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No Time for Trumpets: Title VII, Equality, and the Fin De Siecle

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FOREWORD

I grew up in the East Baltimore of the 1950s. My father was a steelworker at Bethlehem Steel. Bag lunch in hand, he would leave our row house late at night on his way to the Sparrow's Point Plant. He worked from eleven to seven — when he could get work — loading trains with iron ore.

My mother "did hair." She worked in the cramped confines of our kitchen, straightening and styling, curlers rattling, two hours per customer, for a fee of two dollars and twenty-five cents each.

She was very industrious.

My grandparents on both sides were farmers in rural Virginia. My great-great grandparents were slaves.

We were called "Negroes" then, and as Negroes we lived behind a kind of wall — not a physical wall, but a wall of deeply understood limitations on what we could aspire to, what work we could get, what constituted achievement. The wall ran high and long across the vale of history and surrounded not only my family but my totally Negro neighborhood as well. The wall, as a pattern of economic and social relations, replicated itself across the United States of my youth. The meaning of being a Negro in the 1950s, an era in which Jim Crow and overt segregation held sway, was that one had to live behind the wall. Behind the wall my mother and father, my cousins and uncles, worked as janitors and stevedores and maids and hairdressers and garbage men and steelworkers. We picked the cotton, washed the floors, cooked food in restaurants in which we could not be served, made the beds, cut the grass, and sold watermelon from horse-driven carts.

The psychological reality of the time is perhaps best chronicled by the popular culture it produced. I remember shows like *Tarzan,*

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Jack Benny, and *Amos 'n' Andy* portraying the Negro variously as a native, as a childlike butler, or as a con man long on ambition but short on talent, trying to bilk his friends. These depictions of Negroes of the 1950s, in the explicit way in which they walled Negroes out of any sense of human dignity, mirrored perfectly the explicit way we Negroes were walled out of the larger economy and society in those bad old days. From behind the wall I would call my parents to the living room whenever a miracle would happen, as they did from time to time — when a Negro would be shown, not as a native with a spear or a con man or a servant, but in a respectable job, perhaps as a high school teacher. These respectable jobs did exist for Negroes, but they were in Negro schools or hospitals. We could be respectable, after a fashion, but we had to stay behind the wall.

The wall in effect divided true respectability and its imitation. Respectability always had a white face. The principals of the schools I went to — all of which were predominantly Negro — were white; the policemen were white; the mayor and the lawyers and the executives I saw downtown were white. Whites ran the banks and did the hiring at the restaurants, at Bethlehem Steel, at the taxi cab company, at City Hall. Whites presided over the courts; they were the foremen at the plant. The boss was white; the insurance man was white.

The world of the 1950s, along with the stark and demeaning patterns of de jure segregation in employment, has passed away. Since then, I have struggled to wrest my identity from the clutches of Tarzan and of Amos and Andy. I am now a professor of law at a southern law school. I have moved from the inner city of East Baltimore to the suburbs of Miami amidst palm trees, Olympic-size pools, and glitzy sports cars — and I am no longer called a Negro. My friends include blacks who are lawyers, doctors, members of legislatures, and members of university faculty. One legacy of the past is progress, at least for the talented tenth. But somehow I do not think this is yet a time for trumpets.

Ironically, the people I see who cut the lawn, who pick up the trash, who wield jackhammers to fix up the streets, are still almost always black. The law firms, the doctors' offices, the hospitals, the judges' chambers, the faculty lounges at most major law schools, the corporate boardrooms, the U.S. Senate, and the affluent areas of town are still overwhelmingly white. For me the worlds of the 1950s and of the 1990s are not distinct but seem to interpenetrate one another. The wall is less visible. But the wall is still there.

INTRODUCTION

And they said unto him: We have dreamed a dream and there is no interpreter of it.[1]

Equality is the precept in whose name America has chartered itself. Since Jefferson's famous aphorism, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,"[2] the idea of equality has rung down the corridors of history as a clarion call to national unity and resolve. In the midst of the Civil War, Lincoln invoked equality as an exhortation to a renewed sense of national identity in his Gettysburg Address: "[O]ur fathers brought forth upon this continent a new nation . . . dedicated to the proposition that all men are created equal."[3] In the twentieth century in the speech of former President Lyndon Johnson, equality reverberated as a summons to rededication to national ideals: "This was the first nation in the history of the world to be founded with a purpose. The great phrases of that purpose still sound in every American Heart . . . 'All men are created equal' . . . ."[4] In the legitimating myth[5] reposing in the Declaration of Independence and in the narratives of three presidents, equality has been the moral equivalent of the holy grail: it is the object of our sacred quest, and this quest has defined and ennobled us. Equality and our professed search for

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1. *Genesis* 40:8.

2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* 2 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 469 (1939). Notice that the rhetoric of Lincoln draws on a metaphor of birth. It is the ideal of equality that gives this metaphor its particular eloquence because our notion of equality and the story of the nation's birth that Lincoln retells are references to and for each other.

4. Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281, 282 (Mar. 15, 1965).

5. I use *myth* here in two senses: first, as a story or narrative that helps explain the world, and second, as a fairy tale or fantasy that covers up the world's profane aspects, as the story of the stork's bringing babies does. In the first sense, I refer to the narrative about equality that occurs as a theme in the story of how this nation was founded and how American society came to have its formal emphasis on "equal justice under law." *See* Robert Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4 (1983) ("No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."). This narrative is a "legitimating myth" in that it allows Americans to think of themselves as both democratic and morally whole. As Cover suggests, these stories act as narratives to connect American institutions to the normative world, or nomos.

These stories about egalitarian traditions are myths in the fairy-tale sense to the extent that institutions like chattel slavery and segregation profoundly contradict them. In this sense the equality story operates as a kind of psychic detour on the bridge between nomos and historical American institutions to connect Americans to a wishful, fictive reality. The equality narratives are signs by which Americans have created a false national identity — a fictive self — to mediate between themselves and the normative world they have created.

it in each era renews that era as a time of beginning, a time shot through with an emancipatory, revolutionary spirit.[6] Equality has given us both our sense of who we are and our sense of the spirit of the age.

But prior to 1964, equality for black[7] Americans was only a dream. This was particularly true in the realm of employment.[8] It

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6. In this point, in speaking of equality as a theme in an American historical narrative, two things are implicit. The first is the nature of the epistemic framework that informs legal texts, whether Title VII, which is the subject here, or any other legal text, and takes its meaning from the historical narratives "that locate it and give it meaning." *See id.* at 4-5. The second point is Walter Benjamin's and explains historical narrative as a trope or figure in which a revolutionary time, or a time when the nation overcame a crisis, is paired with, or rhetorically mirrored in, the present:

> [N]o fact that is a cause is for that very reason historical. It becomes historical posthumously, as it were, through events that may be separated from it by thousands of years. A historian who takes this as his point of departure stops telling the sequence of events like the beads of a rosary. Instead he grasps the constellation which his own era has formed with a definite earlier one. Thus he establishes a conception of the present as the "time of the now" which is shot through with chips of Messianic time.

WALTER BENJAMIN, *Theses on the Philosophy of History, in* ILLUMINATIONS 253, 263 (Hannah Arendt ed. & Harry Zohn trans., Schocken Books 1969) (1955).

7. In this essay I speak, using the black experience with discrimination as a reference point. This reflects my desire in this essay, and in my work generally, to find an authentic voice — to find my voice. I must add that I reject the notion that there is an objective or neutral place to stand in legal, historical, or philosophical inquiry. I am reminded of the black woman who asked her white female colleague what she saw when she looked in the mirror. "I see a woman," the colleague said. She asked a white male colleague, and he said, "I see a human being." But the black woman said she saw a "black woman" when she looked in the mirror. Our identities and experiences situate us — and our scholarship. Traditionally, of course, some experiences and identities, white male identity for example, have been more privileged than others. At the same time a pervasive claim of universalism and perspectivelessness within our academic culture obscures race and gender as operative categories. In this privileging process, the very mechanism of hierarchy becomes invisible. In speaking openly from his own experience, the scholar of color hopes to make visible what "perspectiveless" discussions obscure. Also, my effort to seek the rich particularity of my own experience is not exclusive of exploring the "experience" of the marginalized other in general. Latinos, gays, and women, to varying degrees, will find the black experience a paradigm for understanding their own.

8. It was a dream first in the obvious sense of an imaginary, utopian, and humanizing vision that offered psychological release from a dehumanizing social reality. Equality was a dream also in the sense of a vision incapable of being expressed within the formalism of ordinary language. This "transcendental" notion of equality resonates in black literature and oratory. King expressed this notion of equality by referring to it as "his dream":

> I . . . have a dream . . . that one day this nation will rise up and live out the true meaning of its creed — we hold these truths to be self-evident, that all men are created equal. I have a dream that one day . . . sons of former slaves and sons of former slave-owners will be able to sit down together at the table of brotherhood. . . . I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low . . . and all flesh shall see it together. . . . This will be the day when all of God's children will be able to sing . . . "Free at last, free at last; thank God Almighty, we are free at last."

Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 219-220 (James M. Washington ed., 1986). Another poet talked of it as something not of "earth":

> That bright chimeric beast
> Conceived yet never born,
> Save in the poet's breast,
> . . . . . .

was a dream word that reposed deep in the realm of the moral imagination, inspiring itinerant preachers, civil rights marchers, presidents at moments of national crisis, and progressive whites, but yet only a word — one whose truth had never been realized within the lived experience of black Americans. But dreams still have the power of prophecy. Words still have power to create worlds.[9] It was this mere dream that had the power to unite a coalition of blacks and northern liberals into a social and political movement beginning after the end of the Second World War.[10]

The movement was extraparliamentary in form and consisted of protest marches, sit-ins, freedom rides, freedom walks, and economic boycotts.[11] As an extraparliamentary expression, the move-

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Never may be taken
In any earthly wood.

That bird forever feathered,
Of its new self the sire,
After aeons weathered,
Reincarnate by fire,

. . . . . .

If beasts like these you'd harry,
Plumb then the poet's dream;

. . . . . .

Make it your wood and stream.

Countee Cullen, *That Bright Chimeric Beast, in* AMERICAN NEGRO POETRY 86, 86-87 (Arna Bontemps ed., rev. ed. 1974).

9. "[I]n the creation myth of the Hebrews, God made the world by word of mouth; and in the Christian myth as recorded in St. John's Gospel the Word became God himself." Chinua Achebe, *Language and the Destiny of Man, in* HOPES AND IMPEDIMENTS, SELECTED ESSAYS 1965-1987, at 87, 88-89 (1988). The stories of origin may be read as ancient, mythic representations of the spiritual source of life or as a symbolic expression of modern-postmodern insights as to the role of language in our inner life. In the same vein, Edward Sapir writes:

> Language is not merely a . . . systematic inventory of the various items of experience . . . but is also a self-contained, creative symbolic organization, which not only refers to experience . . . but actually defines experience for us by reason of its formal completeness and because of our unconscious projection of its implicit expectations into the field of experience.

Edward Sapir, *Conceptual Categories In Primitive Languages, in* LANGUAGE IN CULTURE AND SOCIETY 128, 128 (Dell Hymes ed., 1964).

10. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 181 (1979). Piven and Cloward identify a coalition of blacks, white industrial workers, and the Democratic party. The great northern migration saw vast numbers of blacks move north. At the same time the Democratic party's southern base was eroding. Thus, Democratic presidents came to rely upon the black vote. Also, urban blacks shared class interests with whites on jobs and labor issues in the party of the New Deal. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA 74-177 (1990) (detailing the political history of, inter alia, Title VII, and describing a coalition centered around liberal Democrats, labor organizations, and blacks).

11. The simultaneously glorious, tragic, heroic, and disappointing civil rights era is wonderfully conjured up by the speeches and documents that survive. *See* THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE, 1954-1990 (Clayborne Carson et al. eds., 1987). *See generally* GRAHAM, *supra* note 10 (providing a sense of the major actors and wars of maneuver at the level of presidential politics).

ment confronted American politics as the cogito confronts the self: the marchers and sit-in protesters stood outside regular political processes, outside the legality of the era of segregation, accepting arrests and officially sanctioned brutality. This was in order to compel Americans to stand in their consciences outside the political process to see themselves and the sheer violence of segregation. This operated at a discursive level: it deployed the story of origins, told by Jefferson, Lincoln, and Johnson in tandem, with a utopian vision of America as it could be — an America risen from the darkness of the past. Equality was the suspension bridge between the golden era of revolution and a hoped-for, progressive future, to whose reality the marches were witness. It premised the reality of segregation as an obstacle on the suspension bridge between America and its destiny, between America and the spirit of its ideals. Through this process of using equality as a conceptual bridge to reimagination of national identity, the moral universe itself could be reconfigured. Racism in public life, formerly as quotidian and as American as apple pie, became the "American dilemma."[12] This American dilemma became both social diagnosis and anthem of a new America trying to be born. The new America resonated with the impulse of the Enlightenment to celebrate individuality over race — modernity itself over the primitivism of the segregated past.

Arrayed against the forces of change through the civil rights movement was the structure of law and the interlocking institutions that maintained segregation. Moreover, behind that structure, deeper and stronger than segregationist laws, stood an ideological[13] structure of assumptions about the naturalness of excluding blacks.

Against notions of equality as a legitimating ideal was posed the freedom of the individual to associate and the freedom of the property owner to use his property, and particularly his workplace, as he

12. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (20th anniv. ed. 1962).

13. By *ideology* I refer to rationalizations within legal doctrine for oppressive power relationships defined and maintained by law. Ideology thus involves a masking or obfuscating of the nonneutrality of legal institutions. *See, e.g.*, Douglas Hay, *Property, Authority and the Criminal Law, in* DOUGLAS HAY ET AL., ALBION'S FATAL TREE 17, 26 & n.2 (1975). A key distinction must be made between characterizing the intent model as ideological and characterizing it as a kind of dishonesty. As Clifford Geertz points out,

> [Ideology] is not (quite) the same as lying . . . for "whereas the liar tries to falsify the thought of others while his own private thought is correct . . . a person who falls for an ideology is himself deluded in his private thought, and if he misleads others, does so unwillingly and unwittingly."

CLIFFORD GEERTZ, *Ideology as a Cultural System, in* THE INTERPRETATION OF CULTURES 193, 196 (1973) (quoting WERNER STARK, THE SOCIOLOGY OF KNOWLEDGE 48 n.2 (1958)).

chose. Against the claims of modernity was posed the serenity and order of the past with its bright lines demarcating the boundaries of public and private. Questions of the employer's decisions fit squarely in the private sphere.[14] Within these social precincts of American life, the segregation of blacks in employment was natural, or at least inevitable.

Title VII of the Civil Rights Act of 1964[15] represents the political resolution of a historic conflict. Through Title VII, passed after perhaps the longest legislative debate in history,[16] the dream became law. Through Title VII the word *equality* had become in a sense flesh, or at least official policy. This new federal policy heralded and served as an emblem of a new era, perhaps a second Reconstruction, in American law.

There was consensus that the wall of segregation must come down, that discrimination was illegal and had no place in the marketplace. The trouble was that the statute defined neither *discrimination* nor its animating ideal, *equality.* While equality or equal opportunity had gone from gossamer ideal to concrete rule of law, the nature and scope of this equality "rule" remained cloaked behind the veil of indeterminacy.

In the early days we spoke of two models or theories of discrimination. There was, of course, the intent model. Under this conception the law prohibited discrimination as an intentional act. But it was also possible to speak of discrimination as an effect or objective result. Each of these theories of discrimination manifested a different vision of the meaning of the phrase *to be equal.* Underlying these diverging legal theories were diverging social visions. One vision involved "equality of opportunity" only, another "equality of result." There was room within this framework to speak of discrim-

14. Essentially, the common law regarded relations between employer and employee, master and servant, as a matter solely between the parties themselves. *See* Lochner v. New York, 198 U.S. 45 (1905); *see also* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, in* 3 RESEARCH IN LAW AND SOCIOLOGY 3, 8-17 (1980) (describing the central tendency of the classical common law approach as an ordering of the social world into spheres of total liberty for individual legal actors). *But see* Karl E. Klare, *The Public/Private Distinction in Labor Law,* 130 U. PA. L. REV. 1358, 1362-75 (1982) (tracing the common law public-private distinction to a notion of property ownership).

15. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended principally at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991)). Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1988).

16. *See* 2 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1020 (1970); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 230 (1985). Both texts offer a historical treatment of the passage of Title VII.

ination as a violation of law and as a social problem, as a negative prohibition and as an affirmative right. This was an initially open-ended discourse in which contradictory and normatively divergent conceptions of equality could both be discussed.[17]

In my view, the significance of the past thirty years, from the inauguration of Title VII to the present, is that the wheel has come full circle. Title VII of the Civil Rights Act of 1964, in its enactment, was indeed a symbol of national triumph over the racial past, a monument to a nation's reaching the mountain top of its ideals. But it has become scarcely more than a relic of our political history, a memorial to consensus on moral aspiration. Title VII is the juridical equivalent of the last fading smile of a Cheshire cat of social justice that has long since disappeared. The coalition of blacks and northern liberals who were able to enact Title VII and who agreed at the level of ideals on a need to end discrimination could not agree on the proper limits of the antidiscrimination principle. Whites, North and South, increasingly distanced themselves from the sacrifice and loss of privilege that giving full expression to the liberal notion of equality would have meant[18] and opted for the more conservative view. The collapse of the political coalition was mirrored in our legal discourse.

The open-ended framework in which there was room for two visions of equality, in which discourse was possible about the history and lived experience of blacks, has collapsed as well. In its place the Supreme Court has erected a new framework that offers only one coherent vision of equality. The Court gives equality fixed boundaries, a new fixed sphere of expression.

In a real sense the Supreme Court has erected a new wall, a new discursive barrier that places the bulk of what blacks experience as racial subordination beyond the reach of discourse. In the end it has rendered the discourse of equality meaningless for blacks.

My essay seeks to examine the internal architecture of the discursive barrier — the wall — that the Supreme Court has built within the doctrinal framework of Title VII and concomitantly within the discourse of equality. To understand how the Court has

17. *See* D. Marvin Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams,* 25 U.S.F. L. REV. 1, 2-3 (1990) (arguing that the two theories reflected opposing poles of thought involving the nature of legal rights — embracing both positivistic and morality-based conceptions).

18. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 6 (1987) (suggesting that whites took on the cause of civil rights laws as a means of redemption but retreated when they found that the laws in themselves did not bring redemption and that real sacrifice was required).

erected this discursive wall, we must begin with history. Equality, while historically a vehicle for national identity and contemporaneously for modernist conceptions of justice, is synchronically and diachronically indeterminate. Equality is a deeply sedimented concept[19] with not one objective meaning but successive levels of meaning built up over time. Each of those historic understandings is itself a unity of opposites, of often contradictory interpretations constructed by interpretive communities in conflict — former slaves and former slave owners, northern Republicans and southern Democrats, employers and minorities who worked for them — each viewing the moral universe through a different lens. This framework, much like an archeological dig, is organized in successive layers of structure. My project becomes one of excavation, through which I want to show how, at increasingly deeper levels of theory, equality has been torn loose from its moorings in history and how, within the remaining text of equality, competing interpretations reflecting the lived experiences of minorities have been erased.

In Part I, "Equality as Historical Memory," I argue that equality's meaning in the nineteenth century grew directly out of the national experience with slavery. Both blacks and the legal community attempted to imagine equality in terms of its opposite: the conditions of slave life. I argue further that the initial difficulty was not in defining equality but in reconciling competing world views, those of former slave owners who wanted to maintain a traditional social order notwithstanding Appomattox, and those of blacks and northern Republicans who pursued transformation of social order. This social order privileged whites to a racially exclusive society in which they enjoyed special status and power vis-à-vis blacks. The claims of privilege were cloaked in the Reconstruction debates as claims of autonomy or liberty. Liberty trumped equality in the realm of social life, the argument went. Thus the dispute was

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> When I move about my house, I know without thinking about it that walking towards the bathroom means passing near the bedroom, that looking at the window means having the fireplace on my left, and in this small world each gesture, each perception is immediately located in relation to a great number of possible co-ordinates. When I chat with a friend whom I know well, each of [our] remarks . . . contains, in addition to the meaning it carries for everybody else, a host of references . . . without our needing to recall previous conversations with each other. . . . In the same way there is a "world of thoughts," or a sediment left by our mental processes, which enables us to rely on our concepts and acquired judgements as we might on things there in front of us . . . without there being any need for us to resynthesize them.

MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 129-30 (Colin Smith trans., Routledge & Kegan Paul Ltd. 1962) (1945).

not about the meaning of equality but about whether it had a social role. Equality failed, I argue, not because of competing claims about what equality was but because of a convergence of historical forces — the collapse of a key political coalition and the triumph in the judicial arena of a paradigm[20] of the traditional social order in which equality has no place.

In Part II, "Equality as Grand Theory," I address contemporary as opposed to historical conceptions of equality. Here I map the structure of thinking that seems to underlie the current doctrinal framework. In the brave new context of "modernity," the terms of the debate have been reconfigured. At least at the explicit level of discussion, there is a contest over the meaning of equality.

I begin with the notion that there is a theoretical struggle between competing communities of interpretation, each understanding equality through a different lens. That lens is what I refer to as "grand theory."[21] The notion of grand theory here connotes a foundation for law. Law is grounded in assumptions about the notion of fault, the notion of discrimination, the notion of interpretation, the notion of law itself. From the perspective of the black community, the legally operative paradigms of discrimination and fault are incoherent. I try to identify the epistemic, historical, and moral dimensions of the struggle over the meaning of equality. I try to show how the idea of equality is indistinguishable from the assumptions through which the dominant society has viewed the question. I argue further that, as the dominant society has con-

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20. The word *paradigm* enters our lexicon through the work of Thomas Kuhn. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). Kuhn's work is both a history of science and a deconstruction of classical notions of knowledge. In historicizing science, Kuhn historicizes the notion of objectivity, showing how evolving conceptions in science have varied less according to a linear progression of understanding things than according to the manner in which differing communities have interpreted them. It is in this postmodern context, in which all truth is a function of the communities that interpret it, that the concept of a paradigm must be understood.

In simplest terms a paradigm refers to an "accepted model" or "pattern." *Id.* at 23. A paradigm is a conceptual device that serves as a shared source qua source of rules and standards, a source of objectivity itself in that community. *See id.* at 23-34. Key here is the notion that theory is not separate from fact: conceptual frameworks or paradigms for understanding phenomena are not separate from perception of phenomena. Kuhn explains:

> [S]omething like a paradigm is prerequisite to perception itself. What a man sees depends both upon what he looks at and also upon what his previous visual-conceptual experience has taught him to see. In the absence of such training there can only be, in William James's phrase, "a bloomin' buzzin' confusion."

Id. at 112.

21. *Grand theory* refers first of all to an ordering of diverse concepts into a perceived unity. Secondly, *grand theory* refers to a foundation or grounding for the systematic understanding. *See, e.g.*, MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (criticizing grand theory in the context of constitutional law).

structed it, equality is a concept that operates as a semantic horizon from which blacks cannot articulate their own victimization.

In Part III, "Equality as Prison," I trace the outlines of thirty years of discrimination law, that is, the common law of Title VII and how it culminates in a relentlessly intentionalist model of discrimination. I try to show both the rigidity and the constructedness of the Court's approach. I trace this meaning simultaneously to a subjectivist[22] conception of fault and to an atomistic conception of the discrimination problem. These models in turn are traced back to the grand theory I have attempted to identify. There is a base-superstucture relationship between legal doctrine and a grand theory of equality reflecting the world view and experience of the dominant group. I argue in turn that given this structure, Title VII law and, implicitly, equality are imprisoning for blacks. Antidiscrimination law itself becomes a barrier both to social reform and to discourse.

In Part IV, "Equality as Redemption," I discuss the future of Title VII as it is contingent upon unbuilding what our dominant political and legal culture sees as its very foundations. I suggest that what must be sacrificed is less the foundations of a legal system than its privileged identities.

I. Equality as Historical Memory

> The nineteenth was the first century of human sympathy[ ] — the age when half wonderingly we began to descry in others that transfigured spark of divinity which we call Myself; when clodhoppers and peasants, and tramps and thieves, and millionaires and — sometimes — Negroes, became throbbing souls whose warm pulsing life touched us so nearly that we half gasped with surprise, crying, "Thou too! Hast Thou seen Sorrow and the dull waters of Hopelessness? Hast Thou known life?" And then all helplessly we peered into those Other-

22. By subjectivism I mean a focus upon the "subjectivity" or mindset of the individual as the object of inquiry in a discrimination case. This is subjectivism as a theory of fault. Compare that meaning with subjectivism as a theory of knowledge. This is referred to as Pythagoreanism and essentially holds that truth is as each individual sees it. *See* Plato, Theaetetus (Benjamin H. Kennedy trans., Cambridge Univ. Press 1881). Epistemological subjectivism is not the subject of my discussion. My essay does, however, implicitly reject this form of subjectivism as well, and posits that there are moral truths, such as that it is wrong to try to injure someone simply because he is black.

My criticisms of subjectivism as a moral theory or theory of fault are interrelated with my critique of objectivism as a theory of language. Both of my critiques are limited to the narrow context of the discourse about equality occurring within the law of Title VII. Subjectivism as a moral theory is bad because it leads to mentalistic inquiries that are impossible and does not address the lived conditions blacks face. Objectivism is bad *in context* as a theory of language because it is used to posit as "true" this "bad" subjectivist interpretation of equality as the only notion of equality.

worlds and wailed, "O World of Worlds, how shall man make you one?"[23]

From the vantage point of history,[24] the idea of equality as a vehicle for discourse about the hopes and aspirations of blacks is itself problematic. Before the Civil War and during Reconstruction,[25] blacks and their allies — first abolitionists and later northern Republicans as well — framed the discussion in terms of freedom and citizenship. The primacy of the discussion of citizenship resonates in the infamous *Dred Scott* decision.[26] In Chief Justice Taney's opinion the question was whether a black man, slave or manumitted, could become a citizen.[27] This question was the pivot upon which rested not only Dred Scott's claim of freedom qua freedom but also the legal rationalization of racial subordination, in the form of slavery.[28] Slave society presumed a radical and essential

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23. W.E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK 159 (Fawcett Publications 1961) (1903).

24. Our political history and our intellectual history, particularly the history of how the discourse of equality evolved, are mutually entailed.

> Abstract changes in moral concepts are always embodied in real, particular events. . . . There ought not to be two histories, one of political and moral action and one of political and moral theorizing, because there were not two pasts, one populated only by actions, the other only by theories. Every action is the bearer and expression of more or less theory-laden beliefs and concepts; every piece of theorizing and every expression of belief is a political and moral action.

ALASDAIR MACINTYRE, AFTER VIRTUE 61 (2d ed. 1984).

25. Eric Foner dates this "Radical Reconstruction" period from 1867 — when "Radical Republicans" in Congress "swept aside Southern governments . . . and fastened black suffrage upon the defeated South" — to 1877, the date of the Hayes-Tilden Compromise when, in exchange for favorable resolution of a dispute over the presidency, the Republicans agreed to remove the Northern troops that had enforced civil rights laws. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1867, at xix (1988). During Reconstruction a panoply of civil rights laws were passed, and blacks were elected to office and began numerous businesses. These black gains were largely swept away after 1877. *Id.* at 602.

26. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The Taney Court held, inter alia, that Dred Scott remained a slave despite his temporary sojourn in the "free state" of Illinois. 60 U.S. at 452-53. In Chief Justice Taney's view, Scott's claims relied on the notion that he could be a U.S. citizen capable of suing in U.S. courts. Taney asserted that the original intent of the Constitution was that neither slaves nor their descendants were "citizens" within the meaning of the Constitution. *See* 60 U.S. at 411-12. *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE (1978).

27. Taney framed the issue as follows:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarant[e]ed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

60 U.S. at 403.

28. *See* MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST 140 (1981).

difference between black slaves and their white masters.[29] This essential difference was expressed in the first instance by the fact that slaves were property[30] and concomitantly by the fact that slaves had no rights.[31] This knotting together of the categories of slave and property in turn expressed, roughly, an equation between slave and nonperson. Because slaves were property, because they were entities without rights, the statuses of slave and citizen were by definition mutually exclusive. But what was the source of the slave's inferiority? It was clear, of course, that slaves were not citizens and not included within the sovereign community, but was this disability a function of their status as slaves or of their status as blacks? If the legally, artificially created status of slave was the only rationale for the dichotomy between slave and citizen, the whole scheme of master-slave relations would be tautological and without foundation in reason. Thus, if the status of citizen included blacks, the legal bonds that bound white masters and slaves in their respective places could potentially unravel.

The idea of citizenship that *Dred Scott* infamously constitutionalized denied blacks this right of inclusion. The *Dred Scott* opinion articulates that idea as follows:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they

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29. As Winthrop Jordan explains,

> Even in an age thoroughly accustomed to the hovering omnipresence of early death, the enormous toll of Negro life must have caused many white men to withdraw in silent horror, to refuse to admit identity with a people they were methodically slaughtering year after year. . . . To the horrified witness of a scene of torture, the victim becomes a "poor devil," a "mangled creature." He is no longer a man. He can no longer be human because to credit him with one's own human attributes would be too horrible.

WINTHROP D. JORDAN, WHITE OVER BLACK 233 (1968). This phenomenon of denial was facilitated by law that defined slaves as property. *See* D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437 (1993) (arguing that the categories of master and slave and the opposition between the categories were the foundation of the slave system as a system of both social and legal relations).

30. Thus, Harriet Beecher Stowe could write:

> The slave-code . . . of the Southern States, is designed to keep millions of human beings in the condition of chattels personal; to keep them in a condition in which the master may sell them, dispose of their time, person, and labour; in which they can do nothing, possess nothing, and acquire nothing, except for the benefit of the master; in which they are doomed in themselves . . . .

HARRIET BEECHER STOWE, THE KEY TO UNCLE TOM'S CABIN 132 (Arno Press 1968) (1852).

31.

> Each slave state regulated the condition of slavery through codes of laws. . . . The slave could not own personal property, rent real estate, make any civil contract, or lawfully be taught to read and write. . . . Thus he could not bear witness against his master, nor could he institute suit in his own behalf.

PHILIP S. FONER, HISTORY OF BLACK AMERICANS: FROM THE EMERGENCE OF THE COTTON KINGDOM TO THE EVE OF THE COMPROMISE OF 1850, at 105 (1983).

> had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.[32]
>
> It is not a power to raise to the rank of a citizen any one . . . who . . . belongs to an inferior and subordinate class.[33]

Thus, *Dred Scott* placed the imprimatur of constitutional law upon the primary assumption of slave society: blacks were an inferior order of human life unfit for citizenship.

The primacy of citizenship in the original discussion is reflected equally in the first sentence of the Fourteenth Amendment, ratified in 1868, whose purpose was to overrule *Dred Scott* and guarantee, in Justice Harlan's words, "civil freedom"[34] to blacks: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[35]

To frame a discussion in terms of citizenship was to create a structure for discourse with three dimensions, by placing background and foreground in view.[36] To place citizenship as a unit of political community in the foreground implied as background for discussion our understanding of the democratic commitments of that political community. This bound up our democratic understandings in a context that would always and already be present in any discussion of the meaning or minima of citizenship. It follows that the premises of democracy are inextricably linked to notions of the social contract running between the state and its citizens.[37] This

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32. 60 U.S. at 407.

33. 60 U.S. at 417.

34. The Civil Rights Cases, 109 U.S. 3, 34-35 (1883) (arguing that the purpose of the Thirteenth and Fourteenth Amendments was substantive — to "free" blacks, to elevate them to the level of white citizens, and not merely to abolish slavery).

35. U.S. CONST. amend. XIV, § 1.

36. In a real sense citizenship provided a "baseline" for inquiry. Legal concepts that appear in the doctrinal foreground depend on background assumptions for perspective and evaluation. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987) (speaking of common law assumptions — the background — as the unarticulated baseline against which departures are measured and determined to be constitutional violations). I trace the concept of baseline to Robert Hale's work. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472-77 (1923) (arguing that a background distribution of entitlements determines our perception of what constitutes coercion by the state).

37. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 15 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690). Locke, writing originally in 1690, was a great proponent of a contractual notion of government — the idea that government had power coterminous with the consent of the "commonwealth." *See id.* at 73-74. This implied an implicit "con-

social contract meant that individuals had moral claims against the state. As a framework for discussing the claims of blacks, citizenship explicitly included a substantive dimension of rights and privileges. Citizenship pointed directly to a notion that the state had affirmative duties to blacks as citizens and that correlatively blacks had affirmative rights that the state had an obligation to "protect."

It was precisely this framework of citizenship that provided the idiom of the civil rights movement and resonated in claims by blacks that they were relegated to the status of "second-class citizens." This is to say that the animating notions of equality operative in the civil rights movement took their meaning and content from the experience of the absence of equality.

> The memory of slavery, actively preserved as a living intellectual resource in their expressive political culture, helped them to generate a new set of answers to this enquiry. They had to fight — often through their spirituality — to hold on to the unity of ethics and politics sundered from each other by modernity's insistence that the true, the good, and the beautiful had distinct origins and belonged to different domains of knowledge.[38]

Equality seems to emerge as an instrumental concept in the discussion about equal protection that occurred in the Reconstruction-era debates about *how to secure the equal citizenship of blacks.*

Doctrinally, this point is obscured by the *Slaughter-House Cases,*[39] which formally limited the scope of the Privileges or Immunities (of citizenship) Clause in the context of claims by white businessmen. In *Slaughter-House* the Louisiana state legislature gave a twenty-five year monopoly to a particular slaughterhouse company to land and slaughter livestock.[40] This cramped the ability of previous slaughterhouse owners and butchers to practice their trade and profession. The plaintiffs seized upon the Privileges or Immunities Clause as a possible source of protection of the fundamental civil rights associated with natural law: "[t]he right to oneself, to one's own faculties, physical and intellectual."[41] These fundamental rights, in the plaintiffs' view, extended to the right to practice one's profession.[42] The Supreme Court accepted that these fundamental

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tract" between the government and the governed and indefeasible limitations on governmental power.

38. PAUL GILROY, THE BLACK ATLANTIC 39 (1993).

39. 83 U.S. (16 Wall.) 36 (1873).

40. 83 U.S. at 36.

41. 83 U.S. at 45 (citing M.A. THIERS, DE LA PROPRIÉTÉ 36, 47 (Paris, Imprimé Par Plon Frères 1848)).

42. 83 U.S. at 45-48.

rights existed but suggested that the state, not the federal government, was the guarantor of basic civil rights generally.[43] The Court adopted a structural reading[44] of the Constitution, emphasizing that the first eleven amendments were directed at confining federal power and inferring that the core danger with which the Constitution concerned itself was the danger posed by federal power.[45] As a result, the *Slaughter-House Cases* severely circumscribed the Privileges or Immunities Clause and emptied it of natural law norms. The *Slaughter-House* Court reduced the command of the Privileges or Immunities Clause to a procedural rule that rights be allocated evenhandedly with respect to citizens of different states.[46]

Despite this foray into a procedural model with respect to the Privileges or Immunities Clause, citizenship at an implicit level continued to shape the contours of the Equal Protection Clause. Equal protection, at least in the context of political rights, became a conceptual vehicle for the idea of equal citizenship; it was in a sense an effort to concretize or to define more precisely the duties of government to newly freed slaves. A key point here is that to the extent equality is a term of debate for all parties, it implicitly encompasses historical experience. As a Reconstruction notion, equality was epistemically grounded in a historical context within the memory of the key players in the debate.

This notion of equality as prescriptive of a set of affirmative obligations upon government to blacks — which we will call the "historical model" — resonates deeply in *Strauder v. West Virginia.*[47]

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43. 83 U.S. at 78-79.

44. By *structural reading* I refer to a textualist theory of constitutional interpretation that attempts to discern the meaning of the Constitution from the relationship between its various amendments and articles. Cass Sunstein explains,

> Courts often respond to the various problems in textual approaches by reference to other parts of the text and, more importantly for our purposes, to the structure of the statute. On this view, an interpretation should be disfavored if it would make the disputed position fit awkwardly with another provision or produce internal redundancy or confusion.

Cass R. Sunstein, *Interpreting Statutes in the Regulatory State,* 103 HARV. L. REV. 405, 425 (1989). The classic work here is CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

45. 83 U.S. at 82.

46.

> [The] sole purpose [of the Privileges or Immunities Clause] was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit . . . or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

83 U.S. at 77; *see also* Toomer v. Witsell, 334 U.S. 385, 395 (1948) ("The primary purpose of the [Privileges or Immunities Clause] . . . was . . . to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.").

47. 100 U.S. 303 (1880).

In *Strauder* a black man convicted of murder challenged the constitutionality of his conviction on the ground that state law officially preempted blacks from serving on either the grand or petit jury that decided his fate.[48]

The issue in *Strauder* as the Court framed it was, in the first instance, whether "in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury."[49] This question of what the state may or may not do was not a question of Mr. Strauder's particular rights: "[The question] is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race . . . ."[50] Moreover, there was no issue as to whether Strauder was denied a fair trial, and not even a claim of any causal nexus between the exclusion of blacks and the outcome in Strauder's case. The question was simply one of power: Could the state deny blacks the opportunity to participate in the area of government delimited by the jury process? The Court held that it could not.[51] A key element of the Court's rationale was the notion that equality involves affirmative protections or "immunities," which, through the Equal Protection Clause, delineated strict limits on state authority:

> The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race[ ] — the right to exemption from unfriendly legislation against them distinctively as colored[ ] — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their . . . rights . . . and discriminations which are steps towards reducing them to the condition of a subject race.[52]

This proscription against official efforts to subordinate blacks or to reduce them in status flowed from the purposes of the Reconstruction-era amendments as a whole:

> No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each . . . the freedom of the slave race . . . and the protection of the newly made

48. The West Virginia statute read, in pertinent part, "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." 100 U.S. at 305 (quoting 1873 W. Va. Acts 102).

49. 100 U.S. at 305.

50. 100 U.S. at 305.

51. 100 U.S. at 305.

52. 100 U.S. at 307-08.

> . . . *citizen* from the oppressions of those who had formerly exercised unlimited dominion over [him].[53]

This interpretation of the purpose of the Reconstruction-era amendments was in turn grounded in historical context:

> [I]t required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of *citizenship,* be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed.[54]

It followed that the West Virginia statute was unconstitutional because of the impermissible state purpose or motive the Court found to be clear in the statute: to reduce the legal status of blacks as a class. The Court explained:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[55]

Three things are clear from *Strauder.* First, the unit of moral inquiry is the group rather than the individual.[56] *Strauder* proceeds from a historically grounded concern about the subordination of blacks and a concern in modern terms about the specter of racial caste. Second, *Strauder* recognizes, again by situating itself within a historical context, that equal-protection-based equality has a substantive dimension: it presumes the existence of a class of impermissible ends that the state absolutely may not pursue — for example, to place blacks in an inferior legal status vis-à-vis whites. The notion was that blacks as a group could not be subordinated by law to whites. The problematic of equality was framed in terms of a claim of right to stand on the same plane of legal status. Third, and perhaps most important to my theme in this Part, it follows that

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53. 100 U.S. at 307 (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873)) (emphasis added).

54. 100 U.S. at 306 (emphasis added).

55. 100 U.S. at 308.

56.

> The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that . . . certain discourses, certain desires, come to be identified and constituted as individuals. The individual . . . is not the *vis-à-vis* of power; it is, I believe, one of its prime effects.

MICHEL FOUCAULT, *Two Lectures, in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 78, 98 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

equality, as understood in *Strauder,* mirrors the concept of citizenship and seems to take its meaning from the meaning of citizenship itself.

The idea of equality as such represented a claim to redistribution and reallocation of rights, duties, and, ultimately, power between blacks and their former masters in the South. This notion of equality as a constitutionally or federally imposed norm requiring a reorganization of social order collided, of course, with antebellum southern assumptions about the social world — assumptions that remained unchanged by either Appomattox or the Fourteenth Amendment itself. During Reconstruction these assumptions found expression in a challenge not to the meaning but to the scope of equality norms. The classic expression was that of Senator Joshua Hill during the debates about the Civil Rights Act of 1875:

> I must confess, sir, that I cannot see the magnitude of this subject. I object to this great Government descending to the business of regulating the hotels and the common taverns of this country, and the street railroads, stage-coaches, and everything of that sort. It looks to me to be a petty business for the Government of the United States . . . .[57]

> What he may term a right may be the right of any man that pleases to come into my parlor and to be my guest. That is not the right of any colored man upon earth, nor of any white man, unless it is agreeable to me.[58]

Hill's framework involved two key features. First, the social contract creates a private sphere, including the home and presumably one's private property, in which the individual is sovereign. Second, there is a structure to federal-state relations in our constitutional scheme. The federal government and state government represent dual planes of authority. The federal government may not descend to the level of private individual relations. In the zone of privacy created under this conception, government has no right to impose rules or values. This is a zone of liberty. In this model the protection of minorities is simply a governmental objective in tension with the indefeasible rights of the individual. It follows that this model posits liberty as in tension with equality but lexically prior[59] in the hierarchy of values.

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57. CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871) (remarks of Sen. Hill).

58. *Id.*

59. *Lexical priority* is a phrase I have borrowed from John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 42-45 (1971). It is helpful as a heuristic here in appreciating how different political and discursive communities engage in ordering and ranking of values.

This classical approach made no challenge to the meaning of equality, but it did make the severest effort to constrain its boundaries and scope, limiting its meaning to a certain public sphere of life. Congress rejected Hill's approach in the Reconstruction debates. During the golden historical moment of Reconstruction, however, the rejection of Hill's approach reflected the prevailing power relations between the northern-Republican-controlled Congress and the defeated South. Those power relations changed in the aftermath of the Hayes-Tilden compromise.[60] Concomitantly, in this aftermath, Hill's framework was written into law in the *Civil Rights Cases*.[61]

The *Civil Rights Cases* arose out of a challenge to the constitutionality of the Civil Rights Act of 1875.[62] The Act prohibited, inter alia, discrimination on the basis of race in public accommodations, and it provided both criminal and civil liability for persons violating provisions of the Act. The *Civil Rights Cases* consolidated criminal appeals in four cases — appealing convictions for denying blacks admission to inns, hotels, and theaters — and an appeal of a civil penalty in another. The question, as the Court framed it, was "[h]as Congress constitutional power to make such a law?"[63]

The question of the Act's constitutionality flowed from "an ingenious verbal criticism"[64] of the Fourteenth Amendment on the

60. The Hayes-Tilden compromise represented a reconciliation of North and South at the expense of southern blacks. Tilden, the Democratic candidate and a favorite of southern whites, had orchestrated a campaign of fraud, calculated violence, and intimidation against blacks. "[T]hroughout the Deep South, black belt Democrats either barred freedmen from the polls (Yazoo County[, Mississippi] recorded only two votes for Hayes) or stuffed the ballot boxes to 'make it appear the negroes voted with them.' " FONER, *supra* note 25, at 575. Although Tilden did not do well enough for a colorable claim for recount, his tactics disrupted the electoral count enough that he was able to negotiate the removal of Northern troops in exchange for a concession of counting irregularities — irregularities he and his supporters had deliberately caused. Perhaps the remarks that best sum up what happened come from a colloquy between Jerry Moore, a former slave and head of a Republican club, and his landlord. During the period leading up to the election, Moore warned his white landlord against violence against blacks: "Mind what you are doing, . . . the United States is mighty strong." Unfazed, the landlord replied, "[B]ut Thornton, . . . the northern people is on our side." *Id.* at 574.

61. 109 U.S. 3 (1883).

62. This Act established that

> all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Act of March 1, 1875, ch. 114, 18 Stat. 335, § 1.

63. 109 U.S. at 10.

64. 109 U.S. at 26 (Harlan, J., dissenting).

part of the Court. This criticism involved two rhetorical moves. The Fourteenth Amendment reads,

> All persons born . . . in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[65]

By juridical slight of hand, the Court simply ignored the first sentence of the Fourteenth Amendment altogether.[66] This was the first step. The second telling step was to posit — not to argue but merely to posit — that the Amendment ought to be interpreted literally.[67] The Court went on to posit, further, that the phrase *no state* is a phrase of limitation, limiting the scope and ambit of congressional power under Section Five.[68]

It follows that Congress's power to enforce the Fourteenth Amendment is coterminous with state action:

> [The Fourteenth Amendment] does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.[69]

The court had written into constitutional law a scheme of federal-state relations in which federal and state governments were relegated to separate planes of power. Moreover, the dividing line between state power and federal authority tracked the dividing line between private action — the acts of individuals — and state action, which was of "public" concern.

> The wrongful act of an individual, unsupported by [State] authority, is simply a private wrong, or a crime of that individual . . . . An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; . . . unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right . . . . It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.[70]

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65. U.S. CONST. amend. XIV, § 1.

66. *See* 109 U.S. at 11 (quoting the Fourteenth Amendment without the first sentence).

67. *See* 109 U.S. at 11.

68. *See* 109 U.S. at 11.

69. 109 U.S. at 11.

70. 109 U.S. at 17-18.

These principles of interpretation were not woven out of whole cloth; rather, they reflected precisely the notions earlier spun out on the Senate floor by Joshua Hill and purportedly rejected by the Reconstruction Congress. "The Court in the *Civil Rights Cases* reverses the statutory outcome of the [Reconstruction debates]. The [C]ourt substitutes Hill's conception of discrimination as a matter of private choice for Sumner's Radical Republican conception of discrimination as a deprivation of rights."[71]

Given this revisionist interpretation of the limits of federal civil rights laws, the Court held the Civil Rights Act of 1875 unconstitutional as an ultra vires act of Congress — a specious intermeddling in local and private affairs without textual warrant in the Equal Protection or Due Process Clauses.[72]

Following the *Civil Rights Cases,* the Fourteenth Amendment and the Equal Protection Clause fell into desuetude. The failure of the historical model of equality to transform race relations, however, must not obscure a basic point: in the Reconstruction era, equality guarded a claim by blacks not to be relegated as a group to a subordinate, inferior legal status. Equality was a slogan or vehicle for the substantive goals of blacks to become part of the sovereignty defined as "We the People." The collapse of this framework reflected the collapse of the coalition of freed slaves and northern Republicans. I submit this history as prologue to the story of equality as it plays out in the federal common law of Title VII.

II. Equality as Grand Theory

> Imagine that the natural sciences were to suffer the effects of a catastrophe. . . . [A] Know-Nothing political movement takes power and successfully abolishes science teaching in schools and universities, imprisoning and executing the remaining scientists. Later still there is a reaction against this destructive movement and enlightened people seek to revive science, although they have largely forgotten what it was. But all that they possess are fragments: . . . half-chapters from books, single pages from articles, not always fully legible because torn and charred.
>
> . . . .
>
> What is the point of constructing this imaginary world . . . ? The hypothesis which I wish to advance is that in the actual world which we inhabit the language of [equality] is in the same state of grave

71. Jones, *supra* note 17, at 62-63.

72. 109 U.S. at 11-13.

> disorder as the language of natural science in the imaginary world . . . just described.[73]

Title VII of the Civil Rights Act of 1964,[74] as a historical event, defines the juncture between two eras of our nation's history: the era of segregation and the era of civil rights. It mediates also between minorities and those who employ them, between victims of discrimination and those who perpetrate it. Located as it is at a discursive juncture of historic, legal, and political conflict, Title VII, far from resolving conflict, itself becomes the theater for its continuation. Title VII represents equally a reawakening of dormant ideals and the political and legal struggle over the limits of those ideals.

Title VII formally collapsed this framework of public and private spheres on which segregation in the marketplace had rested. The purpose and design of Title VII was to eradicate segregation — to integrate blacks into the economic mainstream. The social goal of Title VII was the reciprocal of the world view it replaced. Discrimination on the basis of race no longer fit into the world as Title VII had reordered it.

In a real sense Title VII sought to break down the wall — the wall of individual and institutional decisionmaking that operated as a barrier to blacks. Implicit here as well was the goal of breaking down the discursive wall of contractarian claims that had prevented the norms of equality from finding their proper expression in the marketplace. But while Title VII formally erased Hill's framework of public and private spheres that had hobbled Reconstruction efforts, it failed to erase classical assumptions — about social order, individual rights — internal to the paradigm.[75]

In prohibiting discrimination, Title VII presumes a certain norm of equality applicable to the workplace. But equality is only an absent presence within the text of the statute; it is nowhere defined. It is the meaning of equality, a terrain not mapped by the text of the statute, that becomes contested territory claimed by two competing communities of interpretation, by two competing views of the social

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73. MACINTYRE, *supra* note 24, at 1-2. In this passage MacIntyre is actually discussing "the language of morality," but his parable seems also to illuminate our consideration of the language of equality.

74. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended principally at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991)).

75. I would identify these internal assumptions as follows: (i) the unequal distribution of wealth and power between blacks and whites is natural and inevitable; (ii) the rights of the individual are prior to social or group concerns; and (iii) legislation may not be redistributive or deny individual rights in favor of group concerns.

world. The two perspectives diverge diametrically as to how they construct two concepts: the concept of the wrong to be addressed and the concept of moral responsibility or fault. The two concepts are as inextricably linked as chicken and egg: the paradigm of discrimination leads to a particular notion of responsibility and vice versa.

A. *Competing Paradigms of Discrimination*

For all concerned, the concept of equality pivots on an understanding of what the evil to be addressed is and on the epistemology that validates that understanding.

From the baseline of historical experience, racism appears as a monolithic pattern of systematic exclusion and subordination of blacks to whites in every area of endeavor germane to life.[76] What is essential to this view is the idea that racism is coextensive with the conditions and forms of life for a member of a perpetual underclass.[77] Moreover, the significance of racial subordination, of being the lowest paid or the last hired, lies not in the individual instance of being denied a job but in the significance of the denial within a social context that connotes inferiority and stigma.[78]

> The stigma flow[s] not from the isolated fact of the denial, but from the specific denials' relation to a pattern of denials which resonate and reverberate throughout American society, all tending to declare particular minorities inferior or limited to a certain place. The stigma flow[s] from the fact that each denial of opportunity, in the context of the larger pattern, carries with it an increment of prediction that future denials lie ahead.[79]

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76. *See* JOHN W. BLASSINGAME, THE SLAVE COMMUNITY (1972) (examining slavery as a culture); FONER, *supra* note 31 (surveying the history of black Americans from Africa to the emergence of the cotton kingdom); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1972) (providing a portrait of antebellum southern plantation life); SAUNDERS REDDING, THEY CAME IN CHAINS: AMERICANS FROM AFRICA (rev. ed. 1973) (examining slavery as a defining experience for black Americans); *see also* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (Frank Cass & Co. 1966) (1935) (detailing the plight of blacks from 1860 to 1880); JOHN H. FRANKLIN, *The Two Worlds of Race: A Historical View*, *in* RACE AND HISTORY: SELECTED ESSAYS 132 (1989) (exploring the extent to which legalized segregation created for blacks a distinct and inferior world from that of whites); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR (1978) (examining through the lens of legal history the experiences of slaves and "freedmen" in colonial America).

77. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1088-93, 1099-102, 1107-14 (1978).

78. *See* D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349, 374 (1992).

79. *Id.* at 365.

> The wrongfulness of a particular employer decision has no meaning, no significance as discrimination in itself. Rather, history and the social milieu in which we are situated create the significance of a biased decision. . . . [A] single employer with a wrongful state of mind cannot cause the stigma of discrimination because discrimination . . . requires a social . . . dimension to exist.[80]

White racism is a social practice, not a creature of individual choice. Although blacks may speak of "individual" racism, "it is an evil that takes its meaning from a somber mosaic of oppression that stretches across the social landscape and deep into history."[81]

Racism, as a social or group practice, is expressed through the image of "the white man."[82] The figure of the white man personifies whites as a group and serves as a metaphor of a predicament in which oppression is a faceless entity that transcends individual subjectivity.

The evil to be addressed here is not the individualistic concern of deprivation of a right to associate with whites or the liberal concern with the wrongfulness of considering race[83] but the group concern[84] with how rights and power are distributed in society between

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80. *Id.* at 366.

81. *Id.* at 375.

82. The figure of the white man personifies the idea of racism as a social institution as omnipresent as whites themselves. The white man, at least until recently, occupied a highly prominent place in black protest literature and political thought. *See, e.g.*, DU BOIS, *supra* note 23, at 137 (speaking of the white man as he who binds both blacks and himself with the "Black" and the "White belt"); ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 201 (1964) (referring to the "white man" as he who is "controll[ing]" black people through dependence upon his material goods); *see also* THE BLACK PANTHERS SPEAK 2 (Philip S. Foner ed., 1970). The October 1966 Black Panther Party Platform and Program stated, "We want an end to the robbery by the *white man* of our Black Community," and went on to identify this figure as "this racist government" and the "American racist." *Id.* (emphasis added); *see also* DEREK WALCOTT, *Ti-Jean and His Brothers, in* DREAM ON MONKEY MOUNTAIN AND OTHER PLAYS 81, 98 (1970) (depicting "the devil" as a "white master" and the source of evil in society); Jones, *supra* note 78, at 375.

83. This liberalism was uncritically embraced in the civil rights-era slogan, "Judge me by the content of my character, not by the color of my skin." Moreover, many blacks insist on liberal, individualistic notions of equality. My point is to suggest that these models are inconsistent with the historical experience of blacks and the social context of racism in which racism occurs as a social pattern. Both racism and racists are socially constructed. This is not to say that racial oppression does not exist but only that to understand it as a phenomenon of individual choices is artificial.

84. By *group concern* I refer to the idea that the group, rather than the individual, is the proper unit of moral inquiry. This implies that individuals are constituted by groups and not the other way around. *See* FOUCAULT, *supra* note 56.

A number of legal scholars have embraced this as a moral framework. The classic is Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1971) (arguing for a group rights model based on a concern about "racial caste"); *see also* ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 236-89 (1984) (positing a theory of politics based on "organic group affiliations"); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (conceiving of racism as an attempt by the dominant group's whites to cast blacks in the role

the races. As a social problem the focus is on the hierarchical relationship between blacks and whites. In these terms, the practice of individuals making distinctions based on color is only a vehicle for the institution of racial hierarchy[85] and the maintenance of power relations that define that hierarchy.

The epistemic anchor for this interpretation of the problem is synchronically and diachronically the black experience. Blacks experience humanity through its negation. We have been treated as slaves, as second-class citizens, as bodies without minds, as an inferior order of "human" life, as objects.[86] It is our group experiences — the experience of racial caste, of subordination based on one's race — that defines discrimination. It is, in fact, the experience of racism, not biology or even culture, that defines being black.

If the lens through which blacks understand racism is their own experience, the lens through which the larger society comprehends the concept is the lens of its assumptions about the self and other.

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of the "other"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that dealing effectively with racism requires recognizing the unconscious beliefs one group has about another). Moreover, the dichotomy between those who adopt individualist and group rights models is often used as a heuristic to understand the tensions within the discourse about equality occurring simultaneously under Title VII and the Equal Protection Clause. *See* Richard H. Fallon & Paul C. Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1 (characterizing the tension as between a model of group justice and a model of individual justice); *see also* Charles Fried, *The Supreme Court, 1989 Term — Comment:* Metro Broadcasting Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990) (arguing that the Court must choose between retired Justice Brennan's collectivist vision and Justice O'Connor's individualist vision of equal protection).

But in speaking of the group-rights model as a victim's perspective, I am speaking of something beyond the discourse of academics, of something that is entrenched within the political culture of blacks as an animating view of the world. This is evident from language. Thus, blacks and their allies often speak of "artificial barriers" to equal rights. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (adopting this language). Moreover, the EEOC continues to speak of "underutilization" of minorities. *See, e.g.*, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1993). In the context of advising employers on the use of tests, the EEOC suggests, tracing the normative arc of *Griggs*, that "Federal enforcement agencies may draw an inference of adverse impact . . . if the user has an underutilization of a group in the job category . . . ." 29 C.F.R. § 1607.4 (1993).

85. *See* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1014 (1993) ("[T]he explicit use of racial classifications . . . [was a] vehicle of racial oppression; structural and institutional racism . . . now are the predominant causes of blacks' continued inability to thrive in this society."); *see also* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

86.

> In the African communal group, ties of family and blood, of mother and child, of group relationship, made the group leadership strong . . . . In the case of the more artificial group among American Negroes, there are sources of strength in common memories of suffering in the past; in present threats of degradation and extinction; in common ambitions and ideals; in emulation and the determination to prove ability and desert.

W.E.B. DU BOIS, DUSK OF DAWN 219 (Kraus Thomson Org., Ltd. 1975) (1940).

The dominant society's concept of discrimination involves two interpenetrating narratives, each grounded ultimately in notions of individual subjectivity.[87] There is in this an implicit reference to the Enlightenment idea that human subjectivity creates human identity and worth.[88] This larger-society or traditional view is, in its abstraction, in its epistemic stance, in its focus on individual subjectivity, the exact reverse of the black perspective.

The traditional notion of prejudice[89] posits man as a rational actor who must act logically if he is to realize his individuality and conform to society. It follows that prejudice is an irrational act, and more specifically an irrational response to the fact of race.[90] The specific irrationality is in making a prejudgment about an individual on the basis of membership in a group. It is in the first instance a problem of thinking illogically. The linchpin of this notion of prejudice is that the individual mind or individual character, not one's status as a member of a group, is what counts, particularly for purposes of identity. *Cogito ergo sum.*[91] I think therefore I am. This notion of prejudice postulates individual identity as constituted by individual subjectivity and the capacity to reason. Prejudice, then, is a kind of intellectual heresy, a deviationist thinking; prejudice constitutes identity in terms of the group.

Prejudice as irrational and deviationist is also associated with irrational emotions, such as hatred or fear of someone who is differ-

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87. *See* FOUCAULT, *supra* note 56, at 98.

88. *See* ROLAND BARTHES, *The Death of the Author, in* IMAGE — MUSIC — TEXT 142 (Stephen Heath trans., 1977) (decrying the hegemony of Enlightenment notions of autonomous individual subjectivity as that which is the arbiter of meaning as authoritarian). Barthes writes about foundationalism in the context of interpretation as it relates to the arts, but there is a parallel foundationalism in law, particularly in the doctrine of Title VII.

89. My discussion of the concept of prejudice here is merely to sketch the outline of it as it relates to my argument about the nexus between the concept of discrimination and liberal conceptions of the subject. This is obviously part of a much more vast discussion. *See, e.g.,* JORDAN, *supra* note 29, at 234-36; JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 83 (1970). I would also note that the concept of racism is itself, arguably, part of the structure of ideas that maintain racial hierarchy. *See* Jones, *supra* note 29, at 437.

90. *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 3-15 (1954).

91. This proposition lies at the heart of Descartes's phenomenology, in which he posited that a philosophical system could be grounded on this "self-evident" truth. He premised the indisputability of individual subjects as validated by individual consciousness. *See* RENÉ DESCARTES, *Meditations on First Philosophy, in* 1 THE PHILOSOPHICAL WORKS OF DESCARTES 131 (Elizabeth S. Haldane & G.R.T. Ross trans., rev. ed. 1968). Descartes's assumptions are at the core of the Enlightenment project of which liberal legal theory is a subset. A generation of poststructuralist thought grew up in challenge to Descartes. *See, e.g.,* JACQUES DERRIDA, MARGINS OF PHILOSOPHY 14 (Alan Bass trans., Univ. of Chicago Press 1982) (1972); FOUCAULT, *supra* note 56. For a law professor's critique of Cartesian assumptions, see Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law,* 78 CAL. L. REV. 1441 (1990).

ent.[92] This image of prejudice crystallized during the civil rights movement, when whites saw Governor Faubus preventing little Autherine Lucy[93] from attending a segregated school, sending her home with spittle literally dripping from her dress; when helpless blacks were sent reeling by the high-pressure hoses of southern fire departments; when images of women and children bludgeoned by southern police came into white living rooms. These irrational emotions are understood, in implicitly Freudian terms, as animalistic urges or responses that a reasonable person must keep in check. The idea of prejudice is parasitic upon the idea of carnal desire. As sexuality threatens individual subjectivity by threatening to submerge it in a pool of irrational impulses, so does prejudice, to a lesser degree but in the same way, present a similar threat.

This idea of prejudice also traces to a narrative about sin. Prejudice is something low that we must get beyond to reach our higher selves. There is an implicit analogy between the impulse to prejudice and the impulse to illicit sexual knowledge. The mythology of race, with its deep concern with essences and blood, is a kind of knowledge the higher self must repress.

The theme that recurs between these two narratives is the notion that prejudice is a choice or *decision,* irrational or immoral or both — a product of individual subjectivity. The source of this model of prejudice is not experience but a set of texts, including theology and Enlightenment assumptions about the autonomous subject.

The paradigm of discrimination as a problem of individual subjectivity leads unerringly to a legal framework in which the evil to be addressed is discriminatory *decisions* or choices. Discrimination becomes a procedural concept concerned with ensuring that each employment *decision* is made neutrally, free of illicit "intent." The illicit decision premise was perhaps best stated by Professor Blumstein:

> Because the nondiscrimination notion is a procedural concept assuring evenhanded treatment of similarly situated individuals, it is breached when similarly situated people are treated differently be-

92. There is a biblical connection here: "But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself . . . ." *Leviticus* 19:34.

93. Autherine Lucy was the little girl whose court-ordered admission to a formerly segregated Little Rock, Arkansas school led to a showdown between Governor Orville Faubus of Arkansas and President Eisenhower. The state defied the court order and at the same time went to court to seek postponement of the order. The Supreme Court ruled in favor of Autherine Lucy in Cooper v. Aaron, 358 U.S. 1 (1958). *See also* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE,* THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 88-95 (1979).

> cause of their race. Such differential treatment has an essential ingredient of volition, and a finding of unconstitutional discrimination therefore rests on a finding of intent.[94]

In this iron paradigm, discrimination always originates in, and is coterminous with, an employer's *decision* to treat similarly situated persons differently.

The idea of discrimination as a creature of decisions leads to the idea that fair employment laws can police only decisions tainted by discriminatory animus.[95] The line dividing between racial animus and the employer's taste — to hire and fire whom he pleases for good reason, bad reason, or no reason at all[96] — again becomes the dividing line between public and private spheres of decisionmaking.

This densely abstract, conceptual scheme of what the problem is is quintessentially an outsider's viewpoint. The idea that discrimination is a creature of decision is not merely detached from the experience of blacks; it is a viewpoint that, in its focus on individual mindset rather than on objective conditions, in its epistemic grounding not in experience but in the assumptions of the Enlightenment, is altogether the opposite of blacks' perspective. The traditional view of the larger society is not merely inconsistent but incommensurate with the view of blacks.[97] Through the lens of these traditional assumptions, the lived experience of blacks is entirely incomprehensible. These two communities of interpretation contend, on an uneven terrain of vastly differing degrees of privilege and power, over the meaning of equality.

Implicit in this struggle between political and interpretive communities is a struggle over interpretive and linguistic assumptions. The conservative side of the debate sees the arbiter of textual meaning as either plain meaning or the intent of the legislature or

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94. James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 643-44 (1983). The operative image within Blumstein's paradigm is the image of equality as a "balance." A scale is balanced when its two hands are level or "even" with one another. *See* Jones, *supra* note 17, at 28. In our context, employers treat people equally when they are "evenhanded," or when they act as "evenhanded" employers.

95. *See* Blumstein, *supra* note 94, at 643-45 (arguing that this naturally or inevitably limits the enforcement of antidiscrimination laws).

96. One must "grant[ ] fullest rein to an employer's discretion to hire, promote, or fire for a 'good reason, a bad reason, or no reason at all' . . . ." Barnes v. Costle, 561 F.2d 983, 997 (D.C. Cir. 1977) (MacKinnon, J., concurring).

97. They are classic instances of incommensurate viewpoints in that "the whole conceptual web" is shifted in the one paradigm in comparison to the other so that language itself is not shared between them. *See* KUHN, *supra* note 20, at 149 ("[C]ompeting paradigms practice their trades in different worlds.").

both. Equality can only be defined in one way. The Supreme Court exemplified this view in a 1979 employment case:

> The operative sections of Title VII prohibit racial discrimination in employment *simpliciter.* Taken in its normal meaning, and as understood by all Members of Congress who spoke to the issue during the legislative debates, this language prohibits a covered employer from considering race when making an employment decision . . . .[98]

This definitional assumption expresses itself, as we see below, in a relentless formalism[99] in which historical context is utterly dismissed as a parameter of legal inquiry. For conservatives the fact that few blacks have positions in management or academia, and the fact that this is a chronic problem, has no legal meaning. It is, however, the decision to consider race, to pursue affirmative action in order to eradicate historic inequities, for example, that constitutes the discrimination.[100]

Finally, there is a strand of this debate revolving around the nature of language. For formalists, words within the discourse of

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98. United Steelworkers v. Weber, 443 U.S. 193, 219 (1979) (Rehnquist, J. dissenting) (citation omitted).

99. Formalism can be defined by the way it looks at text: it sees text as a vehicle for an author's intent. Moreover, there is the romantic notion that the writer's intent is "immortal" to the ravages of time. Shakespeare's famous Sonnet LXV is the classic statement of the idea:

> Since brass, nor stone, nor earth, nor boundless sea,
> But sad mortality o'ersways their power,
> How with this rage shall beauty hold a plea,
> Whose action is no stronger than a flower?
> O! how shall summer's honey breath hold out
> Against the wrackful siege of battr'ing days,
> When rocks impregnable are not so stout,
> Nor gates of steel so strong, but Time decays?
> O fearful meditation! where, alack,
> Shall Time's best jewel from Time's chest lie hid?
> Or what strong hand can hold his swift foot back?
> Or who his spoil of beauty can forbid?
> O! none, unless this miracle have might,
> That in black ink my love may still shine bright.

WILLIAM SHAKESPEARE, SHAKESPEARE'S SONNETS 149 (Tucker Brooke ed., 1936). To this imagery is added the fiction that we can, from our temporal distance, still determine this intent and we must do so to preserve the integrity of the text. *Cf.* MICHEL FOUCAULT, *What Is an Author?, in* THE FOUCAULT READER 101 (Paul Rabinow ed., 1984) (arguing that because the writer is absent, he does not really exist for interpretation — he is just a construct). As it seeks to follow original "authorial" intent, interpretivism is a form of formalism. In law, formalism is generally condemned. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 124-30 (1961) (criticizing formalism's refusal to acknowledge the necessity of choice in the penumbral area of rules); Mark V. Tushnet, *Anti-Formalism In Recent Constitutional Theory,* 83 MICH. L. REV. 1502, 1506-07 (1985) (describing formalism as the artificial narrowing of the range of choices). *But see* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law,* 97 YALE L.J. 949 (1988) (praising formalism for aspiring to see law as more than merely political).

100. *See, e.g.,* Johnson v. Transportation Agency, 480 U.S. 616, 658 (1987) (Scalia, J., dissenting) (describing judicial approval of race-conscious remedies as an "engine of discrimination").

equality have fixed and objective meanings set by the legislature. Thus the meaning of *discrimination* does not vary over time or from one social context to another. Thus racial consideration cannot be discriminatory when done against blacks and nondiscriminatory when done against whites. This implies an objectivism[101] about language in which words may have one-to-one correlations with things in the world.

Thus, the conservative paradigm of the social world, with its rigid baselines concerning public and private spheres and its abstract notions of what prejudice is, is brigaded by theories of interpretation and language that are equally rigid. The three paradigms, like wheels within wheels,[102] operate between sign and signified, between the word *equality* and its received legal meaning, to create a grounding grand theory[103] or foundation for the discrimination concept.

It is this debate about grand theory, about language and interpretation, about epistemic sources, about self and other, that has been at the core of the doctrinal debate about the meaning of equality. At stake in the debate over the meaning of equality is the extent to which Title VII will be a means of ameliorating the vast gulf separating the socioeconomic conditions of black workers and those of their white counterparts. Reciprocally, at the level of discourse, there is uncertainty about whether equality will have a reference to the lived experience of blacks, or if instead equality itself

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101. *Objectivism* refers to, inter alia, the idea that there is a correspondence between the word categories we use and the real world: "On this perspective, the world consists of some fixed totality of mind-independent objects. There is exactly one true and complete description of 'the way the world is.' Truth involves some kind of correspondence relation between words or thought-signs and external things . . . ." HILARY PUTNAM, REASON, TRUTH AND HISTORY 49 (1981). Many scholars believe that objectivism is fundamentally flawed because language provides no objective description of reality separate from our conceptual schemes. *Id.* at 50; *see also* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1131 (1989).

102.

> The appearance of the wheels and their work was like unto the colour of [a crystal]: and the four had one likeness: and their appearance and their work was as it were a wheel in the middle of a wheel. . . . Whithersoever the spirit was to go, they went, thither was their spirit to go; and the wheels were lifted up over against them: for the spirit of the living creature was in the wheels.

Ezekiel 1:16, 20 (King James).

103. There is a close interconnection, indeed a virtual identity, between the concept of grand theory as it functions within the law of Title VII and the concept of ideology. The function of grand theory in the context of Title VII is to legitimate racial hierarchy as it exists in the workplace. Grand theory does this by creating a system of ideas that is received as rigorously logical and in which unjust results are not choices but logical and inevitable outcomes. *See* TUSHNET, *supra* note 21, at 3 (arguing that the chief goal of grand theory is to legitimate the existing system of constitutional law).

may be defined in such a way that it never reaches that context and becomes meaningless for blacks.

B. *Competing Paradigms of Fault*

Through a series of Supreme Court cases dealing nominally with procedural issues, particularly the burden and order of proof in Title VII cases, the Supreme Court has been engaged incrementally in defining the meaning and content of discrimination and, concomitantly, equality.[104] Ostensibly, the cases unfold as answers to the questions of what evidence must be shown at each stage of the litigation, who must produce the evidence, who has the burden of persuasion, and to whom the evidence should be presented. Moreover, these issues of what evidence is required and from whom pivot on a balance between competing notions of fault qua fault. Fault forms the pivot because equality in its opaqueness is not directly the subject of debate. Rather, courts seem to discuss equality only implicitly and through a circumlocutory discussion of fault that feeds in circular fashion into the courts' background assumptions.

One notion of fault, which we will call the objective model, premises liability on causation. This is the model traditional to labor law.[105] It is also the model that flows most literally, for those literalists among us, from the text of the statute, which simply says that a violation occurs when an employer makes a decision "because of . . . race."[106] This notion of fault is essentially objective.

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104. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). These cases will be discussed in detail *infra* Part III.

105. *See* Thomas G.S. Christensen & Andrea H. Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and Fictive Formality*, 77 YALE L.J. 1269, 1269 (1968) ("Horizontal mergers may or may not violate anti-trust laws, but their illegality is not dependent upon the motives of their promoters."). Also, it is important to point out that in early labor law cases involving discrimination, intent was treated, "not as an essential element of the substantive violation, but as an evidentiary aid in determining whether protected union activity had been the cause of the terminations." *Id.* at 1275.

106. Title VII reads, in pertinent part:

(a) Employer practices
It shall be an unlawful employment practice for an employer —
(1) to . . . discriminate against any individual . . . because of such individual's race . . .
(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race . . . .
(b) Employment agency practices
It shall be an unlawful employment practice for an employment agency . . . to discriminate . . . because of . . . race . . . .
(c) Labor organization practices
It shall be an unlawful employment practice for a labor organization —
(1) to . . . discriminate . . . because of . . . race . . . .
(d) Training programs

There is room here for a mental component of responsibility, but this is referred to in context as motive and is determined through the consideration of surrounding circumstances; it is an objective quantity.[107] Because of accessibility to proof, I would locate this model at the pragmatic pole on the scale of moral responsibility.

There is also a notion of fault in discrimination law — the contractarian model — that premises the liability of the employer on intent. Justice Holmes provided the classic expression: Even a dog knows the difference between being stumbled over and being kicked.[108] This is often called, uncritically, the "fault" model. It represents merely the contractarian pole in our thinking about moral responsibility. This notion of fault is mentalistic and subjective. Here a psychological gloss is smuggled into the notion of causation,[109] and we must find actual intent associated with objective causation before liability may be imposed. In this model we are concerned with what the employer actually thought.

I suggest that each of these models corresponds to a particular paradigm; each leads like a winding staircase to a particular grand theory of discrimination. The objective model of fault leads to the paradigm of equality in which results are supremely important. People are equal according to their relative objective conditions. The results of what the employer does, not his intent, are relevant. Social context becomes the arbiter of meaning. There is room in this pragmatic approach for the plight of blacks as a group to be a core concern — for a sense of need to transform society, to eradicate discrimination, and to ameliorate economic exclusion, not merely police violations. This notion of equality in turn expresses the perspective of the victim's experience. The contractarian model of fault leads to the paradigm of equality that premises the individual as the proper unit of moral inquiry, that seeks to focus atomistically on specific violations, and that seeks everywhere to consider the common law prerogatives of the employer.[110] This notion of

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> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship . . . to discriminate . . . because of . . . race . . . .

42 U.S.C. § 2000e-2 (1988). Note that intent is not expressly required.

107. *See* D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733 (1987) (arguing that motive refers to the objective reasons a person does something and that such an objective mental standard is frequently used in law).

108. OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1881).

109. *See* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 297 (1971).

110. Of course, the traditional prerogative of the employer was to be free from all constraints on who to hire and fire. Once the traditional prerogatives of the employer are con-

equality is a pure expression of the traditional, stereotyped assumptions about what prejudice is. This notion of equality also lends itself to a revised version of Joshua Hill's conception of social order in which there is still a private sphere of life.

At each procedural juncture in the litigation of a Title VII case, the Court is called upon to fashion standards of proof. What constitutes a prima facie case? What satisfies the plaintiff's burden of production? What constitutes rebuttal of a prima facie case? What is the nature of the presumptions created at each point? I suggest that the Court makes a choice at each of these points. On the surface, the choice is between competing models of proof. With unerring consistency over the last thirty years of litigation, at each juncture of the proof process, in cases involving both broad institutional practices and individual claims, the Court has relentlessly focused all inquiry on the employer's intent. In effect, the Court has constructed discrimination as a creature of the employer's mental processes.

Implicitly, the Court has chosen a subjectivist conception of fault with all the theoretical structure that conception contains. I would argue that the systematic way in which the Court has chosen a subjectivist conception is a function of an underlying grand theory. At each doctrinal juncture the Court makes a choice that corresponds to a certain notion of a private sphere of life, background assumptions about the nature of prejudice, and a concept of the primacy of individual decisionmaking. At the same time, the Court expresses a formalism in construing crucial terms and an objectivism about language. This objectivism — this conflating of chosen interpretation of equality with objective meaning — allows the Court to build its grand theory into the very process of interpretation. Equality is rigidly defined, across a substantive and a hermeneutic axis. It has only one meaning and calls for only one narrow interpretive approach. Equality itself becomes a barrier to discourse — a wall.

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sidered, determining the scope of antidiscrimination laws becomes at each juncture a balancing test. A court weighs the desirability of protecting minorities against the undesirability of intruding on traditionally "forbidden ground." (My apologies to Professor Epstein.) Caselaw makes this tension explicit. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 182 n.4 (1989) (speaking of the "delicate balance between employee and employer rights struck by Title VII"); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In referring to the balance between the rights of putative victims of discrimination and the traditional "freedom" of the employer, the *Hopkins* Court stated that "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This *balance* between employee rights and employer prerogatives turns out to be decisive . . . ." 490 U.S. at 239 (emphasis added).

III. EQUALITY AS PRISON

The shades of the prison-house closed round about [me]: walls strait and stubborn to the whitest, but relentlessly narrow, tall, and unscalable to sons of night who must plod darkly on in resignation, or beat unavailing palms against the stone, or steadily, half hopelessly, watch the streak of blue above.[111]

Title VII, prior to the act of interpretation, was the legal equivalent of a blank canvas.[112] Discrimination, the core evil to be addressed, is a figure entirely unformed within the empty space framed by the statute. What the statute says is that when an employer makes a decision "because of . . . [inter alia] race," this is "discrimination" per se.[113] But there is no context to give this text dimension. The precise nature of the term *discrimination* and how we are to structure elements of proof remained for the future.

The form that discrimination traditionally took was that of "disparate treatment." Disparate treatment is thus "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race . . . ."[114] For my purposes it is helpful to understand disparate treatment as a form of discrimination involving individual decisionmaking. The classic instance of this form of discrimination is perhaps best represented by the fact pattern in *Slack v. Havens,*[115] in which blacks were assigned to do janitorial work while a white with the same job title, responsibilities, and supervisor was specifically exempted from having to do the work. There is no inchoate notion of fault associated *ab initio* with the idea.

Early on, in the seminal case of *Griggs v. Duke Power,*[116] a second form of discrimination was identified. This form of discrimination goes under the heading of "adverse impact." This notion refers to an institutional setting in which a policy or procedure or test disproportionately excludes blacks. *Griggs* arose when a utility company required applicants to have both a high school diploma and "satisfactory scores" on two aptitude tests in order to be hired for

111. DU BOIS, *supra* note 23, at 16.

112. Sunstein, *supra* note 44, at 411 (arguing that statutes do not have preinterpretive meanings).

113. 42 U.S.C. § 2000e-2(a)(1) (1988).

114. Intl. Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

115. 522 F.2d 1091, 1092-93 (9th Cir. 1975).

116. 401 U.S. 424 (1971). The classic article on *Griggs* is Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59 (1972).

its "desirable" jobs.[117] These facially neutral requirements operated to exclude blacks disproportionately.[118] The Court held that adverse impact of the test and prerequisites to employment was presumptively discriminatory. Unless the employer could show a business necessity for maintaining the test and the prerequisites, these requirements were illegal.[119] This model clearly emerged from a sense of statutory purpose that sought to "remov[e] artificial barriers" to blacks in the workplace.[120] The Supreme Court seemed to say that the notion of fault operative here was an objective notion concerned not with the "good intent or absence of discriminatory intent" of the employer's decisions[121] but with the "consequences" of his decisions.[122]

Courts viewed these two concepts of discrimination — disparate treatment and adverse impact — as distinct, proceeding initially along parallel lines of inquiry in any given case and developing parallel lines of doctrinal authority. These early models of discrimination, defined by the factual scenarios in which they arose, represent basic stereotypes of discrimination. They provide skeletal images, mere stick figures for a picture of discrimination yet to be fully articulated. As we move beyond the classic instances to more complex psychological and institutional practices, it is necessary to determine the precise contours of the discrimination concept. We must draw the stick figures more precisely and trace the lines of authority more carefully.

As the Supreme Court fleshed out its picture of the respective models of discrimination, it unerringly fleshed out its picture of equality. It increasingly confined discrimination to the parameters of a model of fault that focused on intent.[123] The two parallel lines

117. 401 U.S. at 427-28. The plant was divided into five departments: labor, coal handling, operations, maintenance, and laboratory and testing. Applicants for positions in all departments except labor had to meet the test and diploma requirements. Incumbent employees could transfer from labor or coal handling to the other three departments by passing the two tests, even if they did not have a high school diploma. 401 U.S. at 428.

118. While 34% of white males finished high school, only 12% of black applicants had done so. Similarly, while 58% of whites passed the required tests, only 6% of blacks passed. 401 U.S. at 430 n.6.

119. 401 U.S. at 431.

120. What Congress requires "is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431.

121. 401 U.S. at 432.

122. 401 U.S. at 432 ("But Congress directed the thrust of the Act to the *consequences* of the employment practices, not simply the motivation.").

123. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) ("The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.' " (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S.

of authority corresponding to the two distinct theories of proof began to blur and merge into one. Embedded as a kind of pentimento in that relentlessly intentionalist picture of discrimination as it developed[124] was a relentlessly formal-objectivist view of the world.

A. *The Submergence of Disparate Treatment in Subjectivism*

The seminal case is, of course, *McDonnell Douglas Corp. v. Green.*[125] Percy Green had been laid off from his job as laboratory technician and mechanic at McDonnell Douglas, an aerospace manufacturer. He protested his separation by participating, with other members of the Congress on Racial Equality, in a "stall-in" at the plant during the morning rush hour.[126]

Despite his bold protest, he reapplied at McDonnell Douglas for positions later advertised that fit his job skills.[127] To no one's surprise, he was passed over for hire.[128] The issue before the Supreme Court was the burden and order of proof. The Court held that a Title VII case unfolds in three stages. At the first stage, the plaintiff is required to eliminate the obvious reasons for his nonselection.[129]

248, 253, 255 (1981))); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); Welch, *supra* note 107, at 734 ("The need to establish discriminatory intent in order to uphold a Title VII disparate treatment claim is one of the most settled positions in discrimination theory.").

124.

> Old paint on a canvas, as it ages, sometimes becomes transparent. When that happens it is possible, in some pictures, to see the original lines: a tree will show through a woman's dress, a child will make way for a dog, a large boat is no longer on an open sea. This is called pentimento because the painter "repented," changed his mind. Perhaps it would be as well to say that the old conception, replaced by a later choice, is a way of seeing and then seeing again.
>
> . . . I wanted to see what was there . . . once, what is there . . . now.

LILLIAN HELLMAN, PENTIMENTO 3 (1973).

125. 411 U.S. 792 (1973).

126.

> [F]ive-teams, each consisting of four cars would "tie-up" five main access roads into McDonnell . . . . The drivers . . . were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency break . . . . The plan was to have the cars remain in position for one hour.
>
> Acting under the "stall in" plan, plaintiff . . . drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a.m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result.

411 U.S. at 794-95 (quoting Green v. McDonnell Douglas Corp., 318 F. Supp. 846 (E.D. Mo. 1970), *revd.*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973)) (alteration in original).

127. 411 U.S. at 796.

128. 411 U.S. at 796.

129. The Court would later say that this prima facie formula was based on common experience with discrimination in which "we presume these acts, if otherwise unexplained are more likely than not based on the consideration of impermissible factors." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

If the plaintiff carries this burden, the employer may "articulate some legitimate, non-discriminatory reason."[130] If the defendant carries this burden, the inquiry moves to a more specific level, and the plaintiff has an opportunity to prove pretext.[131]

The initial skirmishes occurred around the debate over the burden of the employer at the point of rebuttal. The point of contention was the definition of what constituted a permissible reason for rejecting a minority applicant. *McDonnell Douglas* held that an employer had to make out a legitimate nondiscriminatory reason. But did *legitimate* mean "reasonably related to a proper employment objective," implying that the court had a role in scrutinizing the reasonableness *vel non* of the employer's explanation? Or was the term *legitimate* a reference to any reason that was nondiscriminatory, implying that the court's role was simply to make sure no illicit — as opposed to merely arbitrary — rationale was involved? The question here is a question of the level of scrutiny to be applied.

The case to resolve this was *Furnco Construction Corp. v. Waters.*[132] Furnco, a company that produced firebrick, maintained no permanent force of bricklayers.[133] The employer hired sporadically and through a foreman named Dacies.[134] Dacies's selection procedure was to recruit by word of mouth, limiting hires to people he knew or who had been recommended to him.[135] He did not accept applications at the gate.[136] Undaunted by what was formally a closed selection process, three black bricklayers, each of whom was concededly qualified, trudged up to the gate day after day for employment.[137] Vacancies existed, but despite their qualifications they were not, and under Dacies's policy could not, be considered.[138] They watched, no doubt, as white workers no better qualified than themselves were consistently chosen instead of them. They were like batters struck out before they came to bat. Two of them were never hired, and the third found employment only a great deal of time after he initially applied.[139]

130. 411 U.S. at 802.
131. 411 U.S. at 802.
132. 438 U.S. 567 (1978).
133. 438 U.S. at 569.
134. 438 U.S. at 569-70.
135. 438 U.S. at 569-70.
136. 438 U.S. at 569-70.
137. 438 U.S. at 569-70.
138. 438 U.S. at 569.
139. 438 U.S. at 569-70.

The sufficiency of prima facie proof was not in dispute. The fact pattern perfectly matched the elements of the *McDonnell Douglas* model: the men were qualified and had done all that could be done to apply, they were rejected — not even considered — and the employer went on to hire white applicants of similar qualifications. The need for an objective explanation of the issues raised by the prima facie case shifted the burden[140] to Furnco to articulate a legitimate nondiscriminatory reason. The employer's reason was ostensibly that the workers did not qualify under the employer's particular procedure. The qualification lacking, however, was not something related to the job or any failing on the part of plaintiffs; it was knowing Dacies well enough to be recommended.

The court of appeals, applying a rule of reasonableness, rejected this as legally insufficient.[141] This could be justified in two ways. First, the significance of a prima facie case under *McDonnell Douglas* is that one addresses the obvious reasons for rejections and in so doing creates the presumption that the decision to reject was not premised on objective considerations.[142] The significance of this in turn is that employers, as maximizers of utility, would not be expected to act irrationally and that by showing irrationality in the selection process, one sets up the presumption that an irrational consideration, such as race, is involved. There is also operative here a concept of fault; penalties should bear some rational relationship to individual conduct. If the individual black is not lacking in any objective respect, if he did not do anything wrong or has not failed to do something required, it is unfair to penalize him for irrational reasons. It follows that reasons that lack objectivity or rationality fail to rebut the presumption of discrimination. If not for considerations of race, why would a maximizer of utility not choose these qualified blacks who applied, or tried to, day after day? Sec-

140. This burden is often referred to as the burden of going forward with the evidence. It refers to the duty to place a question of fact in dispute reasonably in doubt, to give the jury a genuine question of fact to decide. Although courts speak of the standard as though it represents a certain level of proof, it is most easily understood as a rule defining the role of the judge and jury. The burden of production refers to the situation in which, if the party does not place the issue "reasonably" in doubt, the judge may dismiss the case without jury consideration. *See generally* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 336 (Edward W. Cleary ed., 2d ed. 1972).

Wigmore refers to this as the "risk of nonpersuasion." *See* 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2485, at 285 (James H. Chadbourne ed., rev. ed. 1981). The risk refers to a duty imposed by the substantive law of a particular area to require a party to persuade a jury, or the judge as trier of fact if there is no jury, that an issue of fact is true or false. "The jury must be told that if the party having the burden to persuade has failed to satisfy that burden, the issue is to be decided against him." McCORMICK, *supra,* § 336, at 784.

141. 438 U.S. at 573-74.

142. 438 U.S. at 572-73.

ond, from a pragmatic or result-oriented perspective, rejecting subjective explanations as insufficient is the right definitional balance; it simply carries forward the substantive policy of Title VII, requiring a strong means-ends nexus between the reasons given for excluding minorities and legitimate business concerns.

The Supreme Court reversed, holding that "Title VII prohibits [an employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."[143] Of course, one must be forgiven for asking, "Why not?" The answer is complex. My interpretation is that the Court assumed a priori that discrimination is a creature of the employer's intent. There was no discrimination here because there was no intent to exclude blacks: whites would have been treated the same way. The inquiry of the Court ended with the determination that there was no discriminatory intent and hence no discrimination. The employer's reason, however subjective, sufficiently provided a nondiscriminatory explanation — an explanation that, if believed, negated a finding of discriminatory intent — albeit an explanation that was not entirely fair to the blacks involved. The question becomes "Why is discrimination posited as an intentionalist conception?"

There is nothing in the text of the statute to authorize this reading. The idea of discrimination as intentional is simply an expression of the subjectivist assumptions about fault. The thread knotting together a subjective fault model and discrimination is a felt imperative to guard the employer's freedom of choice against the social claims of minorities. The autonomy of the employer rests on social contract, which necessarily and inevitably circumscribes the ambit to Title VII and the discrimination concept. Autonomy here may be read as "autonomous subjectivity." The subjectivity of the employer is curtailed at one point — the employer may not premise hiring decisions on racial considerations. Beyond that point he stands, again, within Joshua Hill's sphere of liberty. The imperative of protecting the employer's subjectivity is brigaded by a notion of common law baselines — the common law prerogatives of the employer to hire or fire for good reason, bad reason, or no reason at all.

The struggle within *Furnco* and within the early cases is over the nature of the discrimination inquiry. Prior to *Furnco,* disparate

143. 438 U.S. at 577-78.

treatment or discrimination by "individuals" could be evaluated using notions of fault that are either objective or subjective. *Furnco* marks the descent of Title VII standards and of the concept of discrimination into subjective standards of fault. The problem is two-edged, involving an increasing license to provide (i) unspecific or vague reasons or (ii) personal reasons based on the employer's taste. In both cases, we are talking about subjective explanations, which escape objective judgment or close questioning. As the standards become increasingly subjective and detached from objective inquiry in this way, Title VII inquiry becomes more and more like rational basis review under the Equal Protection Clause: the inquiry becomes more and more circular and tautological.[144]

We start with the premise of *Furnco* that any conceivable reason except a discriminatory reason will do. Any differentiation between two candidates becomes sufficient. Of course, whenever an employer decides between two different people, the fact of difference will inevitably lead to a rational distinction for purposes of the rule. Thus, the logical tendency of the *Furnco* "permission" is to presume employer neutrality from the sheer fact of individual difference.

Moreover, if this laissez faire approach entails the notion that one can be general or vague in every case, then in every case — except that of overt discrimination — there will be a refuge for the employer in generalities. Unless the law requires an objective qualification of the differentiation — unless the law prescribes the specificity and the reasonableness of the explanation — then the process of looking for a reason will usually produce one. Low-level scrutiny — whether done explicitly, as it is under the Equal Protection Clause, or implicitly through subjectivist approaches to fault under Title VII — is generally a sham; it is a green light for employers to affix to a particular case the fig leaf of an artificial or general explanation.

The circularity of the subjective approach, if not readily apparent from *Furnco* itself, emerges in the context of gender from the fact pattern of *Texas Department of Community Affairs v. Burdine*.[145] *Burdine* involved a state agency, fully funded by the U.S.

144. Justice Brennan decried the tendency of rational basis review under the Equal Protection Clause as tautology. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 178 (1980) (Brennan, J., dissenting) ("[B]y presuming purpose from result, the Court reduces analysis to tautology."); *see also* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). Here the result of *Furnco* is to allow courts to presume legitimacy from individual difference.

145. 450 U.S. 248 (1981).

Department of Labor, that provided employment training.[146] The facts begin with a budding success story for a young woman who was hired in January 1972 as an accounting clerk.[147] She was promoted to field services coordinator in July and was given expanded responsibilities in November when her supervisor, the project director, resigned.[148] In fact, according to the district court's findings, those expanded duties included doing her former supervisor's job, but without the former supervisor's pay.[149] Burdine officially applied for her supervisor's position, but the position remained open for six months.[150]

Around that time the Department of Labor threatened to terminate the funding of the agency due to "serious concerns" about inefficiency. As acting supervisor, Burdine played a role in saving the agency's funding. The continuation of the funding was contingent upon, among other things, hiring a new project director and reorganizing the staff.[151]

One would have thought Burdine's star was rising. She was, many would have thought, the logical person for the supervisor's job; but instead of promoting Burdine, the deciding official, Fuller, fired her.[152] No good deed goes unpunished, it seems. Burdine's co-worker in the department, however, a Mr. Allen Walz, was retained and promoted to the position of project coordinator.[153] Interestingly, there was no dispute that Burdine had trained Walz for the job he held before she left.[154]

Burdine charged discrimination, inter alia, with respect to her discharge and the retention of Walz.[155] The agency's purported reason for terminating Burdine was that "the three individuals terminated did not work well together, and that TDCA thought that

146. 450 U.S. at 250.

147. 450 U.S. at 250.

148. 450 U.S. at 250.

149. *See* Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563, 568 (5th Cir. 1979) ("[Joyce Burdine] proved that she . . . was qualified to do the job that Allen Walz was retained and promoted to do. In fact, she had been doing that job, and more, for six months when terminated."), *vacated*, 450 U.S. 248 (1981).

150. 450 U.S. at 250.

151. 450 U.S. at 250.

152. The Supreme Court opinion glosses over much of the rich factual record in this case. The record, however, is fleshed out in the opinion of the court of appeals. *See* 608 F.2d at 565.

153. 608 F.2d at 565.

154. 608 F.2d at 568 n.9.

155. 608 F.2d at 566.

eliminating this problem would improve PSC's efficiency."[156] There was no evidence that Fuller made any evaluation of Walz's ability to work well with others.[157] The reason he gave for retaining Walz instead of Burdine was merely that Walz was qualified for the job.

For me the problem with these reasons is that they are incoherent as such. Fuller's proffered explanations do not in any rational way explain the decision made. Fuller's "explanation" that Walz was qualified merely begs the question of why he was retained in the reorganization, but Burdine was not, if there was no conclusion that Burdine was unqualified. The claim that Burdine did not work well with others is similarly unilluminating in isolation. The question would seem to be "How did Burdine compare with Walz?" As the employer made no claims that he investigated this comparison, there was no coherent reason for him to retain Walz and let Burdine go. Again, an employer is a maximizer of utility.[158] Fuller would not fire an employee without a thought process or actual reason. Without a reason, Fuller, as a rational actor and chooser, would not jettison human capital. Yet, incredibly, none is provided. There is only a disconcerting silence.

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156. 450 U.S. at 251.

157. 608 F.2d at 568.

158. The notion of the average employer as maximizer of utility seems implicit in the perspective of conservatives on the Court and explicit in the writing of some conservative academics. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing that employment discrimination laws are an unwarranted and unjustifiable constraint on the contractual freedom of both employers and employees). The idea seems to be that the average employer as a maximizer of utility is motivated by business reasons. A corollary, at least in the Court's version of the idea's explication, is that only the deviant employer with a taste for discrimination considers matters beyond ordinary business considerations. This perspective undergirds the Court's construction of the prima facie case, requiring the plaintiff to eliminate the objective reasons for nonhire.

The problem with the Court's deployment of the concept is the fallacy, certainly not empirically grounded, that the employer motivated by discriminatory animus is deviant. Consider the following facts:

> Median income for blacks with some college education is lower than for white high school dropouts. At every level of educational achievement, blacks earn far less than whites. Black unemployment is at twenty-one percent, a figure not matched by whites since the early 1930's. Since the early 1970's, black unemployment has been over double the white rate. For every one hundred dollars earned by the typical white family, the typical black family earns about fifty-six dollars.

Vernon E. Jordan, Jr., Address, *Civil Rights: Revolution and Counter-Revolution*, 14 COLUM. HUM. RTS. L. REV. 1, 8 (1982). I suspect that at a deep level, as an institutional practice, discrimination continues apace as something subtle but closer to "normal." One way in which Epstein's model is both false and simplistic is that he uncritically adopts a false model of economic choice and a false model of the employer as an autonomous economic chooser, aloof from historical forces.

The issue here is whether the employer can satisfy his burden without providing an objective reason or "rational" explanation — without telling us something specific enough that it gives us a handle on the actual thought process involved. The threshold question is the nature of the reason or the type of evidence that is required. This *should* have been framed as a burden-of-production problem. The court of appeals found the employer had not met a burden of persuasion that Walz was more qualified than Burdine.[159] The court implicitly addressed the sheer irrationality of the employer's response — that the employer failed to present a coherent explanation. The court couched its specific concern about lack of an explanation, however, in a general rule that required the employer to persuade the fact finder that the male was "better qualified."

Seizing upon this broad-brush decisionmaking, the Supreme Court framed the issue as whether, after the plaintiff has proven a prima facie case of discriminatory treatment, the burden that shifts to the defendant is a burden of persuasion to prove a nondiscriminatory reason, or whether it is a burden of production only. With short shrift the Supreme Court, in an opinion by Justice Powell, rejected the notion that the employer has any duty to "persuade."[160]

The Court discussed the reasons in terms of presumptions.[161] The notion is that the prima facie case merely eliminates the most obvious reasons for discrimination. Thus, the employer need only produce evidence that there was a nondiscriminatory "reason."[162] This conceptualizes the discrimination inquiry as one about the subjective or actual intent of the employer. This framework suppresses an objective notion of fault that might have made the decision hinge on identifying conditions associated with discrimination, such as the qualified minority who is passed over and an attendant presumption of liability when objective reasons are lacking. The absence of rational explanations clearly does not matter.

A related premise here is that the employer's "traditional prerogatives" survive Title VII — that, in effect, the statute's parameters are framed by common law baselines. The employer's liberty to be free in his domain of any constraints anchors a notion that in the employer's domain he should be free of the government's intruding gaze. There should be no scrutiny, no questioning beyond

159. 608 F.2d at 567.

160. 450 U.S. at 256.

161. *See, e.g.*, 450 U.S. at 254 ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.").

162. 450 U.S. at 253.

that necessary to determine the existence *vel non* of subjective intent to discriminate. The Court defends liberty of the employer but at the expense of ensuring that the intermediate phase of review, the point of the employer's rebuttal, will be tautology because it lacks any objective constraints.

For the Court, the point was that the plaintiff would later have an opportunity to prove pretext. Pretext refers to an artificial reason that masks the real, discriminatory reason. The classic way of showing pretext is to identify a comparative. In *Slack v. Havens,*[163] it was the white who was let off cleaning detail while all the blacks were so assigned. The linchpin of comparison has been the notion of qualifications. Doctrinally, however, the concept of qualification and consequently the concept of pretext itself has become absorbed in the fog of a subjectivist approach.[164]

In the wake of *Burdine,* one other avenue of proving pretext remained. If the plaintiff could show that the reason provided was not the true reason, she could establish pretext: "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[165]

The fact pattern in *St. Mary's Honor Center v. Hicks,*[166] however, closed the door on that approach. In 1980 a black man was

163. 522 F.2d 1091 (9th Cir. 1975).

164. In United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), a black supervisor for the Postal Service had been passed over for promotion 12 times by whites who, by "objective measures," were inferior to him. 460 U.S. at 713 n.2. Aikens had

> been rated as an outstanding supervisor whose management abilities were far above average. There was no derogatory . . . information in his personnel folder. He had more supervisory seniority and training and development courses than all but one of the [whites] . . . promoted above him. He ha[d] a master's degree and ha[d] completed three years of residence towards a Ph.D.

460 U.S. at 713 n.2 (footnotes and internal quotation marks omitted). Ten of the whites promoted over Aikens had no education beyond high school. 460 U.S. at 713-14 n.2. The district court ruled in favor of the Postal Service, but the court of appeals reversed, in essence on the theory that the district court had erred in evaluating the comparative evidence of pretext. 460 U.S. at 713. The Supreme Court reversed, holding that "the 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discriminated against the plaintiff.' " 460 U.S. at 715 (quoting *Burdine,* 450 U.S. at 253). Superior objective qualifications, like those of Aikens, mean nothing in themselves. There is no necessary nexus between discrimination and the practice of passing over a black Ph.D. in favor of a white high-school graduate.

While the rationale is not explicit, the notion seems to be that the concept of pretext must track a line that gives free rein to the employer's subjective tastes. Within the realm of tastes, the employer is free to prefer law student to law professor, inexperience to experience. Qualifications are constructed as subjective. Comparative evidence becomes endlessly equivocal.

165. 450 U.S. at 256.

166. 113 S. Ct. 2742 (1993).

promoted to supervisor.[167] Following a supervisory shakeup in 1984, his employer retained him but gave him a new immediate and intermediate supervisor.[168] A pattern of disciplinary action followed, in which his employer suspended, reprimanded, demoted, and finally fired him for the failures of his subordinates when it was clear that no other supervisors had been penalized for such lapses.[169] There was no dispute that the policies he allegedly violated did not actually exist and that the disciplinary proceedings against him had been a sham. The district court concluded that "although [he] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated."[170]

There was no dispute that the employer had lied and that the reasons given for Hicks's dismissal were not the real reasons. The plaintiff claimed that this sufficed for a showing of pretext. His argument followed the precise language of *Burdine:* that a plaintiff could establish pretext by showing that the reasons given were "unworthy of credence."[171] The Court rejected this approach.

The Court held, first, that the plaintiff has the burden of persuasion throughout the trial.[172] This holding, however, merely raises the question of what may satisfy that burden. According to the text of *Burdine,* showing that the employer's reason is not credible is not enough to satisfy the burden of persuasion. For the Court, the fact that the defendant is a liar does not mean that he is a bigot or a discriminator: "But a reason cannot be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason."[173] But this assumes that discrimination is a priori an intentional act and that objective notions of fault with attendant notions of constructive intent do not apply.

Much of the Court's analysis is verbal slight of hand. The starting point and foundation of the Court's rationale, in the teeth of its

167. 113 S. Ct. at 2746.

168. 113 S. Ct. at 2746.

169. 113 S. Ct. at 2746, 2748.

170. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991). Various considerations led the court to this conclusion, including the facts that two blacks sat on the disciplinary review board that recommended disciplining the respondent, that the respondent's black subordinates who actually committed the violations were not disciplined, and that the number of black employees at St. Mary's remained constant. 756 F. Supp. at 1252.

171. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

172. 113 S. Ct. at 2747.

173. 113 S. Ct. at 2752 (quoting *Burdine,* 450 U.S. at 253) (emphasis omitted).

own pronouncements in *Burdine,* is a rhetorical theory of discrimination. That is, for the Court, discrimination plainly entails an intentional act. This theory of discrimination is rhetorical in the sense that, as noted above, there is no textual warrant for this, much less an objective means of fixing discrimination as an intentional construct. The structure of the Court's analysis is not to demonstrate that discrimination must always be intentional but to posit it and repeat, like one repeats a mantra, the dicta of *Burdine* that the issue in the case is intentional discrimination.[174] Justice Scalia's majority opinion in *Hicks* also exploits the procedural posture of the case. The plaintiff brought the action under 42 U.S.C. § 1983 and Title VII. The section 1983 claim was founded on an equal protection theory that requires a showing of racial purpose. The plaintiff thus pleaded that he was intentionally discriminated against. This allowed the Court to emphasize that this was a claim about intentional discrimination. The Court then went on to conflate the evidentiary standards of Title VII and the Equal Protection Clause: "[T]he purposeful-discrimination element of respondent's § 1983 claim . . . is the same as the purposeful-discrimination element of his Title VII claim . . . . Neither side challenges that proposition."[175]

But from the standpoint of the interpretive methodology so systematically used by Justice Scalia — a method that relies upon the "plain meaning" of words — the source or grounding of the idea that discrimination equals intentional discrimination is not the acquiescence of the plaintiff but Scalia's and the Court's own free-wheeling objectivism. Words are posited as essences, as mind-independent quantities. In this fixed, unchanging interpretive universe, discrimination has been indefeasibly joined with intent.

The objectivism, however, does not stop with positing discrimination as intentional. The focus on intent can entail a number of widely varying standards for proving intent. Intent is variously understood as (i) subjective foreseeability, as in intentional torts; (ii) objective foreseeability, as with negligence in tort; and (iii) accountability for the consequences of one's behavior, as with strict liabil-

174. "We granted certiorari to determine whether, in a suit against an employer alleging intentional racial discrimination . . . ." 113 S. Ct. at 2746. The Court relied heavily on *Burdine,* repeating its pronouncement that the ultimate issue in a discrimination case is the "elusive factual question of intentional discrimination." 113 S. Ct. at 2746 (quoting *Burdine,* 450 U.S. at 255 n.3).

175. 113 S. Ct. at 2746-47 n.1.

ity.[176] The Court simply posits that *actual* intent, not its *constructive* counterpart, is required. The subjectivism of the Court's theory of fault and the objectivism of the Court's theory of language run into and propel each other.

In *Hicks* the Court closes the circle that defines a sphere of autonomy and sovereignty for the employer to decide whom to hire, fire, or promote. The boundaries of the circle define not only a space in which the employer may be subjective but an area in which only evidence of subjective mental states counts. Finally, only comparative evidence will suffice to prove what that subjective state is. If the employer claims that the black was fired for lateness, and the court discovers that the black was never late, this does not necessarily prove anything.[177] It only shows that the employer made a mistake or is a liar.

But even if one goes on to find a comparative — a white who was late as much but was not fired — this comparative evidence, through the window of the holding in *Hicks,* is quintessentially equivocal: Was the white retained because of his race or because the employer worked with or liked him better? The effect of interfacing subjective standards of fault with a relentlessly particularized focus upon individual relations between employer and employee is of two mirrors being interfaced: the plaintiff in a Title VII case finds herself in an infinite regress down an endless corridor of skepticism about objective evidence.

It is possible to prove pretext, but, admissions aside, in the context of a disparate treatment case, there is no objective way of doing so.

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176. *See* Alan Freeman, *Antidiscrimination Law: The View from 1989,* 64 TUL. L. REV. 1407, 1423 (1990).

177. To be sure, the Scalia opinion permits a court to find discrimination if it finds that the employer's explanation is not worthy of credence.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons[ ] will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

113 S. Ct. 2749. My point, however, is that such a finding is not required. The plaintiff may prove that the reasons given by the employer — for example, inadequate performance or misconduct — were absolute lies, or even, as in *Hicks,* that the reasons given were concocted as part of an active conspiracy to get rid of the plaintiff; even this proof will not necessarily have any legal or evidentiary significance. In the beginning, the absence of objective reasons for the employer's actions was pivotally significant for establishing a prima facie case under *McDonnell Douglas.* Now the absence of objective reasons ceases to be significant in itself for purposes of pretext. The objective facts become irrelevant in themselves, and the subjective fact of what the employer thought in his mind becomes all-important.

Formally, Title VII remains a clarion call to equal rights in the market place. But in the cold reality of day-to-day enforcement, it is hard to see how this call will ever get over the wall the Supreme Court has built — a wall of assumptions about what discrimination is, about what moral responsibility is — to reach the real world of lived experience.[178] The exchange from *Henry the Fourth, Part I* comes to mind:

> Glendower:
>
> I can call spirits from the vasty deep.
>
> Hotspur:
>
> Why, so can I, or so can any man;
>
> But will they come when you do call for them?[179]

B. *No Exit: The Collapse of the Effects Model into Atomism*

In the early years there were two theories of discrimination. There was a theory of discrimination as an institutional phenomenon and a theory of discrimination involving individual decisionmaking. There was the effects model and the disparate treatment model. These two theories not only reflected the different contexts in which discrimination occurred but also represented an open-ended language in which one could talk about competing notions of equality. One notion was liberal, individualistic, subjectivistic, formal; another notion was pragmatic and focused on the group, on historical context, on broad social patterns.

The opposition between these two competing models of equality has expressed itself as a debate around the issue of the proper boundaries or limits of antidiscrimination law. In the original mapping, the effects model was taken as valid and reconcilable with the disparate treatment model when each is relegated to its respective context. This structure of discussion operated as a bridge between different political and discursive communities, between employer and victim of discrimination, between different world views. But

178. Consider, for example, that in fiscal year 1990 the Equal Employment Opportunity Commission resolved 67,415 cases. *See* OFFICE OF PROGRAM OPERATIONS, EEOC, FY 1993 ANNUAL REPORT 32. Of these 67,415 cases, 41,510 (61.6%) were determined on the merits — meaning that they were resolved after full investigation with findings that discrimination did or did not occur. *Id.* at 10, 32. Of these 41,510 cases, the Commission determined that discrimination likely occurred in only 2,973, or 4.4% of the total number of cases resolved. *Id.* at 32. Further, the overwhelming majority of Title VII claimants lose in court. *See* Theodore Eisenburg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989) (listing a success rate of 22%); *id.* at 1578 ("The success rate[ ] for . . . employment discrimination . . . [is] far below reported trial success rates for most other litigation.").

179. WILLIAM SHAKESPEARE, HENRY THE FOURTH, PART I act 3, sc. 1, ll. 51-53 (David Bevington ed., Oxford Univ. Press 1987) (1598).

that framework depended on a dualism vis-à-vis models of discrimination and their respective underlying concepts of equality.

Through the sorcery of the Court's rhetorical approach, that dualistic framework has disappeared. After thirty years of discrimination law, we find ourselves in a system of fixed meanings, of rhetorical assumptions received as fact. Discrimination is posited to mean one thing: intentional discrimination by discrete, individual actors. We know two things from this definition. We know what the nature of discrimination is: it is intentional. From this definition of discrimination as intentional — as something only a discrete individual can do — we also know implicitly what the limits or boundaries of antidiscrimination laws are: antidiscrimination laws constrain only individual decisions and require that in each instance we locate and identify the discrete individual actor. The significance of this definition is that the effects model, as it was originally understood, disappears. The effects model as a model that addressed institutional exclusion — a model of results, of historical context, of concerns external to the individual employer and her individual decisions — a model, finally, of real equality — is rendered incoherent. The two models collapse into one intentionalist conception. The dominant, white political community has written into law its fixed, individualistic, subjectivist view of equality as the exclusive view.

The case of *Wards Cove v. Atonio*[180] illustrates the problem. It was the culmination of a fifteen-year court battle by Aleuts and Filipinos against the de facto racial stratification in a cannery plant.[181] Although nonwhites composed ten percent of the pool of workers who fit the classification of unskilled labor in the relevant labor market area, over the years of the cannery's operation, they composed from forty-seven to seventy percent of the cannery's unskilled laborers.[182] On the other hand, "virtually all the employees in the major categories of at-issue jobs [— office or administrative jobs —] were white."[183]

180. 490 U.S. 642 (1989).

181. 490 U.S. at 663 n.4 (Stevens, J., dissenting).

182. Again, only an examination of the record of the lower court decision permits an appreciation of the stark facts of the case. *See* Atonio v. Wards Cove Packing Co., 34 Empl. Prac. Dec. (CCH) ¶ 34,437, at 33,828-29 (W.D. Wash. 1983), *revd. in part*, 827 F.2d 439 (9th Cir. 1987), *revd.*, 490 U.S. 642 (1989). The Supreme Court did not question the primary facts — only the legal inferences the lower courts made from them.

183. 490 U.S. at 677 (Stevens, J., dissenting).

The cannery jobs in which nonwhites were concentrated were not only the least prestigious but also the lowest paid.[184] The cannery also provided separate dining facilities for whites and nonwhites. In addition, housing facilities were openly segregated by the employer: the employer used the term *Philippine Bunkhouse* to refer to cannery housing and *native* to refer to cannery jobs.[185] At least one plant official took a matter-of-fact attitude toward the racial patterns in place at the plant:

> "We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups."[186]

The exclusion of nonwhites from the higher echelons of the work force was so extreme that one Justice analogized it to plantation life: "Some characteristics of the Alaska salmon industry described in this litigation — in particular, the segregation of housing and dining facilities and the stratification of jobs along racial and ethnic lines — bear an unsettling resemblance to aspects of a plantation economy."[187]

Although no express policies prevented minorities from seeking noncannery jobs, a system of interlocking discretionary employer practices locked the racial stratification into place. First, the employer only accepted applications off-season,[188] rendering it impossible for employees to apply during the period in which they were employed and housed at the plant. Second, like the employer's policy in *Furnco,* the policy of the cannery was to refuse applications at the gate. The vast majority of the minority cannery workers had been recruited locally and were from Alaska.[189] The employer hired for noncannery jobs, however, mainly in Seattle, Washington or Astoria, Oregon.[190]

Further, there were no posted job vacancies. Recruitment for noncannery jobs was by word of mouth from incumbent, predominantly white noncannery workers to their friends and relatives, who almost always were also white.[191] This led to an apparently incestu-

184. 490 U.S. at 647.

185. 34 Empl. Prac. Dec. (CCH) at 33,835.

186. 434 Empl. Prac. Dec. (CCH) at 33,836 (quoting Letter from Hardy Parrish, Foreman, Wards Cove Packing Co. (Jan. 25, 1971)).

187. 490 U.S. at 664 n.4 (Stevens, J., dissenting).

188. 34 Empl. Prac. Dec. (CCH) at 33,827.

189. 34 Empl. Prac. Dec. (CCH) at 33,828-29.

190. 34 Empl. Prac. Dec. (CCH) at 33,827.

191. 490 U.S. at 677 n.27 (Stevens, J., dissenting).

ous system of promotion in which family membership or friendship ties became de facto qualifications. Under this regime, the lily-white administrative workforce tended to perpetuate itself.

In addition to the absence of posted jobs, there were no posted job qualifications.[192] Thus, nonwhites were in the dark not only as to what jobs were vacant but also as to the requirements for those jobs. During the litigation, the employer labeled all the jobs that were traditionally filled by whites as "skilled" jobs. This was a subjective label. The jobs often required skills, but they were skills that could be provided in brief training.[193] The employer provided no training to cannery employees.[194]

The adverse impact theory conceived of discrimination in terms of requirements that were objective on their face but that operated as artificial barriers to advancement, the classic instance being a specific paper-and-pencil test or a policy requiring a high school diploma. Once one identified the offending requirement or test, one proceeded to ask whether the test was necessary to the business. Generally one conducted a validity study to determine the effectiveness of the test or credential as a predictor of job success. This conception made three assumptions:

> (i) Institutional policies that create artificial barriers will be identifiable;
>
> (ii) Institutional policies must rest on objective considerations — that is, there must be a rational relationship between the credential or test required and job performance; and
>
> (iii) The value or importance of employment requisites imposed via these policies will be objectively measurable, generally through a scientific study of the predictive value of the credential or test required.

The difficulty for the nonwhites in *Ward's Cove* was that their claim of discrimination did not fit the contours of the assumptions at the bottom of the adverse impact model. Their evidence of discrimination was, first of all, the disparity between the relatively small percentage of nonwhites in the unskilled laborer population and the relatively large percentage of nonwhite unskilled workers in the employer's work force. Further, they attempted to contrast the percentage of nonwhites in cannery jobs and the percentage of whites in noncannery jobs.[195] For the Court, these comparisons were irrelevant in and of themselves. The Court required the mi-

192. 490 U.S. at 677 (Stevens, J., dissenting).

193. *See* 490 U.S. at 677 n.26 (Stevens, J., dissenting).

194. 34 Empl. Prac. Dec. (CCH) at 33,830.

195. 490 U.S. at 650-51.

norities to show a causal nexus between their exclusion and an identifiable decision or policy on the part of the employer: "Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[196]

From the Court's vantage point, having posited that discrimination is something a discrete, individual actor decides to do, to require that one establish such a nexus was no more than to specify the elements of a coherent claim. However, as I point out elsewhere,

> [d]iscrimination is not a discrete event. It is a reservoir or lake in which a myriad of social institutions from slavery to Jim Crow, from literature to science, from religious practices to housing patterns . . . have all deposited their streams. It is a reservoir not merely of individual hatreds and fears, but also of institutional inertia and cultural bias built upon a myriad of myths and stereotypes.[197]

The exclusion of minorities in *Wards Cove* was associated not with a discrete decision but with a web of policies and practices: unposted job vacancies, off-season recruitment, recruitment from a remote place. These practices of exclusion were no doubt aided and abetted by deep-seated assumptions about the proper role of "native boys" and the systematic disparities in job skills between minorities *historically* locked into lower-paying jobs and whites who were not.

Nonetheless, alas, because the minorities could not identify the specific decision that had harmed them, they could not make a claim that was coherent to the Court. From the Court's atomistic perspective, without evidence of a causal nexus between the identifiable employer decision and injury, no discrimination could conceivably be established.

This is, of course, circular. Everything flows from the rhetorical assumption that the axis of inquiry is the decisions that the employer makes or fails to make. Discrimination only exists if a particular employer decides qua decides to treat similarly situated people differently because of their race. It follows within this line of reasoning that when a culpable decisionmaker is not identified, there is no discrimination.

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196. 490 U.S. at 656 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion of O'Connor, J.)).

197. Jones, *supra* note 78, at 367 (citations omitted).

If one starts at the other pole of meaning — that segregation and subordination of minorities are objective conditions that define inequality — *Wards Cove* becomes a paradigm not of an incoherent claim but of the incoherence of the Court's own models of proof.[198] The fact that minorities were disproportionately concentrated in unskilled jobs and were living in segregated conditions takes on meaning as part of a larger historical pattern of exclusion and stratification. The Court is able to deny the meaning of the pattern of exclusion in *Wards Cove* by denying social and historical context as relevant dimensions of a discrimination case. More precisely, the Court adopts an epistemology in which law and moral certainty can be grounded only in the facts of a particular case, not in history or social understandings. Like the judges of the slavocratic regime, the Court seems to say that we know nothing about a particular case from knowing history or from our societal understandings.

It is the felt absurdity of this denial that Justice Blackmun expressed when he stated in his dissent, "One wonders whether the majority still believes that race discrimination — or, more accurately, race discrimination against nonwhites — is a problem in our society, or even remembers that it ever was."[199] For me, the critical point of this atomistic model is that the theoretical prism of the conservatives does not merely produce a morally obtuse concept of discrimination; it renders discrimination utterly invisible to them. Absent an identifiable decision, racial stratification, no matter how long-standing or extreme, does not "appear" to be a redressable wrong. Lyotard's words come to mind here:

> It is the nature of a victim not to be able to prove that one has been done a wrong. A plaintiff is someone who has incurred damages and who disposes of the means to prove it. One becomes a victim if one

198. Congress responded to *Wards Cove* with the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C. and 42 U.S.C.). Incredibly, the statute does not address the problem I have with the case. I see no practical way that minorities can challenge either employer hiring prerequisites that are substantially subjective, such as word-of-mouth recruitment, or multiple interlocking prerequisites, such as possessing the right job skills and applying off-season. The problem that the minority faces is in identifying the specific prerequisite that causes the exclusion. The new Civil Rights Act does not speak to this at all, presumably because the coalition that got the bill passed could not come to a consensus that this kind of institutional problem was properly within the ken of the law. For the proponents of the new legislation, there was ambivalence, I suspect, over the boundaries between the problem I am identifying and the problem of society in general. In short, I believe that the "reformers" bought into the Court's premise that discrimination is about decisions. What the bill does is restore the business necessity standard, provide for expanded monetary relief, and provide a jury trial. But all this will only generally address discrimination in the classic forms described. From my perspective the statute reminds me of the familiar police inspector who only rounds up the "usual suspects" in its ability to arrest only meager forms of discrimination.

199. 490 U.S. at 662 (Blackmun, J., dissenting).

> loses these means. One loses them, for example, if the author of the damages turns out directly or indirectly to be one's judge. . . . Reciprocally, the "perfect crime" does not consist in killing the victim or the witnesses (that adds new crimes to the first one and aggravates the difficulty of effacing everything), but rather in obtaining the silence of the witnesses, the deafness of the judges, and the inconsistency (insanity) of the testimony. You neutralize the addressor, the addressee, and the sense of the testimony; then everything is as if there were no referent (no damages).[200]

IV. EQUALITY AS REDEMPTION

> Reflecting the foundational semantic position of the Bible . . . [t]he invocation of utopia references what . . . I propose to call the politics of transfiguration. This emphasises the emergence of qualitatively new desires, social relations, and modes of association within the racial community of interpretation and resistance *and* between that group and its erstwhile oppressors.[201]

Thirty years after Title VII, after the heady promises of the second Reconstruction, black unemployment is more than two-and-one-half times that of whites.[202] Blacks who began their sojourn in this country as slaves, and who were each historically counted for purposes of apportionment as three-fifths of a man, earn today less than two-thirds of what their white counterparts earn.[203] The disparity in income increases as the level of education of blacks increases.[204] Blacks still make up only three percent of the lawyers and three percent of the doctors,[205] but almost fifty percent of the population of U.S. prisons and jails.[206] Blacks are three times more likely to be poor.[207] Ironically, the Negro who was "walled out of the larger economy" in the era of segregation continues as a black person to be walled out of the economy after three decades of formal "equal opportunity in employment" as "law."

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200. JEAN-FRANÇOIS LYOTARD, THE DIFFEREND: PHRASES IN DISPUTE 8 (George Van Den Abbeele trans., 1988).

201. GILROY, *supra* note 38, at 37.

202. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 103 (1992).

203. David H. Swinton, *The Economic Status of African Americans: "Permanent" Poverty and Inequality, in* THE STATE OF BLACK AMERICA 1991, at 25, 28 tbl. 1 (Janet Dewart ed., 1991).

204. HACKER, *supra* note 202, at 95 tbl.

205. *Id.* at 111.

206. *Id.* at 180.

207. *See* David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2160 (1989) (noting that although the percentage of black families below the poverty line is 32.4%, the poverty rate for whites is 9.7%) (citing Allan C. Hutchison, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637, 662-64 (1987) (book review)).

The problem is not that equal employment law under Title VII has merely failed to unbuild the wall of racism. Rather, it is that the framework of law and interpretation built up in this area over the last thirty years is part of the very structure of racism. It is not enough to say that the great promise of equality has been broken to the hearts of blacks. Equality as a liberal discourse, throughout this era of reform and particularly within the precincts of Title VII law, has been for blacks an instrument of disempowerment. According to Derrick Bell's friend Geneva Crenshaw,

> It is incredible that our people's faith could have brought them so much they sought in law and left them with so little they need in life.
>
> It is so unfair. Like the crusaders of old, we sought our Holy Grail of "equal opportunity," and having gained it in court decisions and civil rights statutes, found the quest to be for naught. Equal employment opportunity, far from being the means of achieving racial equality, has become yet another device for perpetuating the racial status quo.[208]

The liberal notions of autonomous individual subjectivity, of a private sphere of life, and of formalism in interpretation converge as an ideological barricade between the victims of discrimination and their history and context. The problem at one level is an incommensurability of world views and a legal framework in which the experiences minorities wish to articulate are inexpressible within the definitions and meanings of operative legal terms. Simultaneously, and with a universalist voice, the same legal system, uncritical of its own objectivism, pronounces itself perspectiveless and neutral. At another level it is a problem of conflicting economic interests between victims who wish a redistribution of rights and goods and a dominant group that feels such claims threaten the foundation of legal order.

Finally, it is not merely theoretical investments or economic interests that must be sacrificed on the altar of social justice but privileged identities as well. *Whiteness* has referred not merely to racial hierarchy but to a kind of psychic wealth.[209] The masses of blacks remain in a castelike status vis-à-vis the larger society.[210] Race remains "an important marker for social, legal, and economic sta-

208. Derrick Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 16 (1985). Geneva Crenshaw is one of the characters Bell creates in his narrative.

209. This in large part was my point in Jones, *supra* note 89, at 469.

210. *See* HACKER, *supra* note 202, at 103, 111 (illustrating disparities in unemployment rates between blacks and whites, and also identifying categories of job fields in which blacks are overrepresented and underrepresented).

tus."[211] To embrace equality for some whites — real, not formal, equality — would represent a loss of privilege, or property, profoundly more important than that lost by slave owners in the postbellum South.

Moreover, civil rights laws, regardless of their teeth — and Title VII started with few — are inevitably filtered through an interpretive lens. One's identity, one's psychological stakes in one's sense of self, is itself a powerful lens naturalizing the results of a juridical framework that legitimates the status quo.

> *"[I]nterpretation is a function of identity."* In interpreting the interpreter tends to recreate himself. Thus, interpretation acts as a kind of mirror reflecting not so much the real world, but simply who the interpreter is and his or her desires and fears.[212]
>
> We seem to be caught in a circular argument, but it is not the argument which is circular — it is the human condition in which we cannot extricate an "objective" reality from our "subjective" perception of it.[213]

Race is always and already there. It is not possible to "not see it," only to be unaware of race as a window through which we look at the world. The problem of racial identity itself and the problem of interpretation within the discourse of Title VII are intertwined. To transform the situation would mean not only jettisoning basic precepts of liberal thought, not only yielding economic status, but also yielding traditional concepts of racial identification. Each white judge would have to find and become that black person inside of himself for the law to work.[214]

Given the pervasiveness, depth, and systematicity of the problem, it is easy to understand why one law professor has lamented, in the words of Jeremiah, "The harvest is past, the summer is ended and we are not saved."[215]

Paradoxically, I think this is a juncture of absolute despair and absolute hope. It is, of course, impossible to imagine whites voluntarily making the sacrifices necessary to free blacks from the social

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211. Jerome M. Culp, Jr., *Neutrality, The Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform,* 45 RUTGERS L. REV. 965, 967 n.6 (1993).

212. Jones, *supra* note 78, at 391-92 (quoting STEVEN MAILLOUX, INTERPRETIVE CONVENTIONS: THE READER IN THE STUDY OF AMERICAN FICTION 24 (1982)).

213. Norman N. Holland, *Transactive Criticism: Re-Creation Through Identity,* 18 CRITICISM 334, 340 (1976).

214. This point seems to have application over a number of contexts. To do justice to gender issues, judges who have always been privileged males would have to find a woman inside of themselves. We could also apply this to issues of national origin. In terms of this "finding," I refer not merely to empathy but to the deconstruction of privileged identity.

215. BELL, *supra* note 18, at vii (quoting *Jeremiah* 8:20).

and economic prison house where they have been confined. But it is also impossible to imagine that whites do not need to break down the selfsame walls of the prison house that has blocked their moral vision.

> [W]hat the house of bondage accomplished for . . . the classic white American was the destruction of his moral sense, except in relation to whites. . . . [T]herefore, his sense of white people had to be as compulsively one-dimensional as his vision of blacks. The result is that white Americans have been one another's jailer's for generations . . . .[216]

The regime of racial subordination and the grand theory of equality that rationalizes it depends vitally on classical conceptions of self and other; on the separation between that which is true and that which is practically good and between that which is right and that which one does; on a classical language and world view that is internally unstable.

If it is true that the discursive barrier we face is entrenched at a profound depth, it is also true that it totters under the weight of its own assumptions. We have to find a way to become an oppositional force against this already-tottering edifice of ideology.

It is only when the slave names or defines his own reality that she begins to have power, that she begins to live. Sisyphus, a kind of slave, was condemned by power to roll a rock up a hill only to have it roll back down when he reached the top. Then he was doomed to repeat the process. As Camus has told us, Sisyphus began to live when, unable to alter his material conditions, he learned to define his attitude toward them.[217] Then he was free.

We have to find a way to redefine some terms — the basic terms within the discourse of equality. This involves new relationships with language and philosophy — perhaps a new canon in which Ellison and Delany, Du Bois and Malcolm, Douglass and Franklin take center stage. We must create in the interior, sovereign space of writing itself an authentic connection between the experience of ancestors enslaved and herded to the back of the bus and turned away from lunch counters and knocked down by southern waterhoses, and the contemporary experiences of blacks languishing unemployed and marginalized in the ghettos of Harlem, South Central Los Angeles, Overtown, Bedford-Stuyvesant, and East Baltimore. We will find in that sacred, interior space a way to cross the suspen-

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216. JAMES BALDWIN, *Notes on the House of Bondage, in* THE PRICE OF THE TICKET 667, 672-73 (1985).

217. ALBERT CAMUS, *The Myth of Sisyphus, in* THE MYTH OF SISYPHUS AND OTHER ESSAYS 119, 123 (Justin O'Brien trans., Alfred A. Knopf 1972) (1942).

sion bridge between the spirit of Jeffersonian ideals and the reality so eloquently captured in the vision of Dr. King. We will find a way to say that there can be no wall between the true and the good, self and other, private and public, black and white. Then, perhaps, a new and finally modern America will be born — inside of us. Then, perhaps, the ideal of equality which for so long has been meaningless will have a meaning. Then, perhaps, it will mean redemption.