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Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment

MARY E. BECKER*

As a result of many advantages, white men earn significantly more than women and minorities, especially minority women. Women with college educations earn less than men with high school educations.¹ Comparisons of wages for full time white male workers and minority women are especially dramatic. For example, African-American women workers earned \$0.62 for every \$1.00 earned by white male workers in 1988.² Hispanic women earned even less: \$0.56 for every \$1.00 earned by white men.³

These differences are attributable to many factors. Employment discrimination is only one aspect of the systemic subordination of women and people of color to whites and men, particularly white men, under rules, practices, and standards made by white men and preserving their power. In a society in which neither race nor sex affected future access to economic security and power there would be both a more equitable distribution of resources and less subordination.

Given the systemic subordination of other groups to white men, Professor Strauss has focused our attention on an important question: what are the best remedies for racial discrimination in employment?⁴ He suggests several reasons why we should replace individual remedies with a system of quotas and fines.⁵ After using economic models to describe discrimination, he discusses why such discrimination is conventionally regarded as wrong.⁶ Professor Strauss posits that individual disparate treatment is hard to prove and that disparate treatment remedies work best when the market itself is most likely

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1. THE AMERICAN WOMAN 1990-1991 392 (1990) (comparing earnings of workers age 25 and over for 1987).

2. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 409 (1990) [hereinafter CENSUS REPORT] (for full time year-round workers, median weekly earnings were \$288 for African-American women and \$465 for white men).

3. See *id.* (median weekly earnings for Hispanic women were \$260).

4. Strauss, *The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1619 *passim* (1991).

5. *Id.* at Part IV.

6. *Id.* at Parts I and II.

to eliminate discrimination.⁷ In addition, he asserts that there are too many weak employment discrimination cases.⁸ He therefore suggests that individual claims of disparate treatment be eliminated except for government enforcement and replaced by a system of quotas and goals.⁹

I agree with much of what Professor Strauss has to say. Title VII of the Civil Rights Act of 1964¹⁰ is not a very effective way of equalizing the opportunities of white men and other workers. Title VII is inadequate because it focuses only on employment, though much of the inequality in the wage-labor market is attributable to structural advantages white men enjoy outside the wage labor market. Current Title VII remedies are inadequate for discrimination within employment. And even within Title VII's limited ambit, too few individuals sue.¹¹

I also agree that a system of quotas would be a good remedy for the disadvantages women and minorities face than individual disparate treatment claims. There are, however, problems with the quota system proposed by Professor Strauss. Further, why must we choose between quotas and individual relief. Structuring the question as such a choice in today's political climate is extremely dangerous.

Remedies for employment discrimination are appropriate for two reasons. Remedies should offset or eliminate the structural advantages of white males. Remedies should also compensate identifiable individuals who have been damaged by subordination on the basis of race and sex, just as tort law compensates individuals injured in other, analogous contexts. Although quotas are often more effective than individual remedies at eliminating structural barriers, individual wrongs should be compensated just as we compensate other sorts of individual wrongs in the tort system.

I am also troubled by Professor Strauss's method. He accepts abstract economic models as describing the real world of discrimination and then tailors legal remedies to cover only that discrimination likely to persist according to these models. But the economic models of discrimination have not been successful at explaining the real world persistence of discrimina-

7. *Id.* at Part IV.A.1-2.

8. *Id.* at 1645.

9. *Id.* at Part IV.D.

10. 42 U.S.C. § 2000e (1988).

11. As a formal matter, Title VII does include structural remedies in the form of disparate impact claims, but recent Supreme Court decisions have virtually eliminated this aspect of Title VII by making it extremely difficult for plaintiffs to win. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657, 659 (1989) (to establish prima facie case of disparate impact under Title VII, employees must show any racial disparity in workplace results from specific employment practices; furthermore, plaintiffs retain burden of persuasion in showing such practices not justified by legitimate business needs); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 991, 997 (1988) (disparate impact analysis applies to subjective employment practices but employee retains burden of proof in showing no business necessity exists for employer's actions).

tion.¹² Nor do they describe all forms of discrimination. They do not even purport to describe two common forms of discrimination: many employers' desire to dominate and their difficulty empathizing with women and people of color.

Another problem is Professor Strauss's abstract and narrow focus on a single racial minority—African Americans. He does not consider their history and, thus, ignores historical reasons why individual remedies might be justified. He also ignores the fact that most members of racial minorities—women of color—experience racial discrimination in conjunction with sexual discrimination. Any employment discrimination remedy should consider the problems of race and sex discrimination for this most vulnerable group of employees.¹³ And Professor Strauss does not consider other racial groups at all, though, for example, Hispanic Americans earn even less than African Americans.¹⁴

This article is divided into six sections. Section I presents a concrete example of discrimination. It is used to make substantive points throughout the other sections of this article. Section II examines the methodological problem of relying on economic models to describe the reality of discrimination. Section III presents a number of problems with considering remedies for *racial* discrimination without including the needs of women, particularly women of color. Section IV discusses the continuing need for individual remedies. Section V discusses the substantive problems with the Strauss quota system as well as the danger in today's political climate of suggesting that we repeal individual remedies and enact a system of quotas and fines.

Section VI suggests alternative reforms. The section begins with a discussion of ways in which Title VII could be improved, many of which were included in the Civil Rights Act of 1990¹⁵ and are included in the proposed Civil Rights Act of 1991,¹⁶ and ends with a discussion of structural remedies aimed at improving workplace opportunities by looking beyond the workplace to social structure.

I. DISCRIMINATION IN THE REAL WORLD

Helen Brooms was a thirty-six year old married black woman when she

12. See Donohue & Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, Part II (1991) (in the segregated South, for example, discrimination survived market forces in part because of informal social penalties for not discriminating and universal racist perceptions of blacks' abilities).

13. Recall that women of color earn significantly less than white women or men. See *supra* notes 2-3.

14. CENSUS REPORT, *supra* note 2, at 409.

15. S. 2104, 101st Cong., 2d Sess. (1990).

16. H.R. 1, 102d Cong., 1st Sess. (1991).

was hired by Regal Tube Company as its industrial nurse.¹⁷ She was supervised by John Oberlin, Royal's Assistant Manager, and Charles Gustafson, Regal's Human Resource Manager. Gustafson made many sexist and racist statements to Brooms during the sixteen months she worked at Regal. Brooms ignored or objected to these comments during her first eight or nine months on the job. She did complain to Oberlin after Gustafson propositioned her on a business trip she and Gustafson made together. Oberlin advised her "to tell Gustafson that her husband had given her herpes and to tape-record her conversations with Gustafson."¹⁸

Brooms declined to follow this advice and wrote a letter of protest to Francis Sazama, Regal's Vice President and General Manager, with a copy to John Oberlin. Sazama hired an attorney to investigate the allegations. That attorney interviewed both Gustafson and Brooms and found Brooms to be "honest and straightforward."¹⁹ Sazama met with Brooms who said, in response to Sazama's inquiry, that she wanted "an apology from the company and from Gustafson and . . . the offensive remarks to end."²⁰ Sazama then met with Gustafson and made him apologize to Brooms, delayed Gustafson's merit raise, and told him that he would be fired if he repeated the behavior. Although Gustafson told Brooms as soon as Sazama left that he was not afraid of Sazama, he did not harass her for several weeks thereafter.²¹

A couple of months later, however, the harassment escalated. "[I]n a particularly offensive incident, Gustafson showed Brooms a pornographic photograph depicting an interracial act of sodomy and told her that the photograph showed the 'talent' of a black woman."²² Gustafson told Brooms she had been hired for that purpose. After this event, Brooms filed a formal charge with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission. Regal received notice of the charge but apparently took no action against Gustafson.

A few months later, Gustafson showed Brooms one of several xerox copies of a "racist pornographic picture involving bestiality."²³ He told her that the picture illustrated "how she 'was going to end up.'"²⁴ As Brooms reached for one of the copies, "Gustafson grabbed her arm and threatened to kill her if she moved."²⁵ Brooms "threw coffee on him and ran away, screaming and

17. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 416 (7th Cir. 1989).

18. *Id.* at 416 n.1.

19. *Id.*

20. *Id.*

21. *Id.* at 416-17.

22. *Id.* at 417.

23. *Id.*

24. *Id.*

25. *Id.*

falling down a flight of stairs as she fled."²⁶ She was temporarily disabled and never returned to Regal. Gustafson and those above him "determined that he would no longer be effective at Regal" and he resigned.²⁷

Brooms filed suit under Title VII and section 1981 of the Civil Rights Act of 1866.²⁸ The jury, as the trier of fact in the section 1981 suit, denied her compensatory and punitive damages, finding that "Brooms did not prove by a preponderance of the evidence that defendant Gustafson 'had engaged in racial harassment which was so excessive that it altered the condition of plaintiff's employment and created an abusive working environment.'"²⁹ The judge found for Brooms on her Title VII claims and awarded her back pay but no other compensatory damages.³⁰

Against the background of Helen Brooms's experience, I consider the adequacy of both Strauss's method and proposed reform. In the next section, I focus on his method—reliance on economic models of discrimination. In subsequent sections, I consider his reform in light of the discrimination Helen Brooms faced.

II. ECONOMIC MODELS

Economic models of discrimination play a critical role in David Strauss's argument for eliminating (apart from agency enforcement)³¹ individual relief for disparate treatment in employment. Strauss argues that individual relief is unnecessary because "[t]he disparate treatment standard is most effective at duplicating the work that the market is likely to do anyway. . . ."³² This is true if and only if economic models and their underlying assumptions describe the reality of discrimination adequately and accurately. In this section, I discuss five major failings of economic models of discrimination: the assumptions of rationality and exogenous preferences, the failure to recognize the desire to subordinate and the difficulty empathizing with women and people of color as forms of discrimination, and the expectation that markets will eliminate discriminatory desires.

A. RATIONALITY

Adherents of economic models assume that, when discriminating on the

26. *Id.*

27. *Id.*

28. 42 U.S.C. § 1981 (1988).

29. *Brooms*, 881 F.2d at 417.

30. *Id.* Compensatory damages are available for claims of *racial* discrimination under section 1981 but are not available under Title VII, though the latter provides back pay relief for sex as well as race discrimination. 42 U.S.C. § 2000e-5(g) (1988).

31. For a discussion of the problems with relying on agency enforcement, see *infra* Part IV.c.

32. Strauss, *supra* note 4, at 1644.

basis of race or sex, people act rationally given their exogenous preferences or their perceptions of group differences. Some discrimination is, of course, rational: a rational employer will be less likely to employ members of a racial minority if they have gone to inferior schools.

Much discrimination is not, however, rational. The word "discrimination" is poorly chosen, suggesting rationality where it is often absent. Professor Robin West pointed this out to me in comments on an earlier draft. "Discrimination" means the ability to make fine distinctions, to see subtle differences, to use one's reason in an analytically rigorous way. Racism and misogyny—the belief that people of color and women are less than fully human—are not "discrimination" in this sense. One does not believe that African Americans and women are less than fully human because of an analytically rigorous delineation of subtle differences between them and white men. To the contrary, racism and misogyny are deeply irrational emotions, based on hatred or a lack of empathy for "the other," often accompanied by the need to establish one's own importance by denying others' humanity. It is not reason and fine ethical distinctions that explain why jurors impose the death penalty most often on African-American defendants whose victims were white.³³

Strauss nevertheless uses economic models which assume that discriminators act rationally given exogenous preferences. Like the economic modelers, Strauss never defines "rational." Perhaps he means choosing what is in one's narrow self interest. If this is what is meant by rational discrimination, then Charles Gustafson did not behave rationally in harassing Helen Brooms. He lost his job because, even after a warning from a superior, he escalated his harassment. Perhaps "rational" does not have so narrow a meaning. Perhaps it means only doing what satisfies one's preferences, even when the result is self-destruction. At this point, however, "rational" does not have meaning; it is tautological. What one does is rational because one does it.

B. EXOGENOUS PREFERENCES

Economists who use economic models assume that discriminatory preferences arise outside of regulatory systems, but discriminatory preferences are precisely what discrimination law should be regulating. This point can be made in two ways.³⁴ First, as a historical matter, current preferences are in part the result of past forms of regulation which are not exogenous to the

33. See *McCleskey v. Kemp*, 481 U.S. 279, 286, 292-93 (1987) (study of 2000 murder cases in Georgia showed jury imposed death penalty in 22% of the cases involving black defendants and white victims, which was far more often than cases involving either white defendants or black victims; such statistics insufficient to prove defendant's sentence discriminatory and violative of equal protection clause).

34. See generally Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3 (1991).

legal system. Slavery and Jim Crow are closely connected to the refusal of many whites today to interact with African Americans as equals. Past legal limitations on women's ability to function as autonomous human beings are closely connected to the refusal of many men today to interact with women as equals.

Second, there would be no need for antidiscrimination laws if current preferences to discriminate on the basis of race or gender were not troubling and capable of change through regulation. The relevant question is how existing preferences can most effectively be changed.

To assume, as economists do, that preferences are external to, and independent of, the regulatory system, is to limit inappropriately the range of possible solutions considered. For example, as discussed in Part VI.B, many changes outside the employment system might be necessary if employer preferences are to change.

There is an additional problem with economists' assuming exogenous preferences. Ideally, the reformer interested in ending discrimination should know how discriminatory attitudes are formed and why they persist. In a world in which we understand little, it may be necessary to try to limit discrimination without such knowledge. But the more the reformer understands about how and why racist and sexist attitudes develop and endure, the more effective reform is likely to be. Economic models blind the reformer to this need by assuming what needs to be explored: the existence and persistence of discriminatory "preferences."

We do not, in fact, have a very good understanding about how racism and sexism take shape and persist. It is, however, clear that socialization—teaching social norms through interpersonal interactions—is powerful in these areas.³⁵ A comparison of various societies reveals that, although different racial, ethnic, or religious groups are disfavored in various societies, among societies there is "much consistency through time in the pattern of intergroup relations."³⁶ Individuals learn prejudice within a culture like they learn other aspects of culture.³⁷ Socialization tends to produce individuals who conform to group norms with respect to intergroup attitudes.³⁸

Socialization in our society operates through parents, peers, schools, and

35. See Ashmore & Del Boca, *Psychological Approaches to Understanding Intergroup Conflicts*, in *TOWARDS THE ELIMINATION OF RACISM* 73-114 (P. Katz ed. 1976) (discussing theories that racism is learned through sociocultural interaction as well as through intergroup conflict, intergroup relationships, cognitive and psychological processes).

For a discussion of a psychological theory of gender inequality, see N. CHADOROW, *THE REPRODUCTION OF MOTHERING* 9-10 (1978) (women's mothering places them in a domestic sphere where they are dominated by men who occupy a nondomestic, public sphere).

36. Ashmore & Del Boca, *supra* note 35, at 94.

37. *Id.*

38. *Id.* at 97.

the mass media.³⁹ There is evidence that each of these cultural channels shapes intergroup attitudes.⁴⁰ One cause of racism is that whites are more visible than African Americans in school text books, the media, etc.⁴¹ Whites know less about African Americans than African Americans know about whites in terms of history and culture. This "lack of knowledge about blacks and their past makes them 'strange,' and there may be some psychological rejection of strangeness per se."⁴² Lack of knowledge and contact as equals produce psychological distance, and "laboratory studies [suggest] that psychological distance makes it easier for one person to aggress against another."⁴³

Similar points can be made about socialization and inequality between the sexes. Boys and girls learn an ideology of gender, that a key part of one's identity depends on gender because girls and boys, women and men, are essentially different and have different interests and abilities. This message is given continuously through children's books, the media, toys, clothes, and interactions with others. Even the best intentioned parents cannot eradicate these differences. Girls, for example, are taught from very young ages that their appearance is critically important ("you look so pretty in that dress") in ways boys never experience.

Religion is another socializing influence creating sexist attitudes, at least for Christians. Women who support nontraditional roles for women are likely to have had Jewish, atheist, or agnostic parents.⁴⁴ In general, religious Christian women have more traditional attitudes than nonreligious women,⁴⁵ and traditional roles for women translate into underemployment and low wages in the wage labor market. For example, one study finds a correlation between Christians' religiosity and their preference for men as bosses and

39. *Id.* at 96.

40. *See id.* at 96-100 (citing studies on how parents, peers, schools, and the media affect and shape people's prejudices).

41. *See id.* at 98-99 (textbooks usually ignore black culture and the media tends either to present a skewed picture of blacks or none at all).

42. *Id.* at 98.

43. *Id.*

44. Dempewolf, *Some Correlates of Feminism*, 34 *PSYCHOLOGICAL REPORTS* 671, 674 (1974). Religion continues to be passed down from parents to children. *See* Jennings, Allerbeck, & Rosenmayr, *Generations and Families: General Orientations*, in *POLITICAL ACTION: MASS PARTICIPATION IN FIVE WESTERN DEMOCRACIES* 464 (1979) (in study of five industrialized countries, vast majority of children professed same religious identity as their parents); *America: Land of the Faithful*, *AM. ENTERPRISE*, Nov./Dec. 1990, at 101 (90% of those raised as a Protestant are Protestant today; over 80% of those raised as Catholic or Jewish are, respectively, Catholic or Jewish today).

45. *See* Himmelstein, *The Social Basis of Antifeminism: Religious Networks and Culture*, 25 *J. FOR SCI. STUD. RELIGION* 1, 7-12 (1986) (women involved in religious activities are less likely to support an Equal Rights Amendment and pro-abortion laws than their nonreligious peers).

professionals.⁴⁶ Through religion and other socializing forces, women of all colors are "stereotyped, culturally dominated, and sexually objectified" and, as a result, internalize their inferiority and status as sexual objects.⁴⁷

Socialization as an explanation for racial and sexual inequality only begs the question: why do racist and sexist social norms develop? I do not address this complex question, but make only a more limited point. We might do a better job of eliminating sexism and racism if we understood these social forces better. Further, it is likely that we need to look at socialization practices and norms if we want to ensure equality of opportunity in the workplace. The reformer who accepts economic models as describing the reality of discrimination will not see the need either to understand how discriminatory attitudes develop or to look beyond the workplace for their correction.

C. SUBORDINATION

A third failing of economic models is that they do not even purport to describe the discrimination Helen Brooms faced from Charles Gustafson at Regal Tube. According to the economic models, discrimination takes one of two forms. Some people discriminate because of an aversion to interacting with people in certain other groups: "someone has a 'taste for discrimination,' " if "he" acts "as if he were willing to forfeit income in order to avoid certain transactions" (i.e., working with African Americans or women).⁴⁸ Others discriminate because of real or perceived differences between members of various groups with respect to something relevant to productivity, such as quality of education.⁴⁹ Neither of these forms of discrimination includes the desire of dominants to subordinate those perceived as "other," the desire Charles Gustafson felt when he encountered Helen Brooms.

The failure to include the desire to subordinate is a major gap in economic models of discrimination. Some people discriminate, not because of a desire to work with those like themselves, but because they desire to dominate certain people from other groups. This can occur in situations other than harassment. Some whites might, for example, prefer to employ blacks as domestic or menial workers because this would be consistent with their notions of the appropriate roles for whites and blacks.⁵⁰ Part of one's identity

46. Ferber, Huber, & Spitz, *Preference for Men as Bosses and Professionals*, 58 SOC. FORCES 466, 470 (1979). Catholic women, however, were less traditional than Protestant men and women or than Catholic men. *Id.*

47. BARTKY, *On Psychological Oppression*, in FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 23 (1990).

48. G. BECKER, *THE ECONOMICS OF DISCRIMINATION* 16 (2d ed. 1971) (emphasis omitted).

49. See Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 *passim* (1972) (creating a statistical model illustrating employees' use of race or skin color as a proxy for relevant job information).

50. See *Slack v. Havens*, 522 F.2d 1091, 1092-93 (9th Cir. 1975) (supervisor expected black, but

can be superiority to members of other groups, and appropriate interactions can be ego enhancing.

This desire for subordination, rather than aversion, may be a greater part of discrimination against women than against racial minorities. Sexist men do not, as a general rule, try to avoid all contact with women. On the contrary, they desire contact in certain subordinating forms, such as having women as secretaries and dependent wives. In contrast, many whites would prefer to avoid all contact with African Americans, although other whites, like Gustafson, enjoy subordinating relationships with people of color.

This taste for subordination can be expressed in economic terms. Gustafson's "taste" for sexually humiliating African-American women suggests that he would be willing to pay these subordinates more than, for example, white male nurses. Gratification of one's desire to subordinate is a form of consumption. Gary Becker and other economists who adopt economic models have not, however, incorporated the desire to subordinate into their equations.⁵¹

John Donohue and James Heckman make a similar point in their contribution to this symposium. They note that even aversion discrimination may be viewed as a form of consumption if the discriminator "gets positive utility from hiring workers of a given racial group . . . [because] this conduct serves to brand the nonpreferred races as inferior."⁵² When discrimination in the form of satisfying a desire to subordinate is consumption, there is no reason to expect the market to drive out discrimination regardless of whether it is employers, other employees, or customers who want to subordinate.⁵³ As consumption, subordination can endure despite costs associated with it provided that the utility derived from consumption is greater than the cost.⁵⁴

An economist might respond that a remedy is nonetheless inappropriate because, if Gustafson cannot harass women, or perhaps black women, he may not hire them at all.⁵⁵ This is the standard economic argument against

not white, workers in bonding and coating department of manufacturing plant to help clean because, according to supervisor, "Colored people are hired to clean because they clean better.")

51. See G. BECKER, *supra* note 48, at 16-18 (discussing only tastes for discrimination and market discrimination); Arrow, *The Theory of Discrimination*, in DISCRIMINATION IN LABOR MARKETS 6 (1973) (discussing discrimination only in terms of an aversion to minority groups).

52. Donohue & Heckman, *supra* note 12, at 1723.

53. *Id.*

54. *Id.*

55. An economist might also argue that the Royal Tube job simply was an *additional* opportunity for Helen Bloom. Eliminating it would not be in her favor. She would only have one less job opportunity, and some African-American female job applicants might be willing to endure Gustafson's harassment in order to receive the premium he is willing to pay. This assumes that such a job applicant has perfect information, that there are alternative employment opportunities (at a slightly discounted wage) open to the applicant, and that she knows that there will be less harassment at those jobs than at this one. Alternatively, it assumes that she could easily switch jobs after she has

antidiscrimination remedies: Title VII will not expand opportunities for minorities and women; it will only restrict them. If employers cannot, for example, pay women less because they value them less, they will not hire them at all. Has Title VII, in fact, worked to increase or decrease opportunities for minorities and women?

Empirical work suggests that Title VII has had some marginal positive effect and has not simply closed opportunities for women and minorities.⁵⁶ More importantly, antidiscrimination legislation seems to have changed cultural norms. Although it is impossible to gauge Title VII's effect in changing cultural norms, racial and sexual discrimination are considered by many to be less appropriate today than in 1964 when Title VII was passed. Similarly, sexual harassment is seen as less legitimate than it was before sexual harassment was regarded as illegal under Title VII. These normative changes may be the most important result of Title VII.

A number of my criticisms in this subsection have dealt with the inability of the Strauss proposal to deal with harassment. In the final version of his

been at Royal long enough to realize what faces her. But applicants often have far-from perfect information about a workplace, few viable alternatives, and there are high costs to switching jobs.

56. See, e.g., Beller, *The Effects of Title VII of the Civil Rights Act of 1964 on Women's Entry into Nontraditional Occupations: An Economic Analysis*, 1 L. & INEQUALITY 73, 75 (1983) (concluding that "Title VII has proved somewhat effective in narrowing the earnings gap between men and women"); Donohue & Heckman, *supra* note 12, at Part I (reviewing evidence which suggests Title VII has contributed to African Americans' economic gains); Heckman & Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138, 143-44 (1989) (Title VII had positive effects for African Americans in textile plants in South Carolina when EEOC targeted southern textile manufacturers for enforcement efforts; Title VII may have given employer basis for doing what they wanted in tight labor market despite "tastes" of white employees); Pettigrew & Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41, 45-46 (1987) (noting that "governmental actions against racial discrimination" have resulted in employment gains by blacks; for example, in large part because of a settlement between the FCC and Bell Telephone Company, "[b]etween 1960 and 1980 the black proportion of the nation's telephone operators rose from 2.5 to 14.5%").

The Office of Federal Contract Compliance (OFCC), which mandates affirmative action for those contracting with the federal government, has been more effective. See, e.g., EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NONCONTRACTOR ESTABLISHMENTS, 1974-1980: A REPORT OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS 63-64 (1984) (minorities and women employed in greater numbers and in a greater variety of jobs in workplaces operating under OFCC requirements than in workplaces operating only under Title VII requirements); J. LEONARD, THE IMPACT OF AFFIRMATIVE ACTION 38 (1983) (review of 68,000 establishments concludes that blacks' share of employment increased in OFCC workplaces). See also *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary and the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 207 (1985) (statement of the National Association of Manufacturers) ("affirmative action has been and is an effective way of ensuring equal opportunity for all people in the workplace"); H. HAMMERMAN, A DECADE OF NEW OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970's 5 (1984) (Potomac Institute study finds affirmative action an important factor in increasing the number of working minorities and women and in improving the kinds of positions they held).

proposal, Strauss includes a footnote stating: "I should make clear that I do not view my analysis as applying to issues of harassment, and I do not suggest that the scheme I propose is an effective way of dealing with harassment."⁵⁷ He does not, however, explain what individual remedies would survive under his proposal nor how harassment differs from other forms of disparate treatment. Indeed, even in this footnote he does not explicitly state that individuals would be able to bring individual harassment claims if his proposal were adopted. And the proposal itself still states "private individuals should not be able to bring suits for discriminatory treatment under the employment discrimination laws."⁵⁸

Harassment is not a unique form of discrimination.⁵⁹ The points I make about the proposal in light of what happened to Helen Brooms at Regal Tube could be made about other forms of disparate treatment. For example, an employer might adopt an explicit rule requiring black women (or all women) to wear make-up and mini skirts because of a desire of the decisionmaker, male employees, or customers for sexualized and subordinating relationships with women or certain women. Such a requirement would not be harassment (as that word is conventionally understood) but could be equivalent to harassment in terms of the underlying motivations and effects: sexualization of women employees. Similarly, an employer could require black women (or all women) to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have [their] hair styled, and wear jewelry."⁶⁰ Again, this would not be conventionally regarded as harassment but could be equivalent in terms of sexualizing and subordinating women employees. Would women be able to contest these employment practices under the Strauss proposal? If they could, why not all forms of disparate treatment? Precisely what forms of individual disparate treatment would survive?

D. DIFFICULTY WITH EMPATHY

Another form of discrimination not addressed by the economic models is a lessened ability to empathize and identify with women and people of color and to put oneself in their shoes, incorporating their hurts and needs into

57. Strauss, *supra* note 4, at 1624 n.17.

58. *Id.* at 1655.

59. Strauss concludes footnote 17 by stating: "I discuss (from a different angle) the relationship between harassment and discrimination in Strauss, *Discriminatory Intent and the Taming of Brown*," 56 U. CHI. L. REV. 935, 1004-06 (1989). Strauss, *supra* note 4, at 1624 n.17. The brief discussion of harassment in this earlier article argues that harassment is a form of disparate treatment even if the employer's policy can be expressed in neutral terms (employer ignores all harassment). This is entirely consistent with my point: harassment is one form of disparate treatment and not unique in any relevant way.

60. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (holding such conduct discriminatory).

one's perceptions.⁶¹ We all empathize best with those most like ourselves,⁶² but we live in a society in which white men disproportionately hold positions of power. Their difficulties empathizing with women and people of color are, therefore, especially troubling. In addition, even women and people of color may fail to give appropriate weight to the sufferings and needs of those like themselves because they have internalized their inferiority.⁶³

Sexual or racial harassment is one rather extreme form of this failing. Charles Gustafson, for example, did not take into account Helen Brooms's suffering as human pain; he found it titillating rather than troubling. He could not empathize with her. Had she been another white male, he might have been able to empathize with "her" suffering.

Decisionmakers discriminate by failing to empathize in countless situations other than sexual or racial harassment. For example, a decisionmaker considering how severely to discipline an employee who has behaved inappropriately may react differently depending on the offender's race and sex because of a lessened ability to empathize with the problems of women and people of color. Similarly, a decisionmaker evaluating a subordinate's performance will be affected by whether she can empathize with the difficulties the subordinate has faced either at work or at home. Empathy or the lack of it pervades all interpersonal relationships, including the workplace.

Again, the economic models fail to describe this form of discrimination. It is based neither on an aversion to contact with members of certain groups nor on a perception that groups differ with respect to productivity, the two forms of discrimination encompassed by the economic models. If lessened ability to empathize with women and people of color is widespread, the market will not drive out this unconscious emotional failing. It certainly has not eliminated it yet.⁶⁴

61. For discussions of the problem of lessened empathy for women and people of color, see, e.g., D. BELL, *AND WE ARE NOT SAVED* 162-77 (1987) (describing how society is so much more attuned and responsive to whites' problems than blacks'); Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1620-38 (1987) (discussing how some Supreme Court justices' lack of empathy for women affected abortion cases); West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 81-83 (1987) (the legal culture has ignored how women's pain and pleasure differ from men's).

62. Henderson, *supra* note 61, at 1584.

63. See BARTKEY, *supra* note 47, at 22-23 (constant psychological oppression by the dominant group can result in the dominated group internalizing feelings of inferiority and low self-esteem).

64. See S. ESTRICH, *REAL RAPE* 4-5 (1987) (suggesting that juries have difficulty empathizing with rape survivors). The high rate at which juries impose the death penalty on black defendants whose victims are white suggests jurors have more difficulty empathizing with such defendants than others. See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987) (death penalty imposed in 22% of murder cases where defendant black and victim white). Although these sources do not deal with employment, the decisionmakers involved are, of course, also present in the workplace.

E. MARKETS SATISFY DESIRES

Economic models of discrimination predict that the market will eliminate, on inefficiency grounds, discriminatory "preferences" not based on accurate perceptions of group differences.⁶⁵ But the market will often reinforce, rather than eliminate, such discrimination because markets facilitate satisfaction of the desires of those with an ability to pay.

The racial and sexual segregation of labor and subordination of people of color and women did not begin with capitalism. Capitalism developed in societies in which people of color and women were regarded as less human than white men, were "naturally" subordinate to white men, and generally performed different tasks than white men. Any economic system that develops in a society in which power and opportunities are differentially allocated on the basis of race and sex is likely to operate in a manner that will perpetuate those differentials, regardless of the particulars of economic organization or theory. Thus, opportunities and wages may be allocated on the basis of productivity and potential in a capitalist economy, but productivity and potential are assessed by those with the ability to pay. The desires, values, biases, and blind spots of the dominant determine the allocation of wages and opportunities and the meaning of "productivity" and "potential" in a capitalist economy.⁶⁶

Consider two specific examples of the market's inability always to eliminate discriminatory desire: Charles Gustafson's desire for subordinating sexuality and the cross-cultural sexual division of labor. The market did not in fact drive out Charles Gustafson's desire to dominate Helen Brooms. And it is far from certain that Charles Gustafson will control his behavior in the future, even though he did lose his job at Regal Tube. Sexuality can be self-destructive as well as destructive of the humanity of others. Gustafson may lose job after job harassing African-American women, but may nevertheless persist.

Even if Gustafson does learn to behave differently, he did harass Helen Brooms. He will not be the last to harass a woman. In a culture in which pornography is widely consumed and the subordination of women of all colors is sexualized,⁶⁷ individuals with Charles Gustafson's desires will come of age, get jobs, and abuse positions of power for at least temporary periods. In an increasingly pornographic culture, the market will not drive out such de-

65. See Strauss, *supra* note 4, at Part III.A.

66. This paragraph is taken from a discussion in an earlier publication. Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel & Lazear*, 53 U. CHI. L. REV. 934, 935-36 (1986).

67. See generally Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 591-602 (discussing how pornography subordinates women and desensitizes men).

sire. The market will stimulate it—through advertising, for example—because satisfaction of desires is a good for which people will pay.

The cross-cultural sexual segregation of labor is a second illustration of the market's limitations. Regardless of the details of economic organization, in all cultures there is a division of labor by sex.⁶⁸ Although there is a great deal of variation from society to society in what work is men's and what women's, whatever men do is more important than whatever women do.⁶⁹

More than twenty-five years after the effective date of Title VII, the sexual division of labor in the United States remains extremely high if one looks at site specific data—the extent to which women and men in a single workplace hold segregated jobs.⁷⁰ Consistent with the cross-cultural data, the jobs women hold are valued less than the jobs men hold. In 1988, for full-time workers, women earned about \$.70 for every \$1.00 earned by men.⁷¹ This is remarkably close to the differential specified in the book of Leviticus: fifty shekels for a man and thirty for a woman.⁷²

Differences in women's and men's education, training, and labor market commitment explain, at most, about half of this wage gap.⁷³ These differences may themselves, of course, reflect different treatment of women and men (e.g., with respect to on-the-job training) and the different opportunities they face. Women, for example, may well underinvest in human capital relative to men because they receive less than men in return for their human

68. Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 178 (R. Reiter ed. 1975). Gayle Rubin has called this phenomenon "a taboo against the sameness of men and women, a taboo dividing the sexes into two mutually exclusive categories, a taboo which exacerbates the biological differences between the sexes and thereby creates gender."

69. Ortner, *Is Female to Male as Nature Is to Culture*, in *WOMAN, CULTURE, & SOCIETY* 67 (1974) ("secondary status of woman in society is one of the true universals"); Reskin, *Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work*, 2 *GENDER AND SOC.* 58, 63 (1988) ("men's activities are typically valued above women's"); Rubin, *supra* note 68, at 178.

70. In measuring either the degree to which the sexes are equal or the amount of sex segregation remaining, one should look at site specific data, rather than aggregate data, because individual women and men are not integrated into the same jobs unless they are working at the same job at the same place. If, for example, women and men are managers in equal numbers in different industries or firms at different wage levels (with higher pay and status for men), sex segregation has not ended, and women and men are not equal.

One of the few site specific studies is Bielby & Baron, *A Woman's Place is with Other Women*, in *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES* 27 (B. Reskin ed. 1984) [hereinafter *SEX SEGREGATION IN THE WORKPLACE*]. This study looked at data from 1959-1979 and found that "segregation levels were virtually constant [in most organizations studied] during the late 1960s and early 1970s." *Id.* at 50-51.

71. See *CENSUS REPORT supra* note 2, at 409 (median weekly earnings were \$449 for men and \$315 for women).

72. *Leviticus* 27:1-4.

73. Corcoran, Duncan & Ponza, *Work Experience, Job Segregation, and Wages*, in *SEX SEGREGATION IN THE WORKPLACE* 184-185 (1984); Rhode, *Gender Equality and Employment Policy*, in *THE AMERICAN WOMAN 1990-1991* 179 (1990).

capital investments. In any event, the other half of the wage gap is associated with the fact that women and men do different work (or the same work in different work places), and the work men do is valued more highly than the work women do at any given site.

Given the cross-cultural persistence of a sexual division of labor and the devaluation of women's work, it is unrealistic to expect the market to eliminate sex discrimination. The market does not set values in a vacuum, but in the context of social values. If sexual sameness in labor is taboo and women are devalued, the market will reflect these inequities rather than eliminate them.

In sum, reformers should not accept economic models of discrimination as describing the real world of discrimination for several reasons. First, economists using these models assume people discriminate "rationally" given their exogenous preferences, though much discrimination is not "rational" in any meaningful sense. Second, such economists assume "preferences" are exogenous whereas discriminatory desires are socially constructed. Rather than ignoring how such preferences arise, we need to focus on how to change their construction. Third and fourth, these economists ignore the desire to subordinate and the difficulty of empathizing with women and people of color as forms of discrimination. Fifth, markets facilitate satisfying desires rather than eliminating them.

I now turn from examining Strauss's reliance on economic models to other aspects of his proposal. In the next section, I criticize the narrow way in which he focuses on race. In subsequent sections, I consider other problems with the quota-fine plan and propose alternative reforms.

III. RACE WITHOUT HISPANICS, HISTORY, OR SEX

In this section I offer three criticisms of Professor Strauss's narrowly focused discussion. First, Strauss mentions only one racial minority—African Americans. A thorough discussion of race discrimination must include other racial minorities. Second, Strauss fails to consider the effect of history; any thorough discussion of the reasons for remedying discrimination must include more history. Third, Strauss analyzes only race, and not sex, discrimination; considering race discrimination without discussing sex is likely to lead to reforms that do too little for the most vulnerable groups in the labor market.

First, Strauss discusses racial discrimination but mentions only one racial minority: African Americans. There are many racial minorities in the United States. As gauged by wages, African-American workers are not the most vulnerable group in the American labor force; Hispanic workers earn less. Hispanic men earn \$0.66 for every \$1.00 earned by white men; African-

American men earn \$0.72 for every \$1.00 earned by white men.⁷⁴ Hispanic women earn \$0.56 for every \$1.00 earned by white men while African-American women earn \$0.62 for every \$1.00 earned by white men.⁷⁵ Strauss's failure to talk about discrimination against other minorities, especially this particularly vulnerable group, may lead to problems identifying necessary remedies or reforms. For example, Hispanic workers will not have equal opportunities in the job market as long as many are working as illegal aliens, making them particularly vulnerable to exploitation.

My second and related point is that Strauss includes little in the way of history beyond the occasional reference to "past" wrongs.⁷⁶ He does not ever refer to slavery or to the fact that, at the end of slavery, "freed" people were not given their share of the wealth they had amassed; whites kept it all. Nor does he refer to the fact that whites stole the land and destroyed the culture of Native Americans, though that might obviously be relevant to reasons for remedying discrimination against Hispanics, many of whom are the descendants of Native Americans.

Third, Strauss discusses what remedies are appropriate for race discrimination without considering how sex discrimination should be remedied. Judged by yearly wages, the most vulnerable groups in employment are Hispanic and African-American women.⁷⁷ Yet the needs of Hispanic and African-American women cannot be addressed by remedies geared solely to race discrimination without any consideration of sex. Race and sex are not mutually exclusive categories. Kimberle Crenshaw has described what happens when they are treated as though they were: "Black women are theoretically erased."⁷⁸ A similar point could be made about Hispanic women and other women of color.

Discrimination against women of color often operates differently, is fueled by different factors, and results in different stereotypes, than discrimination

74. See CENSUS REPORT, *supra* note 2, at 409 (in 1988, median weekly earnings were \$347 for African-American men, \$307 for Hispanic men, and \$465 for white men).

75. See *supra* note 2.

76. See Strauss, *supra* note 4, at 1629 (in a brief discussion, Strauss refers only to "past wrongs" without citing any specifics).

77. See *supra* notes 2-3 and accompanying text.

78. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. OF CHI. L.F. 139, 139. See also P. COLLINS, *BLACK FEMINIST THOUGHT* 221-237 (1990) (discussing importance of not viewing race, gender, age, class, etc. as separate systems of oppression); Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 10 (1989) ("By creating two separate categories for its major social problems—'the race problem,' and 'the women's issue'—society has ignored the group which stands at the interstices of these two groups, black women in America."); Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991) (discussing many problems black women have under Title VII because of judges' failure to appreciate the ways in which sex discrimination and race discrimination interact).

against either men of color or white women. Consider, for example, African Americans. Sexuality has played an important part in racist attitudes towards black men, who tend, more than white men, to be regarded primarily in terms of their (very threatening) sexuality.⁷⁹ In different ways, sex has been historically used to subordinate black women; consider the frequent rape of female slaves by their owners and overseers. Even after abolition, black women could be raped with impunity, especially by white men.⁸⁰ To this day, black women are seen as “easier” and as more exotic sexual partners than white women.⁸¹ These and other factors (there has been little research on how discrimination operates against black women⁸²) are likely to affect the treatment of African-American women in the job market.

Similar points could be made about Hispanic women, Asian women, and other women of color. Discrimination operates differently for each of these groups with respect both to men of their group and women of other groups. Asian women are, for example, seen as particularly passive.

Three points follow from an appreciation of how sex discrimination intersects with race discrimination. First, the reformer should consider how discrimination against these marginal groups operates in deciding what reforms are needed. Second, the reformer should appreciate that one cannot deal separately with racial and sexual discrimination.

Both these points are illustrated by *Brooms v. Royal Tube*. A reformer who considered racial-sexual harassment would not be likely to eliminate individual remedies in favor of racial quotas. Such “reform” leaves Helen Brooms inadequately protected with respect to race discrimination. Helen Brooms experienced discrimination as an African-American woman, not as *either* a woman *or* a member of a racial minority. Helen Brooms was racially *and* sexually harassed. Recall, for example, that Gustafson told her that a pornographic picture showed the “talent” of a black woman.⁸³ If racial and sexual remedies are distinct, Helen Brooms will have difficulty presenting her claim for racist-sexist harassment. If Helen Brooms is to be able to seek a remedy for the kind of discrimination she actually experienced (rather than the kind a black man or a white woman would have), then she must be able to show that Gustafson made racist-sexist comments.

If Helen Brooms is limited to making claims of either racial or sexual discrimination, then she must express her wrong in terms of the wrongs suffered

79. See BARTKY, *supra* note 47, at 23 (“Black men and women of all races have been victims of sexual stereotyping—[and] are thought to lack the capacities for instinctual control”).

80. Crenshaw, *supra* note 78, at 157-59.

81. *Id.* at 159.

82. Pettigrew & Martin, *supra* note 56, at 52 n.5.

83. *Brooms v. Royal Tube Co.*, 881 F.2d 412, 417 (7th Cir. 1989).

by the more privileged.⁸⁴ There will be some risk that she will lose both claims. The trier of fact may conclude that she was not discriminated against on the basis of race (as the jury did) and also that she was not discriminated against on the basis of sex (as the judge, fortunately, did not).

Because her harassment was seen as only sexist, Helen Brooms was unable to get full relief; the remedies available to her distinguished between race and sex. Section 1981 relief, with compensatory damages, was available only for claims of racial, and not sexual, harassment.⁸⁵ Title VII is available for claims of racial and sexual discrimination, including harassment,⁸⁶ but awards monetary damages only in the form of back pay;⁸⁷ general compensatory damages are not available under Title VII. Because the jury found no racial discrimination, Helen Brooms was limited to back pay under Title VII in her claim for sex discrimination.

Brooms should not have had to plead and prove her racial harassment and sexual harassment claims separately because the harassment was both sexist and racist. The inability to combine these forms of discrimination under section 1981 resulted in an inadequate remedy. Reformers should not consider the appropriate remedies for race discrimination separately from the remedies for sexual discrimination.

There is a third problem with Strauss's failure to consider the needs of women of color. If Strauss's quota applies only to race and does not, for example, apply separately to African-American women as a group distinct from African-American men, then employers, including blue collar employers who are likely to prefer men for a variety of reasons,⁸⁸ can fill their quota by hiring only African-American men. African-American women would have no apparent remedy under the Strauss proposal, despite the likelihood that such an employer will discriminate more against them than against African-American men. As a result, African-American women may have less chance of being hired for traditionally male, higher-paying jobs under the Strauss quota system than today. Yet Strauss never considers the effect of his proposal on this vulnerable group of workers.

84. Crenshaw, *supra* note 78, at 140 ("in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged blacks; in sex discrimination cases, the focus is on race- and class-privileged women").

85. 42 U.S.C. § 1981 (1988) (language does not encompass sexual discrimination).

Today, racial harassment claims can no longer be brought under § 1981. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) (§ 1981 only applies to "discrimination only in the making and enforcement of contracts" and not to racial harassment).

86. *See id.* at 180 (racial and sexual harassment actionable under Title VII).

87. 42 U.S.C. § 2000e-5(g)(1988).

88. *See Becker, From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1237-1241 (1986) (women have been excluded from blue collar jobs because of their vulnerability to hazardous environments, the costs of protective equipment and added washrooms, and the difficulties with on-the-job training).

In this section, I have criticized Strauss's narrow focus on race discrimination because he ignores racial minorities other than African Americans, ignores history, and ignores the fact that racial minorities have a sex. I have argued that the reformer must consider the experience and needs of the many racial minorities in the United States, the history of these groups, and the fact that most are women. In the absence of such analysis, we are unlikely to formulate reforms that will meet the needs of the most numerous and vulnerable people of color: women. I have argued for "placing those who currently are marginalized in the center" of reform efforts.⁸⁹ In the next section I consider Strauss's proposal to eliminate individual remedies for employment discrimination on the basis of race.

IV. THE CONTINUING NEED FOR INDIVIDUAL REMEDIES

Professor Strauss proposes that individual remedies under Title VII be eliminated.⁹⁰ Agency enforcement would still be available, but unless the agency pursued a claim, an individual claimant would be limited to "state wrongful discharge actions and . . . employment grievance proceedings."⁹¹ In this section, I offer two related criticisms of this aspect of the Strauss proposal. First, I argue there is a continuing need to redress individual claims of discrimination, addressing in detail a number of Strauss's points about why such claims are no longer necessary. Second, I argue that the question is not whether such claims should be entirely eliminated, but whether a federal forum should be available for discrimination claims.

A. THE CONTINUING NEED FOR INDIVIDUAL CLAIMS

In building a case against redress of individual disparate treatment claims, Strauss offers a number of unsubstantiated assertions. I begin with his more general assertions and then move to specific ones.

1. *The market will tend to eliminate nonstatistical discrimination.*⁹² The most basic problem with Strauss's conclusion that the market will tend to eliminate nonstatistical discrimination (especially employer or employee animus) has been discussed in an earlier section of this article: his reliance on inadequate economic models. Economic models do not describe reality, and thus cannot justify eliminating individual remedies. Individual remedies continue to be needed. The market had not, for example, driven out racial-sexual harassment by 1983 and 1984, the years Charles Gustafson harassed Helen Brooms. She needed an individual remedy.

89. Crenshaw, *supra* note 78, at 167.

90. Strauss, *supra* note 4, at 1655.

91. *Id.*

92. *Id.* at Part III.A.

2. "[T]he employment discrimination laws should be designed to give employers incentives to hire and promote members of minority groups in proportion to their representation in the relevant population."⁹³ Professor Strauss offers no compelling reason for this assertion. In other areas—tort and contract, for example—the law is concerned with compensating injuries as well as creating appropriate incentives. Why should Helen Brooms's injury be less compensable than the injuries traditionally recognized as tort or breach of contract? What sort of message would a legal system give were it to compensate individual injuries in tort and contract but not in employment discrimination?

Antidiscrimination law, like law in other areas, should be concerned both with compensating past injuries and creating incentives so that injuries will be less likely in the future. Title VII provides too little, not too much, compensation for past injuries. Title VII did not fully compensate Helen Brooms, though Gustafson's conduct harmed Helen Brooms just as surely as if he had committed a clearly recognized tort. She should be fully compensated by receiving, not only backpay, but also compensation for the pain and suffering associated with her psychological and physical injuries.

3. *There are too many Title VII cases brought today.*⁹⁴ In arguing that our society has moved beyond individual disparate treatment claims, Strauss maintains that there are too many Title VII cases. The evidence suggests, however, that there may be too few. People are much less likely to see a lawyer or litigate an employment discrimination claim than any other legal claim.⁹⁵ Although people may be more likely to consult a lawyer today about job discrimination than they were in the past,⁹⁶ data from 1974 are spectacularly low: only about 1% of those who thought they had been discriminated against in employment consulted a lawyer.⁹⁷ In the period from 1978 to 1985, over twice as many personal injury tort cases were brought in federal courts as job discrimination cases.⁹⁸ This is a particularly striking statistic because most personal injury cases were probably brought in state

93. *Id.* at 1620.

94. *Id.* at 1648.

95. See B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 135 (1977) (study based on interviews conducted in 1974 concluded that people are much less likely to consult a lawyer about perceived job discrimination than any other legal problem).

96. See Samborn, *Many Americans Find Bias at Work*, *THE NAT'L LAW JOURNAL*, July 16, 1990, at 1 (62% of people surveyed reported that they would be more likely to sue for employment discrimination than they would have been five years ago).

97. B. CURRAN, *supra* note 95, at 136. The next lowest category involved disputes against a municipality; only about 6% of people with such disputes consulted a lawyer. *Id.* at 135.

98. See Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 *J. LEGAL STUD.* 337, 357 (1990) (15,865 personal injury tort claims brought, compared to 7,165 job discrimination claims).

courts during this period. Without data about the relative incidence of traditional tortious injuries and employment discrimination, together with information about the number of torts litigated in any court and norms about the appropriate level of litigation in these areas, one cannot conclude that there have been too many Title VII suits. There may have been too few.

There are a number of weaknesses in Title VII which make it extremely likely that there are too few suits. Title VII has unusually short filing requirements⁹⁹ and no compensatory damages other than backpay.¹⁰⁰ Title VII trials are painful for plaintiffs both personally and professionally. Many discriminatees do not know that there has been discrimination. Discriminatees still working for the discriminator are reluctant to sue. Even people who have been fired are unlikely to sue because suing is likely to have a negative effect on employability for the rest of their lives; the plaintiff may be considered a whiner, someone who can't take a joke and go with the flow. For countless reasons, including the internalization of inferiority, victims are unlikely to sue.¹⁰¹

Another reason there are too few Title VII cases is because it is too difficult for plaintiffs to win on the merits. A number of substantive rules hamper plaintiffs. The roll call of recent Supreme Court cases limiting the availability of employment discrimination remedies is well known,¹⁰² but other substantive rules also pose problems. Consider, for example, the tendency of judges to consider women's job preferences as stable and exogenous to women's perceptions about employment opportunities.¹⁰³ This tendency

99. 42 U.S.C. § 2000e-5(e) (1988) (charges must be filed with the EEOC within either 180 days or 300 days of the discriminatory act, the longer period being applicable in states with EEOC-like state agencies).

100. *Id.* § 2003-5(g) (compensatory damages limited to back pay).

101. K. BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 78-84, 98-108 (1988) (discussing the problems victims have, including feeling intimidated and powerless, in using the legal system to redress discrimination).

102. *See, e.g.,* *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 909-10 (1989) (time period in which challenges to discriminatory seniority systems must be brought begins to run from the date the seniority system adopted, not from when effects of seniority system felt); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (plaintiff has burden of persuasion in showing not only that an employment practice had a disparate impact, but also that it did not serve a legitimate business purpose); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989) (once employee shows a decision was influenced by impermissible discrimination, the defendant has opportunity to show that, but for the discrimination, the same decision would have been made); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 997-98 (1988) (in challenge to promotion criteria, employer has burden of producing evidence that its practices serve a business necessity; employee retains burden of proving equally effective, nondiscriminatory criteria exist).

Although *Price Waterhouse* at least shifts the burden from the plaintiffs, it would be better to hold that the defendant loses once the plaintiff shows that the decision was tainted.

103. *See* Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1756 (1990).

has made it very difficult to use Title VII to challenge sex segregation in the workplace, even though segregation is a major component of workplace discrimination on the basis of sex.¹⁰⁴

Because many discrimination claims can only be tried by judges,¹⁰⁵ judicial hostility may be another reason too few cases are brought. My impression from reading a nonrandom selection of cases is that it is much easier for federal judges to empathize with and find for plaintiffs in age discrimination cases.¹⁰⁶ This is not surprising since age discrimination plaintiffs are often elderly professional white men like the judges themselves, people judges can easily imagine are qualified. Juries do better than judges at empathizing with plaintiffs in employment discrimination cases. One study reports that when employment discrimination cases in federal court were tried by a judge, plaintiffs won 19.2% of the time.¹⁰⁷ In contrast, when the cases were tried by a jury, plaintiffs won 42.6% of the time.¹⁰⁸ This is true even in the south, where plaintiffs won cases tried by judges only 18.6% of the time but won cases tried by juries 38.4% of the time.¹⁰⁹ Success rates before juries are not out of line with success rates for other kinds of claims in federal courts. For example, plaintiffs win personal injury cases involving assault, libel, and slander 42% of the time in federal court.¹¹⁰

4. *Title VII cases are weak; plaintiffs are marginal employees.*¹¹¹ Strauss minimizes the need for on-the-job disparate treatment protection by asserting that “[e]ven a discriminating employer will be less likely to discharge a supe-

104. See EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1315 (N.D. Ill. 1986), *aff'd*, 839 F.2d 301 (7th Cir. 1988) (EEOC presented statistical evidence showing employer had significantly underhired women for higher paying jobs, but trial judge found any workplace segregation was due to women's lack of interest in the higher paid, more competitive jobs).

For an excellent critique of cases suggesting women's job preferences are shaped outside of the workforce and suggestions for better substantive rules, see Schultz, *supra* note 103.

105. Juries are only available in § 1981 suits, which can be brought only when the plaintiff alleges race discrimination in hiring or in promotion to a new position (which is considered equivalent to a new contract of employment). See *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) (by its plain terms, § 1981 applies only to the “making and enforcement” of contracts).

106. Compare the following cases in which the Seventh Circuit took strikingly different approaches to sex discrimination and age discrimination plaintiffs. Compare *International Union v. Johnson Controls, Inc.*, 886 F.2d 871, 892 (7th Cir. 1989), *rev'd* 111 S. Ct. 1196 (1991) (in challenge to employer excluding all fertile women from certain hazardous jobs, plaintiffs bear burden of showing no less restrictive, equally effective alternative policies exist) with *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1209-12 (7th Cir. 1987) (where employer fired manager of unprofitable plant because he made more money than other employees, court found age discrimination because employer did not meet burden of showing that less restrictive alternative—such as reducing salary—as not available).

107. Eisenberg, *Litigation Models and Trial Outcome in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1591 (1989).

108. *Id.*

109. *Id.*

110. Eisenberg, *supra* note 98, at 357.

111. Strauss, *supra* note 4, at 1645.

rior minority employee.”¹¹² In deciding what remedies are needed, the reformer cannot assume that everyone will act in their rational self-interest and that the market will therefore eliminate discrimination. Discrimination is based, in part, on factors too deeply embedded in the human psyche to be so easily eradicated. Consider, for example, Gustafson’s treatment of Brooms. Or consider a male supervisor deciding, because the economy is in a slump,¹¹³ whether to fire a man (whom he regards as a breadwinner) or a woman (whom he regards as earning a disposable second income). Choosing the man over the woman might not be entirely rational if she is the superior worker, but it nevertheless occurs. Recall the experience of women workers in factories when World War II ended and the “boys” came home. Most were fired regardless of ability. Moreover, it is “rational” in some sense for male decisionmakers to maintain male privilege, regardless of the interests of the owners of a company.

Strauss asserts that “there is some tendency for plaintiffs in discrimination litigation to be borderline employees.”¹¹⁴ He does not, however, cite any authority for this assertion.¹¹⁵ In part, it is based on Strauss’s belief that even “a discriminating employer will be less likely to discharge a superior minority employee.”¹¹⁶ But it does happen. That it is unlikely does not mean it may not happen millions of times a year in a country as large as the United States. Many unlikely events lead to legal liability for harm caused when they do occur. Strauss does refer to anecdotal evidence that a Title VII disparate treatment trial tends to be a two- or three-day investigation of “the qualifications of a borderline employee.”¹¹⁷ But this ignores the settlement effect. One would expect strong cases to settle. They may even settle prior to a complaint being filed. If strong cases settle, one would expect the litigated cases to be weak. That the litigated cases may be weak does not mean that all cases are weak or that the cause of action is unnecessary. Moreover, the fact that plaintiffs before juries win employment discrimination cases under section 1983 as often as assault, libel, and slander cases¹¹⁸ suggests that litigated Title VII claims are no weaker than other claims, though the requirement that Title VII claims be tried before more hostile judges is a problem and likely to result in too few Title VII cases being brought.

112. *Id.*

113. Discriminatory firing claims rise when the economy is weak. Donohue & Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 999-1000 (1991).

114. Strauss, *supra* note 4, at 1645.

115. Later in that same paragraph, Strauss cites to Donohue & Siegelman, *supra* note 113. This paper, however, only establishes that Title VII cases usually involve firing rather than failure to hire. Donohue and Siegelman say nothing about the strength or weakness of Title VII firing cases.

116. Strauss, *supra* note 4, at 1645.

117. *Id.* at 1646.

118. *See supra* notes 106-110 and accompanying text.

Further, if individual claims for outrageous discrimination are eliminated, overt discrimination will become more common. The fact that overt discrimination has declined since Title VII was enacted hardly guarantees that it will not reappear were Title VII to disappear. Racism and sexism pervade our culture. Racist hate speech is emerging more strongly on college campuses.¹¹⁹ Pornography and sexist jokes pervade many workplaces even with Title VII on the books.¹²⁰

5. *Statistical discrimination is most likely to occur at hiring.*¹²¹ Strauss minimizes the need for on-the-job disparate treatment protection with the statement that statistical discrimination "is most likely to occur in hiring."¹²² He cites no authority for this proposition. Discrimination at entry is certainly a major problem. But statistical discrimination may occur whenever the decisionmakers who statistically discriminate interact with a member of the suspect group. If the "suspect" (i.e., the person suspected of having characteristics perceived as typical of her or his group) is in a token situation with few members of her or his group present, majority workers are likely to assume the "suspect" is incompetent.¹²³ Supervisors often have unreasonably low or high expectations about the performance of "suspects."¹²⁴ Unrealistically low expectations may affect job assignments and performance.¹²⁵ Because of statistical discrimination, the "suspect" workers may receive lower evaluations than similarly-competent white coworkers.¹²⁶ In one experiment, white subjects were asked to rank workers whose performance was manipulated. They ranked African-American workers significantly lower than white workers.¹²⁷ Statistical discrimination is not a discrete event occurring at hiring. It pervades on-the-job interactions.

119. See Byrne, *Racial Insults and Free Speech*, 79 GEO. L.J. 399, 401-02 nn.6-7 (1991) (citing examples of white students abusing minority students on university campuses).

120. Consider, for example, the results of a recent University of Cincinnati study of women in the construction industry which found that even women who worked for companies with strong antidiscrimination policies faced sexual harassment and sexist jokes. *Women in Construction: Great Opportunity, Great Frustration*, United Press International, March 25, 1991 (available on Lexis).

121. Strauss, *supra* note 4, at 1647.

122. *Id.*

123. See Pettigrew & Martin, *supra* note 56, at 59 (citing studies suggesting majority workers view token workers as incompetent and dissimilar).

124. See *id.* at 55-58 (experiments show that perceptions of "solo" individuals are more extreme than perceptions of majority workers).

125. See *id.* at 55-56 (blacks sometimes internalize low expectations, leading to lower performance).

126. See *id.* at 56, 60-65 (low expectations frequently result in low performance). See also Hamner, Kim, Baird, & Bignoess, *Race and Sex as Determinants of Ratings by Potential Employers in a Simulated Work-Sampling Task*, 59 J. APPLIED PSYCH. 705 (1974) (empirical study in which subjects exhibit race discrimination in ratings).

127. Hamner, Kim, Baird, & Bignoess, *supra* note 126, at 705.

B. A FEDERAL FORUM

David Strauss suggests that if individual disparate treatment claims can no longer be brought under Title VII, claimants will be able to sue only if their claims can be brought as statutory or common law wrongful discharge claims or in a grievance proceeding.¹²⁸ But eliminating individual claims under Title VII will not have this effect because states have adopted antidiscrimination laws which provide direct remedies for discrimination. The result of eliminating individual claims under Title VII will be to relegate them to state fora, not eliminate them. The question, therefore, is whether a federal forum should be available.

A federal forum should be available because plaintiffs then have a better chance of finding an unbiased forum: they can choose between state and federal court. State courts may often be more hospitable to these claims, but a federal forum should be available for all the reasons federal courts have traditionally been available to redress discrimination claims in constitutional and other areas: these are important cases and deserve the least biased forum available. Pursuant to the fourteenth amendment, the federal government should act affirmatively to provide more, not less, protection to vulnerable groups than that available from the state.

C. THE INADEQUACY OF AGENCY ENFORCEMENT

Individual suits remain necessary because agency enforcement has always been and is almost certain to remain inadequate. The Equal Employment Opportunity Commission (EEOC) has been notoriously ineffective at dealing with individual complaints of discrimination.¹²⁹ Its primary priority during the last decade has often been to close the maximum number of cases in as timely a manner as possible. This is done most efficiently if claims are found to have no reasonable basis after little or no investigation.

There is no reason to think that a new agency would do better. Strauss proposes that discriminatory treatment claims be "screened in the way that unfair labor practice claims are currently screened by the National Labor Relations Board [NLRB]."¹³⁰ But the NLRB has hardly been effective in fostering strong unions in the United States.¹³¹

128. Strauss, *supra* note 4, at 1655.

129. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?* 42 VAND. L. REV. 1121, 1170 (1989) (Reagan era has left "the EEOC . . . largely inoperative"); Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1327 (1990) (during 1973-1975, the EEOC successfully litigated or settled 1% of more than 12,800 charges).

130. Strauss, *supra* note 4, at 1655.

131. See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1774-86 (1983) (NLRB's certification procedures, including a lengthy representation campaign, make unionization more difficult).

Effective administrative enforcement is hampered by bureaucracy, lack of executive commitment, particularly in conservative administrations, and budgetary limitations which are likely to be severe throughout the nineties. Any one of these is sufficiently serious to make the Strauss proposal the equivalent of abolishing disparate treatment remedies entirely.

In the absence of an individual cause of action, employers would be free to treat minorities differently as long as employers hired them in sufficient numbers or paid the fines. For example, as long as Royal Tube employed African Americans in sufficient numbers, it would be free to subject them to any racial harassment or other forms of disparate treatment (such as different work rules). If the Strauss proposal were to extend to sex discrimination—and remedies for race and sex should not be separate¹³²—then employers would be free to require that female employees “walk more femininely, talk more femininely, dress more femininely, wear make-up, have [their] hair styled, and wear jewelry.”¹³³ As long as women were employed in sufficient numbers, this treatment would be legal. As long as Royal Tube employed the right number of African Americans and women, Gustafson would be free to treat Helen Brooms any way he wanted.

In sum, the elimination of individual disparate treatment cases is not a good idea for a variety of reasons ranging from the need to compensate individual victims of discrimination to the EEOC's inefficiency and budgetary pressure. Were individual claims eliminated, there would be no effective redress of overt disparate treatment such as Helen Brooms experienced and overt disparate treatment would probably increase dramatically. Further, employment discrimination claims are not as weak as Strauss suggests. Were the law substantively more hospitable to such claims and were they triable before juries, there is no reason to think success rates would be significantly lower than for other sorts of suits in federal courts. A federal forum should remain available to increase the chances the plaintiff will find a nonbiased forum.

V. QUOTAS AND FINES TIED TO NATIONAL POPULATION

The fine-quota system Strauss proposes would be unwise and unfair. It would make the cost of doing business in rural Minnesota higher than the cost of doing business in Washington, D.C., in effect transferring resources from rural to urban areas. Under the proposal, rural Minnesota employers, unable to meet their quota, would have to pay the fine, close, or move. In

132. For a discussion of why separate remedies for race and sex discrimination would be inappropriate, see *supra* text accompanying notes 77-89.

133. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, (1989) (holding such employer conduct discriminatory).

contrast, urban employers surrounded by large minority populations would only have to hire minorities in proportion to their presence in the national employment pool. For example, regardless of the percentage of African Americans in the labor pool for Washington D.C., a Washington D.C. employer would only have to hire twelve percent or so, the proportion of African Americans in the national population. Many urban employers would be able to set overt quotas and hire fewer minorities than they would hire if they did not discriminate, and nondiscriminatory rural employers would have to pay fines.

Similarly, the Strauss proposal would give employers of low skilled labor the right to hire fewer minorities than are available and would fine employers of highly skilled labor for their likely inability to find skilled minorities in national-population numbers. Both an engineering firm and a trucking firm would have to hire twelve percent African Americans or pay fines. The engineering firm will almost certainly pay the fines and the trucking firm might well employ only twelve percent African-American truckers. Again, employers will be able to set overt quotas and hire fewer minorities than they would hire if they did not discriminate. In response to these criticisms, Professor Strauss has modified his original proposal by providing that there would be a reward for employers who exceed the national population quota.¹³⁴ But unless this "reward" is set at the appropriately high level, an exceedingly unlikely event in the current political climate, minorities will be underemployed in the geographic areas in which they are concentrated and in the jobs for which they are most qualified.

Both problems discussed thus far in this section could be eliminated were the quotas tied to the minority's presence in the qualified workforce in the local geographic area.¹³⁵ Such quotas would be a good remedy against future discrimination. But a serious problem remains besides the lack of compensation for victims of discriminatory wrongs.

Strauss's system of quotas would be politically feasible only if the fines were set so low that they would be equivalent to a "license to discriminate." Strauss's proposal bears an uncanny resemblance to Professor Derrick Bell's proposed Civil Rights Act of 1996 (as related by Geneva Crenshaw), which gives employers a license to discriminate on the basis of race provided they pay a fee into an "equality fund" used to improve the social and economic status of African Americans.¹³⁶ Bell's proposal is, however, premised on the

134. Strauss, *supra* note 4, at 1655 n.69 and accompanying text.

135. Strauss resists this solution because employers would then have an incentive to move to areas in which there are few minorities. *Id.* at 1656. There is, however, no perfect solution.

136. See Bell, *Foreword*, 79 CALIF. L. REV. 597 (1991) (suggesting a licensing and fee system as a radical but workable method of ending black subordination).

view that Americans do not want effective remedies whereas Strauss's is premised on the view that Title VII has been so effective it is no longer needed.

I fear that Geneva Crenshaw is right. With respect to future action, quotas are the most effective remedy. But even legislation that does not explicitly mandate quotas—such as the Civil Rights Act of 1990,¹³⁷ vetoed by Bush—is damned by being labeled a “quota bill.”¹³⁸ As this issue goes to press, the Civil Rights Act of 1991,¹³⁹ which explicitly bans quotas, is being successfully characterized by opponents as a quota bill.¹⁴⁰ Imagine what would happen to a bill which really does mandate quotas! The only version of Strauss's proposal that the American political system could produce would be a license to discriminate.

There is an additional danger in Strauss's proposal. His criticisms of current individual remedies would be politically acceptable. The result could be the repeal of Title VII and section 1983 without the adoption of quotas. Reformers interested in improving remedies for employment discrimination should concentrate on less dangerous changes rather than hopelessly advocating quotas in the current climate. In addition, they should consider changes beyond the workplace that are likely to facilitate equality in the workplace.

VI. STRENGTHENING TITLE VII AND SYSTEMIC REMEDIES

Although Title VII has improved the situation somewhat for minorities and women,¹⁴¹ Title VII is not a very effective remedy. David Strauss has pointed out a number of the problems, as I have elsewhere.¹⁴² Individual cases alleging disparate treatment on the basis of sex or race are hard to win without smoking gun evidence.¹⁴³ In part, this is because judges are relatively hostile to such claims and have developed substantive rules favoring defendants.

137. S. 2104, 101st Cong., 2d Sess. (1990).

138. See H.R. CONF. REP. NO. 101-856, 101st Cong., 2d Sess. 22 (1990) (explicitly stating bill does not require or encourage quotas); Raspberry, *Sign the Civil Rights Bill*, Wash. Post, Oct. 22, 1990, at A11, col. 1 (Bush Administration claims bill is a “quota” bill even though many amendments adopted to ensure bill does not have that effect).

139. H.R. 1, 102d Cong., 1st Sess. (1991).

140. See *Major Differences Over Civil Rights*, N.Y. Times, June 3, 1991, at A14, col. 1. My point holds regardless of whether the 1990 or 1991 Civil Rights Acts would require or permit quotas; even reform which does not explicitly mandate quotas can be killed with the quota label. Reformers should not expect to be able to camouflage legislation mandating quotas as something else.

141. See *supra* note 56 and accompanying text.

142. See Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel & Lazear*, 53 U. CHI. L. REV. 934 *passim* (1986) (Title VII, for example, does not effectively remedy undervaluing a “women's job,” customer discrimination, or subtle steering of women into traditional jobs). See also *supra* note 101 and accompanying text.

143. Becker, *supra* note 142, at 939.

A. IMPROVEMENTS TO TITLE VII

Many of these problems could and should be addressed by improving Title VII, as the civil rights community has been trying to do with the vetoed Civil Rights Act of 1990 and proposed Act of 1991. I mention a number of improvements to Title VII here, most of which were part of the Civil Rights Act of 1990 and are included in the proposed Act of 1991.¹⁴⁴

Because part of the problem is judges' reluctance to rule for plaintiffs, jury trials should be available in all employment discrimination cases, including disparate impact as well as disparate treatment.¹⁴⁵ Full compensatory damages should be available in disparate treatment cases so that, for example, Helen Brooms is able to recover for the injury she sustained in falling down the stairs.¹⁴⁶ This wrong should be compensated for the same compensatory justice reasons other personal injuries are compensated. Filing requirements should be made more liberal. If an employee shows that sex or race tainted an employment decision, the employee should win and the employer should not have the opportunity to show that the same decision would have been made anyway. Title VII should award the successful plaintiff damages plus experts' fees, costs, and attorneys' fees.¹⁴⁷ Damages should include full compensatory damages and, when appropriate (e.g., in Helen Brooms's case) punitive damages.

A more effective remedy for job segregation should be devised.¹⁴⁸ Judges

144. For other discussions of ways to improve enforcement see e.g., Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. UNIV. L. REV. 795, 815-26 (1989) (suggestions include liberalizing the award of plaintiffs' attorneys' fees, forcing employers to disclose information on their employment patterns, and authorizing the EEOC to hold hearings and issue cease and desist orders); Rose, *supra* note 129, at 1169-81 (calling for increasing executive enforcement of equal employment laws, awarding plaintiffs' experts' fees, analyzing standardized tests, and establishing a Cabinet level council to coordinate enforcement of antidiscrimination laws).

145. The Civil Rights Act of 1990 would only have extended the right to jury trial to disparate treatment claims for compensatory damages (i.e., monetary damages beyond back pay). See S. 2104, 101st Cong., 2d Sess. § 8(a) (1990). The Civil Rights Act of 1991 provides a jury trial only when a claim of intentional discrimination is made. See H.R. 1, 102d Cong., 1st Sess. § 8(B) (1991).

146. *Brooms v. Regal Tube Co.*, 881 F.2d at 417.

147. Such costs are not always available in Title VII cases. See *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989) (Title VII does not permit award of nominal damages or attorney's fees when plaintiff suffered harassment, but such harassment did not cause her discharge). For a discussion of the general need to award plaintiffs' experts' fees, see Rose, *supra* note 129, at 1174-1175.

148. The Civil Rights Act of 1990 did not include any provision addressing sex segregation, nor is one included in the proposed Act of 1991. Strauss apparently regards "choice" as an adequate explanation for job segregation. He is not troubled by any part of the earnings gap being attributable to members of different groups holding different jobs because they might have "exogenous reasons" for doing so. Strauss, *supra* note 4, at 1623-24. But the supply of labor is not "exogenous" to employment opportunities. If a group has been excluded from an occupation, it is not likely to be in the relevant labor pool. Workers' occupational interests are not established for life at the time they enter the wage-labor market. Instead, these interests change over time as a result of employment

should rule for plaintiffs in sex or race segregation cases unless the employer shows that it made significant efforts to attract women or racial minorities, efforts which would have been effective had women or racial minorities been interested.¹⁴⁹ An employer in such a case should prevail only on a showing that they have enlisted "the participation of community organizations that serve working women [and minority communities] and employ creative strategies to describe the work in terms that will appeal to women" and minorities.¹⁵⁰

Title VII should be amended to require explicitly that all jobs as rabbis, ministers, and priests be open to women. This change is needed both to open these powerful employment opportunities to women and to moderate the sexism in mainstream religion.¹⁵¹

Disparate impact should also be strengthened. An employer should be held to the standard originally applicable in disparate treatment cases. Employers would then lose disparate impact cases unless they could show that there were not enough qualified minorities in the available labor pool or that the practice was significantly related to productivity.

At a minimum, the federal government, the states, and very large employers (who tend to set internal wages according to internal evaluations) should be required to make internal comparable worth evaluations followed by internal adjustments.¹⁵² This limited comparable worth remedy would create a climate in which comparable worth arguments could more easily be made within employment structures by all employees and would probably result in some improvement without requiring the courts to use standards that seem, at the present time, exceedingly vague. At some point, a better-developed comparable worth standard should be imposed on all employers.

Finally, Title VII should be amended to include agency enforcement through the use of testers; that is, the agency should send employers similar applicants of varying sex and race. Remedies for finding tester discrimination should include fines and whatever other remedies the judge considers

experiences. See Schultz, *supra* note 103, at 1815-39 (discussing how women's work preferences are created and shaped by employment conditions).

149. See Schultz, *supra* note 103, at 1841-42 (employers should be required to make efforts to change their workplaces so that women will be attracted to nontraditional jobs).

150. *Id.* at 1842. In addition, employers should guard against "hiring criteria, training programs, performance evaluation standards, mobility and reward structures, response to harassment, and its managers' and male workers' day-to-day attitudes and actions" which create "an organizational culture" that "debilitates women from aspiring to nontraditional jobs." *Id.*

151. For a more general discussion of the problems women face as result of patriarchal religion, see Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. (forthcoming 1992).

152. Employees would initially be able to sue only to force the internal evaluation and adjustment, but not to challenge the terms of either.

appropriate.¹⁵³

B. STRUCTURAL INEQUITIES CONNECTED TO EMPLOYMENT

Although individual employment discrimination remedies are appropriate, they will always be inadequate for two reasons. First, many discriminatees will not sue. Second, and more fundamentally, remedies focusing on employment cannot address the many and varied structural inequities contributing to racial and sexual inequality in employment. The next Civil Rights Act (after some form of the Civil Rights Act of 1991 is passed) should be a broad attack on structural inequalities affecting employment. I will call it the Civil Rights Act of 2001.

THE CIVIL RIGHTS ACT OF 2001

Education should be one of the four major components of this bill. Education creates a number of serious structural barriers to employment success for African Americans. Schools in African American communities tend to be underfunded and of low quality relative to schools in other communities. People "educated" at such schools are often disadvantaged for life because they have not had the opportunity to develop basic skills needed for successful employment.

In addition, when African Americans and other Americans are educated in segregated schools—which means housed in separate neighborhoods—they are likely to lead segregated lives—which means that African Americans will tend to be impoverished. In part this is because of differential opportunities, but in part it is because separation throughout childhood contributes to the development of racist attitudes in whites. It is easier to think of a minority group as different, and possibly inferior, if one has had little contact with them.¹⁵⁴ As other researchers more knowledgeable about education than I have noted, "isolation of blacks has perpetuated patterns of avoidance learning and social behavior among whites that cause them to resist desegregation in the schools and in other social settings."¹⁵⁵

153. Such judicially ordered remedies should include quotas or goals, but the bill would not refer to such remedies for the political reasons already discussed. See *supra* notes 136-138 and accompanying text.

Enforcers other than EEOC have begun to use testers. See, e.g., *Urban Institute Research Using Testers Documents Bias Against Black Job Seekers*, Daily Labor Rep. (BNA) No. 94 at A-4 (May 15, 1991) (Urban Institute used testers to find discrimination by employers in Chicago and Washington, D.C.); *Washington Civil Rights Group Uses Testers as Basis for Bias Suit Against Personnel Agency*, Daily Labor Rep. (BNA) No. 86 at A-3 (May 3, 1991) (Fair Employment Council of Greater Washington used testers to find discrimination by personnel agency).

154. See *supra* notes 39-43 and accompanying text.

155. Braddock, Crain, & McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259, 261 (1984). See also E. ARONSON,

Not surprisingly, an employer survey reveals that employers are more likely to hire African Americans from desegregated schools.¹⁵⁶ Both blacks and whites who have attended integrated schools are more likely to work in a desegregated workplace.¹⁵⁷ Researchers have found that "attending desegregated schools improves the attitudes of both blacks and whites toward future interracial situations."¹⁵⁸ African Americans who attend integrated schools are more likely to be in integrated jobs and earn more money than African Americans who have gone to segregated schools.¹⁵⁹

This Civil Rights Act would ban the use of local property taxes to fund public education and would require collection of taxes on a state-wide basis and payment on a per pupil basis. In addition, the bill would contain a voucher system for every child in a private school. Given the desperate plight of many minority children in terrible public schools, this radical step is necessary to give these children a better chance at gaining an education.¹⁶⁰

The second major component of this bill would be housing. The housing program would be designed to integrate suburban and other areas. Empirical research shows that desegregated education and housing are likely to occur together.¹⁶¹ This aspect of the law would have a number of features, including middle class and subsidized desegregated housing projects in all-white areas.

A third component would provide funding for nontraditional job training for minorities and women and for involvement of community-based organizations in placing the graduates of these programs.¹⁶² This component would include provisions designed to ensure that high schools and welfare-

THE SOCIAL ANIMAL 268-271 (1988) (the expectation that integration is inevitable decreases prejudice among groups).

156. See Braddock & McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. SOC. ISSUES 5 (1987) (social contacts strongly affect likelihood of hiring).

157. Braddock, Crain, & McPartland, *supra* note 155, at 262.

158. *Id.*

159. *Id.* at 263-64.

160. Under this system, some children may end up in schools even worse than inner city public schools are today. Were the situation today less grim, I would not make such a proposal.

161. Braddock, Crain, & McPartland, *supra* note 155, at 262.

162. See, e.g., Haignere & Steinberg, *Nontraditional Training for Women: Effective Programs, Structural Barriers, and Political Hurdles*, in *JOB TRAINING FOR WOMEN: THE PROMISE AND LIMITS OF PUBLIC POLICIES* 352-55 (1989) (discussing promising programs for nontraditional training for women under the Comprehensive Employment and Training Act); Law, "Girls Can't Be Plumbers"—*Affirmative Action for Women in Construction: Beyond Goals and Quotas*, 24 HARV. C.R.-C.L. L. REV. 45 *passim* (1989) (describing barriers faced by women in the construction industry and advocating increased enforcement of antidiscrimination laws plus community programs to open opportunities up for women). See also Braddock & McPartland, *supra* note 156, at 26 (minorities more likely to be hired "when employers use community agencies to recruit applicants, even after the race composition of the local labor market and other job characteristics are taken into account").

related work training programs do not steer people only into types of employment deemed appropriate for their sex or race.¹⁶³ Such steering is currently widespread despite antidiscrimination mandates.¹⁶⁴ In addition, welfare-to-work programs would focus on training people for good jobs, rather than for the lowest possible employment opportunity.

The fourth and final component of the Civil Rights Act of 2001 would focus on socialization. Federal funds would be used to develop courses at all educational levels addressing the problems of racism and sexism. Such courses would include critical analysis of media presentations of racial minorities and women and would be a prerequisite to continued federal funding. In addition, other more direct approaches to controlling media racism and sexism would be explored by a governmental commission.

Many of my proposals are politically difficult. None, however, would be as dangerous as an offer to replace individual remedies with quotas in the current political climate. It is all too likely that such a proposal would be partially accepted: individual remedies would be repealed but quotas would not be enacted. Further, as noted earlier, the Strauss quota system could be enacted only if the fines were set so low that it would operate as a license to discriminate.¹⁶⁵ Advocating such a proposal is dangerous in ways in which my suggestions, I hope, are not.

CONCLUSION

Economic models of discrimination are both too thin and too limited to be accepted by the reformer as describing the world of discrimination. Economic models are too thin in a number of fatal ways. They assume, counterfactually, that people act rationally and that sexism and racism are susceptible to rational calculation and correction. They assume what needs to be understood: how racism and sexism develop and persist. They do not even purport to describe the desire to subordinate and difficulty with empathy, two common forms of discrimination.

Professor Strauss discusses the conventional justifications for remedies for race discrimination without mentioning history or any racial minority other than African Americans, nor noticing that most people of color are women. Since Hispanic and African-American women are the most disadvantaged group in employment (based on wages), it is necessary to consider how race

163. See De Parle, *Skills-Training Policy Opening Doors to Jobs*, N.Y. Times, Oct. 25, 1990, at A16, col. 1 (describing unusual welfare-to-work programs which train women in nontraditional and better paying jobs).

164. See Rhode, *supra* note 73, at 199-200 (government funded education perpetuates stereotypes in part by failing "to improve women's math and science skills" or "to interest men in traditionally female vocations").

165. See *supra* text accompanying note 136.

and sex discrimination intersect. Remedies must be tailored to the needs of these most vulnerable groups; separate race and sex remedies are not adequate.

There are a number of problems with the Strauss proposal. Under it, employers would have too little incentive to employ minorities in those geographic areas in which they are concentrated and for those jobs for which they are most likely to be qualified. There are many reasons why individual claims should still be allowed; indeed, such remedies should be strengthened. More fundamentally, the proposal to replace current individual remedies with quotas is extremely dangerous. The likely result in the racist political climate of the United States today would be partial success: elimination of individual remedies and either no quotas or a system of fines so low that they would be a "license to discriminate."

A less dangerous reform package would attempt to strengthen Title VII and enact structural remedies. Title VII, as it is currently constituted, has become too weak a remedy for employment discrimination. It has always been too narrowly focused on employment to be effective in eliminating the structural barriers to equal employment opportunities for all women and men. Title VII should be strengthened by including, in part, a better remedy for job segregation and a ban on sex requirements for religious ministry. In addition, a number of structural remedies are necessary, such as improved educational opportunities and greater school desegregation.

