

# EMPLOYMENT DISCRIMINATION LAW AND THE NEED FOR REFORM

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## INTRODUCTION

### I. INTRODUCTION: SUPREME COURT DECISIONS INVITE REFORM

Recent Supreme Court decisions, particularly those from the 1988-89 term, reconstructed the law of employment discrimination.<sup>1</sup> The result of this reconstruction is clear: victims<sup>2</sup> of discrimination now have a very difficult task. Burdens of proof were changed to the disadvantage of those already disadvantaged by discrimination.<sup>3</sup> Definitions were reformulated to defer to managerial preferences.<sup>4</sup> Statute of limitations issues were resolved in favor of white males.<sup>5</sup> Moreover, a vast body of racial discrimination claims were removed from the powerful protections of section 1981<sup>6</sup> of the Civil Rights Act of 1866, and relegated to the less favorable protections of Title VII of the 1964 Civil Rights Act.<sup>7</sup>

In each of these decisions, the Court implicitly grappled with the risks inherent in legal formulations. Any legal rule creates a risk of error. In any employment discrimination litigation, the judge must make a decision, thereby creating a risk of the wrong

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1. The most significant decisions from the 1988-89 term are: *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT & T Technologies*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Like these decisions, other, less recent decisions have injured civil rights plaintiffs. See, e.g., *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Marek v. Cheany*, 473 U.S. 1 (1985). See *infra* notes 44-155 and accompanying text for discussion of the cases from the 1988-89 term, and *infra* notes 25-43 and accompanying text for discussion of the earlier cases.

2. Use of the word "victim" has fallen into disrepute because it connotes passivity and helplessness. However, in the context of employment discrimination, it remains apt. While the recipients are not necessarily passive, and not always helpless, the current state of the law encourages both. Moreover, I know of no good word replacement.

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

4. *Id.*

5. *Lorance v. AT & T Technologies*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989).

6. 42 U.S.C. § 1981 (1988).

7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988). Hereinafter, Title VII will be cited to its specific sections only.

decision. If the judge mistakenly finds that unlawful discrimination occurred, an innocent employer must pay money to a plaintiff who has not really suffered employment discrimination. If the judge mistakenly finds that no unlawful discrimination occurred, the unfound but real discrimination continues, and its victim is left with no remedy. Recent Supreme Court decisions choose to risk that real discrimination will continue, unremedied, rather than risk that employers pay for "innocent" acts.

Because recent Supreme Court decisions rather drastically changed discrimination law to the disadvantage of employees and to the advantage of employers,<sup>8</sup> Congress responded with the proposed Civil Rights Act of 1990.<sup>9</sup> The initial bill was progressive.<sup>10</sup> The Bush Administration's threatened veto, however, led Congress to weaken the proposed bill in numerous ways.<sup>11</sup> Even after Congress made serious attempts to placate the Administration, the bill was vetoed anyway.<sup>12</sup> President Bush labelled the bill a quota bill,<sup>13</sup> and little else made the public debate.<sup>14</sup>

Presumably in recognition of *some* political appeal of a civil rights bill, the Administration sent its own bill to the Hill.<sup>15</sup> The

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8. See *infra* notes 44-155 and accompanying text for an explanation of how the 1988-89 term changed the face of employment discrimination law.

9. S. 2104, As Amended by the Substitution of H.R. 4000, 101st Cong., 2d Sess. (1990) [hereinafter S. 2104, as amended by H.R. 4000]. Changes made by the House-Senate Conference, H.R. CONF. REP. No. 856, 101st Cong., 2d Sess. (1990), will be cited as Conference Report.

10. See *infra* notes 237-56 and accompanying text discussing enhanced remedies, availability of a jury trial, and relief for discrimination unrelated to adverse employment divisions.

11. *Conference Report on Civil Rights Act of 1990 (S.2104) As Passed By Senate Oct. 16 and House Oct. 17*, 202 Daily Lab. Rep. (BNA) E-1 (Oct. 18, 1990). [Hereinafter Conference Committee].

12. *Message to the Senate Returning Without Approval the Civil Rights Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). See also *Bush Vetoes Rights Bill, Sends Alternative to Hill*, 205 Daily Lab. Rep. (BNA) A-10 (Oct. 23, 1990); *Senate Sustains Veto of Civil Rights Bill*, 207 Daily Lab. Rep. (BNA) A-6 (Oct. 25, 1990). The 66-34 vote to sustain the veto was one short of the number needed to override the veto. *Id.*

13. *Statement on the Civil Rights Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1631 (Oct. 20, 1990). See also *Bush Vetoes Civil Rights Bill After Sending Alternative to Hill*, 205 Daily Lab. Rep. (BNA) A-10 (Oct. 23, 1990).

14. *On Job Rights Bill, A Vow to Try Again in January*, N.Y. Times, Oct. 26, 1990, at A25, col. 1. "[T]he bill was exceedingly complex and legalistic. Important as it may have been, the legislation did not have the sweep and moral weight of a statute conferring rights on people." *Id.* at col. 2.

15. *Bush Administration's Alternative Civil Rights Bill As Sent to Congress October 20, 1990 and White House Section-By-Section Analysis*, 205 Daily Lab. Rep. (BNA) D-1 (Oct. 23, 1990). [Hereinafter Presidential Alternative].

Bush bill substantially weakened the already diluted Congressional proposal, but it represented the Administration's willingness, at least on paper,<sup>16</sup> to recognize some defects in current law. With movement by both the Congress and the President toward compromise, and with the recent Congressional elections,<sup>17</sup> a Civil Rights Bill of 1991 is to be expected. Whether it will constitute real reform is another matter.

A. *The Ordinary Title VII Case: How the Law Was Changed to the Disadvantage of Victims of Discrimination and to the Advantage of Employers*

Title VII prohibits discrimination on the basis of race, color, sex, religion, and national origin.<sup>18</sup> These prohibited discriminations can occur in many forms. Two forms of discrimination that are illegal under Title VII<sup>19</sup> are disparate treatment discrimination and disparate impact discrimination. Disparate treatment is the type of discrimination most commonly and easily understood. It is treating a person in a disfavored way because of that person's membership in a disfavored class.<sup>20</sup> "No Irish need apply" is an anachronistic example of systemic disparate treatment discrimination: an entire group is treated unfavorably because of its national origin. The individual disparate treatment<sup>21</sup> case occurs when, for

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16. Because the final Administration proposal was a repudiation of its prior positions made through Attorney General Thornburgh — positions that Congress took seriously in trying to win passage — it is hard to know the President's real position. Thornburgh had fought Congress on all its compromise proposals. See *Text of Letter from Attorney General Thornburgh to Sen. Dole, October 12, 1990*, 199 Daily Lab. Rep. (BNA) E-1 (Oct. 15, 1990) [hereinafter *Thornburgh Letter*].

17. Democrats gained one seat in the Senate and nine in the House. The 56 Democrats in the Senate are just eleven short of the number needed to override a veto if everyone votes. The House ratio is 266 Democrats and one Independent to 167 Republicans. A two-thirds majority of 290 votes would be necessary to override a veto if all 435 House members voted. A new civil rights bill, along with other workplace proposals, are under consideration. *Workplace Issues High on Agenda of 102nd Congress*, 4 Daily Lab. Rep. (BNA) C-1 (Jan. 7, 1991).

18. 42 U.S.C. § 2000e-2.

19. There are some other types of discrimination outlawed by Title VII. See SCHLEI & GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* (2d ed. 1983), who speak of present effects of past discrimination, and who also properly mention failure to accommodate, a kind of discrimination generally limited under Title VII to religious discrimination. The present effects of past discrimination theory was seriously undercut by *United Air Lines v. Evans*, 431 U.S. 553 (1977) (discrimination not made the subject of a timely charge may be treated as lawful).

20. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

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

example, an employer refuses to promote a particular woman because he does not think a woman can function well in the job—perhaps because she must deal with men from foreign countries,<sup>22</sup> or perhaps because she is too unattractive.<sup>23</sup>

Disparate impact discrimination is the form of illegal discrimination that is less easily understood. The difficulty in understanding this type of discrimination may result from the tendency to think of discrimination as discrete decisions that negatively affect particular individuals or groups. The disparate impact theory of discrimination acknowledges, in a very limited way,<sup>24</sup> that discrimination has a pervasive societal connection, enacted through systems that tend to permanently subordinate women and minorities. The disparate impact theory recognizes, in a more direct way than does disparate treatment theory, that many employment decisions are race-related but not race-specific, or gender-related but not gender-specific.

Disparate impact discrimination, first prohibited in 1971 by the Supreme Court in *Griggs v. Duke Power*,<sup>25</sup> occurs when a facially neutral policy or practice disproportionately excludes members of a protected class from employment or promotion. This

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22. See *Fernandez v. Wynn Oil Co.*, 20 Fair Empl. Prac. Cas. (BNA) 1162 (C.D. Cal. 1979).

23. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There are two reasons for distinguishing between individual and systemic disparate treatment cases. One is the role of statistics: they are commonly used to establish the systemic, but not the individual, case. See *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (EEOC did not prove prima facie case because of inadequate statistics and absence of anecdotal evidence). The other important distinction is the presumption of class-wide entitlement to relief in the remedial phase of the systemic case. After liability has been established for class-wide discrimination, the employer can escape relief toward each class member only by proving that the individual was unqualified, or that no job was available at the appropriate time. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); FIVE-YEAR CUMULATIVE SUPPLEMENT TO SCHLEI & GROSSMAN'S EMPLOYMENT DISCRIMINATION LAW 511 (Cathcart & Ashe eds. 2d ed. 1989) (noting that "statistical evidence continues to dominate adverse impact cases and disparate treatment class actions," and then discussing use of nonstatistical proof in class actions and adverse impact claims); see also *Talley v. United States Postal Serv.*, 720 F.2d 505 (8th Cir. 1983).

24. The limitations of the impact theory in eradicating entrenched discrimination can be seen when one compares it with MacKinnon's more visionary, proposed legal standard on subordination, dominance, and difference. C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635 (1983). More far-reaching alternatives are suggested by I. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

25. *Griggs v. Duke Power*, 401 U.S. 424 (1971) (neutral employment practice that operates to exclude a protected class is unlawful unless it serves a valid business purpose).

type of discrimination is unlawful *only* if the policy or practice is *not* a business necessity. In disparate impact discrimination, it does not matter that the decision-maker had no intent to discriminate.<sup>26</sup> The relevant issue involves the negative consequences of employment policies that do not measure job ability or predict job success. No selection device that screens out women and minorities should be used *unless* the employer really needs to use that device to make employment decisions. Unintentionally discriminatory policies must be prohibited because of their effect. They serve to keep minorities and women locked into inferior employment positions.

The Court has enunciated different standards of proof applicable to each type of discrimination because disparate treatment and disparate impact differ in character. In general, it is easy to show a *prima facie* case of individual disparate treatment discrimination and easy for the employer to make a rebuttal. In contrast, the systemic case is much harder, due to the exacting requirements of statistical proof.<sup>27</sup> In the typical individual disparate treatment case, the plaintiff alleges, "I was qualified, I applied, I am black (or female, Hispanic, Catholic, etc.), there was an opening, but you didn't hire me."<sup>28</sup> The employer then responds by "articulating,"

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26. *Id.* at 432. This longstanding requirement of the disparate impact case has been questioned by Justice O'Connor in her *Watson* plurality opinion. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (liability for impact discrimination should not be imposed under lighter standards than those obtaining for treatment discrimination). The dissent in *Wards Cove* suggested that the majority changed the distinction between the impact and the treatment case. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 679 (Blackmun, J., dissenting).

27. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1987) (EEOC tendered inadequate statistics to establish a *prima facie* case, especially in the absence of anecdotal evidence). The *Wards Cove* requirements for statistical proof will be fully applicable to systemic treatment claims. Systemic cases of all kinds, whether impact or treatment, are usually brought by the EEOC (statutorily authorized to bring suit under section 706(f) of Title VII), or by a civil rights organization. See Shanor & Marcossan, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 *Lab. Lawyer* 145 (1990). "Private disparate impact cases were rare even before *Wards Cove*; to the extent that the decision increases the burden on impact-case plaintiffs, the incentives for private counsel to take impact cases have been diminished." *Id.* at 181. A good illustration of the battle and suggested costs of the experts is *EEOC v. Andrews Corp.*, 49 *Fair Empl. Prac. Cas.* (BNA) 804 (N.D. Ill. 1989).

28. See *McDonnell Douglas Corp. v. Green Corp.*, 411 U.S. 792 (1973). The purpose of the *prima facie* case in the individual disparate treatment claim is simple: to raise the inference of discrimination by eliminating the most common reasons for a rejection—lack of qualifications and lack of a job opening. *Id.* The presumption fails when the employer presents its articulation of the legitimate reason for its decision. The plaintiff must then win

through admissible evidence, its justification for its decision.<sup>29</sup> At this point, the employer might say, "But you weren't nearly as qualified as the person we hired,"<sup>30</sup> or "No, we had no opening,"<sup>31</sup> or "We didn't hire you because your references were bad."<sup>32</sup>

The individual disparate treatment case usually is decided on the issue of pretext.<sup>33</sup> The determinative question is whether the plaintiff can prove that the employer's articulated justification for its employment decision was a pretext for unlawful discrimination. The determination of the pretext issue usually depends upon the credibility and credence of the competing claims. For example, if the employer justifies a refusal to hire on the basis of poor references, but routinely hired white males with bad references, then the employer will likely lose. However, absent such evidence in the form of comparative data, the employer is likely to win. In order to win a disparate treatment case, the plaintiff generally needs either the proverbial smoking gun or excellent comparative data, statistical or otherwise, showing that similarly situated persons in another class were treated more favorably than the plaintiff.<sup>34</sup>

Compared to the individual disparate treatment case, it is difficult to make a *prima facie* showing of disparate impact discrimination<sup>35</sup> because the plaintiff must have ample statistical evidence that the employer's practice kept the plaintiff class out or down. To prove such adverse selection, it is necessary to compare the percentage of qualified persons of a particular protected class who are available to work within the geographically defined "relevant labor

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

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

30. *Id.* See also *Cuthbertson v. Biggers Bros.*, 702 F.2d 454 (4th Cir. 1983).

31. See *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536 (11th Cir. 1987).

32. Consider, for example, *Waters v. Furnco Constr. Corp.*, 688 F.2d 39 (7th Cir. 1982), *on remand Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

33. FIVE-YEAR CUMULATIVE SUPPLEMENT TO SCHLEI & GROSSMAN'S EMPLOYMENT DISCRIMINATION LAW 25 (Cathcart & Ashe eds. 2d ed. 1989).

34. The following cases contain facts suggesting how difficult it is for the disparate treatment plaintiff to win: *Hill v. Mississippi State Employment Serv.*, 918 F.2d 1233 (5th Cir. 1990); *Jackson v. Harvard Univ.*, 900 F.2d 464 (1st Cir. 1990); *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458 (9th Cir. 1987), *cert. denied*, 484 U.S. 853 (1987); *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980).

35. See *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (plaintiffs could not establish the *prima facie* case of disparate impact because of inadequate statistical information). The same problems exist for establishing the *prima facie* systemic treatment claim. See cases and articles cited *supra* note 27.

market" to the percentage of class members among those persons actually selected by the employer.<sup>36</sup> In a case of alleged race discrimination, for example, it would be necessary to compare the racial composition of the class of qualified and available persons, on the one hand, to the racial composition of the class comprised of persons selected by the employer during the relevant time frame, on the other. Statistical proof that the challenged employment policy adversely affected minorities and/or women<sup>37</sup> would constitute the prima facie case of disparate impact discrimination. Plaintiffs have used statistical data to challenge employment practices such as tests,<sup>38</sup> subjective ratings of applicants,<sup>39</sup> and word-of-mouth recruitment.<sup>40</sup>

Until the Supreme Court's recent turnabout,<sup>41</sup> the plaintiff who successfully presented a prima facie case of disparate impact discrimination had an excellent chance of winning her case. This is because the employer usually<sup>42</sup> had difficulty proving that the challenged policy was justified as a business necessity.<sup>43</sup> An important reason that the business necessity defense was difficult to sustain is that employers, like the rest of us, typically make decisions based on belief rather than fact. When it comes to job qualifications, we simply know them when we see them.

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36. *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

37. It is not necessary that the adverse impact be against minorities and/or women; it could be against whites and/or men. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (whites protected against racial discrimination); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (men protected against sex discrimination). It would be more precise to use the phrase "protected classes," but somehow that does not convey the flavor of what these cases are about.

38. *E.g.*, *Griggs v. Duke Power*, 401 U.S. 424 (1971); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

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

40. *See Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984). *But see Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

41. *See infra* notes 44-83 and accompanying text discussing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

42. *Compare Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed under Rule 60*, 404 U.S. 1006 (1971) (business need must be compelling) *with Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (no-spouse rule justified because it plausibly improved the workplace), *and Spurlock v. United Air Lines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (sliding scale for business necessity when safety considerations are invoked).

43. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979).

### 1. *The Disparate Impact Case: From Griggs<sup>44</sup> to Wards Cove<sup>46</sup>*

Until the *Wards Cove* decision, employment lawyers were quite certain of what *Griggs* required. The plaintiff makes the prima facie case of disparate impact discrimination through the use of statistics. If the appropriate statistics are used and the conclusion therefrom is adverse impact, then the burden of proof shifts to the employer to justify its selection device as a business necessity. If the employer cannot prove this business necessity defense, then the plaintiff wins.<sup>46</sup> Although this sounds simple, most of it was not. There was a continuing struggle regarding the type of statistical data that a plaintiff had to offer,<sup>47</sup> and about the definition of business necessity.<sup>48</sup> It was usually clear that a causal connection between the challenged employment policies and the adverse impact had to be shown in the prima facie case.<sup>49</sup> There was no doubt, however, that it was the employer who had to prove business necessity.

The Supreme Court in *Wards Cove* reformulated three important aspects of the disparate impact case and sent a strong message with respect to a fourth. First, the impact plaintiff could not generally challenge a group of employment practices without showing that *each* challenged policy caused an adverse impact.<sup>50</sup> Second, business necessity was redefined as a practice that "serves, in a significant way, the legitimate employment goals of the employer."<sup>51</sup> Thus, an employment practice can be a business necessity without being "essential"<sup>52</sup> or "indispensable"<sup>53</sup> to the employer's business. Third, the plaintiff bears the burden of proving that the employer's stated business necessity either did not exist, was not credible, or could be equally served by a lesser discrimina-

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44. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

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

46. See generally SCHLEI & GROSSMAN, *supra* note 19.

47. See, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584-87 (1979). A recent case posing the same problems is *EEOC v. Andrew Corp.*, 49 Fair Empl. Prac. Cas. (BNA) 804 (N.D. Ill. 1989).

48. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 658-60 (1989).

49. The causation requirement was specifically discussed in *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979), but it has been implicit at least since *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

50. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989).

51. *Id.* at 659.

52. *Id.*

53. *Id.*

tory alternative that imposed no greater burden on the employer than the original policy.<sup>54</sup> This alternative defense will be rare, as “[c]ourts are generally less competent than employers to restructure business practices.”<sup>55</sup> The common understanding that *Griggs* put the burden on the employer to prove business necessity was a misunderstanding<sup>56</sup>—by all courts, and for nearly 20 years.<sup>57</sup> Fourth, the Supreme Court’s pronouncement on what it considers to be the best statistical evidence to show a prima facie case of impact discrimination broke no new ground. The Court determined that a comparison of the racial composition of the class comprised of workers in the “at-issue” jobs to the racial composition of the class comprised of qualified persons in the relevant labor market<sup>58</sup> would be the most effective way to demonstrate impact discrimination. However, the Court’s insistence on great precision in defining the relevant labor market—even when such definition is nearly impossible or extravagantly expensive, and when other data are strongly suggestive—was severe. The impact of *Wards Cove* will be the perpetuation of discriminatory systems.

Although the foregoing outlines the broad contours of the *Wards Cove* decision, it does not do it justice. It is hard to imagine a contemporary<sup>59</sup> setting so seething with discrimination as that of *Wards Cove Packing Company’s* Alaskan salmon canneries. *Wards Cove Packing Company* had a racially stratified work force. The company’s higher paying jobs were given to whites. The lower-paying jobs were held by American minorities, primarily Filipinos and Native Alaskans. Chinese, Japanese, and Samoan workers were also employed in the most inferior jobs.<sup>60</sup> Many specific employment practices concerning hiring and promotion were challenged in the class action suit. These practices included nepotism, a re-hire preference, subjective hiring criteria, and the refusal to promote from within. Plaintiffs also challenged a word-of-mouth recruitment policy that kept information about job openings within the

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54. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660-61 (1989).

55. *Id.* at 661 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

56. *Id.* at 659-60.

57. *Id.* at 662.

58. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989). This was the message of *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977).

59. The case was filed 15 years before the Supreme Court’s decision, so perhaps it is not so “contemporary.” *Wards Cove*, 490 U.S. at 647. However, there is no information to suggest that the situation at *Wards Cove Packing* has changed.

60. *Id.* at 647.

segregated groups.<sup>61</sup>

The salmon canning was short-term, seasonal work, performed at remote camps in Alaska. At the camps, the housing and mess halls were segregated along occupational lines, which translated to segregation along racial lines. The Asians and Alaskans alleged that their houses were less insulated than those of the whites, and their food was inferior.<sup>62</sup> As noted by Justices Stevens and Blackmun in dissent, the camps looked like "a plantation economy."<sup>63</sup>

Courts have recognized that statistics come in all varieties, and their utility must be evaluated on a case-by-case basis.<sup>64</sup> Sometimes if the best, most convincing data are difficult to obtain, courts will admit other statistical data to show adverse impact even though such data are inferior.<sup>65</sup> One form of such other statistical data is internal work force statistics that reveal racial stratification.<sup>66</sup> However, internal work force statistics did not suffice in *Wards Cove*. The Court wanted the plaintiffs to show that the percentage of minorities who were qualified and available for the better-paying jobs greatly exceeded the percentage of minorities actually selected during the relevant time frame by the employer for the better jobs.<sup>67</sup> This specific showing was not attempted.

It is difficult to think of a case presenting a greater challenge in defining the available pool of potential applicants in a relevant labor market.<sup>68</sup> First, it would be necessary to define the geographical area from which *Wards Cove Packing Company* could be expected to draw employees, which was apparently from all over the

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61. *Id.* at 647, 674. Plaintiffs' claim was originally brought on both disparate treatment and disparate impact theories. The plaintiffs lost in the courts below on the treatment claim, and only the impact claim was before the Supreme Court. *Id.* at 649 n.4.

62. *Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1124 (9th Cir. 1985).

63. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661-62 (1989) (Blackmun, J., dissenting).

64. *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984) (Title VII plaintiff must first focus analysis on "proper" groups for comparison and then meet "generally accepted standards of statistical significance"). *See also Bazemore v. Friday*, 478 U.S. 385 (1986) (failure to include all variables in multiple regression analysis will affect probative-ness, but not admissibility).

65. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651 (1989); *see also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 585 (1979).

66. *See Craig v. Alabama State Univ.*, 804 F.2d 682 (11th Cir. 1986).

67. *Wards Cove*, 490 U.S. at 647-55.

68. For a much simpler case, see *EEOC v. Andrew Corp.*, 49 Fair Empl. Prac. Cas. (BNA) 804 (N.D. Ill. 1989), where it was very difficult for the plaintiff to provide proof of adverse impact.

Pacific Northwest and Alaska. Moreover, it would also be necessary to identify the pool of potential applicants who had the necessary skills and the desire to work away from home in a fishing camp on a seasonal basis. It is not surprising that the plaintiffs' attorneys considered the company's internal work force data to be the best available information about the racial/ethnic composition of the pool of qualified individuals interested in canning jobs.<sup>69</sup> How better to know which seasonal workers from all over the Northwest are available to work in the far reaches of Alaska than by looking at data compiled from the records of those persons actually hired to work there?<sup>70</sup> If employees at the lower ranks are qualified for higher-paying positions but are not selected, is that not evidence enough of disparate impact? Why is it that the company did not recruit and promote qualified minorities from within its own ranks?<sup>71</sup>

Why did the Supreme Court, when faced with an obviously segregated work force coupled with a word-of-mouth recruiting policy, *refuse* to conclude that minorities were being improperly excluded from the higher-paying, unskilled positions at the Wards Cove Packing plant? Why did the Court require the plaintiffs to construct a qualified, relevant labor market when the best model possible in this situation already existed? Two reasons are suggested. Either the Court wants to send a message that disparate impact claims will rarely succeed or it does not want to hold employers liable for a fortuitous discriminatory impact that is not the employer's fault. The Court in *Wards Cove* even mentioned "innocent" causes of the disparity within the workplace.<sup>72</sup> These views, however, represent a shift from the original policy reasons underlying the disparate impact theory: the eradication of discriminatory

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69. *Wards Cove*, 490 U.S. at 650.

70. *Id.* at 676 (Stevens, J., dissenting). Comparing racial compositions within the work force is "more probative than the untailored general population statistics" of a work force potentially drawn from the entire Northwest. *Id.*

71. Is this then disparate treatment or disparate impact? Cases not uncommonly proceed on both theories. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). *Wards Cove Packing Company* had proceeded on both theories at trial. *Id.* at 649 n.4. The use of a facially neutral device (subjective rankings of supervisors) could have the adverse impact of keeping the Asians out of the higher-paid jobs. That would constitute disparate impact. The manner of applying the subjective rankings could be a form of intentional disparate treatment. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) suggests a convergence between the impact and treatment theory.

72. *Wards Cove*, 490 U.S. at 657 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988)).

consequences even in the absence of discriminatory intent. The Court, like the public, is losing track of the distinction between disparate impact and disparate treatment. The Court is resisting the fact that discrimination operates in systemic, non-discrete ways.

Furthermore, the Court's new rule on causation, that each challenged employment practice must cause a disparate impact, compounds statistical difficulty. The Court disingenuously decreed that the required information is normally available, either through Title VII's record-keeping requirements or through liberal discovery.<sup>73</sup> However, certain record-keeping requirements under Title VII regulations have an express exclusion for seasonal workers—precisely the kind of workers in *Wards Cove*.<sup>74</sup> Even in the more typical, non-seasonal case, the employer is only required to retain applicant flow and hiring decision data for six months, a period of time shorter than the statute of limitations for filing charges under Title VII in most states.<sup>75</sup> As for the allowance of liberal discovery, the employer will not necessarily have useful evidence of the relevant labor market.<sup>76</sup>

The imposition of stiff causation and statistical burdens on plaintiffs is unreasonable. As Justice Stevens' dissent noted, "proof of numerous questionable employment practices ought to fortify [rather than undermine] an employee's assertion"<sup>77</sup> of discrimination.

It is too early to tell if the world of work for women and minorities has been changed by *Wards Cove*. Most cases cite *Wards Cove* without showing whether or not the case would have turned out any differently than before. The courts have imposed statistical requirements for proof of the prima facie case in basically the same way they imposed them before *Wards Cove*.<sup>78</sup>

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73. *Wards Cove*, 490 U.S. at 657-58.

74. *Id.* at 658 n.10.

75. 42 U.S.C. § 2000e-5(e) (1988).

76. The applicant flow data retained by the employer may be inadequate to show adverse impact. For example, the data may have been skewed by the employer's discriminatory recruitment practices. See *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

77. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 673 (1989) (Stevens, J., dissenting).

78. Applicant flow data remain the appropriate statistical source for the qualified relevant labor market where the at-issue jobs are unskilled, despite an employer's argument that *Wards Cove* implicitly rejected applicant flow as too narrow a source. See, e.g., *Green v. USX Corp.*, 896 F.2d 801, 804-05 (3d Cir. 1990). Applicant flow will not constitute the quali-

Reflecting the *Wards Cove* pronouncement on causation, however, courts have dismissed broad attacks on the cumulative policies of an employer.<sup>79</sup> As for the deference to managerial authority embodied in the new business necessity defense, some lower court decisions do mirror the Supreme Court's deference,<sup>80</sup> and some do not.<sup>81</sup> No clear trend has emerged.

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fied relevant labor market where the at-issue jobs require particular skills not possessed by the general population; the qualified, relevant labor market must be drawn precisely to account for particular required qualifications. *Mallory v. Booth Refrigeration Supply Co.*, 882 F.2d 908 (4th Cir. 1989) (no blacks had ever been promoted to five supervisory positions, but plaintiffs needed to show how many black employees were qualified to become supervisors). Nor will applicant flow suffice where applications have been deterred by discriminatory recruitment practices, since discriminatory recruitment practices distort the applicant pool. *EEOC v. Andrews Corp.*, 49 Fair. Empl. Prac. Cas. (BNA) 804, 811 (N.D. Ill. 1989). The EEOC was unable to show the adverse impact upon Hispanics of a policy prohibiting the employment of applicants with felony theft or larceny convictions. *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989). Some pre-*Wards Cove* analogues come to mind for each of these cases: *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Hester v. Southern Ry. Co.*, 497 F.2d 1374, 1379-80 (5th Cir. 1974) (applicant flow data establish impact where jobs are unskilled); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1560 (11th Cir. 1986); *Babrock v. Jewel Food Co. & Retail Meatcutters Union, Local 320*, 773 F.2d 857 (7th Cir. 1985) (employer cannot defend applicant flow data where they were skewed by discriminatory practices); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (stringent proof of impact required to show that illegal or quasi-illegal conduct was discriminatory).

79. *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364 (2d Cir. 1989). "[A] prima facie case [cannot be established] simply by broadly attacking as discriminatory the hiring process as a whole." *Id.* at 1371 (Age Discrimination in Employment Act [ADEA] case). *But see Green v. USX Corp.*, 896 F.2d 801 (3d Cir. 1990). The causation requirement was, at least technically, what caused the plaintiffs to lose in *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 751 (S.D. Fla. 1989).

80. *See EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 754 (S.D. Fla. 1989) (court will not overturn "employer's judgment").

81. *See EEOC v. Andrew Corp.*, 49 Fair Empl. Prac. Cas. (BNA) 804, 818-19 (N.D. Ill. 1989) (word-of-mouth recruiting cannot be justified on the basis of simplicity, efficiency, or that the employer had no control over incumbents' talk).

However, in a fetal vulnerability case, the *Wards Cove* decision arguably made a difference. *See UAW v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd*, 59 U.S.L.W. 4209 (U.S. March 20, 1991). The Seventh Circuit granted summary judgment to an employer who had banned from production positions all women who could not prove sterility. The ban was a business necessity because women were exposed to air-borne lead, a known cause of serious and permanent fetal abnormalities. *Id.* at 875. Applying *Wards Cove*, the Seventh Circuit held, among many other things, that the plaintiff-union had not "presented evidence sufficient to permit the district court to conclude that Johnson Controls' business necessity defense cannot be factually supported." *Id.* at 890. Nor had the union proven "adequate but less discriminatory policies" available to serve the employer's interest. *Id.* at 893. But *Wards Cove* was not essential to the result: employers have won fetal vulnerability cases even before *Wards Cove*. *See Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). Where a fetal vulnerability policy is in dispute, at least prior to the recent United States Supreme Court decision in the *Johnson Controls* case, one could not count on the courts to utilize ordinary discrimination theories and formulas. *See infra* note 207.

Courts have said virtually nothing definitive about the role of the burden of proof in disparate impact cases since *Wards Cove*. There is some indication that plaintiffs can prevail even under the new standards,<sup>82</sup> but there is no hint as to what role the burden of proof plays in most cases. While the practical impact of *Wards Cove* cannot yet be described, its possibilities are daunting. Only plaintiffs with the strongest of cases can mount a claim of disparate impact discrimination.<sup>83</sup>

## 2. *The Mixed Motive Disparate Treatment Case*

Unlike disparate impact, the disparate treatment theory enjoys wide understanding and acceptance. It is ironic that the form of discrimination most readily condemned is so difficult to prove. Without smoking guns or dramatic data, the disparate treatment case is a tough one for the plaintiff to win: the employer need prove so little and the employee need prove so much.<sup>84</sup>

The United States Supreme Court has recognized that the proof formulas of *McDonnell Douglas* and *Burdine* are inapplicable to cases in which discrimination is proved by direct evidence.<sup>85</sup> This standard of proof has also been rejected in cases involving dual or mixed motives,<sup>86</sup> where some motives are permissible and others are not. The Supreme Court enunciated the standards of proof for the mixed motive case in *Price Waterhouse v. Hopkins*.<sup>87</sup>

Ann Hopkins was the only woman<sup>88</sup> considered for partnership in 1982 at Price Waterhouse. She was denied the promotion despite her acknowledged competence and rainmaking skills.<sup>89</sup> The partners at Price Waterhouse were dissatisfied with Hopkins' personality; she was too abrasive and unfeminine. One critic said she needed to take a course at charm school. Another rationalized her

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82. See *Allen v. Seidman*, 881 F.2d 375 (7th Cir. 1989).

83. Shanor & Marcossou, *supra* note 27. Plaintiffs who attempt to prove the existence of a lesser discriminatory alternative need clear proof that their alternative can be equally effective in achieving the employer's business ends. *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 753 (S.D. Fla. 1989).

84. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

85. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (case involving Age Discrimination in Employment Act [ADEA]).

86. See *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985).

87. 490 U.S. 228 (1989).

88. *Id.* at 233.

89. *Id.* at 233-34.

unappealing behavior as overcompensation for being a woman.<sup>90</sup> She was advised that she should behave in a more feminine manner: "Walk more femininely, talk more femininely, dress more femininely, wear make-up, have [your] hair styled, and wear jewelry."<sup>91</sup> When Hopkins realized that she would never make partner, she resigned and sued.<sup>92</sup>

The issue before the Court was the order and allocation of proof in a mixed motive case under Title VII. Hopkins' case was a mixed motive case because the decision not to promote was based on two types of reasons: lawful (she was too abrasive), and unlawful (she was a woman). The unlawful motivation was shown by the sexist comments used in the decision-making process. These comments were evidence that different standards were being applied to her because of her gender.

A plurality of the court, with Justice O'Connor concurring, determined that in a mixed motive employment discrimination case, the plaintiff must "prove that the employer relied upon sex-based considerations in coming to its decision."<sup>93</sup> The plaintiff does not have to show the precise causal role of the impermissible consideration, only that it played a part, either "motivating"<sup>94</sup> or "substantial,"<sup>95</sup> in the employer's decision.<sup>96</sup> Once the plaintiff proves this impermissible factor, the burden then shifts to the employer to prove, by a preponderance of the evidence,<sup>97</sup> that it would have come to the same adverse decision even without taking the impermissible factor (gender) into account.<sup>98</sup> Justice O'Connor's concurring opinion suggested that the employer's proof must be established by objective evidence.<sup>99</sup>

The Court noted that sex stereotyping is impermissible, and observed that "[a]n employer who objects to aggressiveness in

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90. *Id.* at 235.

91. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). At trial, Hopkins presented an expert witness, a social psychologist, who testified that the intensely critical comments made by partners who knew Hopkins only slightly were probably the result of sex stereotyping. *Id.* at 235-36.

92. Hopkins' resignation was considered a constructive discharge. *Id.* at 233 n.1.

93. *Id.* at 241-42, 261-62 (O'Connor, J., concurring).

94. *Id.* at 249-50.

95. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 278 (1989) (O'Connor, J., concurring).

96. *Id.*

97. *Id.* at 258.

98. *Id.*

99. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (O'Connor, J., concurring).

women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they don't. Title VII lifts women out of this bind."<sup>100</sup> Sexist remarks, however, do not inevitably prove that gender influences employment decisions. Plaintiffs still must establish a causal relationship between gender and the adverse employment decision.<sup>101</sup> Stray remarks in the workplace are not enough to create a mixed motive case.<sup>102</sup>

An overlooked aspect of the *Price Waterhouse* case is that proven discrimination unrelated to a tangible, economically measurable job injury receives no remedy. The Court assumed that subjection to sexual stereotypes, "stray" yet derogatory remarks in the workplace, and gratuitous gender-based comments are insignificant. This assumption implies that these immeasurable injuries are mere discrimination "in the air," and beyond the law's reach.

Another subtle aspect of *Price Waterhouse* is that the "same decision" standard may be difficult for employers to satisfy. The Court said that "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made."<sup>103</sup> This is a back-door way of heightening the standards for defense of the discrimination. This stricter standard, however, will apply only if noticed and acted upon by lower courts.

Most post-*Hopkins* cases have found *Hopkins* inapplicable. The cases are not mixed-motive cases because courts require—and then refuse to find—that the plaintiff has presented direct evidence of substantial discrimination. Without direct evidence that substantial discrimination played a motivating role in an employment decision, courts tend to find that the case is simply a single-motive case, and that the *Burdine* standard must be followed. The plaintiff must prove pretext, and the defendant-employer need "prove" nothing.<sup>104</sup>

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100. *Id.* at 251.

101. *Id.* at 240-42.

102. *Id.* at 277 (O'Connor, J., concurring).

103. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (quoting *Ayers v. Western Line Consol. School Dist.*, 555 F.2d 1309, 1315 (5th Cir. 1977)).

104. See *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325 (7th Cir. 1989) (management officials' racist remarks were merely stray, not a substantial factor in the employer's decision and not enough to make the case a mixed-motive one); *Lynch v. Belden and Co.*, 882 F.2d 262 (7th Cir. 1989) (application of the *Hopkins* formula requires direct evidence of discrimination); *Adams v. Frank*, 712 F. Supp. 74 (E.D. Va. 1989) (statistical

### B. The Seniority Case: Protect White Males

Part of the compromise that facilitated the passage of Title VII was a special protection for bona fide seniority systems.<sup>105</sup> That protection was given an expansive reading in the Supreme Court's *Teamsters* decision in 1977.<sup>106</sup> Title VII immunizes all seniority systems which are not discriminatory in intent.<sup>107</sup> *Teamsters* established that a seniority system which is facially neutral and neutrally applied is lawful, unless the seniority system was adopted for a discriminatory purpose. Discriminatory consequences are insignificant. Liability attaches only when the plaintiff proves that the seniority system was adopted because of an intent to discriminate. In *Lorance v. A T & T Technologies*,<sup>108</sup> the plaintiffs attempted to prove precisely such a motive by claiming that their seniority system was modified because of an intent to discriminate against women. The United States Supreme Court held that their proof came too late.<sup>109</sup>

The seniority system challenged by the three women in *Lorance* had been modified in 1979. Before the change in the seniority system, most "tester" positions were filled by men, and most "non-tester" positions were filled by women. In the 1970s,

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evidence cannot create a mixed motive case); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989); *Ingram v. Missouri Pacific Railroad Co.*, 897 F.2d 1450 (8th Cir. 1990); *Jindal v. New York State Office of Mental Health*, 728 F. Supp. 1072 (S.D.N.Y. 1990); *Jones v. Jones Bros. Constr. Co.*, 716 F. Supp. 1122 (N.D. Ill. 1989); *Gray v. University of Ark.*, 883 F.2d 1394 (8th Cir. 1989) (no credible evidence of gender as a motivating factor); *California State Employees Ass'n v. State of California*, 724 F. Supp. 717 (N.D. Cal. 1989) (comparable worth claim does not show that gender played a motivating part in job classification and pay system); *Summers v. Communication Channels Inc.*, 729 F. Supp. 1234 (N.D. Ill. 1990) (no direct evidence of age discrimination); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309 (6th Cir. 1989) (no direct evidence that impermissible factors were substantial motivation for decision).

105. Section 703(h) of Title VII provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1988).

106. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

107. *Id.* at 352-53. A seniority system is bona fide and within the provision's shelter if it is facially neutral and "did not have its genesis in racial discrimination, and . . . was negotiated and has been maintained free from any illegal purpose." *Id.* at 356.

108. *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900 (1989).

109. *Id.* at 912.

women began to take steps to become qualified for the higher-paying tester positions. The change in the seniority system adopted in 1979 served to discourage advancement to the tester positions, and to insulate the male incumbents from competition.<sup>110</sup> Before the change, competitive seniority for testers was calculated according to plantwide seniority. After the change, however, competitive seniority was determined by the time spent as a tester, not by plantwide seniority. The result was that a woman who advanced to a tester position which was newly opened to women would forfeit her previously enjoyed, plantwide seniority. By accepting the testing position, she would thereby fall to the bottom of the seniority ladder.

The plaintiffs became testers between 1978 and 1980. During an economic downturn in 1982, the plaintiffs were demoted because of their low seniority under the 1979 provision. They would not have been demoted had the former plantwide seniority system remained in place. The women sued, claiming that the seniority system was not bona fide because it had been adopted with an intent to discriminate against women.<sup>111</sup>

The respondents defended on procedural grounds—the statute of limitations had run.<sup>112</sup> Under Title VII, the statute of limitations is no more than 300 days.<sup>113</sup> Thus, the issue in the case involved determining the point at which the limitations period begins to run in a lawsuit challenging the adoption of a facially neutral seniority system. The Court held that the limitations period begins to run on the date that the facially neutral seniority system was adopted or modified. This holding imposes on women and minorities an impossible duty of foresight. They must sue before they have been harmed, and perhaps before they can anticipate harm. This date might be before the victim's date of employment, or even before her date of birth. Justice Scalia justified this result as necessary to protect the "valid reliance interests"<sup>114</sup> of the incumbents who had "worked-for" their seniority expectations.<sup>115</sup>

*Lorance* thus established that facially neutral and neutrally applied seniority systems cannot be subjected to Title VII suit

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110. *Id.* at 903.

111. *Id.* at 901-03.

112. *Id.* at 903.

113. 42 U.S.C. § 2000e-5(e) (1988).

114. *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 912 (1989).

115. *Id.*

later than 300 days after their adoption or modification. This decision is an impressive victory for employers and unions, and a defeat for those harmed by seniority systems designed to protect incumbent white males.<sup>116</sup>

The response to *Lorance* is scattered, with many courts crafting distinctions to elude the distasteful dictates of the case.<sup>117</sup> Some courts narrowly construe or interpret the decision. Most courts limit the reach of *Lorance* to seniority systems.<sup>118</sup> There is that stray and scary case that has applied *Lorance* to any employment policy or practice, extending *Lorance's* devastating consequences beyond the seniority provisions essential to the *Lorance* decision.<sup>119</sup> This kind of extension would protect all discriminatory policies that survive without challenge for more than 300 days.

### C. Consent Decree Challenges: Protect White Males

*Martin v. Wilks* arose in 1974 when African-American fire fighters sued the city of Birmingham over racial discrimination in employment decisions within the fire department.<sup>120</sup> This lawsuit was settled by a consent decree containing numerical goals for hiring and promoting African-American fire fighters.<sup>121</sup> White fire fighters affected by the consent decree had the opportunity to intervene or to appear at what is called a "fairness hearing" in order to voice any objections to the proposed settlement.<sup>122</sup> They failed, however, to do so in a timely manner. Subsequently, certain white

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116. Note, however, that a facially discriminatory system can be challenged any time it is in operation, and a system that is applied in a discriminatory manner can be challenged within 180 or 300 days of the discriminatory application. *Lorance*, 490 U.S. at 912 n.5.

117. One district court found *Lorance* to erect a three-pronged test for the triggering of the limitations period: (1) the action complained of must be outside the limitations period; (2) plaintiff must have known, or should have known, that they did or would suffer concrete harm at the time of the adoption or modification of the seniority system; and (3) the plaintiff must have known, or should have known, at the time of the action complained of, that the action was discriminatory. Moreover, the *defendant* must prove the final two prongs of the three-pronged test. *Artis v. U.S. Industry*, 720 F. Supp. 105, 107 (N.D. Ill. 1989). Judge Moran distinguished *Lorance* on the grounds that the women in *Lorance* knew or reasonably should have known of the system's discriminatory impact on the date of the seniority system's modification. *Id.*

118. See *Cohn v. A.E. Staley Mfg. Co.*, 734 F. Supp. 832, 834 (N.D. Ill. 1990) (*Lorance* held to be inapplicable to facially discriminatory management retention agreement in an ADEA case); *Ross v. Buckeye Cellulose Corp.*, 733 F. Supp. 344, 356 (M.D. Ga. 1989).

119. *EEOC v. City Colleges of Chicago*, 740 F. Supp. 508, 514-16 (N.D. Ill. 1990).

120. *Martin v. Wilks*, 490 U.S. 755, 759 (1989).

121. *Id.* at 759.

122. *Id.*

fire fighters initiated a separate case, charging that promotion decisions were made on the basis of race, pursuant to the consent decree.<sup>123</sup>

Procedural issues, rather than the law of affirmative action, formed the basis of the *Wilks* decision.<sup>124</sup> In a five to four decision, the Court held that an employer, who is a signatory to a consent decree designed to resolve claims of discrimination, may be subject to claims of reverse discrimination by non-minorities allegedly harmed by the decree. The majority insisted that the white fire fighters could not be bound by a judgment to which they were not parties, even though they had the opportunity to intervene in the suit before approval of the decree. Parties to the consent decree must join all affected persons to the lawsuit in order to prevent successful challenges.<sup>125</sup>

The Court's decision destroyed the "impermissible collateral attack" doctrine, which is "the attribution of preclusive effect to a failure to intervene" in a lawsuit about which the individual had knowledge.<sup>126</sup> This doctrine had immunized consent decrees from challenge by non-beneficiaries of the decrees.<sup>127</sup>

The dissenters saw both legal reason and social need to promote the use of consent decrees, particularly in civil rights litigation.<sup>128</sup> They acknowledged that the white fire fighters were harmed by the consent decrees and were themselves innocent of racial discrimination. Yet, "they [were] nevertheless beneficiaries of the discriminatory practices that the litigation was designed to correct."<sup>129</sup> Employers should be able to rely on consent decrees as a defense to further litigation. To safeguard such reliance, the dissenters would have ruled that "compliance with the terms of a valid decree remedying violations of Title VII cannot itself violate that statute or the equal protection clause."<sup>130</sup>

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123. *Id.* at 760.

124. *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989).

125. *Id.* at 763.

126. *Id.* at 762-65.

127. Only the Seventh Circuit and the Eleventh Circuit did not apply this doctrine to protect consent decrees. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987); *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986); see also *Wilks*, 490 U.S. at 762 n.3 (listing cases supporting the use of the impermissible collateral attack doctrine).

128. *Wilks*, 490 U.S. at 769 (Stevens, J., dissenting).

129. *Id.* at 791 (Stevens, J., dissenting).

130. *Id.* at 792 (Stevens, J., dissenting).

Under *Wilks*, employers can be challenged for employment decisions taken pursuant to consent decrees unless all persons affected by the consent decree have been joined as parties to the lawsuit.<sup>131</sup> Given the majority's decision to manage the appropriate joinder, it will be necessary to identify the numerous persons who are or will be affected by the consent decree. The Court gave no guidance as to how one might identify "adversely affected parties." Such parties could include persons not yet employed, not yet in the labor market, and not yet born.

The *Wilks* decision will surely discourage the use of consent decrees. Because affirmative action goals and timetables are commonly used in consent decrees, *Wilks* hampers remedial affirmative action efforts. Numerous consent decrees have been challenged since *Wilks*,<sup>132</sup> and lawyers representing employers struggle to settle cases within its confines.<sup>133</sup>

Many commentators have noted the irony and inconsistency of the Court's sympathies in *Lorance* and in *Wilks*.<sup>134</sup> Although both cases were decided on the same day, women challenging a discriminatory seniority system had to sue quickly; men challenging the affirmative action program contained in a consent decree could sue at their leisure.<sup>135</sup> There is no inconsistency. The Court's sympathies are clear. The white males "worked-for"<sup>136</sup> their seniority positions in *Lorance* and therefore need protection, while the white males in *Wilks* deserve protection against unworthy affirmative action claimants.

#### D. "The Making of Contracts": An Astonishing Interpretation

Reconstruction-era civil rights legislation provided that "[a]ll

131. *Id.* at 767.

132. See *United Mineworkers v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989). At least one defense attorney has declared that *Wilks* is an "unmitigated disaster" for both plaintiffs and defendants: there is no clean way to settle the cases. Brian Bulger, "Aftermath of the 1988-89 Supreme Court Term," Address to Illinois Institute for Continuing Legal Education (Oct. 31, 1990).

133. Bulger, *supra* note 132.

134. See Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 505 (1990).

135. The *Wilks* decision did not confront the issue of the appropriate limitations period, but it suggests that any refusal to hire or promote because of the consent decree would start the limitations period running. *Wilks*, 490 U.S. at 755.

136. *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 912 (1989).

persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."<sup>137</sup> Five score and ten years later, this statute was interpreted to prohibit racial discrimination in private employment.<sup>138</sup> The interpretation was based on the idea that the employment relationship was contractual, and any discrimination in that contractual relationship denied non-white citizens the right to make contracts on the same basis as white citizens.

Section 1981 became a critical tool in civil rights enforcement. While both Title VII and section 1981 prohibit racial discrimination, the procedural prerequisites of Title VII are far more onerous, and its remedial provisions far less generous, than those of section 1981. Section 1981 provides several advantages for race discrimination plaintiffs. It allows for a trial by jury,<sup>139</sup> while Title VII does not.<sup>140</sup> It has a longer limitations period—generally two years<sup>141</sup> instead of 180 or 300 days.<sup>142</sup> Section 1981 provides broader coverage, whereas Title VII requires 15 employees in order for it to apply.<sup>143</sup> There are no administrative prerequisites under section 1981, Title VII has several.<sup>144</sup> Finally, compensatory<sup>145</sup> and punitive damages are awarded to successful plaintiffs under section 1981, unlike Title VII which allows for make-whole relief only.<sup>146</sup> Both statutes allow recovery of attorney's fees.<sup>147</sup> The only disadvantage of section 1981, from the plaintiff's perspective, is that the disparate impact theory of discrimination cannot be raised in a section 1981 claim.<sup>148</sup> Section 1981 is limited to claims of race discrimination,<sup>149</sup> and, unlike Title VII, does not reach gender or

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137. 42 U.S.C. § 1981 (1988).

138. *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976).

139. *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1140 (8th Cir. 1981).

140. *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir. 1983); *Grayson v. Wickes Corp.*, 607 F.2d 1194, 1196 (7th Cir. 1979).

141. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

142. 42 U.S.C. § 2000e-5(e) (1988).

143. 42 U.S.C. § 2000e(b) (1988).

144. 42 U.S.C. § 2000e-5 (1988).

145. *Johnson v. Railroad Express Agency*, 421 U.S. 454, 459-60 (1975).

146. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-22 (1975).

147. Title VII, section 706(k) allows the prevailing party recovery of reasonable attorney's fees. 42 U.S.C. § 2000e-5(k) (1988). Attorney's fees are not covered directly within section 1981, but the Civil Rights Fee-Shifting Statute allows attorney's fees in all other civil rights cases. 42 U.S.C. § 1988 (1988).

148. *Washington v. Davis*, 426 U.S. 229 (1976).

149. Since *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), race discrimination under section 1981 encompasses most claims of ethnic discrimination, because the dispositive question is the meaning of race when the Act was passed in 1866.

religion.

In *Patterson v. McLean Credit Union*,<sup>150</sup> plaintiff Brenda Patterson alleged racial harassment, the imposition of demeaning terms of employment, and a discriminatory failure to promote. In a ruling that severely limited the utility of section 1981 as an enforcement tool, the Court held that the statute prohibits neither racial harassment in the workplace nor discriminatory terms and conditions of employment that arise after the initial formation of the contract. Discriminatory promotion decisions are prohibited only if the promotion represents a "new and distinct relation[ship]."<sup>151</sup>

The phrase "to make . . . contracts" only encompasses conduct that occurs at initial contract formation. The Court noted that

the right to make contracts does not extend . . . to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.<sup>152</sup>

Thus, persons subjected to racially discriminatory employment conditions cannot bring claims under section 1981. The Court, in effect, eliminated section 1981's coverage, procedures, and remedies from all claims of post-formation racial discrimination.

Dissents from Justices Brennan, Marshall, Blackmun, and Stevens urged that Title VII was not undermined by the established interpretation of section 1981. Congress had ratified and built upon section 1981 when it passed Title VII. The statute was not intended to supplant other rights and remedies. Justice Stevens' separate dissent best exposes the failings of the majority.<sup>153</sup> What good is section 1981 if it prohibits only the most egregious, overt forms of discrimination perpetrated at the time of the initial hiring of the employee,<sup>154</sup> while permitting subsequent discrimination in

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150. 491 U.S. 164 (1989).

151. *Id.* at 185.

152. *Id.* at 177.

153. *Id.* at 219 (Stevens, J., dissenting).

154. Stevens' dissent in *Patterson* is rich in understanding:

[I]f the white and black applicants are offered the same terms of employment with just one exception—that the black employee would be required to work

the imposition of terms and conditions of employment?

Moreover, Stevens' dissent points out the majority's misconception of the contractual nature of the employment relationship: "An at-will employee . . . is not merely performing an existing contract; she is constantly remaking that contract. Whenever significant new duties are assigned to the employee—whether they better or worsen the relationship—the contract is amended and a new contract is made."<sup>155</sup>

The reason for the majority's surprising conception of contract law has to be its view that discrimination claims should be resolved under Title VII, with its procedural obstacles, its limited remedies, and its denial of a jury trial. Nothing else accounts for such a misunderstanding of contracts. Nothing else explains the incongruity of liability for discrimination at the beginning of a contract, but not at the middle, or at the end.

One consequence of *Patterson* has been the dismissal of hundreds of cases alleging racial harassment.<sup>156</sup> Lower courts are struggling to define the "new and distinct relationship" required for section 1981 to cover promotion decisions.<sup>157</sup> While post-formation

in dark, uncomfortable surroundings, whereas the white employee would be given a well-furnished, two-window office—the discrimination would be covered by the statute. In such a case, the Court would find discrimination in the making of a contract because the disparity surfaced before the contract was made . . . . [I]t is difficult to discern why an employer who makes his intentions known has discriminated in the 'making' of a contract, while the employer who conceals his discriminatory intent until after the applicant has accepted the job, only later to reveal that black employees are intentionally harassed and insulted, has not.

It is also difficult to discern why an employer who does not decide to treat black employees less favorably than white employees until after the contract of employment is first conceived is any less guilty of discriminating in the 'making' of a contract.

*Patterson v. McClean Credit Union*, 491 U.S. 164, 220-21 (1989) (Stevens, J., dissenting).

155. *Id.* at 221 (Stevens, J., dissenting).

156. Holmes, *New Battle Looming As Democrats Reinroduce Civil Rights Measure*, N.Y. Times, Jan. 4, 1991, at A12, col. 2; see also *supra* note 14; *Minnesota Widens Rights Act to Counter High Court Move*, N.Y. Times, May 12, 1990, § 1, at 1, col. 1. A LEXIS search discloses over 60 reported cases dismissed on the basis of *Patterson*.

157. See *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1311 (7th Cir. 1989) (Judge Posner suggested that *Patterson* could be read to mean that failure-to-promote claims are barred under section 1981 only when the promotion at issue "was the sort of routine advancement that only existing employees qualify for.") It is also unclear whether retaliation claims are cognizable under section 1981. *Id.* at 1312-13. Another problem is the disposition of cases involving a failure to recall laid-off employees. See *Artis v. U.S. Industry*, 720 F. Supp. 105, 110 (N.D. Ill. 1989) (failure to recall actionable under section 1981).

conduct was deemed by the Supreme Court not to constitute the "making" of contracts, some lower courts have looked at post-formation conduct in order to shed light on discrimination that occurred at the contract formation stage.<sup>158</sup> The question of whether discriminatory discharges are covered by section 1981 has already created a split in the circuits.<sup>159</sup>

## II. THE BEGINNING OF REFORM: THE DEFEATED, BUT SOON TO BE RESURRECTED, CIVIL RIGHTS ACT

At the end of the 1988-89 term, the civil rights community was outraged by the series of Supreme Court decisions which dramatically reduced the availability of remedies for violations of civil rights. Five points summarize the damaging effects of these decisions. First, the disparate impact claim, responsible for eradicating entire systems of discriminatory testing and other devices,<sup>160</sup> was made more difficult to win. The employer no longer need prove the necessity of policies which are discriminatory in effect.<sup>161</sup> Second, the disparate treatment case remains hard to win.<sup>162</sup> A plaintiff who proves that intentional discrimination motivated an employment decision will not obtain relief if the employer proves that the same decision would have been made in the absence of discrimination.<sup>163</sup> In other words, a plaintiff must endure discrimination in the workplace unless a tangible economic benefit to the plaintiff is destroyed by the discrimination.<sup>164</sup> Third, a facially neutral, but

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158. See *Jackson v. McCleod*, 748 F. Supp. 831 (S.D. Ala. 1990).

159. Because of *Patterson*, the Fifth, Sixth, Seventh, and Ninth Circuits have held that racially motivated firings are not prohibited by section 1981. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1257-58 (6th Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104, 110 (7th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990). The Eighth Circuit held that *Patterson* did not apply to discharges. *Hicks v. Brown Group, Inc.*, 902 F.2d. 630, 635 (8th Cir. 1990). The court reasoned that *Patterson* did not discuss discharge, and that a discharge is fundamentally different from harassment. *Id.* at 637-39.

160. Numerous kinds of mental and physical tests, experience requirements, and height and weight standards have been invalidated under Title VII. See SCHLEI & GROSSMAN, *supra* note 19, at 80-190 (discussing specific cases).

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

162. See *supra* notes 27-34 and accompanying text.

163. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

164. An important exception, untouched by *Price Waterhouse*, is sexual harassment, which violates Title VII even in the absence of a tangible job loss. However, there will still be no monetary relief absent a constructive discharge, which is usually found in cases of sexual harassment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

intentionally discriminatory, seniority system can be lawfully enforced if it manages to survive without challenge for 300 days.<sup>165</sup> Fourth, affirmative action efforts effectuated through consent decrees may be vitiated, in effect, through reverse discrimination claims brought by parties affected by the decree.<sup>166</sup> Fifth, and most devastating, the protection from racial discrimination in employment under the Civil Rights Act of 1866 was severely limited, in a way that implicated both procedures and remedies.<sup>167</sup>

To fully understand the plight of the civil rights plaintiff, one must also look at the procedures and rules for the recovery of costs and attorney's fees. Title VII was designed to encourage private enforcement, that is, meritorious lawsuits brought by private plaintiffs.<sup>168</sup> Under Title VII, the plaintiff who prevails is entitled to reasonable attorney's fees.<sup>169</sup> However, the amount of recovery available is tightly controlled. The attorney for the prevailing party is obligated to keep clear time records, and submit evidence of the fair market rate of the services rendered.<sup>170</sup> A court will deny recovery of attorney's fees for unnecessary time spent on a case, for duplicative efforts, and for time that could have been spent by a non-lawyer.<sup>171</sup> The attorney cannot recover fees for time spent on unsuccessful portions of the case.<sup>172</sup> The attorney's fees for services performed after an offer of judgment that is more favorable than what is subsequently awarded at trial may not be recovered.<sup>173</sup> Moreover, if the Title VII plaintiff wins, but is later forced to defend that victory against an intervenor, she cannot receive attorney's fees against the intervenor unless the intervention was "frivolous, unreasonable, or without foundation."<sup>174</sup>

Civil rights claimants who prevail under statutes *other than* Title VII can obtain attorney's fees under the Civil Rights Attor-

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165. *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 912 (1989).

166. *Martin v. Wilks*, 490 U.S. 755, 759 (1989).

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

168. Although Title VII authorizes the EEOC to sue in its own name, section 706(k), the attorney's fee provision, was designed as an incentive for bringing private suits. See *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989).

169. 42 U.S.C. § 2000e-5(k) (1988).

170. See *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1324, 1327 (D.C. Cir. 1982).

171. See *Coulter v. Tennessee*, 805 F.2d 146 (6th Cir. 1986).

172. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

173. *Marek v. Chesny*, 473 U.S. 1, 12 (1985).

174. *Independent Fed'n of Flight Attendants v. Zipes* 491 U.S. 754, 760 (1989).

ney's Fees Awards Act of 1976 (Fees Act).<sup>175</sup> Because the Fees Act was patterned after the fee provisions of Title VII, the case law of one statute generally applies to the other.<sup>176</sup> Thus, any encroachments on fee awards under the Fees Act will be imported into Title VII.

The Fees Act was at issue in the 1986 case, *Evans v. Jeff D.*<sup>177</sup> In *Evans* the Supreme Court allowed a civil rights defendant to condition settlement upon a waiver of the plaintiffs' claim to attorney's fees. Attorney's fees were not included in the settlement proposal but the offer included virtually all relief sought by the plaintiffs. This relief happened to be non-monetary. As a result, counsel for the plaintiffs felt both an obligation and an ethical duty to accept the settlement offer. Their counsel's subsequent attempt to reject the fee waiver was rebuffed by the Supreme Court. The Court held that nothing in the Fees Act, the spirit of civil rights laws, or professional ethics precludes a waiver of attorney's fees and costs as a condition of settlement.<sup>178</sup>

The civil rights community is also concerned about an anti-trust case, in which expert court attendance fees were limited to a statutory amount of thirty dollars per day.<sup>179</sup> The most consequential civil rights litigation is complex litigation requiring expert testimony.<sup>180</sup> For example, experts will be needed to establish the appropriate labor market. The application of this rule to civil rights cases would add another disincentive to civil rights enforcement.

In sum, when pursuing civil rights cases in the public interest, the prospects of victory are slim and the chances of being paid are even slimmer. These disincentives, along with the persistent and pervasive discrimination that keeps women and minorities in inferior and low-paying positions, suggest the need for legislative reform.

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175. 42 U.S.C. § 1988 (1988).

176. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

177. *Evans v. Jeff D.*, 475 U.S. 717 (1986) (suit against Idaho public officials for mistreatment of handicapped children).

178. See *id.* at 730.

179. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987). There is no firm rule regarding costs in Title VII actions. Compare *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984) (costs not limited to statutory costs) and *EEOC v. Sears, Roebuck & Co.*, 42 Fair Empl. Prac. Cas. (BNA) 1358 (N.D. Ill. 1987) (costs recoverable only at statutory rate).

180. *Shanor & Marcossan*, *supra* note 27.

Congress proposed and passed a civil rights bill designed to remedy and deter civil rights violations. The bill, which was vetoed, addressed these objectives in three ways.<sup>181</sup> First, the Supreme Court's dramatic reductions in civil rights from the 1988-89 term would have been reversed.<sup>182</sup> Second, the recent cases limiting the costs and fees available to prevailing plaintiffs would have been voided.<sup>183</sup> Finally, the rights of all persons aggrieved by the discriminations prohibited by Title VII would have been harmonized with those under section 1981.<sup>184</sup>

Congress' strong legislation was diluted at the last minute in an effort to avoid a veto.<sup>185</sup> Nonetheless, the veto came, along with an alternative bill from the President.<sup>186</sup> The President's own measure was not taken seriously by Congress, but is perhaps illustrative of the Bush Administration's willingness to compromise.

To assess their effect on civil rights, it is necessary to examine the major provisions of the new legislation. Accordingly, the major features of the legislation will now be described, including the original initiatives passed by both Houses, S. 2104, the diluted version resulting from Congressional compromise, and the Administration's alternative.<sup>187</sup>

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181. The proposed legislation also changed the Age Discrimination in Employment Act (ADEA). See S. 2104, as amended by H.R. 4000, *supra* note 9, at § 17 (extending the ADEA limitations period for the filing of charges to two years, and imposing a new requirement that the EEOC notify claimants of dismissal and the ninety day period for claimants to file a private suit). In addition, although not an explicit goal of the legislation, the provisions of the recently enacted Americans With Disabilities Act (ADA) are implicated, for ADA incorporates both the remedies of Title VII and its law on disparate impact (under which compensatory and punitive damages remain unavailable).

182. S. 2104, as amended by H.R. 4000, *supra* note 9, at §§ 2-7.

183. S. 2104, as amended by H.R. 4000, *supra* note 9, at §§ 9-10.

184. S. 2104, as amended by H.R. 4000, *supra* note 9, at §§ 7-8.

185. See *House Names Conferees for Omnibus Civil Rights Legislation*, 182 Daily Lab. Rep. A-7 (Sept. 19, 1990). See also *Sununu Resumes Talks Over Rights Bill*, N.Y. Times, Sept. 22, 1990, § 1, at 10, col. 1.

186. *Bush Administration's Alternative Civil Rights Bill As Sent to Congress October 20, 1990 and White House Section-By-Section Analysis*, 205 Daily Lab. Rep. D-1 (Oct. 23, 1990). The Administration's bill would have been prospective only. *Id.* at § 17. The Civil Rights Act of 1990 was to have been retroactive in order to reverse the effect of the offending Supreme Court decisions. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 15.

187. See *supra* notes 183 and 186.

A. *On Reversing the Supreme Court's Recent Decisions Restricting Civil Rights*

1. *Wards Cove: The Disparate Impact Case*

The proposed Civil Rights Act of 1990 would have changed *Wards Cove* and disparate impact law in three significant ways: (1) broad attacks on the employer's collective employment practices could establish a prima facie case of adverse impact;<sup>188</sup> (2) the burden of proof on the issue of business necessity would be transferred back to the employer;<sup>189</sup> and (3) business necessity would be defined with less deference to managerial decisions.<sup>190</sup> As a result, disparate impact would be easier for a plaintiff to establish, and more difficult for an employer to defend.

The proposed Civil Rights Act would have permitted a plaintiff to establish a prima facie case by statistical proof that a *group* of employment practices resulted in a disparate impact. Once this prima facie case is made, the employer must prove the business necessity or absence of disparate impact for each practice challenged.<sup>191</sup> This formulation properly places the burden of proof of causation on the employer because it is the employer who voluntarily selected and implemented each of the challenged practices.

The establishment of a prima facie case through statistical data about a group of practices was one innovation among many that was scuttled by a Congress intent on avoiding a veto. The legislation was changed to require a plaintiff to show which specific practice caused the adverse impact.<sup>192</sup> However, to prevent sloppy or deceitful record-keeping, an employer without adequate records would have the burden of proving an absence of disparate impact or the presence of business necessity to justify each challenged practice.<sup>193</sup>

188. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 4.

189. *Id.*

190. *Id.* at § 3(o).

191. The proposed legislation, however, would require that the plaintiff prove the specific causation of each challenged practice if the court determined that the plaintiff could identify which specific practice or practices contributed to the disparate impact. *Id.* at § 4(iii).

192. Conference Report, *supra* note 9, at § 4(k)(1)(B)(iii).

193. *Id.* When Congress made this change, the White House responded, through Attorney General Thornburgh, that the changes were inadequate for a number of reasons. The most important reason was that the employer should not have to justify all relevant practices since many innocent causes can result in an adverse impact. Nor should employers be

While the congressional compromise generally followed *Wards Cove* regarding proof of a prima facie case,<sup>194</sup> Congress restored the *Grigg's* formula for defense against claims of disparate impact. Once the prima facie case of impact is established, the burden of proof, not merely production, would shift to the employer. The employer would be required to rebut the plaintiff's prima facie case by demonstrating that the challenged practice is required by business necessity.<sup>195</sup>

The President's ultimate proposal would have reversed the *Wards Cove* burden of proof regarding business necessity. This proposal, however, would have retained the causation and statistical requirements of *Wards Cove*, to which Congress had already acceded.<sup>196</sup> If the Bush Administration is serious in its commitment to place the burden of proof of business necessity on the defending employer, then this commitment should find its way into a new civil rights bill.

A definition of the business necessity defense remains elusive. The *Wards Cove* Court worried that a strict definition "would be almost impossible for most employers to meet, and would result in a host of evils,"<sup>197</sup> primarily the adoption of quotas. As a result, the Court defined business necessity as something more than "insubstantial," but less than "indispensable."<sup>198</sup> Congress wanted a stricter standard than *Wards Cove* provided, and attempted to establish it through the proposed Civil Rights Act.<sup>199</sup>

Early versions of this bill defined business necessity as "essential to effective job performance."<sup>200</sup> This provision was dropped in response to testimony that such a definition would result in quota

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required to keep records to show impact. *Thornburgh Letter*, *supra* note 16.

194. Conference Report, *supra* note 9, at § 4(k)(4).

195. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 4. In Conference Committee, the *Wards Cove* approach was retained: a justified employment practice is nonetheless unlawful if the plaintiff can demonstrate a less discriminatory alternative that serves equally well the employer's legitimate interests. Conference Report, *supra* note 9, at § 4(k)(1)(B)(iii). See also *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (describing how the burden of showing a less discriminatory alternative shifts to the complaining party when an employer can justify an employment practice).

196. Presidential Alternative, *supra* note 15, at §§ 3-4.

197. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

198. *Id.*

199. See S. 2104, as amended by H.R. 4000, *supra* note 9, at §§ 3-4.

200. HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND LABOR, H.R. REP. NO. 101-644, 101st Cong., 2d Sess. 53 (1990).

hiring.<sup>201</sup> A selection device is justified as a business necessity when it "bear[s] a significant relationship to successful performance of the job."<sup>202</sup> In the case of a challenged employment policy that is not a selection device, such as a decision to close a plant, the decision is a business necessity when it "bears a significant relationship to a significant business objective of the employer."<sup>203</sup>

To prevent proof of business necessity by mere speculation, personal opinion, or general conviction, Congress required that business necessity be proved by demonstrable evidence. Congress specified that "[u]nsubstantiated opinion and hearsay are not sufficient . . . . The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate."<sup>204</sup>

In an attempt to accommodate the President, Congress added one more way of proving business necessity. Congress allowed business necessity to be proven through "testimony of individuals with knowledge of the practice."<sup>205</sup> Although the White House initially resisted this provision,<sup>206</sup> the President ultimately relented. The President thus incorporated Congress' changed definition of business necessity.<sup>207</sup>

The proposed Civil Rights Act of 1990 also tried to simplify the judicial response to challenges to employer drug policies.<sup>208</sup> An

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201. *Id.*

202. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 3(o)(1)(A).

203. *Id.* at § 3(o)(1)(B).

204. *Id.* at § 3(o)(2).

205. Conference Committee, *supra* note 11, at § 3(o)(2).

206. *Thornburgh Letter*, *supra* note 16. (suggesting the change was "no improvement").

207. Presidential Alternative, *supra* note 15, at § 3. Another piece of the legislation, which was little noticed, restricted the business necessity defense to claims of disparate impact. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 4(k)(2). This provision probably would have overruled the fetal protection cases which allowed business necessity to justify disparate treatment. See *United Auto Workers v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (en banc). However, with the Supreme Court's recent ruling in *United Auto Workers v. Johnson Controls, Inc.*, 59 U.S.L.W. 4209 (U.S. March 20, 1991), it is now clear that only bona fide occupational qualification, *not* business necessity, can be used to defend an employer's fetal protection policy.

208. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 4(k)(3). Irrespective of adverse impact or business necessity, it is not unlawful to refuse to employ or retain "an individual who currently or knowingly uses or possesses an illegal drug . . . other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by . . . law," unless the employment practice is motivated by intent to discriminate. *Id.*

employer may prohibit use or possession of illegal drugs, regardless of adverse impact, unless such rules are motivated by racial or other prohibited discrimination.<sup>209</sup> There was no dispute about this provision. Further, the standard of business necessity will be fully applicable to subjective employment practices. The case of *Watson v. Fort Worth Bank & Trust* established that a disparate impact challenge could be made to subjective decisions and practices.<sup>210</sup>

The Bush Administration's treatment of *Wards Cove* has been confusing. When all was said and done, the President vetoed a bill that would have reversed *Wards Cove*. In the President's own legislation, however, the Administration agreed to reverse *Wards Cove*.<sup>211</sup>

## 2. Price Waterhouse: *The Injury Requirement*<sup>212</sup>

Congress attempted to expand *Price Waterhouse* in two significant ways. First, a violation would occur when prohibited discrimination is a *contributing* factor in an employment decision or practice.<sup>213</sup> Thus, any prohibited discrimination would violate the Act. Second, while the impact of the contributing discriminatory factor would be irrelevant to liability, the remedy would be limited to the injury caused by that contributing factor.<sup>214</sup> There could be no reinstatement or back pay for same-decision discrimination. Nonetheless, there could be an injunction, attorney's fees, and compensatory and punitive damages.<sup>215</sup> This new liability of employers could provide real monetary relief for victims of same-decision discrimination.

Congress made changes to the proposed legislation. Congress changed the language of mixed motive cases from "contributing" to "motivating."<sup>216</sup> This was a change of questionable conse-

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209. *Id.*

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

211. Presidential Alternative, *supra* note 15, at §§ 3-4, 17.

212. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 5.

213. *Id.* at § 5(a)(1).

214. *Id.* at § 5(b).

215. See *infra* notes 238-55 and accompanying text, discussing proposed Civil Rights Act provisions for compensatory and punitive damages to remedy intentional discrimination.

216. Conference Report, *supra* note 9, at § 5(a) (amending § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2).

quence.<sup>217</sup> No money damages would be available for same-decision discrimination, but declaratory and injunctive relief, as well as attorney's fees and costs, could be awarded. However, "stray remarks," remained lawful under the proposed Act.<sup>218</sup>

The President seemed to agree with much of Congress' revisions. However, his general rejection of compensatory damages would not provide monetary relief, unless exceptional circumstances were present.<sup>219</sup>

### 3. Lorange: Seniority System Limitations Period

There is almost no controversy that *Lorange* should be overruled.<sup>220</sup> The proposed legislation provides that *application* of a seniority system, not its mere *adoption*, triggers the limitations period.<sup>221</sup> In addition, the limitations period is expanded to two years.<sup>222</sup>

### 4. Martin v. Wilks: Attacks on Consent Decrees

Congress wanted to insulate consent decrees from the challenges invited by *Martin v. Wilks*. Accordingly, the proposed Civil Rights Act made a consent decree a defense to a claim of reverse discrimination for employment decisions made pursuant to that decree. There are many details of this portion of the proposed legislation. Further, the bill has many counter-versions.<sup>223</sup> However, virtually all parties, including the President,<sup>224</sup> agree that *Wilks*

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217. Thornburgh said the change in language was worse. His letter claimed the term "motivating" would penalize bad thoughts. *Thornburgh Letter*, *supra* note 16.

218. Conference Committee, *supra* note 11, at § 7 (Explanatory Statement).

219. Presidential Alternative, *supra* note 15, at § 8.

220. See S. 2104, as amended by H.R. 4000, *supra* note 9, at § 7; Presidential Alternative, *supra* note 15, at § 7 and § 7 Summary.

221. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 7(b).

222. See *infra* notes 47-49 and accompanying text, discussing the proposed Civil Rights Act's expansion of limitations period to two years.

223. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 6(m)(1)(A)(i)-(m)(1)(C). (precluding three classes of persons from challenging a consent decree: (1) persons who had actual notice from any source and who had a reasonable opportunity to be heard; (2) persons whose interests were adequately represented; or (3) persons toward whom reasonable efforts of notice were made.) See also Conference Committee, *supra* note 11, at § 6(m)(2)(A)-(C) (further restricting any challenges by persons who, during the notice period, were employees, former employees, or applicants); Presidential Alternative, *supra* note 15, at § 6 (including provisions similar to Conference Committee, *supra* note 11).

224. Presidential Alternative, *supra* note 15, at § 6 and § 6 Summary (explaining modification to the rule of *Martin v. Wilks*).

needs to be changed.<sup>225</sup> The disagreement centers on how to retain the utility of remedial affirmative action while ensuring its fairness.

### 5. *Patterson: The Reach of Section 1981*

All of the advocates agree that *Patterson* must be reversed.<sup>226</sup> The proposed Act restored the pre-*Patterson* meaning of section 1981: "[t]he right to 'make and enforce contracts' shall include the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."<sup>227</sup> All racial discrimination in the employment relationship is prohibited in this interpretation of section 1981.

In *Patterson*, the Supreme Court reiterated that both public and private contracts were covered by section 1981,<sup>228</sup> yet Congress was apparently fearful of further erosion of section 1981's reach. The amendment specifies that racial discrimination in both private and public contracts are prohibited by section 1981.

#### B. *Private Enforcement of Meritorious Claims*

Congress proposed sections of the Civil Rights Act to enhance the ability of private plaintiffs to pursue meritorious claims under Title VII.<sup>229</sup> Costs recoverable to prevailing plaintiffs would include all reasonable expert's fees;<sup>230</sup> attorney's fees incurred in all proceedings to obtain, defend or enforce Title VII relief;<sup>231</sup> and attorney's fees for services performed after an offer of judgment

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225. *Martin v. Wilks* is widely deplored by both civil rights advocates and employers. The only supporters of *Wilks* are those who gain from the campaign against affirmative action. Perhaps that's why Attorney General Thornburgh opposed reversal of *Wilks*. See generally *Thornburgh Letter*, *supra* note 16.

226. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 12; Presidential Alternative, *supra* note 15, at § 11.

227. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 12(2)(b).

228. *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989).

229. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 9; Conference Committee, *supra* note 11 at, § 9.

230. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 9 (to prevent the application in the civil rights context of *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), an antitrust case limiting expert court appearance fees to thirty dollars per day.)

231. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 9 (to neutralize contrary suggestions in *Independent Fed'n. of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), limiting fees for defense against an intervenor).

more favorable than that subsequently recovered at trial.<sup>232</sup> Congress proposed that settlements should be approved by courts only upon assurances that any attorney's fee waivers were voluntary.<sup>233</sup> The Administration proposal said little about costs of litigation, but did allow for the award of expert fees.<sup>234</sup>

C. *Harmonizing the Rights of Civil Rights Claimants: Limitations, Remedies, and Trial by Jury*

A plaintiff's success with a meritorious civil rights claim depends upon the statutory source of protection available to the litigant. An African-American claiming intentional discrimination on the basis of race is in a much better position than a woman claiming refusal to hire on the basis of sex. This is because race discrimination, but not sex discrimination, is prohibited by both section 1981 and Title VII.<sup>235</sup> Under section 1981, the African-American has the advantage of trial by jury,<sup>236</sup> a longer limitations period,<sup>237</sup> and the possibility of compensatory<sup>238</sup> and punitive<sup>239</sup> damages. Since Title VII provides none of these advantages,<sup>240</sup> the woman claiming sex discrimination has less to win—and without a jury, less likelihood of winning.<sup>241</sup>

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232. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 9 (reversing *Marek v. Chesny*, 473 U.S. 1 (1985), which precluded an award of attorney's fees for time spent in litigation which obtained less than the offer of judgment).

233. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 9(2) (reversing *Evans v. Jeff D.*, 475 U.S. 717 (1986), which allowed defendant to condition settlement on waiver of plaintiff's attorney's fees).

234. Presidential Alternative, *supra* note 15, at § 9. Another provision of the Congressional bill allowed interest on back pay and attorney's fees against the federal government to compensate for delay in payment of the same. This would overrule *Library of Congress v. Shaw*, 478 U.S. 310 (1985). Prejudgment interest on compensatory damages would not be available. Although this provision is somewhat arcane, it is of great importance to the government as an employer. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 10.

235. Title VII, § 703(a) prohibits discrimination based on sex and religion; section 1981 does not.

236. *See, e.g., Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir. 1983).

237. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

238. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

239. *Smith v. Wade*, 461 U.S. 30 (1983).

240. Title VII provides for equitable, not legal, relief. 42 U.S.C. § 2000e-5(g). The limitations period is either 180 or 300 days in deferral states. 42 U.S.C. § 2000e-5(e). Because Title VII is equitable only, there is no jury trial. *See Great American Fed. Sav. & Loan Assoc. v. Novotny*, 442 U.S. 366 (1979) (*dicta*, but approving general consensus that jury trial unavailable under Title VII).

241. This claim is not susceptible of proof, but is one of the major reasons employers oppose the new Civil Rights Act. *See Bush Vetoes Civil Rights Bill After Sending Alternative to Hill*, 205 Daily Lab. Rep. (BNA) A-10, A-12 (Oct. 23, 1990).

Changes proposed in the Civil Rights act of 1990 were designed to eliminate these discrepancies. Compensatory and punitive<sup>242</sup> damages, as well as jury trials,<sup>243</sup> would have become available for intentional discrimination under Title VII.<sup>244</sup> A cap on the amount of punitive damages was a subject of much discussion in Congress.<sup>245</sup> This discussion culminated in the acceptance of a cap of \$150,000 for all employers.<sup>246</sup> The two-year limitations period proposed in the new legislation<sup>247</sup> would have expanded the current Title VII limitations period, and made the period similar to that used under section 1981.<sup>248</sup>

This deliberation also changed the triggering requirement of the limitations period.<sup>249</sup> The triggering event under the proposed Civil Rights Act was either the occurrence of discrimination, or the application of a discriminatory policy to an individual. The new triggering event would change existing law and overrule *Lorance* entirely so that it could not be applied in any context, seniority or otherwise.

The President's bill would have overruled *Lorance*, but it did not otherwise extend the limitations period of Title VII. Nor did the Presidential alternative allow for compensatory or punitive damages. However, in a vaguely worded section it did allow for additional monetary relief for intentional discrimination.<sup>250</sup> The relief could only be awarded by a court under carefully controlled standards, not by a jury. The award could not exceed \$150,000 in any case.<sup>251</sup> Moreover, the President's Alternative seems limited to

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242. Punitive damages would have become available for intentional discrimination (but not against the government), when the respondent acted "with malice, or with reckless or callous indifference to the federally protected rights of others." S. 2104, as amended by H.R. 4000, *supra* note 9, at § 8 (B).

243. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 8.

244. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 8.

245. See *Conferees Meet on Civil Rights Act But Defer Action on Punitive Damages Cap*, 186 Daily Lab. Rep. (BNA) A-7 (Sept. 25, 1990). The House version had put a cap on punitive damages for employers with fewer than 100 employees. The cap was the greater of \$150,000 or an amount equal to compensatory damages and equitable monetary relief. The Senate version contained no such cap on punitive damages. *Id.*

246. Conference Committee, *supra* note 11, at § 3(b).

247. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 7.

248. See *supra* note 239.

249. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 7.

250. Presidential Alternative, *supra* note 15, at § 8.

251. There were several restrictions on the award of monetary relief. The award of additional monetary relief can be made only if a court found the equities, the purposes of Title VII, and the public interest justified such an award, and further found that the award was

cases of sexual harassment.<sup>262</sup>

A hortatory amendment<sup>263</sup> would have spurred the use of alternative means of dispute resolution. However, any arbitration would supplement, not supplant, the remedies provided by Title VII, and would not preclude the option of using a federal district court.<sup>264</sup>

### III. IF CONGRESS AND THE PRESIDENT AGREED ON CERTAIN POLICIES AND PROPOSALS, WHY WAS THERE NO CIVIL RIGHTS ACT OF 1990?

If President Bush agreed in substance to a reversal of *Wards Cove*, *Lorance*, or *Patterson*; if the Republican Administration was willing to provide some additional monetary relief for intentional harassment; and if the President concurred in limiting challenges to consent decrees—then why was there no Civil Rights Act of 1990? Two reasons are possible. One is that the President really did not agree to any changes in the employment discrimination laws. This possibility is supported by Attorney General Thornburgh's adamant opposition to every concession made by Congress.<sup>265</sup> Perhaps the President's last minute proposal was a sham. Even a sham, however, could be treated as a bluff, and called by Congress.

The second reason is that the President's legislation contained provisions unacceptable to civil rights supporters. Civil rights claimants need a trial by jury. The Administration proposal gave none out of fear that trial by jury may result in too many plaintiff victories.<sup>266</sup> Civil rights claimants deserve compensatory and punitive damages, but the Bush Administration gave none. The President fears that the prospect of damages might encourage employers to adopt quotas in order to avoid costly and burdensome litigation.<sup>267</sup> Finally, civil rights supporters insist that affirmative

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necessary to deter respondent from such unlawful practices. A court could submit the issue of liability to a jury if constitutionally required. The Bush Administration thought a jury would not be required, but acknowledged that the issue is not free from seventh amendment doubts. *Id.*

252. *Id.*

253. Conference Committee, *supra* note 11, at § 18.

254. *Id.*

255. *Thornburgh Letter*, *supra* note 16.

256. S. 2104, as amended by H.R. 4000, *supra* note 9, at § 8.

257. *Bush Vetoes Civil Rights Bill After Sending Alternative to Hill*, 205 *Daily Lab.*

action remain a viable tool to equalize employment opportunities. The Bush bill would have eliminated all voluntary goals and timetables. The Administration proposal provided that the Act shall not be construed so as "to require, permit, or result in . . . quotas."<sup>258</sup> Such a provision would overrule the existing law on voluntary affirmative action.<sup>259</sup>

Congress' bill did not require quotas, nor did it in any way change the restrictive Supreme Court rulings on affirmative action.<sup>260</sup> The proposed Act expressly stated that "mere existence of a statistical imbalance" could not establish a violation.<sup>261</sup> This provision was designed to reassure quota-criers,<sup>262</sup> but the Bush Administration was not convinced. Congress finally added a provision that quotas were not even "encouraged" by the new legislation.<sup>263</sup> This did not satisfy the Bush Administration. It still saw quotas.

The Administration's misplaced<sup>264</sup> fear of quotas does not account for the failure of the civil rights legislation. The real reason for the demise of the proposed bill is that the Administration prefers to have the risk of error borne by the victims of discrimination rather than their employers. Observations about the economic position of women and minorities suggest that this burden was too

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Rep. (BNA) A-10 (Oct. 23, 1990).

258. Presidential Alternative, *supra* note 15, at § 14.

259. *Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987).

260. *Weber*, 443 U.S. 193; *Santa Clara County*, 480 U.S. 616. Those Supreme Court rulings are rather restrictive. Voluntary affirmative action programs in the private sector can pass statutory muster only if there is a demonstrated need to correct a manifest imbalance in the workplace which is in some way attributable to some past discrimination of the employer. The affirmative action program must be temporary, and it must be designed to eliminate discrimination, not to maintain racial balance. The public sector rules are even more stringent, inasmuch as public sector voluntary affirmative action programs are gauged by the strict scrutiny standard. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In effect, a white male who feels discriminated against by an affirmative action plan has a ready plan of attack against anything that is a mere quota.

261. Conference Committee, *supra* note 11, at § 4(4). Moreover, this passage mirrors 703(j) of Title VII, which states that mere imbalance in a work force shall not constitute a violation of Title VII. 42 U.S.C. 2000e-2(j).

262. See JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, appended to Conference Committee, *supra* note 11, at § 5. A prima facie case of impact discrimination could be made only by plaintiff's demonstration that the employment practices result in a prohibited imbalance with respect to the *qualified* labor market, not with respect to the general population. *Id.*

263. Conference Committee, *supra* note 11, at § 13.

264. The law of "quotas" would not be changed by the legislation. S. 2104, *as amended* by H.R. 4000, *supra* note 9, at § 13; Conference Committee, *supra* note 11, at § 13. There is no convincing evidence that employers adopt quotas to avoid Title VII liability.

heavy before the 1988-89 term.<sup>265</sup> It only got heavier with each Supreme Court decision. The proposed Civil Rights Act merely restored the more reasonable, but still difficult methods of proving a violation. After proof of a violation, the Civil Rights Act would provide real relief for the violations that have been proven. That does not seem to be too much to ask.

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265. 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, 1751 n.1 (1990); L. THURLOW, *THE ZERO SUM SOCIETY* 184-87 (1980) (describing position of economic minorities).

