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# The Death of the Employer: Image, Text, and Title VII

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# The Death of the Employer: Image, Text, and Title VII

D. Marvin Jones\*

I.	INTRODUCTION: GENEVA CRENSHAW'S COMPLAINT .....	349
A.	<i>The Intent Model: A Problem of Law As Ideology and Legitimation</i> .....	353
B.	<i>The Hidden Discursive Barrier</i> .....	356
II.	THE EMPLOYER AS MYTH .....	358
A.	<i>Every Event A Deed</i> .....	359
B.	<i>The Speaker In the Text</i> .....	366
III.	THE EMPLOYER AS METAPHOR .....	373
A.	<i>Real Equality: The Historical Group Model of Discrimination</i> .....	374
B.	<i>Formal Equality: The Employer-Centered, Conventional Model of Discrimination</i> .....	379
C.	<i>Historical Echoes</i> .....	386
IV.	THE VISIBLE AND THE INVISIBLE: HOW THE EMPLOYER HIDES OUR INTERPRETIVE CHOICES .....	389
V.	CONCLUSION: THE PARABLE OF THE SOWER .....	392

## I. INTRODUCTION: GENEVA CRENSHAW'S COMPLAINT

It is incredible that our people's faith could have brought them so much they sought in the 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 opportunity, far from being the means of achieving racial equality, has become yet another device for perpetuating the racial status quo.<sup>1</sup>

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1. Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99

Title VII of the Civil Rights Act of 1964<sup>2</sup> was hailed as the most important legislation of the twentieth century.<sup>3</sup> And within the deep symbolism<sup>4</sup> of our civil rights discourse this, of course, was true. Title VII represented not merely a set of antidiscrimination rules, but a break with history. It was both a centerpiece and an emblem of a kind of second reconstruction<sup>5</sup> in which America determined to rise above

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HARV. L. REV. 4, 16 (1985) In the *Chronicles*, Bell examines the tension between the commitment to equality implicit in our constitutionalism and the predicament of blacks. Bell merges the genres of literature and legal scholarship to use narrative as the primary vehicle of his discussion. Geneva Crenshaw is one of the characters Bell creates in his narrative.

2. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)). Title VII prohibits discrimination in employment on the basis of race, sex, religion, color, or national origin. 42 U.S.C. § 2000e-2.

3. "The Civil Rights Act of 1964 was the most important civil rights legislation of this century. Title VII of that Act. . . has been its most important part." Norbert Schlei, *Foreword to BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW* at vii (2d ed. 1983).

4. Civil rights laws in our secular culture play a role analogous to that of a sacred text. The sacred text is one "that, in the community and tradition in question, is seen to charter, to mandate, the form of life to which the community and tradition aspire, and thus the text that, for the community and tradition, symbolizes that mandate." Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 558 (1985). Civil rights laws give textual form to egalitarian and democratic values which are seen to "charter and mandate" our political and legal forms. As text, they "symbolize that mandate." Further, civil rights laws represent the connection between the legal sphere of American life and, if not a spiritual sphere, at least a normative sphere or nomos. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (arguing that the discovery of this connection is the chief project of legal interpretation). However, the source of the connection, I think, reposes only within humanitarian laws, such as laws to protect minorities. It is this bridge within the American political order between its legal institutions and its moral institutions which not only legitimates that political order but distinguishes it from others. "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, North and South: 'All men are created equal'." President Lyndon B. Johnson, Special Message to the Congress: The American Promise (March 15, 1965), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, LYNDON B. JOHNSON, 1965 at 281, 282 (1966).

5. Reconstruction is the period of American history following the Civil War in which Congress enacted a panoply of civil rights protections on behalf of blacks (including the 13th, 14th and 15th Amendments) and stationed troops in the South to enforce them. Eric Foner dates this period from 1867 (when "Radical Republicans" in Congress "swept away 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 which had enforced civil rights laws). See ERIC FONER, *preface to RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* at xix (1988). After the Hayes-Tilden compromise of 1877, many of the gains made by blacks were largely swept away, and the Civil Rights protections enacted by Congress fell into desuetude. A number of scholars have suggested a parallel between the period of reconstruction following the civil war and the period following World War II. See MANNING MARABLE, *RACE REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1982* at 168-99 (1984); T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060, 1115 (1991) (referring to the 'Second Reconstruction' of the 1960s); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1624 n.10 (1986) (referring to the period "occurr[ing] between approximately 1954 and 1968 when legislation, court decisions, and mass protests, dismantled much of the legal apparatus of the Jim Crow system"); see also Derrick Bell, *Xerxes and*

the racism of the past and to resurrect ideals dormant since inception.<sup>6</sup> If discrimination in the workplace was a stone in the path of national progress, Title VII would be the instrument by which it was rolled away.

Title VII reflected for America a new sense of national identity, an America no longer ambivalent<sup>7</sup> about who it included or what its values were. It was thus both a vehicle for legal prohibitions and a celebration of moral rebirth. It served both as law and as a ceremony of redemption.

Ironically, while Title VII retains its significance as a symbol, it has little, if any, significance as a means of helping blacks. Title VII created a context in which it was impossible to speak, in public discourse, of employment discrimination as a legitimate activity. But reciprocal to this new concept of discrimination as a public wrong, Title VII inaugurated a concept of discrimination as something extremely difficult to find. The same statutory regime which ushered in formal equality in the workplace made discrimination something particularly abstract, meaningless and remote.

For example, in fiscal year 1990 the Equal Employment Opportunity Commission<sup>8</sup> resolved 67,415 charges.<sup>9</sup> Of those 67,415 charges, the Commission determined that discrimination likely occurred in only 2973, or 4% of the cases.<sup>10</sup> Of those 2973 cases, the Commission was

*the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1612 (1989).

6. Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey). Moreover, "the relative position of the negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.* at 6547.

7. More important to the larger society than Title VII's promise to emancipate blacks from systematic exclusion from skilled jobs was the significance of that promise as an emancipation of society from a longstanding conflict between the egalitarian values professed and the segregation practiced in fact. See generally GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (9th ed. 1944).

8. The Equal Employment Opportunity Commission (hereinafter the EEOC) is the enforcement agency designated under Title VII. See 42 U.S.C. § 2000e-4. The Commission initially investigates discrimination complaints, called "charges" of discrimination, and makes a determination as to whether there is "reasonable cause to believe that the charge is true." See 42 U.S.C. § 2000e-5(b). If the EEOC finds that there is reasonable cause to believe that discrimination occurred, the agency has no power to order the employer to cease and desist. Rather it attempts to "conciliate[e]" the charge. *Id.* If conciliation efforts fail, the EEOC may bring suit directly in federal court. *Id.* at § 2000e-5(f)(1). The structure of the EEOC administrative process reflects an underlying ambivalence about the nature of discrimination and its place in public life. Discrimination is presumptively a private matter best resolved through methods of conciliation, conference and persuasion; discrimination claims are in tension with the rights of the employer and those rights presumptively should not be disturbed by cease and desist orders.

9. EEOC Office of Program Operations, Enforcement Statistics, Fy 1981 - Fy 1990 (1991).

10. *Id.* Figures here include charges filed under Title VII, the Age Discrimination In Employment Act, and the Equal Pay Act. The statistical source does not allow for breakdown by statute. The aggregate figures are probative, however, because discrimination claimants under the various

able to obtain benefits for the claimants in only 522 cases.<sup>11</sup> Thus, only fourth-fifths of one percent of all claimants obtain any formal relief through the EEOC administrative process. Although in theory every claimant who is unsuccessful at the administrative level may seek relief in court,<sup>12</sup> most claimants lack the resources to do so. Further, the overwhelming majority of those claimants who do pursue Title VII remedies in court lose.<sup>13</sup>

Moreover, the avowed goal<sup>14</sup> of Title VII, to address the chronic exclusion of blacks from the mainstream of the American economy, is more distant than ever before. Overt discrimination has dramatically decreased, but twenty five years after the passage of Title VII, the economic disparity between whites and nonwhites has widened,<sup>15</sup> and racial stratification has increased.<sup>16</sup> The specter of racial caste, the evil which Title VII was conceived to excise, is not only still with us, but now has a stronger hold on the American soul.<sup>17</sup>

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statutes generally have similar experiences.

11. EEOC, *supra* note 9.

12. 42 U.S.C. § 2000e-5(f)(1).

13. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases* 77 GEO. L.J. 1567, 1578 (1989) (listing a "success" rate of 22%). Success here may be misleading. The definition of success is: "Who is the 'prevailing party'?" *Id.* at 1576. The prevailing party in a Title VII or other civil rights case is the plaintiff if the plaintiff obtains "some of the relief" sought. *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987) (stating that a plaintiff might lose on everything except declaratory judgment—obtaining neither damages nor substantive relief—and still "prevail"). However, even using this extremely generous definition of "success" "[t]he success rates for . . . employment discrimination . . . are far below reported trial success rates for most other litigation." Eisenberg, *supra*, at 1578.

14. Justice Brennan found that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII . . . was with 'the plight of the Negro in our economy'" and that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them." *United Steelworkers of America v. Weber*, 443 U.S. 193, 202-203 (1979) (quoting 110 CONG. REC. 6548, (1964) (remarks of Sen. Humphrey); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (characterizing Title VII as a statute designed "to achieve equality . . . and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." (citation omitted)).

15. As of 1984, 4 million of 8.8 million black men between the ages of 16 and 64 were either unemployed, out of the labor force, or in prison. See Bell, *supra* note 1, at 11 n.27. See also REYNOLDS FARLEY & WALTER R. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 217 (1987). (noting that the disparity in unemployment rates between black men aged 16 to 24 and [their statistical counterparts] increased by almost .5% annually between 1950 and 1985).

16. Blacks as a group are increasingly relegated to a certain socio-economic level. Perhaps the best evidence of this is the increasing gap between the median income of blacks and the median income of whites. In 1969 blacks between the ages of 25 and 34 made 68% of that of whites in the same age group. In 1984 the same group of blacks made only 60% of white income. See FARLEY & ALLEN, *supra* note 15, at 305. It is not idle speculation to suggest that increasingly race correlates with class, that the socio-economic predicament of blacks is becoming more and more an entrenched pattern.

17. *Id.*

A. *The Intent Model: A Problem of Law As Ideology and Legitimation*

It is almost axiomatic of Title VII literature to attribute the gap between professed ideals and social reality to a tension between the substantive provisions of Title VII and the evidentiary framework for proving Title VII claims. Under the common law of Title VII, minorities must validate their discrimination claims against employers by proving not merely that an employer excluded them from some benefit, but also that the source of this exclusion was discriminatory intent.<sup>18</sup> Intent is, of course, notoriously difficult to prove.

In the conventional<sup>19</sup> critique, the choice of this particular eviden-

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18. "The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.'" *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (citation omitted); *accord Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1980); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see also* D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis On Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 734 (1987) (stating that "[t]he 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"). There was a time, of course, when these very conservative assessments of Title VII proof requirements could be contested. One could have argued under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny that there were two models of proof in Title VII cases. Then, one might have identified an adverse impact model in addition to an intent model. Under the adverse impact approach only a showing of disproportionate exclusion would be necessary to establish a prima facie case. However, in the aftermath of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the two models largely have been collapsed into one. There is, of course, The Civil Rights Act of 1991 which purports to overrule *Wards Cove*, but the Act does move to memorialize a continuing lack of consensus about the vitality and scope of the adverse impact model than to reverse the doctrinal evisceration of the model. *See The Civil Rights Bill*, Pub. L. No. 203-266, 105 Stat. 1071 (1991).

This emphasis upon intentionality as the arbiter of fault, although commonplace in the common law of torts, is anomalous in federal regulatory structures. *See* Thomas G. S. Christensen and 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) (noting that "[h]orizontal mergers . . . may or may not violate the 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, motive "was treated not as an essential element of the *substantive violation*, but as an evidentiary aid in determining whether protected union activity had in fact been the cause of the terminations." *Id.* at 1275 (emphasis added).

19. By "conventional" I mean the notion that judging is constrained by traditional practices and conventions. Two key assumptions form the foundation of this interpretive practice. One is the widely shared view that legislative intent or purpose determines the meaning of statutory text. *See, e.g.,* Richard A. Posner, *Statutory Interpretation In The Classroom and In The Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (offering an explication of the legislative intent standard); *see also* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1259-72 (1947) (offering perhaps the original formulation of the legislative "purpose" standard). On the difference between the two standards *see* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 321-25 (1990). Another key conventional assumption is the idea that legal reasoning is an "objective" process. *See e.g.,* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982). Conventionalist thinking is associated with scientific legalism, in which lawyers must search for neutral princi-

tiary standard causes the problem. Some scholars argue simply that the intent standard<sup>20</sup> is not desirable vis-a-vis the broader goal of eradicating discrimination.<sup>21</sup> The boldest challenge within this genre is Professor Fiss's argument that the intent standard is inconsistent with the plain language of the statute.<sup>22</sup> Title VII prohibits discrimination "because of",<sup>23</sup> *inter alia*, one's race. Relying upon the "because of" language, and the conspicuous absence of the word intent, Fiss asserts that causation is the central inquiry in a discrimination case. In Fiss's view the intent standard represents a specious "psychological gloss"<sup>24</sup> on the

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ples to ground interpretive results. The classic work here is HERBERT WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* (1961). The conventional viewpoint is internal to traditional legal thought, and traditional legal approaches are seen quite simply as "correct." *But see* Richard Delgado, *Brewer's Plea: Critical Thoughts On Common Cause*, 44 VAND. L. REV. 1 (1991) (challenging conventional thinking as ultimately circular).

20. Of course, the concept of intent is notoriously indeterminate: Intent is variously understood as (1) subjective foreseeability (e.g., intentional torts); (2) objective foreseeability (e.g., negligence in tort); and (3) accountability for the consequences of one's behavior (e.g., strict liability). However, the common law of Title VII entrenches as a standard a narrow notion of intent. In Title VII doctrine, intent means specific intent to harm just as it would in criminal law. *See* Alan D. Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1423 (1990).

21. *See* Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 588 (1977) (warning that the imposition of onerous intent standards relegates the judiciary to a "severely diminished role in ameliorating racial inequities"); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978) (arguing that the intent standard "places a 'very heavy burden' of persuasion on the wrong side of the dispute, to the severe detriment of . . . protection of racial equality") (citation omitted); *see also* Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1203 (1982) (warning that the intent standard threatens Title VII goals when courts fail to recognize that burden and order of proof questions impinge on, and implicitly are in fact, questions of policy).

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

23. Title VII reads in pertinent part:

(a) It shall be an unlawful employment practice for an employer-

(1) to . . . discriminate against any individual . . . *because of* such individual's race . . . ; or  
(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  
. . . .

(h) It shall be an unlawful employment practice for an employment agency . . . to discriminate . . . *because of* . . . race . . . .

(c) It shall be an unlawful employment practice for a labor organization-

(1) to . . . discriminate *because of* . . . race . . . .

(d) 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) (emphasis added).

24. Fiss, *supra* note 22, at 297. Fiss points out that gratuitously searching for an intent to discriminate in "the employer's" mental state ignores much of the victimization experienced by blacks. Fiss goes on to argue that

[l]ack of adequate information about the productivity of individuals may lead the employer to make mistakes. He may make incorrect assumptions about the productivity of blacks because of the general prevalence of racial stereotypes in our society, derived from widespread

causation concept.<sup>25</sup> Thus, the conventionalist approach reflects an impulse to breathe life into Title VII by restoring the "true meaning" of the discrimination concept. Fiss attempts to determine the true meaning of discrimination through a "fresh" examination of the text itself. Other conventional authors seek to determine the "true meaning" of discrimination by divining the statutory purpose or the "social goals" underlying Title VII.<sup>26</sup> The "Conventionalists" rely upon, however, and are constrained by a search for this meaning within the boundaries of legislative purpose or intent.

A second school of thought, critical race scholarship,<sup>27</sup> has attempted to challenge the social assumptions which underlie and surround the intentionalist approach. Critical race scholars question the claim that focus on intent is objective<sup>28</sup> or perspectiveless, pointing out

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prejudices and myths generated under the slave regime; or he may make a mistake because of the lack of social and commercial contacts between races, contacts which are often necessary to obtain accurate information about applicants for employment.

*Id.* at 251.

25. In offering a dichotomy between an inquiry into causal nexus and an inquiry into the employer's actual mental state, Fiss follows a line traced initially by Professor Bickel. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 209-10 (2d ed. 1986) (distinguishing between purpose and motive: purpose is the aim, the end to which a decision leads, while motive is the cause, that from which the decision proceeds). Distinguishing between motive and intent, D. Don Welch wrote: "Motive addresses the factors that lead into a decision: the reasons upon which a decision is based. . . . Intent is synonymous with purpose. It speaks to the goals toward which the actor moves, the ends the actor aims to achieve." Welch, *supra* note 18, at 736.

26. See Fiss, *supra* note 22, at 297.

27. Critical race scholarship is a political discourse of people of color within the legal academy. The point of departure for critical race scholars is an understanding that conventional legal methods of inquiry often terminate before reaching the context of oppression of blacks and other people of color. If conventional legal scholars look at law through the epistemological lens of general principles, critical race scholars tend to look at law through the lens of their shared experiences. See, e.g., Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope for Plural Justice*, 75 MINN. L. REV. 993 (1991). On the difference between critical race scholarship and critical legal studies, see Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARV. C.R.-C.L. L. REV. 301 (1987). Bell, *supra*, note 1; Frances Ainsley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989); Charles Lawrence, *The Id., The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988); Jerome Culp, *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39 (1991); Neil Gotanda, *A Critique of "Our Constitution is Colorblind"*, 44 STAN. L. REV. 1 (1991); Taunya Banks, *Aids and Government: Plan of Action: Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic*, 87 MICH. L. REV. 1321 (1989); Harlan Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989); Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

28. As Martha Minow has noted,

Scholars who challenge the implicit, unspoken assumption of objectivity in effect claim that



that the victims' stories often cannot be heard,<sup>29</sup> or their injuries adequately conceptualized<sup>30</sup> within the framework of the "intent model." One scholar has argued that the intent standard presupposes that discrimination is not the norm, and that there is a class of innocent employers which has no responsibility for the discrimination problem.<sup>31</sup> He characterizes this as the perpetrator perspective.<sup>32</sup> In a similar vein, Professor Lawrence has challenged the intent model's concept of discrimination as a conscious phenomenon and argues for an approach that takes the social psychology of racism into account.<sup>33</sup>

### B. *The Hidden Discursive Barrier*

Implicit in the critical racial theory approach is the image of a political struggle between employers and minorities as a group, occurring in what is nominally the legal sphere. The intent model serves here as a means of legitimation: It rationalizes legal standards that privilege the employers' side of the social debate.<sup>34</sup> The unifying theme is the Foucauldian impulse<sup>35</sup> to liberate our civil rights discourse by revealing the

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knowledge depends on the interaction between the one who sees and what is seen. Reality is not discovered but constructed and invented—and this process of invention needs itself to be included within the search for knowledge.

Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 175 (1987). The theme that much of what the Supreme Court counts as objective in its conception of equality is in fact artificial and constructed resonates within the genre. See, e.g., Patricia Williams, *The Obliging Shell: An Informal Essay On Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2137-43 (1989); Crenshaw, *supra* note 27, at 1347-48.

29. See generally Richard Delgado, *When Is A Story Just A Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) (contrasting a narrative of racial exclusion with the same "story" as it would be filtered through the intentionalist framework).

30. See, e.g., Crenshaw, *supra* note 27, at 1344 (arguing that the key difficulty is that the intentionalist model—denoted here as the "restrictive view" of equality—assumes that "a racially equitable society already exists").

31. "[Antidiscrimination] law views racial discrimination . . . as the misguided conduct of particular actors. It is a world where, but for the conduct of these misguided ones, the system of equality of opportunity would work. . . ." Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978).

32. *Id.* at 1054.

33. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

34. See generally Freeman, *supra* note 31; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (arguing in a related context that formal equality legitimates the subordination of black women).

35. Foucault's work seems to exhort us to "pose the question of power" to discourse. See MICHEL FOUCAULT, *THE FOUCAULT READER* (Paul Rabinow ed., 1984). In Foucault's emancipatory critique, the question posed with respect to the discourse of equality is not so much what does it mean but who does it serve. *Id.*

legal ideology<sup>36</sup> hidden within the doctrine of antidiscrimination law.

There is, however, an invisible discursive barrier, a deep fiction that stands in the way of locating the "meaning of discrimination" and of liberating Title VII doctrine from its ideological constraints. It is a fiction which lurks as an objectivist<sup>37</sup> assumption within both the conventional and the critical critique. It is this fiction which is at the heart of the intent standard and is the ultimate source of normative tension within antidiscrimination law. The fiction is the employer himself or herself. Like the classical trope of an author within a text,<sup>38</sup> the employer in a Title VII case is a construct.

If the intentionalist model hangs like a fog over the area of antidiscrimination law, it is a fog the employer has brought in. It is the employer who demands, in the language of the social contract, that we carefully determine fault before we intrude into his workplace. It is the employer who insists that we determine the guilt or innocence of his mental processes before we can judicially intervene to address the social problem of discrimination. To the extent we believe in the employer, we

36. The notion of ideology is that it is like a dark glass through which one looks and through which the world is distorted. See KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 55-75 (1936) (arguing that people under the sway of an ideology refuse to acknowledge incompatible facts). The notion of "law's ideology" encompasses the tendency of legal doctrine to obscure or mask the non-neutrality of legal institutions. See, e.g., DOUGLAS HAY ET AL., *ALBION'S FATAL TREE* (1975). In order for ideology to work it must be implicit in legal doctrine rather than explicit. *Id.* As Geertz has pointed out, "[Ideology] is not (quite) the same as lying . . . '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, *THE INTERPRETATION OF CULTURES* 196, (1973) quoting W. STARK, *THE SOCIOLOGY OF KNOWLEDGE* 48 (1958).

37. By "objectivist" I refer to the assumption that there can be a one to one relationship between words and objects in the world, that legal language acts as a kind of mirror. From this perspective, "the world consists of some fixed totality of mind-independent objects. . . . Truth involves some sort of correspondence relation between words or thought-signs and external things." HILARY PUTNAM, *REASON, TRUTH AND HISTORY* 49 (1981).

38. See, e.g., W. K. WIMSATT, JR. & MONROE C. BEARDSLEY, *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* 3 (1954) (arguing that "the design or intention of the author is neither available nor desirable as a standard for judging . . . a [literary] work"); see also ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142, 142-48 (S. Heath trans. & ed., 1977) (arguing that text is the result of the submergence of the author's identity into linguistic and artistic forms—the author dies in producing a work); STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 46-47 (1980) (arguing that texts are constituted not by authors but by reader's interpretive strategies). These arguments are, of course, contested. See, e.g., E. D. HIRSCH, *Counterfactuals In Interpretation*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 58 (Sanford Levinson & Steven Mailloux eds., 1988). However, they represent a position which in many scholarly circles is orthodoxy itself. It seems that law, and particularly civil rights law, has avoided the critique of intentionalism by asserting a discontinuity between legal and literary theory. See generally RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988). There is the notion that law is an authoritative text and the judge is constrained in his interpretation by that authority. I suggest, on the contrary, that law as a text is subject to the same critique, and that this is the same debate.

accept the possibility that guilt and innocence really are at stake and legalisms like fault and intentionality become the false horizons of our discourse.

The purpose of this paper is to explain how the figure of the employer appears in and mediates between our civil rights laws and our social goals. Part II interrogates<sup>39</sup> the claim that the employer is naturally or logically "found" in a discrimination case. That Part questions the credibility of the notion that discrimination is something the employer causes or intends and the related fallacy that the "guilty" employer in a discrimination context can be identified or singled out.<sup>40</sup> Part III focuses on the instrumentalism of the employer concept and shows how the notion of the employer is a metaphor that seeks to unite a formalistic construct of discrimination with common-law assumptions about fault. Part IV focuses on the cognitive framework which conceals the artificiality of the employer concept within both the language of discrimination law and our interpretive assumptions. Part V concludes with a call for a debate about how we might conceptualize a new theory of discrimination law once the employer is removed from our discourse.

## II. THE EMPLOYER AS MYTH

I notice something and seek a reason for it . . . I seek an intention in it, and above all someone who has intentions, a subject, a doer: every event a deed. . . .

. . .

Our "understanding of an event" has consisted in our inventing a subject which was made responsible for something that happens and for how it happens. We have combined our feeling of will, our feeling of "freedom," our feeling of responsibility

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39. Interrogation refers to a method of questioning, a digging beneath surface explanation to search for epistemological foundations. See MAURICE MERLEAU-PONTY, *THE VISIBLE AND THE INVISIBLE* (Claude Lefort ed. & Alphonso Lingis trans., 1968) Ponty's work, *inter alia*, is an interrogation of science's claims of knowledge. It is helpful because legal reasoning is often modeled on scientific reasoning. Although unspoken, antidiscrimination doctrine often presupposes that we know that "[t]his is the way things are and nobody can do anything about it." *Id.* at 4. Through the method of interrogation I endeavor to "make visible" the presence of such claims of certitude within antidiscrimination doctrine and to expose, if not their bias, at least their contingency.

40. Antidiscrimination law has been preoccupied with questions of fault: "Who is guilty of causing discrimination?" and "Who has acted with wrongful intent?" I suggest there may be a prior question as to whether the employer plays a role in the discrimination problem in the first instance. I want to examine the fault question instead of trying to answer it. In the words of Derrida: "If we answered . . . questions before examining them as questions, before turning them back on themselves, and before suspecting their very form, including what seems most natural and necessary about them, we would immediately fall back into what we have just disengaged ourselves from." JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 14 (Alan Bass trans., 1982). Derrida wrote about the oppositional relationships between language and speech, text and interpretation, writing and sign. He warned that within even the most neutral textual propositions lurk a number of hidden layers of discourse that imperceptibly construct webs of significance in which we may become trapped. Derrida's insight is supremely applicable to law.

and our intention to perform an act, into the concept of "cause". . . .<sup>41</sup>

#### A. *Every Event A Deed*

In viewing the employer as a real person, an active, relevant player in the discrimination suit, we are like someone who has walked through a mirror to the other side of the looking glass.<sup>42</sup> The mirror is the dividing line between fact and value, between reality as it is and our beliefs and interpretations of reality. It is the dividing line between two different rhetorical worlds—one in which discrimination appears as inseparable from historical patterns and one in which discrimination seems to be inseparable from individual fault.

Perhaps the key cognitive difficulty in grasping the fictional character of the employer is that employers are, obviously, real, living individuals with whom we have all had experience. In contrast modern interpretation has recognized that classical conventions such as the "framers" of the constitution or the enacting "legislature" are constructs for purposes of interpretation.<sup>43</sup> The framers are not living people and we cannot know their intent. To arrive at their intent we must engage in an imaginative, creative act; we must construct it. Similarly, although an enacting legislature may be comprised of persons still living we must nonetheless work with a statute's legislative history, which is often silent, contradictory or ambiguous. To arrive at the legislative intent of a recent statute, we must engage in a process which Posner calls "imaginative reconstruction."<sup>44</sup>

Perhaps because of our familiarity with the employer as someone "we know," his decisions appear to us as "immediate, discrete, and significant." Although the employer is firmly rooted in our own experience, he is only artificially located as the source of the injury we call discrimination. He is grounded in the doctrine of antidiscrimination law via two moral and linguistic assumptions: that discrimination involves a wrongful decision (intentionality), and that it involves a discrete actor.

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41. FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 294, 296 (Walter Kaufmann ed. & R.J. Hollingdale trans., 1967).

42. "This fact is concealed by the influence of language, moulded by science, which foists on us exact concepts as though they represented the immediate deliverances of experience." FISH, *supra* note 38, at 33 (quoting A. N. Whitehead).

43. See e.g., Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intent*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 50 (Sanford Levinson & Steven Mailoux, eds., 1988). Although arguing for original intention as the arbiter of constitutional meaning, Fried concedes that we cannot nor should we pretend to be able to "take the top off the heads of authors and framers—like soft-boiled eggs." See also Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 457 (1984) (referring to original intent as a legal fiction generally used to justify the interpreter's own agenda).

44. RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985).

Professor Blumstein perhaps best stated the wrongful decision premise:

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 because 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.<sup>45</sup>

Although Blumstein explicitly attempts only to trace the limits of antidiscrimination law, he implicitly relies upon a widely shared paradigm<sup>46</sup> of how disparities in treatment of minorities occur. Undergirding this concept of antidiscrimination law as a matter of "shalt nots" or mere negative prohibitions is a set of interconnected assumptions which define and skeletally conceptualize the phenomenon of discrimination.

In Blumstein's iron paradigm, discrimination always originates in and is coterminous with an employer's decision to treat similarly situated persons differently. As a corollary to the notion that discrimination is a problem of decisions, Blumstein posits that such decisions are both irrational<sup>47</sup> and associated with a particular employer's bias or wrongful state of mind.<sup>48</sup> Thus, the source of discrimination lies in the employer's mental processes. It is the guilt or innocence of those processes that primarily concerns discrimination law.

This framework of assumptions, supporting the idea of discrimination as causally linked to an employer's wrongful state of mind, is not freestanding. In turn, it rests upon a certain underlying schema.<sup>49</sup> According to cognitive theorists, the way we talk about and understand the world rests on an interior sub-strata of thought of which we are often unaware.<sup>50</sup> Thus, our ordinary conceptual and linguistic structures flow from relatively few prototypical understandings—one of which is our notion of kinship.<sup>51</sup> According to Professor Turner, much of our

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45. 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).

46. The word "paradigm" comes from the writings of Thomas Kuhn in the history of science and refers to an "accepted model or pattern" that provides a framework for "further articulation and specification under new or more stringent conditions." THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 23 (2d ed. 1970).

47. See Blumstein, *supra* note 45, at 638; see also *Rogers v. Lodge*, 458 U.S. 613, 650 (1982) (Stevens, J., dissenting) (stating that discrimination "on the basis of . . . race is, at the very least, presumptively irrational").

48. Blumstein, *supra* note 45, at 634-35.

49. "Schema" is a reference to the cognitive models which structure our conceptual framework. See generally Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

50. See MARK TURNER, *DEATH IS THE MOTHER OF BEAUTY: MIND, METAPHOR, CRITICISM* 7 (1987); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 19-21 (1980) (providing a survey of the relevant research).

51. TURNER, *supra* note 50, at 22-51. The starting point for seeing how kinship notions are

conceptual apparatus is concerned with how "things in the world, the mind, and behavior can spring from each other."<sup>52</sup> It follows that the concept of causation emerges from our concept of progeneration. In cognitive terms, that which causes something is the parent, while that which it causes is the offspring.<sup>53</sup> The intentionalist model of discrimination deploys precisely this cognitive framework. The rhetoric<sup>54</sup> of conventional doctrine portrays discrimination as a thing which springs fullblown from the mind—or the wrongful state of mind—of the employer.<sup>55</sup> This image results even when the context suggests that the problem lies within historical or traditional patterns of segregation. Thus, although a seniority system may lock in the results of past exclusion, it is not discriminatory in the doctrinal account unless it "ha[s] its genesis" in racial animus.<sup>56</sup> Both liberals and conservatives<sup>57</sup> talk this

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able to facilitate the organization of our conceptual universe is the idea that cognitively we start with three categories—world, mind and behavior. *Id.* at 40-53.

52. *Id.* at 40.

53. As Turner explains, "WHAT SPRINGS FROM SOMETHING IS ITS OFFSPRING. . . . The arrow springs from the bow. Therefore, *Job* 41:20 calls the arrow the son of the bow. . . . Since effects spring from their causes, CAUSES ARE PARENTS AND EFFECTS ARE OFFSPRING. For example, age is the mother of sickness." *Id.* at 24.

54. "Rhetoric" has two senses. In an Aristotelean sense, rhetoric refers to a realm of discourse in which, in contrast to the realm of science, exact certainty is possible. See PAUL RICOEUR, *THE RULE OF METAPHOR: MULTI-DISCIPLINARY STUDIES OF THE CREATION OF MEANING IN LANGUAGE* 9-43 (Robert Czerny et al. trans., 1977). In this sense rhetoric represents the marriage of reason with the impulse to persuade. *Id.* at 9. Rhetoric also refers, however, to the "power to manipulate words" and to "manipulate men by manipulating words." *Id.* at 11. It is this latter sense in which I use the word. More specifically, by rhetorical strategy I refer to what Dworkin calls a "semantical" theory. See RONALD DWORKIN, *LAW'S EMPIRE* 33-44 (1986). In the debate about the foundations of law, Dworkin notes that some thinkers presuppose that lawyers all agree on the grounds of law or about the criteria for determining what law is. The presuppositions are entrenched in discourse via a set of linguistic rules which classify propositions as law or not law based on unexamined assumptions about the limits of the concept. There is a similar problem in the discourse of equality. Not only do courts presuppose that discrimination is analogous to an intentional act, but they also accept this unexamined assumption perpetuated by a linguistic convention imposed as "law."

55. See, e.g., *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989) (Marshall J., dissenting).

56. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 356 (1977) (identifying the issue as whether "the seniority system . . . ha[d] its genesis in [intentional] racial discrimination, and whether "it was negotiated and has been maintained free from any illegal purpose"); *accord* *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 905 (1989); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). To be sure, the Court frames the threshold question as one of legislative intent, more specifically, whether Congress under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1981), intended that seniority systems remain immune from claims that they perpetuate past exclusions. *Teamsters*, 431 U.S. at 345-46. However, I suggest that the underlying, deeper conflict is simply over how we conceptualize discrimination. The concept which drives *Teamsters* and the subsequent opinions is discrimination as something that has its genesis in the employer's wrongful mental state.

57. I use the terms "liberal" and "conservative" in their ordinary meaning in American political discourse. Liberals and conservatives by definition often differ on political and social issues. However, both liberals and conservatives often and perhaps typically share traditional, conven-

way. For example, Justice Marshall, in *Public Employees Retirement System v. Betts*,<sup>58</sup> although suggesting the burden of proof should be placed on the employer, spoke of discrimination as something "born of improper intent" in the mind of the employer.<sup>59</sup> In the conventional account the employer is quite simply the mother of discrimination. The rhetoric of the employer engendering discrimination—the core word-picture within Blumstein's paradigm that the employer "causes" discrimination—resonates from and is reinforced by our kinship based cognitive understandings. This harmonic confluence of legal rhetoric and cognitive structure drowns out the genuine dissonance between Blumstein's mechanical paradigm of discrimination and discrimination as it is experienced. The notion that the employer engenders discrimination comes to sound quite natural.

Thus, the doctrinal concept of the employer as the origin of discrimination generally finds acceptance as not an opinion of how discrimination occurs, but as an objective<sup>60</sup> and self-evident description of it. The employer, however, does not "objectively" exist as the source of discrimination in the social world or as a proper center of concern in discrimination law. Objectively, an employer's wrongful decisionmaking does not "engender" or "cause" discrimination. The employer who "causes" discrimination because of his wrongful state of mind is simply an imaginary composite figure, a corollary of simplistic fallacies about intent and causality embedded in the language of antidiscrimination law. The rhetorical imagery of discrimination springing fullblown from the wrongful state of mind of the employer is merely a fictional individualization of what is, in fact, a collective responsibility.

Lawyers tend to conceptualize a cause as the "necessary antecedent" to an outcome.<sup>61</sup> The employer's wrongful decision is simply not a

tional assumptions about the "correct" meaning of legal concepts and "correct" methods of legal interpretation. Cf. David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986) (using the adjective "liberal" so broadly that it embraces both politics and methodology: "Liberalism refers to contemporary legal theory and the artificial conventions [i.e., the methods] of that theory").

58. 492 U.S. 158, 182 (1989) (Marshall, J., dissenting).

59. Justice Marshall argues that "a more appropriate approach would place the burden on the employer to show that the discrimination was not born of improper intent." *Betts*, 492 U.S. at 186 n.5 (Marshall, J., dissenting).

60. By "objective" I mean that Blumstein specifically, and conventional scholars in general, assume that there is no space, nothing mediating between the idea of discrimination as something an employer causes and our actual experience. This idea, however, is nothing more than an interpretation of human experience that incredibly is not apparent as such to the interpreter. "This simply means . . . that the context is so established, so deeply assumed, that it is invisible to the observer." STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 315, 320-21 (1989); see also Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 643 (1990).

61. This is what Professor Prosser has called the "necessary antecedent" rule or the "but for" rule. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 41, at 266 (5th

cause in this sense. In post-Coasean<sup>62</sup> normative terms, causation is an instrumental fiction used to isolate conduct identified as a social evil. Even in this normative sense, the idea of the employer as the locus of discriminatory animus seems strained. The individual employer's state of mind, his malice or irrationality, is not the source of the injured victim's discrimination experience. Society, not the employer, is the mother of discrimination.

For example, in *Price Waterhouse v. Hopkins*,<sup>63</sup> a female manager named Ann Hopkins sought promotion to partner in a major accounting firm.<sup>64</sup> Ms. Hopkins, like a female version of Horatio Alger, "worked long hours, [and] pushed vigorously to meet deadlines. . . ."<sup>65</sup> One of her clients "described her as 'extremely competent, intelligent,' 'strong and forthright, very productive, energetic and creative'."<sup>66</sup> The accuracy of this assessment was evinced by her success in obtaining a twenty-five million dollar contract for the firm with the Department of State.<sup>67</sup> No other partnership candidate could equal her record of productivity.<sup>68</sup> She was, however, denied promotion.<sup>69</sup>

On the surface, the reasons for Hopkins' denial—poor interpersonal skills and an offensive manner—were neutral.<sup>70</sup> The fact that Hopkins did not fit some of her co-workers' ideas of womanhood, however, clearly contributed to this negative evaluation of her performance. One partner characterized her as "macho".<sup>71</sup> Another suggested that

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ed. 1984). The "but for" rule actually explains the majority of instances confronted in law. There is, of course, an exception in situations where an event may be the product of two concurrent causes. *Id.* But for our purposes, in the context of interrogating Blumstein's paradigm in which he has posited an inextricable nexus between employer and discrimination, the "but for" rule is perfectly appropriate.

62. Coase asks whether traditional notions of causation are really grounded in "objectivity." His discussion reveals that the traditional "neutral" analysis of causation is actually traceable to normative assumptions rather than empirically verifiable data. Empirically, cattle cause the grazing of a neighboring farmer's land no more than does the neighboring farmer who chooses to reside within grazing range of the cattle. Coase collapses the nominally empirical question of causation into the question of policy. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-13 (1960); see also Mark Kelman, *The Necessary Myth of Objective Causation Judgements In Liberal Political Theory* 2 (Dec. 1986) (working paper, on file with the University of Miami Law Library) (arguing that since parties must interact to cause harm "we can never fully causally attribute damage to any [defendant], and there is no obvious way to distinguish, on purely causal grounds, the relative contributions of two wholly necessary parties.").

63. 490 U.S. 228 (1989) (plurality opinion).

64. *Id.* at 231-32.

65. *Id.* at 234.

66. *Id.*

67. *Id.* at 233-34.

68. *Id.* at 234.

69. *Id.*

70. *Id.* at 234-35.

71. *Id.* at 235.



she take "a course in charm school."<sup>72</sup> One partner, whose job it was to help Ms. Hopkins understand her areas of weakness, advised Ms. Hopkins to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>73</sup> These comments, many of which were made in writing, went forward through two levels of administrative review, including an Admission's Committee and a Policy Board.<sup>74</sup>

The *Price Waterhouse* case vividly illustrates both the pervasiveness of stereotyping<sup>75</sup> in the workplace and how those stereotypes are often shared not only by those who set out to denigrate minorities, but also those who do not. These stereotypes created distinct barriers to Ms. Hopkins' aspirations for promotion. However, to fit within the conventional paradigm of discrimination law, the problem of stereotyping must be tied to a discrete wrongful decision.<sup>76</sup> The threshold difficulty flows from the nature of stereotyping: it is an unconscious mental process.<sup>77</sup> The stereotyping is irrational, it is wrongful, but it is not an active decision or deliberate act. In a real sense, it is more cultural artifact than individual choice.

Moreover, the multi-level nature of the selection process placed a layer of bureaucracy between the recommenders who engaged in open stereotyping and the final decisionmakers on the policy board. This allowed *Price Waterhouse* to argue credibly that the governing board rejected Ms. Hopkins as a practical matter because she did not seem to fit in.<sup>78</sup> Justice Brennan, for the plurality, found the employer liable but only through the agency of its own rhetorical strategy: the Court posited that by taking into account comments of partners who were biased, the employer inevitably considered sex.<sup>79</sup> On the contrary, it is difficult

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72. *Id.*

73. *Id.*

74. *Id.* at 232-33.

75. Stereotyping is what cognitivists refer to as a process of "categorization." Lawrence, *supra* note 33, at 337. Lawrence explains the rationale for categorization through interest theory. Categorization of women as having certain attributes—inability to be managers for example—is consistent with preserving traditional male advantage. Similarly, categorizing blacks as inferior is consistent with preserving traditional racial hierarchies: "[T]he preservation of inaccurate judgments about the out-group is self-rewarding." *Id.*

76. *Price Waterhouse*, 490 U.S. at 243-44.

77. See Lawrence, *supra* note 33, at 338-39. Lawrence argues that:

[a]ll of these processes . . . occur outside the actor's consciousness. . . . Case studies have demonstrated that an individual who holds stereotyped beliefs about a "target" will remember and interpret past events . . . in ways that bolster and support his stereotyped beliefs. . . . The decisionmaker who is unaware of the selective perception that has produced her stereotype will not view it as a stereotype.

78. She was characterized as "universally disliked." *Price Waterhouse*, 490 U.S. at 235. The Supreme Court attempts to identify the case as a mixed motive case.

79. *Id.* at 251.

to imagine a practical employer who would force an unpopular employee on a firm regardless of sex. The employer's action is not neutral, but it is, it seems, at least unthinking. It reflects not deliberate action, but rather an institutional indifference to an existing corporate culture which is structured as a microcosm of a larger culture of sexist presuppositions about the role of women.

The claim that the policy board's discriminatory animus caused Ms. Hopkins to be rejected is both artificial and abstract in this context. The exclusion minorities experience as discrimination does not necessarily hinge on the employer's wrongful mindset. Nor are the decisions of the employer inevitably the source of race or sex based constraints placed on minority aspirations. The formal decisionmaking process in this case, and perhaps generally, simply constitutes a microcosm of far more complex structures of marginalization.

Similarly, it was simply not the malice or irrationality of the employer which precipitated the discrimination against Ms. Hopkins. In a narrow sense the employer as the Policy Board acted rationally and without malice. The pain and stigma<sup>80</sup> of Ms. Hopkins' rejection occurred because of the traditional and pervasive view that minorities like Hopkins are somehow undesirable. The stigma flowed 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 as inferior or limited to a certain place. The stigma flowed 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.

To place this argument back in the specific context of race, it is possible to humiliate a black by calling him or her a "nig-r."<sup>81</sup> Indeed, the image of someone being called a "nig-r" is perhaps the paradigm of

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80. The notion of stigma—which literally refers to marking by blood—may be traced back to the biblical narrative recounting how the Jews were set apart in the land of Egypt: "And they shall take some of the blood and put it on the two door posts and the lintel of the houses . . ." *Exodus* 12:7-14. Stigma, as a term referring to a label or mark of inferiority, entered the American legal lexicon as a term to encapsulate white attitudes about blacks. See *Dred Scott v. Sandford*, 60 U.S. 393, 406, 409 (1856) (speaking of stigma as something that set the "negro African" apart, and as attaching the "deepest degradation" upon the entire black race).

81. I follow Matsuda's practice of not spelling out racial epithets. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2329 n.49 (1989); see also AUDRE LORDE, *To the Poet Who Happens to be Black and the Black Poet Who Happens to be a Woman*, in *OUR DEAD BEHIND US* 6, 7 (1986). Lorde wrote:

but I remember a promise  
I made my pen  
never to leave it  
lying  
in somebody else's blood.

our concept of a racial slur. In our historical context, the notion of blacks as "nig-rs" rationalized their segregation on trains, in schools, in housing, in medical care, and in jobs. It conjures up a stereotype of someone lazy, ignorant, unintelligent and, of course, black. The violence<sup>82</sup> of calling someone a "nig-r"<sup>83</sup> is not merely the refusal to accept someone's humanity, it is the prophecy that, as a black, one will never be accepted. It designates one's color as an unbridgeable divide, an irreducible wall. The epithet becomes a disempowering evocation of a diffuse racial mindset which will everywhere bar access to one's dreams.<sup>84</sup> The evocation depends entirely on social and historical context for its meaning.

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. As such, discrimination cannot be reduced to an isolated sequence of a wrongful state of mind leading to an inequitable decision. As the *Price Waterhouse* case shows, genuine disparities may occur without an employer's wrongful state of mind. More importantly, a single employer with a wrongful state of mind cannot cause the stigma of discrimination because discrimination can only be constituted by social practice and requires a social or historical dimension to exist.

### B. *The Speaker In the Text*

Moreover, even if discrimination could be identified as something which springs from an employer's wrongful state of mind, the problem of identifying the individual responsible, of separating the innocent from the guilty or the good from the bad, would remain. This determi-

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82. See Matsuda, *supra* note 81 (arguing that, seen in context, there is a moral equivalence between racial epithets and violence); see also Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L.J. 431, 452 (speaking of the "injurious impact" of racist speech).

83. Stigma, in the black experience, represents a notion of having one's humanity imprisoned within a set of unalterable, absolutely degrading racial attitudes. It is the perceived omnipresence or inescapability of the attitudes which creates a felt wall between blacks and a sense of personhood: "[T]o be a negro meant, precisely, that one was never looked at but was simply at the mercy of the reflexes the color of one's skin caused in other people." JAMES BALDWIN, *NOTES OF A NATIVE SON* 93 (1955). And, there is something which all black men [hold] in common, something which cut[s] across opposing points of view, and place[s] in the same context their widely dissimilar experience. . . . What, in sum, black men [hold] in common [is] their ache to come into the world as men." JAMES BALDWIN, *NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON* 29 (1961).

84. Thus, we cannot get rid of discrimination even if we could get rid of all employers who make formal decisions premised on racial animus. Discrimination is always and already within the marketplace, and it is often informal, hidden within shared stereotyping assumptions that act merely as a lens (imperceptible to the employer himself) through which minorities, in their full humanity, become invisible.

nation requires the conceit that discrimination is traceable to a discrete individual actor and a discrete individual act.

Discrimination is not a discrete event. It is a reservoir or lake<sup>85</sup> in which a myriad of social institutions from slavery to Jim Crow, from literature to science, from religious practices to housing patterns, from disparate education to disparate health care 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. Given this reservoir of disparities, there is no need for affirmative individual acts to occur.

The essence of effective racial discrimination was and remains the creation of rules and circumstances that minimize the necessity for new acts of intentional discrimination. Once such a system has been established, all that is accomplished by forbidding further intentional discrimination is interference with the ability of biased officials to fine-tune the system and adapt it to unforeseen developments.<sup>86</sup>

The focus on individual employers represents a denial<sup>87</sup> of the extent to which the past conditions our racial present. It is a refusal to read discrimination fact patterns as part of the larger historical narrative,<sup>88</sup> and a choice to read them instead as local drama or local narra-

85. The image is borrowed from Taine. See Hippolyte-Adolphe Taine, *Introduction to the History of English Literature*, in *CRITICISM: THE MAJOR TEXTS* 505 (W. J. Bate, ed., 1970) (stating that "race is no simple spring but a kind of lake, a deep reservoir wherein other springs have, for a multitude of centuries, discharged their several streams"). Taine argues that race is the source, in literature, of all structures of thoughts and feeling. *Id.* Ironically, precisely this ideology about race (which Taine expresses in exemplary fashion), having been artificially made so central to discourse, becomes the reservoir of all structure of feeling and thought. See Henry Louis Gates, *Race, Writing, and Difference*, 4 *Miss. C. L. Rev.* 287 (1984) (arguing that race, for all its power over the imagination, is a fiction).

86. Eric Schnapper, *Perpetuation of Past Discrimination*, 96 *HARV. L. REV.* 828, 863 (1983).

87. In the particular context of employment I articulate a critique stated in general terms by Professor Peller:

It is necessary to resist the image of social relations as simple products of individual intent and choice. Rather, we must recognize and articulate the social and external aspects inherent in so-called private relations. . . . "Private" relations are "private" to the extent that they are represented as not constituted or influenced by "absent" public or social forces. . . . The metaphysics of [the independent subject] denies the politics of the social construction of the self and the other. . . .

Gary Peller, *The Metaphysics of American Law*, 73 *CAL. L. REV.* 1151, 1178 (1985).

88. That which gives both our legal and political community its cohesiveness and unity is an underlying epic story or narrative. As Professor Cover eloquently wrote:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 4-5 (1983). There is the historical story of how blacks were subjected to Jim chattel slavery and Jim Crow. However, the narrative or story that structures antidiscrimination law is that the bad old days are gone and the nation has renounced this history. As part of this story the litigation by blacks recounting individual episodes of exclusion and victimization signifies nothing more than

tive about discrete persons interacting with one another with discrete legal consequences. Within the ahistorical concept of discrimination as a local narrative—or morality play—it seems natural to focus on individual actors—the plot does not make sense without them.<sup>89</sup>

Similarly, if the discrimination case is a narrative or story it must have an author, someone whose thoughts, desires and intentions give meaning and significance to the actions which take place.<sup>90</sup> The employer's intent creates the dimensions in which legal frameworks of fault and formal equality can operate. The actual mental event of the employer deciding to hire or fire the minority creates a past and a present and opens up a moral dimension—was the decision to hire or fire innocent or guilty?

This formalist<sup>91</sup> concept that a discrete person exists who, like the

an effort to rehash history. Black claimants seek in the "stories" they tell to show how their experiences as victims are reenactments of the had old days, how the present injury is shot through with the archetypal injuries of their community. They seek to use their history and group experiences as a mirror which reflects their personal situations. The employer, however, perpetually objects to the relevance of the historical narrative that blacks would like to use. He insists that we hear only the story of this particular case.

89. Addressing the contemporary novel, the French philosopher Roland Barthes wrote:

On the one hand, the characters (whatever one calls them—*dramatis personae* or *actants*) form a necessary plane of description, outside of which the slightest reported 'actions' cease to be intelligible; so that it can be said that there is not a single narrative in the world without "characters."

BARTHES, *Introduction to the Structural Analysis of Narratives*, in IMAGE, MUSIC, TEXT, at 79, 105 (1977). Barthes, argues, however, that characters or specific agents are not necessary for action to occur. Rather, discourse often drives actions in literature. *Id.* at 106.

90. Of course, in the classical conception the author created the meaning: "the *explanation* of a work is always sought in the man or woman who produced it, as if it were always in the end . . . the voice of a single person, the *author* confiding in us." BARTHES, *supra* note 38, at 143. The author thus speaks to us within the text. Modern criticism has viewed this as a "romantic" fiction. See WIMSATT & BEARDSLEY, *supra* note 38, at 6; see also FOUCAULT, *supra* note 35. According to Foucault, text in the modern view is a product of cultural conventions as opposed to the author's personal expression: "Using all the contrivances that he sets up between himself and what he writes, the writing subject cancels out the signs of his particular individuality . . . [T]he mark of the writer is reduced to nothing more than the singularity of his absence. . . . [I]t is language which speaks, not the author." *Id.* at 102-03. In the current approach to discrimination we seem to believe that there is a single person who acts or "speaks" within the narrative of a discrimination case. We think that a single employer, through his bias or lack of it, determines the meaning or moral significance of the employment action. But discrimination is, like writing, a cultural phenomenon. Antidiscrimination law has yet to appreciate the extent to which the employer, like the author, is culturally and historically situated. This area of law is not yet modern.

91. Formalism generally refers to a theory of interpretation in which a text has a single correct meaning that exists prior to the act of interpretation. See Cass R. Sunstein, *Interpreting Statutes In The Regulatory State*, 103 HARV. L. REV. 407, 416 (1989) (describing formalism by using the term textualism, and setting forth arguments in favor of textualism). Under formalism, the text constrains the interpreter so that he has no choice, i.e., there is an objectively correct interpretation. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 515 (1988). The spin I give to formalism is the notion—specious I think—that in legal interpretation there is no freedom to go outside the formal doctrine to consider social context and shared experience. Cf. H.L.A. HART, THE

author of a text, creates the discrimination case (and the corollary that the act of discrimination occurs between identifiable individual actors) in the real world dissolves in the reservoir of race. This dissolution is illustrated by the recurrence of virtually identical patterns of exclusion of blacks from the higher echelons of nearly every industry and professional field in our society.<sup>92</sup> The recurrence of these patterns of exclusion suggests a common source. It contradicts the atomistic concept of the marketplace as composed of discrete individual employers making discrete decisions. Discrimination involves not merely autonomous psychological processes but, more importantly, shared, recurring expectations, which themselves are impregnated with racial assumptions. Discrimination recurs because individual employers merely replicate the cultural assumptions they internalize. Because the process is unconscious, it does not require a dimension of conscious choice or fault as such. Racial stereotypes drawn from culture destroy not only the individuality of blacks but also the individuality of the employer. In a real sense racial stereotypes are a kind of text. As the author dies in the creative process of constructing a text,<sup>93</sup> the employer, as a rational autonomous individual, dies in the creative process of constructing in his own mind the text of a racial stereotype.

Moreover, the stereotypes and cultural assumptions rarely surface as discrete and intentional discriminatory acts, rather they emerge as part of a complex and crystalline reticulation of policies and practices such as old-boy networks or rigid qualifications which disproportionately exclude minorities. The disproportionate exclusion propagates the stereotype; the existence of the stereotype legitimates the exclusion. The individual decisionmaking process blurs and dissolves within the cultural and historical dynamism of the process. The reservoir of discrimination that results from all this has grown quite deep. Thus,

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CONCEPT OF LAW 124-30 (1961) (defining formalism as a 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) (criticizing formalism as the artificial narrowing of the range of choices).

92. Although blacks comprise 12.3% of the population, they comprise only 2.3% of the lawyers and judges, 3.3% of the doctors, 3.8% of the engineers, 4.4% of the architects, and 6.1% of the managers and administrators. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. 645, STATISTICAL ABSTRACT OF THE UNITED STATES 389 (1990). Moreover, the relatively small numbers of blacks who make it into the elite professions tend to earn less than their white counterparts. For example the median earnings for blacks in professional jobs is only 75% of the median earnings for whites. FARLEY & ALLEN, *supra* note 15, at 272 table 9.2. Similarly, the median earnings for blacks in executive, managerial, and administrative jobs is only 78% of the median earnings of their white counterparts. *Id.*

93. Foucault wrote that "[t]he work, which once had the duty of providing immortality, now possesses the right to kill, to be its author's murderer . . . the writer . . . must assume the role of the dead man in the game of writing." FOUCAULT, *supra* note 35, at 103.

neither a discrete individual employer nor a discrete individual employer's intent awaits discovery within the discrimination case. To the extent we find a discrete individual employer in these cases it is an employer conveniently constructed to serve the purposes of formalism.

The case of *Wards Cove Packing Co. v. Atonio*<sup>94</sup> illustrates the point. In *Wards Cove*, Aleuts and Filipinos challenged the de facto racial stratification in a cannery plant: whites worked in the administrative office and in other skilled positions while nonwhites were relegated to the cannery floor with inferior pay, working conditions, food, and shelter.<sup>95</sup> The exclusion of nonwhites from the higher echelons of the work force was so extreme that one justice analogized it to plantation life.<sup>96</sup>

Although there were no express policies preventing minorities from seeking noncannery jobs, a system of interlocking discretionary employer practices locked the racial stratification into place. Nonwhite cannery employees had problems applying for jobs outside of the cannery. For example, if they applied during the season in which they were working, they were not considered because the employer only accepted applications off season.<sup>97</sup> Moreover, the vast majority of the minority cannery workers had been hired locally and were from Alaska.<sup>98</sup> On the other hand, the employer recruited for noncannery jobs mainly in Washington or Oregon.<sup>99</sup> Further, there were no posted job vacancies, and no listed job qualifications.<sup>100</sup> Nonwhites neither knew when jobs were vacant nor what "qualifications" were needed for the job. Moreover, while the employer claimed that certain noncannery jobs were skilled, in many instances, this was a subjective label. The jobs often required skills that could be provided in brief training,<sup>101</sup> yet the employer provided no training to cannery employees.<sup>102</sup> Finally, there was no formal promotion system. 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.<sup>103</sup> Under this system the overwhelmingly white noncannery work

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94. 490 U.S. 642 (1989).

95. *Id.* at 647.

96. Justice Stevens wrote that "[s]ome 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"). *Id.* at 664 n.4 (Stevens, J., dissenting).

97. *Id.* at 674.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 677 n. 26.

102. *See id.* at 675.

103. *Id.* at 678 n.28.

force consistently perpetuated itself.

The difficulty for the nonwhites in this case was that the fact pattern did not fit within the common-law baselines<sup>104</sup> imposed by the Court on discrimination claims. The Court required the minorities to show a causal nexus between their exclusion from higher paying jobs and a specific set of employer decisions made. The minorities had to show that their deprivation was caused by something identifiable and concrete, such as the employer's failure to post job vacancies, or the employer's use of an informal promotion procedure. They simply could not meet this burden. The sheer informality of the practices (very little documentation of reasons for decision was available) together with a veritable kaleidoscope of interlocking obstacles militated against a showing of which specific decision caused the problem. The web of informality, the unwritten standards, the word of mouth referrals within a network of insiders, all of which ensnared the minorities in *Wards Cove*, were not the products of a specific person or a discrete set of decisions. Rather, they resulted from a complex intersection of racial stereotypes, institutional inertia, and the systematic, historic disparities in job skills between the minorities who were locked into lower paying jobs and the whites who were not. That same intersection between cultural stereotypes, historical disparities in job skills, and unwritten standards which adversely impact on minorities is typically present—to one degree or another—throughout the employment setting.

For the Supreme Court, the minorities' argument was simply incoherent. Indeed, the Court's requirement that the specific injurious decisions be identified<sup>105</sup> was no more than the Court's specification of the elements of a coherent claim. Because the minorities could not identify the specific decisions which had harmed them they could not make out a claim that was coherent for the court. From the Court's perspective, without evidence of a causal nexus between an identifiable employer decision and injury, no violation of law could *conceivably* be established.

This is, of course, circular. The Court begins with the objectivist

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104. The notion of baseline refers to the idea that legal doctrine inevitably involves foreground/background relationships. Legal concepts which 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). The concept of baseline is traced to Robert Hale's work. 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).

105. *Wards Cove*, 490 U.S. at 656-57.



assumption that discrimination means<sup>106</sup> that a particular employer decided to treat similarly situated people differently because of race. It follows within this line of reasoning that when that employer is not identified the Court concludes that there is no discrimination.

If one starts from the opposite conceptual baseline—the a priori moral assumption that segregation and subordination of minorities, de facto or otherwise, is an unacceptable result—*Wards Cove* becomes a paradigm not of an incoherent claim, but of the incoherence of formal models of proof. The *Wards Cove* paradigm demonstrates that there are many outcomes which are horribly unfair and unacceptable in moral terms because they allow the disparate treatment of minorities but which are not directly traceable to a particular actor or intent. Both the discrete employer and his “intent to discriminate” are simply unavailable.

The individual employer and his mental state, like the classical notion of the author of a work, began as and remain instrumental fictions. These devices allow courts to close the text and require plaintiffs to explain stories about discrimination within a closed framework of classical moral assumptions.<sup>107</sup> When the Court uncovers the wrongful motive and identifies the discriminating employer, the story is explained. In this case, the Court has discovered a willful violation of the law and, within the framework of the fault model, has the moral authority to take corrective action.<sup>108</sup> When the Court cannot find the discriminating employer the story changes—the plaintiff is not injured—and the story is also explained. The plaintiff may have been treated unfairly but this is not a legal claim. These mechanical explanations assume that all plaintiffs’ claims are part of a larger, never-ending story, a legitimating myth about discrimination as a problem of individual mind set, justice

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106. My approach identifies the rhetorical structure of the decision. That is, the explicit rationale of the *Wards Cove* case flows from what the court assumes about the nature of language and meaning. From the court’s “objectivist” perspective, words naturally have fixed meanings. This view leads to a rhetorical practice in which the word “discrimination” is always used as if a single, objectively correct definition applied. See D. Marvin Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams*, 25 U.S.F. L. Rev. 1, 36 (1990). That definition posits that discrimination always refers to a decision to treat similarly situated individuals differently. Having so fixed the parameters of the discrimination concept, the discrimination inquiry becomes the juridical equivalent of a Procrustean bed. Those experiences which don’t fit must be stretched, distorted, or cut off altogether.

107. See BARTHES, *supra* note 38, at 147 (warning that this closure effect is the *raison d’être* of the author’s existence).

108. See Paul Gewirtz, *Choice In the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 734 (1986) (stating that a finding of liability “unleashes a transitional regime during which courts temporarily adopt remedial rules that would be inappropriate if discrimination had not occurred and that will become inappropriate once the effects of discrimination have been eliminated”).

as procedural fairness and equality as formal equality only. The Court has heard the plaintiff (provided procedural fairness). The Court has celebrated our commitment to equality (albeit a formal version of it), and the Court implicitly has affirmed the idea that racial unfairness is not the norm, not a routine product of the decisions employers make, but something resulting from the particular individual's bad intent.

The figure of the individual employer, which began as a myth, must end as such within the illuminating fact pattern of *Wards Cove*. The complexities of societal discrimination and historical inequalities are not disentangled, nor are they capable of being disentangled by searching for an identifiable decisionmaker at which to point a finger.<sup>109</sup> The individual employer, seemingly so clearly in place in the text of a discrimination case, blurs and disappears into institutional inertia, into a cultural ethos of racial stereotypes, into the historical reservoir of race.

### III. THE EMPLOYER AS METAPHOR

It is not enough to know that the employer is an imaginary figure; it is essential to know why we have imagined him.

The fiction of the employer can only be understood in terms of a battle over the boundaries of discrimination. The employer is quite simply a rhetorical device by which one side of the conflict seeks to locate the discrimination within the confines of a grand theory about individual rights.<sup>110</sup> This battle over the conceptual boundary of discrimination is equally a battle over the legitimacy of a certain ordering of the social world. The stakes are not only whether or not the oppression of minorities can be coherently conceptualized but also whether or not the classical legal world view, in which equality claims have been confined, will persist. This section will sketch the outlines of the theoretical debate and then demonstrate how the fiction of the employer privileges one side of the debate and suppresses the other.

Discrimination is a concept located at the intersection between moral philosophy and law. It is a normative description of events<sup>111</sup>

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109. Professor Patricia Williams eloquently made the point that discrimination law, in its preoccupation with identifying specific violators, amounts to an ongoing effort to place blame on individuals. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

110. The difficulty with this grand theory, which reposes at the core of cases like *Wards Cove*, and which empowers the employer, is that it denies the experience of minorities; it denies that anything which cannot be traced to the individual employer's will falls within the category of discrimination.

111. Geertz calls this thick description. The idea is that we assume a one to one relationship between interpretation of phenomena and phenomena that exist within our cultural ethos. GEERTZ, *supra* note 36, at 3-30. As the workman's tool becomes part of his arm, so do the mechanisms of interpretation and the underlying value assumptions which ground our interpretations. See WIL-

rather than an observation of an empirical fact; discrimination is to what happens in the workplace as obscenity is to what happens on a stage.

Two great diverging concepts of discrimination compete to determine the content of our civil rights discourse.<sup>112</sup> One concept is liberal, one conservative, one pragmatic, one rigidly contractarian. One is rooted in the gritty realism of social context, one in formal legal principles. One has as its goal "real equality," one only "formal equality." The fault line that separates the two concepts of discrimination tracks the dichotomy between the historical and social experience of blacks and the world of legal forms.

#### A. *Real Equality: The Historical Group Model of Discrimination*

From the baseline of the historical experience of blacks, discrimination appears as a monolithic pattern of systematic exclusion.<sup>113</sup> Blacks are excluded as a group, on the basis of their race from every endeavor germane to life. Moreover, from the standpoint of blacks, the significance of racial distinctions as racism flows not from the individual instance of a denial of a job, but from the significance of the denial within a social context which connotes inferiority and stigma. From this historical and experiential vantage point, racial unfairness results from the existing pattern of racial exclusion which is coextensive with the specific exclusion.<sup>114</sup> Blacks speak of individual discrimination, but, as has

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LIAM S. HAMRICK, AN EXISTENTIAL PHENOMENOLOGY OF LAW: MAURICE MERLEAU PONTY 138 (1987). We cease to be aware of the operation of these background assumptions.

112. See generally Fiss, *supra* note 22, at 237-49 (presenting the seminal insight that two competing moral norms exist within the concept of equality). I identify the dichotomy as that between "real equality" and "formal equality," while Fiss distinguishes between "equal treatment" and "equal achievement." Cf. Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality* and Weber, 59 N.C. L. REV. 531, 540 n.33 (1981) (distinguishing between "freedom now" and "status quo" approaches); Paul Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (distinguishing between discrimination as a "process" and as a "result"); Gewirtz, *supra* note 108, at 729 (differentiating between "purposeful discrimination" and "disadvantage").

113. Through an historical lens the problem of racism toward blacks appears primarily as an institution, something grounded in the very structure of society. See JOHN BLASSINGAME, *THE SLAVE COMMUNITY* (1979) (examining slavery as a culture); EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974) (portraying antebellum Southern plantation life); J. SAUNDERS REDDING, *THEY CAME IN CHAINS: AMERICANS FROM AFRICA* (rev. ed. 1973); see also W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935) (detailing the plight of blacks from 1860-1880); JOHN FRANKLIN, *RACE AND HISTORY: SELECTED ESSAYS 1938-1988*, at 132-52 (1989) (exploring the extent to which legalized segregation created a distinct world for blacks, a world inferior to that of whites); A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR: THE COLONIAL PERIOD* (1978) (examining the experiences of slavery and freedom in colonial America through the lens of legal history).

114. Professor Alan David Freeman writes that:

From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective

been earlier pointed out, it is an evil that takes its meaning from a somber mosaic of oppression that stretches across the social landscape and deep into history.

In the idiom of the black community, this concept of discrimination as a social practice was expressed through the image of "the white man."<sup>115</sup> This figure personified whites as a group, and implicitly portrayed racial discrimination as a group activity. While the figure of the white man does not appear explicitly in legal discourse, the normative baggage which he carried has found a theoretical vehicle in Professor Fiss's concept of group rights.<sup>116</sup>

From this perspective society has been the wrongdoer, rather than a particular employer, and it is a social phenomenon which must be halted rather than a particular act.<sup>117</sup> Thus, when discernable patterns of racial exclusion exist, this approach emphasizes the development of adjudicative frameworks which produce desired results for society as a whole. This emphasis produces a hierarchy of values in which social goals trump individual rights and substantive results outrank process

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conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual.

Freeman, *supra* note 31, at 1052-53.

115. 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., W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 136 (20th ed. 1935) (speaking of the white man as he who binds both blacks and himself with the "Black" and the "White Belt"); MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 30 (1965) (speaking of the psychological conditioning of blacks to racial abuse as an ongoing practice of the white man); HUEY P. NEWTON ET AL., *THE BLACK PANTHER LEADERS SPEAK* (G. Louis Heath ed., 1976). Although generally speaking of the source of oppression in political and economic terms, an underlying metaphor of racism as a cultural form surfaces in the text of what was known as the Black Panthers' ten-point program: "We want an end to the robbery by the white man of our Black community." The program then goes on to talk about "the racist" American government and "The American racist." NEWTON, *supra*, at 3; see also DEREK WALCOTT, *Ti-Jean and His Brothers*, in *DREAM ON MONKEY MOUNTAIN AND OTHER PLAYS* 81, 98 (1970). Walcott depicts the West Indian folk tradition in which the existence of evil in society is explained through the figure of "the white man," who appears literally as "the devil." However, "evil" here concerns something specific: it seems to mean man's inhumanity to man, or more specifically, white society's inhumanity to blacks. The mythology is an assimilation of a transnational black concept of racial politics into symbolic terms.

116. Fiss has argued, proceeding from an ethical concern against caste, that the rights of blacks as a group are prior to those of individual employers when they diametrically conflict. He argues for a hierarchy of values in which the need to address historical imperatives takes precedence over traditional contractarian precepts concerning individual rights. Fiss, *supra* note 22.

117. See *United Steelworkers of America v. Weber*, 443 U.S. 192 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In all of these cases there is a deep concern for blacks as a group being walled off into a separate caste. These cases have their foundation in historical and social interpretations, at least as much as in the specific facts raised in the individual cases. The court normatively focuses on a concern about subordination of groups rather than on the equities between discrete disputants.

values.<sup>118</sup> Moreover, because this approach seeks to redress historical patterns of exclusion and caste, it forces the court to consider social context and social realities.

In a constitutional context<sup>119</sup> this concept of discrimination as an historical, group wrong motivated the court in *Brown v. Board of Education*.<sup>120</sup> This same historically grounded notion of discrimination reappeared in the Title VII context in *Griggs v. Duke Power Co.*<sup>121</sup> The

118. The substance/process dividing line between theories of equality tracks the dividing line between theories of the state. Process-based theories assume a state which is neutral as to both public values and outcomes of public debate. The state, through the lens of process-based theory, is essentially a structure or framework for discourse empty of all but the grand procedural design. See Kenneth Casebeer, *Running on Empty: Justice Brennan's Plea, the Empty State, the City of Richmond, and the Profession*, 43 U. MIA. L. REV. 989 (1989). In this model government strives not for justice in a broad sense but for justice as fairness which, rather than guaranteeing particular results, guarantees that from an original position all outcomes are fair. For the seminal work on this model, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). Equality of opportunity, as the legitimate end of antidiscrimination guarantees, appears as the marketplace analogy to justice as fairness in the political sphere.

119. There is no bright line in my view between the theoretical debate occurring within Title VII doctrine and constitutional law. Technically, of course, constitutional claims only arise when the state acts. See *The Civil Rights Cases*, 109 U.S. 3 (1883). Moreover, Title VII focuses solely on employment while equality claims under the Constitution fan out over a rainbow of concerns. There are a host of other technical differences. But at a deeper level, the level at which we attempt to conceptualize the meaning of equality, the two discourses are essentially continuous. For example, the discourse about equality that occurred in the early constitutional cases frames our current discussion. Also, as we see below, the assumptions of the intentionalist model, the baseline of contractarian values, and the use of formalism as a means of interpretation transcend nominal boundaries of statutory and constitutional context.

120. 347 U.S. 483 (1954) (*Brown I*). There are two dimensions to the *Brown* Court's real equality approach. First, the *Brown* Court shifted the mode of reasoning from the formalistic, text based, mechanical jurisprudence of the past to a contextual, socially grounded approach. In *Brown*, sociological data scorned as irrelevant by formalist thinking became not only relevant but crucial. The focus of the inquiry shifted from a search for what the Fourteenth Amendment meant—the Court in *Brown* simply said that the actual intent of the Fourteenth Amendment is unclear—to a concern about social imperatives. The Court tried to protect the "hearts and minds" of blacks from the destructive effects of segregation. *Id.* at 494. There is a strong instrumentalist theme here. For the *Brown* Court, regardless of the Fourteenth Amendment's original intent, the continuation of state enforced segregation was an unacceptable result.

Second, the *Brown* Court rejected the idea that equality or equal protection should be thought about in merely positive legal terms empty of all but formal, negative prohibitions. The *Brown* Court developed the notion that constitutional claims to equality have normative as opposed to merely legal content: equality demands an inquiry into what is right as opposed to what the law requires. In *Brown* the Court defined equality in terms of America's highest moral aspirations. It interpreted equality as a demand to find congruence between the promise of racial fairness located in the formal text and the contradictory historical experience of blacks. See Jones, *supra* note 106.

121. 401 U.S. 424 (1971). Doctrinally, the Court in *Griggs* held that a test or job prerequisite that disproportionately excluded blacks was presumptively illegal. Thus the good faith or bad faith of the employer was irrelevant. The court reached this holding despite ambiguity in the text of the act about the applicability of this form of exclusion. The *Griggs* opinion, like the *Brown* opinion, finds its authority less in legal text than in an ethical concern about the historic predicament of blacks. The *Griggs* Court, in striking down a high school diploma requirement which disproportionately excluded blacks, made reference to the history of segregation in education, and, implic-

historical or group model provides a mechanism for conceptualizing a way out of the "counter-majoritarian difficulty"<sup>122</sup> which civil rights laws present on the surface. Conceptualizing discrimination as an historical and group problem allows for a linkage between antidiscrimination law and national progress. Under this approach, equality becomes a path,<sup>123</sup> while discrimination, as a group practice, becomes a "barrier" which prevents advancement along the path.<sup>124</sup> Thus, through the lens of the group model, discrimination is a barrier not only to the advancement of minorities, but also to the advancement of legitimate national ideals.

Moreover, there is a notion of a final destination: the goal of discrimination laws is to eradicate discrimination, to achieve "real equality,"<sup>125</sup> to usher in a society where the "sons of slaves and the sons of

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itly, to the chronic caste-like status of blacks. *Id.* at 430. In *Griggs* as in *Brown* there was an overarching concern with identifying and enunciating public values and responding to moral imperatives in the context of race.

122. The term "counter-majoritarian difficulty" originated with Professor Bickel. See BICKEL, *supra* note 25, at 16. Civil rights laws are counter-majoritarian in the sense that they limit the "liberty" of whites—the majority—to refuse to hire or associate with minorities. However, the tension is illusory in the sense that core egalitarian norms within the concept of democracy render a claim to a "liberty to discriminate" a contradiction in terms. Bickel argues that protection of minorities is necessary for legitimization of democratic order. *Id.*; see also Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 280-89 (1983) (speaking of the indispensability of the antidiscrimination principle to the creation of a community).

123. Much of legal language depends on an underlying metaphorical structure for its coherence. This article noted earlier the use of notions of kinship as a way of modeling complex legal relationships. Another source of the law's metaphorical structure is our physical experience. See Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2230 (1989). Winter writes that "[T]he human mind employs basic, embodied experiences to construct more elaborate and abstract social meanings." *Id.* at 2231. The prototypical experience of moving through space, down a path for example, recurs as a means of constructing many legal concepts. Adjudication, like equality, is also a path: there are judicial "proceedings"; the plaintiff must carry a "burden"; the parties cite supporting grounds for their "motions." *Cf. id.* at 2232. Thinking of legal concepts as a patchwork of cognitive imagery is helpful because it demonstrates that law in essence is a concentration of symbolic forms, like poetry or music.

124. The Court in *Griggs* used this terminology:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. . . .

. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

*Griggs*, 401 U.S. at 429-31.

125. In speaking of eradication of discrimination I include an aspiration within the discourse of equality occurring in society at large. The legal text may help shape this discourse, but the larger discourse about the nature of equality is at least as likely to shape our laws. The social debate about the meaning of equality has always clearly included the goal of eradicating discrimination, but that goal has emerged only tenuously as a competing interpretation of equality within the doctrinal debate.

Nonetheless, in the past, the Supreme Court expressly enunciated the goal of actually eradi-

slaveowners will be able to sit down together at the table of brotherhood."<sup>126</sup> There is an undergirding, anchoring vision<sup>127</sup> of what a just society would be like. Thus, the idea of equality as a path relates to a linear notion of history in which America's effort to eradicate discrimination is a point in the struggle to move beyond the moral incongruence of the past toward its own modernity.

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cating discrimination. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988) (plurality opinion); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (determining that "the purpose of Congress [was] to assure equality . . . and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments"); *Griggs*, 401 U.S. at 429.

126. Martin Luther King, Jr., *I Have a Dream*, speech given in Washington, D.C. (Aug. 28, 1963) in 1 *ENCYCLOPAEDIA BRITANNICA EDUCATIONAL CORP., THE NEGRO IN AMERICAN HISTORY* 175 (1969):

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 on the red hills of Georgia the sons of former slaves and the sons of former slaveowners will be able to sit down together at the table of brotherhood.

127. The notion of "real equality" refers to something incapable of being conceptualized merely as a negative prohibition or rule. Rather, it has always referred to a grand, poetic image of a just society in which nothing mediates between legal institutions and the normative sphere. To capture the purity of the real equality ideal, King spoke of his "dream." *Id.* To convey the same idea another poet combined the images of an enchanted creature, a heavenly wood, and a notion of rebirth:

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

Yet another poet tried to capture the real equality aspiration in a vision of a new world:

I dream a world where man  
No other will scorn,  
Where love will bless the earth  
And peace its paths adorn.  
I dream a world where all  
Will know sweet freedom's way, . . .  
A world I dream where black or white,  
Whatever race you be,  
Will share the bounties of the earth  
And every man is free, . . .

Langston Hughes, *I Dream A World* in *AMERICAN NEGRO POETRY*, *supra*, at 71.

B. *Formal Equality: The Employer-Centered, Conventional Model of Discrimination*

The formal equality model of discrimination seeks to remove discrimination from its setting within broad historical and social patterns, from its moorings in the actual experience of blacks, and confine it to the narrow world of legal forms and classical legal values. The employer literally takes us from the real world to a static world empty of all but formalism. The employer, much like Louis Carroll's white rabbit, takes us to an improbable place; he locates us within an abstract, one dimensional, nineteenth century theory in which collective responsibility for discrimination is unreachable.

The employer is quite simply a metaphor, a personification of complex social interactions, a proxy for society itself. Aristotle spoke of metaphor as transposition of the name.<sup>128</sup> Discrimination is, at least from a victim's perspective, an historical and social phenomenon. However, by speaking of discrimination as a product of the employer and in turn the employer's wrongful intent, we transpose the name of a social event to a psychological one. The notion that it is the employer's intent that matters requires the assumption that the etiology of discrimination lies in subjective decisions of discrete individuals. Implicitly, this construct refers to the enlightenment idea that human subjectivity creates human identity and worth.<sup>129</sup> *Cogito ergo sum*: I think therefore I am.<sup>130</sup>

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128. In Aristotle's deceptively simple characterization metaphor consists of giving the thing a name that belongs to something else; the transference of name flows either from genus to species, or from species to genus, or from species to species, or on grounds of analogy. Thus, all metaphors become what Ryle called "category mistake[s]." GILBERT RYLE, *THE CONCEPT OF MIND* 16 (1949). The significance of this seeming mistake is that metaphors have as their ambition a redescription of reality:

In giving to a genus the name of a species . . . and vice versa, one simultaneously recognizes and transgresses the logical structure of language[.]

[I]t involves taking one thing for another by a sort of calculated error . . . . To affect just one word, the metaphor has to disturb a whole network by means of aberrant attribution.

[M]etaphor destroys an order only to invent a new one; and that the category's mistake is nothing but the complement of a logic of discovery . . . . [M]etaphor bears information because it "redescribes reality".

RICOEUR, *supra* note 54, at 21-22.

129. See BARTHES, *supra* note 38, at 142-43.

130. RENÉ DESCARTES, *A DISCOURSE ON METHOD* 28 (1912). Classical liberal thought, of which traditional equality jurisprudence is a subset, is largely premised upon this Cartesian postulate about individual subjectivity as something objective. This contrasts with the "modern" notion of the individual as a mere construct (a metaphor in Peller's terms):

The individual is not to be conceived of 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 consti-



Thus the employer fiction assumes what Peller calls a "transcendental subjectivity"; he views "[i]ndividual subjects as [the] ultimate source of social relations, as prior to and constitutive of objective social structures."<sup>131</sup> In other words, the metaphor of the employer indefeasibly entrenches the autonomous individual in the discourse of discrimination law.

Once the employer as "autonomous individual" is smuggled into the discourse, he brings with him ancient common-law approaches to individual liberty.<sup>132</sup> Most significant is the common-law notion that a private sphere for the employer exists coextensive with the ideal of liberty of contract.<sup>133</sup> Within this private sphere the law imposes no public duties<sup>134</sup> or objective moral standards<sup>135</sup> on the employer. Rather, equilibrium is maintained by protecting the complete subjectivity<sup>136</sup> and

tuted as individuals. The individual is not vis-a-vis power; it is, I believe, one of its prime effects.

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

131. Peller, *supra* note 87, at 1154.

132. See e.g., *Coppage v. Kansas*, 236 U.S. 1, 11 (1915) (invalidating a statute aimed at protecting union members from discrimination on the ground that the law violated the "liberty" guarantee of the due process clause); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a New York law providing maximum hours and working conditions for bakers because this type of socioeconomic legislation interfered with individual "liberty" as protected by the due process clause of the Fourteenth Amendment).

133. Essentially, under the common law, relations between employer and employee or master and servant were analyzed as matters solely between the parties themselves. See *Lochner*, 198 U.S. at 61; 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 (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 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).

134. One theme of the common-law approach assumed the inconsistency of justifying legislative encroachments upon the "private sphere" on grounds of public duties or public interest. The Court thus presumed that socioeconomic legislation resulted from partisan motivations:

[I]t is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread. . . .

[F]rom the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.

*Lochner*, 198 U.S. at 62, 64 (emphasis added).

135. The common-law approach also included a deep moral skepticism about the project of objectively determining what working conditions were fair. For the Court in *Lochner*, such value judgements were inevitably relative and speculative:

[I]t may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. . . . There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.

*Id.* at 59.

136. The impulse to protect the traditional prerogative of the employer to be free from exter-

privacy of the employment relationship. This laissez faire attitude toward the employment relationship finds expression in the traditional rule that the employer may fire an employee for a good reason, a bad reason, or no reason at all.<sup>137</sup> This framework in turn rests on basic tenets of natural law. The central premise is that a court can only take from an individual employer and give to a black individual where there is a showing of individual wrongdoing on the part of the employer.<sup>138</sup> This premise necessarily requires a particularized inquiry.

This natural law framework which the employer brings with him, injects a pervasive rhetoric of innocence<sup>139</sup> into the discrimination discourse. The rhetoric of innocence typically occurs in the context of affirmative action<sup>140</sup> or challenges to seniority systems.<sup>141</sup> In these

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nal controls in his decisionmaking process exerts a powerful pull against the very idea of antidiscrimination law. Once the traditional prerogative of the employer is smuggled into the discourse, determining the meaning of Title VII becomes at each juncture a balancing test. A court then weighs the desirability of protecting minorities against the undesirability of intruding upon traditionally forbidden ground. 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, 239 (1988) (plurality opinion) (referring to the "balance between employee rights and employer prerogatives").

137. *See* Klare, *supra* note 133, at 1362; *see also* H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877).

138. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). The court stated that: An act of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of legislative authority. . . . [A] law that takes property from A and gives it to B: It is against all reason and justice. . . they cannot change *innocence* into *guilt*; or punish *innocence* as a *crime*.

139. *See* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990). For Ross the "rhetoric of innocence" is an appeal to the emotionalism of whites through an implicit narrative about "the innocent white victims." These figures, fictional figures according to Ross, are the mechanisms which bring into the discourse the cultural baggage of whites—their resentments and fears as whites. *Id.* at 299-301.

140. The figure of the "innocent white victim" enters the caselaw in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J.) In *Bakke*, which addressed an affirmative action program in the context of medical school admissions, Justice Powell spoke of "innocent persons . . . asked to endure . . . [hardship as] the price of membership in the dominant majority." *Id.* at 294 n. 34 (opinion of Powell, J.). This rhetoric carried over into the employment context in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In *Fullilove*, Chief Justice Burger, although upholding a congressional affirmative action plan, required that such plans be narrowly tailored and that the burden on innocent parties not be unduly heavy. *See also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion). In *Wygant*, whites challenged a collective bargaining agreement implemented by a local school board which required blacks to be retained in favor of more senior whites. Justice Powell, echoing Chief Justice Burger, expressed his reservations about a "remed[y]" that placed a "burden" on "innocent persons." *Id.* at 281.

141. Seniority systems, which operate via a last-hired, first-fired principle, often operate to freeze the status quo and perpetuate past discrimination. *See* *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In attempting to defend these systems, despite their racially destructive effects, defendants have often explicitly relied upon the rhetoric of innocence. *See* Reply Brief of the EEOC at 19, *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (No. 84-1656) (arguing that "according such preferential treatment to persons who have

settings, the natural law framework becomes the platform for an inverted moral world which paints whites as "innocent"<sup>142</sup> victims and blacks as undeserving recipients of benefits.<sup>143</sup>

Further, defining discrimination as a result of the autonomous employer's individual intent empties discrimination of its substantive content, leaving only a procedural shell. Thus, discrimination occurs only when an individual employer *decides* to treat two employees differently because of race, sex, or some impermissible consideration. The rule imminent within this formal equality model of discrimination is that "like should be treated alike."<sup>144</sup> Because discrimination only occurs when these tainted decisions *qua* decisions are made, this model implies that a deliberative process is a necessary element. Thus, procedural or formal equality becomes the goal, not real equality.

Under this procedural approach discrimination law becomes an atomistic, rather than a regulatory enterprise.<sup>145</sup> Its sole reason for being

no claim to a 'rightful place' in the employer's workforce necessarily deprives innocent third parties of *their* 'rightful place.'"); see also Brief for the Petitioner at 11, Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 467 U.S. 561 (1984) (No. 84-1999) (arguing that "[b]y awarding superseniority to persons not shown to have been victims of discrimination at the expense of innocent nonminority firefighters, the District Court has well exceeded the authority granted by Title VII").

142. Of course, the word "innocent" conveys a particularly narrow concept of responsibility. Innocence refers to the absence of intentional wrongdoing on the part of individual whites. There is no inquiry into whether these same individuals have benefited from the privilege associated with being white. See Ross, *supra* note 139, at 300-01.

143. The relegation of blacks to the role of nonvictims flows from a remorseless application of the fault model: "Because an affirmative action plan does not require particular and individualized proof of discrimination, the rhetorician is able to . . . deny the victim status of [blacks]. . . . 'Victim' status thereby is recognized only for those who have been subjected to particular and proven racial discrimination."

*Id.* at 301.

144. This concept of the antidiscrimination principle generally is accepted as self-evident. See, e.g., *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring) (characterizing the inquiry in a discrimination case as whether or not blacks are treated like "similarly situated" white employees); see also Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-40 (1982) (assuming that "equality" means "people who are alike should be treated alike"). It is no wonder that the notion of equality is empty for Professor Westen because he chooses to view the discourse of equality from the barren landscape of a procedural model of equality. All interpretations "endow some perspectives, rather than others, with power." Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 94 (1987). The "like should be treated alike" paradigm, far from being neutral, focuses on discrete decisions of individuals by suppressing an interpretation of equality focused on the condition of blacks as a group and a concern that they not be oppressed. Cf. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing that equality represents a substantive right of minority groups not to be subordinated by the majority).

145. The impulse to think atomistically about legal problems is linked to a limited concept of language, called the referential theory of meaning. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. 1970). Under this theory of language words refer to specific things, e.g., specific decisions and intentions. Words resemble points in space, dimensionless and unconnected to a grand scheme. This concept of language finds expres-

is to provide a framework for policing violations of law.<sup>146</sup> It follows that attempting to use discrimination law to combat societal discrimination seems sentimental, mystical, and finally nonsensical.<sup>147</sup> Through the lens of the formal equality model, the arc of the moral universe is systematically skewed toward the status quo. Set aside programs that affirmatively redress the chronic absence of blacks from certain industries appear as discrimination because they involve a *decision* to consider race.<sup>148</sup> Conversely, chronic stratification of minorities created by the cumulative effect of societal racism appears as an irrelevant fact—not discrimination—because it is not associated with a discrete *decision*.<sup>149</sup>

The metaphor of the employer also works to transpose a legal category and a moral one. Because the employer is positioned as the locus of the discriminatory act, the employer makes possible an easy analogy between discrimination and a tort,<sup>150</sup> or crime.<sup>151</sup> For example, our no-

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sion within the formal equality model. In contrast, to comprehend the real equality model requires an idealistic notion of language. Words are merely the skin of grand ideas which are integral to a grand vision of a world without prejudice or racism. See generally Jones, *supra* note 106, at 30.

146. See Freeman, *supra* note 31, at 1054 (stating that “antidiscrimination law has thus been ultimately indifferent to the condition of the victim; its demands are satisfied if it can be said that the violation has been remedied”).

147. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 497-98 (1989) (O'Connor, J., concurring) (stating that “societal discrimination [is] an amorphous concept of injury that may be ageless in its reach into the past . . . and timeless in [its] ability to affect the future” (quoting *Bakke*, 438 U.S. at 307)); *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (stating in the related context of voting rights that “[societal] discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful”).

148. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting) (stating that “this language prohibits a covered employer from considering race when making an employment decision, whether the race be black or white”).

149. Thus, no matter how extreme the statistical picture, unless the exclusion of blacks—the injury—can be traced to identifiable decisional causes, there is no “discrimination.” See *Croson*, 488 U.S. at 479-80. Despite the general history of segregation in Richmond, Virginia, and despite the extreme paucity of blacks (0.67%) in the construction industry, the Supreme Court held that the city lacked a sufficient basis to have legislated an affirmative action plan. For a critique of this strict causal approach, see generally Williams, *supra* note 28. This decision implies that social inequities between blacks and whites are matters of fate. Others have also taken this position:

I believe that an individual's moral claim to compensation loses force as the nature, extent, and consequences of the wrongs inflicted become harder to identify and as the wrongs recede into the past. . . .

Indeed, as claims to compensation based on the past injustices of human institutions become attenuated, they begin to compete with claims based on the vagaries of fate. Brest, *supra* note 112, at 42. See also Lawrence, *supra* note 33, at 325 (arguing that courts sometimes assume that black exclusion is merely the result of black inferiority).

150. See, e.g., *EEOC v. Vucitech*, 842 F.2d. 936, 944 (7th Cir. 1988) (speaking of both “common law torts” and “statutory torts such as discrimination in violation of Title VII”); see also Mark Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Cases*, 68 N.C.L. Rev. 495, 537-38 (speaking both of “constitutional” and “statutory torts” of discrimination).

151. The document initiating the discrimination investigation is called a “charge.” See EEOC Compl. Man. (CCH), ¶ 152. Moreover, courts often refer to an employer liable for discrimi-

tion of a tort grows out of basic common-law doctrines that require a showing of a causal nexus between a wrongful state of mind and a discrete injury.<sup>152</sup> Similarly, discrimination becomes a particularized wrong with identifiable actors, discrete decisions, discrete injuries and a causal nexus between the employer's decision and the injury.<sup>153</sup> This concept of discrimination, narrowly confined within the contours of traditional legal categories, obscures or denies the idea of discrimination as an ongoing legacy of societal wrongdoing.

Thus, the Court, approaching discrimination as a traditional legal category, imposes an a priori rule that there be symmetry between the identifiable legal violation and the legal remedy.<sup>154</sup> This requirement of symmetry limits the concept of discrimination to a narrow inquiry about the precise scope of the legal wrong and the precise scope of a remedy.<sup>155</sup> Normative questions about the need to help minorities are foreclosed by positive<sup>156</sup> legal constraints on authority to intervene.

nation as "guilty" of discrimination. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Croson*, 488 U.S. 469. Further, legal scholars often speak of employers who discriminate as "perpetrators." See, e.g., Freeman, *supra* note 31, at 1052-57; see also James Liebman, *Desegregating Politics: "All Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1502 (1990) (speaking of the court's aversion to a theory of remedies designed to "punish the perpetrators" of discrimination).

152. As in a common-law tort, discrimination requires a causal nexus between intent and the claimed injury. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

153. See *supra* note 105 and accompanying text.

154. See *Wygant*, 476 U.S. at 283-84 (overturning a city minority set-aside plan because there was a lack of fit between the identifiable legal wrong and the remedy). This rule is by no means limited to a constitutional setting. See, e.g., *Local 28 of the Sheet Metal Worker's Int'l Ass'n v. EEOC*, 478 U.S. 421, 479-81 (1986) (requiring remedies for discrimination to be "narrowly tailored" to the violation).

155. Mark Kelman, *Taking Takings Seriously: An Essay For Centrists*, 74 CAL. L. REV. 1829, 1847-48 (1986) (reviewing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)). Kelman argues that "[w]e recognize what rights we have simply by seeing what remedies we are entitled to. Legal thought distorts our perception because we . . . come to believe there can be no problem, no significant interest to vindicate unless we can imagine how a legal right might vindicate it." *Id.*

156. The intentionalist model repeatedly emphasizes that the discrimination concept lacks moral content. Concomitantly, discrimination adjudications should occur devoid of moral inquiry. This positivation of the discrimination concept flows directly from the categorization of discrimination as a "legal" term. Once we locate discrimination within the law category, we become enmeshed in the classical concept of law which presupposes a dichotomy between law and morals. The classic work in this field is JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (1832), which advocates law as the command of the sovereign. Austin's basic ideas resonate in "modern" efforts to determine what the legislature really intended or commanded. See also HART, *supra* note 91 (arguing that law is determined in terms of rules of recognition). As Professor Dworkin has shown, however, positive theories do not account well for what judges do and, thus, amount to "semantic" theories of law. See DWORKIN, *supra* note 54, at 31-35.

The persistence of the classical view is linked historically to the post-*Lochner* view that objectivity in the area of morals was unobtainable. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 904 (1987). As a corollary, this moral relativism posits that public values are for politi-

Both judicial and legislative efforts to help blacks are forbidden unless they are precisely congruent with the common-law baselines of the model.

Finally, the metaphor of the employer transposes the categories of ideology<sup>157</sup> and fact. The employer leads us unerringly to the concept of discrimination as an intentional act of an individual. This notion of intentional discrimination, which exists only as a construct or corollary of the formal equality model, is metaphorically transformed into a concrete "fact".<sup>158</sup> The analogy of discrimination to a tort or crime implies that discrimination is a discrete event, something that did or did not happen, like a theft or an assault.<sup>159</sup> This is a classic instance of reification.<sup>160</sup> By making discriminatory intent appear as a factual quantity or real thing, the formalistic model limits the nature and scope of our inquiry into discrimination claims.

We do not hear a discrimination claim as an expansive call to re-

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cal rather than legal determination. See 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI: 1916-1935 at 249 (Mark De Wolfe Howe ed., 1953) (stating that "if my fellow citizens want to go to Hell I will help them. It's my job."); cf. Drucilla Cornell, *Toward A Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 300 (1985) (viewing the problem as arising not from legal discourse but from culture, from the social malaise of "decisionism"). Cornell explains:

Decisionism is the belief that moral propositions are founded only on the choices or commitments of the individual. From the decisionist perspective no rational ground for any decision exists, nor is there a rational standard by which to judge divergent choices . . . reason cannot help . . . select specific values . . . it can only serve as a means to their attainment.

*Id.* Thus, the decisionist perspective believes these are instrumental reasons for retaining the law/morals dichotomy. In this view the dichotomy retains an objective foundation for legal decision-making. Ironically, this positivist framework cuts against itself by raising serious questions about its own legitimacy. See JUROEN HABERMAS, *THE LEGITIMATION CRISIS* 98 (Thomas McCarthy Trans., 1975). According to Habermas, "[t]he positivization of law means that legitimate legal validity . . . can be obtained for any given contents, and that this is accomplished through a decision which confers validity upon the law and which can take the validity from it. Positive law is valid by virtue of decisions." *Id.* (quoting N. Luhmann, *Positives Recht und Ideologie*, in *SOZIOLOGISCHE AUFLÄRUNG* 180 (1970)).

157. See GEERTZ, *supra* note 36, for a discussion of the concept of ideology; see also HAY ET AL., *supra* note 36.

158. "[T]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." *Edington v. Fitzmaurice*, 29 Ch. D. 459, 483 (1885).

159. The notion of discriminatory intent proceeds from an implicit objectivist understanding of language. The notion of discriminatory intent implies first that discrimination is akin to the intent to throw a rock or commit a fraud, and second that discrimination produces a discrete, objective harm or injury.

160. Reification refers to the effect of metaphorical imagery which makes indeterminate or abstract concepts appear as real "things." See Peller, *supra* note 87, at 1206; see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2416-17 (1987) (exploring the ways language limits the horizon of our perceptions of the social world).

store a moral equilibrium. If so, the human imperatives would send us outward to a historical and normative inquiry to determine an acceptable outcome. The right result would be the arbiter of the rule. Rather, by accepting discriminatory intent as a kind of historical fact, we direct courts to look inward, to an inquiry into the employer's mental state. We do not search for values in which to ground the results of a particular case, we search for "the facts" of what happened in the employer's mind. This reification suppresses the debate from the normative question—what is the right—to the legal question of whether a specific factual contention is true.

The metaphor of the employer thus creates three interlocking images. Discrimination appears as a psychological phenomenon, a thing that actually occurs because of the prejudice of the specific individual employer. Discrimination also appears as a particularized legal wrong, something identifiable, discrete, traceable to specific actors and wrongful states of mind. Finally, discrimination becomes a plain fact, something capable of being determined objectively like the existence of a murder weapon or of footprints in the snow.

### C. *Historical Echoes*

The philosophy of the old South toward civil rights enunciated during reconstruction resonates within the structure of this rhetorical universe. The framework adopted by opponents of the Civil Rights Bill of 1875 prefigures the formal equality model of discrimination.<sup>161</sup> This "Old South framework" was a homespun version of classical liberalism. Senator Hill expressed the core idea:

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 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 . . .

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.<sup>162</sup>

Thus, Senator Hill relegated government power to a distinct and different plane than that occupied by individual choices about personal dealings and association.

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161. Act of March 1, 1875, ch. 114, 18 Stat 335 (1875). The Act provided that "all persons" would be entitled to the "equal enjoyment" of public accommodations, including "inns, public conveyances on land and water, theatres, and other places of public amusement." Criminal penalties were provided for violation of the statute.

162. CONG. GLOBE, 42nd Cong., 2d Sess. 242 (1871) (remarks of Senator Hill).

Senator Charles Sumner, speaking for the Radical Republicans,<sup>163</sup> expressed an opposing concept: "The Senator may choose his associates as he pleases . . . That taste which the Senator has now declared belongs to him he will have free liberty to exercise always. . . . but when it comes to rights, there the Senator must obey the law."<sup>164</sup>

This historic debate anticipated the very dualities that frame our "modern" discourse: What was the permissible scope of the antidiscrimination principle with respect to individual liberty? Could the claims of minorities in the nineteenth century context of access to public accommodation be reconciled with the dichotomy between public and private spheres, rights and tastes? Reconstruction era dialogue, like today's, also contained an underlying debate about what was the proper baseline from which to interpret the meaning of discrimination.

For Sumner, the context of substantive rights provided the proper baseline. The core notion seemed to be a democratic imperative that all citizens are entitled to free access to all public institutions. Sumner's framework implied that civil rights protections have normative content.<sup>165</sup> In effect, he conceived of a floor of shared substantive protections and entitlements below which no person could sink. A more fundamental concern that all citizens receive these minimal protections preempted claims of privacy and boundaries of governmental power. This view foreclosed procedural limitations by positing minority claims as matters of substantive right and public duty.

For Hill, Sumner's formulation of the Fourteenth Amendment guaranty<sup>166</sup> of equal protection of the law threatened to create a revolu-

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163. The "Radical Republicans" represented the left wing of the post-bellum Republican party. While Republicans generally shared a desire to make emancipation permanent, the "Radical Republicans" wanted a more far-reaching social transformation. They were generally associated with constituencies "centered in New England and the belt of New England migration that stretched across the rural North." See FONER, *supra* note 5, at 228. "At the core of [Radical Republicanism] were men whose careers had been shaped . . . by the slavery controversy: Charles Sumner, Ben Wade, and Henry Wilson in the Senate; Thaddeus Stevens, George W. Julian, and James Ashley in the House." *Id.*

164. CONG. GLOBE, 42nd Cong., 2nd Sess. 242 (1871) (remarks of Senator Sumner).

165. Sumner's framework echoes in the subsequent dissents of Justice Harlan in the Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) and in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). In both cases Harlan seeks to vindicate claims of blacks by interpreting the Fourteenth Amendment's guarantee of citizenship as a substantive right requiring a normative judgement about what minimum rights should be enjoyed by citizens.

166. The Fourteenth Amendment reads in pertinent part:

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. No State shall make or enforce any law which shall abridge the privileges and 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.

U.S. CONST. amend XIV, § 1. (emphasis added).



tionary new regime of black-white relations. In response Hill envisioned federal law entirely circumscribed by a concept of dual planes of governmental power. The federal government could not "descend" (in Hill's terms) to regulate individual choice because such conduct could only be reached from the plane of state authority. This bi-planar framework, implicit in Hill's remarks, was made explicit by the Supreme Court in the Civil Rights Cases.<sup>167</sup>

It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection.<sup>168</sup>

In modern formal equality jurisprudence the scope of federal laws prohibiting discrimination is coterminous with the boundary between federal and state government. Where the plane of federal governmental power ends, there ends the scope of civil rights protections.<sup>169</sup> This theory of separate planes of power<sup>170</sup> has become a mechanism for emptying the discrimination concept of any substantive meaning. The discrimination inquiry focuses not on result, but merely on who has acted at what level of authority. So long as there is no state action it does not matter that black citizens, unlike white citizens, cannot have equal access to inns, places of public accommodation, or employment.

This boundary between federal and state power is parallel to and a

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167. 109 U.S. 3 (1883). Senator Hill's arguments essentially became part of constitutional law in the Civil Rights Cases. The court not only adopted Senator Hill's ranking of liberty over equality claims, but also adopted his conceptual framework that government power operated in a different area than that of individual choice. The metaphor used in the Civil Rights Cases was a notion of different levels, which equated with the notion of different spheres. Moreover, the Court, in accord with Senator Hill, saw the starting point of the analysis as a procedural inquiry about the proper limits of government power rather than a Sumner-Harlan starting point of substantive rights.

168. *Id.* at 13.

169. This jurisdictional framework was invoked by the Rehnquist Court in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), where the Court held that states and cities, unlike the federal government, lacked the power to enact affirmative action programs without a fairly particularized history of prior discrimination. See generally Jones, *supra* note 106, at 36-43.

170. *Croson* is, in terms of legal method, a virtual mirror image of the Civil Rights Cases. In both cases the Court used a theory of federal-state relations to trump claims of blacks to racial exclusion. In the Civil Rights Cases notions of separate levels of state and federal authority frustrated federal efforts to protect blacks from discrimination. In *Croson*, the Court simply inverted this scheme. The Court held that there were separate levels of authority under Section Five of the Fourteenth Amendment and that the states, unlike the federal government, lack the power to legislate set-asides for blacks in the absence of identified prior discrimination. See *Croson*, 488 U.S. at 504. Both the Civil Rights Cases and *Croson* are at pains to place legal text expressly protecting blacks within a rhetorical framework constructed entirely out of implied jurisdictional constraints.

reflection of a line of demarcation between public law and individual liberty. Indeed, a division of the social world into public and private spheres produced the normative source of jurisdictional constraints on equality claims of blacks.<sup>171</sup> In the private sphere, the sphere of "tastes," the individual is supreme, whether it is an individual who hires or one who invites a person into her "parlor". There is an implicit ranking of individual liberty over equality claims of blacks as a group, and an implicit positive notion of legal duties as not extending to matters of morality, particularly morality about race.

The "modern" employer oriented concept largely reentrenches Hill's classical concept of discrimination: discrimination is something in tension with, and necessarily narrowed by, individual rights. The synthesis of this conflict produces a minimalist construct of discrimination as a procedural concept empty of any substantive, affirmative duties that might interfere with individual "rights".

The world view which reinforced this tension thus becomes reentrenched: The formalist employer model assumes Hill's boundaries between public and private spheres. The sphere of employment remains a sphere of individual liberty. Moreover, in its deep proceduralism and allegiance to positive notions of law and remedy, the model mirrors Hill's skepticism about incorporating moral norms in public law. It alters Hill's framework at only one point: discrimination is not absolutely a matter of taste. But this alteration is fundamentally ambivalent: Government may not freely encroach on individual choice at will. Formal notions of fault now mediate the line between government power to intervene and individual rights, between private and public spheres. Blacks are now freed from the rhetorical prison which limited equality concerns to the plane of state action, but only to the extent that they entered another rhetorical prison. Inquiry about whether the employer is guilty matters. Inquiry about what is happening to blacks in the real world, apart from a narrow inquiry about particularized guilt, does not.

#### IV. THE VISIBLE AND THE INVISIBLE: HOW THE EMPLOYER HIDES OUR INTERPRETIVE CHOICES

Initially, the rift between the romantic fiction of discrimination as something a discrete employer does and the reality of discrimination as something omnipresent in the workplace is obscured by a classic confusion of words and meaning.<sup>172</sup> Lawyers and courts share a common lan-

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171. See Klare, *supra* note 133, at 1360-75 (discussing the public/private distinction in labor law).

172. "Of course, what confuses us is the uniform appearance of words when we . . . meet them in script and print." WITTGENSTEIN, *supra* note 145, at 6e. Wittgenstein focuses on the sub-

guage for the concepts of equality and discrimination but differ as to the meaning of the words. The duality in meaning reflects a duality of social possibilities.

Normative recognition of the historical and social context of discrimination would allow the discourse to bridge the gap between law and human experience. Then society would have the vocabulary to articulate the problems of blacks as a group, as an oppressed caste. Armed with a vocabulary which is currently absent under formalism, society ultimately would have the power to give meaning to discrimination law rather than leave it meaningless. Through a rediscovery of the power of language, society might have the power even to transform itself.

To posit discrimination as a problem of individual wrongdoing represents a very different normative vision of society: It is a society which, under a regime of individual rights, provides only ephemeral procedural fairness. Under this regime, we are frequently unable to express as a legal wrong the undeniable reality of societal discrimination against blacks.<sup>173</sup> For blacks the bottom line of such a regime is "the white men win."<sup>174</sup> Moreover, whites lose too because legal language in such a society has little legitimating power, and ultimately neither do legal institutions.

We choose this debilitating normative structure when we interpret the meaning of discrimination as an "intentionalist" construct. The barrier is the invisibility of the interpretive choice. The notion of the individual employer as "the problem" is founded upon a narrow construct of discrimination which presupposes that words have fixed meanings.<sup>175</sup> Accordingly, discrimination has fixed meaning; it always refers to a decision premised on an employer's biased *state of mind*. Once we accept this imagery as objective, we have passed through a cognitive door in which words, with all their artifice, become the masters of perception.

As a workman's tool becomes part of his arm, something he ceases to be consciously aware of, so too through constant use, does the myth/

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jectivity and contextuality of meaning. The meaning of words, according to Wittgenstein, depends on the speaker's use. A corollary here is that words do not have fixed meanings or essences, only varying applications.

173. See *supra* note 143.

174. See Richard M. Fischl, *Job Bias Barrage*, LEGAL TIMES, Aug. 7, 1989, at S12. Fischl wrote: "Is this what the Reagan revolutionaries meant by a 'jurisprudence of original intention'—that white men win? That unfortunately is how it looks to one side of the 'v.' in employment discrimination cases." *Id.* Professor Fischl, my colleague, is writing about the consequences of intentionalism in constitutional law, but I think his comments apply with equal force to the intentionalist model of Title VII.

175. This represents again an objectivist assumption about language. See *supra* note 159.

metaphor of the employer blend imperceptibly into the lawyer's background assumptions. The image of discrimination as a psychological phenomenon, as a discrete event, as something akin to a common-law assault comes to appear neutral and natural.<sup>176</sup> The unexamined rhetoric of the employer—his claims of innocence, his rejection of the concept of group rights—becomes an unconscious barrier<sup>177</sup> to our discourse.

A more fundamental problem results from the relationship between the way lawyers interpret legal terms (like discrimination) and who they are. Interpretation is merely a form or species of perception. Perception is not a passive process but "a 'constructive act', not merely reflecting but forming reality: 'the individual apprehends the resources of reality (including language . . .) as he relates to them' in such a way that they replicate his identity."<sup>178</sup> As such, "*interpretation is a function of identity.*"<sup>179</sup> In interpreting the interpreter tends to recreate

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176. According to Ernst Cassirer, at least most, if not all, of what counts as knowledge is constructed via a symbolic ordering of the chaos of human experience. 1 ERNST CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* 74-77 (Ralph Manheim trans., 1953). As applied to law, this works by abstracting fragments of our experience and representing these abstracted experiences through the "inner fictions" or metaphors active in our legal thought. *Id.* at 75-76.

The individual employer is a fictional representation of someone everyone has met or can meet. The decision to discriminate is similarly a fictional representation of an act anyone can take or imagine herself taking. The problem lies in our failure to distinguish between that which is simply an image of how something happens and what actually happens. We simply presume that what does not fit our image of discrimination is not discrimination. To some extent these images of discrimination seem natural because they are part of our experiential ethos. Thus, the preemptive character of these images is grounded in a false sense of symmetry. Because we assume, a priori, that we have copied the real world in our symbolic fictions we will inexorably conclude that our understanding of discrimination mirrors discrimination as it actually occurs.

Once we have succeeded in deriving images of the required nature from our past experience, we can with them as models develop the consequences of our actions which will be manifested in the outward world much later or as consequences of our own intervention. . . . The images of which we are speaking are our ideas of things; they have with things the one essential agreement which lies in the fulfillment of the stated requirement, but further agreement with things is not necessary to their purpose. Actually we do not know and have no means of finding out whether our ideas of things accord with them in any other respect than in this one fundamental relation.

*Id.* at 75 (quoting H. HERTZ, *DIE PRINZIPIEN DER MECHANIK* 1 (1894)).

177. Cf. Lawrence, *supra* note 33. Lawrence argues that racial ideology is often unconscious and that legal standards requiring conscious intent fail to account for unconscious racism. My emphasis is less upon external legal institutions, i.e., legal standards, than upon language interior to those standards and how language creates the foundation for our doctrinal difficulties. The law not only ignores unconscious racism; rather, through the use of blinding rhetorical assumptions, the law really can not see unconscious racism at all.

178. STEVEN MAILLOUX, *INTERPRETIVE CONVENTIONS: THE READER IN THE STUDY OF AMERICAN FICTION* 24 (1982) (quoting Norman Holland, *The New Paradigm: Subjective or Transactive?* *NEW LITERARY HIST.* 7, 343 (1976)).

179. *Id.* (quoting Holland, *supra* note 178).

himself.<sup>180</sup> 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.

Under the intentionalist model, interpretation of the meaning of discrimination does not reflect the actual experience of blacks, but rather the patterns of anxiety and desire of the dominant group in our legal culture. The factors which express themselves in this active interpretive process are: (a) the need to avoid anxiety and instability; (b) the desire to gratify wishes; (c) the need to shape the concept of discrimination within a set of social assumptions that reinforce the interpreters' legitimacy.<sup>181</sup> This interpretive transaction in which the interpreter recreates him/herself is again unconscious and ultimately hidden. In effect, interpretation and unconscious racism are intertwined.

## V. CONCLUSION: THE PARABLE OF THE SOWER

Behold a sower went out to sow,  
And as he sowed, some seed. . .  
. . . fell on stony places, where they did not  
have much earth; and they immediately sprang  
up because they had no depth of earth.  
But when the sun was up they were scorched,  
and because they had no root, they  
withered away.<sup>182</sup>

Of course the difficulty with envisioning a new world is that we are so ensconced in the old one that the past permeates our vision of the future. The past is a regime of segregation, of racial caste, of a society that loudly proclaims egalitarian values but rests comfortably with glaring racial disparities. Our past and present, the modern and the bad old days continue to blur and run together.

Through law we nonetheless have a way of freeing the moral imagination. In our institutions we can celebrate those aspirations we as individuals lack the personal nobility to embrace. We started down that road during the reconstruction and we started again in the 1960s. For a moment, in the sixties and early seventies the future took root in the present, within the framework of the law. Antidiscrimination law really

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180. See Norman N. Holland, *Transactive Criticism: Re-creation Through Identity*, 18 *CRITICISM* 334, 340 (1976). Holland wrote: "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." *Id.*

181. MAILLOUX, *supra* note 178, at 24. Thus, there is a Freudian dimension to the process of interpretation. The interpreter not only transforms the text into something which affirms himself but he suppresses from consciousness the mechanisms by which he achieves this gratification.

182. *Matthew* 13:3-6.

began with the promise of *Griggs v. Duke Power Co.*<sup>183</sup> that we would talk of equality as a path down which society as a whole had to travel, the promise that we would eschew the employer's intent and reach the social consequences of discrimination. The promise of *Griggs* brought the hope of redemption, a hope of a better world. The era of antidiscrimination law essentially ended with *Wards Cove Packing Co. v. Atonio*.<sup>184</sup> The *Wards Cove* Court found virtual plantation style segregation legally acceptable because it was not "born" of the employer's wrongful state of mind. Somewhere between *Griggs* and *Wards Cove* the word equality lost its meaning. In our civil rights law the past has not merely become reentrenched in the present. The hope of a new world, planted so well in *Griggs*, has withered away and died.<sup>185</sup>

The statistics concerning how very few individuals gain tangible victories under Title VII bear witness for that demise. The signs of it whisper through my own experience. When I was an attorney with the EEOC, I remember a conversation with the Executive Director of my regional office:

Exec. Dir.: *I'm glad that they're out there filing charges because otherwise I'd have to get a job. (laugh)*

*. . . But they're pouring gasoline on themselves . . .*

By gasoline he meant that the claimants were likely to be the victims of retaliation and that they in effect sealed their fate by coming to the commission for help. It was a narrative of a civil rights enforcement agency that operated as a trap for the unwary.

The signs of demise are also in the desperate efforts of the fragmented civil rights community to muster legislative support for a new civil rights bill to help undo some of the damage to the Title VII standards by *Wards Cove* and other cases.<sup>186</sup>

183. 401 U.S. 424 (1971).

184. 490 U.S. 642 (1989).

185. See generally Jones, *supra* note 106.

186. On November 21, 1991, President George Bush signed into law S.1745, the Civil Rights Act of 1991. The key feature of the bill, and its main *raison d'être*, was to restructure the burden of proof under *Wards Cove*. The bill does place the burden of persuasion on the employer to prove business necessity. This does, if one engages in a literal interpretation, reverse the *Wards Cove* allocation of the burden of proof that shifts to the defendant following the plaintiff's proof of adverse impact. Of course the difficulty is that business necessity is not defined. The bill is an improvement only if business necessity in the Civil Rights Act of 1991 does mean 'necessity' and not something less. This is not clear, however, because at least one legislator understood business necessity to mean no more than a legitimate reason. See *Civil Rights Act Focus Turns to Enforcement*, WASH. POST, Nov. 26, 1991, at A19; (reporting that "Bush told federal officials to rely on a legislative memorandum by Senate Minority leader Dole (R. Kan.) that says the bill affirms the Supreme Court's 1989 ruling in *Wards Cove Packing v. Atonio*, a ruling that set forth the 'legitimate business objective standard'").

Nonetheless, even if the new law changes the burden that shifts to the employer, the threshold problem in *Wards Cove* remains unremedied. The initial difficulty a plaintiff faces under *Wards*

But the fundamental problem is not with doctrine nor with evidentiary standards. These are surface phenomena. The problem is hermeneutical and terminological. The problem is the lens that we use to look at doctrine and standards. That lens is the word. We have given the word "equality" a meaning so remote from the experience of minorities that the law accepts situations which are racially unjust such as *Wards Cove* plantation style segregation. The problem becomes the power of the word to serve as a vehicle for ideology and majoritarianism. If all racism disappeared from the face of the Earth, but we retained the text of antidiscrimination law, there would be enough racism remaining within the rhetorical structure of the text to replenish the earth. The legislative straw, while appealing, cannot cure the problem of racism within the very language of our discourse. It is language which confounds us, through metaphors of individualism and fault, through the metaphor of the employer.

The language in which we speak about the employer as a real person is indeed utopian. The notion that the employer has counterclaims against minorities, has led us to think of both law and an ideal society as a balancing effort, as attempts to reconcile commitments both to equality and to common-law baselines. The law in this normative tension is viewed as the best of all possible worlds. If only we respect the employer's rights, maintaining fault-based notions which require wrongful state of mind, then we can reconcile individual liberty with the equality claims of blacks. The intentionalists' employer speaks a quasi-theological language of illicit vs. innocent intent, appealing to an ancient impulse to judge, to separate the good from the evil, to disentangle virtue from sin.<sup>187</sup> Within this rhetorical utopia, intentional acts are

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*Cove*, where a number of job practices — failure to post vacancies, word of mouth referrals, subjective interviewing practices — are all involved, is identifying which practice 'causes' the exclusion of minorities. Unless the employer keeps formal records — which is precisely the problem in the *Ward's Cove* context — it is essentially impossible for the plaintiff to demonstrate "causation." The new law does not cure this problem, it simply leaves to the discretion of a court whether to excuse the plaintiff from this proof requirement by using a very vague standard. Again, everything becomes simply a matter of interpretation and language. In the words of Shakespeare, the wheel simply "comes full circle."

187. As Justice Holmes noted, the concept of sin provides the ultimate paradigm for all legal wrongs. See OLIVER W. HOLMES, *THE COMMON LAW* 67-76 (1881). Holmes traced the arc of the law's actual evolution from a notion of "wicked[ness]" down a path that culminates in a modern notion of law as an instrument of social policy. For Holmes (and for me) "actual[] wicked[ness]" was legally insignificant in itself, but had value as a proxy for external considerations. "It is an index to the probability of certain future acts which the law seeks to prevent." *Id.* at 74. The modern impulse has been to externalize our notion of responsibility with respect to the legal wrongs by defining the wrong according to the needs of social policy and then constructing intent to fit the policy. See John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility In the Law: A Philosophical Analysis*, 76 GEO. L.J. 2845, 2872 (1988) (characterizing externalization as the law's efforts to accommodate the more modern view that behavior, generally, is socially

everywhere condemned and courts are exhorted to punish the wrongdoers. Of course, when we use the intent standard to identify them we generally never can find wrongdoers. Too bad. Meanwhile, racial stratification continues apace. No matter. In the normative heaven, in which the employer rhetorically situates us, chronic racial stratification and exclusion—unless traced to intent—is perfectly acceptable. The employer speaks the language of equality but only in a particularly formal, empty way.

We find ourselves in the interpretive position of the sower in the parable who cast his seeds on rocky ground. Antidiscrimination law is a morally conflicted, barren landscape. It is the rocky soil. Reform efforts cannot bear fruit.

The fertile soil is a new language of equality in which we understand finally that discrimination as a social problem requires group efforts, group solutions, perhaps group liability in some cases. On the road to transcendence our vision of society, not legalisms like fault, must light the way. We need a language of equality in which discrimination comes to be identified as the absence of blacks. This language must recognize the pattern of exclusion not as evidence of discrimination but as the thing itself. It must demonstrate a concern for equality as a poetic dream, not a creature of formalism. We need to be able to articulate a vision of the world *whole*. Discrimination law, which in its demise spoke incessantly of individual innocence and sin, must learn a new, more secular, vocabulary, including terms for social evil and historical wrongs. We must be able to articulate things as they are. We must find a meaning of equality which is informed by the lived experiences of blacks.

But so long as the myth of the employer remains within our discourse he will deceive us into thinking that the meaning of equality is fixed by his contractarian claims of individual liberty and right. So long as the employer lives, he will imprison us in a realm of fixed meanings, lifeless, changeless as a stone, where the seeds of a new society can find no place to take root and grow. The employer must die for a new discourse of equality to be born.

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determined). In criminal law, felony murder imputes constructive intent to anyone who kills in the commission of a felony regardless of whether the felon consciously intended to harm anyone. In torts strict liability holds people liable for harms, such as in the crash of an airliner on the basis of powerful presumptions instead of basing liability on classical notions of fault. Interestingly, unlike torts or criminal law the jurisprudence concerning discrimination has not begun to externalize fault. Without an external notion of fault there is no way to conceptualize a collective as opposed to an individualistic notion of responsibility.