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Professor David Strauss’s article is a thoughtful, carefully developed economic analysis of current prospects for efficient enforcement of the laws prohibiting racial discrimination in employment. After canvassing various theories of discrimination, Strauss concludes that severe limitations exist in applying to modern conditions legal concepts developed in the early stages of enforcement of Title VII of the 1964 Civil Rights Act.

A brief summary of his major conclusions may be useful as background for my comments, which are both approving and disapproving. Strauss notes that the overt racial discrimination which existed (most visibly in the South) at the time of the 1964 Act is largely absent today. He believes that open discrimination is disapproved of by the bulk of the American people, and few, if any, employers would risk the opprobrium that would be generated by an open “no blacks need apply” stance. This accurate and straightforward factual conclusion leaves little room for disagreement, although, as I will argue, Strauss has not fully considered how this state of affairs came about.

After this preliminary observation, however, Strauss goes much further and concludes that pure racial animus (what he calls “a taste for racial discrimination”) is almost nonexistent, or at least that where present it will operate so covertly as to be uncontrollable through litigation. He suggests that the bulk of complaints about racial discrimination in employment come from discharged minorities who were only marginally qualified employees. These borderline employees, in their efforts to redress imagined wrongs, will impose high litigation costs on employers. From this series of theoretical assumptions, Strauss concludes that the “disparate treatment” legal regime which seeks to combat discrimination motivated by racial hostility should be de-

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2. Title VII makes it unlawful to discriminate in employment on the basis of race, color, sex, religion, or national origin. 42 U.S.C. §§ 2000e to 2000e-17 (1988).
3. Id. at 1619.
4. Id.
5. See infra Part II.
6. See Strauss, supra note 1, at 1645 (employers who discriminate will “cover their tracks,” making it “even more difficult to prove discrimination in court”).
7. Id.
8. Id. at 1646.
emphasized or all but abandoned.9

I believe Strauss is too quick to pronounce the death of racial animus, and too facile in his argument that economic efficiency overcomes discrimination against superior minority employees. I will argue, first, that efficiency is not a reliable combatant against discrimination in several employment arenas, and that prejudice itself is essentially nonrational; second, that disparate treatment lawsuits are not nearly so problematic as Strauss implies; and, third, that several empirical studies suggest the continuing virulence of discrimination in minority hiring and promotion as well as in the firing of minority employees. In response to Strauss's concern that taste-based discrimination will operate so covertly as to be undetectable, I will argue that the holdings of two recent Supreme Court decisions combined with the enactment of a few legislative proposals can work either to expose covert discrimination, or to make its practice prohibitively expensive for the employer. Finally, I explore some of the practical political problems implicated in Strauss's proposals, and suggest what I believe are politically more feasible alternatives.

I. THE CONTINUING VITALITY OF RACIAL DISCRIMINATION

A. EMPLOYMENT DISCRIMINATION AND THE LIMITS OF THE EFFICIENCY ARGUMENT

Strauss hypothesizes that "[e]ven a discriminating employer will be less likely to discharge a superior minority employee."10 This statement presupposes a private employer who will seek to retain highly productive minorities in order to maximize profits. Yet Strauss does not consider that in certain contexts market efficiency will be unable to drive out discrimination. For example, he ignores the governmental sector, where failure to promote minorities and women to high level jobs carries little direct cost because no bottom line exists to measure efficiency.

Strauss's statement that businesses will not allow discriminatory attitudes to jeopardize their ability to retain superior employees is further belied by the fairly widespread incidence of sexual harassment, which causes some women to quit their jobs. In sexual harassment situations, as with discrimination, the supervisor is in no way considering the company's interest in maximizing profits when he is off on his own personal frolic, willing to court the risk to the corporation of litigation costs and damages. One explanation for this behavior is that in a large corporation there may be many levels of management between the rank and file employees and the top officials of the corporation. Low level managers may have a fair degree of hiring, firing and

9. Id. at 1644.
10. Id. at 1645.
promotional authority and receive only a limited amount of oversight from their superiors. These managers would have a fair amount of room to work their discriminatory wishes without fear of repercussions, given their relative insulation from direct concern about bottom line profits. They may be willing to ignore the best interests of the corporation in order to satisfy their "taste for discrimination," particularly because they usually can count on management to close ranks behind them.

Finally, Strauss's belief that an employer will refrain from discriminating against superior employees out of economic self-interest does not account for the deeply emotional, nonrational nature of an act of prejudice. The discriminator may believe that he is not acting out of prejudice because his limited view of the capabilities of minority groups or women is so ingrained that it resists correction by any contrary facts. Overgeneralization or outright irrationality is at the core of prejudice and can drive what may seem like inefficient behavior.

The case of *Price Waterhouse v. Hopkins* is a vivid illustration of this point. Ann Hopkins was the only female candidate in a field of eighty-eight senior managers considered for partnership at the accounting firm of Price Waterhouse in 1982. Forty-seven males were promoted to partnership that year. Ms. Hopkins candidacy, however, was put on hold though she had been essential in securing a $25 million contract for the firm, an accomplishment that none of the other partnership candidates had matched. The Court ultimately found the evidence sufficient to establish that sexual stereotyping had played a part in the consideration of Hopkins's candidacy. Several partners who had evaluated Hopkins had expressed distaste at her aggressive and sometimes abrasive professional character, and chided her for her failure to act more "femininely." Such stereotyped views of women's characters appeared to be pervasive at the firm.

It is possible for the kind of discrimination that went on in *Price Waterhouse* to be widespread at the upper levels of firms and corporations without being very noticeable. The practice would revolve around a few upper level jobs and only occur episodically because there are not that many minorities and women who have attained the qualifications to compete for such openings. Moreover, the loss of a talented individual will probably not

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11. 490 U.S. 228 (1989) (plurality opinion).
12. *Id.* at 233.
13. *Id.*
14. *Id.* at 231, 233-34.
15. *Id.* at 250-51. For a discussion of other aspects of the *Price Waterhouse* case, see infra notes 62-67 and accompanying text.
16. *Id.* at 234-35.
17. *Id.* at 235-36.
be as dramatic as it was in Price Waterhouse because there will usually be white male candidates with roughly comparable qualifications.

B. THE NEED FOR PRIVATE DISCRIMINATION SUITS

From his assumption that taste-based discrimination has largely disappeared, Strauss reasons that a system allowing private discrimination suits is vulnerable to abuse.18 Yet, the picture that Strauss paints of frivolous and unfounded complaints by discharged persons is overblown and unrepresentative of most complaints that become lawsuits. The screening process is elaborate.19 First, the state or federal agency that initially investigates charges of discrimination has every incentive to encourage a complainant not to pursue weak cases. Getting these cases out of the system quickly prevents the development of an embarrassing backlog. Second, if the agency cannot persuade the complainant to withdraw the charge, the agency will stamp the charge with a "no probable cause" finding for lack of evidence of discrimination.20 The complainant will then find it difficult to secure a private attorney willing to take the case on a contingent fee basis, which may foreclose further action by a complainant whose economic means are limited by current or recent unemployment. Third, even an attorney who is retained and paid in advance by the plaintiff runs the serious risk of a countersuit against him by the employer under Rule 11 of the Federal Rules of Civil Procedure if the suit he has filed is frivolous and baseless.21 There have been claims that civil rights plaintiffs' attorneys have been especially targeted for Rule 11 sanctions.22 According to many members of the plaintiffs' bar who have handled Title VII matters, the problem is not that an abundance of complaints lack

18. See supra notes 3-8 and accompanying text.
19. Under Title VII, an employee with a complaint is required to seek redress from the Equal Employment Opportunity Commission (EEOC) and/or any state or local employment discrimination agency prior to initiating a private action. EEOC then conducts an investigation to determine if reasonable cause supports the claim. If EEOC finds probable cause, it will seek to remedy the matter informally; failing this, it may bring an action against the employer. If EEOC fails to bring an action for any reason, and no conciliation agreement has been negotiated, the complainant may bring an action. 42 U.S.C. § 2000e-5 (1988).
20. See id. § 2000e-5(a) (EEOC determines probable cause for complaint).
21. See Remsburg & Gaer, General Overview of Federal Rule of Civil Procedure 11, 38 DRAKE L. REV. 261, 279 (1988-1989). "Rule 11 requires, in addition to a reasonable inquiry into the facts, that the signing attorney reasonably believes that the pleading, motion or other paper is 'well grounded in fact.'" Id. (footnote omitted) (quoting FED. R. Civ. P. 11).
22. See Tobias, Rule 11 and Civil Rights Litigation, 37 BUFFALO L. REV. 485, 513-25 (1989) (suggesting that Rule 11 should be repealed, amended, or judicially circumscribed because it has been disproportionately applied to civil rights attorneys). Between 1983 and 1989, 2000 Rule 11 actions were begun. Eighty percent were against plaintiffs' attorneys and violations were found in 60% of the cases. See Remsburg & Gaer, supra note 21 at 304. Some very visible public interest lawyers have been subjected to Rule 11 sanctions, including Julius Chambers, currently head of the NAACP Legal Defense & Educational Fund Inc., William Kunstler, attorney who defended the "Chicago 8" in the famous anti-Vietnam war trial before Judge Hoffman, and Ramsey Clark, for-
substance. It is rather more a problem of the increasing reluctance of that bar to undertake even well-founded complaints when lawyers face a long and arduous litigation with limited rewards.

C. THE EMPIRICAL DATA

In defending his rejection of disparate treatment antidiscrimination law, Strauss eschews heavy reliance on empirical studies because he believes that existing empirical studies are "highly inconclusive." It is true that many of the studies which seek to measure the presence of racial discrimination in employment qualify their findings with a statement that discrimination may not be the only explanation for the observed disparities between blacks and whites. However, empirical studies, even with the limitations inherent in any social science research, are a necessary corrective to a theoretical analysis which may have a certain surface plausibility and symmetry, but which ultimately may become too unmoored from fact.

1. Discrimination in Hiring

Studies have shown a substantial improvement in the economic status of black Americans since the passage of the 1964 Civil Rights Act. However, one study also shows a substantial and continuing gap between the income of black Americans and that of white Americans, a disparity not fully explained by objective nondiscriminatory factors. In 1980 black men between the ages of twenty-five and thirty-four years old earned a weekly wage that was 12.6% less than that earned by their white counterparts, even when the two groups were matched for years of school completed, region of residence, and several other measurable characteristics. The gap rises to 24.3% when black males are compared to white males in the fifty-five to sixty-four year-

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23. Strauss, supra note 1, at 1628.
24. See Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 INDUS. REL. L.J. 313, 335 (1984) (statistics indicate ratio of minority worker employment increased dramatically from 1950 to 1980 in "white collar" and skilled labor positions, and decreased in unskilled labor positions). It is not clear that all of the improvements are due to the passage of the federal statute and its subsequent enforcement because some improvement in employment opportunities for blacks occurred before the statute was enacted. Id. at 333-34. Professor Alfred Blumrosen argues quite persuasively, however, that the change has been substantial enough to shift the burden to those who doubt the impact of the federal law. Id. at 334-36.
26. Id. at 11. The study suggests that racial discrimination played some role in causing the gap in earnings between black and white men, but does not determine the precise impact because a number of variables, such as quality of schooling and family background were not controlled. Id. It notes, however, that these two factors themselves could have been adversely affected by racial discrimination. Id. at 115 n.9.
old category. Strauss suggests that most employment discrimination plaintiffs will be discharged employees, but the above data indicates there may be widespread discrimination at the hiring stage, unless one posits that black men are deliberately seeking jobs which pay less than those of their white counterparts.

Strauss laments that adequate data on employment discrimination is not, and may never be, available. He says that he is aware of only one study based on controlled testing for employment discrimination. In fact, the General Accounting Office (GAO) recently released a 1990 study which demonstrated continuing employment discrimination against Hispanics. In one part of the study, GAO reported its use of "testers" in two cities. Hispanic and Anglo "applicants" with the same apparent general qualifications were sent to the same job openings. The Anglos received 33% more interviews and 52% more job offers than the Hispanic applicants. The differences were statistically significant, and the GAO concluded that there was a conscious avoidance of the Hispanic applicants. Other statistical evidence supports the inference that there is still widespread discrimination in hiring. One study sought to compare black and white youths who were actual job seekers rather than test subjects as in the GAO study. The authors concluded that black youths received less favorable treatment than whites in seeking jobs in retail establishments.

27. Id. at 113.
28. Strauss, supra note 1, at 1645.
29. The Commission on Civil Rights study, isolating males, was chosen to neutralize the claim that the income of females is lower than that of males because women are culturally conditioned to seek certain kinds of jobs (to remain "feminine" and subordinate to males in their family relationships) and that these jobs are lower paying or that the "overcrowding" generates the lower pay. Even positing a chauvinist society, males (including black males) have every incentive culturally to seek out higher paying jobs in order to fulfill their "head of the family" role.
30. Strauss, supra note 1, at 1648.
31. Id. at 1649.
33. Id. at 48.
34. Id. at 49. While it is possible that many employers were engaging in overkill by rejecting Hispanics to avoid the penalties which could attach to the hiring of illegal aliens under the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (1988) (employer must verify identity and employability of employed and prospective employees; unlawful to employ unauthorized aliens hired after November 6, 1986), the U.S. government has been active in counseling employers on the simple measures they must take to avoid hiring illegal aliens, and the widespread rejections likely reflect simple ethnic hostility to our most recent immigrants.
36. Id. at 249-50. The study involved a small number of job seekers and probably would require replication with a larger sample to assure reliability. Id. at 239. The authors speculated that the large number of white youths who did not continue their participation in the study was an indication of the greater ease with which they secured work in comparison to black youths. Id. at 250.
In the late 1980s unemployment among black Americans averaged 13% nationally, about twice the unemployment rate of whites. One would expect some higher degree of unemployment among blacks when compared with whites, for undoubtedly whites have a higher proportion of persons who possess the necessary qualifications for a wider range of jobs. Yet in the last few decades, blacks have significantly narrowed the gap between themselves and the white community in one variable that should enhance their employability—median years of education. Moreover, blacks are more likely to receive their education in a racially integrated setting in 1991 than they were in 1961. The increased number of years spent in school should be a reliable measure of educational improvement, because schooling was less likely to have occurred in segregated and deprived institutions. Yet black unemployment has consistently remained roughly double that of white unemployment over the last thirty years. In 1988, the black unemployment rate was 2.57 times the white rate and was the highest black-to-white unemployment differential ever recorded.

A host of variables may have played a role in the higher level of black unemployment. Professor Alfred Blumrosen, for example, suggests that the higher rate of unemployment in the 1980s may have been influenced by the fact that birth rates among minorities in the 1960s and early 1970s exceeded white birth rates, thus increasing the relative proportion of the minority population reaching working age in the 1980s. Given the higher unemployment rates among young people than among the general population, a demographic trend such as the one Blumrosen describes would tend to raise the overall black unemployment rate. However, in the 1950s the black youth unemployment rate was fairly close to the white youth unemployment rate; in 1987 it was more than twice the white rate. Black youths have also

37. CENTER ON BUDGET AND POLICY PRIORITIES, STILL FAR FROM THE DREAM: RECENT DEVELOPMENTS IN BLACK INCOME, EMPLOYMENT AND POVERTY, 28 (1988) [hereinafter RECENT DEVELOPMENTS].
38. In 1960 black adults had completed a median of 8 years of schooling; white adults had completed a median of 10.9 years. By 1981, the separation between median years of schooling was only one-half year with blacks completing 12.1 years and whites completing 12.6 years. J. McGHEE, RUNNING THE GAUNTLET: BLACK MEN IN AMERICA 10 (1984).
39. RECENT DEVELOPMENTS, supra note 37, at 28.
41. T. Sowell, KNOWLEDGE AND DECISIONS 78 (1980) (income of families headed by 45-54 year-olds nearly double that of families headed by 24 year-olds and younger).
42. Black and white teenage unemployment figures were about equal in 1955 at 52% for each group. By 1980 there was a 26 point gap between the two groups—the black teenage employment rate had fallen to 27% and the employment rate for white teenagers rose to 53%. Larson, Employment and Unemployment of Young Black Males, in YOUNG, BLACK, AND MALE IN AMERICA 98 (J. Gibbs ed. 1988). In 1987 white youth ages 16-19 had an unemployment rate of 15%. Black teenagers had a jobless rate of 34.3%. R. Hill, Adolescent Male Responsibility in African-American
narrowed the education gap between themselves and their white counterparts, but enhanced education has not reduced the high rate at which they are rejected for employment.

Black youths, particularly males, are probably hindered in their search for employment by the media-induced image of the young, inner-city, black male as irresponsible (creating babies and then refusing to support them), dangerous (involved in gang activity or mugging innocent citizens), or involved with drugs. This image is likely to influence a refusal to hire black youth, a kind of "rational" statistical discrimination of which Strauss writes. Strauss also notes that demoralization is an undesirable side effect of qualified persons being arbitrarily denied employment opportunities for hidden racial reasons. Thus, the unemployment figures for black youths are not the only troubling statistics; their numbers only track the black youth who are still looking for work. The proportion of black youth outside the labor market (not looking for work) is also high and on the increase, a further measure of demoralization.

2. Discrimination in Promotion

Studies have shown barriers to career advancement for black Americans. Whites are twice as likely as blacks to occupy upper level positions such as manager. Also, black females do not rise to high level professional and administrative positions at the same rate as their white female counterparts. This is an especially troubling fact considering that black women as


43. See J. McGhee, supra note 38, table 9 (black youth high school drop-out rate declined from 24.1% in 1971 to 19.3% in 1981).

44. See R. Hill, supra note 42 ("Black youths with some college education often have jobless rates about as high as white youths who are high school drop-outs.").

45. See Strauss, supra note 1, at 1622.

46. Id. at 1629-30.

47. The labor force participation rate of black males above age 20 was 75% in 1982, down from 83% in 1960. The labor force participation rate of black males between the ages of 16 and 19 had dropped to 40% in 1982 from a 46% participation rate in 1972. J. McGhee, supra note 38, at 26.

Demoralization, which results in human capital being unused and undeveloped, bodes ill for the economy if the future economic needs of the country require skilled and trained individuals. That, however, may be the least of the deleterious consequences, for William J. Wilson has made a persuasive showing that the galloping unemployment among young black males probably undergirds and largely explains the parallel growth of the black female headed household with its concomitant poverty and other disastrous associated social ills. See generally W. Wilson, The Truly Disadvantaged—The Inner City, the Underclass, and Public Policy (1987).


49. Id. at 268-70; see also A. Lewis, Racial Conflict and Economic Development 48
a group are more frequently the sole supporters of their families than are white women\textsuperscript{50} and, therefore, probably in greater need of the additional income that flows from a higher level position. The "glass ceiling" experienced by white females is obviously a little lower for black females.

Furthermore, complaints of a race barrier to upward mobility seem fairly common in some businesses and professions. I am currently involved in a project that will report on discrimination in the legal profession and the courts of New York state. This study will give solid empirical support to existing anecdotal evidence that discrimination in promotions is a serious problem within the legal profession. It shows that although white attorneys disagree that minorities are subjected to widespread discrimination at the hiring stage, they do believe that minorities do not have the same prospects for advancement as their white competitors.\textsuperscript{51} Arguably, failure to promote a capable minority is an even rawer form of racial discrimination than failure to hire, because the employer has access to the employee (more "information" in Strauss's terms) and should be in a better position to dispel stereotypical myths. Such an employer is in less of a "risk-taking" position than the employer confronted with an initial hiring decision.

The above data suggesting continuing discrimination in hiring and promotions challenges Strauss's theoretical assumption that most employment discrimination litigation is brought by disgruntled former employees who were fired for reasons at least partially legitimate.\textsuperscript{52} An employer's hiring decision is made with little information about the job applicant. If we assume minimal qualifications on the part of minority applicants—as was the case in the GAO Test Study—\textsuperscript{53} the wide gap between white and minority hiring indicates the presence of either overt racial antipathy or what Strauss calls "statistical discrimination"—the use of race or gender as a crude proxy for qualifications.\textsuperscript{54}

In sum, Strauss has focused his attention too narrowly on his hypothetical

\footnotesize{(1985) (although median incomes for black and white females were equal in the 1980s, black females mean income was only 88\% that of white females because black females above the median earned less than equivalent white females).}

\footnotesize{50. See McGhee, A Profile of the Black Single Female-Headed Household, in The State of Black America—1984, at 56 (J. Williams ed. 1984) (in 1980, 41.7\% of black families were supported solely by females, in contrast to 11\% of white families supported solely by white females). From 1960 to 1981 whites increased their divorce rate by roughly 300\%. Blacks during the same period increased their divorce rate by over 400\%. The divorce rate does not fully measure the extent to which families were broken because black families separated without divorce at five times the rate of whites in 1981. J. McGhee, supra note 38, at 2-3.}

\footnotesize{51. New York State Judicial Commission on Minorities, Survey of Litigators, (forthcoming). The full report of the Commission is currently being drafted and the precise data is not available for publication at this time.}

\footnotesize{52. See supra note 7 and accompanying text.}

\footnotesize{53. See supra note 32.}

\footnotesize{54. Strauss, supra note 1, at 1621.}
discharged "borderline" employee. The theoretical assumptions about minorities who have been discharged do not necessarily apply to minorities who have not been hired or promoted. Indeed, a major problem in employment discrimination law might be quite the opposite of that stated by Strauss: We may need methods for encouraging more individual complaints of disparate treatment from victims of hiring and promotion discrimination as well as for ensuring the success of bona fide complaints.

II. SOLUTIONS TO COVERT DISCRIMINATION

Strauss despairs that covert behavior cannot be efficiently controlled by litigation, but it is hardly surprising that violations of the law (almost any law) will often be covert. Characteristic of many violations of employment law in areas other than race discrimination is an attempt by the wrongdoers to hide their illegalities. For example, much discrimination against employees who lead efforts to bring a union into the workplace operates covertly, and unionizers are often penalized, disciplined, or discharged for ostensibly legitimate reasons. Efforts at silencing or retaliating against "whistle-blowers" who have exposed company derelictions are often disguised as well. The fact that illegal activity will often be hidden behind a smoke screen does not mean we should abandon the effort at controlling it; the task simply becomes one of searching for mechanisms which expose the violation or make the activity more costly.

Some recent Supreme Court decisions may, over time, work to reduce the problem of covert discrimination. If combined with the proposed legislative action set forth below, these cases could make employment discrimination, covert or not, prohibitively expensive for the employer.

The recent case of *Watson v. Fort Worth Bank & Trust* should make it easier to attack a certain kind of hidden discrimination. In *Watson*, a black plaintiff was denied promotion based on subjective evaluations by white supervisors. The Court held that such subjective evaluations of employees could be examined under disparate impact analysis. The Court rejected a flat distinction between disparate treatment and disparate impact applicabil-

55. *Id.* at 1645.
58. *Id.* at 982.
59. *Id.* at 991. Under disparate impact analysis, where discrimination is operative, but difficult to prove directly, plaintiffs can shift the burden of coming forward with an explanation to the employer by showing a pattern of negative evaluations working against the minority group. *Id.* at 994-95 (plurality).
ity based on "objective" versus "subjective" evaluation criteria. To have held otherwise would undermine the use of disparate impact analysis to evaluate any employment or promotion criteria since an employer could escape disparate impact analysis by simply tacking an objective stage onto a series of subjective tests. In future cases, plaintiffs should be able to expose more easily discrimination hidden in subjective evaluations by the use of statistical proofs.

Strauss addresses the "mixed motive" case in which there is some evidence of a discriminatory motive but which is confounded by other evidence providing a legitimate basis for taking adverse action against the plaintiff. The *Price Waterhouse v. Hopkins* decision should be helpful in such a case. In *Price Waterhouse*, a plurality of the Court held that where an employer's decision was tainted by discriminatory motivation, the employer must show by a preponderance of the evidence that she would have made the same decision based on purely legitimate reasons.

Blumrosen suggests that new legislation could improve even further upon the *Price Waterhouse* standard and give more assurance that an employer who intentionally allows discriminatory factors to influence an employment decision would not fully escape liability. He suggests that proof that an employment decision was affected by discriminatory factors should be conclusive on the issue of liability for a Title VII violation. Only at the remedial stage would the employer be allowed to introduce evidence that the same adverse decision against the plaintiff might have been made based upon purely legitimate factors. Thus, even if the plaintiff might not be entitled to reinstatement, promotion, or backpay, the defendant would still be responsible for the plaintiff's attorneys' fees because the plaintiff would have "prevailed" in initially establishing a violation of Title VII. This could be an effective deterrent, given that attorney's fee awards in civil rights cases can be a great deal higher than damage awards.

Disparate treatment suits also might be encouraged if Title VII were amended to permit punitive and compensatory damages, in addition to the present allowances for back pay, attorneys' fees, and injunctive relief. An

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60. Id. at 989-91.
61. Id. at 989-90.
63. Id. at 237.
65. Id.
66. Id. at 1049-51.
67. See *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (in 42 U.S.C. § 1988 action, proposition rejected that attorney's "fee awards . . . should necessarily be proportionate to the amount of damages a . . . plaintiff actually recovers"; fee award seven times amount of damages upheld).
increase in the amount of potential damages might be a spur to persons who have been discriminatorily denied a job, denied promotion, or discharged. Persons who have been refused hire or who have been discharged might not file or pursue a claim if their only remedies are backpay or reinstatement. They have every incentive to look for work elsewhere, and if they secure other employment within a short period of time, they may decide that the amount of the backpay lost is not worth the effort of litigation. They may also fear accepting employment or reinstatement in a company that practices discrimination. Such persons might, however, file charges and pursue a suit if they could recover, for instance, special damages for pain and suffering upon proof of especially egregious conduct by the defendant.

Persons who have been discriminatorily refused a promotion may also be reluctant to file a charge for fear of retaliation by their employer. Studies of the operation of the National Labor Relations Act, which affords only a backpay remedy for successful plaintiffs, show that there is some evidence that employers may harass and penalize employees who have brought successful charges against the employer under the Act. An employer who wishes to harass or intimidate a complaining employee may not be deterred by the threat of a backpay remedy. Punitive damages against any employer who unlawfully retaliates against a complaining employee might deter such conduct and encourage wronged employees to bring charges about denials of promotion.

It is possible that much discrimination goes unchallenged because the victims are unaware of the possibility that they have been refused hire or promotion unfairly. Perhaps we should require employers to give unsuccessful minority candidates a written explanation of what factors prompted the hiring or promotion of their white competitor. This could be administratively burdensome and probably unnecessary for the employers whose workforce composition suggests that nondiscriminatory policies are in place. We might therefore take a leaf from Professor Strauss's proposals and require these written explanations only of employers with statistical deficiencies in minority representation.

Other commentators have suggested a number of reforms and improvements in Title VII jurisprudence and administration that would strengthen individual employment discrimination suits. The proposals deal with subjects ranging from attorneys' fees to expert witnesses to increasing the staff of

68. See A. Cox, D. Bok & R. Gorman, Labor Law—Cases and Materials, 264-65 (10th ed. 1986) (studies show that 80% of employees who received and accepted reinstatement left their jobs within two years).
69. See id. at 262-63 (combination of net loss doctrine, which requires deduction of wages earned during interim or other employment from back pay award, and employee's duty to mitigate damages "removes most of the deterrent effect of the back pay award").
the Equal Employment Opportunity Commission (EEOC). None of these measures has been adopted yet. Considering the positive changes noted above, as well as the possibility of further reform, it may be much too early to dismiss the individual lawsuit as a form of behavior control. Although Strauss acknowledges that the possibility of litigation deters statistical discrimination, he does not fully consider the degree to which this influence may account for the near disappearance of the most overt forms of discrimination.

III. RACIAL QUOTAS AND POLITICAL REALITY

A. BARRIERS TO IMPLEMENTATION

Further research may support Strauss's contention that the bulk of individual disparate treatment claims are lost or settled for small amounts because discrimination could not be shown. If so, there is much to recommend Strauss's approach. It may be that a stronger emphasis ought to be placed on the "bottom-line" method he suggests—holding firms to a strict requirement of employing minorities in proportion to their respective percentages in the nation's population.

There is, however, the problem of political feasibility. Strauss's proposal appears to require the amendment or repeal of some current civil rights legislation. First, individuals would have to be deprived of the right to sue which they now possess under Title VII because only federal or state antidiscrimination agencies would have that authority. Strauss proposes this limitation in order to remove the need for employers to incur the costs of defending individual suits. Strauss seems to allow for the possibility that discrimination suits could still be brought under claims for a breach of a


71. Strauss, supra note 1, at 1647.

72. Id. at 1655.

73. Id. I have proposed elsewhere that the Equal Employment Opportunity Commission be styled closer to the National Labor Relations Board and be given authority to issue cease and desist orders, but I did not go so far as to propose the complete removal of private counsel from the enforcement process. See Clark, Insuring Equal Opportunity in Employment Through Law, in RE-THINKING EMPLOYMENT POLICY, 192-94 (1989). Individual suits can play an important role in any civil rights schema, both because of the expertise of private counsel and because such suits may serve as a counterweight to any administration efforts to subvert the enforcement of antidiscrimination laws. See N. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 108-30 (1988) (detailing fluctuations in civil rights enforcement between the Carter and Reagan administrations).
collective bargaining agreement or under wrongful discharge statutes, but if he truly wishes to exempt employers from the costs of individual discrimination suits, then a natural extension of his idea would require that federal law be amended to preempt such claims from being brought in state courts. Title VII would have to be further altered by a repeal of section 703(j), which currently forbids any interpretation of Title VII that would require an employer to grant preferential treatment to any individual because that person is in a group which is underrepresented in the employer’s workforce.

Strauss’s proposal would also require the repeal of the Civil Rights Act of 1866, which has been interpreted to allow private suits against discrimination in the making of employment contracts. The 1866 Act would be particularly vulnerable under Strauss’s proposed regime, because the statute has been limited in its application to disparate treatment cases and does not require resort to federal or state antidiscrimination agencies.

The difficulties inherent in amending existing civil rights law pale beside the political problems created by the supposed imposition of racial hiring quotas. Last year the President vetoed the Civil Rights Act of 1990 and Congress was unable to override the veto. The veto was sustained (primarily by Republican congressional representatives) two weeks before an election, and despite the fact that the President and a number of commentators acknowledged the serious political risks of opposing any civil rights bill. The President must have calculated that the public would generally applaud his action if they accepted his claim that the bill would have forced employers to adopt quota hiring. Quota hiring is widely believed to force employers to hire incompetents who have nothing to recommend them other than the appeasement of a minority group’s demands.

President Bush’s labeling of the 1990 Civil Rights Act as a bill requiring quotas was inaccurate, but the point is that no member of Congress, even those who supported the bill, thought it was politically feasible to respond to the President’s charges by saying, “this isn’t a quota bill, but what’s wrong with quotas?” Strauss’s emphasis on bottom line representation would cer-

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74. Strauss, supra note 1, at 1655.
78. Patterson v. McLean Credit Union, 491 U.S. 164 (1989) sharply limited § 1981 claims of discrimination in the “making” of a new contract. The Court held that § 1981 does not cover discriminatory conditions on the job, such as the racial harassment at issue in the case. Id. at 178-80. The statute may, however, still prohibit discrimination in promotions where the promotions have the indicia of the “making” of a new contract. Id. at 176-77, 185.
80. See id.
tainly seem to run afoul of this apparent political consensus against quota hiring. Strauss might respond that it is unfair to throw out meritorious ideas simply on the grounds that they are impractical. From my point of view, that is a respectable answer, for a good idea may find its acceptance only over time when the shock value has worn off and its virtue begins to recommend itself upon more careful reflection. Nevertheless, it still makes sense to consider modifications to Strauss's basic proposals that maintain their integrity, but avoid the political quicksand of quota hiring.

B. THE PAST AS PROLOGUE: THE SYSTEMIC APPROACH

At least one historical example offers some hope for the acceptability of Strauss's ideas. Although it was not portrayed as such, a de-emphasis on individual lawsuits and a greater focus on an employer's "minority profile," much like Strauss's goals, seems to be the reform in administration which EEOC Chairperson Eleanor H. Norton pursued during the Carter presidency. Norton implemented two major policy changes in the EEOC during her term in office. First, she instituted a "rapid charge processing system," which emphasized quick settlement of individual complaints through an in-person fact-finding conference. Allied to this approach was a "backlog charge processing system," which settled cases quickly by narrowing the scope of the charge.81 Second, she implemented a program designed to identify major companies exhibiting patterns or practices of discrimination that affected large numbers of persons in the protected classes. These employers were targeted for litigation.82 Thus, the practice of individual complaints triggering a wall-to-wall investigation of a company was ended. Although this restructuring permitted the agency to address larger, more important systemic cases, implicit in the speed with which the individual charges were handled was a statement about their priority as a vehicle for significantly changing patterns of discrimination. Instead of generating political opposition, the Norton-led EEOC received rave reviews for increased efficiency and for the significant reduction of a backlog which had formerly stymied the agency on all fronts.83

Several factors mitigate against a facile application of the Norton example to the current political climate. First, because the Norton program was merely a shift in enforcement emphasis and was not achieved through new legislation (as would be necessary for Strauss's proposals) it proved vulnerable to curtailment by subsequent conservative administrations that had no desire for vigorous enforcement of antidiscrimination laws. The number of systemic law suits, for example, fell from a high of sixty in fiscal 1980 during

81. See N. Amaker, supra note 73, at 109.
82. Id.
the Norton era to zero in fiscal 1983 during the Reagan administration.\textsuperscript{84} Second, the Norton program might not be as successful today, given a recent interpretation by the United States Supreme Court placing significant structures on the disparate impact theory that underpinned Norton’s systemic program.\textsuperscript{85} The Court has removed the burden of proof from the employer to establish that any neutral measures he relies upon in hiring or promotions are related to job performance—he need satisfy only a burden of production on this issue.\textsuperscript{86} Furthermore, plaintiffs can no longer allege that they have disproportionately lost employment opportunities based on the totality of an employer’s practices, but rather must identify the specific employment practices that are alleged to have caused the statistical disparities of which they complain.\textsuperscript{87}

There are significant caveats, then, to an assumption that the success of Norton’s program in the Carter years points the way to the political acceptability of Strauss’s proposals. There is one legislative response, however, that would go a long way toward achieving Strauss’s goal and yet could well be acceptable in the present political climate. Under Norton’s leadership the systemic approach was reinforced by a policy of not pursuing charges of discrimination against a given employer if the employer’s bottom line statistics showed no underrepresentation of minorities.\textsuperscript{88} The idea was to accommodate employers who had not engaged in a time-consuming and costly study to prove that a given employee requirement with an arguably discriminatory impact was a valid measure of job performance, but who, as a corrective, had adopted affirmative action programs to ensure that minorities were proportionately included in hiring and promotions.\textsuperscript{89} Unfortunately, the Supreme Court invalidated a similar bottom line defense in \textit{Connecticut v. Teal}.\textsuperscript{90} Blumrosen, who criticized the \textit{Teal} case when it was decided,\textsuperscript{91} has recently proposed a legislative amendment that would reverse \textit{Teal} and make it easier for defendants to defend claims of discrimination when their bottom line statistics suggest a nondiscriminatory policy.\textsuperscript{92} The initiative would probably

\begin{itemize}
\item \textsuperscript{84} N. Amaker, \textit{supra} note 73, at 110.
\item \textsuperscript{86} \textit{Id.} at 659.
\item \textsuperscript{87} \textit{Id.} at 656; Watson \textit{v. Fort Worth Bank & Trust}, 487 U.S. 977, 994 (1988) (plurality opinion) (accepted by majority in \textit{Wards Cove}).
\item \textsuperscript{88} N. Amaker, \textit{supra} note 73, at 109-12.
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} 457 U.S. 440, 451 (1982).
\item \textsuperscript{91} See Blumrosen, \textit{The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of Connecticut v. Teal}, 20 \textit{Harv. J. on Legis.} 99 (1983) (criticizing \textit{Teal} as destructive of the “group interest” focus of Title VII jurisprudence).
\item \textsuperscript{92} Blumrosen, \textit{supra} note 48, at 271-272. Blumrosen also has argued that despite the formal prohibition of a bottom line defense under \textit{Teal}, the lower courts are in fact less prone to find liability if an employer has a fair representation of minorities overall. See Blumrosen, \textit{The Legacy of Griggs: Social Progress and Subjective Judgments}, 63 \textit{Chi.-Kent L. Rev.} 1, 34-37 (1987).
\end{itemize}
avoid the political backlash likely to be created by Strauss's more extreme proposals. Indeed, given that the business community supported the bottom line defense in *Teal*, business might become an ally of any effort to legislatively reverse the decision.93

IV. CONCLUSION

In summary, the Strauss article is a welcome airing of the need to assess the appropriate enforcement directions for the future battle against employment discrimination, but careful research is required to determine the quality and impact of suits on behalf of individuals. Moreover, even if Strauss's theoretical analysis holds up after empirical research, less confrontational and more feasible enforcement and legislative methods may produce the results Strauss seeks.

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