that does not discourage or ferret out such untruths is fundamentally flawed. Assume further that absent a truthful answer to the question of why the plaintiff was discharged, it is not likely that the plaintiff will know that she lost her job because the customer asked the employer to hire his son. Absent knowledge of the real reason, how can the plaintiff prepare her case and engage in discovery relative to the real reason?

Moreover, an employer who withholds the real and true reason for an employment action can gain a tactical advantage. If the pretextuality of its stated reason is not proven, the employer may continue to conceal the true reason. If pretextuality is established, why should the employer be allowed to use its ace in the hole, the real reason, to
Title VII disparate treatment analysis, as developed by the Supreme Court and applied by the lower courts, does not adequately address substantive inequalities existing at the time of discovery of racial bias and discrimination. As noted above, evidence of intentional discrimination is difficult (if not impossible) to secure, as discriminatory acts are often concealed or disguised as "neutral" acts. In addition, the adverse effects of past and present discrimination in housing, education, and other areas have placed many African-Americans and other people of color at a distinct disadvantage as they seek to enter and compete in the job market.

Consider, for example, an African-American job applicant who, because of past and present discrimination and subordination, has grown up in a high-rise housing project, attended an underfunded and second class segregated school, and received an inferior education. That applicant enters an applicant pool containing whites who have received first-rate educations at adequately funded schools. Before choosing from among the applicants, the employer requires each applicant to take an entry-level exam covering basic math and English. While it is possible that the African-American applicant will score as high or higher than the white applicants, it is more likely that the white applicant with a good or excellent education will score higher than the African-American applicant with a poor education. That result is because of exposure to the necessary education and skill acquisition and not because of skin color. The employer who makes a final employment decision on the basis of the test scores will argue that its reliance on the "neutral" test does not and could not constitute unlawful discrimination by the employer against the African-American applicant. The process for each applicant was the same, and each applicant was treated in an "equal" fashion. Hence, the consequences of such acts and practices linger, and the reality of the disadvantage continues to exist and has a real-world impact in the job market.

block the plaintiff's attempt to prove her case? And why should the litigants and the court have any confidence that a party that has concealed the true reason for its actions is now telling the truth when it presents the so-called real reason? Again, why should the law countenance such behavior?

160. See supra notes 145-46 and accompanying text.
161. See Spann, supra note 52. See generally Eisenberg & Johnson, supra note 146 (the difficulty of proving intentional discrimination is revealed by the surprisingly low number of claims filed).
162. I assume that the test is job-related and is not subject to a disparate impact challenge.
market, even when discriminatory acts and practices have been prohibited as a matter of law and even though, indeed because, the present manifestations of past injustices are not addressed or remedied. 163

2. Disparate Impact

In contrast to disparate treatment analysis, disparate impact theory is expansive, stresses equal achievement and equality as a result, and views the question of discrimination from a group perspective. 164 Under the disparate impact approach, “actual decisions must meet some standard of proportionality—for example, the proportion of blacks or women in the applicant pool or the general population.” 165 The disparate impact model thus looks to the outcome of the race. It relates to the actual distribution of jobs among racial classes and is concerned with both the quantity and quality (measured, for example, by pay level and social status) of the jobs. Jobs should be distributed so that the relative economic position of Negroes . . . is approximately equal to that of whites. Disproportionate unemployment and underemployment of blacks should be eliminated or substantially reduced. 166

The remediation and rectification of discrimination through disparate impact analysis must extend to the group and to the group’s members. 167 The analysis recognizes a “group right in the sense that the locus of the claim to just results is in the group; claims of individuals to participate in these results are derived by virtue of group membership.” 168

The Supreme Court recognized and applied the disparate impact model in Griggs v. Duke Power Company. 169 In Griggs, the

163. See supra note 139 and accompanying text.
166. Fiss, supra note 143, at 237-38 (footnote omitted).
168. Paul N. Cox, The Supreme Court, Title VII and “Voluntary” Affirmative Action—A Critique, 21 Indus. L. Rev. 767, 785-86 (1988); see also Friedman, supra note 142, at 48-49 (stating that equal achievement “is by nature a relative concept because it assesses equality by gauging the respective shares of employment opportunities enjoyed by various race, gender, or other groups”).
169. 401 U.S. 424 (1971). For commentary on Griggs, see Forbidden Grounds, supra note 90, at 192-204; Alfred W. Blumrosen, Griggs Was Correctly Decided—A Response to Gold, 8 Indus. Rel. L.J. 443 (1986); Michael E. Gold, Griggs’ Folly: An
Court held that Title VII prohibited employment practices that disqualified a disproportionate number of African-Americans unless the practices were justified by business necessity.\textsuperscript{170} The Court wrote that, under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."\textsuperscript{171} As stated by the Court:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribe not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.\textsuperscript{172}

In addition, the \textit{Griggs} Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."\textsuperscript{173} Congress "directed the thrust of the Act to the consequences of employment practices, not simply the motivation,"\textsuperscript{174} and "placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."\textsuperscript{175}

Thus, the \textit{Griggs} Court determined that so-called objective criteria may be unlawful under Title VII when those criteria have an adverse impact affecting members of a protected group (e.g., women and African-Americans) at a significantly and disproportionally higher rate than they affect individuals outside the protected

\textsuperscript{170} \textit{Griggs}, 401 U.S. at 431.
\textsuperscript{171} \textit{Id.} at 430.
\textsuperscript{172} \textit{Id.} at 431.
\textsuperscript{173} \textit{Id.} at 432.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
group.\textsuperscript{176} Proof of such disparate impact is invariably quantitative and focuses on the actual operation of a system or the operation of a system if applied to a population of potential applicants.\textsuperscript{177} Statistical evidence of the disparate impact is viewed as not merely circumstantial but as "direct evidence of the results which [would] trigger the demand for additional justification" by the employer.\textsuperscript{178}

One purpose of the disparate impact theory, as formulated by the \textit{Griggs} Court, was to facilitate the identification of discriminatory situations where, through either inertia or insensitivity, employers were following policies that gratuitously and needlessly (although not necessarily deliberately) excluded African-Americans (or other members of a protected class) from equal employment opportunities.\textsuperscript{179} On that view, good faith or the absence of discriminatory intent or animus does not render lawful the disparate impact of an employment practice unrelated to business necessity or job performance.\textsuperscript{180} Consider, again, the example noted above regarding the African-American job applicant,\textsuperscript{181} and assume

\textsuperscript{176} One test used to determine disparate or adverse impact is set forth in the Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines"), 29 C.F.R. § 1607.4(D) (1993). Under the Uniform Guidelines, a test or other selection device will normally be deemed to have an adverse or disparate impact if it has a "selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate." \textit{Id.}

An example of the 4/5 rule is found in Marion G. Sobol & Charles J. Ellard, \textit{Measures of Employment Discrimination: A Statistical Alternative to the Four-Fifths Rule}, 10 \textit{INDUS. REL. L.J.} 381 (1988). Suppose that of 500 white applicants seeking a position, 400 are selected for employment (an 80\% ratio). Suppose, further, that of 500 African-American applicants, 200 are selected (a 40\% ratio). If the African-American selection ratio (40\%) is divided by the white selection ratio (80\%), there is an impact ratio of 50\%. Because the 50\% impact ratio is less than the 4/5 or 80\% percent benchmark of the Uniform Guidelines, an adverse or disparate impact on African-American applicants would be established. \textit{Id.} at 389.


For an alternative to the rule, see Sobol & Ellard, \textit{supra}.


\textsuperscript{178} \textit{Id.} at 47-48. The statistical models and methodology employed in Title VII disparate impact cases are beyond the scope of this Article. For discussions of those subjects, see Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989); Baldus & Cole, \textit{supra} note 177, at 44-51, 53-75; Walter B. Connolly et al., \textit{Use of Statistics in Equal Employment Opportunity Litigation} §§ 2 & 3 (1992).


\textsuperscript{179} Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992).

\textsuperscript{180} \textit{See} Turner, \textit{supra} note 164, at 144-45.

\textsuperscript{181} \textit{See supra} notes 162-63 and accompanying text.
that the employer's test and related employment decisions disproportionately exclude African-Americans. Under disparate treatment theory, the employer could argue that all applicants had been treated alike and that it had not discriminated against (i.e., had no racial animus toward) the African-American applicants. Under Griggs and its progeny, the fact that the employer treated each applicant equally in terms of taking the test, and had no racial animus toward the applicant, would not be dispositive. Instead, the employer could be required to justify the use of the test and to prove that the test was job-related or was related to business necessity.

For many, the notion that an employer could violate Title VII without intending to do so was, and is, controversial. The principal prohibitions of Title VII did not refer to the disparate impact theory, and the only provision of the statute that even arguably alluded to the theory protected professionally developed tests that

---

182. See Connecticut v. Teal, 457 U.S. 440, 446 (1982) (holding that unlawful discrimination may exist when the employer's statistics appear to favor minorities); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979) (holding that dismissal of employees who are in a methadone drug treatment program may be job-related); Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that height and weight requirements for prison guards has a disparate impact on women, and is not job-related since no correlation was shown between height/weight and ability to perform the job); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (holding that discriminatory tests are impermissible unless they are shown to be job related—i.e., that they are predictive of job performance).

183. See, e.g., Gold, supra note 169 (arguing that violation of Title VII should be found only when the discrimination was intentional). Professor Steven Greenberger has written that the answer to the question whether Griggs was wrongly decided depends upon the manner in which a court should read a statute.

The text of Title VII is ambiguous as to whether the use of a non-job-related selection device which disproportionately excludes minorities is illegal. If, as Justice Scalia believes, the text is all that a court should consider in interpreting a statute, then it is hard to know how the case should have been decided. Alternatively, if, as is traditional, the legislative history of the statutory language is considered as well, then the available evidence suggests that Title VII should not have been read at the time to incorporate impact doctrine. That conclusion, too, however, is not wholly certain because the doctrine was never directly debated by Congress. Finally, if the statute is read so as to further the congressional purpose in enacting it, then there is a strong argument that Griggs was correctly decided. Congress was concerned with more than the immorality of explicit racial exclusion, abominable and pervasive though it was. Congress was concerned as well with what it termed the "economic waste" of high African-American unemployment, because it devastated the lives of African-Americans and dampened the economic productivity of the nation.

Greenberger, supra note 56, at 266-67 (footnotes omitted).
were not used as a pretext for discrimination.184 Nevertheless, the
Griggs disparate impact analysis was effective until approximately
1977, at which time its usefulness was limited by Supreme Court
decisions "that imposed procedural barriers in the way of class ac­
tions, eliminated seniority systems from the scope of the theory, and
made the plaintiff's initial showing of adverse impact much
more complicated."185 One of those decisions, Hazelwood School
District v. United States,186 set out the required inquiry into the
proper definition of the labor market and the methods of demon­
strating underrepresentation of specific groups in an employer's
work force.187 That decision "transformed proof of disparate im­
pact from [a] simple matter . . . to a highly technical issue on which
expert testimony usually must be taken. Only if a plaintiff sur­
mounts this initial hurdle under the theory of disparate impact is
any burden of proof placed upon the defendant."188

Despite the fact that Griggs was the law of the land for eigh­
teen years, it was not accepted by the Reagan Administration.189 In
a 1988 decision, Watson v. Fort Worth Bank & Trust,190 the Supreme
Court held that the disparate impact analysis could be applied to
subjective employment criteria.191 A plurality of the Court also
concluded, inter alia, that a disparate impact plaintiff had to identify

---

184. Rutherglen, supra note 169, at 1298. Section 703(h) of Title VII provides, in
pertinent part:

Notwithstanding any other provision of this subchapter, it shall not be an un­
lawful employment practice for an employer . . . to give and act upon the
results of any professionally developed ability test provided that such test, its
administration or action upon the results is not designed, intended or used to
discriminate because of race, color, religion, sex or national origin.

Dist. v. United States, 433 U.S. 299 (1977) (holding that the relevant statistical compar­
ison is between the racial composition of the teaching staff and that of the teacher popu­
lation and not between the African-American teachers and students in the school); East
Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977) (holding that in order to
qualify as a class action, the class must make a pretrial motion pursuant to FED. R.
CIV. P. 23 to be certified as a class); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324
(1977) (holding that § 703(h) protects bona fide seniority systems from Title VII chal­
 lenges even if they perpetuate pre-Title VII discrimination).


187. Rutherglen, supra note 12, at 1476.

188. Id.

189. Former Reagan Administration Solicitor General Charles Fried "concen­
trated on what [he] cared about: taming Griggs, with its pressure toward quotas . . . ."
CHARLES FRIED, ORDER & LAW: ARGUING THE REAGAN REVOLUTION—A FIRST­


191. Id. at 999.
the specific employment practices causing the disparate impact, and that the employer bore a burden of producing a legitimate business justification for its practices but did not bear the burden of persuasion. According to former Solicitor General Charles Fried, the Watson decision "gave us our signal to press for a more thorough re-examination of what the lower courts had been doing in Griggs-type cases."

Fried's efforts were successful, as Griggs was effectively dismantled by the Court's 1989 decision in Wards Cove Packing Co., Inc. v. Atonio. In that decision, the Court established higher evidentiary standards for Title VII disparate impact plaintiffs trying to establish a prima facie case of discrimination based on statistics, and concluded that the use of bottom-line statistics were not sufficient to establish a prima facie case. The Wards Cove Court also held that section 703(j) was relevant to the use and role of statistics in Title VII cases, and concluded, for the first time, that causation was an element of the disparate impact analysis. The business necessity defense was changed to a legitimate business-justification defense (which included a cost justification defense), and the Court imposed the burden of production (but not persuasion) on employers.

Congress addressed and reversed significant aspects of Wards Cove in the Civil Rights Act of 1991 ("CRA"). The CRA codi-
fied the disparate impact theory and a causation requirement;\textsuperscript{201} rejected the \textit{Wards Cove} legitimate business justification defense and replaced that defense with one requiring the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;"\textsuperscript{202} and placed the burdens of persuasion and production on employers.\textsuperscript{203} At least two issues, however, were left unresolved. First, Congress did not decide whether section 703(j) was relevant\textsuperscript{204} or irrelevant\textsuperscript{205} to the use of statistical evidence in Title VII cases. Second, the congressional codification of the job-related/business necessity standard did not define those terms,\textsuperscript{206} and thus left in place the questions, of discrimination," CRA § 3, 105 Stat. at 1071, and found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." CRA § 2, 105 Stat. at 1071. See generally Kingsley R. Browne, \textit{The Civil Rights Act of 1991: A "Quota Bill," A Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?}, 43 CASE W. RES. L. REV. 287 (1993) (examining effect of Civil Rights Act of 1991 on disparate impact theory of discrimination as it relates to affirmative action); Ronald D. Rotunda, \textit{The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation}, 68 NOTRE DAME L. REV. 923 (1993) (criticizing the Civil Rights Act of 1991 as ambiguous, resulting in giving courts tremendous interpretive power).


\textsuperscript{203} The "term 'demonstrates' means meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m) (Supp. IV 1992).

\textsuperscript{204} See supra note 197 and accompanying text.

\textsuperscript{205} See supra note 141 and accompanying text.

\textsuperscript{206} Resort to legislative history to define or give meaning to the terms is prohibited by the CRA itself. Section 105(b) of the CRA provides:

\begin{quote}
No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S. 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.
\end{quote}

CRA § 105(b), 105 Stat. at 1075. Even if resort to the legislative history was permissible, the history on this particular point is not helpful, for the interpretive memorandum referred to in § 105(b) provides:

\begin{quote}
The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators DANFORTH, KENNEDY, and DOLE, and the Administration states that with respect to Wards Cove—Business necessity/cumulation/alternative business practice—the exclusive legislative history is as follows:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642 (1989).

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in \textit{Dothard v. Rawlinson}, 433 U.S. 321 (1977),
equivocations, and ambiguities which characterized disparate impact law prior to *Wards Cove*.207

In sum, disparate impact analysis allows plaintiffs to establish violations of Title VII even though they have no evidence that an employer deliberately excluded African-Americans or women or other people belonging to a protected class from equal employment opportunities. In theory, that approach permits plaintiffs to evade the practical problem and very real difficulty of coming up with "smoking gun" evidence of overt discrimination and racial animus. The initial and *prima facie* view is that the absence or "under-representation" of African-Americans or other protected groups in an employer's work force is not mere happenstance. Nevertheless, an employer may demonstrate that unlawful discrimination is not the cause of the composition of its work force, and plaintiffs certainly may encounter difficulties in establishing a disparate impact cause of action.208

B. **Economic Models of Discrimination**

What is the relationship between the "market" and discrimination?209 What are the implications of that relationship for employ-

---


208. For example, a disparate impact plaintiff must now demonstrate that each particular challenged practice causes a disparate impact unless the plaintiff can demonstrate to the court that the elements of an employer's decision making process are not capable of separation for analysis; if the plaintiff makes the latter demonstration, the decision making process may be analyzed as one employment practice. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. IV 1992).

Plaintiffs must satisfy the causation element only if the employer uses a multi-criteria selection practice and the criteria cannot be disaggregated. If the decisionmaking process can be disaggregated, then bottom-line statistics, which the Court apparently disapproved of in *Wards Cove*, are insufficient to establish a prima facie case. Belton, *supra* note 67, at 928 (footnotes omitted). The standard for determining when multi-criteria selection practices (for example, education, tenure, job title, job performance, and the subjective evaluations of supervisors) can or cannot be disaggregated are not set out in the statute and will be defined by courts presented with that issue. *Id.* at 929. "Moreover, employers seeking to minimize liability in disparate impact cases may be encouraged to adopt multi-selection decisionmaking procedures that lend themselves to disaggregation." *Id.* at 929.

ment discrimination law? Do markets end or at least reduce discrimination, or do markets foster discrimination? Is there anything in an economic analysis of antidiscrimination law that can better inform our view of, and judgments with respect to, Title VII? Is discrimination sometimes rational? Two general types of labor market discrimination advanced by neoclassical economists—taste discrimination and statistical discrimination—are discussed in this section.

1. The Taste for Discrimination

Professor Gary Becker has posited that if an individual has a "taste for discrimination," he must act as if he were willing to pay something, either directly or in the form of a reduced income, to be associated with some persons instead of others. When actual discrimination occurs, he must, in fact, either pay or forfeit income for this privilege. This simple way of looking at the matter gets at the essence of prejudice and discrimination.

210. Milton Friedman and others have argued that employment discrimination laws are unnecessary because free markets would address the problem of discrimination. MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). In Friedman's view, antidiscrimination legislation involves the acceptance of a principle that proponents would find abhorrent in almost every other application. If it is appropriate for the state to say that individuals may not discriminate in employment because of color or race or religion, then it is equally appropriate for the state, provided a majority can be found to vote that way, to say that individuals must discriminate in employment on the basis of color, race or religion. The Hitler Nuremberg laws and the laws in the Southern states imposing special disabilities upon Negroes are both examples of laws similar in principle to [antidiscrimination law].

211. Consider the following view:

We don't so much operate irrationally in an otherwise sound world as create a world with irrationality built into its very structure. Once we create a world where race matters, we become unaware of our creation's contingency. Racial generalizations come to seem natural, a sort of baseline, "the way things are." What now seems irrational is to hire a black or let one in your law school. These decisions require "affirmative action" and are thus morally troublesome . . . . Individual actions work in concert ineluctably to reinforce the racial status quo. It feels like freedom, like individual choice. Yet the effect is tyranny.


213. For a discussion of pre-Becker economic theories of discrimination, see LUNDahl & WADENsIO, supra note 209, at 8-20.

Emphasizing the words "as if," Becker notes that an individual must act as if she were "willing to forfeit income in order to avoid certain transactions." In his view, an employer who refuses to hire blacks solely because the employer erroneously underestimated their economic efficiency engages in discriminatory behavior "not because he is prejudiced against them but because he is ignorant of their true efficiency. Ignorance may be quickly eliminated by the spread of knowledge, while a prejudice (i.e., preference) is relatively independent of knowledge." 

Generally, the taste for discrimination will have a greater negative impact on the incomes of African-Americans, as the reduction in African-Americans' incomes will be proportionately greater than the reduction in the income of whites. This is so because "blacks are only a small part of the economy, [and] the number of advantageous exchanges that blacks can make with whites is greater than the number of advantageous transactions that whites can make with blacks." 

Assuming that whites do not like to associate with African-Americans, but that African-Americans are indifferent to the racial identity of those with whom they associate, the incomes of many whites will be lower than they would be if they did not have such a taste, for those whites forego advantageous exchanges [such as refusing] to sell their houses to blacks who are willing to pay higher prices than white purchasers.

Likewise, a racial preference and taste for discrimination held by whites will result in the reduction of incomes of blacks by preventing them from making advantageous transactions with whites. Applying that analysis in the employment context, an employer's decision to forego an advantageous transaction (for example, refusing to hire an African-American applicant because of that individual's race) can have economic effects on both the employer and the applicant. The employer discriminates by not hiring the worker, thereby foregoing the utilization of that worker's skill in production or service, or will only hire that worker at a lower

215. Id. at 16.
216. Id. (footnote omitted).
217. Id. at 22-24; Posner, supra note 116, at 515-16.
219. Id.
220. Id.
221. The cost incurred by the employer in not hiring the applicant is the employer's own disutility. See Strauss, supra note 14, at 1621-22.
Given the assumption that discrimination will result in a difference in the wages paid to whites and African-Americans (specifically, that whites will receive a higher wage than blacks \( W_w > W_b \)), the taste model would eliminate the effectiveness of the discrimination since, it is argued, labor and capital would move to those firms and industries that did not discriminate at all or discriminated in some lesser fashion. \(^{224}\) Under this model, the market would address discrimination in the long run since labor and capital would shift to firms and industries that did not discriminate or that discriminated less. \(^{225}\) "[I]n the long run, people with equal ability will be paid equal wages, and there will be no effective, i.e., market-observed, discrimination in wages between black and white workers." \(^{226}\) Those firms "not in equilibrium will either pay a premium through reduced profits or find niches in the market where black workers are not necessary and where discrimination, though real, will not influence market wages." \(^{227}\) The discriminators "will ultimately be driven from the market because they indulge their prejudices at the expense of profits." \(^{228}\)

Suppose that an employer does not have a taste for discrimination, but third parties—employees or customers—do, and the third parties refuse to work with or be served by African-American

---

222. In that circumstance, the effective cost incurred by the employer is "the sum of the money wage and the additional cost to the employer resulting from the taste for discrimination." \( Id. \) "Consequently, in order to account for the additional costs, a minority employee's money wage will be less than her marginal product." \( Id. \)

223. Culp, supra note 9, at 983-84.

224. \( Id. \) at 984.

Suppose, for example, that the source of discrimination is bigoted owners. The refusal of bigoted owners to hire black workers will lead to black unemployment, and blacks will be willing to work at depressed wages. This large pool of workers, who will work for wages that are below their actual productive value, provides an opening for nondiscriminating firms to earn large economic profits. They can hire black workers, pay them some amount less than white workers, lower prices, and eventually drive the bigoted firms out of business.


225. Culp, supra note 9, at 984.

226. \( Id. \) (footnote omitted).

227. \( Id. \)

228. Cass R. Sunstein, Three Civil Rights Fallacies, 79 Cal. L. Rev. 751, 753 (1991) (footnote omitted). The conclusion that the market will eliminate racism is contradicted by the view that the "United States has had a free market economy for over two centuries, and racism is as firmly entrenched as ever." Delgado, supra note 211, at 1190.
workers.\textsuperscript{229} In that circumstance, an employer will incur additional costs in higher wages paid to non-minority workers with a taste for discrimination, or in reduced productivity by those workers.\textsuperscript{230} If a customer or customers have the taste for discrimination, such as a law firm's clients who prefer not to be represented by African-American lawyers or restaurant patrons who prefer not to be served by a black waiter, the employer will incur additional costs because its customers are not willing, or are less willing, to do business with firms or businesses employing African-Americans.\textsuperscript{231}

While employer recognition and acceptance of third party discrimination may in some instances maximize profits, it will also result in discrimination against African-Americans, even though the employer has no racial animus and is not bigoted against African-Americans. In that instance, the motivation for the employer's conduct is its economic self-interest.\textsuperscript{232} Thus, according to the taste model, the economic impact of third parties who are in a position to financially "punish" a nondiscriminatory employer results from the ability of third parties to

\[\text{[p]}\text{ressure employers in the direction of discrimination, even if employers would, other things being equal, choose not to discriminate or have no particular view about whether to discriminate or not. Ironically, it is the failure to discriminate that operates as a tax on the employer's business, rather than vice versa. And when this is so, reliance on competitive pressures will force employers to behave in a discriminatory manner if they wish to survive.}\textsuperscript{233}

On that view, market pressures create, and do not prevent, discrimination.\textsuperscript{234}

\section{2. Statistical Discrimination}

Consider an employer who wishes to pay his white employees more than his African-American employees (Ww > Wb), but is required by antidiscrimination laws to pay equal wages to both whites and African-Americans (Ww = Wb).\textsuperscript{235} That employer may re-

\begin{thebibliography}{99}
\bibitem{229} See \textit{Becker}, \textit{supra} note 214, at chs. 3, 4.
\bibitem{230} Strauss, \textit{supra} note 14, at 1622.
\bibitem{231} \textit{Id.}
\bibitem{232} \textit{Becker}, \textit{supra} note 214, at 14-15; \textit{Sunstein}, \textit{supra} note 133, at 753.
\bibitem{234} \textit{Id.}
\bibitem{235} Culp, \textit{supra} note 9, at 984.
\end{thebibliography}
spond to the equal wage requirement by limiting the number of African-Americans hired, or by hiring African-Americans who are not as highly skilled as (some) white workers and paying those African-Americans the same wage as whites, resulting in a loss on each African-American hired.

In making the decision to limit the number of African-American hires or to possibly hire blacks with "lesser" skills, an employer may rely on proxies, stereotypes, and generalizations in predicting performance.

not because he hates or devalues blacks or women, or because he has a general desire to avoid them, or is prejudiced . . . but because he believes (on the basis either of plausible assumption or actual experience) that the relevant stereotypes have sufficient truth to provide a rational basis for employment decisions.

When a "rational" employer who does not have a taste for discrimination nevertheless discriminates by determining that race, sex, etc., is a proxy for employment qualifications, that employer engages in statistical discrimination.

By responding to generalizations and stereotypes and employing them as an "economically rational basis for employment decisions," the employer chooses to avoid the costs of inquiring into and establishing an individual's qualifications. Instead, the employer relies upon the proxy of race and correlates that proxy with qualifications. When better information about an individual's qualifications is more costly to discover, "it will be rational, profit-maximizing behavior for the firm to offer lower wages to a minority

---

236. Because of past and present discrimination against African-Americans and others, African-Americans as a group fall behind whites as a group in certain social indicators (for example, poverty, education, and employment), and it is therefore plausible that in some contexts race and other status is "every bit as accurate a signalling device as, say, test score[s], education, and previous employment." Sunstein, supra note 233, at 27. Consequently, utilization of the statistical discrimination model would harm African-Americans and other groups more than whites.

237. Culp, supra note 9, at 984. An antidiscrimination law that forbids $W_w > W_b$ can result in either additional information costs to the employer or a departure from the optimum wage (which is the "wage equal to a worker's marginal product"). Posner, supra note 116, at 516. Such a law reduces efficiency, which should not be confused with social equity. Id.

238. Sunstein, supra note 133, at 756.

239. Schwab, supra note 212.

240. Statistical discrimination is the "most significant form of racial discrimination that exists in contemporary American culture." Spann, supra note 52, at 121.

employee than it would offer to a nonminority employee."\textsuperscript{242} An employer engaging in such discrimination does not do so because of a taste for discrimination or because the employer is prejudiced against African-Americans; rather, the employer will act on the belief that the stereotypes, generalizations, and proxies related to a person's race, sex, or color are sufficiently true to serve as a rational basis for employment decisions.\textsuperscript{243} "This would be unfair to blacks who were in fact above average, yet might still be an efficient method (in the presence of high information costs) of compensating black workers."\textsuperscript{244}

C. Evaluation

Taste-based discrimination (the result of an exogenous preference)\textsuperscript{245} and statistical discrimination (the result of imperfect information)\textsuperscript{246} both violate Title VII since an employer engaging in either form of discrimination treats African-Americans differently from the way it treats non-black workers or applicants.\textsuperscript{247} An employer who refuses to hire African-Americans because of the employer's prejudice or bigotry, or because third parties who do business with the employer are prejudiced or bigoted, engages in disparate treatment, \textit{i.e.}, treats African-Americans differently and adversely because of their race.\textsuperscript{248} An employer who refuses to hire African-Americans because of stereotypes or some generalized view of African-Americans, or who employs selection devices or criteria that disproportionately exclude African-Americans, may be said to have engaged in disparate treatment and/or disparate impact discrimination.\textsuperscript{249}

Furthermore, both models of discrimination have adverse effects on the acquisition and use of human capital. The existence of discrimination affects individual decisions concerning education, employment, and the like, for rational African-Americans should be expected to invest relatively less in such areas given the reality that, because of discrimination, they will not be able to fully use the

\begin{itemize}
  \item \textsuperscript{242} Strauss, \textit{supra} note 14, at 1622.
  \item \textsuperscript{243} Sunstein, \textit{supra} note 233, at 27.
  \item \textsuperscript{244} Posner, \textit{supra} note 116, at 516.
  \item \textsuperscript{245} Strauss, \textit{supra} note 14, at 1623.
  \item \textsuperscript{246} Id.
  \item \textsuperscript{247} Id.
  \item \textsuperscript{248} See \textit{supra} notes 142-63 and accompanying text.
  \item \textsuperscript{249} See \textit{supra} notes 142-208 and accompanying text.
\end{itemize}
acquired skills in the workplace. Consider, for example, the situation faced by African-Americans who wished to practice as attorneys in the not too distant past. Paul Robeson, an All-American athlete and Phi Beta Kappa scholar, enjoyed an international career as a stage, screen, recording, and concert star. Prior to embarking on that career, Robeson graduated from Columbia University Law School and worked for a New York law firm specializing in estates. During his brief tenure with that firm, Robeson buzzed for a stenographer to take down a memorandum of law he had prepared. The stenographer refused to work with Robeson, stating, "I never take dictation from a nigger." When Robeson discussed the incident with the attorney who had hired him, he was advised that his prospects in the law were limited since the firm's wealthy white clients were not likely to agree to let him try a case for fear that his race would be a detriment. The white attorney also offered to consider opening a Harlem branch of the firm and putting Robeson in charge of the branch. Robeson resigned and never practiced as a lawyer again. Given such encounters, it is conceivable that a "rational" African-American might choose not to pursue a legal education or, if she had obtained a law degree and met the requirements for admission to the practice, might expect less than optimal returns on that investment.

Similarly, the taste for discrimination and statistical discrimination may shape and adversely affect the preferences of both discriminators and those who are subjected to the discrimination. Discriminators may conclude that the victims of discrimination "deserve their fate, that they are responsible for it, or that the current situation is part of an intractable, given, or natural order." Those who are subjected to discrimination may be inclined to reduce the cognitive dissonance they experience by "adapting their preferences to the available opportunities." Thus, discriminators may prefer things as they are now, and may deny or not even be able to see that discrimination exists, or that it is a serious problem. Those who are discriminated against may not form certain preferences—

---

250. Sunstein, supra note 233, at 29.
252. Id.
253. Sunstein, supra note 238, at 759.
254. Id.
255. Id. Professor Sunstein has pointed out that the "reduction of cognitive dissonance is a powerful motivating force: people attempt to bring their beliefs and perceptions in line with existing practice." Id.
may not prefer to be lawyers or doctors, or pursue an education, or other goals—because it is unlikely that they will be able to follow through on their preferences and achieve their goals. Statistical discrimination perpetuates the effects of past discrimination and racial stratification, as there will be no legally required efforts made to address and redress the reality and consequences of such discrimination.

In sum, the term "discrimination" encompasses actions and decisions that

treat[ ] an otherwise similarly qualified black, woman, or handicapped person less favorably than a white, male, or able-bodied person, whether the reason for the decision lies in malice, taste, selective empathy and indifference, economic self-interest, or rational stereotyping. This understanding of discrimination picks up not merely covert unequal treatment, but also requirements that are neutral "on their face" but that would not have been adopted if the burdened and benefitted groups had been reversed.

It follows that the claim of discrimination, best understood, is not for prevention of certain irrational acts, or of "prejudice," but instead for the elimination, in places large and small, of something in the nature of a caste system.

Does Title VII effectively address the aforementioned conceptions of discrimination? Should the current approach to Title VII be scrapped in favor of other approaches? Recent proposals by Professors David Strauss and Derrick Bell are two vehicles for considering these questions.

IV. The Strauss and Bell Proposals

As discussed above, certain aspects of the current Title VII regulatory regime do not advance the objective of promoting the access of African-Americans to the workplace in the most efficacious and user-friendly manner. These problems include the realities of EEOC procedures, lengthy and expensive federal court litigation, the paradigms of discrimination recognized by the courts applying Title VII, and the hoped for but unrealistic expectations

\[256. \text{See Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. Ill. L. Rev. 1043, 1065 (1992) (arguing that the use of mandatory quotas or numerical goals in the college and graduate school admissions process is necessary to remedy discrimination).}
\[257. \text{Sunstein, supra note 233, at 34 (footnotes omitted).}
\[258. \text{See supra notes 102-29 and accompanying text.} \]
regarding the extent to which Title VII can effectively address entrenched and arguably permanent racism.

As the federal courts' dockets grow and the courts are increasingly unable to attend to Title VII and other discrimination cases in a timely manner, employment discrimination cases may linger for years.\(^{259}\) The costs of litigation can be high, and the expense of bringing and prosecuting a Title VII suit can discourage a victim from pursuing a claim.\(^{260}\) Plaintiffs' attorneys, relying on contingent fee agreements and attorneys' fees statutes, may not be able or willing to finance the litigation. Plaintiffs must also take into account the reduction in the real value of any monetary award resulting from the delay in receiving the award.\(^{261}\) Are there better ways of addressing the question of workplace discrimination under the law?

A. The Strauss Proposal

In a 1991 article,\(^{262}\) Professor David Strauss identified "what the purposes of the current generation of employment discrimination laws should be" and suggested "institutional arrangements that promote these purposes."\(^{263}\) According to Strauss, the "objectives of the antidiscrimination laws are not best served by trying to detect individual acts of discrimination. Instead, the employment discrimination laws should be designed to give employers incentives to hire and promote members of minority groups in proportion to their representation in the relevant population."\(^{264}\)

Professor Strauss noted two objections to the disparate treatment approach to employment discrimination.\(^{265}\) "First, it is very difficult to ferret out acts of covert discrimination, and covert discrimination is the form that employment discrimination is most likely to take today."\(^{266}\) Consequently, the "likelihood of error
under this standard is high, and the costs of administering it are likely to be great.”267 In Strauss’ view, “[t]he second problem is that the disparate treatment approach will be least successful at combatting the kinds of discrimination that are most likely to persist in a competitive system.”268 For Strauss, the disparate treatment standard “is most effective at duplicating the work that the market is likely to do anyway, and least effective at doing the antidiscrimination work that the market cannot do.”269 The disparate impact standard270 is superior to the disparate treatment approach, argues Strauss, and “[n]umerical standards are a more efficient way of fulfilling the moral premises that underlie the consensus against discrimination.”271

Professor Strauss sketched an institutional arrangement that would implement his theoretical conclusions with respect to Title VII and employment discrimination.

First, private individuals should not be able to bring suits for discriminatory treatment under the employment discrimination laws. Discriminatory treatment claims should be screened in the way that unfair labor practice claims are currently screened by the National Labor Relations Board: a government agency decides, on the basis of an informal investigation, whether the claim has merit. The agency has discretion to pursue the claim on behalf of the individual if it wishes. If the agency does not pursue the claim the individual cannot. As a practical matter, even under this system, claims of disparate treatment could still be brought as state wrongful discharge actions, and in employment grievance proceedings.272

According to Strauss, “the purpose of this reform would be to reduce the resources expended on disparate treatment claims and to reduce the threat of an unwarranted claim, a threat that can distort employers’ decisions.”273

Second, Strauss would require that “every firm employ minorities in proportion to their percentage in the national population.”274 Employers would have no cost justification defense to this require-
ment, "the sanction for noncompliance would be a fine" which could be paid by employers who found it too costly to meet the requirements, and firms that exceeded the nationwide percentage would be rewarded. The objective of this regime is to accomplish certain social purposes, such as deterring taste-based discrimination and avoiding racial stratification. Conceding that the nationwide percentage requirement is counterintuitive, Strauss argued that the potential dislocations would be limited because the sanction for a failure to meet the standard is a fine; that allowing the numerical standard to vary by region would have negative effects; and that variations in the numerical standards based on qualifications would allow minority employees' lack of qualifications to become barriers to their advancement. The lack of qualifications may be (very surely is, to some extent) the result of past discrimination, and it contributes to racial stratification.

1. NLRB-Type Screening

First consider Professor Strauss' proposal that discriminatory treatment claims should be screened in the way that unfair labor

275. Id.
276. Id.
277. Id.
278. Id. at 1656.
It is questionable both because it does not allow for regional variations in minority population and because it does not allow for variations based on the number of minority employees with the necessary qualifications. In the end it may be a poor idea. But there is, I believe, more to be said in its defense than might at first appear.

279. Discussing this fine, Strauss noted that the crucial question, of course, is the size of the exaction from employers who fail to satisfy the requirement. In principle and at a high level of abstraction, the fine should reflect the gains to society, net of costs, that result from racially proportionate hiring and compensation practices. Determining those gains and costs is of course quite another matter. But at least the inquiry would be focused in the right place—on the possible gains from combatting discrimination and the amount society is willing to pay to achieve them.

280. Strauss stated:
It might create an incentive for firms to locate in areas with low minority population. More important, the problems addressed by the employment discrimination laws should be seen as national concerns. An employer can do its part either by hiring minority employees or by paying a fine. Firms should not be able to opt out of a national effort to address the problem by locating in areas where few minorities live.

281. Id.
practice claims are screened by the National Labor Relations Board ("NLRB" or "Board"). Because Professor Strauss would substitute the NLRB scheme for the Title VII scheme and would prohibit private Title VII suits, an overview of the NLRB process may be helpful.

Generally, an unfair labor practice charge alleging a violation of the National Labor Relations Act ("NLRA") is filed with an NLRB regional office. When an employee appears at an office and indicates that she wishes to file a charge against the employer, the employee is referred to an NLRB agent (known as the information officer). The agent will discuss the matter with the employee and will make an initial determination as to a possible violation of the NLRA. The employee may tell the agent that she was discharged and that the employer "unfairly" failed to pay her the proper amount in her final paycheck. The information officer will advise the employee that her claim does not fall under the NLRA, that she may file a charge if she desires, and that the charge would be promptly dismissed. In most instances, the employee will not file a charge.

If the information officer determines that an employee's complaint involves conduct that may be a violation of the NLRA, the officer will assist the employee in preparing the formal charge, thereby initiating the unfair labor practice investigation process. The charge is investigated by an NLRB agent, and the regional director decides whether an unfair labor practice complaint will be issued against the charged party. If a complaint is issued, the matter is prosecuted by the NLRB General Counsel (by and through an attorney employed in the particular regional office) and is tried...

---

282. See infra notes 285-308 and accompanying text.
283. See supra notes 72-87 and accompanying text.
284. Professor Strauss states that he cannot fully defend his proposed arrangement, that "the institutional particulars are matters of detail," and that "the specific institutional details can be worked out, on a trial and error basis if necessary." Strauss, supra note 14, at 1654.
287. Conferring with an information officer prior to filing an unfair labor practice charge is not required.
288. See MILLER, supra note 285, at 16.
289. Id.
290. Id.
before an administrative law judge ("ALJ"). The ALJ issues a recommended decision and order upholding or dismissing the complaint. If no exceptions to the ALJ's ruling are filed by the parties or the General Counsel with the NLRB in Washington, D.C., the NLRB will generally affirm the ALJ's ruling. If exceptions are filed, the NLRB will consider the case and will issue a ruling. An NLRB order finding by the commissin of an unfair labor practice and ordering the employer to remedy the wrongful action is not self-executing, and the NLRB must petition a federal court of appeals for enforcement of its order.291 Any person aggrieved by an NLRB order may seek judicial review of the order by filing a petition for review in the courts of appeals.292

If an unfair labor practice complaint is not issued and a charge is investigated and dismissed by the NLRB regional office or is withdrawn by the charging party (over eighty percent of all charges are disposed of by the regional offices without the issuance of a formal complaint),293 the rejection of the charge by the regional office may be appealed to the General Counsel in Washington. If that appeal is denied, the case comes to an end since the General Counsel’s decision not to proceed with a complaint is final and is not subject to judicial review.294

Thus, the NLRB process "screens out worthless cases [and] saves innocent respondents huge amounts of money by shutting off worthless litigation at the very outset."295 In addition, screening "may defuse thousands of potentially serious labor disputes each year."296 For employees, an advantage of the NLRB scheme is that the government’s prosecution of the employee’s claim and reliance on the NLRB’s agents in the investigation, settlement, and trial of the case minimizes the employee’s legal costs.297 Thus, employees who are unable to obtain legal counsel are not for that reason foreclosed from litigating against an employer.

The disadvantages of the NLRB process include the politiciza-
tion of the NLRB which results from the appointment of NLRB members who may be more sympathetic to management interests and concerns than they will be to labor's and individual employees' concerns and interests, and the loss of control of the case given the General Counsel's exclusive and final authority in deciding whether to prosecute or dismiss an unfair labor practice charge (recall that the Title VII plaintiff can file suit even if the EEOC dismisses her charge). Delay is also a concern. In 1980, the time expended in obtaining enforceable orders in unfair labor practice proceedings was approximately 1000 days. In fiscal year 1988 the median time between the filing of an unfair labor practice charge and NLRB adjudication was 762 days, with an additional 430 days between the NLRB order and the enforcement of that order by the courts.

It is not apparent to me that substituting an NLRB-type charge processing scheme for disparate treatment cases would be more advantageous than the current Title VII process. Both processes can involve years of litigation. Both processes will require an administrative agency to investigate the claims made and to make a determination regarding the merits of the charge. Unlike the NLRB process, however, the Title VII process allows the employee to decide whether her case will or will not be pursued in federal court and does not leave that decision to a government agency. While it is true that the NLRB-like procedure will provide government attorneys to prosecute the employee's case, that benefit comes with the cost of relinquishing control and authority over the individual's claim. Depending on the particular complainant and the particular case, that trade-off may or may not be advantageous. In proposing an NLRB-like model, Professor Strauss notes that "a government agency decides, on the basis of an informal investigation, whether the claim has merit." The nature of that informal investigation is critical.

The NLRB conducts timely and swift investigations which

298. Id. at 475-76.
299. Id.
300. Cox et al., supra note 293, at 266.
301. William B. Gould IV, Agenda for Reform: The Future of Employment Relationships and the Law 159 (1993). Professor Gould cites the failure of the NLRB to establish internal time limits for processing cases and the frequency of the turnover of NLRB members as some of the factors for the delay in Board adjudication of cases. Id.
302. Strauss, supra note 14, at 1655.
must be completed within non-statutory time targets.\textsuperscript{303} Time targets

are absolutely the most important goal of the NLRB. They determine whether agents get retained or promoted, whether supervisors, regional directors, and agents get bonuses, and whether they are on the good or bad list when the region is audited. With all this riding on the time targets, it is easy to see that they are or become the only thing that matters to many NLRB employees.\textsuperscript{304}

Generally, NLRB agents must conclude their investigation within twenty-six days from the time of the filing of an unfair labor practice charge.\textsuperscript{305} The agent must obtain affidavits and evidence from the charging party and that party's witnesses and obtain a response from the charged party. When a party or witnesses are unavailable or do not cooperate, the NLRB agent's ability to meet the time target will be impeded. "It should be easy to see that the short time target means that agents are tempted to leave issues unexplored whenever time gets tight."\textsuperscript{306}

In addition, "the NLRB conducts tens of thousands of investigations each year without ever subpoenaing a document. Why?"\textsuperscript{307} Professor Ellen Dannin has written that she asked that question and was told that "subpoenas take time to get and time to enforce. That would cause a problem with meeting time targets. . . . It is more important to do a fast investigation than to do a thorough investigation."\textsuperscript{308}

That view of the general lack of thoroughness of


\textsuperscript{304} Id.

\textsuperscript{305} Id.

\textsuperscript{306} Id. Professor Dannin also notes that "until the NLRB Union put a stop to it" supervisors would assign cases to Board agents while the agent was on vacation. Where the case was assigned at the commencement of a two-week vacation, about one-half of the targeted investigation time would pass before the agent would even learn of the case and begin the investigation. \textit{Id.} “Even now, it is not unusual for an agent to return to the office after several days away to find new cases in their in-boxes with time already lost.” \textit{Id.}

\textsuperscript{307} Id. at 629. The NLRA provides that the Board has the power to issue subpoenas in its investigations or proceedings. 29 U.S.C. § 161(1) (1988).

\textsuperscript{308} Dannin, \textit{supra} note 303, at 629. My own experience as an NLRB agent and a private practitioner is generally consistent with Professor Dannin's account of time targets and the non-use of investigative subpoenas. The EEOC is much more aggressive with respect to advising a respondent that, if necessary, it will issue a subpoena and will follow through on that "threat" if the respondent does not comply.
the NLRB's "informal investigation" should be taken into account when considering the Strauss proposal.

Strauss also contends that, as a practical matter, disparate treatment claims "could still be brought as state wrongful discharge actions, and in employment grievance proceedings." The use of state wrongful discharge actions as a means of redressing employment discrimination would not address Strauss' concern with reducing the resources expended on disparate treatment claims and the threats of unwarranted claims. It merely changes the forum in which those issues will be litigated from the federal courts to state courts and state administrative agencies. And where a wrongful discharge cause of action alleges that the challenged employment action constitutes a tort, the employer may be exposed to even greater potential liability. Moreover, many state court employment actions would be preempted by federal labor law or state fair employment laws.

Reliance on "employment grievance proceedings" raises ad-

309. Strauss, supra note 14, at 1655.

310. It is not clear what Strauss means by "state wrongful discharge actions." He could be referring to state court lawsuits, or to employment discrimination charges filed with state agencies under state fair employment laws, or both.


312. For example, the Illinois Human Rights Act, Ill. Stat. ch. 775, §§ 1-101 to 103, prohibits employment discrimination on the basis of race and other specified grounds. That state law also provides that "no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." ILL. ANN. STAT. ch. 775, para. 518-111 (Smith-Hurd 1993). The Illinois Supreme Court has held that the Human Rights Act preempts all common law tort claims arising in and out of the employment context. Mein v. Masonite Corp., 485 N.E.2d 312 (Ill. 1985). Thus, an African-American employee's state court action challenging alleged discriminatory conduct would be preempted by the Illinois fair employment law and could not be maintained in state court.

313. I assume that Professor Strauss is referring to grievance-arbitration procedures found in most collective bargaining agreements. See Bureau of National Affairs, Basic Patterns in Union Contracts 37 (12th ed. 1989) (98% of collective bargaining agreements provide for the arbitration of grievances). That type of griev-
ditional concerns. Given the fact that only eleven percent of private sector employees are unionized, almost ninety percent of all private sector employees would not be able to turn to labor arbitration to challenge any alleged discrimination. Other issues relative to the use of labor arbitration are whether arbitrators may use positive law external to the labor agreement in resolving a grievance, the absence of a rule of stare decisis in labor arbitration (so that arbitrators are not as restrained as courts in their decisionmak-


315. See supra note 313.

316. It is projected that the percentage of workers belonging to unions in the United States will decline to five percent by the year 2000. See Ansley, supra note 93, at 1766 and sources cited therein.

317. Whether arbitrators should apply external law in ruling on grievances in arbitration has been the subject of a longstanding debate. Professor Bernard Meltzer has argued that arbitrators should ignore the law and follow the contract. Bernard D. Meltzer, Ruminations About Ideology, Law and Labor Arbitration, in THE ARBITRATOR, THE NLRB, AND THE COURTS 1 (Dallas L. Jones ed., 1967). Professor Michael Howlett has argued that the law must be considered when interpreting the labor agreement. Robert G. Howlett, The Arbitrator, the NLRB and the Courts, in THE ARBITRATOR, THE NLRB, AND THE COURTS 67 (Dallas L. Jones ed., 1967). Professors Robert Mitenthal and Michael Sovern have argued that arbitrators should ignore legal rules requiring conduct that a labor agreement forbids but should honor statutory provisions prohibiting conduct that the contract requires “on the grounds that it is worse to order something illegal than to require some other agency to compel mandated action.” GETMAN & POGREBIN, supra note 285, at 198; Richard Mittenthal, The Role of Law in Arbitration, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 42 (Charles M. Rehmeus ed., 1968); Michael I. Sovern, When Should Arbitrators Follow Federal Law?, in ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS 29 (Gerald G. Somers ed., 1970).

Professor Theodore St. Antoine has urged that a labor arbitrator is the parties' official "reader" of the contract, and is the parties' "joint alter ego" for the purpose of handling the "anticipated unanticipated omissions of the initial agreement." Theodore J. St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 MICH. L. REV. 1137, 1140 (1977). On that view, "the arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract." Id. Professor St. Antoine believes that viewing the arbitrator as the official reader "would resolve the perennial question of what the arbitrator should do when confronted with an irreconcilable conflict between the parties' agreement and 'the law.' With a right good conscience, he should follow the contract." Id. at 1142. "After all," stated St. Antoine, the arbitrator "is not responsible for 'enforcing' an illegal or invalid contract. Only courts can enforce contracts." Id.
ing), and the narrow standard of judicial review of arbitration awards which precludes the refusal of the courts to enforce an arbitration award even when the arbitrator made a mistake of fact or law.

In addition, approximately twenty percent of nonunion businesses have some form of employment arbitration procedure for employees. Thus, as with labor arbitration, the vast majority of employees do not have access to an alternative dispute resolution scheme which would replace the private disparate treatment claim under the Strauss arrangement. The use of employment arbitration to resolve discrimination claims also raises a fundamental issue concerning the privatization of the adjudication of public law and the use of private "judges" who may decide cases "on the basis of non-legal social mores."

Thus, Professor Strauss' proposal that individual disparate treatment claims could be channelled to "employment grievance proceedings" does not account for the fact that grievance proceedings are not available to most employees. In any event, it is not readily apparent why employees would give up their right to litigate their claim (a right which includes the right to discovery and the possibility of compensatory and punitive damages) in exchange for the opportunity to arbitrate their disputes and statutory claims.


319. In United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), the Court made it clear that an arbitrator's award is "legitimate only so long as it draws its essence from the collective bargaining agreement." Id. at 597. "[S]o far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Id. at 599. As to arbitral fact-finding, "improvident, even silly, factfinding . . . is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 39 (1987).

320. See supra note 313. Employment arbitration was considered and required in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), wherein the Court held that a securities broker had to arbitrate an age discrimination claim because he had agreed to arbitrate all claims arising out of his employment when he signed a registration application with the securities exchanges.


322. Malin & Ladenson, supra note 313, at 1189.

323. See supra note 84 and accompanying text.
2. Proportional Representation

Professor Strauss proposes that every firm should be required to employ minorities in proportion to their percentage in the national population. Before turning to some specific concerns about and objections to the proposal, a brief comment on proportional representation is in order.

One proponent of proportional representation has contended that distributive justice . . . requires that individuals be awarded the positions, advantages, or benefits they would have been awarded under fair conditions. The argument . . . is that only racism, if not of a direct and tangible sort then of an indirect and subtle sort, can explain the failure of racial minorities to attain their deserved proportion of the society's important benefits that they would have on the basis of their numbers in the society. From that, and from the assumption that racism is indisputably unfair, it follows that minorities have the right to claim proportional benefits for themselves.324

Thus, goes the argument, "blacks would attain proportional success in all of society's endeavors if they were not disproportionately hindered."325 And proportionality would not be discriminatory because it "would naturally occur in a fair world."326 Those who argue for proportionality work from "the first-order principle that all people are inherently, randomly equal when it comes to the distribution of intelligence across racial and ethnic lines."

Underlying the proportionality principle is a notion of probabilities and a "way of implementing the legal concept that an actor's state of mind is revealed through his or her actions, and that the actor is found to intend the natural and probable consequences of his or her actions."328 The theory is that if an employer uses nondiscriminatory practices, over time the work force will reflect the pool from which workers are selected. A "sharp divergence" between the racial composition of the work force and the labor market may lead to the inference or conclusion that an employer has treated people differently because of their race (or gender or

325. Id.
326. Id. at 51.
327. Johnson, supra note 256, at 1043-44.
other protected status). Thus, discrimination is seen and defined as a differential, with the definition resting upon and grounded in a normative theory of proportional representation. Again, absent racism and its effects, there would be no differential because society and the economy would presumably produce a percentage of African-American workers proportional to the percentage of African-Americans in the United States.

Others argue that the proportionality principle is an artificial concept which cannot withstand scrutiny. Thomas Sowell has written that "statistical disparities are commonplace among human beings." In his view, the "even 'representation' of groups chosen as a baseline for measuring discrimination is a myth rather than an established fact." For Sowell, "the presumption that groups would be evenly represented in various sectors and levels of society, in the absence of discrimination, has become a belief almost hermetically sealed off from any logical or empirical argument." The issue, argues Sowell, "is an incremental question of multiple causation and perhaps policy responses."

Judge Richard Posner has argued that the ultimate logic of the proportionality principle

is that the percentage of members of each minority racial and ethnic group in each desirable occupation, and in each level of achievement within the occupation, should be raised to equality with its percentage of the total population (either of the entire nation or, in some versions, of some region or local area). The proponents of racial proportional representation do not as yet urge adoption of the standard at complete proportional equality, but there seems to be no logical stopping point short of it within

329. Id.


331. Johnson, supra note 256, at 1044; see also GERTRUDE EZORSKY, RACISM & JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 32 (1991) (arguing for "approximate statistical parity" and the "achievement of occupational integration throughout the hierarchy of employment").


333. Id. "The civil rights vision focuses on groups adversely affected in statistical disparities. Here the relationship between discrimination and economic, educational, and other disadvantages is taken as virtually axiomatic. But if this apparently obvious proposition is taken as a hypothesis to be tested, rather than an axiom to be accepted, a very different picture emerges." Id.


335. THOMAS SOWELL, KNOWLEDGE & DECISIONS 256 (1980).
the structure of their argument . . . . If occupational preferences and abilities are not randomly distributed across all racial and ethnic groups, then governmental intervention in the labor markets (and in the educational process insofar as it affects occupational choice and success) will have to continue forever to secure proportional equality in the desirable occupations.336

Professor Walter Williams disputes the notion of proportional representation and the assumption that all blacks and "[w]hite ethnics are identical in all occupational [and] income-relevant ways."337 Arguing that there is no evidence to support that assumption, Williams contends that "[b]lacks appear to differ . . . from other ethnic groups in their preferences for sports, entertainment, music, . . . religion," and other activities.338

Professor Strauss obviously agrees with the proponents of proportional representation. In his view, African-American employees and applicants lack job qualifications compared to whites at least in part due to discrimination against them as well as their ancestors.

The precise extent to which such wrongs are responsible for any relative lack of qualifications is impossible to specify. But it is utterly implausible to say that they are not responsible at all.

The compensatory justice argument is that statistical discrimination that cumulatively disadvantages African-Americans is objectionable because they would not be less qualified were it not for past wrongs. In a world in which no entitlements had ever been violated, African-Americans would not be disadvantaged (at least to the same extent) by statistical discrimination. Statistical discrimination perpetuates past wrongs; one reason to prohibit statistical discrimination is to try to restore people to the position they would have been in were it not for past wrongs.339

3. Critique

The Strauss proposal arguably would advance the employment

338. Id.; see also Shelby Steele, The Content of Our Character: A New Vision of Race in America 114 (1990) (arguing that affirmative action has pushed society "toward statistically proportionate racial representation, without any obligation of proving actual discrimination").
enhancement purpose of Title VII, eliminate some of the need to resort to the EEOC or the courts for the purpose of challenging employment discrimination, and more effectively address taste-based discrimination and the effects of past and present discrimination. The actual racial composition of the work force, and not disparate treatment or disparate impact, would be the factor assessed in determining whether the employer had complied with its fair employment obligations.

What objections and arguments could be made in opposition to the proposal? First, the proposal would require the nation to admit that discrimination not only exists, but that it exists in such a way and to such a degree that proportional representation is necessary. Such an admission would carry with it the acknowledgement that discrimination has limited, and continues to limit, the job prospects of African-Americans, and that current antidiscrimination law does not effectively address the negative impact of discrimination on the employment prospects and opportunities of African-Americans. I am not hopeful that those admissions will be made. It is one thing to discuss and recognize discrimination at a theoretical or philosophical level. It is quite another thing to establish a national policy under which a percentage of jobs must be made available to African-Americans, especially where there will undoubtedly be dissent as to the premise that discrimination is still prevalent in this society.

Second, racial stratification in the workplace would not necessarily be addressed if Professor Strauss is only proposing that an employer's work force must reflect the percentage of African-Americans in the national population, and is not proposing that specific job classifications within a particular workplace must reflect that percentage. For example, an employer could reach the percentage requirement by employing a sufficient number of African-Americans in so-called "lower level" jobs (janitors, laborers, etc.); in that circumstance, the employer could meet the percentage requirement even though there are a few or even no African-Americans in professional, managerial, technical, or executive positions. A law firm with a "sufficient" number of African-Americans in its mail room and among its support staff could claim that it meets the

340. The courts would still have to decide cases brought under the NLRB-type screening.
341. See supra notes 213-44 and accompanying text.
342. Indeed, some believe that African-Americans have an advantage in this society. See Walter Shapiro, Unfinished Business, TIME, Aug. 7, 1989, at 12, 14.
proportional representation requirement even if the firm employed no, or only a few, African-American attorneys.

Third, it can be anticipated that some will argue that the imposition of percentage requirements on each employer constitutes an improper and illegal "quota." Indeed, by calling for proportional representation based on the percentage of African-Americans in the national population, Professor Strauss' proposal goes beyond the view that with respect to certain jobs the proper and relevant population is and should be limited to those individuals possessing the requisite skills and training for the particular job at issue.³⁴³ For example, it could plausibly be argued that the relevant population for law firms could be the number of African-Americans who hold law degrees and have passed a bar examination. Professor Alex Johnson has noted that although African-Americans comprise thirteen percent of the population of the United States, African-American lawyers represent only about 3.5% of the legal profession.³⁴⁴ Under the Strauss proposal, a law firm of one hundred lawyers would have to employ thirteen African-American attorneys, even where the "relevant population" and availability of African-American attorneys would indicate that the firm would be "expected" to hire three or four African-American lawyers.

Fourth, the speed by which the proportionate requirement would be achieved would have to be addressed. If an employer's work force did not contain the required number of African-Americans, would the employer be required to meet the requirement immediately or over a certain period of time? Would an employer who had not met the requirement be required to hire only African-Americans until the proportionality requirement was met?

Fifth, employers in areas with a low African-American population would face greater difficulty in employing the national percentage than would employers in locales with a significant African-American population. Employer A, with a facility in Wyoming or Idaho or other states with small black populations, would likely ar-


In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise . . . . Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. Id. (citations omitted).

³⁴⁴. Johnson, supra note 256, at 1054.
gue that the absence of African-Americans in its work force was a function of availability and not of discrimination.\textsuperscript{345} Employer B, with a facility in an area predominantly African-American (for example, fifty percent), would not violate the law so long as its work force was twelve to thirteen percent African-American.\textsuperscript{346} Under the Strauss proposal, Employer A would violate the law and would be subject to a fine; Employer B would not violate the law even though its work force was not "representative" of the area in which it operated.\textsuperscript{347}

Sixth, adoption of the Strauss proposal would require a change in the established public policy set forth in Title VII which forbids preferential treatment on account of an imbalance in the employer's work force.\textsuperscript{348} Proposals to amend Title VII to require that the percentage of African-Americans in an employer's work force match the percentage of African-Americans in the national population would certainly be met with anguished howls of quotas, reverse discrimination, etc., and the political prospects of enacting such legislation would, in my view, be next to impossible.\textsuperscript{349}

Seventh, the Strauss proposal mentions only African-Americans and does not include other protected groups, people of color, or women.\textsuperscript{350} If the proportional representation principle were extended to include all such groups, an employer's task would be more complicated.

Having made these points, it must be said that aspects of the Strauss approach are not unprecedented. Consider the obligations imposed by law on federal contractors. Executive Order 11246 ("Order"), signed by President Lyndon Johnson in September

\textsuperscript{346} \textit{Id.}
\textsuperscript{347} \textit{Id.}
\textsuperscript{348} \textit{See} Title VII § 703(j), 42 U.S.C. § 2000e-2(j) (1988). Nothing contained in Title VII shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number of percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.
\textit{Id.; see} BLUMROSEN, \textit{supra} note 44, at 250-53.
\textsuperscript{349} On politics and Title VII, \textit{see infra} notes 384-85 and accompanying text.
\textsuperscript{350} Becker, \textit{supra} note 6, at 1674.
Title VII's Regulatory Regime

1965,footnote 351 bars discrimination on the basis of race, color, sex, or national origin by federal contractors.footnote 352 Under the Order and its implementing regulations issued and enforced by the Office of Federal Contract Compliance Programs ("OFCCP"),footnote 353 federal government agencies are required to include in their contracts with businesses an equal employment opportunity clause which commits the employer to treat job applicants and employees without regard to their status and membership in a protected group.footnote 354 The Order also requires government contractors to take affirmative action (including written affirmative action programs) to ensure that the nondiscrimination directive is met.footnote 355 Employers who fail to comply with the requirements of the Order are subject to penalties and sanctions including debarment.footnote 356

OFCCP regulations provide that an employer covered by the Order must prepare a utilization analysis and include that analysis in its affirmative action program. The employer must analyze all major job groups at covered facilities and consider eight factors in determining whether minorities or women are currently being underutilized (underutilized being defined as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability").footnote 357 Where the analysis reveals un-

footnote 351. Equal Employment Opportunity, 3 C.F.R. 339-48 (1964-65 Comp.). The reach of the Order is broad. Apart from governments and educational institutions, one-half of all employees are employed by businesses required to file statements with the EEOC setting forth the sex, race, and ethnic distribution in the employer's occupational classifications. Approximately 75% of those employees covered by the reporting requirement are employed by federal contractors. See Turner, supra note 164, at 87; Finis Welch, Affirmative Action and Discrimination, in The Question of Discrimination: Racial Inequality in the U.S. Labor Market 154 (Steven Shulman & William Darity, Jr. eds., 1989).


footnote 354. Turner, supra note 164, at 87.

footnote 355. Id.


footnote 357. Revised Order No. 4, 41 C.F.R. § 60-2.11(b) (1993). The eight factors for minority utilization are: (1) the population in the labor area surrounding the facility; (2) the size of the minority unemployed in the labor area surrounding the facility; (3) the percentage of the minority work force as compared with the total work force in the immediate labor area; (4) the general availability of minorities having the requisite skills in the immediate labor area; (5) the availability of minorities having the requisite skills in a reasonable recruitment area; (6) the availability of promotable and transferable minorities within the contractor's organization; (7) the existence of training institutions capable of training persons in the requisite skills; and (8) the degree of training a
derutilization, the contractor must develop goals and timetables\textsuperscript{358} to address the underutilization and must put forth "every good-faith effort" to meet the goals and make the overall affirmative action program work.\textsuperscript{359}

Although the OFCCP requirements are different from and do not go as far as the proposal made by Professor Strauss, my point is that the federal government has put into place and has followed a regulatory scheme which looks to the number of minorities in a pertinent population and labor force, measures the employer's compliance with equal employment opportunity law by comparing the number (utilization) of minorities in the employer's work force with the number of minorities in the relevant population who possess the requisite skills, and requires the employer to address any underutilization in specific job groups and categories through the setting of goals and timetables and other actions. Thus, a governmental role and involvement in regulating and promoting the employment of minorities consistent with some notion of proportionality is not a foreign or novel idea; indeed, it is an established feature of federal law.

For those who believe that Title VII and other antidiscrimination laws should be interpreted and enforced in a manner that promotes some type of proportionality in the employment of African-Americans and other protected groups, the Strauss proposal will be appealing. The statutory and litigatory focus on the question whether an employer has engaged in disparate treatment and unlawful discrimination against an individual would be replaced by a focus on the question of whether an employer employed a specific percentage of African-Americans. While the latter question would appear to be easier to answer than the former inquiry, the Strauss proposal would require a profound change in currently held and accepted views of equal employment law and public policy, as well as the acceptance of a new approach to the question of discrimination in the workplace.

B. The Bell Proposal

In his most recent book,\textsuperscript{360} Professor Derrick Bell tells the

\textsuperscript{358} Revised Order No. 4, 41 C.F.R. § 60-2.12 (1993).
\textsuperscript{359} \textit{Id.}
story of the "Racial Preferences Licensing Act."361 Under that act, all employers, proprietors of public facilities, and owners and managers of dwelling places, homes, and apartments could apply to the federal government for an expensive license authorizing the license holder and its managers, agents, and employees "to exclude or separate persons on the basis of race and color."362 Once the license was obtained, the holder would be required to pay to a government commission a tax of three percent of the income derived from whites employed or served, or products sold to whites during each quarter in which a "racial preference" policy was in effect.363 License fees and commissions would be placed in an equality fund and would be used to underwrite black businesses, to offer no-interest mortgage loans for black home buyers, and for scholarships for black students seeking a college or vocational education.364

Licenses were to be displayed prominently in a public place, and businesses operated in accordance with the racially selective policies set out on the license. No license was available for those who would hire one black person and then discriminate against other black applicants; thus, the license could not be used as a shield against discrimination suits.365

Where a facility was charged with discrimination and did not hold a license, a charging party would bear the burden of proof and

---

361. In assessing Professor Bell's story, it is important to know where he is coming from.
[B]lack people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it, not as a sign of submission, but as an act of ultimate defiance.

Id. at 12 (emphasis omitted). Bell also assumes that racism is a permanent component of American life.

The goal of racial equality is, while comforting to many whites, more illusory than real for blacks. For too long, we have worked for substantive reform, then settled for weakly worded and poorly enforced legislation, indeterminate judicial decisions, token government positions, even holidays. I repeat. If we are to seek new goals for our struggles, we must first reassess the worth of the racial assumptions on which, without careful thought, we have presumed too much and relied on too long.

Id. at 13-14.

362. Id. at 48.
363. Id.
364. Id. at 48-49. The equality fund would be administered by a commission comprised of representatives from, and named by, five civil rights organizations, with each representative to serve one, nonrenewable three-year term. Id. at 49.
365. Id.
could meet that burden with statistical and circumstantial evidence, as well as direct evidence provided by white testers.\textsuperscript{366} Successful complainants would be entitled to damages of ten thousand dollars per instance of unlicensed discrimination, including attorneys’ fees.\textsuperscript{367}

In Professor Bell’s story, the President made the following statement at the signing ceremony for the act:

It is time . . . to bring hard-headed realism rather than well-intentioned idealism to bear on our long-standing racial problems. Policies adopted because they seemed right have usually failed. Actions taken to promote justice for blacks have brought injustice to whites without appreciably improving the status or standards of living for blacks, particularly for those who most need the protection those actions were intended to provide.

Within the memories of many of our citizens, this nation has both affirmed policies of racial segregation and advocated policies of racial integration. Neither approach has been either satisfactory or effective in furthering harmony and domestic tranquility.\textsuperscript{368}

The President also pointed out that three decades after the passage of the Civil Rights Act of 1964, that statute’s protective function, “particularly in the employment area, had been undermined by both unenthusiastic enforcement and judicial decisions construing its provisions even more narrowly.”\textsuperscript{369}

Bell, through the fictional lawyer-prophet and heroine Geneva Crenshaw,\textsuperscript{370} sets out three advantages of the preference licensing act. First, the authorization of racial discrimination would remove the element of the compelled association of whites with blacks. With that element removed, “people who discriminate against blacks without getting the license authorized by law, may not retain the unspoken but real public sympathy they now enjoy. They may be viewed as what they are: law breakers who deserve punishment.”\textsuperscript{371} Second, a requirement of publication of discriminator status and the payment to African-Americans of a price for the

\begin{itemize}
  \item 366. Id.
  \item 367. Id.
  \item 368. Id.
  \item 369. Id.
  \item 370. Geneva Crenshaw was the fictional heroine in Bell’s 1987 book on race and the law. Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987).
  \item 371. Bell, supra note 360, at 61.
\end{itemize}
right to discriminate “may dilute both the financial and the psychological benefits of racism.”

Racists deny that they are racists, and few racists “are ready to post their racial preferences on a public license and [are] even less ready to make direct payments for the privilege of practicing discrimination.”

Third, African-Americans would no longer “have to divine” whether an employer or realtor or proprietor wanted to exclude them. “The license will give them—and the world—ample notice. Those who seek to discriminate without a license will place their businesses at risk of serious, even ruinous, penalties.”

Assuming arguendo that such a Racial Preference Licensing Act could be enacted into law, would entities apply for the license, and in what numbers? Applying for and displaying the license entails a public admission that an entity discriminates or wishes to reserve the right to discriminate against African-Americans. Would the applicant be reluctant to view and identify itself as a discriminator or a racist or a metaracist? My guess is that the vast majority of those who are and who believe that they are discriminators will not wish to display that fact, while other possible applicants will not view themselves as discriminators in need of a license.

Columnist Clarence Page has pointed out an example of the denial of racism. A school district in Aurora, Illinois was charged with a thirty-year pattern of the following discriminatory treatment: providing used textbooks to minority schools and new textbooks to white schools; forced busing of minority students and voluntary busing of whites; and funneling of white students into “gifted” classes with classrooms, bathrooms and entrances separate from the other, primarily minority, students. The lawyer defending the school district, faced with these facts, did not see racism. In his words: “Racist to me is a conscious attitude, like running around with hoods and white sheets.”

Evidently, anything goes in the

---

372. Id.
373. Id.
374. Id. at 62.
375. A racist is bigoted and is prejudiced against another person because of the color of the other person's skin and acts on that prejudice to disadvantage another. "Metaracism" occurs when "[r]acial degradation continues on a different plane, and through a different agency: those who participate in it are not racists—that is, they are not racially prejudiced—but metaracists, because they acquiesce in the larger cultural order which continues the work of racism." Robinson, supra note 29, at 49 n.133.
377. Id.
absence of hoods and sheets.

How would an employer covered by the preference act weigh the costs of the expensive license, the payment of the quarterly tax, and the possible damages of ten thousand dollars per instance of discrimination against the probability of a discrimination action and the prospects of success in the event such a charge is brought? My guess is that, either consciously or unconsciously, the employer will act on the basis of its aversion to the risk of litigation. That risk may be low. As noted above, in any one year less than one-half of one percent of all firms covered by Title VII can expect to be sued. 378 Given those odds and the realities of processing and litigating discrimination claims faced by Title VII claimants, an employer may forego the expensive license and choose instead to vigorously defend against any discrimination action brought against it. To the extent that many or most employers would make that choice and not pay for the license, many of the current problems relative to Title VII would not be eliminated or minimized since, under both disparate treatment analysis 379 and the licensing act, a claimant could still be required to prove that the employer engaged in unlawful discrimination.

Other questions and arguments against the licensing act can be anticipated. Imagine the probable political response to a law proposing to establish another tax and a new government commission during a time in which tax cuts, balanced budgets, and reinventing and streamlining government are topics of the day. Imagine the probable political response to the payment of commissions into an equality fund used for African-American businesses, no-interest mortgages for black home buyers, and scholarships for black students. Imagine the cries of "reverse discrimination." Imagine the call for an explication of the reasons why other people of color and women are not entitled to the same benefit. Imagine the legislative "debate" over such a law and the sight of politicians scurrying for political advantage or political cover.

What I cannot imagine is the enactment of such a law. Like the Strauss proposal, Professor Bell's licensing act would require the nation to "fess up;" to acknowledge that slavery, apartheid, Jim Crow, and de facto and de jure discrimination harmed and continue to adversely affect many African-Americans, and to commit to a new legal approach and regime of antidiscrimination law. It is my

378. See supra note 125 and accompanying text.
379. See supra notes 142-63 and accompanying text.
view that this nation will not agree or commit to such a fundamental change in its discourse on racism.

**Conclusion**

Viewed from the perspective of the statutory goal of opening employment opportunities for African-Americans, the extant Title VII regulatory regime is problematic. While it is customary to present some profound recommendations for a definitive resolution of the problems, the truth of the matter is that legal scholars have offered sundry proposals geared toward "fixing" Title VII, including changing evidentiary standards, fault theories, procedures, and liability provisions.  

One scholar has even argued that Title VII is ineffective because the "Hobbesian foundation [of the statute] denies us an ism-free society."  

I am concerned that the hope that Title VII would and will enhance African-American employment may be unrealistic and unrealized for, as discussed above, the current and principal use of Title VII is to protect the jobs of incumbent workers. Given that reality, we must ask whether too much faith has been placed in the legal prohibition against employment discrimination, and "whether we must be content with laws against employment discrimination that do little more than protect the rights of employees who have already found a measure of success in the workplace."  

Resisting the temptation to restrict this Article to the theoretical, I am also concerned that proposed changes in the regulatory regime such as those offered by Professors Strauss and Bell will run into the brick walls labeled "quotas," "reverse discrimination," and "taxes."  

This is not to say that efforts to address and resolve

---

381. Id. at 612 (footnote omitted). In the cited article, Professor Reginald Robinson argues "Title VII cannot rest on Hobbes's empirical natural law and simultaneously eliminate racial discrimination in employment practices."  

Id. at 677. In his view, we should supplant Hobbes's empirical natural law with Hegel's ethical theory. "By so doing, Title VII advances us toward the full realization of the Ideal in objective reality: an und fur sich."  

Id. (footnote omitted).
382. See supra notes 102-07 and accompanying text.
384. See generally THOMAS B. EDSELL & MARY D. EDSELL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1992) (arguing that the issues of race, rights, and taxes have intersected with a range of domestic issues, resulting in a chain reaction in which a new conservative voting majority has replaced the once-dominant democratic presidential coalition, and that a polarization has pitted major segments of society against one another).
problem areas in the regulatory scheme should not be addressed. It is to say that we must be realistic about, and prepared to deal with, the fact that there may not be any short-term or long-term prospects that Title VII will be interpreted differently than it has been by the courts in recent cases, or that new legislation embodying alternative views will be enacted.385

For four reasons, Title VII will continue to have limited impact in the area of increasing African-American employment. First, there is a built-in and real world disincentive to the filing and pursuit of an EEOC charge by an applicant or employee. An applicant may not have sufficient information on which to base a charge and may understandably be more concerned with the search for employment than with instituting an administrative proceeding and possible litigation.386 An incumbent employee may choose not to institute Title VII proceedings against her employer because she fears that doing so will place a strain on the employment relationship and will expose her to retaliation.387

Second, the statute must be enforced by and in the courts, and plaintiffs face a host of practical and substantive hurdles as they seek to prove that their employer engaged in unlawful discrimination.388 Moreover, Title VII must be interpreted and applied by federal judges, a majority of whom are Reagan-Bush appointees and many of whom believe that "Title VII cannot be a significant agent in removing the vestiges of our long history of racial discrimination."389 As the effectiveness of Title VII is directly tied to the interpretation of that statute's provisions by the federal judiciary,390 a predominant judicial view that the statute cannot be a significant agent can result (indeed, has resulted) in a restricted application of the statute. Although many will argue that the restricted application is "good" or "bad" from their perspectives, the point is that the reach of the statute can be limited by the judicial branch.391

Third, general reliance on the judiciary to apply and enforce Title VII (or any other antidiscrimination law) presents a set of in-

386. See supra notes 109-13 and accompanying text.
387. See supra notes 127-29 and accompanying text.
388. See supra notes 72-87 and accompanying text.
389. Culp, supra note 9, at 967.
390. Id. at 970 ("Title VII can be effective in altering the economic position of black Americans, but its effectiveness is tied to the interpretation of that law by federal judges.").
391. Of course, certain Title VII cases can now be tried to a jury. Whether juries will reach results similar to those reached in bench trials remains to be seen.
stitutional factors which can limit the efficacy of Title VII. Many believe that the proper and limited role of the judiciary is to resolve disputes brought to the courts by parties, with the parties presenting their cases "within well-established, pre-existing legal frameworks" and arguing "their positions according to rigorously enforced notions of relevance."392 In deciding the cases before them, the courts are to consider only the facts proved and the arguments made by the parties. The courts' remedial choices are limited by the absence of the sword or purse393 and, in statutory cases like Title VII, by the remedial provisions of the statute. It has been argued that, given institutional limitations, the courts have not played a major role in the area of civil rights.394 Professor Gerald Rosenberg, "finding that the courts contributed little to civil rights,"395 argues that the combination of "growing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, [and] the increase in mass communication . . . created the pressure that led to civil rights."396 On that view, principal reliance on Title VII and the courts that interpret and apply the statute (including, of course, the Supreme Court) is misplaced.397

Fourth, it must be recognized that Title VII addresses the back end of a process that began many years earlier. Persons seeking employment bring with them the advantages and disadvantages, education and lack of education, skills and lack of skills that were acquired or not acquired in the formative years of their lives. Title VII will not directly address racism, poverty, and associated social ills such as an inadequate education, family instability, welfare de-

393. Id.
395. Id. at 169.
396. Id.
397. Professor Girardeau Spann has argued that the "Supreme Court functions to perpetuate the subordination of racial minorities in the United States. . . . For structural reasons, the institutional role that the Court is destined to play within our constitutional scheme of government is the role of assuring the continued subordination of racial minority interests." SPANN, supra note 52, at 5. In his view, a rational minority response to the veiled majoritarian nature of the Supreme Court would be to abandon efforts to influence the Court and to concentrate minority political activities on the representative branches, because minorities are more likely to secure concessions from an overtly political branch of government than from a branch whose political dimensions are covert.
Id. at 99.
pendency, crime, inadequate housing and homelessness. A principal focus on the back end issues (employment and employment opportunities) with little or no focus on the front end issues will not address or change the underlying conditions facing African-Americans and other disadvantaged persons. Nor will Title VII have any real impact on the spatial mismatch resulting from the movement of jobs to the suburbs and away from residentially segregated and hypersegregated African-Americans.

As we continue to address and seek answers for the question of discrimination, we must recognize that the passage of civil rights legislation in the mid-1960s, while undoubtedly significant, has not solved (indeed, could not solve) the seemingly intractable and worsening economic and social problems faced by many in the African-American community. We must also recognize that Title VII, as currently written, construed and enforced, cannot reach its lofty goal of increasing the employment of, and employment opportunities available to, African-Americans. Any proposed changes in the statute must take account of the pitfalls and limitations facing such proposals. The failure to consider these limitations could result in the exchange of one set of problems for a different set of statutory obstacles—again failing to address and resolve the identified inefficiencies of the current Title VII regulatory regime.


399. A recent article by Professors Douglass Williams and Richard Sander discussed the "spatial mismatch" theory. That theory posits that "firms have simply moved ... jobs to the suburbs, and that residential segregation has prevented blacks from following them." Williams & Sander, supra note 224, at 2020. That theory, first advanced by John Kain, see John Kain, Housing Segregation, Negro Employment, and Metropolitan Decentralization, 82 Q. J. Econ. 175 (1968), notes that as jobs move from cities to suburbs, "mass transportation systems failed to provide adequate access for low-wage workers, and the higher costs of commuting could seriously reduce the attractiveness of low-wage work." Williams & Sander, supra note 224, at 2021.

400. As commentators Massey and Denton note: residents of hypersegregated neighborhoods necessarily live within a very circumscribed and limited social world. They rarely travel outside of the black enclave, and most have few friends outside of the ghetto. This lack of connection to the rest of society carries profound costs, because personal contacts and friendship networks are among the most important means by which people get jobs. Relatively few job seekers attain employment by responding to ads or canvassing employers; most people find jobs through friends, relatives, or neighbors, and frequently they learn of jobs through acquaintances they know only casually.

MASSEY & DENTON, supra note 398, at 161 (footnote omitted).