University of Florida Levin College of Law
UF Law Scholarship Repository

Faculty Publications | Faculty Scholarship

Summer 2003

Factless Jurisprudence

Darren Lenard Hutchinson
University of Florida Levin College of Law, hutchinson@law.ufl.edu

Follow this and additional works at: http://scholarship.law.ufl.edu/facultypub

Part of the Civil Rights and Discrimination Commons, Jurisprudence Commons, and the Legal History, Theory and Process Commons

Recommended Citation
Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 Colum. Hum. Rts. L. Rev. 615 (2003), *available at* http://scholarship.law.ufl.edu/facultypub/393

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

FACTLESS JURISPRUDENCE*

by Darren Lenard Hutchinson**

I. INTRODUCTION

Professor Terry Smith has written a very important work on the inadequacy of juridical approaches to antidiscrimination law in the context of Title VII litigation.[1] Smith argues that the anti-retaliation provisions of Title VII can serve more broadly as a mechanism for protecting workers of color from prohibited racial discrimination.[2] Smith contends that contemporary equality jurisprudence, however, impedes the protective scope of the anti-retaliation provision because courts fail to appreciate the broader context of racial antagonism in which persons of color live.[3] Particularly, courts often misinterpret lawful racial protest in the workplace as disruptive and appropriately regulated to the detriment of the protesting employee. Yet, as Smith's research uncovers, racial protest typically occurs as a reaction to subtle (and explicit) discrimination against persons of color in the workplace.[4] Citing to interdisciplinary works, particularly medical research, Smith argues that confronting acts of racism improves the physical and emotional well-being of blacks, who suffer negative health consequences when they stifle their reactions to racial antag-

---

* I borrow this term from Judith Resnik, who has utilized it to describe the decontexualized "civil rights" and federalism jurisprudence of the William H. Rehnquist Court. *See, e.g.*, Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 Yale L.J. 619, 624 (2001) ("Demanding factful, rather than 'factless,' discussions could help tether judges to records and statutes, thereby cabining the reach of their decisions.").

** Visiting Associate Professor, Washington College of Law, American University; Associate Professor, Southern Methodist University Law School. I am grateful to Dean Claudio Grossman who provided the summer research grant that funded the production of this paper. Natalie Koss provided excellent research assistance.

1. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 Colum. Hum. Rts. L. Rev. 529 (2003).

2. *Id.* at 530–31.

3. *Id.* at 535–36.

4. *Id.* at 546–47.

onism.[5] By linking racial protest to worker health,[6] Smith hopes to provide a richer context for juridical analyses of Title VII anti-retaliation litigation, a context that could lead to more antiracist applications of antidiscrimination law.

Smith's work makes a critical contribution to legal discourse on the problem of inequality and the limitations of traditional juridical approaches to subordination. While his paper offers a sophisticated and compelling reading of doctrinal failings in this area of law, I want to push his analysis further on three particular points that his work implicates, but which could use more theorizing.

First, Smith's article implicates the social or "expressive" nature of identity categories and the current failure of courts to grapple with "expressive identity." Rather than viewing identity categories as closely linked to speech and expression, courts treat identity as separate from the necessary speech and conduct that sustain its existence.

Second (and related to the first point), Smith's article illuminates a broader problem in contemporary civil rights jurisprudence—the failure of courts to contextualize their decisions in historical, social, and economic realities (including the reality of expressive identity). Courts often permit racial and other forms of discrimination to escape judicial invalidation because their understanding of race is ahistorical: they do not recognize the subtle mechanisms of discrimination in a society that demands formal equality. While Smith's article addresses this problem in the narrow confines of Title VII jurisprudence, he could enhance his jurisprudential model for understanding the anti-retaliation provisions by analyzing the pervasive and comprehensive nature of decontextualized juridical analysis.

Finally, Smith's work should remind readers of the vulnerability of oppressed classes in civil rights litigation. As I argue more thoroughly in a forthcoming work, in the context of equal protection jurisprudence, the Supreme Court has "inverted" the concepts of privilege and subordination. The Court provides its most heightened level of protection to historically advantaged groups and to members of dominant classes, particularly whites, who challenge remedial legislation or governmental policies designed to alleviate the material consequences of discrimination. At the same time, the Court denies a careful application of civil rights laws in cases involving claims of discrimination by persons of color.[7] In the context of Title VII, as Smith's article illuminates,

---

5. *Id.* at 547–48.

6. *Id.*

7. *See* Darren Lenard Hutchinson, *Unexplainable on Grounds Other Than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. Ill. L. Rev. (forthcoming 2003) (manuscript at 24, on file with the *Columbia Human Rights Law Review*).

courts often fail to ground their analyses on the histories of victims of racial discrimination and instead apply a white normative model, which effectively protects acts of white supremacy in the workplace against the efforts of persons of color to counter such indignities through their own protests and in the litigation process. Consequently, courts have effectively favored white supremacy over racial protest; they have inverted the legislative purposes of Title VII. Critical theorists do not treat judicial marginalization of persons of color as merely accidental; rather, they see courts as having a central role in sustaining social hierarchy.[8] The indeterminate nature of law and legal analysis, moreover, heightens the vulnerability of oppressed classes in equality jurisprudence.[9] Despite the perceived gains engendered by a rights approach to justice, the malleable nature of law has meant that legal structures may not adequately secure the interests of oppressed classes.

8. Critical Race theorists, for example, have argued that "neutral" legal doctrines, like colorblindness, reinforce social hierarchy. *See, e.g*, Richard Delgado, Review Essay, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 Stan. L. Rev. 1133, 1152–53 (1993) ("Facially neutral laws cannot redress most racism, because of the cultural background against which such laws operate. But even if we could somehow control for this, formally neutral rules would still fail to redress racism because of certain structural features of the phenomenon itself.") (internal quotations omitted); Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953, 957 (1993) (examining the impact upon the doctrine of the "transparency phenomenon" or the "tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1052–56, 1102–18 (1978) (arguing that the Court has embraced a "perpetrator perspective" in its antidiscrimination jurisprudence because it fails to examine critically the negative effects of "neutral" laws upon the victims of oppression); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 Stan. L. Rev. 1 (1991) (examining how color-blind constitutionalism legitimates racial inequality and domination); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 How. L.J. 1, 72 (1995) (arguing that the "diversion of resources from racial minorities to whites [effectuated by color-blind jurisprudence] is good, old-fashioned racial discrimination, pure and simple").

9. *See, e.g.*, John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 Duke L.J. 84, 89 (1995) (arguing that the legal realist indeterminacy thesis "implied that the rules of law could not constrain judges' choices since it was the judges who chose which rules to apply and how to apply them" and that "since such choices were necessarily based on the judges' beliefs about what was right, it was the judges' personal value judgments that consciously or unconsciously formed the basis of their decisions").

II. EXPRESSIVE IDENTITY AND ANTIRACIST SPEECH

Smith argues that racial protest is central to the health of persons of color.[10] Drawing upon psychological and medical research, Smith contends that when blacks confront, rather than absorb, racial indignities, they reduce the level of injury from racism. Smith thus portrays racial protest speech as a form of survival for black workers. As such, racial protest stands as a necessary—or at least very important—part of racial experience for persons of color. Courts, however, often fail to link antiracist expression to racial well-being. Instead, they often favor employers in situations where workers employ dramatic measures to bring attention to the problem of workplace racial antagonism. While Smith's paper should elucidate the boundaries, even if tentative, of appropriate worker protest, I want to focus on a more central and important dimension of judicial marginalization of antiracist protest: the way in which these decisions bifurcate identity and expression.

While Title VII protects employees from race and sex discrimination, substantial misunderstanding exists as to the definition and scope of these categories of identity. Traditional approaches to race and sex discrimination treat these categories as biologically imposed; under the traditional analysis, race is determined by skin color and other morphological features, while sex is rooted in bipolar biological demarcation. A rich body of contemporary literature, however, has debunked traditional understandings of race, sex, and other forms of identity; rather than existing in biology, identity is "socially constructed" and determined by human interaction.[11] The anti-retaliation provisions of Title VII actually link expression and identity by providing a cause of action for employees who suffer a negative employment action due to their good faith expression of antiracism.[12] The juridical articulation of Section 704, nevertheless, places identity and speech in conflict when courts fail to treat

10. Smith, *supra* note 1, at 545–52.

11. *See* Judith Butler, Gender Trouble: Feminism and the Subversion of Identity 2 (1990) (arguing that gender is socially constructed); Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1980s, at 55 (2d ed. 1986) ("The effort must be made to understand race as an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle."); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 Stan. L. Rev. 503, 503–68 (1994) (criticizing biological essentialism in sexual identity theory); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 27 (1994) ("Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.").

12. Civil Rights Act of 1964 § 704, 42 U.S.C. § 2000e-3 (2000).

employee antiracist protests as legitimate expressions protected by the statute. As Smith argues, an obvious route to this decontextualized approach occurs when courts place high burdens upon protesting employees to demonstrate that they had a reasonable basis to conclude that their employers were engaging in racial discrimination.[13] The courts' failure to appreciate the subtle or hidden nature of contemporary discrimination makes them skeptical of plaintiffs' perceived need to engage in antiracist protest.

A second dimension of the jurisprudence in this area more vividly illustrates the false speech-equality dichotomy. As Smith argues, courts have required plaintiffs not only to prove that they engaged in racial protest after reasonably concluding that their employer was discriminating on the basis of race, but that their responsive protest itself was reasonable.[14] The doctrine thus employs a "disruptiveness" test under which some courts have sought to balance employees' statutory right to engage in antiracist protest against the employers' "need" to "control" their personnel. The balancing test recognizes, as mandated by Section 704, some connection between speech and equality. Courts, however, have limited the potential reach of the statute and obscured the relationship between speech and identity by failing to consider how the level and nature of employee protest might relate to, and sustain the racial identity of, persons of color. The balancing formula obfuscates the relationship between speech and identity when it neglects to consider, as Smith reveals, that the "reasonableness of [employee] opposition may be informed by the racial, gender, or other status of the complainant."[15] In attempting to carve out a space for "employer control," courts have distanced expression from the identity categories that form the basis for protection under the statute itself.

The juridical distancing of speech from expression occurs outside of Section 704 litigation, and many critical scholars have revealed how antidiscrimination doctrine typically bifurcates expression and identity, thereby deploying an inadequate and decontextualized theory of equality.[16] In Section

---

13. Smith, *supra* note 1, at 552.

14. *Id.* at 560–64.

15. *Id.* at 562–63.

16. *See, e.g.*, Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. Davis L. Rev. 769, 839 (1987) (arguing that "[i]ndividuals . . . conceive their special identities through a wide amalgam of acts" and that "we must criticize the cavalier fashion with which courts dismiss individuals' claims that employers' racially, sexually, or ethnically premised rules unjustly restrict personal integrity and expression"); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365, 366–67, 371–81 (criticizing courts for not treating employers' regulation of black women's physical appearance in the workplace as a form of racial, gender, and cultural domination); Christopher David Ruiz Cameron, *How the Garcia*

703 litigation, for example, courts have legitimated a host of employer "controls," such as "English-only"[17] rules and grooming[18] requirements that operate to the detriment of persons of color. In these decisions, courts have treated race as if it exists separately and apart from open manifestations of that identity.[19]

Constitutional jurisprudence provides further evidence of courts' clinical or sterile treatment of identity. In *Hernandez v. New York*,[20] for example, the Supreme Court validated a prosecutor's use of peremptory challenges to strike all Spanish-speakers from the jury, which resulted in the exclusion of all Latino and Latina persons from a jury in the trial of a Latino defendant.[21] Despite the immediate racial impact of the peremptory challenges and the cultural and historical linkages between Spanish language and Latino and Latina identity—and white supremacist treatment of Latinos and Latinas—the Court would not accept the defendant's argument that the exclusionary pattern reflected racial bias.[22] Under the Court's analysis, Spanish language is distinct from race.[23]

Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy, 85 Cal. L. Rev. 1347, 1367–72 (1997) (arguing that courts such as the Fifth Circuit in *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) fail to treat employers' Spanish language discrimination as a manifestation of national origin discrimination because they do not appreciate the centrality of Spanish language in constructing Latino/a identity); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 Cal. L. Rev. 1923, 2008 (2000) (arguing that the doctrinal treatment of "race as an immutable trait means that merely 'cultural' behaviors and practices do not receive legal protection unless they can be strongly linked back to the 'immutable' characteristics of race or national origin" and that "[t]he separation of 'race' from 'culture' . . . gives employers and government agencies broad room to force employees marked as racially 'other' to assimilate to a socially 'white' standard").

17. *See, e.g.*, Cameron, *supra* note 16, at 1361–67 (discussing judicial rulings sustaining employer "English-only" rules over Title VII challenges).

18. *See, e.g.*, Caldwell, *supra* note 16, at 371–81 (criticizing failure of courts to recognize racially discriminatory nature of employer grooming rules).

19. *See* Harris, *supra* note 16 (criticizing judicial bifurcation of race and cultural practice).

20. 500 U.S. 352 (1991).

21. *Id.*

22. *Id.* at 364–70 (accepting trial court's determination that exclusion of Latino/a jurors was based on their "bilingual," rather than racial, status).

23. *Id.* at 364–72. For a critique of this decision that reveals the connections between Latino/a status, language, and race, see Juan Perea, Hernandez v. New York*: Courts, Prosecutors, and the Fear of Spanish*, 21 Hofstra L. Rev. 1 (1992).

The judicial bifurcation of identity and speech occurs in contexts outside of race. In recent decisions, for example, the Supreme Court has exhibited a persistent refusal to recognize the expressive nature of identity in the context of gay, lesbian, bisexual, and transgender equality claims.[24] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[25] the Court held that application of a state public accommodations statute so as to require the admission of a gay and lesbian unit in Boston's Saint Patrick's Day Parade (over the objection of parade organizers) would violate the First Amendment rights of parade organizers by "compelling" them to speak.[26] The Court held that the parade itself and participation in the parade constituted forms of expression and that the forced inclusion of the unwanted group within the parade would alter the content of the organizers' speech; the parade organizers had a constitutional right to control the nature of their own speech.[27] While this limited conclusion might have justified the decision, the Court attempts to separate the parade organizers' discriminatory treatment of the gay and lesbian parade unit from "pure" anti-gay discrimination.[28] In so doing, the Court artificially distances gay and lesbian self-identification from gay and lesbian status. For instance, the Court explained that the organizers' discrimination pertained only to speech, rather than to identity:

> Petitioners disclaim any intent to exclude homosexuals *as such*, and no individual member of [the Gay, Lesbian and Bisexual Group of Boston (GLIB)] claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.[29]

---

24. I have examined this matter elsewhere. *See* Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. Pa. J. Const. L. 85, 115–25 (1998) (arguing that courts have not yet included outness in civil rights jurisprudence) [hereinafter Hutchinson, *Accommodating Outness*]; Darren Lenard Hutchinson, *"Closet Case":* Boy Scouts of America v. Dale *and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 Tul. L. Rev. 81, 106–20 (2001) (arguing that Court's budding sexual orientation jurisprudence fails to link "outness" with gay, lesbian, bisexual, and transgender identity) [hereinafter Hutchinson, *Closet Case*].

25. 515 U.S. 557 (1995).

26. *Id.* at 572–81.

27. *Id.* at 568–78.

28. *Id.* at 572 (holding that the parade organizers did not desire to discriminate against "homosexuals *as such*" but only to exclude the group from marching as a "parade unit carrying its own banner") (emphasis added).

29. *Id.* (emphasis added).

The Court blurs the expressive nature of identity in its attempt to make a distinction between gays and lesbians "as such" and gays and lesbians who "flaunt" their sexual identities.[30]

The Court reached a similar—yet even more problematic—decision in *Boy Scouts of America v. Dale.*[31] The Court ruled that application of a New Jersey public accommodations statute to force the inclusion of an openly gay assistant scoutmaster in the Boy Scouts of America would violate the organization's right of expressive association.[32] As I argued in a prior work, the Court's treatment of gay and lesbian identity and expression in *Dale* follows a traditional model that sees expression and identity as unconnected.[33] The Court held that the Boy Scouts could not simply point to Dale's "mere" status as a "member" of the class of gays and lesbians to justify his exclusion.[34] The Court, however, concludes that the Boy Scouts did not engage in pure status-based discrimination. Instead, the organization justifiably excluded Dale on the basis of his gay-related expression and association.[35] To distinguish the Boy Scouts' discrimination from pure status-based exclusion, the Court points to Dale's expression; the Court finds that "Dale, by his own admission, is one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.'"[36] Furthermore, the Court discusses Dale's participation in gay and lesbian politics and social support groups, including the fact that he "was the copresident of a gay and lesbian organization at college and remains a gay rights activist."[37] The Court singles out Dale's gay self-identification in order to illustrate that the Boy Scouts's anti-gay discrimination relates to speech, rather than status. The Court afforded the Boy Scouts, like employers in the Title VII context, a broad ability to control speech among its members; yet, the organization did not, according to the Court's analysis, engage in status-based discrimination.

---

30. *See* Hutchinson, *Accommodating Outness*, *supra* note 24, at 103–04 (arguing that, in *Hurley*, the Court "implied that discrimination against non-heterosexuals is permissible if it only targets openness—or the placing of sexuality on a 'banner'").

31. 530 U.S. 640 (2000).

32. *Id.* at 655–56.

33. *See* Hutchinson, *Closet Case*, *supra* note 24, at 106–20.

34. *Dale*, 530 U.S. at 653 (holding that "an expressive association can[not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message").

35. *Id.* at 653 (discussing Dale's expression and distinguishing it from his gay status).

36. *Id.*

37. *Id.*

The foregoing constitutional and statutory civil rights cases illustrate a common problem in antidiscrimination jurisprudence—the inability of courts to imagine identity as expressive, rather than as clinical and biological. Professor Smith's analysis of the judicial failure to contextualize antiracist protest speech within the context of racial identity exposes this broader inadequacy of equality doctrine.[38] Several scholars, however, have offered alternative paradigms that recognize the expressive nature of identity and the relationship between speech and equality. Nan Hunter, for example, has interrogated the concept of "expressive identity" in her scholarship.[39] Hunter contests the essentialist depictions of identity in juridical discourse, arguing that:

> Expression is the crucible in which identity is formed. Identity cannot exist subjectively without the constitutive impact of complex discursive systems, one of which is expression. Discourses shape individual experiences of self-identification, in part by a process of normalization that makes particular differences matter. Ideas shape identity, and culture creates the self, at least as much as the reverse. Identity is not a prediscursive, biological given.[40]

In the context of antiracism, several scholars have attempted to link black political activism with the collective and individual identities of blacks.[41] Furthermore, other scholars have examined the psychological, political, and cultural benefits of gay, lesbian, bisexual, and transgender self-identification.[42]

---

38. Smith, *supra* note 1, at 555–58.

39. *See* Nan Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 Harv. C.R.-C.L. L. Rev. 1, 4–17 (2000).

40. *Id.* at 9.

41. *See, e.g.*, Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1297 (1991) (discussing how people of color utilize racial identity and "naming" as a "site of resistance"); Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. Rev. 1455, 1467 (2002) [hereinafter Hutchinson, *Progressive Race Blindness?*] ("Political resistance is perhaps the most positive usage of race by persons of color. Persons of color utilize racial identity to respond to racial subjugation. Race serves as an organizational instrument for challenging racial oppression."); Chris K. Iijima, *Race as Resistance: Racial Identity as More than Ancestral Heritage*, 15 Touro L. Rev. 497, 509 (1999) ("At least for Asian Pacific Americans, how we define ourselves is intimately tied to the political purpose of our racial identity.").

42. *See, e.g.*, William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2442 (1997) ("The closet diminishes not only the integrity of its denizens, but also their mental health . . . . A wide variety of psychologists have found that . . . the best-adjusted gay individuals have gone through a process of 'acceptance and appreciation' of their sexual identity."); Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-*

Judicial discussions of identity, however, ordinarily fail to take these connections among speech, identity, and equality into account.

While Smith's article focuses mainly on the retaliatory provisions of Title VII and less on the substantive racial discrimination provisions of the statute, his work nevertheless implicates the speech and identity relationship. As Smith argues, the balancing test that some courts apply in Section 704 litigation fails to appreciate the ways in which speech, and in particular racial protest speech, helps to construct and sustain racial identity.[43] Smith offers a compelling assessment of medical and other scientific literature to support his claim that courts must assess the reasonableness of the racial protest speech with an understanding of blacks' experiences as perpetual victims of subtle discrimination, and to provide an alternative approach that recognizes the intersection of speech and identity.[44] Smith's analysis, however, could benefit from an exploration of courts' general difficulty integrating expression and identity and from an interrogation of the literature responding to this narrow jurisprudence. While Section 704 provides a mechanism for a more integrated discussion of speech and equality, by penalizing employer retaliation against antiracist speech, doctrinal application of the anti-retaliation provisions have limited the progressive uses of the statute.

III. THE "FACTLESS" COURT

Another difficulty that Professor Smith struggles against is the problem of "subtle discrimination." The implementation of formal equality provisions in antidiscrimination law has served both to advance and to hinder the goals of equality. While formal equality has undoubtedly diminished the level of inequality experienced by many members of oppressed classes,[45] the prohibition of racial and sex discrimination has not completely eradicated unequal treatment. Paradoxically, the attainment of formal racial equality has made it

---

Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511, 596–97 (1992) (discussing the mental health costs of gay people concealing their sexual identity); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sexuality 133, 145–46 (1991) (arguing that "lesbians and gay men probably maintain self esteem most effectively when they identify with and are integrated into the larger lesbian and gay community").

43. Smith, *supra* note 1, at 571–72.

44. *Id.* at 545–52, 565–66.

45. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1378 (1988) ("Removal of . . . public manifestations of [racial] subordination was a significant gain for all Blacks, although some benefited more than others.").

more difficult for victims of discrimination to litigate equality claims. In a society that disparages overt manifestations of racism, racist actors often mask their racist intent, making it hard for victims of racism to prove unlawful discrimination.[46] In a classic article, Charles Lawrence traces the problem of subtle or unconscious racism to theories of modern psychology.[47] The human mind reduces racist perceptions to the level of subconsciousness in order to avoid a conflict with prevailing social norms that disparage overt racism.[48] Barbara Flagg powerfully extends Lawrence's analysis in her work on the "transparency" of whiteness, to which she attributes much of the subtle discrimination in contemporary American society.[49] Finally, David Benjamin Oppenheimer has examined a battery of social science data that demonstrate the pervasive embrace of racialized and gendered stereotypes by whites and males.[50]

As Smith's work illustrates, courts have often failed to contextualize their analyses of claims of discrimination within this historical, psychological, and social science framework that informs the work of Lawrence, Flagg, Oppenheimer, and other scholars. Instead, courts have engaged in a decontextualized analysis that treats pervasive patterns of racial and gender discrimination as neutral and legitimate. The dismissal of impact evidence occurs almost routinely in the context of equal protection claims,[51] while courts

---

46. *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 Cornell L. Rev. 1151, 1169 (1991) ("Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1135 (1997) (arguing that the Court has "defined discriminatory purpose in terms that are extraordinarily difficult to prove in the constitutional culture its modern equal protection opinions have created—a culture that now embraces 'equal opportunity' and 'nondiscrimination' as a form of civic religion").

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

48. *See id.* at 331–36 (discussing psychoanalytic approach to racism).

49. Flagg, *supra* note 8, at 957.

50. *See* David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 Hastings Const. L.Q. 921, 946–58 (1996).

51. *See, e.g*, Sheila Foster, *Intent and Incoherence*, 72 Tul. L. Rev. 1065, 1144–61 (1998) (criticizing the Court's dismissal of discriminatory impact statistics in equal protection litigation); Damon J. Keith, *What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years After the 1963 March on Washington*, 19 Harv. C.R.-C.L. L. Rev. 469, 476 (1984) (arguing that "the Court has imposed on the aggrieved party an almost insurmountable burden of proving discriminatory intent"); Randall L. Kennedy, McClesky v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1405

continue to apply, at least in theory, impact models in the Title VII setting. Judicial blindness to facts of history and sociology not only influences the standard case that seeks to prove discrimination by relying, at least in part, upon evidence of discriminatory impact, but it can also impact enforcement of Section 704. As Professor Smith argues, persons of color often engage in "self-help" measures to counter racism, rather than taking the uncertain and costly task of litigating perceived incidents of racism.[52] If these employees suffer retaliation for their antiracist speech, existing jurisprudence may not afford them a remedy under Title VII due precisely to courts' inability to reckon with subtle discrimination.

The judicial unwillingness to recognize unconscious bias affects the Section 704 litigant in two ways. First, courts may not appreciate the level of unconscious bias or everyday indignities that persons of color endure routinely in the workplace, and will therefore question or remain skeptical of the plaintiff's perceived need for protest. If courts are unable to comprehend the pervasive nature of subtle discrimination, then they will likely not find that the plaintiff had a good faith basis for engaging in racial protest. A second way in which judicial ignorance of subtle discrimination can impact a Section 704 plaintiff lies in the doctrinal requirement that the plaintiff's protest—even if based on a good faith belief that the employer is violating Title VII—occurred in a "reasonable" (or nondisruptive) fashion. If courts do not fully comprehend the psychological harms that subtle racism engenders, then they will not appreciate the sometimes colorful or dramatic nature of a plaintiff's reaction to acts of discrimination. Under a decontextualized analysis, courts evaluating the disruptive nature of antiracist and feminist protest have portrayed "minority and female complainants as sociopaths."[53]

Professor Smith urges courts to abandon their decontextualized discussion of discrimination in favor of the approaches advocated by antisubordination and civil rights theorists like Lawrence, Flagg, and Oppenheimer.[54] Yet, Smith could strengthen his own analysis by demonstrating more generally how courts—within and outside of Title VII litigation—weaken

(1988) (arguing that the discriminatory intent rule requires plaintiffs in racial discrimination cases to prove "that officials were 'out to get' a person or group on account of race"); Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 Ohio St. L.J. 117, 136 (1987) ("Because a discriminatory intent standard has led to insurmountable barriers against equal protection relief, and does not even measure unconscious motivation, a new test for calibrating the appropriate level of judicial review may be indispensable for security against modern wrongs.").

52. Smith, *supra* note 1, at 530, 533–34.

53. *Id.* at 561.

54. *Id.* at 536–40.

antidiscrimination law by rejecting a contextualized or fact-based approach to civil rights adjudication.[55] A more comprehensive analysis of antidiscrimination jurisprudence demonstrates that the judicial rejection of context and facts exists as a structural problem in contemporary equality doctrine.

In equal protection litigation, for example, the Supreme Court has repeatedly legitimated laws that, though facially neutral, cause pervasive, often anticipated, patterns of discrimination against historically oppressed classes. The Court, however, has dismissed plaintiffs' efforts to contextualize these discriminatory patterns within a long history of racial and gender domination. Instead, the Court has treated these patterns as presumptively constitutional and has discredited even the most sophisticated statistical, historical, and sociological analyses that seek to unveil the racist and patriarchal roots of "neutral" statutes. In *McCleskey v. Kemp*,[56] for instance, the Supreme Court rejected an equal protection challenge to the Georgia death penalty.[57] The petitioner relied upon a study that controlled for over 230 non-racial variables to isolate race as a substantial factor in the administration of the state's death penalty,[58] and he pointed to the long history of racial discrimination in the context of Georgia criminal procedure.[59] The Court, however, ignored this factual context and dismissed the study as presenting a mere "discrepancy that appears to correlate with race."[60] Furthermore, in a blatant marginalization of the continued importance of the legacy of racial domination, the Court relegates its "discussion" of the relevance of Georgia's history of brutal racial discrimination in the context of criminal law to a mere footnote and summarily rejects petitioner's attempt to invoke this history as a context for understanding his claim of racial discrimination. The court acknowledges that:

> McCleskey relies on "historical evidence" to support his claim of purposeful discrimination by the State. This evidence focuses on Georgia laws in force during and just after the Civil War. Of course, the "historical background of the decision is one evidentiary source" for proof of intentional discrimination. But unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. Although the history of racial discrimination in

---

55. *See, e.g.*, Resnik, *supra* note *, at 623–24.

56. 481 U.S. 279 (1987).

57. *Id.* at 291–92.

58. *Id.* at 287.

59. *Id.* at 298 n.20.

60. *Id.* at 312.

> this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.[61]

The Court's sterile analysis vividly demonstrates the extent to which contemporary equal protection jurisprudence engages in an ahistorical treatment of racial subordination. The ancient and ongoing legacy of racial discrimination in criminal procedure adds a reasonable context to McCleskey's claim of discrimination.[62] In the absence of this history, the contemporary patterns indeed might indicate a "mere discrepancy" and McCleskey's proof might lack social significance.[63]

While the *McCleskey* decision suggests that more recent histories of discrimination might bolster impact evidence in equal protection litigation, precedent in this area paints a dramatically different picture. The Court has applied its stringent discriminatory intent rule even in the face of more recent "overt" discrimination against subjugated classes. In *Washington v. Davis*,[64] for example, the Court first began to require discriminatory intent in equal protection cases;[65] yet, the *Davis* decision, which involved a challenge to an employment practice that caused a racially discriminatory effect, was issued only twelve years after the codification of Title VII. The next year, in *Arlington Heights v. Metropolitan Housing Development Corporation*,[66] the Court would

---

61. *Id.* at 298 n.20.

62. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding imprisonment of Japanese Americans during World War II based on race alone); Powell v. Alabama, 287 U.S. 45 (1932) (reversing conviction of black males accused of raping white women where defendants convicted and received death penalty after one day trial, with all-white jury, and without assistance of counsel); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating criminal ordinance that was enforced in a strikingly racist fashion to the detriment of Chinese Americans and to the advantage of whites); *see also* Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 75 (1973) (observing that 405 of 455 men executed in the United States for rape were black); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. Rev. 969, 984 (1992) ("Characterizing the judiciary's treatment of slaves and free blacks as a 'system of justice' is almost a semantic illusion. Free whites were guaranteed an elaborate system of procedural rights and protections, but blacks suffered under an equally elaborate regime of injustice and harsh penalties.").

63. I extensively address the matter of decontextualized equal protection jurisprudence, including the *McCleskey* decision, in a forthcoming article. *See* Hutchinson, *supra* note 7.

64. 426 U.S. 229 (1976).

65. *Id.* at 248.

66. 429 U.S. 252 (1977) (holding that municipal zoning decision that had racially disparate effects did not violate equal protection).

dismiss as nonprobative impact data in a housing segregation case that was decided just eight years after the enactment of the Fair Housing Act.[67] Title VII and the Fair Housing Act, however, were enacted in a time of overt and pervasive anti-black discrimination.[68] Furthermore, the passage of civil rights statutes indicates an ongoing need to address discrimination against vulnerable classes.[69] Yet, in *Davis* and *Arlington*, the Court found this social setting irrelevant. Thus, even in cases where overt racial discrimination has existed contemporaneously with a plaintiff's claim, the Court has applied an inflexible and decontextualized approach that denies equal protection of the laws.

In addition to dismissing the evidentiary efforts of individual litigants to prove discrimination, the Court has challenged governmental proof in this context as well. For example, in *United States v. Morrison*,[70] the Court invalidated a statutory right of action created by the Violence Against Women Act[71] on the grounds that it did not pertain to interstate commerce or correct a gendered defect in state legislative processes.[72] Congress, however, compiled exhaustive research on the connections among private gendered violence, interstate commerce, and equality.[73] Moreover, in the affirmative action cases, courts have challenged the fact-finding of Congress and state governments (and their subdivisions) in order to overrule governmental arguments supporting remedial uses of race.[74] The Court has engaged in a decontextualized analysis of governmental evidence of discrimination and has treated all forms of race consciousness—whether remedial or invidious—as presumptively unconstitu-

---

67. 42 U.S.C. § 3601 (1994).

68. *See, e.g.*, Lawrence, *supra* note 47, at 366–69 (discussing history of invidious housing discrimination with respect to the *Arlington Heights* case).

69. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in the judgment and dissenting in part) ("It is natural that evolving standards of equality come to be embodied in legislation.").

70. 529 U.S. 598 (2000).

71. The invalidated section was contained at 42 U.S.C. § 13,981 (2000).

72. *See Morrison*, 529 U.S. at 613, 625–26.

73. *Id.* at 628–36 (Souter, J., dissenting) (discussing evidence that Congress considered before implementing the Violence Against Women Act); *id.* at 666 (Breyer, J., dissenting) (same).

74. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that congressional contracting affirmative action plan should be subjected to "strict scrutiny"); Richmond v. Croson, 488 U.S. 469 (1989) (plurality opinion) (holding that municipal contracting affirmative action plan violated Equal Protection Clause); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion) (holding that state medical school affirmative action policy violated Equal Protection Clause).

tional.[75] Accordingly, the inability of courts to recognize the subtleties of discrimination does not affect Title VII litigation alone; instead, courts have exhibited a pervasive intolerance of historical and sociological inquiries in the equality context. Professor Smith can fortify his claim that courts render Title VII inadequate by canvassing these additional juridical areas. These cases suggest, however, that Smith's endeavor to push courts toward a more contextualized equality doctrine may face much more resistance than his analysis concedes.[76]

IV. RACIAL REALISM: THE LIMITATIONS OF LAW AS AN INSTRUMENT OF SOCIAL CHANGE

A final, less substantial, point I wish to make regarding Smith's analysis centers around the implications of critical legal insights, particularly the legal indeterminacy theory, upon his arguments. For most of his article, Smith takes a highly critical stance toward the judicial treatment of plaintiffs in the Title VII context; he bolsters his arguments using liberal and deconstructionist arguments. Yet, Smith concludes his work in modernist fashion by offering a jurisprudential model that he believes will help move law beyond the structural barriers his critical analysis uncovers. Even if courts were to embrace Smith's contextual model, it is possible that the results he desires may not materialize in each case. As critical legal scholars have argued, legal analysis is indeterminate; it is malleable and cannot secure a fixed set of outcomes (even in cases involving closely parallel facts).[77] Thus, it remains unclear whether courts will place sufficient emphasis on historical and contemporary realities of racism even if they apply Smith's contextualized approach, or whether white normative or assimilationist perspectives will re-mutate into new "neutral" perspectives in an analysis that attempts to push courts beyond the present transparently white discourse.[78] I am particularly concerned that in assessing the "disruptive" nature of a plaintiff's response to

---

75. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. Pa. L. Rev. 1, 113 (2000) (arguing that the Court's remedial race redistricting opinions "suggest a new and troubling conception of equal protection, one that appears to be unable to take account of the different ways and contexts in which government may seek to use race, particularly in order to combat discrimination").

76. Smith, *supra* note 1, at 558.

77. *See* Hasnas, *supra* note 9, at 86–90.

78. *See supra* note 8 (discussing the oppressive nature of "neutral" laws).

racism, courts will act upon racial biases that construct persons of color as menacing, threatening, and criminal.[79]

Ironically, Smith discusses Derrick Bell's article recounting the racial discrimination he faced as a professor at Harvard Law School; Smith argues that while Bell could protest racism behind the safety of tenure (which he ultimately relinquished), poor workers only have Section 704 to protect them from unlawful white supremacist retaliation to their antiracist speech.[80] Even the privileged Bell, however, remains highly skeptical toward the ability of law to provide meaningful social change. In an essay entitled *Racial Realism*,[81] Bell argues that American law and society will never transcend their racist roots,[82] thus demonstrating his view of racial subordination as a permanent feature of American existence.[83] Moreover, critical scholars in varying degrees and in a diversity of intellectual contexts have questioned the utility of law as a vehicle for social change.[84] Notwithstanding the insightful nature of these critiques, for several reasons I do not believe that Smith wastes his analysis on legal institutions.

First, as Critical Race theorists have demonstrated, legal analysis can simultaneously embrace both an intense skepticism toward law and legal reasoning while relying upon legal structures as an avenue for progressive change.[85] Critical Race theorists first addressed the "duality" of progressive race theory in response to the Critical Legal Studies movement's assault on rights-based approaches to equality.[86] Informed by poststructuralist and neo-Marxist

79. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1616–51 (1985) (discussing studies demonstrating constructs of blacks as menacing and violent).

80. Smith, supra note 1, at 573–74.

81. *See* Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363 (1992).

82. *See id.* at 373 ("Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.").

83. *See id.* at 377 ("It is time we concede that a commitment to racial equality merely perpetuates our disempowerment. Rather, we need a mechanism to make life bearable in a society where blacks are a permanent, subordinate class.") (footnote omitted).

84. *See* Hutchinson, *Closet Case*, *supra* note 24, at 132–33 & nn. 150-218 (discussing critical stances by various scholars towards law as an instrument of social change).

85. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 430 (1987) (discussing the simultaneous embrace and skepticism of rights by blacks).

86. *See Minority Critiques of the Critical Legal Studies Movement*, 22 Harv. C.R.-C.L. L. Rev. 297 (1987) (presenting several works by Critical Race theorists opposing the radical

thought, Critical Legal theorists deconstructed rights: they viewed them as indeterminate, as causing false consciousness among and offering artificial hope to oppressed people, as declawing progressive activism, and as alienating members of the populace from one another.[87] While Critical Race theorists share the disenchantment of Critical Legal Studies with rights jurisprudence, they also recognize the important historical and social role that rights approaches have played in the liberation of persons of color. In a series of essays, Critical Race theorists argue that while rights are malleable and indeterminate, they have elevated the psyche and economic and social status of persons of color; rights therefore provide a concrete, if imperfect, remedy for social subordination.[88] Thus, while an internal tension exists among the critical and modernist strands of Critical Race Theory, race theorists have resigned to "occupy that very tension."[89] Smith's work models the dual nature of Critical Race Theory. While he takes a critical and deconstructive stance toward legal analysis, he ultimately wishes to refashion legal analysis to make it more responsive to the needs of oppressed persons, rather than abandoning the project of law entirely.

Finally, even as I raise the indeterminacy thesis as a factor to consider in critical legal analysis, I do not wholly embrace this form of analysis as a legitimate critique. First, as the Critical Race Theory and Critical Legal Studies contestation over rights approaches demonstrates, oppressed people have benefited historically from a rights approach. Critical scholarship such as Smith's seeks to reinvigorate antidiscrimination law that suffers greatly under the inflexible and sterile approaches of conservative jurists. Furthermore, the indeterminacy critics fail to offer a tangible alternative to legal analysis. While the law might remain a complicated venue for pursuing remedies to social inequality, critics who wish to discard law altogether have neglected to explain how other disciplines offer more concrete results or why progressive scholars and activists should not pursue legal strategies concurrently with efforts in the political sector. The task for critical scholars, therefore, does not consist of advocating a wholesale abandonment of law and other modernist structures; instead, their status as progressives might require these scholars to revisit and directly engage modernist structures, blending critical and reconstructive

deconstruction of rights by Critical Legal scholars).

87. *See* Hutchinson, *Progressive Race Blindness?*, *supra* note 41, at 1476 (discussing Critical Legal Studies skepticism towards rights).

88. *See supra* note 8.

89. *See* Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 Cal. L. Rev. 741, 762 (1994) (arguing that Critical Race theorists must "live in the conflict between modernism and postmodernism").

approaches.[90] Professor Smith's work makes these important integrative efforts. On the one hand, Smith uncovers the white, transparent, and oppressive nature of existing Title VII jurisprudence, but he also offers a concrete jurisprudential model for addressing the problems of subtle discrimination and the linkages between expression and identity. Smith's work provides a complicated and critical, yet appropriate, response to the factless and decontextualized nature of contemporary equality doctrine.

V. CONCLUSION

Professor Smith's article offers a compelling alternative to the factless state of contemporary equality jurisprudence. His model of equality, which links speech, identity, and well-being, can serve as a guide for reforming not only Title VII jurisprudence, but also doctrinal approaches to equality in the constitutional setting. While Smith's essay could benefit from a more thorough interrogation of the insights of critical legal scholarship, particularly Critical Race Theory, his essay undoubtedly makes an important contribution to ongoing efforts to reform equality doctrine.

---

90. *See, e.g.*, *id.*