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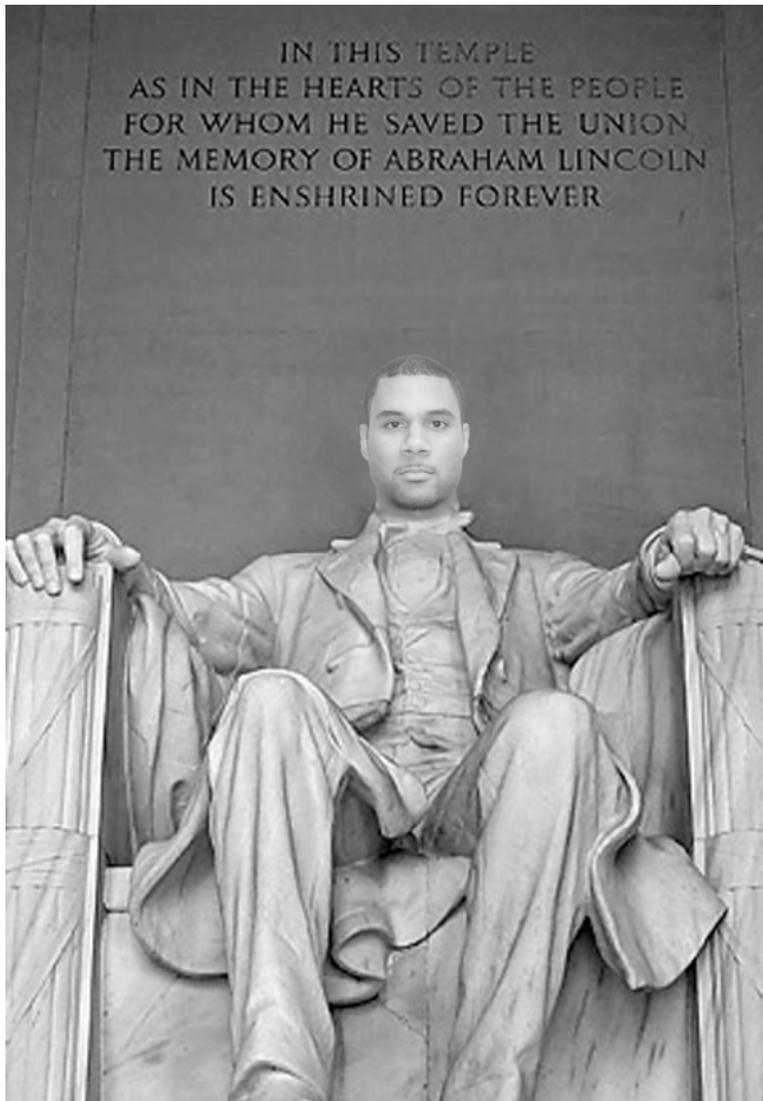
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Volume 3, Issue 1

# THE MODERN AMERICAN™

A Publication Dedicated to Diversity and the Law



*“The probability that we may fall in the struggle ought not to deter us from the support of a cause we believe to be just; it shall not deter me”  
- Abraham Lincoln*

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AMERICAN  
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# LETTER FROM THE EXECUTIVE BOARD

In 1872, Charlotte E. Ray was the first African-American woman to be admitted to the bar in the United States. Despite her superior legal abilities and the path she so bravely forged for all minority female attorneys, she soon gave up the practice of law because she could not attract sufficient clients to stay in business.

Though the legal landscape of our country has undergone drastic changes since Ms. Ray's time, the difficulties she experienced a woman of color in the legal field still plague the profession today. The acknowledgement of this problem and the desire to find solutions recently spurred the American Bar Association to release a report entitled *Visible Invisibility: Women of Color in Law Firms*. The 2006 report is a culmination of surveys, focus groups, and other research that asked male and female lawyers to discuss their career experiences, motivations for staying in a law firm, reasons for leaving a law firm, and salaries. After comparing the data of minority female attorneys to that of other groups, the report uncovered marked differences between the experiences of minority women and their counterparts. The report not only addresses these challenges but also presents solutions to some of the problems it brought to light.

Given the subject matter of this report, when it was brought to the attention of *The Modern American*, it sparked significant discussion. However, though the focus began with the experience of minority women, we soon found ourselves discussing the challenges faced by any person who finds that they identify with multiple minority groups. As a direct result of that conversation and our own attempts to push the boundaries of the issue, our second annual spring symposium is entitled: *Retaining the Two-fers: The Opportunities and Limitations Facing Those Within the Legal Field Who Identify with Multiple Minority Groups*. Our goal is to present stimulating discussion of the topic, featuring a panel of accomplished persons in the legal field who can speak to the issue based on their own experiences and observations. Given that many of our subscribers and readers are employees of or are soon to be employees of law firms and other legal institution, we think it is especially important that you join us for this unique discussion. We hope that you will not only enjoy discussion of such a

timely and important issue, but that you will also take the tools that you learn from our talk back to your respective places of employment, institutions of learning, and daily life.

As evidenced by events like our symposium, we are pleased to say that *The Modern American* continues to be dedicated to our goal of providing our readers with a forum for frank, yet healthy discourse of the issues facing America's minority groups. As has become our custom at this time, we would like to take a few moments to inform you of our recent accomplishments. First, as of last semester, you can now find *The Modern American* on [v.lex.us](http://v.lex.us), a new online international legal database.

Additionally, as mentioned in prior issues, we are working hard to make our decision to provide a third, summer issue of *The Modern American* a reality. Therefore, we are pleased to announce that this year's summer issue will be the result of the collaborative efforts of *The Modern American* and the WCL chapter of the Latino/a Law Student Association (LaLSA). The summer 2007 issue will commemorate the recently held *Tenth Annual Hispanic Law Conference – The Voice of the Latino/a Lawyer: Accomplishment and Challenges*. Like the topic suggests, the issue will feature articles and other written works pertaining to the legal issues relating to the experiences of the Latino/a attorney and community as a whole. If you have any interest in being a part of this ground-breaking issue, please see our submission guidelines. We strongly encourage you to submit your piece for what will surely be a stimulating issue.

In summation, we would like to extend a warm thank you, first, to our staff who truly exhibit admirable levels of dedication to the mission of *The Modern American*. We would also like to thank our ever-expanding board of advisors. Their diligent advice and words of encouragement continue to inspire us and stay our focus.

Sincerely,  
The Executive Board  
*The Modern American*

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# THE DISCRIMINATORY EFFECTS OF PROTECTING AMERICA'S CHILDREN

By Jennifer E. Jones\*

The Federal Communications Commission (“FCC”) has the unequivocal power to regulate indecent broadcasting consisting of “any obscene, indecent, or profane language by means of radio communications.”<sup>1</sup> Recently, indecency regulation has inspired much debate between the public, broadcasters, courts, and the FCC. Indecency regulation exists to protect only one distinct group of people - children. Yet, current indecency enforcement is not prosecuted on behalf of the interests of children. FCC indecency investigations are fueled almost exclusively by complaints submitted by watchdog groups with politically conservative agendas. Consequently, instead of protecting children and facilitating diversity in the media, the FCC’s policing of public airwaves has effectuated cultural and political homogeneity of public airwaves.

This Article exposes current inconsistencies in the stated policy aims of indecency regulation and the statutory requirement that the FCC facilitate diverse media broadcasts. First, this Article discusses FCC indecency regulation generally. Second, this Article describes the stated policy aims of indecency regulation and the inconsistencies of indecency enforcement in advancing those aims. Lastly, this Article discusses the discriminatory impact current indecency regulation has on broadcast media.

## THE POWER TO REGULATE INDECENCY

Essentially, “[o]ne breast and two seconds after the Janet Jackson incident, America became immersed in a cultural war between two competing interests - the broadcasters’ right to exercise their constitutional right to free speech and the FCC’s power to regulate indecent programming.”<sup>2</sup> The Supreme Court has long held that broadcasters have limited First Amendment protection given the unique role which broadcasting occupies as a medium of expression.<sup>3</sup> More recently, the Court has recognized the need to balance First Amendment free speech rights of broadcasters and indecency regulation interests of the government, while keeping with previous decisions which permitted the government to limit broadcasters’ First Amendment rights.<sup>4</sup>

Both the Court’s recent appeal for caution in free speech restrictions and the FCC’s proffered justifications for limiting free speech have provoked strong broadcaster reactions. The FCC’s sole justification for limiting broadcaster rights is the “need to protect our children.”<sup>5</sup> The premise in all indecency precedent is that between certain hours of the day children are uniquely susceptible to broadcasts and should be protected from indecent material.<sup>6</sup>

However, heavy critique exists regarding the enforcement of indecency regulations and whether this regulation is even necessary at all.<sup>7</sup> Interestingly, a source of criticism comes directly from FCC Commissioner Adlestein who stated that the FCC has

failed to “address the many serious concerns”<sup>8</sup> raised in previous cases and that FCC regulations are “arbitrary, subjective and inconsistent.”<sup>9</sup> Commissioner Adlestein claims the FCC’s rulings do not adequately consider the “totality” of broadcast programs.<sup>10</sup> Ultimately, the FCC’s failure to completely consider and review broadcast programming is inconsistent with court-mandated analysis in restriction of speech cases.<sup>11</sup>

For example, the Supreme Court held in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, that broadcast material is subject to indecency regulations when material is broadcast at times when children are reasonably likely to be in the audience.<sup>12</sup> However, the Court has cautioned the government in *Reno v. American Civil Liberties Union* that indecency regulation cannot restrict the adult population to watching only what is fit for children.<sup>13</sup>

When defending such free speech restrictions, the government bears the burden of demonstrating that the indecency regulations in question are sufficiently tailored to resolve conflicts without unnecessarily broad restrictions on speech.<sup>14</sup> Indecency law stems from nuisance law in that indecency regulation seeks to channel material into acceptable timeframes, and not completely prohibit broadcast material.<sup>15</sup> Therefore, the FCC has the burden of showing that indecency regulations are properly tailored to protect children and promote diversity in the media without being overly broad and restraining speech in general. Nuisance law calls for channeling speech, not banning it altogether. However, if broadcasters are prohibited from airing certain types of diverse material during peak hours and are forced to air material to a significantly smaller audience or not at all, bans on speech may be effectuated.

## INCONSISTENT AND MISGUIDED FCC INDECENCY REGULATION

The Telecommunications Act of 1996 mandates that the FCC promote the public interest and diversity in the media.<sup>16</sup> However, the FCC’s incomplete review of broadcaster regulation has created arbitrary censorship of diverse broadcasting material without the heightened scrutiny required by law.<sup>17</sup> Additionally, the FCC’s procedure of investigating and prosecuting broadcasters for broadcasting indecent material has resulted in inconsistent enforcement of poorly reviewed regulation penalties.

More importantly, there is an intrinsic flaw in using the protection of children as the sole justification for indecency regulation. The flaw exists in the FCC’s enforcement policy since children are not the actual individuals reporting potential violations. Rather, the children’s parents, parental advisory councils and watchdog groups submit complaints to the FCC. Parental advisory councils and watchdog groups are problematic because they

often have political affiliations and partnerships with lobbyists. Historically, these groups have pushed for an overall clean up of the airwaves in the interest of the “public good”.<sup>18</sup> Therefore, the original rationale of preventing harm to children has been morphed into campaigns for general community standards of morality - standards which can be arbitrary and discriminatory. Since the FCC conducts indecency regulation only when a viewer complaint is filed,<sup>19</sup> certain groups whose sole function is to “patrol the airwaves” can disproportionately affect indecency enforcement on broadcasters.<sup>20</sup> For example, the Parental Television Council (“PTC”) was responsible for 99.9 % of indecency complaints in 2003 and 99.8 % of indecency complaints in 2004 unrelated to the Super Bowl halftime show.<sup>21</sup> The resulting effect is that PTC, a Republican-driven watchdog group, hyper-monitors the public airwaves, which can effectively lead to overbroad free speech restrictions of broadcast material.<sup>22</sup> PTC’s founder and President, L. Brent Bozell, served as the Finance Director and President of the National Conservative Political Action Committee, furthering his political agenda.

Not only is PTC responsible for an “overwhelming majority of FCC complaints,” but the number of complaints is drastically rising each year due to the new ability to electronically file FCC complaints.<sup>23</sup> PTC regularly issues email alerts to its members who can easily register thousands of complaints simply by filling out an online form.<sup>24</sup> Former Chairman Powell acknowledged this complication and referred to these email complaints as “spam.”<sup>25</sup> Nevertheless, PTC has had an exacting hand in selectively choosing broadcasters for the FCC to target and prosecute for allegedly indecent broadcasts.<sup>26</sup>

Another wrinkle in the FCC’s enforcement policy is the more subjective second prong of indecency analysis<sup>27</sup> which is measured using “contemporary community standards.”<sup>28</sup> Theoretically, if the policy aims of indecency regulation were fulfilled, this contemporary community standard should be used to shield children from harmful material. The Supreme Court relied on industry guidelines in *Infinity Radio License, Inc.* and held that the community standard test is “whether the material is patently offensive for the broadcast medium” which is gauged by the “average broadcast viewer or listener.”<sup>29</sup> Determining what is “patently offensive” and defining who is an “average broadcast viewer or listener” is not only highly subjective, but also difficult to apply.

A tension exists between the original policy aims of protecting children and the contemporary community standards used to measure the protection of children. The subjective bulk of indecency analysis is guided by standards, which are supposed to be that of the average broadcast viewer or listener.<sup>30</sup> But in reality, the aims of indecency regulation are often distorted by watchdog groups with socio-political agendas, capable of filing tens of thousands of complaints per year through their members. FCC Commissioner Adlstein expounded on this inherent inconsistency by stating that the “real party in interest is the Commission, acting on behalf [of] the public, rather than the specific individual or organization that brings allegedly indecent material

to our attention.”<sup>31</sup>

## DISCRIMINATORY EFFECTS OF CURRENT FCC INDECENCY REGULATION

Evaluating future broadcast programs for potentially indecent material requires great expenditures of money and time.<sup>32</sup> In order for broadcasters to comply with indecency regulation as applied to daily programs and broadcasts, they must employ attorneys or specialists able to shield them from the risk of being fined thousands of dollars by the FCC. Broadcasters not only spend vast amounts of money on attempting to ensure that their programs will not be arbitrarily targeted by watchdog groups, but also forgo broadcasting opportunities out of fear of being deemed non-compliant. Given that socio-political agendas of watchdog groups effectively guide the FCC’s current indecency enforcement policy, such regulation has negatively impacted broadcasters.

The standard effectuated in indecency regulation is a neo-conservative standard that blocks out many different kinds of diverse media. When special interest groups, embodying socio-political agendas, effectively prosecute certain broadcasters or individuals, only material indirectly deemed acceptable by that group of individuals is spared from mass complaint filing and is permitted on the public airwaves.

Additionally, even when individuals attempt to “break the surface of placidity,” the very nature and importance of the expression is often misunderstood and penalized under current indecency regulation.<sup>33</sup> Artistic works that serve a political and social purpose among certain minority groups are habitually misunderstood and written off as indecent. For example, Sarah Jones, a well-known female, African-American playwright, actor, poet, and activist wrote a song as a feminist critique of misogynistic lyrics in ‘gangsta rap’ entitled “Your Revolution.”<sup>34</sup> However, based on a single-complaint received by the FCC, her song was deemed to be indecent, and the radio station that aired the song was fined.<sup>35</sup> In her brief on appeal filed with the FCC, Jones stated that “Your Revolution” was performed in high schools and colleges around the country and had been praised as a positive self-affirmation for young African-American women.<sup>36</sup> Sarah Jones used her lyrics as a “free (and imaginative) use of sexual language...that ma[de] the rap empowering,”<sup>37</sup> but the FCC’s indecency regulation left no room for cultural context or analysis in its indecency assessment.

Correspondingly, another example of the FCC’s failure to consider and value cultural context in indecency regulation was in the case of “The Blues” documentary, comprised of interviews of several blues musicians, aired by PBS and directed by Martin Scorsese. Generally, broadcasters feel an artistic and educational integrity to retain certain material in its original form to accurately convey experiences of the film subjects. However, the FCC found “The Blues” contained indecent material in the language used by some of the interviewees. This conservative regulation effectively “paralyzed documentary filmmakers” so that filmmakers with powerful and culturally impor-

tant stories were afraid to make, tell, and air their stories on public broadcast television.<sup>38</sup>

For many broadcasters, there would be no difference between “Saving Private Ryan” and “The Blues” in the usage of certain types of language. “Saving Private Ryan” embodies one of the only known exceptions to indecency analysis, in which the FCC ruled that the use of several expletives in the war film was not indecent and could exist when material was “essential to the nature of an artistic or educational work.”<sup>39</sup> However, “The Blues”, which depicted mainly African-American musicians, was deemed to be indecent, while Saving Private Ryan which depicted mainly White-American male soldiers was not. This decision illustrates the cultural value judgments reflecting a more conservative moral authority that ultimately penalized broadcasters of programming focused on a cultural minority viewpoint.

In both of the cases listed above, Sarah Jones and “The Blues,” the FCC has not issued further explanatory Orders.<sup>40</sup> Broadcasters and certain special interest groups believe in the right to diverse sources of information as mandated by The Telecommunications Act of 1996<sup>41</sup> and the First Amendment.<sup>42</sup> In the minds of some, the FCC often acts as a cultural dictator, determining precisely what cultural mediums are appropriate and acceptable at any given time.<sup>43</sup> In this way, even social ideas damaging to certain groups, whether they involve male/female relations or racial dynamics, are perpetuated into law.<sup>44</sup>

Perhaps the most famous indecent broadcast was the recent exposure of Janet Jackson’s breast during the Super Bowl XXXVIII Halftime Show on February 1, 2004. Some analysts have argued that the FCC’s indecency finding based solely on Janet Jackson’s breast exposure, without regard to Justin Timberlake’s predatory behavior or Nelly’s crotch grabbing, only served to perpetuate social ideas of men dominating women.<sup>45</sup> Timberlake was the main actor in the scene, ripping off a por-

tion of Janet Jackson’s blouse, yet he did not receive the social backlash and fury Janet Jackson underwent for several months, even years.

Given the morally conservative broadcast climate today, individuals in society that have been historically marginalized, such as African-American women, may easily be restricted more frequently under current FCC indecency regulation.<sup>46</sup> The FCC’s discriminatory regulations send negative messages to youth and to the public regarding social ideals of feminist principles and cultural dynamics.<sup>47</sup> It is of the utmost importance

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*Indecency regulation exists to protect only one distinct group of people—children. Yet, currently, indecency enforcement is not prosecuted on behalf of the interests of children.*

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that the FCC not place unnecessarily broad restrictions on broadcasters documenting socio-cultural dialogs. Current indecency regulation has intimidated broadcasters into only broadcasting material that would not likely cause tension with the conservative agenda of watchdog groups.

But this is contrary to the statutorily mandated aim of the FCC. The FCC’s statutory mandate is to enable public access to a diverse array of media over the public airwaves.<sup>48</sup> Using the FCC as a puppet, political watchdog groups have enabled FCC commissioners to become ineffective “culture czars.”<sup>49</sup>

The public, as well as broadcasters, have First Amendment rights to free speech guaranteed by the Constitution. Inconsistently and arbitrarily applied, current FCC indecency regulation has fundamentally quashed these rights. The FCC must find a way to balance the public’s mandated right and interest in diverse forms of broadcast media with the government’s interest in protecting children. Children as a group encompass individuals of all cultures and social classes that have the right to many kinds of culturally sensitive information, not just those deemed to be decent by neo-conservative watchdog groups. The FCC has an affirmative duty to find an effective indecency regulation regime that precludes discriminatory consequences to minority groups in society.

## ENDNOTES

\*Jennifer E. Jones earned her B.A. from the University of Florida in socio-cultural anthropology and is currently a third-year law student at American University Washington College of Law. Academic interests in technology, telecommunications, cultural politics, and the law inspired this Article. Many thanks to the new staff of *The Modern American* for keeping the torch burning and to Martha and Malcom who gave me the time and space to develop this article.

<sup>1</sup> F.C.C. v. Pacifica Found., 438 U.S. 726, 726 (1978).

<sup>2</sup> Sona I. Patel, *An Indecent Proposal*, 231 N.J. LAW. 10, 12 (December 2004) (discussing the FCC’s crackdown on indecent broadcasts after the February 1, 2004 Super Bowl XXXVIII where Janet Jackson’s breast was exposed and efforts to regulate public airwaves for the “public good” as dating back to the Communications Act of 1934 and significant challenges and criticisms of current indecency regulation).

<sup>3</sup> *Pacifica*, 438 U.S. at 727.

<sup>4</sup> See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997) (articulating concerns regarding the vagueness of indecency regulation given “its obvious chilling effect on free speech”).

<sup>5</sup> Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21<sup>st</sup> Century*, 20 BERKELEY TECH. L.J. 341, 359 (2005) (citing *In re Clear Channel Communications, Inc.*, 19 F.C.C.R. 10880, 10887 (2004) quoting Former FCC Chairman Powell).

<sup>6</sup> See *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8001 ¶¶ 5-6, April 6, 2001 [hereinafter *Indecency Policy Statement*] (stating the hours between the hours of 6:01 a.m. and 10:00 p.m. should be regulated).

<sup>7</sup> See Marjorie Heins, *Do We Need Censorship to Protect Youth?*, 3 MICH. ST. L. REV 795, 798-807 (Fall 2005) (noting debate over whether indecent material has any negative affects on children, and therefore, whether children should be shielded from indecent material at all) [hereinafter *Do We Need Censorship*]; see

## ENDNOTES CONTINUED

also, *supra* note 5 at 363-64 (articulating that in *Pacifica*, the Court referenced *Ginsberg's* justification for restricting speech as being harmful to "youth," but failed to include that this discussion should be premised on the "legislature rationally determining that the restricted speech is actually harmful to children"); see also Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW 1, 29 (Spring 2004) (discussing inconsistencies in indecency regulation for cable television, which has at least as many child viewers as broadcast television, if not more, as illustrative that Congress' actions do not demonstrate a belief that indecent material is actually harmful to children).

<sup>8</sup> Statement of Commissioner Jonathan S. Adlestein, *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005 Order*, 2006 WL 3207085, at 24 [hereinafter *Adlestein Statement*].

<sup>9</sup> *Id.* at 25.

<sup>10</sup> *Id.* at 25 (stating that the FCC should not limit indecency considerations to an "isolated programming segment").

<sup>11</sup> See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

<sup>12</sup> See 518 U.S. 727, 744 (1996) (quoting *Pacifica*, 438 U.S. at 732).

<sup>13</sup> See 521 U.S. 844, 875 (1997) (citing *Denver*, 518 U.S. at 759, quoting *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 128).

<sup>14</sup> See *Denver*, 518 U.S. at 741 (citing *Central Hudson Gas & Electric Corp.*, 447 U.S. 557, 566) (stating that "restrictions on commercial speech cannot be 'more extensive than is necessary to serve a substantial government interest'").

<sup>15</sup> *Pacifica*, 438 U.S. at 731, n.4.

<sup>16</sup> Telecommunications Act of 1996, 47 U.S.C.A. §257(b) Section on National Policy (1996) [hereinafter §257(b)].

<sup>17</sup> *Kingsley*, *supra* note 11.

<sup>18</sup> *Do We Need Censorship*, *supra* note 7, at 801.

<sup>19</sup> *Indecency Policy Statement*, *supra* note 6, at ¶ 24.

<sup>20</sup> See *Holohan*, *supra* note 5, at 360.

<sup>21</sup> *Holohan*, *supra* note 5, at 360.

<sup>22</sup> *Holohan*, *supra* note 5, at 361.

<sup>23</sup> *Holohan*, *supra* note 5, at 361; see PTC 2005 Annual Report, 10 (boasting over 100,000 online activists and 109,000 complaints filed electronically from PTC members), available at <http://www.parentstv.org/PTC/joinus/AR2005.pdf> (last visited Mar. 15, 2007).

<sup>24</sup> *Holohan*, *supra* note 5, at 360.

<sup>25</sup> Jeff Johnson, *FCC Indecency Enforcement Called Confusing, Burdensome*, CNSNews.com, January 12, 2005, available at <http://www.cnsnews.com/ViewSpecialReports.asp?Page=%5CSpecialReports%5Carchive%5C200501%5CSPE20050112a.html> (last visited Mar. 15, 2007) (quoting former Chairman Powell's speech to the National Association of Broadcasters on April 20, 2004).

<sup>26</sup> *Holohan*, *supra* note 5, at 361, n.115.

<sup>27</sup> FCC indecency regulation consists of two requirements in determining material broadcasted is indecent. First, material must fall within the indecency definition by describing or depicting "sexual or excretory organs or activities." Second, the material must be patently offensive as measured by "contemporary community standards" after a thorough exploration of the "full context" of the program when the material was aired. This second prong has the following three considerations: 1) explicitness and graphic nature of the description or depiction, 2) whether the material dwells on or repeats at length these depictions or descriptions, and 3) whether the material panders to, titillates, or shocks the audience. See *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rec. 7999, 8003 ¶ 10, April 6, 2001.

<sup>28</sup> *Indecency Policy Statement*, *supra* note 6, at 8002, ¶¶ 7-8.

<sup>29</sup> *In the Matter of Infinity Radio License, Inc.* 19 F.C.C.R. 5022, 5026 (2004).

<sup>30</sup> *Id.*

<sup>31</sup> See Adlestein Statement, *supra* note 8, at 26.

<sup>32</sup> Michael Botein and Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 MEDIA L. & POL'Y 7, 31 (Fall 2005).

<sup>33</sup> See Mira T. Ohm, *Sex 24/7: What's the Harm in Broadcast Indecency?*, 26 WOMEN'S RTS. L. REP. 167, 176 (Spring-Summer 2005) (discussing the split in racist societies between a "puritanical façade" and a constantly threatening "explosively sexual and aggressive underbelly" in using the Super Bowl XXXVIII halftime show example by postulating that the "wardrobe malfunction" may have been a way of acting out sexual desires to "ravage a 'lower' woman who is sexually lascivious"); see also Marjorie Heins, *What Is the Fuss About Janet Jackson's Breast*, Free Expression Policy Project (website), February 3, 2004, available at <http://www.fepproject.org/commentaries/superbowl.html> [hereinafter *What Is the Fuss*] (stating "The first response is that punishments by the FCC are not exactly going to put all of the vulgar words and lusty thoughts that cram our culture back into Pandora's Box").

<sup>34</sup> Ohm, *supra* note 33, at 175.

<sup>35</sup> Ohm, *supra* note 33, at 169.

<sup>36</sup> Ohm, *supra* note 33, at 169, n19.

<sup>37</sup> Marjorie Heins, *The Strange Case of Sarah Jones*, The Free Expression Policy Project, available at <http://www.fepproject.org/commentaries/sarahjones.html> (last visited Mar. 15, 2007).

<sup>38</sup> Lisa de Moreas, *PBS's Lip-Reading Effort*, THE WASHINGTON POST, July 26, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/26/AR2006072602003.html> (last visited Mar. 15, 2007).

<sup>39</sup> See *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

<sup>40</sup> FCC Orders are comparable to court decisions and are written and published by the FCC when an indecency investigation has occurred and programming is deemed indecent or not indecent. In particularly controversial decisions, sometimes due to briefs and complaints filed by broadcasters, the FCC will issue additional orders clarifying previous decisions and establishing further guidance on a specific indecency finding at issue.

<sup>41</sup> §257(b), *supra* note 16.

<sup>42</sup> See Marjorie Heins, *America's Culture Czars*, The Free Expression Policy Project (website), March 21, 2006, available at <http://www.fepproject.org/commentaries/FCC3-21-06.html> at update section [hereinafter *America's Culture Czars*] (Center for Creative Voices in Media filed a Motion to Intervene in the Second Circuit case, arguing that the FCC's decision violated its member artists' and listeners' "rights to have access to diverse sources of information, as is guaranteed by the Communications Act, and the First Amendment").

<sup>43</sup> *Id.*; see also Ohm, *supra* note 33, at 172 (stating that FCC regulation does not address adverse impacts of its rulings on "individual empowerment, cultural meaning, and social heterogeneity.>").

<sup>44</sup> See generally Ohm, *supra* note 33, at 176.

<sup>45</sup> See Ohm, *supra* note 33, at 176; see *What Is the Fuss*, *supra* note 33.

<sup>46</sup> See Ohm, *supra* note 33, at 175 (citing the Sarah Jones' example as having "tame" lyrics in comparison to other songs rap songs regularly broadcasts performed by men).

<sup>47</sup> See generally Ohm, *supra* note 33.

<sup>48</sup> See §257(b) *supra* note 16.

<sup>49</sup> See *America's Culture Czars*, *supra* note 42.

# HITTING THE LEGAL DIVERSITY MARKET HOME: MINORITY WOMEN STRIKE OUT

By LeeAnn O'Neill\*

In the 1990s, in-house corporate counsel began demanding greater diversity in their outside law firms, culminating in the 1999 Morgan Letter, a diversity manifesto signed by more than 500 corporate general counsels to consider diversity when hiring outside counsel.<sup>2</sup> General counsel at corporations began assessing whether women and minority lawyers were among the client relationship managers and their likelihood to be assigned to the company's work.<sup>3</sup> Diversity provisions, including demographic data of the law firm as well as a demographic breakdown of lawyers working on a company's matters,<sup>4</sup> became part of most competitive bidding for legal services. Later, in-house corporate counsel raised the stakes with the circulation of the 2004 Call to Action, which calls on in-house corporate counsel to fire firms that lack "meaningful interest in being diverse."<sup>5</sup> Thus far, more than 100 companies have signed the Call to Action.<sup>6</sup>

In 2005, Wal-Mart shocked the legal community when it fired one of its outside law firms for failing to meet diversity goals for women and minorities.<sup>7</sup> Looking at the sheer number of minority and women attorneys was not enough for Wal-Mart. Rather, Wal-Mart required the identification of at least one minority and one woman attorney to be among the top five relationship attorneys.<sup>8</sup> As a result of Wal-Mart's actions, law firms are finally being forced to take the Call for Action seriously.

For women, the positive impact of these diversity initiatives is recognizable, but slow. In 1995, 14.2% of equity partners were women, in comparison with 17.2% in 2005.<sup>9</sup> Based on current rates, it will take until 2115 to reach equal numbers of male and female partners.<sup>10</sup> The future for minority<sup>11</sup> women looks even more dismal; they represent just 1.48% of all equity partners.<sup>12</sup> The numbers for minority women partners seem unlikely to rise, as the attrition rate for minority female associates has risen from 75% in the late 1990s to 86% in 2005, despite these diversity initiatives.<sup>13</sup>

Well-intentioned diversity initiatives based on the generic advancement of "minorities and women," however, may not produce a complete picture of diversity. By only targeting "minorities and women," law firms' diversity initiatives do not account for the vulnerable position of minority women attorneys as double minorities, nor do they account for unequal advancement of ethnic or racial groups, such as Asian American advancement over Latino or African American advancement.<sup>14</sup> This article seeks to address the precarious status of minority women attorneys, who are particularly susceptible to being left behind in diversity initiatives. First, this article discusses the unequal treatment of women in the legal profession and the institutional barriers to advancement that all women face. Second, this article demonstrates how the combined effect of racial bias,

racial hierarchies, and gender bias disparately impact minority women within the current promotion paradigm. Third, this article analyzes how well-intentioned statistics-based law firm diversity initiatives entrench the existing two strikes against minority women while valuing female attorneys less than their male counterparts. Finally, this article proposes new ways to assess law firm diversity.

## STRIKE ONE: PRE-EXISTING GENDER STEREOTYPING, COGNITIVE BIAS, AND LACK OF CHOICE FOR WOMEN IN THE LEGAL PROFESSION

The passage of Title VII in 1964, which prompted the American Association of Law Schools and the American Bar Association's adoption of equal opportunity policies for women in the early 1970s, coupled with the subsequent explosion of women law students in the 1970s and 1980s, flooded the market with woman attorneys.<sup>15</sup> Although government and legal aid jobs were generally available to women attorneys, private law firms often refused to interview qualified women attorneys or offered lower salaries for positions with no promotion opportunities.<sup>16</sup> One woman who graduated from law school in the 1970s recounted that she was hired because "they just thought it was time to have a woman, but not that work would be assigned to [her]."<sup>17</sup> Once admitted, women were stereotyped by law firms into specialties considered appropriate for women, including "library work and research, brief writing, 'blue sky' work, and the specialties of trusts, estates, wills, and domestic relations."<sup>18</sup> Because of the nature of these specialties, women flew under the clients' radars. Law firms justified this conduct by asserting that women "self-selected" these specialties, indicating their preference for that type of work.<sup>19</sup> Women accepted work in these "appropriate" practice areas to gain acceptance within the law firm and to avoid antagonizing male lawyers, thereby sacrificing new client development, limiting existing client networking, and limiting development of legal skills in more prestigious practices in exchange.<sup>20</sup> Partnership selection relies heavily on inheriting an outgoing partner's clients and subjective assessments of client recruitment and networking.<sup>21</sup> Rather than acknowledging the structural odds stacked against women, law firms reason that women "self-select" into "of counsel" positions or non-partner track careers to accommodate family or work-life balance and avoid the work of client recruitment and development.<sup>22</sup>

"Self-selection," however, does not explain the disproportionate numbers of women attorneys denied partnership, with women attorneys accounting for 48% of all associates but only 17.2% of equity partners.<sup>23</sup> Rather, discriminatory evaluations, assignments of less important work, presumptions of incompe-

## STRIKE TWO: PRE-EXISTING RACIAL STEREOTYPING, RACIAL HIERARCHY, AND LACK OF CHOICE FOR WOMEN IN THE LEGAL PROFESSION

tence, inadequate mentoring, and sexual personality stereotyping plague women in private law firms.<sup>24</sup> For example, in *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, the law firm began with a presumption of incompetence by telling Ezold during her interview that she would have a difficult time because “she was a woman, had not attended an Ivy League law school, and had not been on law review.”<sup>25</sup> Once hired, the firm assigned Ezold to “small” actions in comparison to their standard cases. When later assigned to large, complex cases, the law firm rated her poorly for her analytical skills.<sup>26</sup> Finally, the law firm denied her partnership, citing her poor analytical skills, while advancing men who scored lower in the overall partnership evaluation.<sup>27</sup>

Partnership decisions may also be influenced by implicit gender stereotyping or cognitive bias.<sup>28</sup> Cognitive bias is the unconscious interjection of gender expectations into decision making, including partnership review. For example, in *Price Waterhouse v. Hopkins*, Price Waterhouse did not refute expert testimony that the partnership selection process was likely influenced by sex stereotyping.<sup>29</sup> Hopkins was described both as being “extremely competent” and “forthright” as well as abrasive and “overcompensating for being a woman.” As a solution to aggressive interpersonal skills, one partner recommended Hopkins be more “feminine.”<sup>30</sup>

Even though Title VII failed to provide a remedy for Hopkins and Ezold, women have used it with limited success as a remedy for discrimination on the basis of gender in partnership decisions at other private firms.<sup>31</sup> Nevertheless, scholars criticize Title VII for the heavy evidentiary burden placed on plaintiffs and deference to the subjective partnership decision making process.<sup>32</sup> Under the current McDonnell Douglas burden-shifting framework, a woman attorney must establish a prima facie case of discrimination by demonstrating: (1) that she belongs to a protected class under Title VII, or that she is a woman; (2) that the law firm was seeking partners, that she sought partnership, and that she was qualified for partnership; (3) that despite her qualifications, she was rejected; and (4) that after her rejection, the law firm continued to seek similarly qualified associates for partnership.<sup>33</sup> Once she meets this burden, the law firm must articulate a legitimate nondiscriminatory reason for the attorney’s rejection from partnership.<sup>34</sup> The highly subjective nature of partnership decisions and mixed motives for denying partnership make it easier to mask unconscious biases.<sup>35</sup> Once the law firm articulates a nondiscriminatory reason, the woman attorney has the “opportunity” to show that the stated reason is a pretext, but must demonstrate pretext with evidence of overt discrimination.<sup>36</sup> Once again, the subtle nature of unconscious bias creates a nearly insurmountable barrier to a successful remedy under Title VII.

Along with the explosion of women in law schools and law firms in the 1970s and 1980s came an increase of minority women in the legal profession. Upon graduating, minority women became over-represented in public defender positions or in other government jobs and often took on work helping minorities.<sup>37</sup> As with white women, private law firms often refused to interview qualified minority women attorneys or offered lower salaries for positions with no promotion opportunities.<sup>38</sup> To the extent that private law firms targeted minority women in their hiring, the underlying motivation was sometimes to satisfy both race and sex requirements for the price of one, or, if they were “lucky,” a black Latina attorney was three for the price of one.<sup>39</sup> Once admitted to private law firms, minority women were “ghettoized”<sup>40</sup> into certain practice areas much like their white counterparts.<sup>41</sup> However, minority women attorneys further suffered under overt tokenism, as representatives of their gender and minority groups.<sup>42</sup> One minority woman recalled that she “was always asked to attend functions and award ceremonies, speak to law students of color and pose for advertising publications. However, [she] never had contact with partners in power other than at these events.”<sup>43</sup>

Additionally, minority women often met with clients only when their gender or race was an advantage – as when the client requests a diverse legal team or a partner assumes that minority clients want to see a “familiar face.”<sup>44</sup> In a recent incident, a Korean-American woman in her fourth year as an associate discussed how these assumptions can backfire:

[A managing partner] introduced me to the client who was Korean and he tells him that I’m Korean, too. He said, “She eats kim chee, just like you.” He said to me, “Talk to him.” I looked at the client and said, “It’s a pleasure to meet you. I’m sure you speak English better than I speak Korean.” The client’s face was so red. Then the partner left a message on my internal message system, and he was speaking gibberish, trying to sound like an Asian speaker.<sup>45</sup>

Not only did this incident reinforce race matching, but it also implicitly marked the Korean-American woman as a Korean hostess to the Korean client, rather than establishing the woman as the client’s attorney.

In addition to cognitive bias against women, minority women may also suffer under unconscious racism.<sup>46</sup> For example, minority women attorneys are often mistaken for secretaries, court reporters, or paralegals.<sup>47</sup> The disparate impact of the “double negative” of being a woman and a minority is evident – nearly two-thirds of minority women attorneys compared to 4% of white men were excluded from networking opportunities; 44% of minority women compared to 2% of white men were

denied desirable assignments; 43% of minority women compared to 3% of white men were limited from client development opportunities; nearly one-third of minority women compared to less than 1% of white men felt they received unfair performance evaluations;<sup>48</sup> and 20% of minority women compared to 1% of white men felt they were denied promotions.<sup>49</sup> It is important to note that the “careers of white women attorneys and men attorneys of color were neither as disadvantaged as those of women attorneys of color.”<sup>50</sup> All of these biases culminate in the disparity of retention rates in law firms for minority women at 53% compared to 72% for white men.<sup>51</sup> However, while white men often left to go to other large law firms, many minority women left for smaller or minority-owned law firms, accounting for the estimated 86% attrition rate for minority women.<sup>52</sup>

Often overlooked is the nuanced difference between stereotypes of particular groups of minority women and their effects on women lawyers.<sup>53</sup> Asian-American women attorneys may be stereotyped as “hard-working, obedient, and compliant (a racialized and gendered stereotype), but also as sexually available in a particularly racialized way.”<sup>54</sup> Additionally, Asian-American women attorneys may be seen as too passive for litigation or other “bet the firm” type of work.<sup>55</sup> Interestingly, the very traits lacking in so-called passive and obedient Asian-American women attorneys are considered detrimental for so-called aggressive and combative African-American women attorneys, who are also considered “sexually available” and sexualized as “deceitful and promiscuous.”<sup>56</sup> African-American women attorneys are particularly susceptible to having their attorney status overlooked and mistaken as support staff.<sup>57</sup> Latina attorneys may be questioned about their immigration status or stereotyped as speaking Spanish.<sup>58</sup> Additionally, they may often be channeled into immigration work under the assumption that they would have a vested interest.<sup>59</sup> Finally, Arab-American women attorneys may be stereotyped as oppressed by their veils or as “passive victim[s] of Arab patriarchy.”<sup>60</sup> Although not exhaustive, these stereotypes demonstrate both overt and unconscious biases confronting minority women in the legal field.

These racial biases are compounded by a hierarchy in white America’s prejudice and stereotyping toward different racial groups – with African Americans at the very bottom of the racial hierarchy, followed by Latinos, and with Asian Americans often scoring positively.<sup>61</sup> Social stereotyping often manifests itself in hiring and partnership decisions in private law firms.<sup>62</sup> For example, although Asian Americans accounted for 11.3% of the top 20 law school graduates in 2005, they accounted for 15% of large law firm associates.<sup>63</sup> Compare this to African Americans accounting for 7.4% of law school graduates and just 5% of associates, as well as Latinos accounting for 6.9% of law school graduates and just 4.7% of associates.<sup>64</sup> Between 1998 and 2005, the growth of Asian-American attorneys (nearly doubling from 8.7% to 15%) at large law firms dwarfed the growth of African-American attorneys (marginally growing from 4% to 5%) and Latino attorneys (marginally growing from 3.7% to 4.7%), suggesting that societal racial hierarchies trans-

late to private law firms.<sup>65</sup> However, once allowed to move up the power structure, it seems that all minorities are left out, with Asian Americans as 11.8% of the pre-partner pool and 3.7% of the new partners; African Americans as 4.2% of the pre-partner pool and 1.2% of the new partners; and Latinos as 2.9% of the pre-partner pool and 1.6% of the new partners.<sup>66</sup> The gender and racial hierarchies represented in the studies were also evident in Jenner & Block LLP’s summer associate class, which was the largest reported summer associate class in 2001 - there were 90 white summer associates (61 men and 29 women), 10 Asian-American summer associates (6 men and 4 women), 4 Latino summer associates (2 men and 2 women), and 1 African-American summer associate (0 men and 1 woman).<sup>67</sup> Consequently, minority women are subject to three levels of subjugation in preference: first, subjugated as women; second, subjugated as minorities; and third, subjugated within their own minority status.

While Title VII provides an available remedy for discrimination against minority women, the burden-shifting framework presents some practical difficulties for proving discrimination based on the intersection of gender and race.<sup>68</sup> First, there are no cases to date challenging a partnership decision in the legal profession on the basis of gender plus race, perhaps for the very reason that Title VII is not an effective remedy for minority women. The current framework for challenging partnership decisions may require that a woman choose to litigate as a woman or as a minority, but not as both.<sup>69</sup> Thus, minority women risk the catch-22 of courts bifurcating their female self from their minority self, finding that separately they have not been discriminated against as a woman or as a minority, and ignoring that the permutation of both was the basis of their discrimination.<sup>70</sup>

There are, however, a growing number of cases recognizing intersectionality of protected classes under Title VII.<sup>71</sup> The Fifth Circuit found that African-American women constituted a separate protected class under Title VII in *Jeffries v. Harris County Community Action Ass’n*.<sup>72</sup> Additionally, the Ninth Circuit found in *Lam v. University of Hawaii* that treating race and gender discrimination separately did not adequately assess the form of discrimination leveled against an Asian-American woman.<sup>73</sup> In particular, the Ninth Circuit found that Asian-American women experience a different set of stereotypes than do Asian-American men and white women.<sup>74</sup> However, even after proving all of the elements of prima facie discrimination, a minority woman attorney may have difficulty demonstrating the nuanced discrimination faced by her sub-class in proving pretext for denial of partnership. Moreover, the relatively small numbers of women and minorities in private law firms makes it difficult to find an appropriate “similarly situated” attorney for comparison. In *Moore v. Hughes Helicopter*, the court used intersectionality of protected classes against an African-American woman, holding that she was not similar enough to all women to be certified as a class representative.<sup>75</sup> Additionally, there were no “statistically significant” numbers of Afri-

can-American women employed by the defendant company, barring her from bringing a claim as an African-American woman.<sup>76</sup> Given that the *Moore* court found that an African-American woman was significantly different than white women and African-American men, should Arab-American women be compared with Arab-American men, other minority women in general, or white women?<sup>77</sup> In law firms, finding an appropriate “similarly-situated” person is complicated further by the small numbers of other minorities available for comparison.

### STRIKE THREE: THE NEW DIVERSITY MARKET, MARKET DYSFUNCTION, AND DIVERSITY QUEUES

The lack of an effective remedy under Title VII, the massive attrition rates for minority women in large law firms, and the lack of law firm commitment to diversity drove the rapidly diversifying general counsel of corporations to take action. The Morgan Letter and the Call to Action brought forth a flood of diversity initiatives based on the number of minorities and women in law firms, creating a new market for diversity.<sup>78</sup> Top law students also prioritize diversity when conducting job searches, forcing law firms to at least address the issue to attract the most qualified candidates.<sup>79</sup> In June 2005, Wal-Mart sent a letter to its 100 largest outside counsel requesting a list of three to five potential partners who would manage the case with the general counsel, requiring at least one minority and one woman.<sup>80</sup> Oracle asked “that the first person [a law firm] consider for assignment to the case be a woman or a minority employee of your firm with appropriate experience.”<sup>81</sup> Large corporations, including Dupont and General Motors, track and monitor the number of hours worked by minority and women lawyers on their matters by their outside law firms.<sup>82</sup> Large corporations also require demographic breakdowns of minority and women associates and partners.<sup>83</sup>

Corporate counsel diversity initiatives may not actually generate change in private law firms, however. First, law firms may be resistant to change or do not have effective diversity policies.<sup>84</sup> Some law firms have responded to diversity initiatives by substituting exclusionary discrimination of women and minority attorneys with tokenism and “mascoting,” reminiscent of law firms’ reactions to the affirmative action policies of the 1970s.<sup>85</sup> Furthermore, law firms such as Venable LLP, Womble Carlyle Sandridge & Rice LLP, and Sonnenschein Nath & Rosenthal LLP have circumvented actual change in their partnership structure by forming alliances with minority-owned law firms.<sup>86</sup> Although their motive may not have been to circumvent change, these alliances were prompted by a lack of qualified minorities and women in their firms.<sup>87</sup> Not only does this allow big firms to “outsource” diversity, but it denies their own minority and women attorneys the opportunity to pursue these cases.<sup>88</sup>

Additionally, diversity initiatives may actually entrench minority stereotypes. A danger implicit in diversity initiatives is a tendency to assume clients of a particular racial background prefer to work with attorneys of the same background or for clients to request an attorney of a particular background.<sup>89</sup> By

demanding diversity, general counsel may be intentionally or unintentionally calling for race or gender matching.<sup>90</sup> This reinforces race and gender essentialism and assumes that an African-American male client prefers an African-American male attorney or that an Asian-American woman client prefers an Asian-American female attorney.<sup>91</sup> “Race matching” by private law firms, however, is prohibited under Title VII. For example, although employers may engage in affirmative action to remedy past discrimination, basing job assignments on racial stereotypes violates Title VII.<sup>92</sup>

Furthermore, if assigned to a case by virtue of race, gender, or a combination of both, minority and women attorneys may not be able to turn down assignments without detrimentally impacting their partnership opportunities. For example, in *King v. Phelps Dunbar*, an African-American male attorney claimed that partners at the firm withheld work and unfairly criticized his work after turning down assignments made because of his race.<sup>93</sup> Additionally, King refused to return to a trial after the opposing counsel made a racially insensitive remark.<sup>94</sup> Although it was undisputed that King’s evaluations were positive prior to these incidents and sharply declined until his resignation several years later, the court found that King lacked evidence tying the critical evaluations to these incidents.<sup>95</sup> Consequently, when diversity initiatives prompt “race matching,” minorities may not realistically be able to turn down an assignment. This has implications for career development for minorities who may have an interest in particular practice areas, but are channeled into work where a particular client wants a minority. The relatively small number of minorities in law firms greatly increases the likelihood of this phenomenon. For example, in the Jenner & Block LLP example, if a client had requested that an African-American summer associate work on his case, only one summer associate would qualify, forcing her to take the case.

Finally, numbers-based diversity initiatives put a stigma on women and minorities as “affirmative action hires.”<sup>96</sup> Attorneys hired to meet general counsel diversity standards may lead to the dominant white male partners further questioning their abilities and qualifications.<sup>97</sup> For example, preferences for hiring African Americans may be viewed as counterproductive in large law firms and as evidence that African Americans are not as qualified as their white counterparts.<sup>98</sup> This is the same type of rationale used in discussing why minorities leave large law firms in droves.<sup>99</sup>

Even if private law firms do not side-step changes in their diversity initiatives, the “minorities and women” standard set forth by the general counsel may entrench the existing marginalization of minority women. Continued use of a vague “minority and women” category may allow law firms to hide behind their existing diversity marketing. For example, a survey of the top ten ranked law firms, ranked by associate satisfaction, diversity, hours, pay, associate/partner relations, formal and informal training, and pro bono commitment,<sup>100</sup> demonstrates that even the best law firms utilize the generic diversity standard of “women and minorities” on their recruitment websites. The

“women and minorities” standard is evidenced in diversity initiatives that boast of recruitment of “25% persons of color”<sup>101</sup> to “hosting diversity events”<sup>102</sup> to “diversity scholars programs.”<sup>103</sup> Some tout advancement of women attorneys, but reviewing the ethnic and racial backgrounds of their female partners reveals that advancement of women attorneys really means advancement of *white* women attorneys.<sup>104</sup> When firms list their diversity statistics on their recruitment websites, they generally do not provide a breakdown of minority women and minority men.<sup>105</sup> However, a review of the gender of their minority partners reveals advancement of minority male attorneys, rather than minority women attorneys.<sup>106</sup> Additionally, most of the law firms’ recruitment websites clumped the diversity statistics for all their offices together, rather than providing an office-by-office breakdown. Others did not make mention of diversity programs at all.<sup>107</sup> These were just a few of the generalized images of diversity presented by the top ten law firms, none of which provided a clear picture of the actual diversity of their law firm.

Minority women may also be denied access to the prestigious large corporate cases because of their current position within the “diversity queue.”<sup>108</sup> Barbara Reskin and Patricia Roos discuss job queues as the ordering of a group of employees in the order of preference, where employers will choose the employee in the highest position on the job queue as possible. Historically, employers created “gender queues” in their hiring practices, hiring men before women.<sup>109</sup> An updated version of the “gender queue” would be the “diversity queue,” or the ranking of minorities and women in the order of most preferred to least preferred. Thus, female attorneys are not only valued less than male attorneys, but they are also placed lower in the job queue by virtue of being assigned less important work and presumed to be incompetent. Additionally, the existence of a racial hierarchy caused by cognitive bias and stereotyping, may elevate Asian Americans over Latinos and African Americans in the job queue. Therefore, minority women may be lowered within the job queue by virtue of being a woman and a minority.

Although this phenomenon has not been studied before, the current composition of law firm diversity, especially among the partners of law firms, supports the hypothesis that minority men and white women are more successful in their law firm careers than minority women.<sup>110</sup> It is worth noting that minority male partners outnumber their female counterparts more than two to one, despite the fact there are more minority woman associates than minority male associates.<sup>111</sup> For example, using Jenner & Block LLP’s 2001 summer associate class composition reflecting 111 attorneys, a requirement of assigning a minority or woman attorney to a particular case could create a queue with 44 eligible attorneys to fulfill the diversity requirement - 29 white women, eight minority men, and seven minority

women.<sup>112</sup> If the diversity queue really does exist, the odds are stacked against the seven minority women at the bottom of the queue. Although there is no direct evidence of a diversity queue, the current composition of law firms certainly implies there could be, and that it would be worth further inquiry in the future.

## MAKING IT TO HOME: THE FINAL SCORE

Current diversity initiatives, while well-intentioned, are fraught with loopholes and problems such as the lack of a uniform diversity amongst general counsel, implicit race matching, and lack of transparency in diversity programs at the law firms. Moreover, the new push by corporate general counsel for increasing the numbers of women and minorities will simply entrench the current problems, resulting in the continued marginalization of minority women. By targeting only “minorities and women,” diversity initiatives do not account for the vulnerable position of minority women attorneys as double minorities, nor do they account for unequal advancement of ethnic or racial groups, such as Asian American advancement over Latino or African American advancement, within law firms.<sup>113</sup>

Uniform diversity standards should replace the haphazard diversity reporting requirements established by corporate general counsel for their outside law firms. Instead, an ABA diversity certification program for law firms could create one uniform standard and yearly renewal and oversight over law firm diversity initiatives.<sup>114</sup> Currently, the ABA offers Continuing Legal Education (CLE) courses on diversity and has the institutional knowledge from its comprehensive reports on diversity.<sup>115</sup> The ABA has already worked in conjunction with corporate general counsel to discuss diversity strategies and could continue to do so in creating a new diversity certification program.<sup>116</sup> Although these types of programs have always been voluntary, corporate general counsel could agree to only use and retain law firms who are certified by the ABA as meeting their diversity requirements. Therefore, while diversity certification would not be mandatory, the corporate signatories to the “Call to Action” could simply consult the ABA to verify law firms in compliance with their diversity objectives, creating a business case for law firms to obtain their diversity certification.

Additionally, general counsel should stop utilizing diversity quotas, which could serve to perpetuate “affirmative action bias” and disproportionately disenfranchise minority women attorneys. Rather than focusing on statistics, which tends to promote race or gender matching, a diversity certification program could provide measures resolving or redressing institutional biases against women, minorities, and minority women. For example, the ABA certification program could require equity partners to attend a certain number of diversity CLEs as part of their certifi-

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*Well-intentioned diversity initiatives based on generic advancement of “minorities and women,” however, may not produce a complete picture of diversity.”*

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cation requirements.<sup>117</sup> Consequently, for law firms whose clients are part of the “Call to Action,” this would create a business case for attendance in order to secure the ABA diversity certification and retain their client’s work. Additionally, diversity inclusiveness and environment could be assessed through yearly surveys of each law firm’s associates and partners, with reports generated back to each law firm to identify particular areas of concern. The ABA already has the resources to put together an effective questionnaire and could include factors such as associate/partner relations, experiences of discrimination, availability of work, and others.<sup>118</sup> To allow for personalized diversity programs within each law firm, renewal of certification could be tied to closing the gap between associate and partner perceptions of work environment. Although numbers may be important to assess the medium and long term success rates of diversity certification, they should not be the primary focus as they are now.

Each law firm’s diversity statistics at the associate and partner level should be made publicly available through the ABA, with the breakdown of women (and each sub-category of minorities) and men (and each sub-category of minorities) to avoid the double counting of minority status as well as identify the advancement of each particular minority group. Furthermore, the ABA could follow the National Association for Legal Professionals example of reporting by office to avoid double counting or blurring the numbers of one firm across several offices which could mask diversity problems one particular branch of-

fice.<sup>119</sup> The availability of detailed statistics will force law firms to deal with the realities of their numbers rather than hiding behind idyllic diversity brochures and allow prospective employees to assess the environment of the law firm independently.

Finally, partnership requirements should be more transparent, with clear requirements and benchmarks for associates to rely on in their career development. The subjective nature of partnership decisions makes it difficult for women and minority associates to determine and prove the reason for failing to make partner, since law firms can easily point to other motives.<sup>120</sup> Transparency would help relieve the evidentiary burden on minority attorneys making claims under Title VII and help make Title VII a more effective remedy.

The future success of diversity initiatives promulgated by corporate general counsel will depend on their ability to coordinate with each other to leverage their influence to make the business case for diversity in law firms. Law firms must feel the financial impact of not meeting diversity standards. In particular, this will require more corporations to act like Wal-Mart has done and fire law firms that do not meet their diversity goals. By making the bottom line money and shifting the focus from merely increasing the number of women and minorities to evaluating a firm’s environment of inclusiveness, senior equity partners will be more likely to commit to diversity.

## ENDNOTES

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<sup>1</sup> Learning to Give, available at [http://www.learningtogive.org/search/quotes/Display\\_Quotes.asp?subject\\_id=113&search\\_type=subject](http://www.learningtogive.org/search/quotes/Display_Quotes.asp?subject_id=113&search_type=subject) (last visited Mar. 7, 2007).

<sup>2</sup> Jeremy Fieler, *Law Firm Diversity gets Closer Scrutiny*, PHIL. BUS. J. (May 20, 2002), available at <http://www.bizjournals.com/philadelphia/stories/2002/05/20/story5.html?t=printable> (last visited Mar. 7, 2007); Jill Nawrocki, *GCS Put on the Pressure*, MINORITY L.J. (May 1, 2006), available at <http://www.law.com/jsp/mlj/diversityScorecard.jsp> (last visited Mar. 7, 2007) [hereinafter *Nawrocki*].

<sup>3</sup> Nawrocki, *supra* note 2; Raymond L. Ocampo, Jr., *On Hiring Women and Minority Attorneys: One General Counsel’s Perspective*, FindLaw.com, available at <http://careers.findlaw.com/diversity/articles/onhiring.html> (last visited Mar. 7, 2007).

<sup>4</sup> Fieler, *supra* note 2.

<sup>5</sup> Rick Palmore, *Call to Action: Diversity in the Legal Profession*, available at <http://www.acca.com/resource/getfile.php?id=5748> (last visited Mar. 7, 2007).

<sup>6</sup> Minority Corporate Counsel Association, *Call to Action Corporate Signatories: Diversity in the Legal Profession*, available at <http://www.mcca.com/CTA/signatories-print.shtml> (last visited Mar. 7, 2007) (including companies like Coca-Cola, Wal-Mart, and Microsoft).

<sup>7</sup> Edgardo Ramos and Lynn Anne Baronas, *What Works: Ways to Increase Diversity at Law Firms*, 1/16/2006 NAT’L L.J. 13.

<sup>8</sup> Meredith Hobbs, *Wal-Mart Demands Diversity in Law Firms*, Law.com (July 6, 2005), available at [www.law.com/jsp/law/LawArticleFriendly.jsp?id=1120579809481](http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1120579809481) (last visited March 7, 2007).

<sup>9</sup> WOMEN’S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, *CREATING PATHWAYS TO SUCCESS: ADVANCING AND RETAINING WOMEN IN TODAY’S LAW FIRMS* at 11 (May 2006), available at <http://www.wbadc.org/associations/1556/files/Creating%20Pathways%20Report%20PDF.pdf> (last visited Mar. 7, 2007) [hereinafter *Pathways to Success*].

<sup>10</sup> *Id.*

<sup>11</sup> This article uses “minority” or the phrase “of color” as an umbrella term for persons of Latina, African-American, American Indian, Asian-American, Arab-American, and multiracial descent. Due to a lack of information on the impact of diversity initiatives on lesbian women or other women who could be considered diverse (e.g. handicapped, deaf, etc.), this article focuses solely on diversity in a racial context.

<sup>12</sup> National Association of Legal Professionals, *Percentage of Women and Minorities at Law Firms Up Slightly in 2006; Only 1.48% of Partners are Minority Women*, available at <http://nalp.org/content/index.php?pid=448> (last visited Mar. 7, 2007).

<sup>13</sup> ABA COMMISSION ON WOMEN IN THE PROFESSION, AMERICAN BAR ASSOCIATION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* at 9 (2006), [hereinafter *ABA Report*], available at <http://www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf> (last visited Mar. 7, 2007); see also CATALYST, *WOMEN IN LAW: MAKING THE CASE* (2001) [hereinafter *Catalyst Report*], available at [http://www.catalyst.org/knowledge/titles/title.php?page=lead\\_wlmkcase\\_01](http://www.catalyst.org/knowledge/titles/title.php?page=lead_wlmkcase_01) (last visited Mar. 7, 2007) (noting similar phenomenon from the 1970s to the 1990s).

<sup>14</sup> See Emily Barker, *Not all Diversity is Created Equal*, MINORITY L.J. (Summer 2005), available at <http://www.townsend.com/files/Diversity%206%20page.pdf> (last visited Mar. 7, 2007) (discussing that the strong showing of Asian Americans at private law firms masks the lack of hiring and retention of African Americans and Latinos); ABA Multicultural Women Attorneys Network, American Bar Association, *The Burdens of Both, the Privileges of Neither - Summary*, available at <http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=4520003> (last visited Mar. 15, 2007) (identifying that the combination of being an attorney of color and a woman is a double negative).

<sup>15</sup> Nancy Farrer, *Of Ivory Columns and Glass Ceilings: The Impact of the Supreme Court of the United States on the Practice of Women Attorneys in Law Firms*, 28 ST. MARY’S L.J. 529, 542-43 (1997).

<sup>16</sup> *Id.* at 547-49; Paula Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 174, 184-85

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- <sup>17</sup> Catalyst Report, *supra* note 13, at 30.
- <sup>18</sup> Farrer, *supra* note 15, at 552; HEDDA GARZA, BARRED FROM THE BAR 185 (1996).
- <sup>19</sup> CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 107-08 (2d ed. 1993); *but see* Nachum Sicherman, Gender Differences in Departures from a Large Firm, 49 INDUS. & LAB. REL. REV. 484, 500 (1996); *see generally* Mary Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U. CHI. L. REV. 934 (1986); Jane Friesen, *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation*, 82 Geo. L. J. 31 (1994).
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- <sup>24</sup> Farrer, *supra* note 15, at 556-57; *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also* Neuren v. Adduci, 43 F.3d 1507 (D.C. Cir. 1995).
- <sup>25</sup> Ezold v. Wolf, 983 F.2d 509, 514 (3d Cir. 1992).
- <sup>26</sup> *Id.*
- <sup>27</sup> *Id.*
- <sup>28</sup> *See* Charles Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERS. & SOC. PSYCH. 475 (1990); *See generally* Adam J. Oliner, *The Cognitive Roots of Stereotyping*, Massachusetts Institute of Technology (2000), available at <http://adam.oliner.net/comp/stereotyping.html> (last visited Mar. 7, 2007).
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- <sup>31</sup> *See, e.g.*, Hishon v. King & Spaulding, 467 U.S. 69 (1984); Dow v. Donovan, 150 F.Supp.2d 249 (D. Mass. 2001); Masterson v. LaBrum, 846 F.Supp. 1224 (E.D. Penn. 1993).
- <sup>32</sup> *See* Chwenyen Peters, *supra* note 21, at 639; Martin Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEORGETOWN L.J. 489 (2006); Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 66 (1990); *see also* Alfred W. Blumrosen, *Society in Tradition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1042-44 (1990).
- <sup>33</sup> *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
- <sup>34</sup> *Id.*
- <sup>35</sup> *See generally* Price Waterhouse, 490 U.S. 228.
- <sup>36</sup> *See generally* Green, 411 U.S. 792 (1973).
- <sup>37</sup> *See* GARZA, *supra* note 18, at 171; Catalyst Report, *supra* note 13, at 59; Elizabeth Chambliss, *Miles to Go 2000: Progress of Minorities in the Legal Profession - Summary*, ABA Commission on Racial and Ethnic Diversity in the Profession (2000), available at <http://www.abanet.org/minorities/publications/milestogo.htm> (last visited Mar. 7, 2007); *Diversity in Law Firms*, *supra* note 16.
- <sup>38</sup> Farrer, *supra* note 15, at 547-49; Patton, *supra* note 16, at 185 (2004); *See also* GARZA, *supra* note 18, at 171-176.
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- <sup>40</sup> *See* AMERICAN HERITAGE DICTIONARY (2000), available at <http://www.bartleby.com/61/22/G0112200.html> (last visited Mar. 7, 2007) (defining "ghettoize" as: "To set apart in or as if in a ghetto; isolate").
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- <sup>42</sup> *See* Martha Chamallas, *The Shadow of Professor Kingsfield: Contemporary Dilemmas Facing Women Law Professors*, 11 WM. & MARY J. WOMEN & L. 195, 195 (2004) (crediting the term "tokenism" to Dr. Martin Luther King); *See also*, ANGEL KWOLEK-FOLLAND, INCORPORATING WOMEN: A HISTORY OF WOMEN & BUSINESS IN THE UNITED STATES (2d ed. 2002).
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- <sup>45</sup> Ari Shapiro, *supra* note 43.
- <sup>46</sup> *See* Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 343-344 (1987); David Amodio and Patricia Devine, *Implicit Stereotyping vs. Evaluative Race Bias*, 91 J. PERS. & SOC. PSY. 652-661 (2006), available at [http://www.psych.nyu.edu/amodiolab/Amodio%20&%20Devine%20\(2006\).pdf](http://www.psych.nyu.edu/amodiolab/Amodio%20&%20Devine%20(2006).pdf) (last visited Mar. 7, 2007).
- <sup>47</sup> ABA Report, *supra* note 13, at 10.
- <sup>48</sup> ABA Report, *supra* note 13, at 10 (noting that unfair performance evaluations includes ignored accomplishments, exaggerated mistakes, and "soft" evaluations which made it difficult to correct mistakes).
- <sup>49</sup> ABA Report, *supra* note 13, at 10; *See also* Catalyst Report, *supra* note 13, at 29-44.
- <sup>50</sup> ABA Report, *supra* note 13, at 10.
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- <sup>52</sup> ABA Report, *supra* note 13, at 10.
- <sup>53</sup> *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that a woman's experience cannot be broken down into sex, race, class, etc. separately); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; *but see*, Catharine A. MacKinnon, *Keeping It Real: On Anti-Essentialism*, in WOMEN'S LIVES, MEN'S LAWS 84, 84-90 (2005).
- <sup>54</sup> Emily Houh, *Race, Sex, and Working Identities*, 39 U.C. DAVIS L. REV. 905, 935 (2006); Lily Liu, *All Asian Asians are Good at...*, Diversity and the Bar (May 2001), Minority Corporate Council Association, available at <http://www.mcca.com/site/data/inhouse/minorityattorneys/asianamerican.htm> (last visited Mar. 7, 2007); *see also* Miranda Oshige McGowen and James Lindgren, *Testing the "Model Minority Myth"*, 100 NW. U.L. REV. 331 (2006).
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- <sup>57</sup> *See, e.g.*, Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615, 643 (1998).
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- <sup>59</sup> Judy Scales-Trent, *Equal Rights Advocates: Addressing the Legal Issues of Women of Color*, 13 BERKELEY WOMEN'S L.J. 34, 68 (1998).
- <sup>60</sup> Rachel Saloom, *Arab Stereotyping: A Multi-disciplinary Perspective*, 2 AM. U. MODERN AM. 24, 27-28 (Fall 2006).
- <sup>61</sup> Jeffrey Dixon, *The Ties That Bind and Those That Don't: Toward Reconciling Group Threat and Contact Theories of Prejudice*, 84 SOCIAL FORCES 2179, 2187-88 (June 2006); Tom W. Smith, *Ethnic Images*, General Social Survey Project, Dec. 1990, available at <http://cloud9.norc.uchicago.edu/dlib/t-19.htm> (last visited Mar. 7, 2007).
- <sup>62</sup> *See* Lawrence, *supra* note 46.
- <sup>63</sup> New York City Bar, *2006 Diversity Signatory Law Firm Report* (2006) at 21, available at <http://www.abcny.org/Diversity/FirmBenchmarking06.pdf> (last visited Mar. 7, 2007) [hereinafter *Benchmarking Report*].
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- <sup>65</sup> *Id.*; *see also* Barker, *supra* note 14.
- <sup>66</sup> Benchmarking Report, *supra* note 62, at 22.
- <sup>67</sup> Mark H. Schauer, *Summer Associate Diversity Tops Other Groups at Firms*, CHICAGO LAWYER MAGAZINE, July 2002, at 7, available at [http://www.franczek.com/the\\_firm/press\\_room/summer.html](http://www.franczek.com/the_firm/press_room/summer.html) (last visited Mar. 7, 2007).
- <sup>68</sup> *See* Harris *supra* note 52; Crenshaw, *supra* note 52.
- <sup>69</sup> *See, e.g.*, Degraffenreid v. General Motors Assembly Div, 413 F. Supp. 142, 143 (E.D. Mo. 1976).

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- <sup>71</sup> See generally Kathleen McKenna, *Litigating Employment Discrimination & Sexual Harassment Claims 2006*, 743 PLI/Lit 195 (June 2006).
- <sup>72</sup> *Jefferies v. Harris County Cmty Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).
- <sup>73</sup> *Lam v. Univ. of Haw.*, 40 F.3d 1551 (9th Cir. 1994).
- <sup>74</sup> *Id.*
- <sup>75</sup> *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983).
- <sup>76</sup> *Id.*
- <sup>77</sup> *Id.*
- <sup>78</sup> There has been an explosion of Continuing Learning Education programs on the growing business argument for diversity and how to implement diversity initiatives, many with the assistance of corporate general counsel. See, e.g., ABA-CLE Diversity Programming and Initiatives, *Diversifying the Legal Profession: Strategies from General Counsel*, available at <http://www.abanet.org/cle/clelaw/diversifyingreg.html> (last visited Mar. 7, 2007); ABA-CLE Diversity Programming and Initiatives, *Valuing Diversity: Law Firms and Leadership in the 21<sup>st</sup> Century – Summary*, available at <http://www.abanet.org/abastore/index.cfm?section=cle&fm=Product.AddToCart&pid=V99VDLD> (last visited Mar. 7, 2007).
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- <sup>82</sup> Tamara Loomis, *Corporate Counsel Push Law Firms to Diversify; Data Collected on Billable Hours for Minorities and Women*, 10/25/2000 N.Y.L.J., 8 (2000).
- <sup>83</sup> *Id.*
- <sup>84</sup> See J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table,"* 71 *FORDHAM L. REV.* 1257, 1291 (2003); Delyte D. Frost, Minority Corporate Counsel Association, *Diversity Worst Practices, DIVERSITY & THE BAR* (Mar. 2001), available at <http://www.mcca.com/site/data/corporate/BP/worstpractices0301.htm> (last visited Mar. 7, 2007); Catalyst, Inc., *Making Change: Tackling Resistance to Diversity Efforts - Summary* (2002), available at <http://www.catalyst.org/xcart/product.php?productid=16160> (last visited Mar. 7, 2007).
- <sup>85</sup> See Cunyon Gordon, *supra* note 82, at 1258.
- <sup>86</sup> Dimitra Kessenides, *Outsourcing Diversity?*, *MINORITY L.J.* (May. 1, 2005), available at <http://www.law.com/jsp/mlj/PubArticleMLJ.jsp?id=1146560724206&hubtype=Scorecard.jsp> (last visited Mar. 7, 2007).
- <sup>87</sup> *Id.*
- <sup>88</sup> *Id.*
- <sup>89</sup> See, e.g., *King v. Phelps Dunbar LLP*, 844 So.2d 1012 (La.App. 4th Cir. 4/2/03).
- <sup>90</sup> See Cunyon Gordon, *supra* note 82, at 1284-85.
- <sup>91</sup> *Id.*
- <sup>92</sup> See, e.g., *Ferrill v. Paret Group, Inc.*, 168 F.3d 468 (11th Cir. 1999).
- <sup>93</sup> *King*, 844 So.2d at 1014.
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- <sup>95</sup> *Id.* at 1023.
- <sup>96</sup> BARBARA RESKIN, *THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT* 57 (1998); Madeline Heilman, Caryn Block, and Peter Stathos, *The Affirmative Action Stigma of Incompetence: Effects of Performance Information Ambiguity*, 40 *ACADEMY OF MGMT J.* 603 (1997); GREGORY NORTHCRAFT, *THE STIGMA OF AFFIRMATIVE ACTION: AN EMPIRICAL ANALYSIS - Summary* (1983), available at [http://eric.ed.gov/ERICWebPortal/Home.portal?\\_nfpb=true&\\_pageLabel=RecordDetails&ERICExtSearch\\_SearchValue\\_0=ED235415&ERICExtSearch\\_SearchType\\_0=eric\\_accno&objectId=0900000b801000ff](http://eric.ed.gov/ERICWebPortal/Home.portal?_nfpb=true&_pageLabel=RecordDetails&ERICExtSearch_SearchValue_0=ED235415&ERICExtSearch_SearchType_0=eric_accno&objectId=0900000b801000ff) (last visited Mar. 7, 2007).
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- <sup>99</sup> *Id.*
- <sup>100</sup> Vault.com, available at [http://www.vault.com/nr/lawrankings.jsp?law2004=2&ch\\_id=242&top100=1](http://www.vault.com/nr/lawrankings.jsp?law2004=2&ch_id=242&top100=1) (last visited Mar. 7, 2007) (listing the top 10 law firms and nationally ranking them by weighing scores – 40% satisfaction, 10% percent hours, 10% pay, 10% associate/partner relations, 10% diversity (women, minorities and gays), 10% formal training, 5% informal training, 5% pro bono).
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- <sup>102</sup> See, e.g., Cravath, Swaine & Moore, available at <http://www.cravath.com/Cravath.html> (last visited Mar. 7, 2007).
- <sup>103</sup> See, e.g., Latham & Watkins, available at <http://www.lw.com/recruiting/diversity.asp> (last visited Mar. 7, 2007).
- <sup>104</sup> See, e.g., Sullivan & Cromwell, available at <http://www.sullerom.com/careers/legalrecruiting/womenpartners/> (last visited Mar. 7, 2007).
- <sup>105</sup> See e.g., Davis, Polk, & Wardwell, available at <http://www.dpw.com/careers/racial.htm> (last visited Mar. 7, 2007); Simpson, Thacher & Bartlett, available at [http://www.stblaw.com/div\\_diversity.htm](http://www.stblaw.com/div_diversity.htm) (last visited Mar. 7, 2007).
- <sup>106</sup> *Id.*
- <sup>107</sup> See, e.g., Cleary Gottlieb, available at <http://www.cgsh.com> (last visited Mar. 7, 2007).
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- <sup>109</sup> *Id.*
- <sup>110</sup> See, e.g., Sullivan & Cromwell, available at <http://www.sullerom.com/careers/legalrecruiting/womenpartners/> (last visited Mar. 7, 2007) (where all female partners featured on their diversity recruiting website were white females); see generally the websites of Wachtell Lipton Rosen & Katz, Cravath Swaine & Moore, Skadden Arps, Davis Polk, Simpson Thacher & Bartlett, Latham & Watkins, Cleary Gottlieb, Weil Gotshal, and Covington & Burling; National Association of Legal Professionals, *Percentage of Women and Minorities at Law Firms Up Slightly in 2006*, available at <http://nalp.org/content/index.php?pid=448> (last visited Mar. 7, 2007) (reporting that women represent 17.9% of partners, minorities 5%, minority women 1.48%, and minority men 3.52%).
- <sup>111</sup> National Association of Legal Professionals, *supra* note 107.
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- <sup>113</sup> See Barker, *supra* note 14.
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- <sup>117</sup> See Chwenyen Peters, *supra* note 21.
- <sup>118</sup> A more concise form of the questionnaire used for the ABA Report or the Catalyst Report could be utilized. ABA Report, *supra* note 13; Catalyst Report, *supra* note 13.
- <sup>119</sup> National Association of Legal Professionals, *Women and Attorneys of Color at Law Firms* (2004), available at <http://www.nalp.org/content/index.php?pid=152> (last visited Mar. 7, 2007).
- <sup>120</sup> Chwenyen Peters, *supra* note 21, at 643; Ezold, 983 F.2d 509.

# PLEASE DON'T FEED THE HOMELESS: *POTTINGER* REVISITED

By Shirley D. Howell\*

In 1988, Miami's homeless population filed a class action, *Pottinger v. City of Miami*,<sup>2</sup> alleging that city officials acted in concert to deprive them of their civil rights. While the *Pottinger* litigation was ongoing, Hurricane Andrew struck Miami, leaving 200,000 additional homeless in its wake<sup>3</sup> and creating what the *Pottinger* court termed "a worst possible" scenario.<sup>4</sup> It was the first time that a hurricane figured into homelessness litigation, and it is likely that the outcome of the case was in fact affected by the hurricane. The court held Miami officials liable for violations of 42 U.S.C. § 1983,<sup>5</sup> the Eighth Amendment,<sup>6</sup> the Fourth Amendment,<sup>7</sup> the Due Process Clause,<sup>8</sup> and the right to travel,<sup>9</sup> perhaps in part because the tragedy of mass homelessness was showcased by Hurricane Andrew. In the face of so great a homeless population, the Court could not dismissively assume that people were homeless as a result of a perverse desire to be so, nor would it ignore the multiple violations of their constitutional rights.

The similarities between the homelessness scenarios created by Hurricanes Andrew and Katrina are startling, each storm leaving behind an unassimilated, newly homeless population to join the already burgeoning ranks of America's homeless population. While compassion has worn thin, evacuees have been ousted from temporary lodging. If adequate societal measures are not taken to house these evacuees, they will be forced to live in the streets, parks, and under bridges, as were the *Pottinger* plaintiffs.

This article will explore the relevance of *Pottinger* as the national homeless population rises to approximately five million in the twenty first century. Part I summarizes the demographics and causes of mass homelessness and addresses negative public reactions to the increased visibility of the homeless in major American cities. Part II outlines and discusses the successful causes of action brought by the homeless in *Pottinger*. Part III concludes by setting forth proposals that would reinvigorate incentives to construct additional affordable housing, revisit America's regressive tax schedule, and afford the homeless suspect classification.

## OVERVIEW OF HOMELESSNESS BEFORE HURRICANE KATRINA

In 2000, an estimated two million Americans were homeless on any given night.<sup>10</sup> Between 2.5 and 3.5 million Americans experienced homelessness every year,<sup>11</sup> and 30% of the homeless had been without homes for more than two years.<sup>12</sup> These numbers do not include the indeterminate number of indi-

viduals who had no homes and were "doubled up"<sup>13</sup> living with friends or relatives. Only those persons "who lack a permanent address and sleep in places not designed to be sleeping accommodations for human beings... and those living in shelters"<sup>14</sup> were considered homeless. Thus, those living under the roofs of their families and friends did not meet the definition.

Adult males constituted 44% of the homeless population before Hurricane Katrina.<sup>15</sup> Women<sup>16</sup> accompanied by minor children<sup>17</sup> were the fastest growing segment of the chronically homeless<sup>18</sup> and made up 36% of the homeless population.<sup>19</sup> Some 750,000 children were homeless<sup>20</sup> before Katrina and 1.5 million elderly had "worst case housing needs."<sup>21</sup> Fifty percent of the homeless were African Americans, 35% White Americans,

12% Latinos, 2% Native Americans, and 1% were Asian Americans.<sup>22</sup> The causes of America's rising homelessness rate have been debated for decades. Some contend that personal deficiencies such as mental illness,<sup>23</sup> substance abuse,<sup>24</sup> incarceration,<sup>25</sup> and an intergenerational

dependence upon welfare<sup>26</sup> are the primary causes of homelessness. Others cite macroeconomic factors such as loss of low-income housing,<sup>27</sup> unemployment and underemployment,<sup>28</sup> and a regressive tax structure.<sup>29</sup> Notably, neither school of thought considers the impact of natural disasters.

Years before Hurricane Katrina created the largest homeless population in American history, the public had developed "compassion fatigue" with homelessness.<sup>30</sup> San Francisco enacted a series of ordinances through its so-called Matrix Program to criminalize sleeping in a park, begging near a highway, or blocking a sidewalk.<sup>31</sup> Eleven thousand of San Francisco's poorest people were incarcerated as a result of the Matrix Program.<sup>32</sup> In Santa Anna, the homeless were rounded up, transported to a football stadium, physically marked with numbers, chained for hours, and ultimately released to a different location.<sup>33</sup> Massachusetts has imposed criminal sanctions upon those who "move about from place to place begging."<sup>34</sup> Alabama has made it a criminal act to wander about "in a public place for the purpose of begging."<sup>35</sup>

In response to increasing homelessness in 1984,<sup>36</sup> during which thousands of individuals were sleeping in Bicentennial Park<sup>37</sup> and other public venues, Miami police were directed "to identify food sources for the poor and to arrest and/or force an extraction of the undesirables from the area."<sup>38</sup> To keep the homeless moving and effectively "sanitize"<sup>39</sup> the parks and streets, police were relentless in raiding the campsites of the homeless,<sup>40</sup> summarily destroying all on-site belongings.<sup>41</sup> His-

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*Your house is your larger body  
It grows in the sun and sleeps  
In the stillness of the night;  
And it is not dreamless.*<sup>1</sup>

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tory is repeating itself. In July 2006, Las Vegas enacted an ordinance to ban the giving of food to the homeless.<sup>42</sup> A violation of the ordinance can be punished by a maximum fine of \$1,000 and a jail term of up to six months.

### POTTINGER REVISITED

If America's Post-Katrina response to the unprecedented surge of homelessness is to harass the homeless by jailing them or jailing those who feed homeless, the issues and remedies addressed in *Pottinger* become relevant again. These issues and remedies are addressed below.

### THE EIGHTH AMENDMENT

The most sensitive issue in homelessness litigation concerns the voluntariness of the homeless defendant's actions. Purely involuntary acts cannot properly or morally be condemned as crimes under the Eighth Amendment. To punish a person for his or her involuntary act would be cruel.<sup>43</sup> The question then is whether a homeless person's acts are voluntary. A homeless person who commits rape cannot reasonably assert homelessness as justification for the misdeeds. In that case, status as a homeless person is irrelevant, and society cannot reasonably be expected to tolerate such behavior. The question is more complex when a homeless defendant with nowhere else to go is prosecuted for harmless acts such as sleeping in a park. Is a public action "voluntary" when the homeless defendant must perform it to survive, and he has no private place in which to perform the action?

The *Pottinger* court resolved the question by asking another: is the defendant voluntarily homeless?<sup>44</sup> If a defendant has voluntarily chosen to be homeless, he could be legally and morally deemed to have voluntarily assumed the risk of having to break the law to survive. It is unreasonable for society to lower its expectation of public conduct in order to accommodate a private and voluntary choice of that character. However, if the defendant's homelessness is involuntary, a just society should not prosecute him for the indicia that attach to the fact of his or her homelessness. The success of the *Pottinger* case rested in large part upon the plaintiffs' ability to prove that they were suffering an involuntary<sup>45</sup> state of homelessness and were compelled to perform life-sustaining acts in public view.<sup>46</sup>

The United States Supreme Court in *Robinson v. California*<sup>47</sup> held that a defendant could not be criminally punished for mere status as a drug addict, finding that a statute that made it punishable to be addicted to narcotics constituted cruel and unusual punishment.<sup>48</sup> In *Powell v. Texas*,<sup>49</sup> the Supreme Court addressed a similar issue of whether an alcoholic could be jailed for appearing drunk in public.<sup>50</sup> The Court held that Powell had not been jailed for merely being addicted to alcohol, but for his active conduct of appearing in public in a drunken state.<sup>51</sup> *Powell* is often cited by municipalities that arrest the homeless for the proposition that the homeless are not being punished for being homeless, but for their actions in violation of the law. Such arguments miss the point when the defendant is involuntarily

homeless. The alcoholic, theoretically, can restrict his drinking to his home and avoid punishment, but the homeless have no homes in which to perform what are usually private acts.<sup>52</sup> Sleeping in parks, sitting on sidewalks, and begging are perfect examples. To criminalize such actions when they are unavoidable is tantamount to prosecuting the homeless for existing, and the Eighth Amendment prohibition against cruel and unusual punishments is impermissibly violated.

The plaintiffs have historically borne the burden to establish that their public actions were, in fact, unavoidable. In *Pottinger*, the plaintiffs met that burden with statistical evidence and expert testimony.<sup>53</sup> The plaintiffs offered irrefutable statistical evidence of the severe shortage of beds in homeless shelters in Miami when they were arrested.<sup>54</sup> The expert witnesses also testified that people seldom choose to be homeless.<sup>55</sup> However, public policy that requires the homeless to bear the burden of proving the voluntariness of their status is inherently flawed.

The homeless, by definition, are persons with extremely limited resources, and they are not entitled to state-appointed attorneys in civil litigation in defense of their rights. But for the *pro bono* advocacy of the American Civil Liberties Union,<sup>56</sup> the *Pottinger* plaintiffs would have lacked the resources to amass statistics proving Miami's shelters were inadequate to house the homeless population. They also would not have been able to procure the experts<sup>57</sup> who were pivotal in establishing that people are seldom homeless by choice.<sup>58</sup> The better public policy would allow the plaintiff to meet the burden of a prima facie case by establishing the actions committed by the state or municipality in violation of his or her rights and the fact of his homelessness at the time of arrest. The burden should then shift to the defendants to establish by a preponderance of evidence that the plaintiff is voluntarily homeless and thus, answerable for his or her public actions. This policy would serve dual meritorious purposes: (i) to enhance the ability of the homeless plaintiff to find counsel who would accept his or her case, and (ii) to motivate states and their municipalities to cease efforts to harass the homeless out of their towns, and instead explore serious options for providing adequate affordable housing.

### THE FOURTH AMENDMENT

The homeless are gravely concerned about the conservation of those meager resources that they still have. In Miami, the police frequently destroyed the on-site belongings of the homeless<sup>59</sup> as though the property were public rubbish. In one particularly notorious raid, the Miami police handcuffed a group of homeless individuals, piled their clothing, medications, and a Bible together, and burned them while the homeless watched.<sup>60</sup> The homeless contended that the police seized and destroyed their property without due process of law in direct violation of the Fourth Amendment.<sup>61</sup>

While a seizure of property occurs when there is a "meaningful interference" with an individual's interest in that property,<sup>62</sup> a seizure of property is unreasonable only if the state's legitimate interests in the seizure do not outweigh the

individual's legitimate expectation of privacy in the object of the search.<sup>63</sup> The question then is whether the plaintiffs have a legitimate expectation of privacy in personal property that may appear to others to be public rubbish. Determining the nature of any legitimate expectation of privacy in personal property involves two separate inquiries. First, the court inquires whether the individual has a subjective expectation of privacy in the objects.<sup>64</sup> Second, the court must determine whether that expectation is one that society should be prepared to recognize as reasonable.<sup>65</sup> If the homeless make efforts to protect their belongings by attempting to shelter them from public view, stacking them in organized piles, or designating another homeless person to guard them, there is evidence of subjective expectation of privacy.

The second inquiry is more difficult. Should the public recognize the homeless person's right to privacy when his or her property is littering the streets or public parks? In *Rakas v. Illinois*,<sup>66</sup> the Supreme Court offered guidelines for determining the legitimacy of a plaintiff's privacy interests. As a trespasser or one who leaves property accessible to the public, the plaintiff may lose his or her privacy interests in the property; whereas one who is lawfully on property and shields it from public view may retain a subjective expectation in privacy that the public will recognize. The term *trespasser* is turned on its head "when there is nowhere" private that a homeless person may lawfully be.<sup>67</sup>

The Court has not specifically addressed the issue of whether a homeless person living outdoors has a privacy interest in their property that the public would find reasonable, but a Connecticut court has addressed the issue in part. Based on society's established deferential treatment of closed containers, the court in *State v. Mooney*<sup>68</sup> recognized a right of privacy in the closed duffel bags of the homeless. The court elaborated:

[T]he interior of these items is, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize it as reasonable under the circumstances of this case.<sup>69</sup>

Does a homeless person have a lesser interest in his clothing or medications because he has no duffel bag in which to enclose them? From the perspective of the homeless, the answer is self-evident. However, municipalities also have a legitimate interest in the sanitation and safety of public spaces,<sup>70</sup> which can be compromised by the accumulation of rubbish. The *Pottinger* court balanced the conflicting interests, holding that the homeless had a legitimate expectation of privacy in their property, so long as the property did not create a public danger.<sup>71</sup> The court held that the city was free to confiscate items such as mattresses with exposed springs because such items posed a clear danger. However, the court enjoined the destruction of non-harmful possessions such as Bibles, clothing, eyeglasses, medications, and

personal identification, and declared such destruction a violation of the Fourth Amendment.<sup>72</sup>

### PROCEDURAL DUE PROCESS

Ordinances that prohibit the homeless from performing innocent, necessary functions in public often fail for vagueness or overbreadth. A statute is vague when it fails to give fair notice of the forbidden conduct.<sup>73</sup> The Supreme Court held void vagrancy ordinances in *Papachristou v. City of Jacksonville* because the statutes did not give sufficiently clear notice of the behavior that was prohibited.<sup>74</sup> Loitering statutes have suffered the same fate. In 1983, the Supreme Court overturned California's loitering statute that required citizens wandering the streets to produce identification upon a police officer's request.<sup>75</sup> Although the homeless plaintiffs in *Pottinger* did not attack Miami's ordinances on a vagueness theory, the plaintiffs did focus on the unconstitutional overbreadth of the ordinances when they were applied to innocent conduct of the homeless.

A statute is overbroad when it reaches constitutionally protected conduct or conduct which is beyond the power of the state to regulate.<sup>76</sup> A challenge based upon overbreadth will be upheld if the enactment reaches "a substantial amount"<sup>77</sup> of constitutionally protected conduct. Prior to *Pottinger*, there was no precedent for acts such as eating, sleeping, and sitting to enjoy constitutional protection, unless such acts could be characterized as expressive conduct.<sup>78</sup> For the most part, however, when the homeless eat, sleep, and sit in public, they intend no expressive conduct. They are performing those acts for the same reasons the housed perform them: they are necessary to survival. However, the *Pottinger* court held that when an involuntarily homeless person performs such acts in public "at a time of day when there is no place they can lawfully be,"<sup>79</sup> the statute becomes overbroad for punishing innocent conduct, and the Fourteenth Amendment due process clause is impermissibly infringed.<sup>80</sup>

### THE RIGHT TO TRAVEL

The Supreme Court has recognized the right to travel as a fundamental right in *Edwards v. California*<sup>81</sup> and reaffirmed it in *Shapiro v. Thompson*.<sup>82</sup> In striking down a Connecticut statute denying public assistance to persons who had not been residents of the state for one year, the *Shapiro* decision reasoned that the statute discouraged travel by the poor by withholding benefits from those who would have otherwise qualified to receive them.<sup>83</sup> In 1972, the Supreme Court in *Memorial Hospital v. Maricopa County*<sup>84</sup> struck down a statute that conditioned free medical care upon a one-year residency requirement.<sup>85</sup> This case is especially significant in homelessness cases because the Court specifically denounced the statute for denying indigents "the basic necessities of life"<sup>86</sup> and for the deterrent effect such statutes have on the rights of the poor to migrate.

Because the right to travel is a fundamental right, statutes or ordinances infringing that right must be in furtherance of a com-

elling state interest.<sup>87</sup> They must also represent the least intrusive method for furthering those state interests.<sup>88</sup> State interests such as maintaining public spaces in order to promote tourism, business, and developing inner-city downtown and park areas are not compelling interests. The Supreme Court has held that such interests are substantial but not compelling.<sup>89</sup> Further, the practice of arresting the homeless is not narrowly tailored to achieving the goals of promoting tourism or developing business. The involuntarily homeless arrested under such laws have no recourse but to return to their public lives upon their release from custody. Thus, nothing is ultimately accomplished by the arrests. If cities wish to promote their attractiveness to business and tourism, they must address both short-term and permanent housing for their homeless populations.

#### **CIVIL RIGHTS PROTECTIONS UNDER 42 U.S.C. § 1983**

In 1961, the Supreme Court reinvigorated civil rights protections that had largely remained dormant for some ninety years. In *Monroe v. Pape*,<sup>90</sup> the Court concluded that a party injured by the unconstitutional actions of police officers could recover damages in federal court under § 1983. The police broke into the Monroe home, roused them from bed, and ransacked the house.<sup>91</sup> Mr. Monroe was arrested, but was not allowed to call his attorney and was not promptly arraigned.<sup>92</sup> Monroe claimed that he suffered an unlawful search and seizure in Violation of the Fourth Amendment.<sup>93</sup> He further claimed that his constitutional rights had been violated by the detention. Reversing the lower court's dismissal of the claims against the police officers,<sup>94</sup> the Supreme Court opined that police conduct may be actionable when it is in violation of constitutional rights.

Municipalities may also be held liable for the actions of city officials when those officials act to execute a "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."<sup>95</sup> In § 1983 litigation, the homeless plaintiffs also bear the burden of establishing that the actions were both persistent and widespread.<sup>96</sup> Evidence that the actions were isolated would be legally insufficient to warrant relief against the municipality,<sup>97</sup> though the offending officers might remain liable for the actions.

In *Pottinger*, discovery revealed internal memoranda that were "directed to high-ranking police department officials"<sup>98</sup> regarding the need to oust the homeless from Miami's public areas. The persistent and widespread nature of the attacks on the homeless was a matter of public record. Over 3,500 homeless individuals had been arrested in Miami when the suit was filed. The city could not escape liability under § 1983 for its acts of purposeful harassment of the homeless.<sup>99</sup>

#### **EQUAL PROTECTION**

In *Harper v. State Board of Elections*,<sup>100</sup> the Supreme Court opined that "wealth, like race, creed, or color is not germane to one's ability to participate in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."<sup>101</sup> Nonetheless, the Supreme Court has

declined every opportunity to grant the homeless the suspect classification that is afforded to other historically victimized groups. This status is critical to the homeless population since only those state laws that discriminate against suspect groups are subjected to strict scrutiny<sup>102</sup> and cannot stand unless the state demonstrates a compelling interest that is furthered by a narrowly tailored policy.<sup>103</sup>

The Supreme Court has adopted the following criteria in its suspect-class analysis: (i) whether the disadvantaged class is defined by a trait that frequently bears no relationship to ability to contribute to society; (ii) whether the class has been saddled with unique disabilities because of prejudice and inaccurate stereotypes; and (iii) whether the trait defining the class is immutable.<sup>104</sup> The homeless can make a strong claim to a suspect or quasi-suspect class.

The homeless are a class defined by their abject poverty, and that state of poverty frequently bears no relationship to an actual inability to contribute to society. Many of the homeless have strong work histories<sup>105</sup> and were rendered homeless by events beyond their control.<sup>106</sup> One has only to review the acts perpetrated against the homeless in Miami and San Francisco to be persuaded of the dangerous prejudice of the public against the homeless.

The last prong of analysis proves more challenging. Do the homeless have defining, immutable characteristics? If the term means literally "a characteristic that cannot be changed," the homeless must fail in their attempts to achieve suspect classification. The judicial history of the term does not, however, suggest so rigid a definition. Aliens, who enjoy protection as a suspect class, can become citizens, thereby changing their "immutable" characteristic. Gender, which is protected, can be altered surgically, thus altering the gender characteristic. By analogy, the mere fact that the homeless can again become housed does not alter the fact that, while one is in fact homeless, it is physically apparent to society.

The Supreme Court in *Lyng*<sup>107</sup> adopted a broader interpretation of immutability, including an inquiry as to whether the class members "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group."<sup>108</sup> The homeless have glaringly distinguishing characteristics: they reside under bridges, sleep in parks, shelters and other public places, and they beg.

#### **POTTINGER'S IMPACT**

Litigation in *Pottinger* spanned a decade. Ultimately, the court enjoined the city of Miami from arresting its homeless so long as they are not engaged in conduct harmful to others or themselves.<sup>109</sup> Miami was ordered to establish "safe zones"<sup>110</sup> in areas where the homeless could access food programs and health services. The parties ultimately negotiated a financial settlement for the homeless plaintiffs.<sup>111</sup>

The impact of the case was immediate. Both the city of Miami and other private entities constructed shelters for the homeless while the case was on appeal.<sup>112</sup> As word spread

about the decision in Miami, other cities took stock of their own practices. Fort Lauderdale, Florida stopped its “bum sweeps”<sup>113</sup> and began encouraging its officers to refer the homeless to social services in lieu of making arrests.<sup>114</sup>

## CONCLUSION

As America’s homeless population reaches five million after Hurricane Katrina, *Pottinger*-type abuses such as those in Las Vegas are to be anticipated unless society becomes proactive. Congress must reinforce incentives for constructing affordable housing and raise the minimum wage. Meanwhile, “safe areas” must be available to those who have nowhere else to go, and human resources must be provided to patrol those

areas to protect homeless men, women, and children from the violence of the streets.

As America’s most vulnerable population, the homeless must be afforded a “suspect class” designation. They are easily identified and despised for characteristics they cannot readily change. They have suffered the deprivation of the most fundamental rights because their very existence frightens the greater population on a visceral level. The goal, however, is not only to place the homeless in a better position to defend their constitutional rights, but to create a society that rejects “compassion fatigue” in favor of indefatigable compassion and commitment<sup>115</sup> to the welfare of even its poorest citizen.

## ENDNOTES

\* Professor of Law, Faulkner University Thomas Goode Jones School of Law. Professor Howell wishes to thank her son and research assistant, Christopher D. Howell, for his invaluable research and substantive contributions to this work. Professor Howell also wishes to thank her friend and administrative assistant, Jennifer K. Johnson, for her extraordinary technical assistance and consummate professionalism.

<sup>1</sup> Kahlil Gibran, *The Prophet*, 31 (1996).

<sup>2</sup> *Pottinger v. Miami*, 810 F. Supp. 1551 (1992).

<sup>3</sup> *Id.* at 1558.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1560.

<sup>6</sup> *Id.* at 1565.

<sup>7</sup> *Id.* at 1573.

<sup>8</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1577 (1992).

<sup>9</sup> *Id.* at 1582.

<sup>10</sup> Almanac of Policy Issues, available at [http://www.policyalmanac.org/social\\_welfare.html](http://www.policyalmanac.org/social_welfare.html) 2/21/05 (last visited Sept. 7, 2005) [hereinafter, *Policyalmanac*].

<sup>11</sup> Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 *FORDHAM URB. L. J.* 1215, 1219 (2003).

<sup>12</sup> *Policyalmanac*, *supra* note 10.

<sup>13</sup> Beth C. Weitzman, James R. Knickman & Marybeth Shinn, *Pathways to Homelessness Among New York Families*, 46 *J. SOC. ISSUES* 125, 134 (1990).

<sup>14</sup> 42 U.S.C. 11301 (1995) (The Stewart B. McKinney Act).

<sup>15</sup> *Policyalmanac*, *supra* note 10.

<sup>16</sup> see Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 *J.L. POL’Y* 237 (1994) (“Fifty percent of the homeless women in America were fleeing domestic violence.”); See also Leonara M. Lapedus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 *AM. U. J. GENDER SOC., POL’Y L.* 377 (2003) (A battered woman residing in publicly subsidized housing was evicted because she reported having been battered by her husband); See also Eliza Hurst, Note: *The Housing Crisis for Victims of Domestic Violence*, 10 *GEO. J. ON POVERTY LAW & POL’Y* 142 (2003) (“Because women are disproportionately the victims of domestic violence, public housing authorities that evict families for criminal activity may punish women, as a class, for the acts of their abusers.”).

<sup>17</sup> Deborah M. Thompson, *Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational Promise of the McKinney Act for Homeless Children and Youth*, 31 *CREIGHTON L. REV.* 1209, 1211 (1998) (“For children, homelessness not only threatens their stability and security, it poses a tremendous barrier to the one thing that may give them hope for a better life – a better education.”).

<sup>18</sup> *Policyalmanac*, *supra* note 10.

<sup>19</sup> *Policyalmanac*, *supra* note 10.

<sup>20</sup> Thompson *supra* note 17, at 1209.

<sup>21</sup> HUD, available at <http://www.huduser.org/publications/affhsg/worstcase/finding6.html> (last visited March 24, 2007).

<sup>22</sup> *Policyalmanac*, *supra* note 10.

<sup>23</sup> See, e.g., Marybeth Shinn, *Homelessness: What is A Psychologist to Do?*, 20 *Am. J. Community Psycho.* 3 (1992) (finding that in one sample of homeless

individuals treated at a psychiatric facility, some 97% had been previously treated for psychiatric problems); but see Martha L. Burt & Barbara E. Cohen, *Differences Among Homeless Single Women, Women with Children, and Single Men*, 36 *SOC. PROBS.* 508, 516 (1989) (finding that mental illness is more often the result of homelessness than the actual cause).

<sup>24</sup> See, e.g., Crystal Mills & Hira Ota, *Homeless Women with Minor Children in the Detroit Metropolitan Area*, 34 *SOC. WORK* 485, 487 (1989) (a study of eighty-seven sheltered homeless in Detroit revealed only a 9.2% history of substance abuse); but see Alice S. Baum & Donald W. Burnes, *A Nation in Denial: The Truth About Homelessness*, 49–52 (1993).

<sup>25</sup> Prior incarceration does seem to predispose newly released former inmates to homelessness insofar as federal regulations disqualify them for publicly subsidized housing for a lengthy period. 24 *C.F.R.* 960.203 (c) (2001).

<sup>26</sup> Some researchers have found support for the theory that intergenerational dependence upon welfare promotes ultimate homelessness. See Ellen L. Bassuk & Lynn Rosenberg, *Why Does Family Homelessness Occur? A Case Control Study*, 78(4) *AM. J. PUB. HEALTH* 783, 787. (1988). Other studies show that many of the homeless have significant work histories and no dependence on welfare.

<sup>27</sup> Weitzman, Knickman, & Shinn, *supra* note 14 at 135. A study in New York City indicated that almost half of homeless families requesting shelter had never been able to afford a place of their own.

<sup>28</sup> Lelia M. Reyes & Laura DeKoven Waxman, U.S. Conference of Mayors, *The Continuing Growth of Hunger, Homelessness, and Poverty in America’s Cities* at 47 (1987). Plant closings and loss of blue collar work for Americans produces significant unemployment.

<sup>29</sup> Changes in tax laws beginning in the late seventies have increased tax burdens upon the poor and middle class while creating tax loopholes for the rich. See Lawrence Mishel & David M. Frankel, *The State of Working America* 55 (1991).

<sup>30</sup> See Nancy A. Millich, “Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?” 27 *U.C. Davis L. Rev.* 255 (1994).

<sup>31</sup> Nancy Wright, “Not in Anyone’s Backyard: End the ‘Contest of Non-Responsibility’ and Implementing Long-Term Solutions to Homelessness,” 2 *GEO. J. ON FIGHTING POVERTY* 163, 180-81 (1995).

<sup>32</sup> *Id.* at 181.

<sup>33</sup> *Tobe v. City of Santa Ana*, 32 *Cal. App. 4th* 941, 948 (1994).

<sup>34</sup> *Mass. Gen. L.Ch.* 272§63 (1992).

<sup>35</sup> *Ala. Code* §13-A-11-9 (a) (1) (West 1994).

<sup>36</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1558 (1992).

<sup>37</sup> *Id.* at 1560.

<sup>38</sup> *Id.* at 1567.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1571.

<sup>41</sup> *Id.* at 1560.

<sup>42</sup> Randal C. Archibold, *Please Don’t Feed Homeless in Parks, Las Vegas Says in Ordinance*, *N.Y. TIMES*, July 28, 2006.

<sup>43</sup> See *Robinson v. California*, 370 U.S. 660 (1962) (“(T)he Court held that punishment of a person for his involuntary status...was cruel and unusual in violation of the Eighth Amendment.”).

<sup>44</sup> *Pottinger*, 810 F. Supp. at 1558.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1574.

## ENDNOTES CONTINUED

- <sup>47</sup> 370 U.S. 660 (1962).
- <sup>48</sup> *Id.* at 666.
- <sup>49</sup> 392 U.S. 514 (1968).
- <sup>50</sup> *Id.*
- <sup>51</sup> *Id.* at 532.
- <sup>52</sup> *Powell*, 392 U.S. at 551. Justice White in his concurrence voiced concern about whether a *homeless* alcoholic could be punished for public drunkenness without violation of the Eighth Amendment.
- <sup>53</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1565 (1992).
- <sup>54</sup> *Id.* at 1558.
- <sup>55</sup> *Id.* at 1557.
- <sup>56</sup> Benjamin Waxman, *Homeless in Miami*, (ACLU, FL), May 1998 available at <http://www.aclufll.org/about%20/newsletters/1998/ben.cfm/>.
- <sup>57</sup> *Pottinger*, 810 F. Supp. at 1557.
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.* at 1560.
- <sup>60</sup> *Id.* at 1573.
- <sup>61</sup> *Id.*
- <sup>62</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).
- <sup>63</sup> *Maryland v. Buie*, 494 U.S. 325, 331 (1990).
- <sup>64</sup> *Wells v. State*, 402 So. 2d 402, 404 (Fla. 1981) (citing *Smith v. Maryland*, 442 U.S. 735 (1979)).
- <sup>65</sup> *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1979).
- <sup>66</sup> *Id.* (Persons asserting neither a property nor a possessory interest in a vehicle have no legitimate expectation of privacy in property in the glove compartment).
- <sup>67</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1577 (1992).
- <sup>68</sup> 588 A.2d 145 (1991).
- <sup>69</sup> *Id.* at 161 (The court analogized the property inside a homeless person's duffel bag to property behind the locked door of a home).
- <sup>70</sup> *Id.*
- <sup>71</sup> *Id.*
- <sup>72</sup> *Id.*
- <sup>73</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).
- <sup>74</sup> *Id.*
- <sup>75</sup> *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).
- <sup>76</sup> *See Sawyer v. Sandstrom*, 615 F.2d 311, 318 (5th Cir. 1980) (striking down Dade County's loitering statute as overbroad because it punished innocent associations in violation of first amendment associational rights).
- <sup>77</sup> *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982).
- <sup>78</sup> *People v. Davenport*, 176 Cal. App. 3d Supp. 10 (Cal. Super. 1985), cert denied, 475 U.S. 1141 (1986).
- <sup>79</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1577 (1992).
- <sup>80</sup> *Id.*
- <sup>81</sup> *In Edwards v. California*, 314 U.S. 160, 173 (1941), the U.S. Supreme Court struck down California's statute making it a misdemeanor to transport an indigent person into California.
- <sup>82</sup> 394 U.S. 618 (1969).
- <sup>83</sup> *Id.* at 634.
- <sup>84</sup> 415 U.S. 250 (1974).
- <sup>85</sup> *Id.* at 250.
- <sup>86</sup> *Id.* (Memorial Hospital argued that treating the homeless and other indigents over-burdened the tax base of Arizona's taxpayers. The court held that "a state may not protect the public finances by drawing an invidious distinction between classes of its citizens," effectively discriminating by wealth and property); *See Jane B. Baron, "The 'No Property' Problem: Understanding Poverty by Understanding Wealth,"* 102 MICH. L. REV. 1000, (2004).
- <sup>87</sup> *Personnel Administrator v. Feeney*, 442 U.S. 256, 266 (1979).
- <sup>88</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).
- <sup>89</sup> *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984).
- <sup>90</sup> *Monroe v. Pape*, 365 U.S. 167 (1961).
- <sup>91</sup> *Id.*
- <sup>92</sup> *Id.*
- <sup>93</sup> *Id.* at 170.
- <sup>94</sup> *Id.* at 192.
- <sup>95</sup> *Monell v. City of New York Dept. of Soc. Svcs.*, 436 U.S. 658, 659 (1978).
- <sup>96</sup> *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).
- <sup>97</sup> *Id.*
- <sup>98</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1561 (1992).
- <sup>99</sup> *Id.*
- <sup>100</sup> 383 U.S. 663 (1966).
- <sup>101</sup> *Id.* at 668.
- <sup>102</sup> *Feeney*, 442 U.S. at 266.
- <sup>103</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)
- <sup>104</sup> *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).
- <sup>105</sup> Christina Victoria Tusan, *Homeless Families from 1980 – 1996: Casualties of Declining Support for the War on Poverty*, 70 S. CAL. L. REV. 1141, 1169 (1997).
- <sup>106</sup> *Id.*
- <sup>107</sup> *Lyng*, 477 U.S. at 638.
- <sup>108</sup> *Id.*
- <sup>109</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1584 (1992).
- <sup>110</sup> *Id.*
- <sup>111</sup> Waxman, *supra*, note 56.
- <sup>112</sup> Waxman, *supra*, note 56.
- <sup>113</sup> *Ft. Lauderdale Learns a Lesson from Miami in Dealing with the Homeless*, LAW ENFORCEMENT NEWS (John Jay College of Criminal Justice, New York, N.Y.), May 2000, available at <http://ci.ftlaud.fl.us/police/homeless3.html> (last visited Mar. 19.2007)
- <sup>114</sup> *Id.*
- <sup>115</sup> America's largest religions all urge their followers to a commitment to the less fortunate.
- "A Muslim asserts his/her belief in the merciful and compassionate God by donating money or goods to those less fortunate. This idea is connected to the belief in Islam that all wealth ultimately belongs to God. We have it on loan to be used in God's path to do good deeds in this life." Dr. James Pavlin, "An Islamic View on Caring For Those in Need," IRF Newsletter #51-Spring 2003.
- "The Jewish community has historically seen itself responsible to feed and house the hungry and the homeless. In fact in Hebrew there is no word for charity. Rather, the caring for those in need is called Tzedaka, a derivative of the Hebrew term for righteousness." Rabbi N. I. Barowitz, "A Jewish View on Hunger and Homelessness," IRF Newsletter.
- "When we give to others without any desire or expectation, when we let go of our attachments, we find ourselves relieved of the complications that worldly possessions often bring with them. This means while charity can be done for religious purposes, it should be done because the individual enjoys helping others and the benefits are self-satisfying." Netta Mehta, "A Hindu View on Hunger and Homelessness," IRF Newsletter #48-May/June 2002
- "The Gospel call to be close to Christ who is "homeless" is an invitation to all the baptized to examine their own lives, and to trust their brothers and sisters with practical solidarity by sharing their hardships. By openness and generosity, as a community and as individuals, Christians can serve Christ present in the poor and bear witness to the Father's love." 1997 Lenten Message from Pope John Paul II.

# THE RUBRIC OF FORCE: EMPLOYMENT DISCRIMINATION IN THE CONTEXT OF SUBTLE BIASES AND JUDICIAL HOSTILITY

By Anand Swaminathan\*

When the United States Supreme Court instructed lower federal courts to enforce *Brown v. Board of Education*<sup>1</sup> “with all deliberate speed,” it made “vagueness and gradualism” its official policy for social advancement.<sup>2</sup> Fifty years along the path of gradualism, has our society lost the ability to make continuing progress in combating racial discrimination?

I argue that we have abandoned our commitment to the quest for equal treatment, largely because we have failed to understand the evolving nature of discrimination. In this article, I raise the notion of “force” as an overarching theme that provides a means by which to understand the subtler nature of today’s discrimination and provides renewed justification for the legal regime used to combat it. This article situates the notion of force within the employment discrimination context, partly to define a reasonable and representative scope of study, but also in response to the rich debate over the last ten years as to whether Title VII and other statutes regulating discrimination in the workplace should exist at all.

## THE NOTION OF FORCE

According to civil libertarian legal scholar Richard Epstein, Title VII is counterproductive because its inefficiencies cause the overall economic pie to shrink, as companies hire fewer workers and thereby decrease opportunities for those meant to benefit from antidiscrimination laws.<sup>3</sup> Epstein argues that the market, operating without restrictions, would solve the problem of discrimination by accruing competitive advantage to those who do not maintain discriminatory practices. In Epstein’s view, what small amount of discrimination remains is both tolerable and, in fact, productive.<sup>4</sup>

Richard McAdams presents an alternative economic theory of discrimination termed status-production,<sup>5</sup> which posits that “discrimination and racist behavior generally are processes by which one racial group seeks to produce esteem for itself by lowering the status of another group.”<sup>6</sup> Within this theory, McAdams argues that discrimination will persist in competitive markets even though discrimination is, from an economic perspective, inefficient and decreases overall wealth because it results in a diversion of resources and deadweight loss.<sup>7</sup> McAdams presents three explanations as to why discrimination will persist in competitive markets: (1) the power of discriminatory social norms, (2) the existence of “reciprocity” (restricting social contact to ingroup members) between whites, and (3) under certain circumstances, the effect of esteem-producing racial biases.<sup>8</sup> According to McAdams, “the key to understanding [discrimination and racist behavior generally] is to perceive its

subordinating quality. Status comes about by *disparaging others*, by asserting and reinforcing a claim to superior social rank.”<sup>9</sup> These explanations highlight an important point: subordinating another group achieves greater esteem for the subordinator by denying the very act of derogation; hence, subtler forms of discrimination are more effective than overt ones.

Epstein’s associational theory, by presenting a world in which individuals look innately within their own groups to develop personal connections, lacks any coercive effect. On the other hand, McAdams’ theory focuses quite acutely on the programmatic domination of one group by another. This focus on force is crucial to the debate because it is force that provides the strongest justification for state intervention. Epstein concedes that state intervention was needed in the Jim Crow South, reasoning that the explicit use of physical violence and coercion kept blacks from participating in markets.<sup>10</sup> In his view, the distinction between that period and the present one is the absence of state-sponsored force, a shift he identifies as occurring in 1954 with the Supreme Court’s decision in *Brown v. Board of Education*. I argue that *Brown* merely required a change in the *form* of force. In a way, the coercive force has moved underground, and McAdams’ status production theory lays the foundation for a more thorough explanation of discriminatory behavior.

While McAdams’ language sounds of deliberateness, or premeditation, in this article I consider the growing evidence that subconscious biases contribute to discriminatory outcomes, and place this dynamic within the broader notion of force. In doing so, I reject Epstein’s sterile, almost placid, treatment of these phenomena as part of innate associational “preferences” or “tastes.” Epstein states that *Brown* led to cultural and social changes to the very fabric of the South and asserts that this change resulted in a drastic reduction in the use of force that eliminated the need for legal intervention in combating discrimination. He does not consider the possibility that previously acceptable behaviors would not be abandoned but rather replaced by new, subtler forms of subordination. To establish the persistence of force through new forms, then, would be to lay a strong challenge at the feet of Epstein and others who concede that state intervention was warranted in the Jim Crow South, but argue that such intervention is no longer needed today.

## LINGERING FORCE: COGNITIVE BIASES AND IMPLICIT ATTITUDES

The discriminatory behavior of whites in McAdams’ theory is understood as serving to produce and maintain social status. To this end, despite the influence of competitive markets, whites

use discriminatory social norms and what McAdams terms reciprocity. This behavior of whites, in McAdams' approach, is treated as purposeful or intentional. However, these same means, and resulting end, may be compounded by implicit attitudes and unintentional motivations. Indeed, they may even be the result of healthy cognitive functioning. A study of these forms will buttress McAdams' theory of status production while providing further evidence of ongoing force unaccounted for in, and contrary to, Epstein's assumptions.

### COGNITIVE BIASES AS FORCE

Linda Hamilton Krieger's 1995 article, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, presents a detailed study of behavioral research on cognitive biases and their implications on established legal doctrine.<sup>11</sup> Krieger explains that in the 1970s, psychologists began to recognize that intergroup biases could result not only from motivational processes but also from typical cognitive processes. Called social cognition theory, psychologists began to identify "normal" cognitive processes like categorization and information processing that could also create and reinforce racial biases.<sup>12</sup> According to this view, stereotyping is a cognitive process, resembling categorization, that alters perception, interpretation and other forms of information processing in predictable ways.<sup>13</sup>

Social cognition theory suggests that individuals who may not harbor racist beliefs may nonetheless suffer from unintended but systematic prejudice as a result of categorization-like stereotypes. Behavioral experiments have shown that when individuals are divided into groups, even for trivial or random reasons, they display strong biases in their perception of differences and in the evaluation and reward of ingroup versus outgroup members.<sup>14</sup> Subjects perceive ingroup members as more similar and outgroup members as more different than when those same persons are viewed in the absence of groupings. In addition, subjects are better able to recall undesirable behavior when committed by outgroup members instead of ingroup members, significantly overrate the product of their own group in comparison to that of outgroups, and disproportionately attribute ingroup members' failures to situational factors (i.e. environmental or contextual factors) and outgroup members' failures to dispositional factors (i.e. personal attributes or traits).<sup>15</sup>

In addition to categorization-based biases, social cognition theorists have also identified biases resulting from salience-based cognitive distortions in perception and memory. Studies have found that individuals judge the actions of minorities in more extreme ways when they are token members of a group than when they are members of a fully integrated group.<sup>16</sup> In one study, white males and females evaluated law school applications containing incidental indications of the applicants' race. Evaluators judged black applicants with strong credentials more favorably than otherwise identical white applicants, and judged black applicants with weak credentials less favorably than otherwise identical white applicants.<sup>17</sup>

According to some theorists, these studies show that we pay more attention to stimulus objects that are more salient or distinctive, and as a result more information about these objects is perceived, encoded and stored in memory.<sup>18</sup> Thus, because data regarding such stimuli are more available to the perceiver, impressions formed under conditions of high attention have a greater valence, positive or negative, explaining the polarized evaluation phenomena.<sup>19</sup> An alternative explanation of the polarization findings incorporates previous studies showing that individuals perceive ingroup members as relatively heterogeneous, or complex, while they view outgroup members as relatively homogeneous.<sup>20</sup> As a result, they have an increased appreciation of complexities in evaluating ingroup members and greater awareness of the inadequacy of available information,<sup>21</sup> and thus are more cautious in their judgments.<sup>22</sup> In contrast, evaluations of undifferentiated outgroup members are more broad and inexact, generally either "good" or "bad."<sup>23</sup>

The studies above regarding categorization and salience constitute cognitive sources of stereotypes and schemas, acting as a lens through which subsequent events are viewed. How do these schemas influence behavior? A 1980 study using school-age children examined the effect of social schemas on the interpretation of ambiguous information, presenting cartoon drawings and verbal descriptions of a scene in which one student was poking a classmate in the back with a pencil.<sup>24</sup> Asked to rate the behavior of the offending student, the study found that switching the race of the actor had a significant impact on the manner in which the children categorized the behavior. Specifically, subjects judged the behavior of black actors to be more mean and threatening, and less playful and friendly, while the opposite result obtained when the actor was white.<sup>25</sup>

A further example of schematic distortion affects how we attribute causes to events. This analysis expands upon research regarding "fundamental attribution error," in which people tend to underestimate the impact of situational factors and overestimate the impact of dispositional factors.<sup>26</sup> A variation on this, known as the "ultimate attribution error," relates directly to the categorization-based biases identified above, showing that people tend to attribute desirable ingroup behaviors to internal, dispositional factors but attribute similar behavior by outgroup members to environmental causes.<sup>27</sup> One such study found that subjects perceived misconduct to be more likely to recur where the behavior was in accordance with stereotypes of the actor's ethnicity than when stereotype-inconsistent or stereotype-neutral. Furthermore, when misconduct was stereotype-inconsistent or stereotype-neutral, subjects were better able to recall information about surrounding life circumstances of the transgressor.<sup>28</sup>

In the employment setting, the implications of these studies on how cognitive processes shape perceptions and influence behavior are numerous. Racial minorities are more likely to be alienated as a result of overperceived differences and are more likely to have their work undervalued as compared to that of majority (ingroup) members. In addition, any mistakes they

make at work weigh more heavily in their supervisors' minds and are more likely to be attributed to personal, and not situational, factors, and hence result in more negative personal judgments. These concerns are only exacerbated by salience-based distortions, such that racial minorities in predominantly white employment settings are susceptible to evaluation in the extremes. While the data also shows that their successes are also viewed more positively, the net effect may only be more alienation from co-workers.

In this setting, where there appears to be little room for error for racial minorities in the cognitive minds of their employers, the studies also show that minorities do not get the benefit of the doubt. Instead, in the plethora of ambiguous circumstances that can arise in the workplace, existing schema and causal distortions will act to place a thumb on the scale against minority employees. That is, it is likely that a racial minority involved in a verbal dispute in the workplace will not be seen as passionate or playful but aggressive and threatening; and, this aggressive and threatening behavior is more likely to be attributed to individual character than surrounding circumstances. In this way, the conduct will appear worse, present less opportunity for mitigation or rehabilitation, and thus result in more drastic consequences. Without ever injecting motivational or intentional racial attitudes, cognitive biases present the possibility of just such a playing field. This series of cognitive operations in the minds of employers did not cease the day *Brown v. Board of Education* was decided, nor did it cease the following day.

### IMPLICIT ATTITUDES

The operation of force via subtle, often subconscious and unknowing, discrimination is further evidenced through tests measuring explicit versus implicit attitudes. Generally, these tests show that even individuals who believe that they hold no prejudices towards racial minorities nonetheless harbor such negative attitudes at a strikingly high rate.<sup>29</sup> Unlike the cognitive bias studies discussed above, which focused on bias-creating effects (or byproducts) of otherwise normal cognitive functioning, implicit attitudes tests allow for the inference that individuals who believe they hold no negative racial prejudice nonetheless harbor such attitudes as the result of social conditioning and cultural or other experiential factors. While sharing the unintentionality of cognitive biases, implicit attitudes can be seen as closer to overt discrimination in that they reflect learned behavior or the suppression of previously held overt attitudes.<sup>30</sup> They may also be confirmation of the cognitive bias effect, reflecting the inevitable progression of cognitive-based stereotypes or schemas into implicit attitudes. Either way, implicit attitudes present a second way of capturing the subtle force that continues to operate in the post-*Brown* era.

Implicit Association Tests (hereinafter "IAT") are a method of indirectly measuring the strengths of associations among concepts.<sup>31</sup> IATs are presented on web-based computer interfaces in which instances of four concepts must be sorted using only two options, each of which is assigned to two concepts.<sup>32</sup> The

IAT rationale is that people will find it easier to sort a pair of concepts when they are closely associated than when they are weakly associated. Ease of sorting is indexed both by the speed of responding and the frequency of errors, where faster responding and fewer errors indicate stronger associations. Basically, if you respond faster when "white" and "good" are paired than when "black" and "good" are paired, your score would reflect a preference for whites.<sup>33</sup>

Immediately prior to taking the IAT, subjects are asked to complete a short questionnaire asking about their explicit preferences among the concepts used in the upcoming IAT and including basic demographic information.<sup>34</sup> In this way, IATs are able to compare conscious, explicit attitudes against unconscious, implicit ones. One study, conducted on the original IAT website between October 1998 and April 2000, consisted of 541,696 interpretable tests,<sup>35</sup> of which approximately 221,000 responses were black-white racial attitudes tests (both name and face-based).<sup>36</sup> Analysis of the preference among test takers found that 73% of test-takers automatically favor white over black, and as many as 88% of test-takers showed either pro-white or anti-black preferences.<sup>37</sup> On the explicit measure, whites showed a preference for white over black, but black respondents showed an even stronger preference for black over white. However, on the implicit measure, whites showed a strong preference (significantly stronger than the magnitude of explicit preference) for white, while black respondents showed a *weak preference for white over black*.<sup>38</sup>

New studies that place the IAT in various contextual settings supplement the notion of environmental factors as the source of implicit attitudes and raise possibilities as to how we can combat the effects of these biases. Studies have shown that situational factors, like receiving the IAT from a black experimenter or being shown pictures of, or made to think about, admired black individuals like Martin Luther King, Jr., Michael Jordan, and Bill Cosby, can lower bias scores.<sup>39</sup> Similarly, test-takers display reduced implicit gender biases when asked to reflect beforehand on certain questions, like "What are strong women like?"<sup>40</sup>

In terms of implications on actual behavior, one study found that those test-takers who showed the strongest implicit racial biases, when given the option of working with a white or black partner, tended to choose a white partner. Another experiment found that those who showed strong implicit preference for heterosexuals over homosexuals were more likely to avoid eye contact and show signs of unfriendliness when introduced to someone who they were told was gay. Finally, a German study found that volunteers whose results suggested more bias against Turks (an immigrant group in Germany) were more likely to find a Turkish suspect guilty when asked to make a judgment about criminality in an ambiguous situation.<sup>41</sup>

While critics of both cognitive bias and implicit association theories exist, these studies are oft-repeated and consistent with traditional laboratory findings.<sup>42</sup> Moreover, in analyzing the results of various experiments simulating different hiring-related

decisions, their explanatory power is tremendous. For example, in 2003, Bertrand and Mullainathan conducted a now-famous study in which Boston and Chicago-area employers were sent fictitious resumes that were identical except for interchanging African-American and white applicant names.<sup>43</sup> The study found that applicants with white-sounding names received fifty percent more callbacks from potential employers.<sup>44</sup> Another famous study analyzed the hiring practices at eight leading orchestras dating back to the 1960s.<sup>45</sup> In response to concerns of gender bias in hiring, many orchestras in the 1970s and 1980s shifted from conductors hand-picking new members to a blind jury-selection process in which applicants performed behind a screen in order to conceal their identity, creating a unique opportunity to test for gender-biased hiring. The use of the screen led to a 50% increase in women advancing out of the preliminary rounds and a 30% increase in their chances of being hired in the final rounds.<sup>46</sup>

Although interconnected, it is important to recognize that the source of cognitive biases and implicit associations are presumably different. In one case, it is the cognitive processes that are considered healthy and crucial; in the other, it is the absorption of cultural and situational norms. Together, they demand a shift in focus from our words and thoughts to our subconscious motivations. Moreover, the force of cognitive biases is particularly powerful because of where this manifestation occurs: at the subconscious level. Greater esteem is achieved for a subordinating group when it can deny the act of subordinating, making its status appear innate or natural, as opposed to constructed.

#### *IMPACT OF SUBCONSCIOUS BIAS ON EMPLOYMENT DISCRIMINATION*

By placing the operation of force, at least in part, at the cognitive level and recognizing that even individuals who do not intend to discriminate are nonetheless influenced by implicit biases, it is possible to argue that discrimination is not the exception but the rule in today's workplace. Decisions in which ambiguity and subjectivity are abundant are highly susceptible to the influence of bias. In the employment setting, subjective decision making is commonplace. So, how much discrimination occurs in the workplace?

Survey data on personal experiences with employment discrimination suggest that while discriminators may not recognize that their decisions are clouded by subtle, subconscious biases, victims do. According to national Gallup polls, the percentage of African Americans reporting that they were discriminated against "at [their] place of work within the last 30 days varied between 21% and 18% for the years 1997 through 2001."<sup>47</sup> Thirty-three percent of African Americans and Latinos reported that at least one time at their job, they were not offered a job that a white person got because of racial discrimination, and thirty-one percent reported being passed over for a promotion that was offered to a white person because of racial discrimination.<sup>48</sup>

Researchers at Rutgers University conducted a 2002 study focused specifically on employees and found that 10% of em-

ployees said they had been "treated unfairly at their workplace because of their race or ethnicity." Among this group, 28% reported being passed over for promotion, 21% reported being assigned undesirable tasks, and 16% reported hearing racist comments. Among African Americans, over half of those surveyed "knew of" discrimination in the workplace in the last year, and 28% had themselves experienced racial discrimination in the last year. Given the pervasive nature of subtle forms of discrimination and the tiny percentage of employees perceiving discrimination who actually file claims, one begins to wonder not why there are so many employment discrimination claims but why there are so few.<sup>49</sup>

Admittedly, other scholars have considered the meaning of these subtle forms of discrimination on employment relationships and the surrounding legal regime.<sup>50</sup> My effort here is to place these ideas within a more comprehensive framework for understanding how discrimination operates in our society. More narrowly, I hope these studies rebut the fallacy of Epstein's force-free, post-*Brown* America.

#### **MARKET FORCE: HOW BUSINESS CYCLES EXERT DISCRIMINATORY FORCE**

Here, my endeavor is to consider the relationship between market fluctuations and other force phenomena, including the subtle biases discussed above. The employment setting is an apt one for the study of force. For one, it is an area in which discriminatory behavior has been historically pervasive. Moreover, the plethora of data and statistics available for study provide a practical reason for studying employment discrimination.

By way of background, in order for a complaint of discrimination to become a lawsuit in federal court, an employee must first file a formal complaint with the Equal Employment Opportunity Commission ("EEOC"). After a brief investigation, the EEOC determines whether a case is worth pursuing. If so, it may work with the parties to obtain a settlement or sue on behalf of the employee. In all other cases, the EEOC issues a "right to sue" letter to the employee, at which point an aggrieved employee can file a lawsuit in federal court.<sup>51</sup> Thus, the two major sources of data are the EEOC's Annual Charge Statistics and the Judicial Facts and Figures maintained by the Administrative Office of the United States Courts.<sup>52</sup>

The intuition regarding the relationship between business cycles and employment discrimination is simple: when unemployment rates are low, jobs are available in abundance, so employees who experience discrimination have attractive alternatives to litigation; when unemployment rates are high, jobs are scarce and employees will stay put in a discriminatory work setting, at least for a while. Meanwhile, employers concerned about turnover and associated costs have fewer incentives to prevent such treatment during periods of high unemployment, when they can easily find attractive candidates to replace aggrieved employees. A separate factor supporting this expected effect is that periods of greater unemployment will inevitably be accompanied by a greater number of discrimination-inducing

events – that is, layoffs and firings.<sup>53</sup>

Economists John Donohue III and Peter Siegelman conducted a comprehensive empirical study of the explanations for fluctuations in the amount of employment discrimination litigation, based on data from 1970-1989.<sup>54</sup> In part, Donohue and Siegelman were trying to understand why employment discrimination lawsuits in federal court grew 2166% from 1970-1989 while the general civil caseload only grew only 125% over the same period. As an initial matter, they found that the volume of employment discrimination displayed two patterns: (1) a general upward trend in the long-term, and (2) erratic fluctuations around this trend in the short-term.<sup>55</sup> They also found that the combination of upward trend over time and the lagged unemployment rates explained 96% of the variance in the number of suits.<sup>56</sup>

Applying a similar series of regressions to quantify the impact of various factors likely to contribute to the long-term, upward trend,<sup>57</sup> Donohue and Siegelman concluded that almost 20% of the increased volume of employment discrimination litigation over the period from 1970-1989 could be explained by rising unemployment.<sup>58</sup>

In one sense, unemployment rates themselves contain a racially discriminatory component. Research shows that non-white workers experience a significantly higher rate of unemployment than white workers. Unemployment rates among African Americans and Latinos are consistently higher than for whites, and African Americans in particular have consistently experienced approximately twice the level of unemployment as whites.<sup>59</sup> In this way, unemployment rates exert market force through their inherently racially-disparate functioning. In the following section, I delve deeper into market operations to consider how shifts in the unemployment rate may catalyze and exert force. .

#### *UNEMPLOYMENT RATES AND EMPLOYER BEHAVIOR AS FORCE*

As economists acknowledge, weak labor markets may create an incentive for employers to “indulge in discriminatory preferences” as a result of the excess supply of labor, with an available pool of workers that presumably includes many talented and qualified workers. Employers may also see economic downturns as an opportunity to weed out minority employees who they perceive as underperforming or problematic by urging them to quit. Economists question this incentive by pointing to the high cost of firing, suggesting that the costs of potential employment discrimination litigation create a disincentive to behave in a discriminatory manner, and thus neutralize the labor availability effect.<sup>60</sup> However, this theory rests on the assumption that a significant portion of individuals who are discriminated against will actually bring claims. The assumption is hasty.

In the Rutgers survey, discussed in Part II, *supra*, 34% of those who reported racial discrimination in the workplace did not do anything, and only 3% said that they actually sued their

company or co-worker. Among African Americans who perceived discrimination, less than 1% (0.85%) actually filed a formal complaint with the EEOC, and less than one quarter of one percent (0.22%) actually file a federal lawsuit.<sup>61</sup> Indeed, an employer seeking to push people out could be quite successful in doing so without facing a lawsuit: at least four times as many people will quit than file a formal complaint with the EEOC, and 16 times as many will quit than file a suit in federal court.<sup>62</sup>

Donohue and Siegelman engage in an extensive analysis of EEOC and federal court data to address the possibility of increased employer discrimination during periods of high unemployment.<sup>63</sup> They conclude that no such rise in discriminatory behavior occurs among employers.<sup>64</sup> In support of their conclusion, Donohue and Siegelman identify several empirical findings that contradict the causality of employer behavior. First, they posit that the federal government would not experience incentives to discriminate in the way private employers would, and thus data showing that suits against the federal government follow the same unemployment-related pattern as suits against private employers can only be attributed to the worker benefits effect.<sup>65</sup> Second, they note that the upswing in employment litigation begins within one or two quarters of the economic downturn, though it usually takes longer to satisfy the administrative and procedural requirements for filing suit in federal court, suggesting that increased federal court filings are based on complaints filed with the EEOC prior to the upswing in unemployment rates (and any associated increase in employer discrimination).<sup>66</sup> Third, they find that while the number of federal court filings increase in recessions, the number of EEOC charges remains relatively constant, a pattern inconsistent with increased employer discrimination.<sup>67</sup>

Having laid out their argument against increased employer discrimination, Donohue and Siegelman go on to hypothesize as to the empirical results one may expect to find as a result of a worker benefits effect, eventually showing that the predicted results do indeed occur. Under a worker benefits effect, periods of higher unemployment lead to increased durations of unemployment, and therefore greater backpay awards. Larger damage awards result not only in the established increase in litigation, but also make cases with a lower probability of success more attractive by increasing the possible rewards of successful litigation. Indeed, looking at figures from the same period, Donohue and Siegelman find a small decrease in plaintiff win rates and larger damages awards as unemployment rates rise.<sup>68</sup> In sum, Donohue and Siegelman create a seemingly impenetrable argument rejecting the employer behavior effect and lending strong support for a worker benefits effect.<sup>69</sup>

Nonetheless, I advocate for caution in interpreting their findings. While the strength of their argument rests in its reliance on empirical support from employment litigation data, so too may its weakness. I argue that documented evidence of judicial hostility to employment discrimination litigation may very well poison the well of federal court data used in their findings. This hostility calls for a reinterpretation of their data to consider

the possibility of increased employer discrimination during economic downturns.

### *MARKET FORCE AND EMPLOYEE BENEFITS*

The worker benefits effect essentially argues that, in economic downturns, relatively little changes besides the cost calculus of employees. Even assuming this is true, I argue that the worker benefits effect should be understood within the rubric of force. The fact that longer durations of unemployment make it more economically viable to bring a claim does not, in and of itself, imply that employees are bringing weaker or more frivolous claims. Indeed, the very nature of backpay awards creates a wage threshold whereby high-earning victims of discrimination are more likely to find it worthwhile to sue than low-earning workers. The marginally lower-earning worker whose claim is made worthwhile by the increased length of unemployment is no less meritorious. Instead, valuing a discrimination claim based on the length of unemployment, rather than the actual discriminatory conduct, merely highlights the unfortunate impact – call it force – on low-wage victims of discrimination as a result of a backpay-based remedy structure. After presenting evidence of judicial hostility in the next section, I consider whether victims of discrimination are penalized for bringing their claims during periods of high unemployment .

### **JUDICIAL HOSTILITY TO EMPLOYMENT DISCRIMINATION LITIGATION**

In 1997, the Second Circuit instituted a task force to study the issue of gender, racial, and ethnic fairness in its courts.<sup>70</sup> Generally, the task force began by surveying judges, court employees and attorneys about their observations of gender, racial, and ethnic bias in the courthouse. In regards to bias directed at attorneys, the survey found that judges observed almost no racial or ethnic bias against minority attorneys, an observation shared by white male and white female courtroom employees.<sup>71</sup> Among minority law clerks and courtroom deputies, on the other hand, 24% reported observing a minority attorney's competence challenged because of his or her race or ethnicity, and 19% report observing a minority attorney mistaken for a non-attorney.<sup>72</sup> Among minority attorneys, 39% reported that they "often" or "occasionally" observed various kinds of incidents of racial or ethnic bias directed at minority attorneys, including derogatory racial or ethnic comments; 46% reported being ignored, interrupted, or not listened to; and 52% had been mistaken for a non-attorney.<sup>73</sup>

As previously noted, employment discrimination litigation in federal court increased by 2166% from 1970-1989, versus a 125% increase in the overall civil caseload. Between 1992 and 1997, the volume of discrimination cases nearly doubled.<sup>74</sup> Meanwhile, judicial attitudes toward employment discrimination litigation reflect what can only be described as disgust. In a 1994 *New York Times* article, a former federal judge complained that discrimination cases are an unjustifiable consumer of judicial time because they are "rarely settled, are characterized by

high levels of acrimony and subjective claims of victimization; they are immensely time consuming and are controlled by legal standards that, lacking sufficient precision, are overgeneralized and of marginal use."<sup>75</sup> The Second Circuit Task Force found that other judges privately agreed that the *Times*' article captured the views of colleagues who felt the cases were "small potatoes," clogging up the federal courts and diverting judges' attention from larger, purportedly more significant, civil cases.<sup>76</sup>

Statistically, in the few employment discrimination cases that do make it to trial,<sup>77</sup> plaintiffs are almost twice as likely to win before a jury as they are in a bench trial.<sup>78</sup> From 1990 to 2001, plaintiffs' win rates before juries ranged from 36-44% while win rates before judges ranged from 14-33%.<sup>79</sup> Despite plaintiffs' minimal chances of making it to trial and obtaining a favorable decision, they fair even worse on appeal. In fact, the differential between plaintiff and defendant success rates is greater in employment discrimination cases than any other category of civil cases.<sup>80</sup> When an employment discrimination defendant wins at trial and the case is reviewed on appeal, only 5.8% of those judgments are reversed. By contrast, when an employment discrimination plaintiff wins at trial and the case is reviewed on appeal, 43.61% of those judgments are reversed.<sup>81</sup> Looking solely at post-verdict defense motions for judgment notwithstanding the verdict, proceedings with historically low rates of success, five out of six such appeals resulted in reversals in the Second Circuit from 1992 through 1995.<sup>82</sup>

In a sense, these results are not surprising. There is little reason to believe that federal judges, who are predominantly white and the majority of whom are men, are any less susceptible than the general population to cognitive or implicit biases in decision making. Perhaps, part of the problem can be attributed to a legal regime that is too onerous on plaintiffs and inconsistent with the realities of modern discrimination. In sum, anecdotal evidence of judicial attitudes, lower win percentages at trial before judges than juries, and the widespread perception of bias among minority employees (and attorneys), all evince a certain judicial hostility toward employment discrimination claims.

### *A CRITIQUE OF DONAHUE AND SIEGELMAN*

Donohue and Siegelman fail to account for evidence of the increasingly aggressive use of summary judgment by defendants in the area of employment discrimination.<sup>83</sup> In light of the evidence discussed above, summary judgment effectively precludes the jury's opportunity to perform its traditional duty while simultaneously transferring authority to hostile judicial decision-makers.

Donohue and Siegelman argue that increased rates of settlement and decreased plaintiff win rates at trial during periods of high unemployment lend support to the worker benefits effect.<sup>84</sup> Assuming as they do that "weaker" claims (defined as those with lower probabilities of success) represent the majority of additional cases during market downturns, and that weak claims are likely to settle, increased rates of settlement and lower win

rates at trial support their theory.<sup>85</sup> However, given the growing success of employer motions for summary judgment, in conjunction with the proposal that the incremental, or additional, recessionary claim is weaker, employers should seek and win a greater number of summary judgment claims. Therefore, a better test of whether weaker claims are brought during recessions would study whether rates of summary judgment increased during periods of high unemployment.<sup>86</sup> Correspondingly, rates of settlement should have a smaller, or negligible, correlation with high unemployment. Any actual increase in settlements, then, or findings showing a lack of correlation between summary judgment and increased unemployment, may instead reflect a *greater* quantity or magnitude of employer discrimination.<sup>87</sup> Similarly, we know it is a rare employment discrimination plaintiff who refuses settlement, overcomes a motion for summary judgment and makes it to trial;<sup>88</sup> presumably even rarer would be such a result for one who brings an incrementally “weaker” claim during a period of high unemployment. Among the few cases that make it to trial, then, the win rates should remain relatively constant. Lower plaintiff win rates, in turn, may reflect judicial animosity.<sup>89</sup>

One may be skeptical of the idea that judges are intentionally hostile to claims of discrimination, but subtle biases provide a way of understanding observed judicial hostility to employment discrimination litigation as the result of subconscious influences. Unlike cell phones and cameras, subconscious biases are not checked at the courthouse door. In fact, the differing perceptions of discrimination toward minority employees by white versus minority employees *in the workplace*<sup>90</sup> are consistent with the differing perceptions of discrimination towards minority attorneys by white versus minority attorneys and courtroom employees *in the courthouse*.<sup>91</sup> Indeed, law clerks and courtroom employees identified behaviors that would reflect the operation of categorization-induced biases and negative schemas, including challenges to the competence of minority attorneys and mistaken assumptions that they were non-attorneys.

The intentional-sounding theory presented previously, in which employers increase discriminatory force during periods of high unemployment, can be presented in nonmotivational terms. Employers seeking to make workforce reductions in order to take advantage of the large labor pool will likely seek to push out those who are seen as difficult or as underperformers. Again, this determination itself would be influenced by previous judgments contaminated by subtle biases. In a recession, choosing whom to terminate among a group of adequately performing individuals introduces greater ambiguity, and hence greater susceptibility to the effects of cognitive biases. Finally, subtle biases may also interact with market forces through the behavior of co-workers. Innate ingroup preferences are likely to serve an unknowing status-producing end among white employees, such that individuals who are socially isolated from their work teams, who are more likely to be outgroup employees, would be most vulnerable.

These dynamics, if associated with market downturns, could cast doubt on Donohue and Siegelman’s findings. For example, employer behavior in market downturns may place increased pressure on a set of vulnerable employees without increasing the number of total employees subject to discrimination, explaining the lack of cyclicity in EEOC charges. Similarly, employers may take small steps to reduce costs or take advantage of increased labor *in anticipation of* market downturns and associated increases in unemployment. If so, the upturn in employment litigation within only two quarters after the onset of market downturns<sup>92</sup> may be consistent with increased employer discrimination. While these dynamics present a rebuttal to Donohue and Siegelman, when understood in full they present a way of understanding the relationship between subtle biases, employer behavior and market conditions.

### A FORCE-BASED PRESCRIPTION

Through cognitive and implicit biases, we learn that negative racial attitudes are pervasive and affect decision-making on all levels, even among those who genuinely believe they are acting in a race-neutral manner. The employment setting, wrought with ambiguous and subjective decision making at all stages of interracial interactions, from hiring to firing, raises basic questions about the sort of remedy, and proof structure, that should be implemented to combat such discrimination.

The two major frameworks used to argue workplace discrimination claims are disparate treatment and disparate impact. Under disparate treatment, an employee must prove that the employer’s decision was motivated by a racially discriminatory purpose. Under disparate impact, employees can forgo a showing of discriminatory purpose by identifying a facially-neutral employment policy that has a disproportionate impact, or effect, on racial minorities.<sup>93</sup> In practice, neither adequately captures the operation of subtle forms of force. Disparate treatment, with its focus on intent, or purpose, is immediately deficient. Moreover, its traditional proof structure requires the identification of a similarly situated member of another race who was treated differently. Yet cognitive biases teach us that employers, unknowingly, may perceive differences in qualifications or performance between two virtually identical, or “similarly situated” individuals as a result of ingroup versus outgroup status. This difference will then be articulated as a challenge to the employee’s attempt to identify a similarly situated individual.

Disparate impact seems better suited to remedy discrimination rooted in the subconscious because of its substitution of effect for intent. However, disparate impact theory, as applied currently, is also problematic. First, it requires the identification of a specific, facially-neutral policy or practice that constitutes the source of the disparate impact. Decisions infused with bias-susceptible subjectivity do not easily lend themselves to this causal attribution. We are not talking about an employer policy that says all employees must live within a two mile radius of work; we are talking about interviews, performance reviews, and everyday interactions that are capable of producing system-

atically-biased outcomes. Second, even if a causal relationship between a specific practice and a racially disparate outcome can be established, courts are likely to be extremely reluctant to tell an employer that they cannot engage in many of these practices, especially if the employer can prove that the practice is consistent with business necessity.

I argue for a bias-sensitive theory of discrimination in which disparate treatment still provides the basic framework but where the focus shifts from establishing that there was a discriminatory purpose to establishing that discriminatory biases, explicit or implicit, permeated the employer's decision. In the process, evidence of racially disproportionate outcomes, divorced from any particular practices, could constitute a single relevant factor in attempting to prove the role of force in decision making. The crucial components, however, are the relevant facts and the inferences that can be drawn from them.<sup>94</sup>

By presenting a more accurate picture of how discrimination operates, force theory's most useful contribution may be in providing guidance as to what facts are relevant and what weight should be given to each. For example, the cognitive bias studies discussed above suggest that cases involving minority employees who are in predominantly homogeneous groups, where they are "token" members of their race, should raise red flags. These employees are more likely to be victims of ingroup preferences, are more likely to be judged negatively for ambiguous actions, and are more likely to be judged harshly for relatively minor performance deficiencies. Similarly, regardless of the racial composition of the workplace, ingroup preferences will often be proxied by particular negative assessments of outgroup employees. For example, social isolation caused by ingroup preferences may be seen as "not being a team player." In addition, the overall market conditions and unemployment rate may also provide useful contextual information about the force at play in the workplace at the time of relevant decision making.

Similarly, cognitive biases suggest that certain inferences and presumptions should be given little or no weight in assessing whether force contaminated an employment decision. For example, because studies show that outgroup members are more likely to be judged in extremes, both positively and negatively, a few highly-placed African American executives within a company would provide little evidence of non-discriminatory decision making. Similarly, evidence of bias in mental processing would advocate for the abolition of the "same actor" presumption, a judicially-created legal standard holding that "where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."<sup>95</sup> As a result of cognitive biases, it is perfectly plausible that a hirer would recruit a minority employee and then later judge that individual negatively in various ambiguous situations because of unknowing biases. Or, upon a single perceived deficiency or error by a minority employee, the hirer may subconsciously reorient the minority employee within a negative racial

schema that he had previously thought the employee transcended on the basis of her application or interview. In turn, from that point forth, ambiguous situations are more likely to be understood in a schema-consistent way and these schema-consistent activities are more likely than schema-inconsistent activities to be recalled by the hirer when making later firing, promotion and demotion decisions. By presenting a more complicated picture of decision making, where subconscious considerations influence determinations, inferential shortcuts require questioning.

Where factual circumstances play such an important role, factfinders should be armed with the tools to properly weigh relevant evidence. By training federal judges on their own hostility to employment litigation, statistical evidence of the prevalence of employment discrimination, and the impact of cognitive biases on decision making, judges may be in a better position to determine whether context-providing facts are relevant. For example, courts may need to allow for more scrutinizing review of past performance, placing a greater burden on employers to justify negative determinations based on ambiguous conduct. In addition, minority plaintiffs may be able to support an inference of bias by applying the common disparate treatment strategy of identifying ingroup members who were "similarly situated" but treated differently (more favorably). Courts, in turn, must recognize the role of subtle biases in shaping the very determination of whether a given ingroup member was actually "similarly situated." As an example, an employer will likely deny that two employees are similarly situated by citing the minority employee's greater number of warnings/reprimands, or by identifying more negative performance evaluations. Yet, the differing patterns of behavior may be nothing more than manifestations of the employer's subconscious biases. Therefore, courts should engage in a thorough review of past actions that constitute negative assessments to determine whether biases have contaminated employers' very evidence of nondiscrimination. Similarly, coworker testimony as to these previous disputes may prove informative (and could warrant more or less weight depending on ingroup or outgroup status, for example). Finally, the strikingly common use of summary judgment is particularly disturbing, as the notion of force illustrates that factual circumstances in the employment setting are both complicated and conceptually crucial.

In the section above, I have tried to present some of the implications of a broader notion of force on the current employment discrimination legal regime. Specifically, subconscious biases and their relationship to judicial hostility present numerous concerns as to the type of inferences that can accurately be made in interpreting fact patterns and the ability of legal decision makers - both judges and juries - to avoid the influence of the very same biases they are tasked with assessing.

#### *FORCE AND ROLE OF THE STATE*

By engaging Epstein on the utility of the antidiscrimination

laws, a basic question arises as to the role of the state in regulating racially discriminatory conduct. Epstein's approach is basically that of the laissez faire capitalist, arguing for a hands-off approach in which discrimination will largely be eliminated by markets because of the costs of discriminating. Under this approach, the Jim Crow South was an artificial construct and *Brown v. Board of Education* was the normalizing event that, by eliminating the state-sponsored exertion of discriminatory force, returned markets to their "natural" state. The natural order restored, markets are poised to do their noble work of eliminating inefficiencies and growing the pie.

The rubric of force presents a different view. Regardless of whether a return to a state of nature can be achieved, the force notion compels the view that such a state does not currently exist. Instead, implicit biases suggest that pre-*Brown* attitudes may have found a new home in the subconscious. Cognitive biases support this theory and further suggest that, at least as long as there are identifiable ingroup and outgroup members, a force-free state of nature may never exist.

As a final point, a view of subtle biases as potentially omnipresent suggests that, because of a dearth of truly objective actors, a seismic realignment of the current legal regime may be needed. Where all employment decisions involving racial minorities are reasonably likely to be infected with racial bias,<sup>96</sup> perhaps the presumption of nondiscrimination and the burden of proof should be reversed. Indeed, the United States is in the minority in its use of the at-will employment presumption.<sup>97</sup> Canada bars dismissals that are "unjust" or not supported by "just cause," and nearly all European countries place a similar burden of good cause for dismissal on employers.<sup>98</sup>

The force notion raises questions about the viability of a model that shifts responsibility from the state to workers, who

are treated as an army of "private attorneys general."<sup>99</sup> Where litigation is costly and the problem of discrimination is pervasive, placing the onus on businesses would serve to level the playing field by at least aligning burden with resources.<sup>100</sup>

## CONCLUSION

Legal philosopher Robert Hale argues that coercive force is not created through the application of government regulation or the adoption of any particular legal rule. Rather, the total amount of coercion remains constant while its distribution is shifted.<sup>101</sup> For example, the choice of a particular rule of property, while enhancing the rights of the property holder, simultaneously places a restriction on the use of that property for all others. Contrary to the suggestion by free market advocates that state regulation is the *creation* of coercion upon private parties, in reality these free market proponents simply advocate for a state of affairs in which the balance of coercion is struck at one extreme, which inevitably favors those with the most capital. While the capitalists run amok, racial minorities are subject to the coercive force of history, culture, and cognition.

In the employment discrimination setting, anti-discrimination laws ensure that the balance is not set at the free marketers' extreme, but racial minorities nonetheless labor under too heavy a burden. Vulnerable to the cognitive bias and implicit attitudes of employers, the current balance places the onus on victims of racial discrimination to police what is a pervasive societal ill, permeating our collective *subconscious*, with little help. The status quo asks racial minorities who suffer discrimination in the workplace to seek redress in an unknowingly hostile judicial forum through the use of a set of clumsy legal rules that misunderstand the nature of the problem. If equality is a goal that our society values, a new balance must be struck.

## ENDNOTES

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 313 (Oxford University Press 2004).

<sup>3</sup> See, e.g., Richard A. Epstein and Erwin Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 be Repealed?*, 2 S. CAL. INTERDISC. L.J. 349 (1993); Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws are Still a Mistake*, 108 HARV. L. REV. 1085 (1995).

<sup>4</sup> See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS, 47-78, 91 (Harvard University Press 1992); see also Epstein, *supra* note 3, at 1097 (identifying benefits to racial discrimination where firms "create limited public goods that are easier to supply as the homogeneity in the tastes of group members increases," and noting that "firms that cater to these preferences could well have higher production at lower costs and hence would prosper in a market setting").

<sup>5</sup> See Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination* 108 HARV. L. REV. 1003 (1995).

<sup>6</sup> *Id.* at 1044.

<sup>7</sup> *Id.* at 1074.

<sup>8</sup> See *id.* at 1072-73 ("A final factor that contributes to the persistence of discrimination is racially biased beliefs or stereotypes. As noted above, discriminatory norms invoke rationalization mechanisms; discriminators prefer to have reasons for discriminating other than a bare interest in status production").

<sup>9</sup> *Id.* at 1044.

<sup>10</sup> See Epstein, *supra* note 3, at 1105.

<sup>11</sup> See Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

<sup>12</sup> *Id.* at 1187.

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* at 1191-93 (discussing one study that found that subjects permitted to allocate monetary rewards chose a strategy that would maximize differences in rewards between ingroup and outgroup members, choosing that strategy over both fairness and maximization of mutual gain).

<sup>15</sup> *Id.* at 1192.

<sup>16</sup> See Shelley E. Taylor, *A Categorization Approach to Stereotyping*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 1, 83, 90-94 (David L. Hamilton ed., Lawrence Erlbaum 1981).

<sup>17</sup> See Patricia W. Linville & Edward E. Jones, *Polarized Appraisals of Outgroup Members*, 38 J. PERSONALITY & SOC. PSYCHOL. 689, 693 (1980). This study obtained similar findings regarding gender and age.

<sup>18</sup> See Russell A. Jones, *Perceiving Other People: Stereotyping as a Process of Social Cognition*, in IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING 41, 46-49 (Arthur G. Miller ed., Praeger Publishers 1982); see also David L. Hamilton, *A Cognitive-Attributional Analysis of Stereotyping* 60-61 in 12 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 2, (Leonard Berkowitz ed., 1979); see also Shelley E. Taylor & Susan T. Fiske, *Saliency, Attention, and Attribution: Top of the Head Phenomena* 264-68 in 11 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 249 (Leonard Berkowitz ed., 1978).

<sup>19</sup> See Krieger, *supra* note 11, at 1194.

<sup>20</sup> See, e.g., Edward E. Jones, George C. Wood, & George A. Quattrone, *Perceived Variability of Personal Characteristics, Ingroups and Outgroups: The Role of Knowledge and Evaluation*, 7 PERSONALITY & SOC. PSYCHOL. BULL. 523, 523-24 (1981); Bernadette Park & Myron Rothbart, *Perception of Outgroup Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of Ingroup and Outgroup Members*, 42 J. PERSONALITY & SOC. PSYCHOL. 1051, 1054-58 (1982).

<sup>21</sup> See Linville & Jones, *supra* note 17, at 689.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 691-92.

<sup>24</sup> See H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980).

<sup>25</sup> In a similar study, white college students were asked to evaluate conduct in a scene involving an altercation between two males. Where the antagonist, or instigator, was black, his behavior was characterized as "aggressive" or "violent." But where he was white, his behavior was characterized as "playing around" or "dramatizes." See Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 594-95 (1976).

<sup>26</sup> See, e.g., Edward E. Jones, *How Do People Perceive the Causes of Behavior?*, 64 AM. SCIENTIST 300 (1976); see also Jones, *supra* note 18, at 57-64; Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in COGNITIVE THEORIES IN SOCIAL PSYCHOLOGY, 337, 347 (Leonard Berkowitz ed., 1978).

<sup>27</sup> See Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 461, 464-66 (1979).

<sup>28</sup> Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 277-81 (1985).

<sup>29</sup> The tests are also used to measure implicit biases based on gender and age.

<sup>30</sup> See Shankar Vedantam, *No Bias*, WASH. POST, Jan. 23, 2005, at W12 (relaying that Mahzarin Banaji, a Harvard psychologist and one of the founders of the test, says the test "measures the thumbprint of the culture on our minds").

<sup>31</sup> Brian A. Nosek, Anthony G. Greenwald, Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, Psychology Press, in AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR (J.A. Bargh ed., Psychology Press 2007).

<sup>32</sup> *Id.* (In a typical black-white IAT, subjects are first presented with a screen on which "Black" appears on the top of one side of the screen and "White" appears on the top of the other side of the screen. A series of faces pop up in the middle of the screen, one-by-one, and subjects must classify them as white or black by clicking the "E" or "I" key on their computer (corresponding with the side of the screen on which the category appears). Subjects are instructed to proceed as quickly as possible through the images. Next, the words "Good" and "Bad" appear at the top of the screen and subjects must similarly categorize words such as "laughter," "happiness," "evil" and "grief." Next, the two sets will be paired, so "Black" appears with either "good" or "bad" on one side of the screen and "white" with the other. Now, the same pictures and words appear in the middle of the screen and subjects must properly categorize them. The pairings are then reversed and the process repeats itself. The process is thoroughly randomized, including the sides of the screen on which categories appear, the order of the pairings, and the order of the words and images in the middle).

<sup>33</sup> Based on the difference in response times, the preferences are categorized as "slight", "moderate", or "strong." See generally <https://implicit.harvard.edu/implicit/demo/selectatest.jsp>.

<sup>34</sup> See Nosek, Greenwald, and Banaji, *supra* note 31, at 103.

<sup>35</sup> See Brian A. Nosek, Mahzarin R. Banaji, and Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RESEARCH AND PRACTICE 101, 103 (2002) (explaining that findings by the original creators of the IAT use data that are further scrubbed based on extreme responses, in which respondents were either too slow in responding, or made substantial errors in classification).

<sup>36</sup> *Id.* at 105.

<sup>37</sup> Craig Lambert, *Buried Bias and Bigotry*, HARVARD MAGAZINE, Jul.-Aug. 2002; see also Vedantam, *supra* note 30.

<sup>38</sup> *Id.*

<sup>39</sup> See Lambert, *supra* note 37; see also Vedantam, *supra* note 30.

<sup>40</sup> See Lambert, *supra* note 37.

<sup>41</sup> See Vedantam, *supra* note 30.

<sup>42</sup> See Krieger, *supra* note 11, at 1208.

<sup>43</sup> See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market*

*Discrimination* 2, 6-9 (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003).

<sup>44</sup> *Id.* at 2-3, 10.

<sup>45</sup> Claudia Goldin and Cecilia E. Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians* (Nat'l Bureau of Econ. Research, Working Paper No. W5903, Jan. 1997).

<sup>46</sup> *Id.* at 25.

<sup>47</sup> Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 683 (2005).

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* Nielsen and Nelson's article presents evidence of underclaiming in the area of employment discrimination in greater detail, as well as a discussion of the explanations and implications of underclaiming.

<sup>50</sup> See, e.g., Krieger, *supra* note 11.

<sup>51</sup> See Nielsen and Nelson, *supra* note 47, at 691 (indicating that out of approximately 80,000 total charges per year, the EEOC actually litigates between 200 and 400 claims per year, or roughly one quarter of one percent of total complaints. Most cases end in a finding of "no reasonable cause" (57%), which means the agency does not find the case meritorious and the individual may pursue a private cause of action, or are closed administratively (21%), which means the case is closed without any remedy or finding for the charging party).

<sup>52</sup> It is important to note that while the EEOC breaks down the total charges by type of discrimination, the federal court statistics are grouped into total employment discrimination lawsuits and disaggregated based on disposition of suits. Since federal courts do not break down total lawsuits by type of discrimination, a common assumption made in statistical analysis in this area is that the percentages of race, national origin, sex, age and disability claims in federal court will match that of EEOC complaints.

<sup>53</sup> See *supra* text accompanying note 52. For a more detailed discussion of this argument and its shortcomings, see John J. Donohue & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. Cal. L. Rev. 709, 719-723 (1993).

<sup>54</sup> John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

<sup>55</sup> *Id.* at 985.

<sup>56</sup> *Id.* at 988.

<sup>57</sup> See *id.* at 990-1000 (specific factors isolated for include the following: a roughly 2.31 percentage point increase in unemployment rates between 1969 and 1989; a 62%, or 28.41 million person increase in the protected population of workers attributable to demographic changes including increased participation in the labor force by women; a 15.45 million increase in protected workers as a result of the 1972 Amendments to the Civil Rights Act; the entrance of 49.19 million "new entrants," or young workers, with a higher propensity to sue; the enactment of the Age Discrimination and Employment Act in 1968 which by 1989 formed the basis for 15.1% of employment civil rights cases; the Supreme Court's expansion of §1981 of the 1866 Civil Rights Act to include employment discrimination based on race within the meaning of "making and enforcement of contracts;" and the Supreme Court's creation of the disparate impact theory of discrimination in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

<sup>58</sup> *Id.* Together, congressional expansion of protections through enactment of the ADEA and the lowering of the minimum firm size subject to the Civil Rights Act explain another 20% of the increase in litigation. The Court's expansion of legal doctrine to include reverse discrimination, pregnancy claims and a broader understanding of §1981 explained 9.7% of the increased litigation. *Id.*

<sup>59</sup> Philip Harvey, *Combating Joblessness: An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20<sup>th</sup> Century*, 21 BERKELEY J. EMP. & LAB. L. 677, 740-42 (2000). In relation to market cycles, this two-to-one ratio is maintained through booms and busts, implying that twice as many African Americans gain employment during booms and twice as many become unemployed during recessions. *Id.*

<sup>60</sup> See Donohue & Siegelman, *supra* note 54, at 723-24.

<sup>61</sup> See discussion *supra* Part II.

<sup>62</sup> See Nielsen and Nelson, *supra* note 47, at 693-96.

<sup>63</sup> See Donohue & Siegelman, *supra* note 54 at 726-61.

<sup>64</sup> Donohue & Siegelman, *supra* note 54 at 762.

<sup>65</sup> Donohue & Siegelman, *supra* note 54 at 728-32. Donohue and Siegelman use the phrase "worker benefits effect" to connote the idea that any increase in the amount of employment discrimination claims filed during periods of high unemployment is the result of the change in the expected value, or benefit, of a successful lawsuit to the employee, not the result of any increase in discriminatory behavior among employers.

<sup>66</sup> Donohue & Siegelman, *supra* note 54 at 732-41.

<sup>67</sup> Donohue & Siegelman, *supra* note 54 at 741-44.

<sup>68</sup> Donohue & Siegelman, *supra* note 54 at 757, 760.

<sup>69</sup> Before continuing, a few caveats are in order. Donohue and Siegelman's findings reflect data prior to the Civil Rights Act of 1991, which expanded the scope of Title VII's protections to include compensatory and punitive damages, and enabled plaintiffs to have their cases heard before a jury. See 42 U.S.C. § 2000e-2(m); §102 of the 1991 Civil Rights Act, 42 U.S.C. §1981a (2002). By presenting plaintiffs with remedies beyond backpay, employees considering litigation now face a different cost calculus. In a study published this year, Donohue and Siegelman reconsider their prior findings in light of the 1991 Amendments, finding that, for the period from 1991-1996, the correlation between increased employment discrimination litigation and higher unemployment no longer holds. John J. Donohue III and Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 261, 262-76 (Laura Beth Nielsen and Robert L. Nelson eds., 2005). They reason that the diminished role of backpay decreases the importance of duration of unemployment, breaking the key connection to market conditions. However, as Donohue and Siegelman acknowledge, there are several reasons to approach the new findings with caution. First, a large number of the additional employment claims can be assumed to be claims arising under the newly-enacted Americans with Disabilities Act and judicial decisions recognizing the hostile work environment theory of employment discrimination. In addition, market conditions since the passage of the Civil Rights Act have not included the fluctuations in unemployment necessary to properly test for cyclicity.

Finally, in the context of race, the 1991 Civil Rights Act made minimal changes; prior to its passage, plaintiffs proving race-based employment discrimination under Title VII could obtain monetary damages by attaching a §1981 claim. See *Runyon v. McCrary*, 427 U.S. 160 (1976) (providing a private remedy for racial discrimination in the making and enforcement of private contracts). Moreover, the amendment allows punitive damages for intentional discrimination (as opposed to disparate impact cases), but states that a plaintiff can only recover punitive damages if the defendant acted "with malice or with reckless indifference" to the individual's rights. 24 U.S.C. §1981(a). Some circuit courts read that language to mean that punitive damages require either egregious or extraordinarily egregious conduct. See, e.g., *Luciano v. Olsten Corp.*, 110 F.3d 210 (2nd Cir. 1997). In 1999, the Supreme Court eased plaintiffs' burden by holding that the 1991 Act does not mandate intentional discrimination be egregious in order to merit punitive damages. See *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). Under the new standard, in which "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages," it is still true that only a subset of intentional discrimination cases will qualify for punitive damages. *Id.* at 536.

<sup>70</sup> *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 124 (1997).

<sup>71</sup> *Id.* at 173-74.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See Donohue & Siegelman, *supra* note 54 at 262.

<sup>75</sup> Kenneth Conboy, *Trouble in Foley Square*, N.Y. TIMES Dec. 27, 1993, at A17.

<sup>76</sup> See 2nd Cir. Task Force, *supra* note 70, at 343-44.

<sup>77</sup> See Nielsen and Nelson, *supra* note 47, at 693-96 (stating that in 1990, two thirds of cases were dismissed without judgments and only 8.7% went to trial. By 2001, almost three-quarters of cases were dismissed without judgments, and only 3.8% went to trial. Over the period, the largest percentage of dismissals were settlements, ranging from 35-43%. About 30% were dismissals without judgment and about 25% were dismissals based on other judgments, including default judgments and pretrial motions such as summary judgment. These non-settlement dismissals predominantly favor defendants).

<sup>78</sup> See 2nd Cir. Task Force, *supra* note 70, at 345.

<sup>79</sup> See Nielsen and Nelson, *supra* note 47, at 698.

<sup>80</sup> Theodore Eisenberg and Stewart J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals* (2001). This gap in reversal rates is consistent across all United States Circuit Courts of Appeal. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See 2nd Cir. Task Force, *supra* note 70, at 347-48.

<sup>83</sup> See, generally, Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990).

<sup>84</sup> See Donohue & Siegelman, *supra* note 54.

<sup>85</sup> See Donohue & Siegelman, *supra* note 54 at 438-42.

<sup>86</sup> Although, in light of the evidence of judicial impatience with employment claims, increased rates of summary judgment during periods in which there is an

influx of such claims could also result from judicial docket-clearing – that is, a court's tendency to rid itself of such claims through the filing of dispositive motions.

<sup>87</sup> In fact, as Donohue and Siegelman acknowledge, more meritorious claims are also more likely to settle. See Donohue & Siegelman, *supra* note 54 at 442.

<sup>88</sup> Donohue & Siegelman, *supra* note 54.

<sup>89</sup> Complicating the matter, while the argument against increased employer discrimination may be buttressed if it can be shown that grants of summary judgment for defendants do indeed increase during recessions, it raises other concerns. The increased success of summary judgment motions would indicate that, in light of judicial hostility to employment discrimination litigation, fluctuations in market conditions contribute to racially discriminatory force upon protected workers by harming their ability to receive redress for statutory violations of their civil rights. Accepting Donohue's and Siegelman's focus on the impact of a backpay-based remedy structure, low-wage workers with no-more-frivolous claims would account for a significant portion of the increased litigation. Why should these litigants now face a legal system inhospitable to their claims? See Donohue & Siegelman, *supra* note 54.

<sup>90</sup> Donohue & Siegelman, *supra* note 54.

<sup>91</sup> See 2nd Cir. Task Force, *supra* note 70, at 173-4.

<sup>92</sup> Donohue and Siegelman posit that three quarters are the minimum time necessary to go from filing a complaint with the EEOC to bringing a claim in federal court. See Donohue & Siegelman, *supra* note 54.

<sup>93</sup> Under disparate impact theory, after the employee's statistical showing, the employer still has an opportunity to establish that the challenged policy is necessary for the operation of the business.

<sup>94</sup> At least one scholar has argued that these subtle forms should be regulated through a two-tier legal system in which only employer conduct reflecting intentional discrimination would be subject to compensatory and punitive damages while proof of discriminatory outcomes reflecting unknowing biases would only be subject to equitable remedies such as backpay and reinstatement. See Krieger, *supra* note 11, at 1241-45.

Although reinstatement is rarely an agreeable option to either party, and backpay has long been the dominant equitable remedy for victims of employment discrimination, perhaps this trend would not hold for subconscious discrimination. Perhaps employers, found liable of only unknowing conduct and not invidious behavior, would be more amenable to reinstating an employee; perhaps victims would see employers as less blameworthy and thus find their workplaces still desirable places in which to work. If not, one may expect to see a reiteration of the business cycle effect and an associated increase in market force during periods of high unemployment, as well as increased exclusion of low-wage workers from seeking redress for discriminatory treatment.

<sup>95</sup> *Proud v. Stone*, 945 F.2d 796 (4th Cir.1991) (applying the presumption in an age discrimination case). This standard was then made applicable to other protected groups; See, e.g., *Wexler v. White's Furniture, Inc.*, 317 F.3d. 564, 572-74 (6th Cir. 2003) (en banc); *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461 (6th Cir. 1995).

<sup>96</sup> Interestingly, evidence of ingroup versus outgroup behavior could implicate not only white supervisor-black employee scenarios, but also nontraditional scenarios such as "reverse discrimination," racial discrimination by a racial minority against a different racial minority, and even discrimination by a racial minority supervisor against an employee of the same race.

<sup>97</sup> See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, B.C. L. REV. 351, 405 (2002). The at-will rule is the principle that an employer can fire an employee at any time, for any reason, and employees can similarly leave at any time, for any reason.

<sup>98</sup> *Id.* For example, an employer in France must show a reason that is both genuine and serious to warrant termination. In Germany, the Constitution proscribes "socially unwarranted dismissals . . . not based on reasons connected with the person or [his conduct] . . . or [not based] on urgent social needs that preclude his continued employment."

<sup>99</sup> *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting that "the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority").

<sup>100</sup> On the other hand, placing the onus on employers may be too onerous in light of the pervasive nature of force, essentially holding employers accountable for a societal ill whose ramifications take hold well before and beyond the scope of the employment relationship.

<sup>101</sup> See BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 18 (Harvard University Press 1998) ("[W]hen the government intervened in private market relations to curb the use of certain private bargaining power, it did not inject coercion for the first time into those relations; it merely changed the relative distribution of coercive power").

# BOOK REVIEW

## The Trouble With Simplicity

By Walter Benn Michaels. Metropolitan Press (2006). ISBN 080507841X

Reviewed By Shannon Reaves\*

Essentially, Walter Benn Michaels is correct: there is sharp class division in America that is characterized by gross inequality of opportunity and goes virtually unchallenged in the political mainstream. In his latest book, “The Trouble with Diversity: How We Learned to Love Identity and Ignore Inequality,” Michaels suggests that this lack of attention is rooted in our collective obsession with racial and cultural diversity. He proposes that, instead of fixing the problems of a poor underclass created by the free market economy, Americans choose to pursue solutions to inequality by focusing upon “diversity.”

Michaels acknowledges that within the poor, some are racial minorities, and some are not. He argues that if we solved the issues of the disproportionate racial representation beneath the poverty line, while the group would be a more appropriate representation of races in that class of society, we would still have the same number of underprivileged people. The end result, he argues, is that nothing is accomplished, but this is a highly debatable conclusion. Michaels seems to believe that race and gender-related inequality should be put aside in an effort to fix the country’s class issues. He often treats the two concepts as though they are mutually exclusive. He urges Americans to focus on eliminating the differences in wealth that exist between the poor and the rich.

Ignoring race in the reconstruction of class, as Michaels suggests doing, would support the imbalance of power that has shaped America since its inception. When America pulls its citizens from poverty, into real opportunity, racial discrimination may still leave people behind. Michaels does not seriously engage in that particular dilemma, even vacillating about whether racism actually exists in any significant form in America today.

In this vein, Michaels questions the legitimacy of identity-based considerations, such as affirmative action programs. In what may be a determined effort to be shocking and cutting-edge, Michaels - a self-proclaimed liberal - comes dangerously close to advocating the end of most current programs intended to level the playing field for visible racial minorities.

If you can manage to put these problems aside, however, what is left of “The Trouble with Diversity” is insightful and thought provoking. Michaels suggests that the U.S. downplays its growing economic divide by convincing citizens that the country is actually still a meritocracy where, for example, the brightest students go to the best schools. He also indicates that

the U.S. asserts that the rich and poor are equals, just culturally different. By convincing the population of this, the United States sidesteps the issue of actually creating equality of opportunity. The trick “is to think of [economic] inequality as a consequence of our prejudices rather than as a consequence of our social system and thus to turn the project of creating a more egalitarian society into the project of getting people” to stop being bigoted.

His major proposal is for the abolition of private schools and for the equal distribution of funding among public schools. This would replace the present system, in which schools are funded by local property taxes, which results in incredibly well funded public schools in wealthy districts and dismally underfunded public schools in impoverished districts. Michaels believes that if the state can provide equal education to all, it would advance the opportunity for class mobility for all Americans. However, as the Supreme Court has not looked kindly upon efforts to eliminate private schools, this proposal will likely remain nothing more than an interesting hypothesis in the near future.

Michaels’s most important message is that focusing on racial and cultural diversity does not address true economic inequalities in the United States. Michaels suggests that “poverty” is not an identity and does not fit under the “diversity” umbrella. It is not African-American or Irish-American, but it *is* inequality. Americans need to fix it, not just find new ways to tolerate it. His overall message is a good one, though his approach of both downplaying the importance of race and recommending wealth redistribution may turn off readers on both the left and the right, respectively.

Still, “The Trouble with Diversity” is full of interesting revelations and out-of-the-box thinking. The one notable failure of the text, however, is that the author proposes engaging the class problem at the expense of race, which remains another significant dilemma in the U.S. As a result, Michaels engages in the same sleight of hand of which he accuses the nation. While he is quick to point out that America hides the economic divide as it “celebrates diversity,” Michaels appears to make racial discrimination disappear while he focuses on issues of class. While acknowledging the role that race plays in the equation is not as simple as the contrast he suggests between the rich and the poor, considering race is still not superfluous. It is necessary, and it is incredibly complicated - and *that* is the trouble with diversity.

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# ELECTING ONE OF OUR OWN: THE IMPORTANCE OF BLACK REPRESENTATIVES FOR BLACK COMMUNITIES IN THE CONTEXT OF LOCAL GOVERNMENT

*By Royce Brooks\**

**O**n New Year's Day 2005, the Tarrant County Commissioners' Courtroom was at standing-room only for perhaps the first time ever as hundreds of supporters gathered to watch Roy C. Brooks<sup>1</sup>, the newly-elected Precinct 1 Commissioner, take the oath of office. The candidate's family had prime seats in the front two rows - not only his wife, son, and daughter, but nieces and nephews and in-laws, and brothers and sisters by blood and otherwise. This day marked the achievement of a long-sought goal, not just for the candidate, but also for his entire community of supporters.

There were quieter moments on the program: a gracious speech by the outgoing commissioner, a brief tribute by one of his community supporters, readings by a few more ministers. Even the moment of official business was made personal as the candidate was sworn in on the Brooks family bible, the same bible in which his parents had recorded the names and birth dates of their children years ago.

Finally, it was the candidate's turn to speak. He called his family up to the dais and introduced each person by name. He thanked his brother, who was also his campaign treasurer. He thanked his sisters for all of the time and support and, not least, money that they had contributed. The crowd that came out to celebrate Roy Brooks' achievement did not tear themselves away from their black-eyed peas just to congratulate a new commissioner — most of them probably had no idea what a commissioner actually does. They came out to celebrate something much more important: that they had just elected one of their own.

## **MAJORITY-MINORITY V. COALITION DISTRICTING: THE DEBATE**

The national debate over redistricting and effective minority representation generally focuses on how best to draw Congressional and state legislative districts. The arguments both for and against coalition districting<sup>2</sup> take for granted the existence of large-scale communities of interest among minority voters (i.e., that the vast majority of African Americans share common political interests) and ignore the reality of an aggregate power component to the districts. Those in favor of coalition districting argue that minority influence in the aggregate legislative body ultimately is more important than constituent satisfaction with an individual representative. Scholars who are in favor of coalition districting argue that blacks and other minorities will be much better off when districting maximizes the number of

legislators who are beholden to black communities for votes, because their legislative issues will more likely be brought to the table.<sup>3</sup> Under this theory, majority-minority districts, by packing more black voters into fewer districts, result in less effective representation of blacks in the aggregate legislative body. This leads to a ghettoization of black political issues, with only a few voices willing to bring those issues to the fore. This view has been gathering support for years, from proponents both black and white, and on both sides of the congressional aisle.<sup>4</sup>

However, both scholars for and against majority-minority districts fail to take into account local political concerns in their arguments. The prevailing wisdom among those in favor of coalition districting is that black constituents in a coalition district are better served by a moderate or conservative representative than a liberal representative, because the moderate will be better able to garner support for key black issues in the aggregate legislative body. In this view, legislation dealing with issues of importance to the black community will have a better chance of being passed under moderate or conservative representation, even if most black voters would prefer a much more liberal representative. The problem with adding up black legislators and black-sympathetic legislators and judging success by voting records and committee appointments is that voters are not only worried about their statistical representation - the percentage of influence they wield within a national body. They are also concerned whether the face of government with which they deal regularly looks like them and reflects their experiences. The redistricting debate is therefore incomplete without thorough consideration of pertinent issues from the local government perspective, where questions of representation and community identification most affect voters' daily lives.

## ***A LOCAL PERSPECTIVE***

This article focuses on the 2004 campaign and election for the Precinct 1 Commissioner's seat in Tarrant County, Texas. In a majority white county precinct in north central Texas, four candidates competed for the slot: three black candidates battled fiercely for the Democratic nomination, and the winner faced the Republican candidate, also black, in the general election. Once elected, Roy Brooks took his seat as the only black member of the five-member Tarrant County Commissioners' Court. This article takes a ground-level view of one candidate's campaign, eventual election and initial days in office. The author explores a number of questions. First, what circumstances did these black candidates face as they struggled to distinguish themselves

with black voters while still appealing to the white majority? Second, how does the new black commissioner balance his or her commitment to zealous representation of black community interests with a commitment to the majority white constituency? Third, how does the only black commissioner maneuver politically within such a small governmental body? Finally, what do black constituents want from a black county commissioner?

### RUNNING AND WINNING: THE STORY OF A COMMISSIONER'S COURT RACE

Tarrant County is the third-largest county in Texas. According to a 2001 census, its population was estimated at 1,486,392.<sup>5</sup> With the population of neighboring Dallas County at approximately 2.3 million<sup>6</sup>, the combined Dallas County-Tarrant County region, commonly known as Dallas-Fort Worth, is one of Texas' largest urban centers.

Racially, Tarrant County is significantly more homogeneous than the rest of Texas, with a non-Hispanic white population of 61.9%, compared with just 52.4% for Texas statewide. Economically, Tarrant is predominantly middle-class, but with a striking 10.6% of the county's population living below the poverty line. Tarrant is also home to the billionaire Bass and Moncrief families, whose oil fortunes are a consistent source of funding for local civic projects.

Of Tarrant County's four precincts, Precinct 1 is the most racially diverse. Whites make up just 46% of the population of Precinct 1, with blacks comprising 31% - two and a half times the county average - and Latinos comprising 20%. Precinct 1 is widely economically and socially diverse as well. The three-hundred thousand person area stretches from the apartment communities of southeast Fort Worth, where zero-tolerance police patrols break-up gatherings of brown and black men on darkened street corners, to the dream-home gated communities of southwest Fort Worth, where seven-bedroom palaces stand along privately financed, tree-lined avenues. Politics is no exception to the pattern of wild diversity in Precinct 1. It is the only majority-Democratic precinct in the county.

The Precinct 1 Commissioner's race in 2004 was unique in that all the primary and general election candidates, both Democratic and Republican, were black. With a very popular commissioner - the first black and the first woman ever to sit on the court - finally retiring after sixteen years in office, several black candidates raced to fill the void. Because a black commissioner had held the office for so long, many voters and political operatives in Tarrant County have come to think of Precinct 1 as the county's unofficial black seat.

The difference between campaigning in black communities and campaigning in white communities is not merely one of style. Everyone from campaign managers to party operatives to

the candidates themselves indicates that different approaches and even different substantive methods are offered to each group. This is a little-mentioned effect of coalition districting. In a majority-minority district, a candidate hoping to represent the views and experiences of a minority community would feel free to campaign on those issues, instead of feeling pressured to soften certain ideas for the benefit of an audience. In such a district, it would be possible for a black candidate to win based on a platform of issues of importance to the black community. In a coalition district, though, a candidate cannot win without some white support. And that white support generally comes when black candidates successfully soften or dilute their black political messages to suit the palates of white voters.

Election law scholars acknowledge that minority voting cohesion and white crossover voting are important factors in understanding whether black voters in a given district will successfully elect their candidate of choice.<sup>7</sup> In their 2001 article exploring effective minority districting, Bernard Grofman, Lisa Handley, and David Lublin explain that relying solely on the minority percentage in a district does not consistently predict

black election success. According to Grofman, Handley, and Lublin, We also need to incorporate the level of minority cohesion and the degree of white crossover voting that can be expected when a minority-preferred candidate competes for office. If, for example, white voters regularly cross over to vote for black candi-

dates, the percentage black necessary to create an effective black district decreases.<sup>8</sup>

Conversely, if white voters regularly fail to vote for black candidates, the black percentage necessary for black voters to achieve their preferences in a district increases dramatically. Despite moves toward pervasive crossover voting in nearby Dallas, and despite the individual successes of a handful of prominent local black candidates, white voters in Tarrant County still overwhelmingly prefer white candidates.<sup>9</sup> "By and large, white voters do not vote for black candidates." So says Art Brender, Chairman of the Tarrant County Democratic Party. Brender, who is white, knows well of what he speaks. As a civil rights attorney who has been involved in several of the recent Texas disputes over redistricting, Brender is also a life-long Tarrant County resident. As a result, Brender is intimately familiar with the voting patterns and political atmosphere of the region. But if white voters do not vote for black candidates, what makes Precinct 1, with its succession of black commissioners and its slate of black candidates running in a majority white district, an exception? Brender points to five factors. First, the reluctance of whites to vote for blacks is less prevalent among lower income white voters, such as those who vote in the Democratic primaries. Second, in the past twenty years, many of the white voters who would not be willing to vote for black candidates have

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*Under this theory, majority-minority districts, by packing more black voters into fewer districts, results in less effective representation of blacks in the aggregate legislative body.*

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switched from the Democratic to the Republican Party. Third, because Precinct 1 has a higher percentage of white voters who are Democrats than other areas of the county, there is likely less of a racial voting effect by party than would be expected in other areas, with all of the blacks voting for the Democratic candidate and all of the whites voting for the Republican. Fourth, in this year's Precinct 1 race, the candidates were particularly attractive to white voters, with recognized names and impressive records of public service, including a sitting member of the Fort Worth city council and the highly visible administrative assistant to the popular incumbent commissioner. Brender especially emphasized name recognition as a positive factor for both Brooks and Commissioner Bagsby before him. Finally, Brender acknowledges that what may be the most important factor is also the simplest: all of the candidates were black, which diminished any racial effect of voting by stripping white voters of any alternatives.

Despite his candid assessment of white voters' view toward black candidates, Brender is reluctant to admit that the county's Democratic Party operation might sometimes differentiate its message on the basis of race. However, Brender does acknowledge that party workers might be more likely to emphasize civil rights themes or include messages by leaders like Jesse Jackson when campaigning in a black community, but not in a white or a Latino community, where civil rights issues fail to resonate as successfully.

The Brooks campaign was also sensitive to the charge of inconsistency in campaigning (as well as, presumably, the more disparaging charge of race pandering). As a result, both Brooks and his campaign manager were reluctant to admit differentiating their message based on race. When asked whether his campaign ever delivered different messages to different communities according to race, Brooks replied, "We never altered the basic message, but we may have shifted our emphasis on certain issues in the overall platform."<sup>10</sup> Brooks had several issues that formed the core of his campaign: improved health care, economic development, implementing a freeze on senior citizen property taxes, and a general pledge to put his superior level of experience and knowledge of county government to use for the benefit of constituents without lapse in service from the previous commissioner. In an election year when Bush's characterization of John Kerry as a "waffler" may have cost Kerry the presidential election, Brooks was well aware of the dangers of appearing to be inconsistent. "You become liable to the charge of pandering to different interests," says Brooks.<sup>11</sup>

When asked about the receptiveness of white voters to his candidacy, Brooks noted that the senior citizen tax freeze certainly resonated in white communities because by and large, white voters are higher income people and own more expensive property than minority voters. Health care and economic development issues were aimed more toward black and Latino communities whose needs are much more basic and whose communities have not received the same support for basic infrastructure - business development, healthcare, and the like. "[T]o a certain

degree, there was a tailoring of the message. But I said the same things in the white community," said Brooks.

Brooks' campaign manager, Charmaine Pruitt, had a similar take on the question of message differentiation.<sup>12</sup> When Pruitt, who is black, was asked whether the campaign differentiated its message according to race, she said that the message itself did not change, but the emphasis did change in certain instances. For example, in black neighborhoods, the campaign may have focused more heavily on increasing outreach and service for the county hospital system, which serves mostly indigent patients. In white neighborhoods, the campaign may have focused more on economic issues like capping the property tax for seniors.

The tension between messages that appeal in black communities and those that appeal to white voters is part of the reason why, despite the evident ability of blacks to run and win in Precinct 1, many black voters in Tarrant County prefer the majority-minority model to the coalition district model. When asked about the viability in Tarrant County of coalition districts that rely on white crossover voting to elect minority candidates, Brooks said,

I'm suspicious of the willingness of white voters to apply that strategy across the board. I think that [white crossover voting] is situational. I think this upcoming city council election presents some interesting opportunities for crossover. Precinct 1 works because Democrats are the majority in the precinct, but blacks control the Democratic primary. It would be interesting to research exactly why blacks are allowed to control the primary.<sup>13</sup>

That the battle for the Democratic nomination was centered in the black community is not just a consequence of black candidates playing up to black voters. In Tarrant County, as across Texas and the rest of the south, large numbers of white voters have turned to the Republican Party in recent years. As white voters leave the Democratic Party and black voters remain, blacks gain proportionately more voting power within the party.<sup>14</sup> Further, in Tarrant County, black voters are somewhat more likely than white voters to participate in the Democratic primary. Therefore, for the commissioner candidates, capturing a significant number of black votes was essential to winning the primary.<sup>15</sup> According to Brooks, many white Democrats either don't vote in the primary or vote defensively by voting in the Republican primary and voting Democrat in the general election.

When asked whether he would prefer redistricting in favor of a smaller number of guaranteed majority-minority districts or a larger number of coalition districts with the potential to elect minority candidates, Brooks said that he would prefer the guaranteed seats: "I think that American society is still polarized, and we vote for people who look like us. For people to vote in patterns other than that is the exception, not the rule." Perhaps things will be different in the future, but Brooks has a clear assessment of the situation as it stands now: "I don't think we

have gotten to that place yet.

### CONSTITUENT SERVICES: THE FOUNDATION OF LOCAL GOVERNMENT

Because of its size and function, questions of aggregate legislative power do not apply to the five-member Tarrant County Commissioners' Court. The court is a governing body, not a legislative body, and has no ordinance-making authority. Instead, the county government operates as the local arm of the state government, and the Commissioners' Court acts as the county executive, exercising powers specifically delegated to it by the state government. According to Commissioner Brooks, the court is authorized to "provide order and structure to the county government, to make policies that affect the local implementation for state programs, and to pay the bills."<sup>16</sup> Specific court mandates include the responsibility for operating the state criminal justice system, providing health care for the indigent, implementing programs for child welfare and mental health and mental retardation services, bridging the gap for welfare recipients between the application for assistance and the receipt of federal welfare benefits, and maintaining all non-municipal roads.

The court is presided over by the County Judge, which is a county-wide elected position. Because the court does not elect its own leader, party affiliation and other group identity does not come into play. Any separate committee work handled by the court includes all five members as a committee of the whole. With such a small group working so closely together, merely forcing initiatives through the system based on one party's superior numbers would make for uncomfortable working conditions. Instead, the commissioners must maintain personal relationships with each other, and advocate for their constituents behind the scenes as well as on the vote tally board. Additionally, because the court has limited authority to pursue policy-making on the kinds of political issues that engage most voters, court members are much more likely to be judged based on their relationships with their constituents than on what specific legislation they helped to pass or defeat.

For four-term commissioner Bagsby, Brooks' immediate predecessor and former boss, constituent service was a top priority.<sup>17</sup> In addition to reaching out to citizens' groups and holding community meetings as she had during her initial campaign for office, Bagsby took a programmatic approach to constituent outreach, beginning with publishing a citizens' guide to county government, which included descriptions of the processes of county government and contact information to make services more accessible to citizens. She initiated outreach efforts like broadcasting the weekly court meetings on public access television, and she created a volunteer coordinator position to encourage citizens to become involved in charitable activities through

the county, such as volunteering at county hospitals. Bagsby also started an immunization project with the local Junior League through the county hospitals. Because of her efforts, the county has become much more visible in the community - county offices have adopted local elementary schools, and county employees drive for Meals on Wheels and are encouraged to participate in other charitable efforts.

Having assisted Bagsby's successful administration for fourteen years, Commissioner Brooks takes constituent outreach just as seriously as did his former boss. When asked what importance he attaches to constituent services as part of his overall job description, Brooks answers,

When you hold office, you don't operate in a vacuum, and you're not there to serve your own needs, but to serve the needs of the people who elected you. The only way to know what the people want is to directly communicate with the citizenry and get them involved.<sup>18</sup>

Brooks therefore counts community meetings as among his most important commitments. His office hosts some meetings and is invited to many more, from neighborhood associations to senior citizens' groups to churches; he personally attends two or three per month. In addition to these organized invitations from the public, Brooks says his office is contacted "many times a day" by constituents needing help with personal problems. These include anything from a dispute with a landlord to a family member in jail. Brooks tries to help them all, and will soon add a staff member whose sole responsibility is community outreach and constituent services.

Brooks' main programmatic goals for constituent services are health care-oriented. Brooks wants to address local issues of health disparity between affluent communities and poorer, especially minority, communities. He hopes to be able to direct the county-run health system into a community health model, and to eliminate the county's policy of treating undocumented patients only in an emergency room setting. Brooks is also in the process of creating a nonprofit entity to partner with community groups to apply for grants for community initiatives from SAT preparation courses and summer youth camps to senior citizen programs. According to Brooks, "We'll just have to see what the people want."

### HOW ELECTION LAW SCHOLARS OVERVALUE LEGISLATIVE POWER

For some, the coalition district model represents the triumph of racial cooperation over the provincialism and polarization that often characterizes contemporary politics. Richard Pildes presents coalition districts as an alternative to safe districts

## **REALLY SUBSTANTIVE REPRESENTATION: THE IMPORTANCE OF HAVING "OUR GUY" IN OFFICE**

In academic parlance, substantive representation exists when a representative is effective in promoting a community's interests, regardless of whether that representative is a racial or ethnic member of that community. In contrast, descriptive representation exists when a community's political representative is merely a racial or ethnic community member.<sup>24</sup> In reality, however, for many black voters, there is no such thing as being "merely" a racial representative. Racial identity is as important a factor in representation as legislative success or party leadership. In the context of local officials who sit on small bodies or hold lone executive positions, and whose official duties often lack either the salience or the magnitude to resonate with most voters, racial representation can be one of the most important factors voters seek. A black representative offers the black community a social and emotional stake in the political process - the existence of black officials shows the community that it is possible for other interested minorities to run for office and win. From an academic perspective, a more accessible governmental process and the establishment of officials as role models for a particular racial community are secondary benefits, external to the more important process of maximizing minority-sympathetic votes in legislatures. For many minority voters, however, being able to access government through an elected representative from one's own community is truly a substantive concern.

Does electing a black county commissioner really make for better representation for black constituents? County government is certainly not a high-profile enterprise, and many citizens, both black and white, are completely unfamiliar with its mission. But according to local community leader Deralyn Davis, having a black representative in county government is "not just for show" - it is vital to county policy.<sup>25</sup> Commissioners are responsible for appointments to boards and commissions that bring political and monetary benefits to the black community. For example, the Tarrant County Commissioners' Court appoints members to the John Peter Smith Hospital Board, which oversees a county hospital system that serves a large percentage of low-income and minority patients. Before Commissioner Bagsby was elected, only one black member had ever been appointed to the hospital board, despite the fact that black patients comprise approximately one-third of those served by the John Peter Smith system. It was only after the election of a black commissioner to the court that black members became a regular fixture on the hospital board. Davis points out that a governing board is most effective when its members contribute a variety of experiences and ideals. Davis gives the example of her service as the first woman to serve on the State Prison Board, appointed by then-Texas governor Mark white.<sup>26</sup> Her suggestion resulted in portable toilets being brought into the fields where women prisoners labored so that they no longer had to relieve themselves in public under the eyes of male guards. None of the male members of the board had previously considered this problem. Similar con-

where whites and blacks have achieved "meaningful" political cooperation.<sup>20</sup> Some believe that this model is just right for Texas, where political racial tensions are rooted in a history of slavery and de jure segregation. Tarrant County Democratic Party Chairman Art Brender has favored coalition districting over majority-minority districting for many years. Brender states, "I've said for a long time that the majority-minority model is disappearing because of the upward mobility of blacks and Hispanics in the region."<sup>21</sup> Brender further explains that Tarrant County has seen a trend of generational dispersion among black voters: children raised in traditionally black neighborhoods like southeast Fort Worth are moving away from those neighborhoods as adults. As a result, it is becoming harder in Tarrant County to create separate majority-black voting districts. Brender sees coalition districts as the solution to this problem. Although Brender admits that a coalition model based on white crossover voting would be unlikely to succeed locally, he believes that coalitions of local minority communities based on common economic and social interests would be viable vehicles for black candidates. For example, education issues, economic issues, health care, and public transportation are common interests that unite black, Latino, and Asian communities in the area, and serve as bases for potentially successful coalition districting.

The story of multi-ethnic coalition districts is especially popular among both election law scholars and Democratic Party operatives, because it seems to suggest a clear solution for minority representation. Communities of underprivileged and marginalized minority groups would band together to elect representatives from each other's communities; thus, helping each other achieve fuller, more descriptive representation than any one group could achieve on its own. Further, the Democrats could count those seats as safely in the "win" column, meaning that Democrats in the aggregate legislative body would have that much more power, and would be in a better position to pass legislation of importance to minority communities. This fails to take into account, however, that while minority voters would prefer Democratic representatives to those of another party, the effective representation debate neglects the fact that they may prefer representation by a member of their own community above all else. For example, Carol Swain concludes that black voters value the constituent services and community solidarity that a black Congressional representative provides, more highly than they value the greater influence in the aggregate body that a white representative might provide.<sup>22</sup> Despite this finding, Swain ultimately proposes that coalitional districting with white representatives is the best solution for black community representation.<sup>23</sup> One can only marvel at the willingness of even a black academic, a member of the very voting community in question, to disregard the opinions of black voters in her recommendations for achieving the most effective representation of those voters.

cerns of sensitivity and awareness arise in the context of the Commissioners' Court-appointed hospital board. It is hard to know just how attentive an all-white board would be to the particular needs of its black patients.

Officials who are members of the minority communities they represent have a real stake in the governing of those communities, because they will be personally affected by the outcomes of the decisions they make. And voters within a community feel a real connection to a representative who looks and lives like them. According to Roy Brooks, "They feel like they have a sort of ownership in me. They helped put me there."<sup>27</sup> Deralyn Davis sees this sense of personal connection in one's representative as an important part of political participation, and she thinks that for Tarrant County, the coalition district model threatens that feeling of connection for minority voters.

According to Davis, the coalition district model is unlikely to be successful in electing black candidates, despite the exceptions of Bagsby and Brooks in Precinct 1. Both Bagsby and Brooks gained support from a wide range of voters based on individual appeal: both were from well-respected Fort Worth families whose names tended to overcome doubt among white voters, and both had relatively high profiles within the greater Fort Worth community based on their professional experiences before running for office. Not every black candidate has such advantages when it comes to drawing crossover-voting support. Davis fears that without a majority-minority model, black candidates will be unable to win locally, and black voters will lose their already limited personal connections to representative government.

#### NAVIGATING A FIVE-MEMBER COURT: ONE COMMISSIONER'S STORY

In 1988, Bagsby was the only Democrat elected in Tarrant County. Many of her supporters had backed her because of a surrounding sexism controversy, not because they cared about, or were familiar with, county government. One of her first acts in office was putting together an informational pamphlet called "County Government A to Z," as one of her many efforts to make the Court more accessible to citizens.

Bagsby felt a conscious responsibility to demonstrate that women belonged on the Court and that a minority woman could be a competent commissioner. At first, she experienced "both covert and overt hostility" from some members of the court, so she was careful to do her homework.<sup>28</sup> Bagsby saw that the boards and commissions that were appointed by the court were not demographically reflective of the local community as a whole, so she pushed for term limits for appointed positions and nominated qualified minorities and women for vacant spots. Bagsby says she knew that other court members were looking for a reason to gang up against her, so she made sure always to have one or two of them in partnership on any effort, and she usually let one of the others present the idea in court meetings. "That's the way women work - they are consensus builders and collaborators."<sup>29</sup> But she says it would have been hard for

someone who needs public validation to operate in such a behind-the-scenes manner. Bagsby encouraged the court to take a critical look at members of the county's senior staff and evaluate them objectively. She pushed for professionalization of the staff with an eye toward encouraging the county's operations to become technologically up-to-date, and she initiated a tuition reimbursement program for employees who wanted to pursue higher education.

The primary goal of Bagsby's first term in office was to change the culture of the court; she did not push for change in the delivery of services right away. But according to Bagsby, despite the fact that the changes she initially pushed for were mostly internal, she did not have a problem being satisfactorily accountable to the black community. "They were just glad to see me there every Tuesday," she says.<sup>30</sup>

Initially, Bagsby's fellow commissioners were less than welcoming. Perhaps they resented having to share their authority with a black person and a woman. Perhaps they feared further encroachment from communities they felt uncomfortable dealing with - once minorities and women started to take an interest in the court, how long would any of their seats be safe? Unfortunately, it seems they had no cause for worry. In the sixteen years since Bagsby first ran for the court, no minority commissioner has been elected from any other precinct, and no black candidate has ever run for a seat outside of Precinct 1. Instead, Precinct 1 has become the black seat, the district in which it is safe for blacks to run and win. There is a consistent minority presence on the court, but it is sequestered in such a way that white members of the court are safe from minority challenges. Lani Guinier identified this type of problem in New York's Village Voice,<sup>31</sup> arguing that the limited minority presence allowed by white elites in their various institutions both legitimizes those institutions and insulates the elites from real competition from minorities. She compares the Supreme Court's ruling in *Georgia v. Ashcroft*<sup>32</sup> with its handling of the affirmative action question in the Michigan cases<sup>33</sup> and finds that in each case, the Court leaves the ultimate choices of redistricting and student admissions not to the taxpayer and the voter, but to the power elite.

Precinct 1 seems to fit this model exactly.<sup>34</sup> The 1990 and 2000 redistrictings each increased the proportion of black voters in Precinct 1, consequently decreasing the proportion of black voters in the other precincts. By 2004, with four black candidates vying for one commissioner seat, and zero black candidates running in any other race, it seems that the concerns of the black community have been successfully relegated to one corner of the commissioners' court.

#### CONCLUSION

It is clear that, on the ground, the debate between majority-minority and coalition districting is far more complicated than the mere amassing of districts to maximize the aggregate legislative clout of the Democratic Party. On a local level, black vot-

ers do not define political efficacy only, or even primarily, according to policy implementation. Instead, they count constituent services and the ability to identify personally with their representatives as their most important concerns. Black voters, therefore, experience the fullest political access, and receive the best response from government, when they are represented by black elected officials with the political freedom to pursue black interests zealously. Coalition districts do not sufficiently allow

for this paradigm. Instead, when black candidates must please both minority and white communities, they will differentiate their political messages in order to appeal to white voters. Majority-black districts allow black communities to experience ownership of the political process in a way that coalition districts do not. For the debate over effective minority districting to be complete, election law scholars must fully take into account this sense of empowerment - the value of electing one of

## ENDNOTES

\* Royce Brooks is a 2001 graduate of Rice University and a 2005 graduate of Harvard Law School. She is currently in private practice in Washington, D.C.

<sup>1</sup> Commissioner Brooks is a familial relation of the author.

<sup>2</sup> See Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1522 (2002) (defining coalition districts as "those with a significant minority population and white voters who are willing to form interracial political coalitions in support of minority candidates").

<sup>3</sup> See, e.g., *id.* (assessing coalition districts as an attractive potential alternative where voting is not racially polarized); see also Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002) (arguing in favor of coalition districting as a more effective approach for electing minority candidates).

<sup>4</sup> Hirsch, *supra* note 3, at 22.

<sup>5</sup> All Tarrant County demographic information is from Tarrant County eGov, available at <http://www.tarrantcounty.com/egov/cwp/view.asp?a=703&q=425078> (last modified Dec. 15, 2003) (last visited Mar. 24, 2007).

<sup>6</sup> U.S. Census Bureau, Texas Quickfacts, 2003 population estimate, available at <http://quickfacts.census.gov/qfd/states/48/48113.html> (last visited Mar. 18, 2007).

<sup>7</sup> Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework*, 79 N.C. L. REV. 1383 (2001).

<sup>8</sup> *Id.* at 1407.

<sup>9</sup> Telephone Interview with Art Brender, Tarrant County Democratic Party Chairman, Jan. 28, 2005 [hereinafter "Brender Interview"].

<sup>10</sup> Telephone Interview with Roy C. Brooks, Tarrant County Commissioner Precinct 1, Feb. 7, 2005 [hereinafter "Brooks Interview"].

<sup>11</sup> Brooks Interview, *supra* note 10.

<sup>12</sup> Telephone Interview with Charmaine Pruitt, Brooks Campaign Manager, Jan. 28, 2005.

<sup>13</sup> Brooks Interview, *supra* note 10.

<sup>14</sup> See Grofman, Handley & Lublin, *supra* note 7, at 1409 ("[T]he growing Republicanism of white voters in the South has a double-edged effect on the likelihood of black electoral success: for a given black population proportion in the

district, *ceteris paribus*, as the Republican share among white voters goes up, black candidates are more likely to win the primary, but less likely to win the general election.").

<sup>15</sup> See Grofman, Handley & Lublin, *supra* note 8, at 1409 (emphasizing the importance of including the primary system in the overall calculus of drawing effective black districts, although the debate over effective minority districting is predominantly concerned with the ability of black candidates to win general elections).

<sup>16</sup> Brooks Interview, *supra* note 10.

<sup>17</sup> Interview with Dionne Bagsby, Former Commissioner Tarrant Country Precinct 1, June 26, 2005 [hereinafter "Bagsby Interview"].

<sup>18</sup> Brooks Interview, *supra* note 10.

<sup>19</sup> Brooks Interview, *supra* note 10.

<sup>20</sup> Pildes, *supra* note 2, at 1529.

<sup>21</sup> Brender Interview, *supra* note 9.

<sup>22</sup> CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF BLACK AMERICANS IN CONGRESS* (Harvard University Press 1993).

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Hirsch, *supra* note 3, at 8.

<sup>25</sup> Telephone Interview with Deralyn Davis, Former Chairperson of the Coalition of Black Democrats, Jan. 27, 2005.

<sup>26</sup> *Id.*

<sup>27</sup> Brooks Interview, *supra* note 10.

<sup>28</sup> Bagsby Interview, *supra* note 17.

<sup>29</sup> Bagsby Interview, *supra* note 17.

<sup>30</sup> Bagsby Interview, *supra* note 17.

<sup>31</sup> Lani Guinier, *Saving Affirmative Action And a Process for Elites to Choose Elites*, VILLAGE VOICE, Jul. 2, 2003.

<sup>32</sup> 539 U.S. 461 (2003).

<sup>33</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the University of Michigan law school affirmative action program is permissible because race is considered in conjunction with other factors); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that the University of Michigan undergraduate affirmative action program is unacceptably race-based).

<sup>34</sup> Guinier, *supra* note 31.

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# SPECIAL CREDIT PROGRAMS: A WELL-INTENTIONED IDEA GONE BAD

By Luke Reynolds\*

*Every consumer deserves an equal opportunity to access the credit market, and that credit should never be withheld because of sex or any other factor not related to ability and willingness to repay the loan.<sup>1</sup>*

Decades ago, lenders could refuse to provide credit to qualified borrowers based solely on arbitrary characteristics such as race, religion, or sex.<sup>2</sup> Moreover, when faced with equally creditworthy loan applicants, lenders would charge certain borrowers higher loan rates for no legitimate reason.<sup>3</sup> Congress passed the Equal Credit Opportunity Act (“ECOA”)<sup>4</sup> to forbid arbitrary discrimination.<sup>5</sup> But, did the ECOA fully protect consumers from facing discrimination on the basis of arbitrary characteristics?<sup>6</sup>

At the same time that Congress outlawed discrimination in “any aspect” of a credit transaction on a prohibited basis, it specifically allowed “affirmative” discrimination on these same grounds. Any such affirmative action credit program is called a “Special Purpose Credit Program” (“SPCP”)<sup>7</sup>, known as the consumer credit equivalent to affirmative action hiring plans.<sup>8</sup> For instance, a disadvantaged Black applicant could legally be turned down because of the color of her skin if she applied for an SPCP designed for Native Americans.<sup>9</sup> Both large and small lenders currently offer SPCP programs that make credit available on preferential terms to certain groups.<sup>10</sup>

This article will not take a position on whether affirmative action is constitutional or whether it is beneficial for society. Rather, this article will argue that SPCPs are limited by equal protection principles external to the ECOA. This question is timely because “affirmative action” and equal protection law have evolved in the 30 years since the ECOA and its SPCP provision was first passed. At least one law firm recently advised its clients to be mindful of a challenge to the SPCP under civil rights principles, in part, as a result of some of these changes.<sup>11</sup> While the Federal Reserve Board is required to regularly review and, if necessary, update the ECOA,<sup>12</sup> the SPCP section has received only perfunctory changes.<sup>13</sup> The Federal Reserve Board is unlikely to mandate changes that negate the letter of the law in any regulation, including the ECOA, as the Board’s role is primarily to write regulations that implement the laws passed by Congress.<sup>14</sup>

This article is intended to fill a necessary void and analyze SPCPs in light of three decades of legal developments.<sup>15</sup> Part I will provide a brief history of applicable constitutional and civil rights law, including the ECOA, to help the reader understand the context for SPCPs, and introduce the reader to SPCP pro-

grams. Part II will propose a multi-step analysis and argue that SPCPs are illegal under the equal protection clause. Part III will propose two amendments to the ECOA to ensure that SPCPs are available to satisfy special social needs without discriminating against any protected class. Finally, Part IV concludes in support of fair lending enforcement to advance public policy interests.

## BACKGROUND-THE EXISTING LAW

### A. IMPORTANT CONSTITUTIONAL PRINCIPLES

#### 1. EQUAL PROTECTION

The Equal Protection (“E.P.”) clause<sup>16</sup> has evolved substantially during the twenty-first century, as it is considered to be a “viable [and] powerful” strategy to challenge inequality.<sup>17</sup> Simply put, the E.P. clause prohibits purposeful<sup>18</sup> or “invidious discrimination.”<sup>19</sup> Considering that certain classes or groups may benefit more than others from virtually any government action,<sup>20</sup> the courts apply one of three tests to assess the constitutionality of a challenged behavior.<sup>21</sup> An E.P. analysis is essentially identical under both the Fifth and Fourteenth Amendments,<sup>22</sup> as the primary difference is the level of government at issue.<sup>23</sup> However, the actor need not be a state or federal entity. Private conduct is considered to be state action in several circumstances, including conduct authorized by the state, which is significant for this article. Unfortunately, the Court does not have a precise test for state-authorized conduct, as it makes a determination after weighing the facts in each case.<sup>24</sup>

#### 2. AFFIRMATIVE ACTION LAW

An affirmative action program is designed to “change the outward and visible signs of yesterday’s racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.”<sup>25</sup> The constitutionality of affirmative action programs is evaluated under the equal protection clause because the equal protection clause “protect[s] persons, not groups.”<sup>26</sup> Tracing their origins to New Deal-era labor laws,<sup>27</sup> affirmative action programs started in the employment context and later expanded to college admissions.<sup>28</sup> Affirmative action is largely court-defined, as it is not expressly authorized in what is considered its statutory genesis, the Civil Rights Act of 1964.<sup>29</sup> One source of controversy is whether the Supreme Court abrogated this “unambiguously colorblind” statute through its decisions to allow affirmative action programs,<sup>30</sup> or whether its legislative history allows consideration of race “in order to alleviate the historic problem of racial

inequity.”<sup>31</sup>

Affirmative action law has undergone substantial change in the forty years since its inception. Most affirmative action cases are traceable to *Regents of the University of California v. Bakke*, which allowed a public university to consider race as a factor in its admissions process.<sup>32</sup> The Court recently upheld the fundamental holding of *Bakke*, holding that it was legal to consider race as one of many factors,<sup>33</sup> yet illegal to automatically favor an applicant based on race.<sup>34</sup> Nonetheless, the Court will use strict scrutiny to determine whether governmental race-based affirmative action programs are narrowly tailored to the compelling government interest.<sup>35</sup>

The preceding discussion applies only to affirmative action plans by governmental entities. The Supreme Court has noted that affirmative action programs by private actors do not trigger equal protection clause scrutiny.<sup>36</sup> Thus, the affirmative action principles delineated above will apply only to SPCPs that are operated, either directly or indirectly, by the government. Truly private SPCPs need not satisfy these rules. This section summarized the underlying law pertaining to the affirmative action-like component of SPCPs which permit otherwise illegal discrimination. The next section introduces these anti-discrimination laws.

## **B. ANTI-DISCRIMINATION LAW IN LENDING**

While the Civil Rights Act (“CRA”) of 1968 generally prohibited discrimination by private actors in housing-related transactions,<sup>37</sup> it neither “proscribed” lending discrimination, nor established a comprehensive enforcement scheme.<sup>38</sup> Thus, the CRA was inadequate to protect creditworthy individuals against credit discrimination on “often irrational” grounds.<sup>39</sup>

The ECOA was passed in 1974 to protect consumers on the basis of sex and marital status in response to reports of credit practices that ran contrary to the spirit of equality for all.<sup>40</sup> For instance, the ECOA was initially called a “Women’s Law”<sup>41</sup> because creditworthy females often had been unable to obtain credit in their own names.<sup>42</sup> Congress enhanced and expanded the ECOA two years later in 1976.<sup>43</sup> The ECOA prohibits a lender from discriminating in “any aspect” of a credit transaction on the basis of sex, marital status, race, color, religion, national origin, age, receipt of public assistance income, or exercising certain consumer rights in good faith.<sup>44</sup> The ECOA protects a consumer in all stages of the credit process from the lender’s conduct before it receives an application, the decision whether to approve the application and on what terms, to the treatment of the consumer once becoming a customer.<sup>45</sup>

### **1. OVERVIEW OF SPCPS**

The SPCP was added to the ECOA in 1976. The three types of SPCPs include: those authorized by law for the benefit of an economically disadvantaged class;<sup>46</sup> those offered by a non-profit corporation for its members or an economically disadvantaged class;<sup>47</sup> and those offered by a for-profit organization to meet special needs.<sup>48</sup> To qualify, the targeted group need not prove historical disadvantage or disparate treatment.<sup>49</sup>

Credit unions, as not-for-profit institutions,<sup>50</sup> fall into the second category. Thus, while banks and for-profit lenders must satisfy legal formalities before establishing an SPCP, a credit union can create an SPCP without a formal plan for any group or for any reason.<sup>51</sup> Credit unions requested and received this special treatment compared to other lenders because they feared violating the ECOA by restricting lending to their members.<sup>52</sup> Simply put, Congress wanted to permit “church-affiliated credit unions” to only serve their members.<sup>53</sup> Thus, Congress sought to protect credit unions using the SPCP provision.

SPCPs are intended to help economically disadvantaged individuals or meet special social needs. It is possible that the SPCP provision was partially motivated by a federal commission report<sup>54</sup> that recommended low-income individuals receive credit on competitive terms, and presented case studies on programs that help the disadvantaged. Regardless, Congress had in mind programs based on the applicant’s age when creating the SPCP for for-profit organizations,<sup>55</sup> as Congress did not intend to prohibit positive credit programs aimed at “young adults.”<sup>56</sup> SPCPs are clearly not limited to certain age groups, as the three examples provided in Regulation B for SPCP programs targeted to a specific audience are “race, national origin, or sex.”<sup>57</sup>

The SPCP allows creditors to engage in conduct that would otherwise be discriminatory.<sup>58</sup> A lender may require all participants in a SPCP to share a “common characteristic,” such as age, while barring from the program those who do not meet this characteristic.<sup>59</sup> A creditor does not have free reign, though. As a lender, the creditor is still subject to all other provisions of the ECOA and cannot discriminate other than by requiring this common characteristic. SPCPs also cannot be structured to evade the requirements of the ECOA. It is unlikely that a SPCP can be used for any residential real estate-related loan program because the Fair Housing Act does not include a SPCP exception.<sup>60</sup>

## **2. SPCPS IN PRACTICE**

Just as Congress intended,<sup>61</sup> a SPCP may overtly discriminate against specific protected classes or disparately treat<sup>62</sup> certain groups. The Federal Reserve Board<sup>63</sup> acknowledged this when it found that a New York State law that prevented a SPCP from being established on the basis of “race, creed, color, national origin, sex, or marital status” was preempted by the ECOA.<sup>64</sup> The Federal Reserve Board evidently realized that Congress intended to allow SPCPs to discriminate. Furthermore, while not dispositive of the issue, the United States Department of Justice (“DOJ”) has stated in court filings that a SPCP may be based on race, assuming the program meets all the other legal requirements.<sup>65</sup>

The Federal Reserve Board proposed to clarify the regulation to indicate that a SPCP “should not have the effect of depriving people who are not part of the class of rights or opportunities they otherwise would have.”<sup>66</sup> Regardless, federal bank examiners are instructed to encourage banks offering SPCPs based on a protected class to rename and restructure the program based on factors “not prohibited by the ECOA,” such as “first-

time home buyer.”<sup>67</sup>

Indeed, the SPCP is used in a discriminatory manner. For instance, the Virginia Housing Development Authority (“VHDA”) precluded unmarried couples from participating in a preferential loan program by requiring that the applicants be related by “blood or marriage.”<sup>68</sup> A federal court dismissed an ECOA claim for marital status discrimination on which the plaintiff would “plainly prevail”<sup>69</sup> because the VHDA program was a SPCP authorized by state law. Additionally, Mobil Oil and the former OmniBank offered a SPCP that allowed female or minority borrowers preferential treatment in the lending process when seeking a loan.<sup>70</sup> Credit unions offer preferential credit programs targeted to an age group under 62.<sup>71</sup> While it is unknown how many SPCP programs are in existence, the federal Office of Thrift Supervision (“OTS”)<sup>72</sup> issued a guidance letter to the lenders it regulates in response to SPCP inquiries from thrifts.<sup>73</sup>

## THE SPECIAL PURPOSE EXCEPTION IS LIMITED IN SCOPE

### A. BASIC OVERVIEW AND ANALYSIS

SPCP programs face limitations not inherent in the ECOA. SPCPs may violate equal protection concepts or exceed the scope of the ECOA law. Based on an equal protection analysis, I offer here a multi-step test to gauge their legality.<sup>74</sup>

The first step is to determine whether the SPCP discriminates against a protected class. The eligibility requirements for a SPCP may be based on either neutral factors or on the applicant’s membership in a protected class. An example of the former is a program that offers any first-time, low-income homebuyer with a credit on closing costs. An example of the latter is a program that offers any person under 25 years of age with a preferred rate on an installment loan. Both program structures are *now* legal under the ECOA. However, it is clear that only programs in the first category *should* be presumed legal. The analysis for the first category of programs will end for purposes of this article, although these programs would be illegal if they violate the disparate treatment rules of the ECOA.<sup>75</sup> By contrast, programs in the second category should be suspect owing to their use of a prohibited class, and hence proceed to the next step of the analysis.

The next step of analysis is to identify the type of discrimination.<sup>76</sup> Discrimination can occur during either the *underwriting* process (when the lender decides whether to approve the loan request), or after approval when the *terms and conditions* (such as rates) are set. For instance, a program that enables those under age 25 to receive a credit card regardless of their credit history is an example of a lender discriminating during the underwriting process, while a program offering a loan rate discount only to women would be an example of discrimination through terms and conditions.

From there, the analysis splits depending on the type of discrimination involved. Any program that offers terms and conditions that are preferential compared to ordinary borrowers

is illegal, as SPCPs are not empowered to discriminate in this matter.<sup>77</sup> For any program that discriminates in the underwriting process, the analysis hinges on whether the SPCP is operated by a public or private entity. If the SPCP is *purely* private, the lender discrimination is authorized because the program falls under the SPCP exception to the normal anti-discrimination rules of ECOA. Equal protection principles would not regulate the private actor’s conduct. If the SPCP is public or governmental, the proper level of scrutiny to evaluate the SPCP is determined based on the protected class at issue. This article argues that all SPCPs, even those offered by private lenders, must be analyzed in this way.

The 5<sup>th</sup> Amendment and 14<sup>th</sup> Amendment generally provide no protection against discrimination committed by private actors.<sup>78</sup> Thus, an equal protection claim against a private entity for a discriminatory program will fail if the lender is not (either directly or indirectly) a state actor.<sup>79</sup>

However, the Constitution prohibits discrimination by a private entity when there is a “sufficiently close nexus” between the government and the lender’s questionable practice.<sup>80</sup> The government must provide sufficient encouragement, “either overt or covert,” to make it responsible for the practice.<sup>81</sup> In the words of Judge Friendly, “the state must be involved not simply with some activity...alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury...the state action, not the private action, must be the subject of complaint.”<sup>82</sup> For example, governmental authorization does not exist when a statute governs deregulated, traditional business conduct,<sup>83</sup> yet does when the law creates a climate in which private parties may choose to discriminate.<sup>84</sup>

SPCPs easily fit the second category as the SPCP creates an exception that permits discrimination that would otherwise be illegal; it is essentially a “statutory invitation to private actors to discriminate.”<sup>85</sup> In other words, lenders would be unable to practice illegal discrimination *but for* the government’s SPCP exception. This is clearly an invitation to discriminate; the government is the root cause of the private actor’s discrimination. One commentator has noted that the Supreme Court will find invitations to discrimination to be state action, as enticing discrimination is different from allowing the free market to independently develop.<sup>86</sup> Consequently, all SPCPs must be analyzed as state-administered programs.

### B. WHY STATE ADMINISTERED SPCPs FAIL EQUAL PROTECTION ANALYSIS

This section will analyze SPCPs that are *expressly* state authorized or *considered* state actions.<sup>87</sup> In reality, though, this discussion applies to *all* SPCP programs since, as shown earlier, all SPCP programs are government authorized. To recap, the alleged state interest in allowing governmental entities and non-profits to create SPCPs is to help an “economically disadvantaged class of persons,” for credit unions to serve their members, and allow private entities to meet “special social needs.”<sup>88</sup>

A court performs the Equal Protection Clause analysis using

the appropriate level of scrutiny. The court will use an intermediate scrutiny test for sex, strict scrutiny for race, color, religion, and national origin, and rational basis scrutiny for marital status, age, receipt of public assistance income, or exercising certain consumer rights in good faith.

### **1. ANALYSIS UNDER STRICT SCRUTINY: RACE, COLOR, RELIGION & NATIONAL ORIGIN**

Affirmative action programs based on race or national origin must use a strict scrutiny, or narrowly tailored, least discriminatory<sup>89</sup> means to meet a compelling state interest.<sup>90</sup> Any SPCP based on classifications that are subject to strict scrutiny (race, color, religion, and national origin) fails this test.

The Supreme Court has held that any person has “the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny,” and that “benign” discrimination cannot be held to a lower standard of scrutiny.<sup>91</sup> The Court later went a step further, and struck down a university admissions program that automatically favored applicants on the basis of race.<sup>92</sup> The Court applies strict scrutiny to suspect programs based on color, religion, or national origin.

Regarding SPCPs, the Fifth Circuit found an analogous federal program unconstitutional. In *Moore v. USDA*, the plaintiff was denied financing from a USDA program designed to help “socially disadvantaged groups” due to his race, as the notification letter stated, in part, “No Whites.”<sup>93</sup> Although his Fifth Amendment equal protection claim failed for seeking monetary damages and not equitable relief, the plaintiff succeeded in his ECOA claim.<sup>94</sup>

A SPCP is not the least discriminatory means to accomplish Congress’s stated goal or to serve its intended purpose. For instance, consider the situation of an immigrant from an impoverished Eastern European nation who owns a small business in an impoverished community, yet would be precluded, simply because of skin color, from participating in a major bank’s SPCP offering preferential underwriting standards.<sup>95</sup> The stated goal of helping the economically disadvantaged is clearly not served when a business is unable to receive special financing terms because of the owner’s race or national origin. Consequently, any SPCP that is structured based on a particular class of individuals benefits solely that class and excludes similarly situated individuals in other classes.

Likewise, it would clearly be more effective to offer credit under a streamlined program to any individual without a credit history, rather than only to those who share an arbitrary or immutable characteristic (such as age). In other words, a program structured around neutral factors, such as economic need, would be the most beneficial to society and most effectively fulfill Congress’ stated goals.<sup>96</sup> Perhaps this is why President Clinton shifted the focus of affirmative action policy solely from membership in a protected class to residence in an economically distressed area as defined by poverty and unemployment data.<sup>97</sup> Consequently, the least burdensome means test is not satisfied by SPCPs.

Additionally, Congress could have clarified that a credit union may only lend to its members without creating a much broader exception that favors credit unions over banks with respect to the ECOA.<sup>98</sup> Therefore, these SPCPs are not narrowly tailored (nor the least discriminatory means) to meet Congress’ goals of helping economically disadvantaged individuals, protecting credit unions, or meeting special social needs.<sup>99</sup> Disadvantaged individuals and credit union members will receive the same credit opportunities when a SPCP is structured on a neutral basis.

### **2. ANALYSIS UNDER INTERMEDIATE SCRUTINY: GENDER**

Gender discrimination is evaluated using intermediate scrutiny, although recent cases indicate that it is an elevated level of intermediate scrutiny review.<sup>100</sup> A program that discriminates on the basis of gender violates the equal protection clause, unless it serves an important governmental interest<sup>101</sup> and has an exceedingly persuasive justification.<sup>102</sup> For instance, it was illegal to grant alimony in a divorce to the wife only, as the Court held that it was not appropriate to use gender as a proxy for need or assume the male was the primary breadwinner.<sup>103</sup> Interestingly, gender-based affirmative action programs are less likely to be invalidated than race-based programs.<sup>104</sup>

Nonetheless, the outcome of SPCPs using intermediate scrutiny is the same as with strict scrutiny earlier. Specifically, courts will review the stated purpose of any affirmative action program to ensure its legality.<sup>105</sup> As one court stated, “when government undertakes affirmative action, it must present a ‘strong basis in evidence’ for doing so.”<sup>106</sup>

Here, Congress failed to adequately support its decision to implement this affirmative action program to discriminate based on a protected class. The House hearings do not discuss the SPCP provision, except for testimony by an industry representative who sought an exemption from the ECOA for “negative discrimination that results in the denial of credit” or “reverse discrimination” programs.<sup>107</sup> The House hearings included testimony on “affirmative approaches” by lenders, which were targeted to underserved, inner-city areas as much as they were designed to help “minority businessmen.”<sup>108</sup> The Senate hearings, interestingly, refer to the House hearings as being the justification for the SPCP exception.<sup>109</sup> Therefore, SPCPs based on gender must fail because Congress failed to provide the requisite strong justification.

### **3. ANALYSIS UNDER RATIONAL BASIS SCRUTINY: MARITAL STATUS, AGE, RECEIPT OF PUBLIC ASSISTANCE INCOME, OR GOOD FAITH EXERCISE OF CERTAIN CONSUMER RIGHTS**

It is possible some SPCPs could be based on a protected category within the ECOA, yet be subject only to rational basis constitutional scrutiny.<sup>110</sup> For example, a program could offer a credit card to customers between ages 18 and 25 without regard for the applicant’s length of credit experience. This program is discriminatory against older borrowers who do not have credit histories, as these older borrowers are, at a minimum, not encouraged to apply, and would be subject to the normal under-

writing criteria that would preclude them from obtaining credit.

It is likely that a SPCP based on any category reviewed using rational basis scrutiny would satisfy an equal protection analysis. Under rational basis scrutiny, a law is upheld assuming its means are, at least remotely, related to a health, safety, or moral concern of government, even if there is a less discriminatory policy available.<sup>111</sup> Additionally, courts will give particular deference to the legislature on social and economic legislation.<sup>112</sup> In short, courts give broad deference to the government when conducting a review using the rational basis standard.<sup>113</sup> Thus, a SPCP structured on any of these criteria would meet constitutional scrutiny.

### A PROPOSAL FOR REFORM

Since SPCPs are presumably illegal under equal protection analysis in light of the information presented above, the ECOA must be amended. This is because a SPCP should never be based on a protected class, and credit unions should be held to the same standards as banks under the ECOA. Two amendments are proposed below.

First, the ECOA should be amended to prevent membership in a protected class from being a prerequisite for participation in a SPCP. This may be accomplished by adding a provision to § 1691(c) that states, “A credit assistance or special purpose credit program may not base its eligibility guidelines upon whether a person is a member of a class of persons defined in § 1691(a).” This amendment would preserve Congress’s intent to enhance the credit opportunities available to the disadvantaged, yet would protect a person from discrimination based on immutable characteristics such as race or sex. The change would also ensure that SPCPs are subject to relaxed judicial scrutiny.<sup>114</sup>

For instance, a hypothetical SPCP designed to help those without established credit histories should not be limited to only those under age 25, as older individuals may not have credit histories due to legitimate reasons such as being a recent immigrant to the United States or heritage from a culture that shuns traditional financial service providers. A hypothetical program based on class helps borrowers solely of a specific class who have a credit problem, and not those in other classes with the same credit problem. If the fair lending laws are relevant, a lender should not be given the flexibility to discriminate when a viable alternative is available to prevent discrimination.

Second, credit union issues require another amendment to the ECOA. As described earlier, credit unions are broadly granted more flexibility than banks to use SPCPs to discriminate. However, this is not the only way that credit unions receive favorable treatment under the ECOA. The National Credit Union Administration (“NCUA”) enforces federal credit unions’ compliance with the ECOA.<sup>115</sup> The NCUA must refer to the DOJ all patterns or practices of ECOA violations that involve either illegal discrimination in “any aspect”<sup>116</sup> of a credit transaction or the improper discouragement or denial of applications.<sup>117</sup> The DOJ provides Congress with an annual report

summarizing the ECOA referrals it receives from the federal regulatory agencies.<sup>118</sup> These reports indicate that the NCUA has made no referrals to DOJ, while the four bank regulatory agencies have referred dozens of substantive ECOA violations to DOJ. For instance, a General Accounting Office Report showed that the NCUA made none of the 53 referrals between 1990 and 1995,<sup>119</sup> and none of the 140 cases sent to DOJ between 1999-2004.<sup>120</sup>

On the one hand, the fact that the NCUA referred no ECOA matters to DOJ could be an excellent sign because it suggests that credit unions are in compliance with the fair lending laws. Granted, credit unions are often smaller and less complex than many banks, thereby indicating less fair lending risk.<sup>121</sup> A former NCUA administrator even testified before Congress that credit unions are “different” from other lenders because they “do not deal with the general public” but rather those affiliated through a common bond.<sup>122</sup> Alternatively, it could indicate either that the NCUA is not making referrals to DOJ when required, or the Interagency Fair Lending Procedures are not being properly implemented during examinations of federal credit unions.

Unfortunately, based on the author’s review of credit union websites in April of 2005, it appears that the second scenario may be true.<sup>123</sup> Congress intended the mandatory referral provision of the ECOA to be an “enforcement mechanism” when adding it to the ECOA in 1991.<sup>124</sup> Credit unions already receive preferred treatment compared to banks in other areas.<sup>125</sup> Congress did not intend for the NCUA to put a low priority on the ECOA.<sup>126</sup> This is particularly important as credit unions are becoming more analogous to banks by getting larger, more complex, and merging together.

Therefore, §1691 (c)(2) should be amended to clarify that credit unions can lend to their members without violating the ECOA, but may not otherwise receive less scrutiny than banks when establishing a SPCP. The change can be accomplished by revising §202.8(a)(2) to read, “It is not a violation of this section for a nonprofit organization to extend credit only to its members. A nonprofit organization may also create a special purpose program to meet special social needs pursuant to the standards prescribed in regulations by the Board.”

It is essential that the extra discretion given to credit union-run SPCPs be eliminated and their rules mirror those for private lenders. As mentioned earlier, Congress intended this provision simply to protect credit unions from ECOA challenges. Amending this provision will allow Congress to clarify that credit unions may not use a credit assistance program to discriminate without first meeting the same requirements as a bank. After all, it does not matter to a consumer whether she is discriminated against by a SPCP operated by a bank or a credit assistance program operated by a credit union. These proposed changes to the ECOA will ensure that every creditworthy consumer has equal access to credit regardless of immutable or arbitrary characteris-

tics such as race or national origin that fall under equal protection analysis.

## CONCLUSION

It is important that we do not forget that illegal discrimination still occurs in housing and finance despite the substantial achievements achieved over recent years.<sup>127</sup> Enforcing fair lending laws is not just a safety-and-soundness issue or a con-

sumer protection issue that affects solely one institution's members. Rather, fair lending enforcement is necessary to further the national public policy goal of ensuring equal access to credit by creditworthy borrowers. This article has shown that the SPCP provision of the ECOA has not been updated to reflect the changes in equal protection law over the past three decades. By enacting the proposals propounded in this article, Congress can ensure that all have equal access to credit.

## ENDNOTES

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<sup>1</sup> 120 Cong. Rec. 19,213 (June 13, 1974) (statement of Sen. William Brock proposing an amendment to H.R. 11221 that would later become the ECOA, 93d Cong. (1974)).

<sup>2</sup> S. REP. NO. 94-589, at B-28-29 (1976) (summarizing hearing record that was "replete" with examples of discrimination); FEDERAL RESERVE SYSTEM, DISCRIMINATION IN CONSUMER CREDIT MARKETS 19-20 (1982) (finding evidence of lending discrimination on the basis of race, age, and marital status in pre-ECOA credit markets).

<sup>3</sup> U.S. DEPT. OF HUD, EQUAL CREDIT OPPORTUNITY: ACCESSIBILITY TO MORTGAGE FUNDS BY WOMEN AND MINORITIES 4-19 (1980) (reporting on study results that found minorities are charged higher interest rates than whites); see also 120 Cong. Rec. 19,213 (June 13, 1974) (statement of Sen. William Brock) (stating "women simply cannot get credit on the same basis as men").

<sup>4</sup> 15 U.S.C. § 1691 (2006).

<sup>5</sup> Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1500 (1974) (Congressional Findings) ("There is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced. . . by an absence of discrimination. . .").

<sup>6</sup> See, e.g., Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words that Actually are There*, 61 BUS. L. 829, 842 (2006) (concluding that Congress did not authorize disparate impact discrimination claims to be brought under the ECOA); Vincent Di Lorenzo, *Legislative Heart and Phase Transitions: An Exploratory Study of Congress And Minority Interests*, 38 WM. & MARY L. REV. 1729, 1767-68 (1997) (asserting the Congressional response to "neighborhood lending discrimination has been weak," and concluding over a 31-year period, the fair lending bills enacted by Congress were less responsive to the needs of minorities than proposed legislation).

<sup>7</sup> SPCP will be used in this article to refer to both special purpose credit programs (see 12 C.F.R. § 202.8(a)(3) (2005)) (describing programs offered by a for-profit organization) and credit assistance programs (see 12 C.F.R. § 202.8(a)(1)-(2)) (describing programs offered by non-profit organizations or authorized by law). These programs are described in more detail *infra*.

<sup>8</sup> DEE PRIDGEN, CONSUMER CREDIT AND THE LAW 183 (2004) (drawing comparison between the SPCP provision and affirmative action hiring plans). For an example of one affirmative action program, see 42 U.S.C. § 2000e-16(b)(1) (2006) (authorization for affirmative action programs in federal government hiring).

<sup>9</sup> See DAVID MCF. STEMLER, FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL 4-50 (2004) (illustrating the application of the SPCP exception and emphasizing how a lender using the SPCP exception must be careful to comply with ECOA's anti-discrimination rules).

<sup>10</sup> See, e.g., *infra* notes 71 and 95 for examples.

<sup>11</sup> Fried Frank, *Fair Lending Alert*, available at <http://www.fhhsj.com/fairlend/flarch/fl950807.htm> (Aug. 7, 1995) (last accessed Mar. 18, 2007) (warning lenders of the possibility of a discrimination charge if a credit application is denied because the applicant does not qualify for a special purpose credit program due to the applicant's race).

<sup>12</sup> The Board must review Regulation B at least once every ten years pursuant to the Economic Growth and Regulatory Paperwork Reduction Act § 2222, 12 U.S.C. 3311 (1996). Also, the Board has always had the ability to amend Regu-

lation B at any time pursuant to the regular administrative rulemaking process. 15 U.S.C. § 1691b (2005) (giving the Board power to prescribe regulations to implement the ECOA); see Equal Credit Opportunity, 68 Fed. Reg. 13,144 (Mar. 18, 2003) (describing the Board's two most recent comprehensive reviews of Regulation B as occurring in 1985 and 1998).

<sup>13</sup> See, e.g., Equal Credit Opportunity, 68 Fed. Reg. 13,144 (Mar. 18, 2003) (to be codified at 12 C.F.R. pt. 202) (adjusting the exceptions for public utilities credit, modifying self-test rules, expanding record retention requirements, and clarifying several terms); Equal Credit Opportunity, 60 Fed. Reg. 29,965 (Jun. 7, 1995) (to be codified at 12 C.F.R. pt. 202) (revising Official Staff Commentary).

<sup>14</sup> 15 U.S.C.S. § 1691b (2005) (stating "the Board shall prescribe regulations to carry out the purposes of this subchapter").

<sup>15</sup> SPCP programs have never been evaluated by courts for compliance with general constitutional or civil rights principles, which is essential since ECOA is primarily a civil rights law. See generally *United States v. American Future Systems, Inc.*, 743 F.2d 169, 177-82 (3d Cir. 1984) (finding the defendant did not have a SPCP program in place because it did not meet technical requirements); *Diaz v. Virginia Hous. Dev. Auth.*, 101 F. Supp. 2d 415, 420 (E.D. Va. 2000) (District Court upholding the validity of a SPCP, but warning that the "exception is not boundless" because of Constitutional constraints); DAVID MCF. STEMLER, FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL 4.48 (2004) (describing and analyzing SPCPs).

<sup>16</sup> U.S. Const., amend. XIV, cl. 5.

<sup>17</sup> JAMES KUSHNER, GOVERNMENT DISCRIMINATION 40 (2004) (observing that the Supreme Court no longer sees the equal protection clause as a "last resort" constitutional argument, as evidenced by its holdings in cases such as *Bush v. Gore*, 531 U.S. 98 (2000)).

<sup>18</sup> *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (noting the requirement of "purposeful discrimination" – which is when an actor overtly intends to discriminate – as being a "common thread" in earlier cases); For examples of these overt discrimination cases, see, e.g., *Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (concluding that it was illegal for courts to have a "purpose" – or intent – of excluding African-Americans from the jury); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973) (holding that a finding of "intentionally segregative" actions by a school board establishes a prima facie case of unlawful segregation in the school district).

<sup>19</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (requiring strict scrutiny of a law compelling sterilization of certain habitual criminals because the law's unequal impact on similarly situated offenders could lead to invidious discrimination against certain classes for arbitrary reasons. *Id.* at 541. For example, those who committed grand larceny by stealing chickens were subject to the law, while embezzlers were not. *Id.* at 539.).

<sup>20</sup> See LEE EPSTEIN & THOMAS WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 651 (1995) (stating that "almost every government action involves some form of discrimination," and explaining how even imposing a tax can lead to discrimination claims).

<sup>21</sup> Depending upon the group affected by the discrimination, courts judge a suspect law's legality using the rational basis test (the law must be reasonable and designed to achieve a legitimate governmental purpose) (see *McGowan v. Maryland*, 366 U.S. 420, 425-29 (1961)), intermediate scrutiny (the law must be substantially related to the achievement of an important objective) (see *Craig v. Boren* 429 U.S. 190, 197-04 (1976)), or strict scrutiny (the law must be the least restrictive means to accomplish a compelling state interest) (see *Johnson v. California*, 543 U.S. 499, 505-06 (2005)). See generally LEE EPSTEIN & THOMAS WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 621, 621-2 (2001) (describing the tests courts use to analyze equal protection claims).

<sup>22</sup> See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (stating, in dicta, that "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" while considering the constitutionality of a campaign finance reform law).

## ENDNOTES CONTINUED

- <sup>23</sup> See LEE EPSTEIN & THOMAS WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* 620 (2001) (concluding that while state or local government practices are challenged under the Fourteenth Amendment Equal Protection Clause, and the Fifth Amendment Due Process Clause guarantees essential fairness at the federal level, courts apply the same general principles in either circumstance).
- <sup>24</sup> *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (noting that the Court did not attempt the “impossible task” of creating a test for a state’s involvement in discrimination, as the determination must be made by “sifting facts and weighing circumstances on a case-by-case basis”).
- <sup>25</sup> *U.S. v. Paradise*, 480 U.S. 149, 156 (1987) (describing an order imposing hiring quotas on the defendant state agency that engaged in unlawful discrimination); See also Exec. Order No. 10,952, 26 F.R. 6577 (1961) (using the phrase “affirmative action” for the first time, directing federally funded contractors to “take affirmative action to ensure that applicants are employed. . . without regard to the race, creed, color, or national origin”).
- <sup>26</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that the Court must evaluate whether the *personal* right to equal protection is breached when government makes classifications based upon a protected group). In this case, the lower court was ordered to consider whether a law met strict scrutiny when it precluded a firm from winning a construction contract solely because it was not a “disadvantaged” business. *Id.* at 205.
- <sup>27</sup> See, e.g., Exec. Order No. 8802, 6 F.R. 3109 (1941) (banning employment discrimination by the federal government and defense contractors).
- <sup>28</sup> MARK TUSHNET, *A COURT DIVIDED* 226-7 (2005) (tracing the history and background of affirmative action law).
- <sup>29</sup> Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964); see, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (permitting race to be one of several criteria for admission to a medical school); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (permitting a set-aside in a public works program for minority businesses to remedy past discrimination); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (permitting a program that set aside 50 percent of openings for Blacks to correct past hiring discrimination); *Local 28, Sheet Metal Workers Intern. Assn. v. EEOC*, 478 U.S. 421 (1986) (permitting a set-aside of 29 percent of new openings for minorities). For a concise history of affirmative action law, see Jerry Wegman, *Affirmative Action Today*, available at <http://www.cbe.uidaho.edu/wegman/AFFIRMATIVE%20ACTION%20TODAY-htm.htm>.
- <sup>30</sup> Nelson Lund, *The Law of Affirmative Action in and After the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L.R. 87, 90 (1997) (arguing that the Court deviated from the colorblind standard set in the Civil Rights Act). Lund pointed to decisions such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that facially neutral employment practices that have a disparate impact upon minorities are illegal, unless there is a valid business necessity for the practice) and *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding an employment program that set aside 50 percent of certain jobs for Black applicants).
- <sup>31</sup> Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 334 (1996).
- <sup>32</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
- <sup>33</sup> *Grutter v. Bollinger* 539 U.S. 306 (2003) (upholding as narrowly tailored a law school admission policy that considered the applicant’s race as one of several “soft variables” – such as the applicant’s enthusiasm and the quality of the applicant’s undergraduate institution – because it considered all pertinent elements of diversity during the application process and was designed to select applicants who have the most potential to contribute to the school’s diversity, regardless of their race).
- <sup>34</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down an undergraduate admissions policy that automatically awarded 20 of the 100 points necessary for admission to applicants from certain minority groups because it was not narrowly tailored to the compelling state interest of achieving educational diversity).
- <sup>35</sup> *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (noting, while considering a prison policy that grouped inmates by race, that the Court always uses strict scrutiny to review all racial classifications, even those that are benign); *Gratz*, 539 U.S. at 270 (noting, while reviewing a university affirmative action program, that it is “well established” racial classifications are subject to strict scrutiny).
- <sup>36</sup> See, e.g., *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (reversing a lower court enjoining a private employer from instituting racial quotas for an employment training program because it was a “private, voluntary, race-conscious affirmative action effort.” *Id.* at 204.). However, while beyond the scope of this piece, it should be noted that some programs may be scrutinized under other laws. See, e.g., 42 U.S.C. § 2000e (2006) (Title VII of the Civil Rights Act of 1964 that prevents certain employment-related discrimination); 42 U.S.C. § 2000d (2006) (Title VI of the Civil Rights Act of 1964 that prohibits discrimination in programs that receive federal funding).
- <sup>37</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-14 (1968) (upholding a claim under the Civil Rights Act for racial discrimination between two private parties, yet noting that the Act imposed few other constraints on private housing-related discrimination).
- <sup>38</sup> *Johnson v. Zaremba*, 381 F. Supp. 165, 167 (N.D. Ill. 1973) (comparing the differences between the Civil Rights Act and the Fair Housing Act in a lawsuit for alleged discrimination in the rental housing market).
- <sup>39</sup> *To Amend the ECOA of 1974: Hearing on H.R. 3386 Before the House Comm. on Banking, Currency, and Housing*, 94th Cong. 15 (1975) (statement of Rep. Sullivan) (describing need for anti-discrimination law), reprinted in 121 CONG. REC. 27,136 (Aug. 1, 1975); see also H.R. REP. NO. 94-210, at B-66 (1975) (additional views of Rep. Sullivan observing there were no laws before 1972 to prohibit credit discrimination based on sex or marital status).
- <sup>40</sup> Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974) (describing the “need” to “make credit available with fairness, impartiality, and without discrimination”); S. REP. NO. 93-278, at B-3-B-4 (describing and summarizing the discriminatory acts that established a “clear pattern of discrimination”).
- <sup>41</sup> *To Amend the ECOA of 1974: Hearing on H.R. 3386 Before the House Comm. on Banking, Currency, and Housing*, 94th Cong. 15 (1975) (statement of Rep. Sullivan) (describing the original ECOA as being useless to address other forms of discrimination), reprinted in 121 CONG. REC. 27,136 (Aug. 1, 1975); see also THE NATIONAL COMMISSION ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE U.S.* 152 (1976) (summarizing “numerous documented accounts” of consumer credit discrimination against women).
- <sup>42</sup> GLEN WALKER, *CREDIT WHERE CREDIT IS DUE* 46 (1979) (describing context for ECOA’s passage).
- <sup>43</sup> Equal Credit Opportunity Act, Pub. L. No. 94-239, 90 Stat. 251 (1976).
- <sup>44</sup> 15 U.S.C. § 1691 (2006).
- <sup>45</sup> See S. REP. NO. 93-278, at B-2 (describing the scope of ECOA); DEE PRIDGEN, *CONSUMER CREDIT AND THE LAW* 148-50 (2004) (describing the comprehensive approach of ECOA).
- <sup>46</sup> 12 C.F.R. § 202.8(a)(1) (2005).
- <sup>47</sup> 12 C.F.R. § 202.8(a)(2) (2005).
- <sup>48</sup> 12 C.F.R. § 202.8(a)(3) (2005). Those offered by a for-profit organization, such as a bank, must be operated pursuant to a written plan for the purpose of “extend(ing) credit to a class of persons who, under the organization’s customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.”
- <sup>49</sup> See *Diaz*, 101 F. Supp. 2d at 421-22 (holding a credit assistance program need not be targeted to a “historically disparately treated or disadvantaged” group).
- <sup>50</sup> 12 U.S.C. 1752(1) (2006) (defining a credit union to be a “cooperative association”).
- <sup>51</sup> 121 Cong. Rec. 27,137 (Aug. 1, 1975) (statement of Rep. Sullivan) (indicating Congress did not want to prevent credit unions from lending only to their members).
- <sup>52</sup> This particularly holds true for credit unions chartered to serve a narrowly defined group, such as members of a church. See S. REP. NO. 94-685, at B-22 (1976) (clarifying the Congressional intent leading to the adoption of the special purpose credit exception was, in part, to permit credit unions to restrict lending to members only); see DAVID MCF. STEMLER, *FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL* 4-4; 4-48 (2004) (describing how credit unions benefit from the SPCP exception).
- <sup>53</sup> 121 Cong. Rec. 27,137 (Aug. 1, 1975) (statement of Rep. Sullivan).
- <sup>54</sup> *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93rd Congress 502 (1974).
- <sup>55</sup> 121 Cong. Rec. 27,138 (Aug. 1, 1975) (statement of Rep. Sullivan) (stating the Subcommittee writing the special purpose provision intended to permit age-based credit programs).
- <sup>56</sup> S. REP. NO. 94-589, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 407 (explaining the purpose of the legislation).
- <sup>57</sup> 12 C.F.R. § 202.8(c) (2005).
- <sup>58</sup> PAUL BARRON & MICHAEL A. BERENSON, *FEDERAL REGULATION OF REAL ESTATE AND MORTGAGE LENDING* § 8:12 (2006), available at Westlaw, FRREML § 8:12 (explaining the special purpose credit program and how it legalizes programs that would otherwise be discriminatory).
- <sup>59</sup> 12 C.F.R. § 202.8(b)(2) (2005).
- <sup>60</sup> The anti-discrimination provision of the Fair Housing Act is at 42 U.S.C. 3604 (2006) and contains no SPCP-like exceptions.

## ENDNOTES CONTINUED

- <sup>61</sup> See S. REP. NO. 94-685, at B-22 (1976) (clarifying the Congressional intent leading to the adoption of the special purpose credit exception as being that of overriding ECOA's general anti-discrimination rules for the purposes delineated in the law).
- <sup>62</sup> See Patrick J. McEnerney, *Targeted Programs, Mortgage Banking Dec. 1994*, at 46 (advising lenders to "consider the possibility" of disparate impact caused by a "well-intended" program).
- <sup>63</sup> Congress directed the Federal Reserve Board to write the regulations governing SPCPs.
- <sup>64</sup> Equal Credit Opportunity: Preemption of New York Law, 53 Fed. Reg. 45,756 (Nov. 14, 1988).
- <sup>65</sup> Brief of Amici Curiae United States, Hargraves v. Capital City Mortgage, 147 F.Supp.2d 1, at III-A-7 (D.D.C. 2000) (No. 98-1021), available at <http://www.usdoj.gov/crt/housing/documents/hargraves1.htm> (last accessed Mar. 18, 2007) (arguing that affirmative marketing programs are permitted by Fair Housing regulations and under the Special Purpose provision of ECOA).
- <sup>66</sup> Equal Credit Opportunity, 59 Fed. Reg. 67235 revisions to (proposed Dec. 29, 1994). This proposal, however, was not adopted because the Federal Reserve Board was unclear "precisely how this condition applies in the credit context." Equal Credit Opportunity, 60 Fed. Reg. 29965 (June 7, 1995).
- <sup>67</sup> Federal Financial Institutions Examination Council, *Interagency Fair Lending Procedures*, available at <http://www.ffiec.gov/PDF/fairlend.pdf> (last accessed Mar. 18, 2007).
- <sup>68</sup> 13 VA. ADMIN. CODE § 10-40-30 (1997) (permitting unmarried couples to participate in the program beginning in 2003).
- <sup>69</sup> *Diaz*, 101 F. Supp. 2d at 419 (permitting state to allow only married couples to participate in housing assistance program).
- <sup>70</sup> Joyce Jones, *A Gusher of an Opportunity*, *BLACK ENTERPRISE*, Sept. 1996, at 19, available at [http://www.findarticles.com/p/articles/mi\\_m1365/is\\_n2\\_v27/ai\\_18600912](http://www.findarticles.com/p/articles/mi_m1365/is_n2_v27/ai_18600912) (last accessed Mar. 24, 2007) (describing credit program).
- <sup>71</sup> See, e.g., Transportation Federal Credit Union, *Products and Services*, available at [https://www.transfcu.com/prodserv/packaged\\_accounts.html#premiere50](https://www.transfcu.com/prodserv/packaged_accounts.html#premiere50) (last accessed Mar. 18, 2007) (describing program that allows those age 50 or over to receive an extra ¼ percent loan rate reduction); Bulls Eye Credit Union, *Products and Services*, available at [http://www.becu.net/products\\_services/savings/club\\_accounts.html](http://www.becu.net/products_services/savings/club_accounts.html) (last accessed Mar. 18, 2007) (describing program that gives those under age 22 a one percent discount on loans); Texans Credit Union, *Freedom*, available at <http://www.texascu.com/Disclosures.aspx?id=647> (last accessed Mar. 18, 2007) (describing program giving those under age 24 a .50 percent discount on an auto loan).
- <sup>72</sup> OTS is the federal agency that charters and regulates the thrift (savings bank & savings and loan) industry.
- <sup>73</sup> Press Release, Office of Thrift Supervision, OTS Offers 'Special Purpose Credit Programs' Guidance (July 1, 1998), available at <http://www.ots.treas.gov/docs/7/77848.html> (last accessed Mar. 18, 2007).
- <sup>74</sup> While this is the author's own proposed analysis, for an example of a multi-step discrimination analysis, see Federal Financial Institutions Examination Council, *Interagency Fair Lending Procedures*, available at <http://www.ffiec.gov/PDF/fairlend.pdf> (last accessed Mar. 18, 2007).
- <sup>75</sup> The disparate impact test is also known as the effects test. See S. REP. NO. 94-589 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 405; Equal Credit Opportunity, Revision of Regulation B, Official Staff Commentary, 50 Fed. Reg. 48,050 (Nov 20, 1985) (to be codified at 12 CFR pt. 202); Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266, 18268-9 (Apr. 15, 1994).
- <sup>76</sup> Illegal practices that discourage applications from a protected class, such as redlining or preferential advertising, and practices that may discriminate against existing loan customers, are beyond the scope of this article.
- <sup>77</sup> The law does not grant the ability to offer preferential rates in a special purpose program, only to "refuse to extend credit offered" under a special purpose program. 15 U.S.C.S. § 1691 (2005); see also S. REP. NO. 94-589, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 409; H.R. CONF. REP. NO. 94-239, at 8, reprinted in 1976 U.S.C.C.A.N. 403, 428 (clarifying the SPCP provision was intended to permit "denials of credit to persons ineligible for" SPCPs). Since a SPCP must comply with all provisions of ECOA not specifically exempted, and preferred rates are not specifically authorized, ECOA's general anti-discrimination rule prohibits offering preferential rates based on race, religion, or other protected classes. 12 C.F.R. § 202.8(b) (2005).
- <sup>78</sup> Civil Rights Cases, 109 U.S. 3, 11-12 (1883) (finding Civil Rights Act unconstitutional).
- <sup>79</sup> *Rannels v. Meridian Bancorp.*, 718 F. Supp. 10, 12-13 (E.D. Pa. 1989), aff'd, 893 F.2d 1331 (3d Cir. 1989), cert. denied, 494 U.S. 1017 (1990) (finding bank program that discriminated on age to provide non-loan discounts did not constitute sufficient state action to sustain a private plaintiff's equal protection lawsuit); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (holding the 14th Amendment may only be violated by state action).
- <sup>80</sup> *Jackson v. Metropolitan Edison*, 419 U.S. 345, 351 (1974) (explaining holding in a due process claim against a private utility).
- <sup>81</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (explaining when private conduct constitutes state action).
- <sup>82</sup> *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968) (explaining when the acts of a private party can be imputed to the state).
- <sup>83</sup> *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (upholding state law permitting a warehouse owner to threaten to sell a customer's property, despite the statute failing to meet constitutional due process standards).
- <sup>84</sup> *Reitman v. Mulkey*, 387 U.S. 369 (1967) (finding unconstitutional a state law that prohibited the government from interfering with a private property owner's "right" to discriminate, holding the state "encouraged" private discrimination).
- <sup>85</sup> *Sidney Buchanan*, State Authorization, 21 Hous. L. Rev. 1, 29 (1984) (describing state authorization of discrimination).
- <sup>86</sup> *Id.* at 29-32 (1984).
- <sup>87</sup> 12 C.F.R. § 202.8(a)(1) (2005).
- <sup>88</sup> 12 C.F.R. § 202.8 (2005).
- <sup>89</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).
- <sup>90</sup> See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
- <sup>91</sup> See *Adarand*, 515 U.S. at 201, 226 (remanding to determine whether the Small Business Administration program that allowed certain racial minorities to be presumed "socially disadvantaged" and eligible for economic benefits was narrowly tailored to serve a compelling governmental interest).
- <sup>92</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the University of Michigan's undergraduate admissions policy, holding that the University's deliberate and automatic preference of a racial class in the admissions process was not narrowly tailored to the state's interest in achieving diversity. *Id.* at 275.).
- <sup>93</sup> *Moore v. USDA*, 55 F.3d 991, 992 (5th Cir. 1995).
- <sup>94</sup> *Id.* at 995 (relying on *FDIC v. Meyer*, 510 U.S. 471 (1994)).
- <sup>95</sup> See *Union Bank of California, FAQ*, available at [http://www.uboc.com/business/main/0\\_2485\\_5543,00.html](http://www.uboc.com/business/main/0_2485_5543,00.html) (last accessed Mar. 18, 2007) (stating that only women and minority-owned businesses are eligible to apply for a special credit program that features benefits such as a longer financing term than other loan products); Office of the Comptroller of the Currency, *Community Developments Online*, available at [http://www.occ.treas.gov/cdd/CD\\_winter03/images/special.PDF](http://www.occ.treas.gov/cdd/CD_winter03/images/special.PDF) (last accessed Mar. 18, 2007) (further describing the Union Bank of California program).
- <sup>96</sup> See *supra* notes 53-60 and accompanying text.
- <sup>97</sup> Exec. Order No. 13,005, 61 Fed. Reg. 26069 (May 16, 1996).
- <sup>98</sup> See Part I of this article.
- <sup>99</sup> See *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93rd Congress 71 (1974) (statement of Jeffrey Bucher, Member, Board of Governors of the Federal Reserve System, "some credit unions are directly associated with churches or church-related organizations. An essential requisite to obtaining a charter for a credit union...is that the credit union have a specifically limited field of membership. Therefore, without some allowance, a church-affiliated credit union might be faced with the dilemma of granting credit to an applicant outside its field of membership and violating its charter, or denying credit to the applicant and violating the Act's sanctions.").
- <sup>100</sup> JAMES KUSHNER, GOVERNMENT DISCRIMINATION 565-66 (2004).
- <sup>101</sup> *Craig v. Boren*, 429 U.S. 190 (1976).
- <sup>102</sup> *United States v. Virginia*, 518 U.S. 515 (1996).
- <sup>103</sup> *Orr v. Orr*, 440 U.S. 268 (1979).
- <sup>104</sup> See JAMES KUSHNER, GOVERNMENT DISCRIMINATION 566-68 (2004).
- <sup>105</sup> *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277 (1986).
- <sup>106</sup> *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1244 (11th Cir., 2001).
- <sup>107</sup> *To Amend the ECOA of 1974: Hearing on H.R. 3386 Before the House Comm. on Banking, Currency, and Housing*, 94th Cong. 15 (1975) (statement of John Dillon, Executive Vice President, National BankAmericard).
- <sup>108</sup> DC ADVISORY COMMITTEE TO THE US COMMISSION ON CIVIL RIGHTS, OBSTACLES TO FINANCING MINORITY ENTERPRISES 29-30, reprinted in *To Amend the ECOA of 1974: Hearing on H.R. 3386 Before the House Comm. on Banking, Currency, and Housing*, 94th Cong. 172 (1975).
- <sup>109</sup> *Equal Credit Opportunity Act Amendments and Consumer Leasing Act: Hearing on S 483, 1900, 1927, 1961 and HR 5616 Before the Senate Comm. on Banking, Currency, and Housing*, 94th Cong. 24 (1975) (statement of Rep. Sullivan).
- <sup>110</sup> These categories are Marital Status, Age, Receipt of Public Assistance Income, or Good Faith Exercise of Certain Consumer Rights.

## ENDNOTES CONTINUED

<sup>111</sup> Scariano v. Justices of Supreme Court of State of Ind., 38 F.3d 920 (7th Cir. 1994).

<sup>112</sup> Dandridge v. Williams, 397 U.S. 471 (1970).

<sup>113</sup> Allied Stores v. Bowers, 358 U.S. 522, 527-29 (1958) (holding that a legislative action will be upheld when reviewed under the rational basis test if the court finds that the legislature had “any” conceivable basis to enact the law. *Id.* at 528.).

<sup>114</sup> See *Adarand*, 515 U.S. at 212-13 (stating that race-neutral programs are subject to relaxed judicial scrutiny).

<sup>115</sup> 15 U.S.C.S. § 1691c(a)(3) (2005).

<sup>116</sup> 15 U.S.C.S. § 1691e(g) (2005) (stating general referral rule); see 15 U.S.C.S. § 1691(a) (2005) (listing violations that are referable).

<sup>117</sup> 12 C.F.R. § 202.17(b)(3) (2005).

<sup>118</sup> 15 U.S.C.S. § 1691f (2005).

<sup>119</sup> *Fair Lending: Federal Oversight and Enforcement Improved but Some Challenges Remain*, GAO # 96-145, available at <http://www.gao.gov/archive/1996/gg96145.pdf> (last accessed Mar. 18, 2007), page 40 (1996).

<sup>120</sup> See *The Attorney General's Annual Report to Congress Pursuant to the Equal Credit Opportunity Act* for each year between 1999 and 2004, available at <http://www.usdoj.gov/ct/> (last accessed Mar. 18, 2007); data for 1996, 1997, and 1998 are not available.

<sup>121</sup> 136 Cong. Rec. S17472 (Oct. 27, 1990) (statement of Sen. Dixon)

(explaining rationale for allowing the NCUA to dedicate fewer examiners to consumer compliance issues, explaining credit unions are “less sophisticated” than banks).

<sup>122</sup> *Banking Regulatory Agencies' Enforcement of the Equal Credit Opportunity Act and the Fair Housing Act: Hearings before a Subcomm. of the House Comm. on Government Operations, 95th Cong. 199 (1978)* (statement of Lawrence Connell, Administrator, National Credit Union Administration).

<sup>123</sup> This author contacted the NCUA regarding more than a dozen credit union websites with apparently illegal language. These pages included programs offering preferential rates to those under age 62, programs requiring a consigner

without first determining whether the applicant independently qualifies for credit, and those that discourage unmarried couples from applying for credit. The NCUA committed to review the websites, but responded that some of the credit unions cited in the letter had already changed their sites or are no longer in existence. The NCUA also indicated faith in the ability of credit unions to comply with the ECOA and indicated that NCUA examiners will recommend referral to the Department of Justice when violations are identified. Regardless of the NCUA’s response, it is troubling that the websites, at least at one point during 2005, apparently violated the law, regardless of whether they are now corrected. By contrast, a similarly exhaustive search of bank websites revealed only four questionable pages, and all related to loan discounts offered beginning at an age less than 62. See Letter from David Marquis, Director, Office of Examination and Insurance, National Credit Union Administration, to Luke Reynolds (June 6, 2005) (on file with author).

<sup>124</sup> H. REP. NO. 102-330, at 1944 (1991).

<sup>125</sup> For example, credit unions enjoy significant federal tax advantages compared to banks.

<sup>126</sup> See 136 Cong. Rec. S17472 (Oct. 27, 1990) (statement of Sen. Dixon) (stating an exemption for the NCUA on examiner staffing levels does not “lessen the priority that Congress intends the NCUA to place on consumer compliance”).

<sup>127</sup> See, e.g., U.S. Dept. of HUD, *Discrimination in Metropolitan Housing Markets: National Results from Phase 1, Phase 2, and Phase 3 of the Housing Discrimination Study (HDS)*, available at <http://www.huduser.org/publications/hsgfin/hds.html> (last accessed Mar. 18, 2007) (paired tests found minority homebuyers subject to adverse treatment during the finance process); National Fair Housing Alliance, *2005 Fair Housing Trends Report*, available at <http://www.nationalfairhousing.org/> (last accessed March 24, 2007) (follow “News Archive” hyperlink; then follow “Trends and Reports” hyperlink and scroll to “2005 Trends Report” link) (467 mortgage lending complaints received during 2004 by member agencies).

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# LEGISLATIVE UPDATES

*By Daniel Raposa\**

## **S 535 “THE EMMETT TILL UNRESOLVED CIVIL RIGHTS CRIME ACT”**

This bill would establish an Unsolved Crimes Section in the Civil Rights Division of the Department of Justice. It would also create an Unsolved Civil Rights Crime Investigative Office in the Civil Rights Unit of the FBI.

Named in honor of the Emmett Till, whose murder in Mississippi in 1955 was one of the catalysts of the American Civil Rights Movement, this bill would act as the benefactor for a crucial area of civil rights crime work: unresolved civil rights crime. It would partition and allocate resources to individual divisions in the agencies that could be devoted solely to working on cases whose resolutions remain in limbo.

Till himself was shot, beaten, and left in the Tallahatchie River by two white men, who were acquitted at trial but later confessed. The jury deliberations took only 67 minutes, and the blasé attitudes of the all-white jury (one juror took a soda break to stretch the deliberation time to over an hour) led to public outrage in the United States and Europe, and helped kick the Civil Rights Movement into high-gear.

Sen. Dodd (D-CT) introduced the bill for himself and Sen. Leahy (D-VT). It is currently in the Judiciary Committee. A companion bill, H.R. 923, was introduced by Rep. John Lewis (D-GA). It currently has 66 cosponsors.

## **H.R. 998 “CIVIL RIGHTS HISTORY PROJECT ACT OF 2007”**

This bill would create a project to collect oral histories of individuals from the Civil Rights Movement (CRM) in the Library of Congress and the Smithsonian, and these oral accounts would then be available to the public.

The purpose of the bill is to help American citizens learn about the CRM through a vital primary source: oral histories. The legislation emphasizes allowing future generations, who would not necessarily have contact with persons involved in the CRM, to be able to relive the history, struggles, and traditions of the era. The project would have tremendous reach, as it would help coordinate all preexisting efforts to archive oral histories at the national level. It would also complement previous work that has been done to archive other primary source materials on the CRM. There is also an emphasis on assisting local efforts to preserve similar oral histories.

Rep. Carolyn McCarthy (D-NY) introduced the bill, which has 35 co-sponsors. It is currently in the House Committee on House Administration.

## **S. 543 “DECEPTIVE PRACTICES AND VOTER INTIMIDATION PREVENTION ACT OF 2007”**

This bill makes a number of technical amendments to Subsection (b) of section 2004 of 42 U.S.C. 1971(b), in order to crack down on reporting false election information and any deceptive practices in federal elections.

The legislation acknowledges that the right to vote is a fundamental Constitutional right and an underpinning of democracy. The bill’s findings recognize that huge strides have been made in voter rights, particularly since the era of literacy tests, poll taxes, and property requirements. The bill also recognizes the Constitutional legacy of piecemeal inclusion of more and more citizens with franchise. This includes the 15th, 19th, and 24th Amendments.

However, despite much forward progress, tactics that aim to confuse certain demographics of voters and suppress voter turnout threaten today’s elections. Principal among these new tactics are the dissemination of false information, intimidation of voters to dissuade them from voting, and attempts to influence those who do vote.

There are countless examples of this voter intimidation and influence. African-American voters in North Carolina received false information about their voter registration status in 1990 and were threatened against trying to vote. In 2004, Native American voters in South Dakota were turned away unnecessarily at polls for lack of photo identification. In the 2006 election, some Virginia voters received messages telling them that they were ineligible to vote and threatening criminal prosecution if they tried. In 2006, in predominately African-American districts of Prince George’s County, Maryland, certain candidates distributed fliers insinuating that they belonged to the party of which they were not members.

Senator Barack Obama (D-IL) introduced this bill, which has notable co-sponsors, including Sen. Hillary Clinton (D-NY), Sen. Edward Kennedy (D-MA), and Sen. John Kerry (D-MA).

## **S. 556 “HEAD START FOR SCHOOL READINESS ACT”**

This bill would make technical amendments to provisions of Head Start (42 U.S.C. 9831), one of the most important social programs for lower-income schoolchildren. The bill’s authors recognize the vital role that Head Start plays in the social and cognitive development of many of these children.

Sen. Edward Kennedy (D-MA) introduced this bill, and it is currently in the Committee on Health, Education, Labor and Pensions.

### **S. 358 “GENETIC INFORMATION NONDISCRIMINATION ACT OF 2007”**

This bill would regulate and bar certain types of discrimination based on genetic information, including discrimination in health insurance and employment discrimination.

Recognizing that advances in science and medicine with respect to genetics hold the possibility of great societal advances, the authors of this bill also recognize the potential negative byproducts that the disclosure of genetic information brings.

The bill recognizes that although genes are facially neutral markers, many genetic conditions and disorders are both more prevalent and more readily associated with particular racial and ethnic groups. This could lead to the stigmatizing of, and discrimination against, members of a particular group as a result of that genetic information. An example of this phenomenon is the occurrence of certain types of discrimination against African Americans in the 1970s based on their higher tendency toward sickle-cell anemia.

Sen. Olympia Snowe (R-ME) introduced the bill, which currently has 25 co-sponsors and is in the Committee on Health, Education, Labor, and Pensions. Its companion bill is H.R. 493.

### **H.R. “NO MORE TULIAS: DRUG LAW ENFORCEMENT EVIDENTIARY STANDARDS IMPROVEMENT ACT OF 2007”**

This bill seeks to “increase the evidentiary standard required to convict a person for a drug offense, to require screening of law enforcement officers or others acting under color of law, participating in drug task forces, and for other purposes.”

The bill’s authors have come to the realization that some programs funded by the Edward Byrne Memorial Justice Assistance Grant program have created and sustained racial disparities, corruption in law enforcement, and the commission of civil rights abuses across the country. The Edward Byrne program funds hundreds of regional anti-drug task forces. As these task forces are administered by local officials with very little federal oversight, racial and law enforcement issues have cropped up and hampered the program’s effectiveness to combat drug problems while remaining race-neutral. The ACLU and other watchdog organizations have documented numerous occasions of local programs administered under the EBMJAG program presiding over false arrests and convictions.

The bill hopes to both streamline procedures for local programs receiving federal funds and ensure that states administer proper oversight to these programs.

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