

THE MICHAEL JACKSON PILL: EQUALITY, RACE, AND CULTURE

*Jerome McCristal Culp, Jr.**

I want a new drug
One that does what it should
One that won't feel too bad
One that won't feel too good
I want a new drug
One with no doubt
One that won't make me talk too much
or make my face break out¹

I. THE CHRONICLE OF THE MICHAEL JACKSON PILL²

I was leaving Langdell Hall, after having feasted too fervently at my fifteenth law school reunion, when I noticed what looked like a very ancient document pushed down in the trash can that litters the small entrance to the main reading room of Langdell. The ancient scroll seemed out of place so carelessly thrown away outside the

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1. HUEY LEWIS AND THE NEWS, *I Want a New Drug*, on SPORTS (Chrysalis 1983).

2. This chronicle is in tribute to the work of Derrick Bell, past, present, and future. I have borrowed his character Geneva Crenshaw as part of that tribute, and I hope she helps me raise some of the issues that he has taught us are important.

All characters in this chronicle are fictional, including Professor Culp and Professor Bell. Any relationship they may have to the real Professor Bell and Professor Culp is dictated by the requirements of creativity and the extent to which reality and fiction necessarily merge. I know that the real Derrick Bell is wiser than the one captured fictionally here, and I believe that is sometimes true of the real Jerome Culp.

When this essay speaks of Professor Not-Professor-Bell, I do not mean to speak of any particular person. Initially I had planned to put names at other parts of the chronicle, but I was persuaded that doing so would be too arrogant. Indeed, unlike an earlier work of mine, see Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 99-105, this essay does not have any particular individuals in mind when I speak of generic professors or characters.

I hope that I am not dismissive of the important ideas among scholars of color who are noted here. For a discussion of some of the pitfalls of this area, see Patricia Williams, *And We Are Not Married: A Journal of Musings upon Legal Language and the Ideology of Style*, in CONSEQUENCES OF THEORY 181, 183-87 (Jonathan Arac & Barbara Johnson eds., 1991).

world's largest law school library. I picked it up and was surprised to discover that there, very near Derrick Bell's former office, I had found another of the scrolls that Professor Bell's friend Geneva had revealed to him before she joined the celestial curia.³ What was this wondrous document doing in Langdell Hall? Maybe it was some further message from Geneva Crenshaw that had been dropped there for me to discover. I rushed to find Professor Bell to tell him of my good luck.

As I approached the office that had once belonged to Professor Bell, I noticed a group of six black men standing together in the hallway. Much to my surprise and delight, I recognized among them the five faculty members at Harvard Law School who are both black and male. I know of Scott Brewer and his work as careful thinker and philosopher.⁴ David Wilkins is a friend and had even once been an excellent student in one of the undergraduate economics classes I taught as a graduate student at Harvard.⁵ Charles Ogletree⁶ and

3. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 51-74 (1987) [hereinafter BELL, *AND WE ARE NOT SAVED*]; DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) [hereinafter BELL, *FACES AT THE BOTTOM OF THE WELL*].

4. Professor Brewer has added the hard edge of philosophical insight to debates about legal theory and critical thought. See, e.g., Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990) (examining the debate precipitated by Randall Kennedy's article on "racial critiques" and suggesting that there is a kind of common ground that the nature of the debate has obscured); Scott Brewer, *Pragmatism, Oppression, and the Flight to Substance*, 63 S. CAL. L. REV. 1753 (1990) (arguing that there is a tension in the notion of deferring to the perspective of the oppressed and that in the end we have to make our own moral judgments — that is, the flight to substance). But see Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991) (arguing that Brewer requires too large a compromise and sees more commonality than actually exists).

5. Professor Wilkins is Professor of Law and Director of the Program on the Legal Profession at Harvard. His writing focuses on the nature and ethics of the legal profession. See, e.g., David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye Scholer*, 66 S. CAL. L. REV. 1147 (1993) (asking how the context of the relationship of Kaye, Scholer to Lincoln Savings affected the way both the OTS and Kaye, Scholer's expert looked at the problem and how that type of context ought to influence the ethical responsibilities of lawyers); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993) (examining the proper role of legal education in forming the ethics of the black corporate lawyer); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801 (1992) (providing a careful examination of how and when lawyers should be regulated for their unethical conduct).

6. Professor Ogletree, a great teacher and lawyer, has written powerfully about the criminal justice system. See, e.g., Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) (arguing for a larger rationale for lawyers to represent the indigent and to sustain that representation through empathy and heroism).

Chris Edley⁷ had been contemporaries of mine at Harvard Law School, and I had read with increasing interest the powerful epistles from Randall Kennedy about race and the law, which are now sprinkled in the important law reviews and symposia.⁸ The sixth man was not Professor Bell, nor did I know him from Harvard, but he nonetheless looked familiar and unmistakably professorial.⁹ Seeing this group gathered there confirmed the only possible interpretation of my discovery — I had been given the opportunity to share it with those at Harvard who would most appreciate its significance and, perhaps, explain it to me. It could not simply be by chance that I had discovered this document now.

“Hey guys! What are you doing here?” I asked, chuckling secretly to myself about my discovery. However — as I was about to say some new version of “Guess what I found?” — I noticed that they all held scrolls that looked markedly like mine. Without an additional word we all opened our scrolls to find identical statements:

Dr. Michael Jackson, a doctor educated at Motown University and now a professor of medical appearance at Hollywood University, has invented a pill that if taken by black people will remove all vestiges of being black. Black features will disappear from black people who take the pill, and they will be given a random selection of names that white people in America have. Black speech patterns and ways of organizing expression will go away. With respect to every outside appearance, all black people who take the pill will become white.

The legislature of the Commonwealth of Massachusetts has passed Massachusetts General Law 1619.28, requiring all black residents of the Commonwealth of Massachusetts to take the Michael Jackson Pill. Black residents who do not take the pill are subject to fines of up to \$2,000. Sonny Flynn, speaker of the Massachusetts Assembly, said, “This bill will for all time remove the vestiges of slavery that have plagued this great commonwealth.” The NAACP objects to the application of this statute to black residents of Massachusetts and asks the five black Harvard faculty members and Professor Derrick Bell to write a brief and argue the case. Representative King, one of three African Americans in the Massachusetts House of Representatives,

7. Professor Edley has written powerfully about the administrative process. See, e.g., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990).

8. See, e.g., Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999 (1989); Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 *HARV. L. REV.* 1388 (1988); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 *HARV. L. REV.* 1327 (1986); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 *COLUM. L. REV.* 1622 (1986).

9. Professor Not-Professor-Bell, the sixth in the group of black male faculty members, is a fictional character. His views are an amalgam of many views from within the black academic community.

has pointed out that evidence suggests that white people who take the pill will become black. He argues that black is beautiful and that we ought to make all white people take the pill. Marjorie Jones, a white professor of political economy at the Kennedy School, in a widely cited argument, has noted that it is cheaper to have black people take the pill and that the problems with race are basically confined to the unfortunate segment that is black. "We, the white citizens of Massachusetts, are willing to welcome black people to that great white melting pot," she adds.

We were all instantly removed to a conference room nearby, with Derrick Bell at one end of the table and at the other an empty chair. Several of the faculty began to talk simultaneously when a deep but very feminine voice, belonging unmistakably to Geneva Crenshaw, interrupted . . .

Geneva Crenshaw: Excuse me — Excuse me. I see that you are all here. I have called all of you here today to discuss with Derrick how this latest chronicle ought to come out. The question is whether black people should take this pill. Can we be saved by a pill that transforms all black people into white people? Derrick has been making trouble by questioning whether some of you even want to be white, but Dr. Jackson has given all black people that opportunity.

Professor Bell: Gee — I think I need to know a little bit more about this pill.

Geneva Crenshaw: You mean you want to know whether you still will have rhythm after you take the pill.

Professor Culp: We all know your penchant for hyperbole, Ms. Crenshaw, but hasn't this description of the pill been too simplistic? Eliminating blackness may exact a heavy price, and personally, I like being black.

Geneva Crenshaw: I don't know who you are — though there must be a reason for you to be here — but the point is so simple that a third-year law student could see it without the benefit of *Emmanuel's*. You take the pill and you aren't black anymore — though some of you may have to take it twice. The pill doesn't eliminate class or other characteristics, but I understand that Dr. Phyllis Schafly is working on a pill that will remove gender.

Professor Bell: I think we ought to start with a vote to see how many people think that all black people ought to be required to take this pill.

[The black male faculty look around at each other. Some raise their hands — most of them slowly. Others look disturbed but do not raise their hands.]

Professor Culp keeps raising and lowering his hand.

One by one they each start to speak, asking questions of Geneva Crenshaw and of one another and beginning a debate that continues for some time. (Unfortunately, not all of this conversation can be chronicled here.) After listening to his compatriots carry on for a while, the strange-yet-familiar professor joins the conversation . . .]

Professor Not-Professor-Bell: I don't understand your ambivalence, Professor Culp. This pill washes away all the manifestations of racial difference. You have pointed out in your writing the importance of race as a cause of our nation's problems. Race will be no more, and therefore racial problems will be no more.

Professor Culp: I'm sorry, but the issue is still not clear to me. I gain from being black. My parents have strength of character that aids me in my work. The history of my family has an importance that would be erased if there were no culture or language or notion of place that was connected with being black.

Professor Not-Professor-Bell: Race is simply a cultural creation. As Professor Kendall Thomas of Columbia Law School is fond of saying, black people are raced.¹⁰ The pill removes the power of white people to race us.

Professor Culp: I understand that we are raced by society, but culture means something positive to me. People are raced, but people are also cultured and the two are interdependent. There are, therefore, positive and negative sides to the issue of race. Black people invent themselves as black people through culture and history.

Professor Not-Professor-Bell: We're all lawyers here, not cultural critics. Race will not matter in the job market when black people have taken the pill and become white. Being black doesn't make one a better janitor or a better law professor. Culture is a social creation: with this pill, those of us who want to love jazz or basketball or Toni Morrison or Gwendolyn Brooks can do so without the handicap of difference. Race doesn't matter, so taking it away shouldn't matter either. Indeed — what we want to eliminate are the transient and unimportant things that get in the way of equality.

10. See Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431. "Moreover, the cultural meaning of race continues to be promulgated through millions of ongoing contemporaneous speech/acts. Thus, [Kendall Thomas] says, 'we are raced.' The social construction of race is an ongoing process." *Id.* at 443 n.52 (citing Kendall Thomas, Comments at a Panel on Critical Race Theory, Frontiers of Legal Thought Conference, Duke Law School (Jan. 26, 1990)).

Professor Culp: I'm not sure that race is so easily disconnected from our notion of what a law professor is. I was pushing a garbage cart toward my office one evening when the child of two of my black colleagues, Gwynn Swinson and Percy Luney, asked me whether I had to do a second job. My colleagues' child understood that at least at Duke, what you do is closely connected with your race. Black people clean and wash toilets, and if they are special, like her parents, they may get to teach at a law school. Her fear — consistent with her experience — was that all black people secretly had to be cleaning people, doing some black job as well as a white job.

Geneva Crenshaw: You may be right, Professor Culp, but not completely. You see race from the patriarchal perspective of being a black male. This very male room may be willing to take the pill without understanding the implications of culture. However, gender and other notions of identity cannot be separated from race, and culture holds gender and race together. Black men always think that if their apparent problem were solved — if only they weren't black — then the problems of black people would go away. The point is that black problems are more than simply race as defined by what black men are concerned about. Maybe fewer people would have their hands up if there were more black women or other women of color in the room — people who understand that oppression is a multiple-aspect condition.

Professor Culp: But Geneva, black men are oppressed. They are jailed and die at an alarming rate.

Geneva Crenshaw: You don't have to tell black women about black men. The problem is that black men want to define the problem of black people only from their own perspective. Black women are oppressed by both race and gender, and this pill does nothing about this multiple oppression.

Professor Not-Professor-Bell: Isn't that the point, Ms. Crenshaw? This pill will eliminate any intersection between race and gender.

Professor Culp: The intersection will only be eliminated if we also remove the economic and other concerns produced by the interaction of race and gender.

Geneva Crenshaw: Close, but only a *B-* for theoretical rigor. The intersection of race and gender or of race, class, and gender cannot be reduced either to separate concerns or to a combination of concerns that are measured in economic values. The intersection of race and gender leaves black women always still women with the

additional oppression of blackness. This oppression, however, is not simply added on. Oppressions, like rabbits, multiply exponentially when they are combined.

Professor Not-Professor-Bell: But taking the race pill will eliminate that multiplication by eliminating race, Geneva.

Professor Culp: That will only be true if we know what race is and what happens when we eliminate that social construction. It may take a race-gender pill to eliminate the intersections if race and gender add together to form something more powerful . . .

Geneva Crenshaw: I see why some people think you law professors are too theoretical. Before you get to a race, gender, class, or sexual orientation oppression pill, deal with the problem we have before us. You have not answered the question of whether you think the law ought to require black people to take the Michael Jackson Pill. It might be true that we should not desire that black people give up jazz and storytelling, but there are white people who play jazz and who tell stories. Haven't you, Professor Culp, fallen into the trap of essentialism? You assume that race exists when it is in fact a political illusion.

Professor Culp: I am not naive. I read the biological and historical literature. I know that people have argued that there is no meaningful biological basis for race,¹¹ but that does not mean that we cannot worry about its social consequences.

Professor Bell: I argued in my most recent book that racism is a permanent phenomenon.¹² The problem I see is that this pill cures race but not racism.

Geneva Crenshaw: You men just don't get it. The point of this exercise is to ask what the role of the government ought to be with respect to race and racism; after all, one can't exist without the other. Should we make people take the pill?

Professor Not-Professor-Bell: I read most of the employment discrimination cases, and there are lots of pills that — in effect — the law tries to impose on black people, but none of these "pills" are quite the Michael Jackson Pill. In passing the 1991 Civil Rights Act,¹³ Congress proposed not that black people take a pill that

11. See, e.g., Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in "RACE," WRITING, AND DIFFERENCE 21, 21-22 (Henry L. Gates, Jr., ed., 1985); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437 (1993).

12. See BELL, FACES AT THE BOTTOM OF THE WELL, *supra* note 3, at 13.

13. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.).

eliminates blackness but that they take one that replaces blackness with merit. Title VII, as interpreted by the Supreme Court, now excludes the use of race as an indicator of anything. We have created, at least in the employment area, the requirement of color-blind decisions.

Professor Bell: I'm sorry, but I too have followed those statutory changes and the legal interpretations and I don't see that. Professor Culp has argued that there is a distinction between antidiscrimination and color blindness, and I am persuaded that on this point he is right. Title VII is a color-conscious statute. The improper use of race and the other categories alone triggers the protective mechanisms of Title VII and other civil rights statutes. Race, not merit, is used to limit employers' decisions. Merit is not mentioned, and, even though merit is a defense in some Title VII actions, the courts have often said that Title VII does not require that the most meritorious person be hired.¹⁴

Professor Culp: At best Title VII says that you can't be caught using race as a factor, but it doesn't even suggest color blindness.

Geneva Crenshaw: But don't you admit that being color conscious to try to eliminate the negative consequences of race can reduce the negative impact of race? Isn't that, by your logic, a kind of antirace pill that we should require people to take?

Professor Culp: That might be so if employers couldn't peek at race and use it covertly to achieve the ends they want.¹⁵

Geneva Crenshaw: So if we could cure employers of their racial voyeurism, you would be happy?

14. See, for example, the Eleventh Circuit's opinion in *McCarthy v. Griffin-Spalding County Board of Education*, 791 F.2d 1549 (11th Cir. 1986):

Title VII does not require an employer to hire or promote the most qualified applicant; it only requires that the employer make such decisions without regard to race, sex, religion, color, or national origin. Although failure to hire the most qualified applicant may be circumstantial evidence of discrimination

. . . This unpublicized use of recommendations, standing by itself or considered with the alleged failure to hire the most qualified person, does not make the district court's credibility determination clearly erroneous.

791 F.2d at 1552 (citations omitted); see also *Connecticut v. Teal*, 457 U.S. 440, 463 (1982) (Powell, J., dissenting) ("Title VII does not require that employers adopt merit hiring or the procedures most likely to permit the greatest number of minority members to be considered for or to qualify for jobs and promotions."); *Smith v. Horner*, 839 F.2d 1530, 1539 (11th Cir. 1988) ("Where, as here, several candidates are well-qualified for a single position, and the district court accepts the employer's testimony that it chose the person it thought best qualified for the job, that finding ordinarily will not be overturned on appeal.").

15. See generally Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162 (1994).

Professor Culp: No. I really think the problem is that the pill that Title VII and the 1991 Civil Rights Act offer requires that black people accept market outcomes. It's really a kind of Thomas Sowell Pill that promises equality in some distant, market-induced future.¹⁶

Geneva Crenshaw: You've lost me and, I'm sure, much of this room with your argument. If I remember my history correctly, it was Booker T. Washington who argued for market solutions well before Thomas Sowell, Glenn Loury, and Walter Williams were born.¹⁷

Professor Not-Professor-Bell: Isn't the truth that the market solution can get widespread community support, while other policies and pills simply can't?

Professor Culp: I guess I remember that history differently also. Booker T. Washington argued for market solutions, but he never was convinced they would be sufficient. He was being expedient. I would hate to be expedient here and urge black people to take a pill that won't solve their problems.

Geneva Crenshaw: There are no guarantees about any solution, but isn't that all we ever have — expediency? If expediency says take the pill, shouldn't we swallow and complain later? Title VII, even as this Court has interpreted it, is not perfect, but isn't it expedient?

Professor Culp: The Supreme Court for a long time has been making it more difficult for black employees to succeed with respect to employment discrimination. In a series of decisions starting with *Watson*¹⁸ and culminating in *Patterson*¹⁹ and *Wards Cove*,²⁰ the Court has suggested that the claims that black people were making were not remediable.²¹ Despite recent congressional chas-

16. Thomas Sowell is a conservative black economist who has argued that blacks ought to rely on market solutions and that government solutions cannot work. See, e.g., THOMAS SOWELL, *MARKETS AND MINORITIES* 103-24 (1981).

17. See Booker T. Washington, *The Economic Development of the Negro Race Since in Slavery*, in *THE NEGRO IN THE SOUTH* 9 (1907) (arguing that black people have experienced great progress through hard work, reliance on the market, and religious faith).

18. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

19. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

20. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

21. See 487 U.S. at 992-99 (expanding the scope of disparate impact claims to cover subjective or discretionary promotion programs, but also asserting that employers have no duty to eliminate all the varied causes of racial imbalance in the workplace); 491 U.S. at 175-82 (holding a claim of racial harassment not to be actionable under § 1981); 490 U.S. at 650-55 (stating that racial imbalance alone cannot be a ground for invoking Title VII because it would necessitate strict racial quotas, which were rejected by Title VII's drafters).

tisement of part of that trend,²² in *Hicks*²³ the Court has again made the point that Title VII should not be too effective or reach too much of the real discrimination. As you will remember, this was a case in which a black male employee was discharged from a supervisory job.²⁴ The employer articulated two rationales for this discharge, both of which the district court rejected as unsupported by the record. Instead, the district court, sitting as trier of fact, concluded that the white supervisor might have simply had personal animus.²⁵ The court came to this conclusion despite the fact that the supervisor testified that he had no personal animus against Hicks.²⁶ Can we really expect the market to rectify this sort of judicial reasoning over the long haul?

Professor Not-Professor-Bell: I don't understand this criticism. Congress passed the 1991 Civil Rights Act, expanding the opportunities of women, including black women, and repealing *Patterson* and *Wards Cove*.²⁷ It is true that the Court has been reluctant to require racial quotas — that, after all, is what Justice O'Connor criticized in *Watson*,²⁸ and the Court ratified O'Connor's position in *Wards Cove*.²⁹ However, the Court expanded its definition of sexual harassment in the *Harris* case³⁰ so that an employee who wants

22. The 1991 Civil Rights Act explicitly rejects *Wards Cove*:

SEC 2. FINDINGS.

The Congress finds that —

.....
(2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC 3. PURPOSES.

The purposes of this Act are —

.....
(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*
Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991); see also Jerome McCristal Culp, Jr., *Neutrality, The Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993). See generally Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 50-59 (1993) (describing how opponents of the Supreme Court's jurisprudence sought to overturn five Supreme Court decisions handed down at the end of the 1989 Term).

23. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993).

24. 113 S. Ct. at 2746.

25. 113 S. Ct. at 2748.

26. 113 S. Ct. at 2766 (Souter, J., dissenting).

27. See *supra* note 22.

28. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991-93 (1988).

29. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989).

30. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

to prove sexual harassment does not have to prove psychological damage to win a lawsuit.³¹ Indeed, even Justice O'Connor, writing for the majority in *Watson*, approved the use of disparate impact analysis in situations involving subjective criteria.³²

Professor Bell: But at the same time Justice O'Connor held for a plurality in *Watson* what became the majority opinion in *Wards Cove*: that the burden of proof in disparate impact analysis should always be on the plaintiff.³³ Congress modified that holding, at least in part, in the 1991 Civil Rights Act, but it did not do so clearly and effectively enough.

Professor Culp: And it is clear that the decisions in those sexual harassment cases, while useful, will not be expanded to remove racial slurs and a discriminatory atmosphere from the workplace for black people. Courts are going to continue to argue that the racial slurs were not "extensive" or "personal" enough to create an actionable harm.

Professor Not-Professor-Bell: You seem to want to exaggerate

...

Professor Culp: Isn't it obvious that the most likely beneficiary of such a situation is a white male who is subject to an inappropriate atmosphere in the workplace? I've noticed some reports on the enforcement of these racially enhanced criminal statutes in the aftermath of the *Mitchell* case.³⁴ In North Carolina a disproportionate share of the prosecutions for racial motivation have been of black people.³⁵ It is hard to believe, even in 1994, that there is so little white racial violence in North Carolina. Why should we expect anything else in the employment discrimination area?

Professor Not-Professor-Bell: Aren't you making the same mistake you accused us of earlier? Some of the women who are sexually harassed are black women, and the Court, by trying to give them protection, is likely to provide some more protection for ex-

31. 114 S. Ct. at 370-71.

32. See 487 U.S. at 989-91.

33. See 487 U.S. at 994 (plurality opinion); 490 U.S. at 656.

34. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (upholding a Wisconsin statute providing for enhanced sentences for hate crimes); see, e.g., Pedro Ponce, *Some Question Use of Hate-Crime Laws by Victimized Whites*, SAN DIEGO UNION-TRIB., May 5, 1994, at A36.

35. Todd Nelson, *Racial violence poses dilemma*, NEWS & OBSERVER (Raleigh), Apr. 11, 1994, at 1A, 4A (reporting that some observers contend that blacks are more likely to be charged under North Carolina's penalty enhancement statute). According to Christina Davis-McCoy, executive director of North Carolinians Against Racist and Religious Violence, the North Carolina bias crime legislation was intended "to protect groups that had historically experienced animosity, victimization and violence But they tend to use the law to protect the majority." *Id.* at 4A.

actly that intersection between race and gender that you claim you're worried about.

Professor Culp: Yes, but the Court seems to flinch even in that area. When Ms. Patterson was harassed, the Court was unwilling to say that the harassment amounted to discrimination cognizable under the law. The Court said instead that harassment after formation of the employment contract was outside the confines of 42 U.S.C. § 1981, which refers to the "making" of contracts.³⁶

Professor Not-Professor-Bell: Aren't you exaggerating here? *Patterson* does not limit the ability of black women to get protection under *Harris* or *Vinson*,³⁷ the cases in which the Supreme Court defined sexual harassment discrimination.

Professor Culp: The point is that Title VII assumes that equality will result if we simply leave the present processes in place, or, put differently, that we will achieve racial equality without active government intervention.

Professor Not-Professor-Bell: You're arguing that the antidiscrimination pill will not alter the present because you dislike the status quo. But law can't alter the status quo. If black people are to achieve racial equality, they will have to work on it themselves. Law has a limited role to play, and the pills you describe, whether they are Michael Jackson Pills or Thomas Sowell Pills, will play that limited role. The rest is up to us, in our own communities.

Professor Culp: You sound like Justice Bradley in the *Civil Rights Cases*,³⁸ arguing that law can only do so much,³⁹ just as the protection of law is being taken away from black citizens.

Professor Not-Professor-Bell: That's the point made by Gerry Spann in his book *Race Against the Court*⁴⁰ — that we cannot expect the courts to protect our interests in the long run.

Professor Culp: But isn't Professor Spann's point even less optimistic than you suggest? He writes not only that the courts won't be a force for change but also that they will sometimes be an active force for oppression.⁴¹ Moreover, these pills leave no room for involvement by communities. Race is eliminated as a positive creator of communities, as are the opportunities for those racially created

36. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 170-71 (1989).

37. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

38. 109 U.S. 3 (1883).

39. See 109 U.S. at 11-25.

40. GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993).

41. See *id.* at 3-5, 94-99.

communities to produce change. When people try to create change in the job market, they are likely to be the targets of lawsuits; when they are successful in getting the legislature or Congress to make a change, the courts will limit and frustrate that effort. Hasn't Derrick shown that in his book *Faces at the Bottom of the Well*?⁴²

Professor Not-Professor-Bell: On the other hand, the elimination of race also eliminates white communities opposed to change. After all, the Ku Klux Klan is a racially created community for keeping the racial status quo.

Professor Culp: Indeed, the Democratic party was at times a racially created community to prevent change in the black community, particularly in the South.⁴³ However, this pill doesn't eliminate the white community; it simply permits those who take the Michael Jackson Pill to enter it. If the white community contains elements of oppression, it may reinvent other subcommunities of people to oppress — people who tan too well or who have other characteristics. And for those black people who choose to stay black, race will still exist, as will racism.

Professor Not-Professor-Bell: The courts limit the notions of equality that the legislature or Congress can use, but they do not eliminate the ability of those institutions to make changes. What this pill does is provide choice to black people in the same way that *Roe v. Wade*⁴⁴ provides choice to women about pregnancy.

Professor Culp: One of my white male students wondered whether he could challenge a minority clerkship that was created for black first-year law students in a large southern law firm without many black associates and partners. He questioned whether such a program was fair or legal. My answer was that the program is probably legal, but as the market becomes tighter, it is going to be more and more difficult to prevent courts from overturning any victory accomplished in Congress or state legislatures or local governments or by community groups. The Court's jurisprudence in *Croson*,⁴⁵

42. See BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 3, at 49-51.

43. See *Nixon v. Herndon*, 273 U.S. 536 (1927) (holding that a Texas statute excluding "negroes" from the Democratic primary violated the Fourteenth Amendment); *Nixon v. Condon*, 286 U.S. 73 (1932) (holding that a state effort to circumvent *Nixon v. Herndon* by permitting the Democratic party to become a private club also violated the Fourteenth Amendment).

44. 410 U.S. 113 (1973).

45. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down a Richmond set-aside program for minorities).

Hicks,⁴⁶ and *Shaw v. Reno*⁴⁷ supports this view. When black people engage fairly in the governing process, their views are found to be inappropriate if they alter the racial status quo. Such alteration threatens white supremacy, which the Supreme Court is not willing to eradicate.

Professor Not-Professor-Bell: Aren't you making this student out to be a villain when he is simply trying for fairness? Why should the son of a black doctor get a job instead of the son or daughter of a white mechanic?

Professor Culp: You miss the point, just as that student and, too often, the Court do. Racial communities have played the same role regarding problems of class that the gay community has in the AIDS health crisis. We know that there is a class and poverty problem in this country primarily because we can see evidence of the problem in the black community. The gay community's involvement with AIDS allowed all of us to understand the existence of the AIDS health crisis much earlier than we would have otherwise. Communities and the differences those communities produce have importance and power that individuals do not — for good as well as evil. A large part of the power behind change for the poor comes, not from the larger white poor community, but from the black poor who are fairly egalitarian about the change they support.

Geneva Crenshaw: This sounds like the argument often heard in black literary and political circles — that blacks have some mythic ability to suffer and to redeem white America.⁴⁸

Professor Culp: No, I don't believe pain is good for the soul or necessarily leads to redemption. I see too much pain in our poor communities of color and too little redemption there. I'm trying to make a different point. The redemption thesis assumes that we can only see the world through the lenses of the majority. I would like to see it through the lenses of the black minority and the other communities of color. In those communities we can form action, not as an example of pain or as victims of oppression, but as positive forces for change.

Geneva Crenshaw: Does this mean that you think that the black community alone will solve the problems of poverty and race?

46. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993) (making disparate treatment discrimination under Title VII harder to prove).

47. 113 S. Ct. 2816 (1993) (holding that a race-conscious redistricting plan that is so irregular on its face that it can only be explained as an effort to separate voters into different districts on the basis of race may violate the Fourteenth Amendment).

48. See WILSON J. MOSES, *BLACK MESSIAHS AND UNCLE TOMS: SOCIAL AND LITERARY MANIPULATIONS OF A RELIGIOUS MYTH* 1-48 (rev. ed. 1993).

Professor Culp: My point is that one of the few forces for change in our society comes from the politics surrounding race. If we eliminate that positive force it will be even more difficult to accomplish change in the world. One of the reasons I suspect that Title VII and the other antidiscrimination statutes have become less effective is precisely because the enforcement efforts have lost any connection to a sense of community. The Court's efforts to limit class actions⁴⁹ and its desire to make Title VII solely a tool of individualism⁵⁰ have been part of that separation of community and enforcement.

Professor Not-Professor-Bell: I agree with you that community is important, but why does it have to be *black* community? Isn't it possible that the reason other communities are not forces for change is that race gets in the way? If that's true, removing the notion of race not only will eliminate that impediment but also may allow new, more effective, nonracial communities to come into existence.

Professor Culp: What you say is theoretically possible, but the truth is that the most effective communities have been those that have some notion of identity that empowers change. This has been true for ethnic groups — Jews and Italians, for example — as well as for some Asian groups and some religious groups — including Mormons and Catholics. All these groups have used a sense of community — defined in different ways — to accomplish social and economic progress.

Professor Bell: You're saying that the very idea behind the pill runs counter to the forces that have produced change in America

49. See, e.g., *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977) (rejecting the lower court's view that plaintiffs did not necessarily have to suffer an injury to serve as class representatives).

50. See, e.g., *Connecticut v. Teal*, 457 U.S. 440 (1983) (stating — in both the majority and the dissenting opinion — that Title VII's primary aim is to protect individuals).

The Court has not completely rejected group claims, even in *Teal*. However, the Justices who replaced Brennan, Marshall, White, and Blackmun leave the Court in a position not conducive to success for group claims. The bias against group claims is evident in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). In *Hicks*, the Court refused to grant relief to a black male petitioner because the trier of fact concluded that he had failed to prove that his discharge was motivated by race, even though he had shown that the reasons proffered by the employer were pretextual. 113 S. Ct. at 2748-49. The district court assumed that the discharge must have been motivated by personal animosity — a theory that the petitioner was never given the opportunity to refute — and failed to consider the possibility that this animosity was itself racially motivated. 113 S. Ct. at 2766 (Souter, J., dissenting). By allowing this reasoning to stand — and remanding only for a review of the district court's factual determination, see 113 S. Ct. at 2756 — the Court expressed its understanding of the petitioner's claim as essentially an individual claim. The petitioner claimed to be treated badly because he was black; the Court evaluated his claim as a claim by an individual first and as a black man second. This understanding belies the group genesis of Title VII.

and that we will not be able to accomplish change without some notion of community.

Professor Culp: People are not identity-less automatons. If we eliminate people's race and the communities in which they exist, can they be whole?

Geneva Crenshaw: As I understand it, the Michael Jackson Pill creates a person who is not raceless but white. Aren't you simply doing what you criticize in others, Professor Culp, by assuming that white people don't have a race?

Professor Culp: You may be right. What I meant to say is that we cannot make black people into white people without losing something important.

Professor Not-Professor-Bell: How can that be? Race has no meaning. Professor Culp, you're looking for a form of essentialism that replaces race with culture. As Anthony Appiah has said, this does not solve the problem of essentialism.⁵¹ More importantly, aren't you falling into the trap set by the Afrocentric essentialists, who argue for a superior black culture? They would replace white supremacy with black supremacy. Aren't you arguing for a milder version of that pill? If race doesn't matter, then the community we replace the black community with will be better than the one that exists.

Professor Culp: Isn't that just assuming that race doesn't matter or that white is superior to black? Why not require white people to take a pill to change their race? After all, most of the world is made up of people of color.

Professor Not-Professor-Bell: If race doesn't matter, then whether we have black people take the Michael Jackson Pill — the cheaper solution — or whether white people take the Michael Jackson Pill, the results will be the same.

Professor Bell: Even if you believe that and you do not harbor any antiblack feelings, isn't it clear that Massachusetts is acting because it does harbor those fears and antagonisms? That fact requires us to use different weights in our own analysis of this problem and in interpreting what might be the Court's analysis.

Professor Not-Professor-Bell: Would you two make the same argument if we were talking about a pill to make people thin? The First Circuit has, correctly, found obesity to be a disability under

51. See KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 28-46, 173-80 (1992).

the Americans With Disabilities Act.⁵² Are we going to have communities of the disabled blocking us from giving fat people pills to eliminate obesity because some people think there is a fat community or a community of disabled people? It seems to me that we have to be able to allow law to make people normal. Law reflects norms and the status quo. We cannot escape these norms, and it is fruitless to try. The fat have no more right to be fat than those who won't work have to get paid.

Professor Culp: I take it your point is that race and fatness can be defined by society as bad and that we should accept those community-imposed norms.

Professor Not-Professor-Bell: Yes, law has to reflect the decisions of society. Those decisions may change over time as society changes, but no society can exist that cannot impose its own norms on those it identifies as "deviants."

Professor Culp: My problem is that you are defining race as deviance and the black community as wrong. We all suffer when we allow law to be just an enforcement of community norms. Law also has to be able to live with difference.

Geneva Crenshaw: Professor Culp, you've criticized the solutions others have suggested for reaching racial equality. The color-blindness pill won't work, you say, because we can peek at color. The assimilation pill won't work because it is too damaging to the black psyche and because white society really is not able to fully assimilate black people. And the antidiscrimination pill won't work because the enforcers of the process are also racist. What pill would you suggest? It's easy to criticize but harder to help us construct a better future.

Professor Culp: I think the ultimate problem is the view that this kind of micropill will ever work to attack race or racism. Indeed, the problem I see at the heart of our legal system is a reliance on microchoices that leave unresolved macroproblems. I guess I think we've described the problem in the wrong way. The real problem with these pills as a solution is not what is changed but what isn't. Black employees are given the choice to change their hair, their mannerisms, and their neighborhoods in order to fit in, but even those choices are not likely to be enough to ensure a change in the status quo. As long as race is connected to crime, poverty, and unemployment, no black person can escape the impact

52. See *Cook v. Rhode Island*, 10 F.3d 17 (1993); see also Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1990)).

of racism no matter what microchoices she makes, including in the job market.

Professor Not-Professor-Bell: Don't you exaggerate the problem here? It won't happen overnight, but we do see progress. Indeed, your life and ours around this table prove that Title VII and what you call the market pill and the Michael Jackson Pill are working.

Geneva Crenshaw: Does it really prove that there has been progress? Or does it just show that, having taken your own tenure-passing pills, you all are not able to see the negative aspects of your conditions?

Professor Culp: Maybe our own pills have worked imperfectly, Ms. Crenshaw, but that does not give you the right to make fun of us. All of us have pointed to different kinds of evidence that these pills will not continue to work successfully. Black progress has stalled through much of the last fifteen years, and there seems to be little indication that it's likely to speed up again. I agree that some of us, including me, may sometimes engage in a form of celebration of the status quo that ought to be decried. Some seem to believe that if we wait, the long-run processes will lead to justice. That need not be true, and there is strong evidence that it is not true now.

Professor Not-Professor-Bell: You are simply making Derrick's point in a different way. You seem to believe that the fact of racism is so powerful that microchoices in law will lead to bad results. I've read your criticism of Judge Posner's opinion in *Consolidated Service Systems*.⁵³ In that case he argued that the market will sometimes produce choices that seem discriminatory but that also make sense. Judge Posner argued that a Korean employer who decided to hire only from the Korean community, for what Judge Posner concluded were nondiscriminatory reasons, did not violate Title VII.⁵⁴ The market, Judge Posner argued, is more powerful than our macrodesires for racial equality. The market matters, Posner tells us, and our desire to have it not matter will not alter the experience or choices of employers or employees. Saying the market matters does not mean I celebrate the fact, but I am realistic about how change can occur in our society.

53. *EEOC v. Consolidated Serv. Sys.*, 989 F.2d 233 (7th Cir. 1993); see Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After Hicks*, 23 *CAP. U. L. REV.* (forthcoming Spring 1994) (manuscript at 13-14, on file with author).

54. 989 F.2d at 236.

Professor Culp: The market matters, but if we accept the market and we only try to deal with microchoices, we are unlikely to achieve racial equality. The problem is in thinking that any particular microchoice — any pill — will work without extensive efforts by the government to alter the macroopportunities of communities. Black middle-class and black poor people have been making the right microchoices about what neighborhood to live in and where to send their kids. The right choices benefit their children and themselves in the short run, but those choices will not build a nonracist community or fight the oppression that exists for those who have fewer choices.

Geneva Crenshaw: So is this pill a good thing or a bad thing for the black community, however it is constructed?

Professor Culp: Like all good medicine used in the right situation, it will work. This pill is required medicine for individuals in some situations, but we are asking it to do much more than it is designed for, and we are requiring it in situations where it will do some harm. We require the black community to take this pill but at the same time to cure themselves of any social ills. Requiring the pill works against the macrosolutions of community involvement and creation. In addition, if government looks only to individual solutions, we cannot be guaranteed that we will achieve justice or equality. Title VII has to be reformed to allow difference, but, as I have suggested elsewhere, that permission for difference is never likely to be permanent.⁵⁵

Geneva Crenshaw: I don't think the black community demands justice. I think it just wants the possibility of progress, and your modified proposal doesn't even do that. How do we form these "better" communities, and how do we get the positive aspects of race without getting negative aspects as well?

II. CULTURE AND EQUALITY IN TITLE VII

Suddenly I was transported from the Harvard conference room to a small television studio with large monitors and huge television cameras. Around a seedy wooden table that looked elegant on the monitors sat four black or brown people, myself among them, flanked by two white males. The smaller and more frenetic white man began to speak as a voice from the darkened studio said, "You're on the air."

55. See generally Culp, *supra* note 22.

Announcer: Live from Washington — *Crossfire*.⁵⁶ On the left, Michael Neoliberal, and on the right, Patrick Ultraconservative. Tonight — the “Michael Jackson Pill.” In the crossfire, Jerome McCristal Culp, Jr., Professor of Law at Duke University School of Law, and Michael Delgado, Professor of Law at Harvard Law School; and in opposition, George Hernandez, Professor of English at UCLA, and Joan Martinez, writer.⁵⁷

Michael Neoliberal: Welcome to *Crossfire* — the Michael Jackson Pill. Simple and elegant solution to this country’s race problem, or arrogant tool of white supremacy? The Michael Jackson Pill will eliminate race. Is this the most elegant solution to racism possible? Shouldn’t we endorse it? In our crossfire tonight we have two of the bevy of law faculty advising Geneva Crenshaw, who argued *NAACP v. Commonwealth of Massachusetts* for the petitioner this afternoon before the Supreme Court. They are Jerome Culp, a professor at Duke Law School, and Michael Delgado, a professor at Harvard Law School and the author of *Browning the Law: A Definitive Look at Culture, Race, and Community*. For the other side, Joan Martinez, civil rights expert, author, and generally wise person; and George Hernandez — author, writer, and professor of English.

Joan, you and your group, Neoconservatives for the Status Quo, have written an amicus brief in this case arguing that black people ought to be subject to fines if they refuse the — how should I say — “kind” offer of the Commonwealth of Massachusetts and won’t take the Michael Jackson Pill. Wasn’t Justice Blackmun right when he asked counsel for Massachusetts whether this was not simply an effort to strip black people of their racial being?

Joan Martinez: I don’t know what you and Justice Blackmun are talking about. Race doesn’t exist and culture does, so all the Michael Jackson Pill does is remove false markers for injustice. I would have thought that all right-thinking people would be in favor of such a plan, but the truth is that liberals get a great deal of pleasure from being the recipients of government largesse. They will not let go of race — and not for positive reasons — but because they like singing the blues.

Jerome Culp: There are reasons why people might want to — as you say — “sing the blues.” We have failed to adequately address our race problems — problems that center on the issue of racial

56. This Part is patterned after the successful news-discussion program *Crossfire* (CNN television broadcast, 1982-present).

57. Michael Delgado, George Hernandez, and Joan Martinez are fictional characters.

difference. Blacks suffer higher unemployment, make less money, and are more likely to be incarcerated than are whites. In addition . . . [At this point, the larger and more physically imposing figure seated at the right end of the desk, Patrick Ultraconservative, interrupts, and the television screen shifts to him and seems to focus on his eyebrows.]

Patrick Ultraconservative: Jerry! Take the pill. We all know these statistics, but the truth is they are irrelevant. If black people simply will play their part, race as we know it will go away. This is the quintessential American solution of blending the many into one. My grandparents did this when they came here from Ireland. Others from Eastern Europe and Italy have done so. Now, Asian immigrants from Taiwan, Korea, and Vietnam are doing this with few problems. Many Hispanics have done this: Why shouldn't the poor, overworked taxpayer of Massachusetts say enough is enough? We have paid for enough welfare and enough affirmative action — take the pill.

Michael Delgado: Pat, as always, you have it wrong. This pill is a snare and a delusion. It attempts to deal with America's race problem as a black-and-white issue. It is not. There are lots of shades between and within black and white. Indeed, I come from a group that is not definable by traditional American racial classifications. We see ourselves as tied to each other by culture and language and imagination and less effectively by notions of color or race. Race is not irrelevant, but it also does not define our identity or the nature of the problems we face in the job market.

Joan Martinez: Michael, I agree that Hispanics are different. We are not black people in brownface, but we have to support the kinds of changes in ourselves, in our communities, and in others that will make this a better place.

Michael Delgado: If you want to understand the problems of the assimilation you advocate, then listen to Juan Perea, a professor of law at the University of Florida.⁵⁸ He has pointed out that we have had no significant enforcement activity against national origin discrimination in the almost thirty years of Title VII's existence.⁵⁹ Very few cases have been decided with respect to national origin, and even liberal judges have been willing to find that an employer can fire an employee for speaking Spanish to a fellow employee on

58. See Juan F. Perea, *National Origin Discrimination*, 35 WM. & MARY L. REV. 805 (1994); see also Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

59. See Perea, *supra* note 58, at 807-09.

the job.⁶⁰ This can be true even if speaking Spanish is a practical necessity for parts of the job — for example, if some of the customers speak Spanish.

Jerome Culp: I take it that you are saying that Title VII already requires of Spanish-speaking people a kind of “Anglo” pill that is the moral equivalent of the Michael Jackson Pill.

Patrick Ultraconservative: Are you suggesting, Professors Culp and Delgado,⁶¹ that employment discrimination law should allow someone to make it more difficult for an employer to be able to control his workers? It seems to me that Title VII law simply requires employees to take a very limited pill in order to get and keep a job. This pill is not offensive and does not extend beyond work situations. Latinos should adjust to the environment that exists.

Michael Neoliberal: Ms. Martinez, do you agree with my bombastic colleague, Mr. Ultraconservative, that people should have to change to be able to enter the work force? Should women have to put up with pornography and sexually explicit comments at a construction site, for example? Are we willing to require women to take a male pill to be in the work force?

Joan Martinez: Some of this activity could be discriminatory towards women or Hispanics. If an employer altered his work force to make it more offensive to most women after women came on board, that might be discrimination. But women should be willing to become like men to the extent that it is job related. If the work force is already pornographic or sexually explicit, women should be willing to put up with it.

Jerome Culp: That’s the rub, isn’t it? When do we find something “job related” and when do we see it as like this Michael Jackson Pill, just enforcing the norms? The problem is that norms change and the law has to ask what is fair about those norms. When a woman construction worker comes on the job and needs to use the bathroom, is it all right to have dirty and unsafe conditions

60. See *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (Rubin, J.) (holding that an employer may fire employees for speaking Spanish to one another during work time even when Spanish is required for the job of retail service to a partially Spanish-speaking clientele), *cert. denied*, 449 U.S. 1113 (1981). Judge Rubin of the Fifth Circuit had been one of the most committed and passionate defenders of the claims of the oppressed, so many were surprised that he authored this opinion. For a careful examination of this case in light of Judge Rubin’s other jurisprudence, see Martha Chamallas, *Racial Segregation and Cultural Domination: A Rubin Trilogy on Title VII*, 52 LA. L. REV 1457 (1992) (noting the Judge Rubin was able to see the issues of segregation and oppression but had a more difficult time understanding cultural oppression as race discrimination). According to Judge Rubin, culture is mutable but race is not; Professor Chamallas shows this to be stilted and limited view of culture. See *id.* at 1475-76.

that are a threat to her but not to men? Do we do justice in the situation to require her to suffer bladder infections on the altar of normality?⁶¹

Patrick Ultraconservative: Professor Culp, you are avoiding the question by altering the facts faced by the Supreme Court. We do not have an Anglo pill or a gender pill; we have the Michael Jackson Pill. This pill is about ending racism.

Jerome Culp: Tell me, Pat, would you take a pill that altered your sexual orientation or shifted your ethnicity from Irish to Arabic?

Patrick Ultraconservative: Those two questions are not the same. I am proud of my Irish heritage, as I am sure you are of your African-American heritage, but I do not think that I would be injured by being required to become part of some other dominant ethnic group. If I went to Saudi Arabia, I would assume I would need to be like them. Indeed, if I moved to Greenwich Village or San Francisco and the people there wanted me to take a “sophisticated” pill or a “cool Californian” pill to live there, I would move right back. But I still think they should have the right to require the pills. Law is about imposing reasonable norms on others. Now if they wanted me to take a “queer” pill, that would not be about normality. That would be about trying to make me a child molester or a deviant. One’s normal sexual orientation is not the kind of normality that can be changed, any more than I could require you to take a pill to become a sadomasochist. Title VII appropriately allows employers to make black women straighten their hair and Chinese women cut theirs. Title VII also allows employers to require white women to be men. None of these requirements are unfair or inappropriate. Like the Michael Jackson Pill, they merely require a change to normality.

Michael Neoliberal: Do I see a great deal of homophobia peeping out, Pat?

Michael Delgado: You don’t understand justice for those who are different. You see the result as creating “normality” out of chaos. For those of us with multiple experiences and cultures that are the same and different, to require a single response is to miss the possibility of diversity, whether because of race, gender, or sexual orientation.

61. See *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987) (holding that a construction company that did not provide sanitary toilet facilities for either men or women could be held liable on a disparate impact claim under Title VII because of women’s greater risk of disease or infection).

Joan Martinez: Diversity is permitted in this system. Any employer can require any normality it wants. A Korean cleaning agency can require Korean ethics and normality in its job force. In that sense, Title VII allows multiple pills to be consumed by the community.

Jerome Culp: That notion of diversity accepts the existing allocation of employers as appropriate. It says that this status quo, if not perfect now, will produce justice in the future. I question whether that's true. Requiring the Michael Jackson Pill only works if the status quo afterward is just. I do not believe it will appropriately accommodate the possibility of differences in identity, race, class, or ethnicity.

George Hernandez: You don't see the poor unwilling to take a pill that will free them from poverty. The normality of difference seems overrated to those who live with the difference. The truth is that Professors Culp and Delgado are willing to accept affirmative action when it comes at the expense of the seniority or job prospects of white males.

Jerome Culp: I see what you're saying, and a plurality of the Court advocated your position in *Wygant*.⁶² It even quoted Richard Fallon and Paul Weiler for the proposition that the most important resource held by workers is their accumulated seniority rights.⁶³ But the truth is that workers' investments in their homes and in their general education and other human capital is likely to be more important. The Court has consistently overestimated the injuries to white Americans and underestimated the concerns of black Ameri-

62. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). The Court struck down a union layoff provision that favored black employees. 476 U.S. at 283-84. Writing for the plurality, Justice Powell noted:

Of course, when a State implements a race-based plan that requires such a sharing of the burden [of the remedy], it cannot justify the discrimination effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. . . . [T]he petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues.

476 U.S. at 281 n.8 (quoting 476 U.S. at 299 (Marshall, J., dissenting)).

63.

A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, *the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home.*" . . . Layoffs disrupt these settled expectations in a way that general hiring goals do not. 476 U.S. at 283 (quoting Richard H. Fallon & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CR. REV. 1, 58) (emphasis added). This claim by Professors Fallon and Weiler was not sound when they wrote it in 1985, and changes in the labor market since then have made seniority even less important.

cans. In *Wygant*, for example, the Court said that the interests of white teachers were injured by the enforcement of a negotiated seniority provision in a union contract that benefited black teachers.⁶⁴ The Court ignored the fact that the black teachers lured to the Jackson County school system by this union contract provision were likely to be disproportionately injured by the Court's refusal to protect their interests. The Court did not deal with the real, lived experiences and concerns of black teachers.

Michael Delgado: You've made that point elsewhere.⁶⁵ I take it that you want to say that the Court requires blacks and other people of color to take pills that disempower them. The law requires that black people give up a lot when they take the Michael Jackson Pill or some type of Anglo pill, but it does not provide them with the benefits that it promises.

George Hernandez: That may be so, but that is not the case the Supreme Court heard today. This pill will do all the things you say the law cannot. Shouldn't you support it?

Jerome Culp: Even if you're right that there are no other hidden side effects from the Michael Jackson Pill, does it do too much violence to other interests that are important?

Patrick Ultraconservative: There are no other interests.

Jerome Culp: White politicians and judges have always thought that black people were inferior and therefore had no interest worthy of respect. That lack of respect existed in the original constitutional draft⁶⁶ and in cases like *Dred Scott*,⁶⁷ the *Civil Rights Cases*,⁶⁸ and *Plessy v. Ferguson*.⁶⁹ Haldeman's diaries suggest that Richard Nixon thought so,⁷⁰ and descriptions of President Eisenhower suggest that he believed in states' rights and the inferiority of black people.⁷¹ I have argued that this flavor is not totally absent from

64. 476 U.S. at 282-84 & n.8.

65. See Culp, *supra* note 22, at 978-83.

66. Blacks were not mentioned in the original constitutional draft directly but were euphemistically noted as "other persons." U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all *other persons*." (emphasis added)); see Culp, *supra* note 2, at 67-68 & n.84.

67. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

68. 109 U.S. 3 (1883).

69. 163 U.S. 537 (1896).

70. See H.R. HALDEMAN, *THE HALDEMAN DIARIES* 53 (1994) (remarks of Richard Nixon as recorded by H.R. Haldeman) ("[T]here has never in history been an adequate black nation, and they are the only race of which this is true.").

71. See, e.g., HARRY S. ASHMORE, *CIVIL RIGHTS AND WRONGS* 86, 121-23 (1994) (noting that General Eisenhower opposed desegregating the military and as President gave only lukewarm support to ending school segregation).

the current Court.⁷² This pill does not avoid the problem of imposing a form of inferiority on those who are required to take it. It's a very "American" nonsolution to what W.E.B. Du Bois described as "the problem of the Twentieth Century."⁷³

Patrick Ultraconservative: We'll be right back with Michael in the crossfire.

[A commercial flashes in front of us, showing ethnically unplaceable, androgenous people buying, selling, and making fools of themselves. It is probably just my imagination, but it appears that the group becomes whiter and whiter as the commercials continue.]

Michael Neoliberal: We're back. Pat, this pill is not the savior of the universe, but it's also not the greatest evil. If employers want to give this pill to their employees, or if the government wants to require Haitian refugees to take it, or if the government wants to provide it to criminals in return for early parole, it seems to me to be totally consistent with American principles. I do think that the notion of imposing a fine may be too harsh, however, and I think the Court should strike down that part of the Massachusetts statute.

Patrick Ultraconservative: Michael, you're closer to the truth than you normally are. But if employers, the border patrol, and immigration officials can require employees who want to get a promotion or a job, immigrants who want to enter this country, and inmates who want an early parole to take this pill, why can't the Commonwealth of Massachusetts impose a penalty for not taking it? Black people have to stop using race as a crutch and become "just" Americans.

III. THE DECISION

Without warning, the television studio became a small, elegant, wood-paneled room. I suddenly realized that this small room was the Supreme Court. I was sitting in the gallery when a speaker from the bench began to read an opinion in the old-fashioned way. He or she said his or her name, but his or her face kept changing from man to woman, from bearded to clean shaven, and very occasionally from white to black. The speaker was a Supreme Court Justice, and he or she read the opinion of the Court with slow precision:

This action comes on appeal from a decision of the Massachusetts Supreme Judicial Court upholding Massachusetts General Law

72. See Culp, *supra* note 2, at 77-87.

73. W.E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK* at v (Fawcett Publications 1961) (1903) ("[T]he problem of the Twentieth Century is the problem of the color line.").

1619.28 against challenges that the statute inappropriately and invidiously discriminates against black citizens of the Commonwealth of Massachusetts in violation of the First, Thirteenth, and Fourteenth Amendments. We affirm.

Dr. Michael Jackson developed the racial elimination and decoloring pill as part of his work on the gene project at Hollywood University. Massachusetts General Hospital in Boston was one of the principal locations for the successful trials of the pill. After the development and trials of this pill, the legislature of the Commonwealth of Massachusetts passed General Law 1619.28. This law requires all citizens of Massachusetts who are not white to take the Michael Jackson Pill.^a Violation of this statute constitutes a felony and subjects the violator to a \$2,000 fine. This case is an appeal from a unanimous decision of the Massachusetts Supreme Judicial Court holding that the Commonwealth of Massachusetts has the power to impose these requirements.

Although the action of a state through officers charged with the administration of a law that is fair in appearance may be of such a character as to constitute a denial of the equal protection of the laws,^b such a conclusion is here neither required nor justified. The statute, on its face, makes no racial discrimination, and the record fails to show the existence of such discrimination in application.^c We should note that the result we reach in this case does not turn on the fact that the pill makes black people white; the result would be exactly the same if we were dealing with a law that, as a legitimate effort to cure a social problem, required all Americans to take a pill that made them Asian or black.

In 1954, this Court held that "in the field of public education the doctrine of 'separate but equal' has no place."^d The following year, the Court ordered an end to segregated public education "with all deliberate speed."^e Our subsequent jurisprudence has continued to teach that race has no place in our constitutional edifice.^f This has been an unvarying principle of the framers of our post-Civil War con-

a. A group of nonblack and nonwhite citizens have challenged the application of this statute to them. We express no opinion on those claims because it appears that Massachusetts has tried to enforce the statute only with respect to black citizens.

b. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (striking down a law that on its face applied to everyone but that in practice was used only against the Chinese).

c. See *Bailey v. Alabama*, 219 U.S. 219, 231 (1911) (holding that the mere fact that a law was applied against a black person does not establish a violation of the Equal Protection Clause without a showing that the law either discriminated on its face or was applied in a discriminatory manner).

d. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*).

e. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

f. See, for example, Justice O'Connor's description of *Batson v. Kentucky*, 476 U.S. 19 (1986), in her concurrence to a denial of certiorari in *Brown v. North Carolina*, 479 U.S. 940 (1986):

Batson, in my view, depends upon this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter. . . .

. . . .

stitutional and legislative history. Stretching from the original civil rights statutes^g to Title VII of the 1964 Civil Rights Act,^h Congress has joined us in trying to create a world in which, by statute, race does not exist. The so-called Michael Jackson Pill requires us to examine how that jurisprudence of color blindness should link up with our other concerns about race and difference.

The issues this pill raises can be seen most clearly in our jurisprudence on Title VII and race. Title VII renders it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."ⁱ Accordingly, this Court has rejected the notion that race ought to be the deciding factor in employment decisions.^j Consider an example:^k Assume that forty percent of a business's work force are members of a particular minority group — a group that comprises only ten percent of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified. He is rejected by a hiring officer of that same minority group, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under *McDonnell Douglas*,^l the plaintiff could easily show a prima facie case of discrimination.^m Moreover, under the interpretation of our law advocated by some former members of this Court, not only must the company come forward with some explanation for the refusal to hire — which it will have to try to confirm

We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be. That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact.

479 U.S. at 941-42 (O'Connor, J., concurring) (denying petition for certiorari); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (rejecting a municipal set-aside requirement that a fixed percentage of government contracts be awarded to minority business enterprises); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that a preferential layoff scheme favoring minorities over nonminorities with greater seniority violated the Equal Protection Clause); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that the effects of racial prejudice cannot justify the removal of an infant child from the custody of its natural mother); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a state statutory scheme designed to prevent marriages between persons solely on the basis of racial classifications).

g. The post-Civil War Congresses passed a number of civil rights statutes to eliminate the pernicious impact of slavery. See, e.g., Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (reenacted in part at 42 U.S.C. § 1981-82 (1988)).

h. 42 U.S.C. § 2000e-2 (1988 & Supp. IV 1992).

i. 42 U.S.C. § 2000e-2(a)(1) (1988).

j. See generally *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

k. See Justice Scalia's hypothetical in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2750-51 (1993).

l. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

m. See 411 U.S. at 802 (describing the elements of a prima facie case).

out of the mouth of its now-antagonistic former employee — but the jury must be instructed that if they find that explanation to be incorrect, they must assess damages against the company, whether or not they believe the company was guilty of racial discrimination.ⁿ The disproportionate minority makeup of the company's work force and the fact that its hiring officer was of the same minority group as the plaintiff is irrelevant, because the plaintiff's case can be proved "indirectly by showing that the employer's proffered explanation is unworthy of credence."^o That approach, in an effort to create a race-free workplace, transforms race into the most important and devastating piece of evidence in the case against the employer. The elimination of the element of race altogether will more effectively afford those who choose to avail themselves of the pill a race-free employment and social environment. The pill seems to this Court to be a reasonable and rational response — indeed, the appropriate response — to the fact that race exists and is difficult to deal with.

The alternative approach to race in society — the approach advocated by the petitioner — requires special treatment of racial minorities to counteract the harms of a history of discrimination. We have rejected in this context the notion that race can be the justification for preference. For example, in a case involving admission to a medical school, we held that setting aside places for racial minorities violates the Fourteenth Amendment.^p Among the justifications offered in support of the plan were the desire to "reduc[e] the historic deficit of traditionally disfavored minorities in medical school and the medical profession" and the need to "counte[r] the effects of societal discrimination."^q Five members of the Court determined that none of these interests could justify a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities. Justice Powell contrasted the "focused" goal of remedying "wrongs worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past."^r He indicated that for the governmental interest in remedying past discrimination to be triggered, "judicial, legislative, or administrative findings of constitutional or statutory violations" had to be present.^s

In another case, four members of the Court applied heightened scrutiny to a race-based system of employee layoffs.^t Justice Powell,

n. See *Hicks*, 113 S. Ct. at 2759 & n.5 (Souter, J., joined by White, Blackmun & Stevens, JJ., dissenting); see also *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 717-18 (1983) (Blackmun, J., joined by Brennan, J., dissenting).

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

p. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

q. 438 U.S. at 306 (citations omitted).

r. 438 U.S. at 307.

s. 438 U.S. at 307.

t. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (holding that the school board's policy granting preferential protection against layoffs on the basis of race violated the Fourteenth Amendment).

writing for the plurality, again drew the distinction between societal discrimination, which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief.^u

For obvious reasons, societal discrimination alone is an inadequate basis for race-conscious classifications. It is sheer speculation that any particular black citizen might be able to do better than white citizens if he had not suffered the social and economic deprivations associated with his race in our society. There may be numerous explanations for the differences between a particular black person and a white person, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. A black person, for example, may be more likely to be attracted to jobs that provide low incomes or more leisure time.

To accept the petitioner's claim that past societal discrimination alone can serve as the basis for rigid racial preference would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a nation of equal citizens would be threatened. Therefore, we find that the Commonwealth has an interest in pursuing other, less problematic solutions to the problem of race.

The Commonwealth of Massachusetts contends that the petitioner cannot establish standing in this case because it failed to allege that one or more of its members would suffer an injury through the enforcement of the challenged ordinance. The decision that is most closely analogous to this case is *Regents of University of California v. Bakke*. In *Bakke*, a twice-rejected white male medical school applicant claimed that the school's admissions program, which reserved sixteen of the one hundred places in the entering class for minority applicants, was inconsistent with the Equal Protection Clause. Addressing the argument that the applicant lacked standing to challenge the program, Justice Powell concluded that the "constitutional requirements of Article III" had been satisfied because the requisite "injury" was the medical school's "decision not to permit Bakke to compete for all 100 places in the class, simply because of his race."^v Thus, "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing."^w Four other Justices joined Justice Powell in this portion of his opinion.^x

In this case, however, the petitioner does not allege a harm that is cognizable. This pill, like much that is required of citizens, simply imposes an inconvenience in order to remove a problem that is cre-

u. 476 U.S. at 277-29.

v. 438 U.S. at 281 n.14.

w. 438 U.S. at 280-81 n.14.

x. 438 U.S. at 272; see also *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, Fla.*, 113 S. Ct. 2297, 2302-03 (1993) (Thomas, J.) (comparing *Bakke* to the case at hand and concluding that the "injury in fact" in equal protection cases may be the imposition of a barrier, not the "ultimate inability to obtain the benefit").

ated by the status of race. It removes this problem by eliminating the status of race altogether. Thus, it cannot be seen as creating a real injury to the people represented by the NAACP. Petitioner contends in its brief that the injury suffered by African Americans because of this pill is analogous to the injury to the plaintiff in *Bakke*. The difference, unfortunately for the petitioner's position, is that in that case the harm that was suffered was something that was constitutionally recognizable: the deprivation of the constitutionally cognizable right to compete for admission to a state medical school. The petitioner in this case, by contrast, has failed to describe what injury the implementation of this policy will cause for those who take the pill. Those individuals obviously will be treated just as others are. As for those who refuse to adhere to the statute and do not take the pill, the injury is not the product of the state's policy but the direct result of the socially produced notion of race. The Commonwealth of Massachusetts has the right to penalize behavior that will be costly to its citizens. To the extent that race matters, it is appropriate for the state to eliminate race.

There remains the question whether the Thirteenth Amendment limits the ability of the Commonwealth to impose this penalty. In relevant part, the Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."^y In this case, the petitioner contends that the Commonwealth's imposition of the pill on black citizens constitutes a "badge of slavery."^z The record, however, discloses no racially discriminatory motive on the part of the Massachusetts legislature. Instead, the record demonstrates that the interests that motivated the legislature are legitimate. The elimination of the consequences of racial difference is sufficient to justify an adverse impact on the NAACP and those of its members who are somewhat inconvenienced by having to take the pill. That inconvenience cannot be considered an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate. The argument that the pill violates the amendment must therefore rest, not on the actual consequences of the law, but rather on the symbolic significance of the fact that most of those who will be inconvenienced by the action are black. This pill, however, simply makes black citizens of the Commonwealth of Massachusetts white. Because we understand "badges and incidents of slavery" to have the opposite effect, this pill cannot be such a badge or incident. Proper respect for the dignity of all citizens requires that they all accept the same burdens as well as the same benefits of citizenship, regardless of their racial or ethnic origin. The elimination of race altogether clearly serves those ends.

The Massachusetts Supreme Judicial Court held that even if the law discriminates between black and white citizens, this discrimina-

y. U.S. CONST. amend. XIII, § 1.

z. See *The Civil Rights Cases*, 109 U.S. 3, 20-21 (1883).

tion is nonetheless justified because the statute is narrowly tailored to serve compelling state interests. Specifically, the court concluded that this law helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling; we are convinced the law can be said to promote them.

We affirm.