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FROM ASPIRATION TO ARROGANCE AND BACK: THE ONCE AND FUTURE ROLE OF
"EQUAL EMPLOYMENT OPPORTUNITY" UNDER TITLE VII

Barclay D. Beery

Of course it's not true. Of course it never will be true. But I challenge anybody
to tell me that it isn't the type of goal we should try to get to as fast as we can.

- Thurgood Marshall

... the others you will meet.
They won't act as kindly if they see you on the street.

- Donald Fagen and Walter Becker

I. INTRODUCTION

Our grandson, Jack, has come over to visit us. We sit on the steps on
a Sunday October afternoon watching the colorful leaves blow down the
sidewalk in front of our house. Jack is in the eighth grade at one of the
schools here in town. He talks enthusiastically about the cultural
exchange that he and his classmates have been doing as part of a
segment of their American history class on the struggle for equality and

1 Abraham L. Freedman Fellow, Temple University School of Law. Special thanks to Rick
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School of Law for its research support.

2 Annual Judicial Conference Second Judicial Circuit of the United States, in 115 F.R.D.

3 Steely Dan, Barrytown, on PRETZEL LOGIC (ABC Records 1974).
civil rights. Jack says that, as a result of the exchange, he has learned about the cultural backgrounds of his classmates, everything from food and music to family traditions and family history. He has also learned about some of the experiences his classmates have had with prejudice. For example, one of his classmates talked about a recent occasion when a car full of people shouted hateful racial remarks at him and his friend. Another student related how her mother’s co-workers had made fun of the way she spoke English, her second language.

Jack asks me what I learned when I was growing up in history class about cultural differences between groups and prejudice. I tell him that, although we may have read a few things, his grandmother and I did not really experience anything like the cultural exchange he described until we attended an anti-racism training program as adults. The training taught us about the perspectives of people from racial or ethnic backgrounds different from our own. I tell Jack that I would like to have listened more to the stories of others before I had so much to unlearn about them.

My daughter, Leah, Jack’s mother, arrives to take Jack home. She is an executive vice president of a company in town where she is principally involved in human resources and employee relations. For the past several weekends, she has been coordinating bias awareness training for the company’s employees through one of the educational organizations specializing in such training. The training is designed to help employees become more aware of their own biases and develop strategies for reducing the impact of these biases on others in their work environment. At one of the previous training sessions, Leah learned that several employees perceived the company’s recently implemented grooming policy as unfair to individuals of their particular ethnic group. Leah said that the manager who had drafted the policy had tried to consider all of the problems it might present for employees but had missed the particular ethnic association identified in the training. Part of the company-sponsored training also provides participants with an opportunity to exchange cultural experiences, so Leah and Jack have been able to share the stories they have heard. Leah is in a hurry to get Jack to soccer practice, so she tells us she will call us later. I smile proudly as I watch them walk away together . . . and then my alarm goes off. It was a good dream, but like so many I have had before, it feels incomplete, unfinished.

“IT’s only a dream.” My parents used to say that to comfort me after I awakened frightened from a nightmare. The message was that,
because the nightmare was a dream, it was nothing to worry about. Yet like so many words in our language, “dream” has more than one meaning. It refers to our conscious aspirations, as well as our unconscious musings. The message we receive from our parents and others regarding our dreams as aspirations may be the opposite of “it’s only a dream” in that we should pay attention to them and follow them. Or it may be the same, based on the perception that the distance of our dreams from reality renders them as meaningless as a nightmare. But dreams as aspirations are never meaningless; they are an essential part of the human condition and a prerequisite to our progress.4 Aspirations inspire action, and the messages in language people receive about them can profoundly affect whether they continue to exist as inspirational forces or die as “former” dreams.5

This Article examines language in the law and the aspiration to eliminate the problem of employment inequality, defined figuratively as the contribution of employer decision making to a workplace playing field that is more difficult for members of “outgroups” to play on than others. The aspiration to eliminate employment inequality mirrors the aspiration for “equal employment opportunity,” defined as the level workplace playing field. The purpose of the Article is to examine the relationship between the message of language about Title VII of the Civil Rights Act of 1964 (“Title VII”),6 the law’s principal response to the problem of employment inequality,7 and the aspiration for equal employment opportunity. My contention is that language about the law has replaced the aspiration in equal employment opportunity with arrogance8 by sending the message that the law is the solution to the

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5 See id. at 15-18.
7 Title VII was initially drafted as a response to employment inequality as defined above. After Adam Clayton Powell became Chair of the House Labor and Education Committee in 1961, he appointed a subcommittee on labor to hold hearings across the United States in order to investigate and highlight inequality in employment. See Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy, 1960-1972, at 95-96 (1990). Through these hearings, Powell and the other committee members were able to highlight to the rest of the legislature the manner in which workplace decision-making created obstacles to equality in employment. See id. at 96-97. Having gathered information on a variety of employer-rooted barriers to employment opportunity, a sub-committee of Powell’s committee proposed and drafted Title VII as a legal response. See id. at 97-98.
8 Arrogance is a word with very negative connotations. Here, arrogance is used to mean the absence of humility. See Rex J. Zedalis, Connections: Interpretive Perspectives and Social Attitudes, 26 Seton Hall L. Rev. 255, 268 (1995) (“Humility consists of an absence of
problem of employment inequality. This message suggests to the regulated public that compliance with Title VII is sufficient to create workplace equality, which is a dangerous suggestion that affirms an attitude of complacency about compliance rather than the kind of self-examination necessary to move workplaces closer to the level playing field ideal.

Language can effectively inspire individuals and groups to work on a very complex problem while at the same time communicate the problem’s solution as a distant, perhaps even unreachable aspiration. Part II of this Article discusses some examples of such language within the struggle for civil rights which produced Title VII; it analyzes what made the language effective in inspiring action to address the problem of inequality without understating the strength of the psychological and institutional forces sustaining that inequality. This Article then draws a parallel between the message of civil rights language before Title VII and the message of various groups engaged in some form of bias awareness education today. These examples both provide a sense of where the law’s response to employment inequality began and demonstrate how official language about the law in the future might communicate a similar inspirational message about equal employment opportunity.

Part III describes how the language about Title VII has evolved to depict the law as the solution to employment inequality. The discussion begins with the seeds of this message in the language used by various government leaders during the formative years of federal antidiscrimination legislation and then focuses on the language of the Equal Employment Opportunity Commission (“EEOC”), the primary entity charged with educating the regulated public about Title VII. The EEOC’s use of language in the early years of Title VII demonstrated its recognition of the complexity of employment inequality and contributed to an interpretation of discrimination which covers some employer practices that, although applicable to all, have a disproportionate

arrogance . . . .”); Wilton Blake II, The African Origin of Morality, 1 HOW. SCROLL 1, 9 (1993) (“The opposite of humility is arrogance.”). Because humility in my view represents an aspirational quality that human beings are not capable of fully attaining, arrogance in this usage is a common characteristic, not a description limited to those who consider themselves beyond reproach.

9 See infra notes 20-31 and accompanying text.
10 See infra notes 32-41 and accompanying text.
11 See infra notes 42-87 and accompanying text.
12 Under the section of Title VII which creates the EEOC, the EEOC has an educational, as well as an enforcement, mandate. See 42 U.S.C. § 2000e-4 (1994).
adverse effect on members of one or more of the outgroups the statute protects. In other direct communication with the regulated community, however, the EEOC has used language suggesting that the law solves the problem of employment inequality, which is an arrogant claim for the law in the face of such a complex and pervasive problem. The emergence of equal employment opportunity ("EEO") as a familiar term of the workplace has reinforced the message that Title VII produces equal employment opportunity.

Regardless of whether the law itself can effectively address the complex problem of employment inequality, Title VII, as interpreted, does not do so. Part IV explains how the Supreme Court's interpretation of discrimination, the conduct prohibited under the statute, establishes the incompleteness of Title VII as a response to employment inequality.\(^{13}\) The doctrinal division of discrimination into two "types" of analysis, with no articulation of an overall wrong linking the two, allows aspects of employment inequality that neither analysis recognizes. The role of unconscious bias in specific personnel decisions, for example, slips through the doctrine's focus on intent as the wrong of discrimination in such decisions. Therefore, Title VII, as interpreted, does not and cannot solve the problem of employment inequality.

Part V asserts that, although the incompleteness of the doctrine is lamentable, public perception of employment inequality as a problem fully addressed or addressable by Title VII may be a more immediate problem than the shortcomings of the doctrine, which are now fairly well entrenched.\(^ {14}\) This perception, encouraged by the language about Title VII, affirms an attitude of complacency that directly impedes the struggle for equality. Complacency not only blocks the kind of improved awareness through self examination necessary to address the roots of employment inequality that Title VII does not cover but also threatens the progress accomplished by Title VII up to this time.\(^ {15}\)

In Part VI, this Article suggests that, by attempting to eliminate from official discourse about the law the language which equates the law with equal employment opportunity, the EEOC may be able to restore the

\(^{13}\) See infra notes 88-145 and accompanying text.
\(^{14}\) See infra notes 146-53 and accompanying text.
\(^{15}\) If, for example, Sisyphus decided to stop pushing the rock up the mountain, the weight of the rock presumably could force him down to the bottom. See generally ALBERT CAMUS, The Myth of Sisyphus, in THE MYTH OF SISYPHUS AND OTHER ESSAYS (Justin O’Brien trans., 1955).
law's EEO goal as an aspiration including, but extending beyond, Title VII compliance. Then, hopefully, the official message about Title VII will stop impeding existing civil rights educational efforts, and awareness of individual responsibility for employment inequality will begin to replace complacency as a small step in the right direction.

II. THE MESSAGE OF ASPIRATION IN THE LANGUAGE OF THE STRUGGLE FOR EQUALITY

The historical struggle for African-American equality provides some excellent examples of individuals and groups that have communicated equality as an aspiration in order to inspire work for progress toward that aspiration. These examples demonstrate that language addressing a complex problem, the oppression of African-Americans, can inspire attention to the problem without understating the problem's complexity. Section A begins by discussing this language and analyzing how the language succeeded in inspiring action for change while realistically depicting the tremendous resistance to that change. Section B then briefly discusses the use of similar language in current educational efforts directed toward increasing awareness of continuing inequality between groups.

The language discussed in this Part and its success in communicating equality as an aspiration sharply contrasts with the official language about Title VII discussed in Part III and its failure to convey the aspiration in equal employment opportunity. The success of the approaches discussed herein at communicating an inspirational message, in the face of such a dauntingly complex problem, provides an example of the kind of message the law should encourage and attempt to emulate rather than obstruct.

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16 See infra notes 154-60 and accompanying text.
17 In this Article, the language of African-American civil rights leaders has been chosen because it demonstrates clearly the effective communication of the elimination of a complex problem as a distant aspiration. Discussing race in terms of a black-white paradigm, is problematic. Moreover, the academic literature's focus on the African-American struggle tends to present an under-inclusive picture of civil rights history. See Juan F. Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 CALIF. L. REV. 1213, 1219, 1238 (1997) (joint symposium by California Law Review and La Raza Law Journal).
18 See infra notes 20-31 and accompanying text.
19 See infra notes 32-41 and accompanying text.
A. Language in the Struggle for Equality Before the Enactment of Title VII

Civil rights reform efforts, of course, focused on the problem of inequality in the workplace and elsewhere long before the formal recognition of a "civil rights movement."20 Frederick Douglass, a prominent African-American voice for change in the 19th century, described employment inequality as one of several unjust manifestations of prejudice against his race.21 Douglass connected the experience of being excluded from employment on the basis of race to the experience of slavery:

The workshop denies him work, and the inn denies him shelter; the ballot-box a fair vote, and the jury-box a fair trial. He has ceased to be the slave of an individual, but has in some sense become the slave of society. He may not now be bought and sold like a beast in the market, but he is the trammelled victim of a prejudice . . . 22

In linking the experiences of discrimination and slavery, Douglass conveyed the severity of existing inequality by showing how small a step emancipation had been toward real freedom.23

Another prominent feature of Douglass's rhetoric, that effectively inspired without understating the severity of the problem of inequality,
was his emphasis on the contradiction between the reality of inequality and the country's democratic principles. When people of color were left out of participation in the Columbian World Exposition in Chicago, Douglass wrote the Introduction to a pamphlet of protest, in which he included the following:

We have deemed it only a duty to ourselves, to make plain what otherwise might be misunderstood and misconstrued concerning us. To do this we must begin with slavery. The duty undertaken is far from a welcome one. It involves the necessity of plain speaking of wrongs and outrages endured, and of rights withheld, and withheld in flagrant contradiction to boasted American Republican liberty and civilization.\(^{24}\)

After Douglass, other leaders working in the cause of racial equality, like W.E.B. DuBois, continued to apply the two techniques of grounding the explanation of inequality in the historical experience of slavery and contrasting the inequality with articulated national principles.\(^ {25}\) As the cause of racial equality transformed into a movement, the rhetoric remained essentially the same. In 1955, just a few days after the arrest of Rosa Parks in Birmingham for refusing to give her bus seat to a white

\(^{24}\) See Frederick Douglass, Introduction to the Reason Why the Colored American is not in the World's Columbian Exposition (1892), in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER 469, 470 (Philip S. Foner ed., 1955). Douglass then went on to discuss a number of as yet unfulfilled developments for American people of color which would be consistent with national statements of human rights, including principles articulated in the Declaration of Independence. See id. at 470-71.

\(^{25}\) Like Douglass before him, W.E.B. DuBois included in his reform efforts persuasive communications to the broader community in an attempt to create political pressure. See W.E.B. DuBois, An Appeal to the World (1947), reprinted in W.E.B. DUBOIS SPEAKS: SPEECHES AND ADDRESSES, 1920-1963, at 202, 202-21 (Philip S. Foner ed., 1970). In 1946, DuBois drafted an Introduction to a document presented to the Commission on Human Rights of the United Nations, the purpose of which was to protest the situation of African-Americans. See id. at 202-03. Before moving into more specific facts, DuBois employed the two rhetorical strategies of discussing inequality as slavery and contrasting inequality with national ideals as a means of highlighting the injustice of the situation:

A nation which boldly declared "That all men are created equal," proceeded to build its economy on chattel slavery . . . and a great nation, which today ought to be in the forefront of the march toward peace and democracy, finds itself continuously making common cause with race hate, prejudiced exploitation and oppression of the common man. Its high and noble words are turned against it, because they are contradicted in every syllable by the treatment of the American Negro for three hundred and twenty-eight years.

Id. at 205.
passenger, Martin Luther King, Jr., responding to the incident, stated: "We, the disinherited of this land, we who have been oppressed so long are tired of going through the long night of captivity. And we are reaching out for the daybreak of freedom and justice and equality ...."26

Like the speeches and writings of Douglass and DuBois, King's expressions of hope for change were grounded in the experience of oppression; but, as the movement encountered more resistance, his description of that experience became more evocative of the complexity of racial inequality. In responding to eight white Birmingham clergymen who had publicly labeled the demonstrations for which King had been arrested in April of 1963 "unwise and untimely," King stated:

I guess it is easy for those who have never felt the stinging darts of segregation to say wait. But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policeman curse, kick, brutalize, and even kill your black brothers and sisters with impunity; when you see the vast majority of your 20 million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see the tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky, and see her begin to distort her little personality by unconsciously developing a bitterness toward white people; when you have to concoct an answer for a five-year-old son who is asking in agonizing pathos: "Daddy, why do white people treat colored people so mean?" .... then you will understand why we find it difficult to wait.27

27 Martin Luther King, Jr., Letter from Birmingham City Jail (Apr. 16, 1963), in THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM
Through images of deeply held and destructive individual prejudice (the mob) and institutional oppression and resistance to change (the policemen), King persuasively advocated for change while communicating to a white audience some of the complexity of the phenomena contributing to racial inequality.\textsuperscript{28}

When King did touch on the appropriate public response to racial inequality, he did not oversimplify the solution. For example, in explaining the struggle's aspirations for workplace equality, King conveyed the sense that creating a level playing field would be a complex task:

The struggle for rights is, at bottom, a struggle for opportunities. In asking for something special, the Negro is not seeking charity. . . . He does not want to be given a job he cannot handle. Neither, however, does he want to be told that there is no place where he can be trained to handle it. So with equal opportunity must come the practical, realistic aid which will equip him to seize it. Giving a pair of shoes to a man who has not learned to walk is a cruel jest.\textsuperscript{29}

\textsuperscript{28} See id. at 153-58. King also conveyed the severity of the impact of inequality through both large scale statistics and a vivid description of the impact of racial exclusion on the psyche of a small child. See id. King's poetic reference to "the depressing clouds of inferiority" was reminiscent of what was probably the first major official recognition of the complexity of inequality, the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954). The Supreme Court based its conclusion in Brown that "[s]eparate educational facilities [were] inherently unequal," in part on the psychological impact of the "sense of inferiority" that the forced separation from other children placed on African-American children. Brown, 347 U.S. at 494-95. The Brown decision was not the first to recognize this aspect of the complexity of inequality between racial groups. As Juan Perea points out, Brown was preceded by Mendez v. Westminster School Dist., 64 F. Supp. 544 (S.D. Cal. 1946), aff'd, 161 F.2d 774 (9th Cir. 1947). See Perea, supra note 17, at 158-59. In Mendez, the District Court judge concluded that California's segregation of Mexican-American students violated Equal Protection, and reasoned, as the Court in Brown would eight years later, that separation itself produced social inequality regardless of equality of facilities and learning materials. See Mendez, 64 F. Supp. at 549.

\textsuperscript{29} Martin Luther King, Jr., Why We Can't Wait 136 (1963).
Although the language of civil rights leaders, like any language, was subject to the interpretation of the receiver, the message therein regarding equality was communicated through the experience of inequality. By communicating the psychological as well as the economic burdens of this legacy of mistreatment, these “outside” voices provided a rich “inside” perspective on racial inequality. At the same time that their rhetoric depicted a severe problem in need of immediate legal attention, it also described a complex problem insusceptible to a simple or immediate solution.

B. A Current Parallel in Community Education

The work of communicating and promoting greater understanding of the inequality experienced by outgroups has been a continuing aspect of the struggle for civil rights up to the present. For example, a number of community organizations have developed some form of bias awareness education as a means of building bridges and encouraging progressive work toward equality. Although each anti-racism or bias awareness program differs somewhat in the specific content of the information presented and the format of the presentation, training generally includes a substantial presentation of the perspective of victims of inequality on the forces which contribute to their oppression and an opportunity for participants to exchange stories regarding their

31 King also, of course, frequently spoke about equality in the language of faith. See ANDREW MICHAEL MANIS, SOUTHERN CIVIL RELIGIONS IN CONFLICT 74 (1987) (quoting King as saying that “God has marvelous plans ... for this nation and we must have faith to believe that one day these plans will materialize.”); Cf. David Luban, Difference Made Legal: The Court and Dr. King, 87 Mich. L. Rev. 2152, 2194 (1989) (asserting that King placed the message of the Civil Rights Movement side-by-side with passages of The Bible in his “Letter from Birmingham City Jail”).
32 Government publications created in association with President Clinton’s Race Initiative have attempted to highlight the work of various national and local organizations actively engaged in building bridges of understanding between groups. See ADVISORY BOARD’S REPORT TO THE PRESIDENT, ONE AMERICA IN THE 21ST CENTURY: THE PRESIDENT’S INITIATIVE ON RACE, app. H1 (Sept. 1998).
33 See id. One of the organizations with a national presence in diversity training is the Anti-Defamation League (“ADL”). See id. at app. H1-1. Before the enactment of federal civil rights legislation, the ADL cooperated closely with the major African-American led civil rights organizations in the Leadership Conference for Civil Rights, the major political lobbying force of the civil rights coalition. See GRAHAM, supra note 7, at 95.
own personal experiences with prejudice. Training or education usually includes diversity of both trainers and participants so that the presentation by the trainers and the exchange by the participants will involve an exposure to diverse personal stories of prejudice and its impact.

Although the precise language used in bias awareness training fluctuates depending on who is facilitating the training, the message of the training's content is consistent with the reality that inequality

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34 See, e.g., Joseph Barndt, Dismantling Racism 29-30 (1991); Louise Derman-Sparks & Carol Brunson Phillips, Teaching/Learning Anti-Racism: A Developmental Approach 3-5, 70-76, 97-102, 106 (1997); Judith H. Katz, White Awareness: Handbook for Anti-Racism Training 61-91 (1978). In the "Big Foot Analysis" developed by the People's Institute for Survival and Beyond, a national organization of trainers based at 1444 North Johnson Street, New Orleans, LA 70116, the various institutions which contribute to oppress racial minority communities are described, based on interviews of individuals living in those communities, as the feet that are "kicking [their] community in the behind." Barndt, supra at 29-30.

A parallel within legal academic discourse to this perspective-based approach to education has been the scholarly effort to communicate the complexity of outgroup inequality by writing stories or "narratives" which provide the perspective of oppressed citizens on the many forces which contribute to their experience of oppression. Jane B. Baron and Julia Epstein have divided the storytelling movement in legal scholarship into three strands. See Jane B. Baron & Julia Epstein, Language and the Law: Literature, Narrative, and Legal Theory, in The Politics of Law 662-79 (David Kairys ed., 1998). The first of these strands, which they call the "strategic" strand, employs the use of stories as a means of more effectively communicating the nature of a problem like, for example, unconscious discrimination. See id. at 668-69. The other two strands, referred to as the "evidentiary" and "multiple realities" strands, involve the use of stories to demonstrate the particular failings of the law and to challenge the notion that there is an objective truth for the law to address, respectively. See id. at 669. The narrative strand, which I refer to here as a parallel in both content and delivery to the message of early civil rights leaders and bias awareness educators, is the "strategic" strand, which focuses on improving understanding of underlying problems through the use of stories. See, e.g., Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerprinting as Law's Response to Racism, 42 U. Miami L. Rev. 127, 127-30 (1987).

Because this Article focuses on the message delivered to the general public about Title VII and the problem it addresses, and scholarly journals would seem to have only an indirect "trickle down" effect on education of the public, a detailed review of narrative scholarship is beyond the scope of this Article. But see Ian F. Haney Lopez, White By Law (1996) (urging an increase in scholarly attention to race consciousness as a primary means of dismantling whiteness). For literature addressing the value of narrative scholarship generally, see Jane Baron, Resistance to Stories, 67 S. CAL. L. REV. 255 (1994); Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay On Legal Narratives, 45 STAN. L. REV. 807 (1993); Kathryn Abrams, Hearing the Call of Stories, 79 CAL. L. REV. 971 (1991).

between groups is a complex, pervasive phenomenon maintained by both institutional and individual forces. As Michael Omi and Howard Winant state in their discussion of racism: "We believe . . . that ideological beliefs have structural consequences, and that social structures give rise to beliefs. Racial ideology and social structure, therefore, mutually shape the nature of racism in a complex, dialectical, and overdetermined manner." Michael Omi & Howard Winant, Racial Formation in the United States from the 1660s to the 1990s 74-75 (2d ed. 1994). Omi and Winant also state:

Today, racial hegemony is ‘messy.’ The complexity of the present situation is the product of a vast historical legacy of structural inequality and invidious racial representation, which has been confronted during the post-World War II period with an opposition more serious and effective than any it had faced before.

Id. at 75-76.

Gunnar Myrdal labeled the same phenomenon a “vicious circle.” Gunnar Myrdal, An American Dilemma 75 (1944). Myrdal cites historical developments in housing, education, government, land ownership, health care, labor, the media and the arts as continuing influences on both real inequality and perceived racial differences impacting attitudes. Id. A more detailed discussion of the various components of structural or institutional bias is beyond the scope of this Article. There have been recent attempts to discuss the complexities of race in American society today. See, e.g., An American Dilemma Revisited (Obie Clayton, Jr. ed., 1996); Jennifer L. Hochschild, Facing Up to the American Dream (1995).

Adding even further to the complexity of the employment inequality problem is the broad spectrum of “otherness” in this country. Even some of the most extensive studies of the impact of race alone, including its manifestation in employment inequality, have addressed race either exclusively or almost exclusively as a black/white issue. See, e.g., Joel Kovel, White Racism: A Psychohistory (1970); Myrdal, supra note 36. The extent to which the use of the black/white paradigm in discussing race adds or detracts from our understanding of employment inequality more generally is an issue for debate; Omi & Winant, supra note 36; Cornel West, Race Matters (1993); White Racism: Its History, Pathology and Practice (Barry N. Schwartz & Robert Disch eds., 1970). Compare Perea, supra note 17, at 151-52 (arguing that biases associated with “foreignness” or with “language or accent” experienced by Latino/as and Asian Americans cannot be understood solely through study of black/white relations), and Robert Blauner, Racial Oppression in America 175 (1972) (criticizing the black/white paradigm by pointing out how the unique history of Mexican-Americans in the U.S. fits neither within the model of assimilation applied to other non-black immigrant groups nor within the black/white model), with John O. Calmore, Exploring Michael Omi’s “Messy” Real World of Race: An Essay
or short-term solution and closely parallels the message of those who were engaged in the struggle for equality before Title VII was enacted. Moreover, the presentation of this message through the perspective of those who have been victims of inequality in different forms has persuasive power reminiscent of the power of Martin Luther King, Jr.’s references to the experience of bias in his family. At the same time, bias awareness education is about increasing understanding, not as an end, but as a critical first step in actively working toward the aspiration of a more level playing field.

III. ARROGANCE AND THE EVOLUTION OF LANGUAGE ABOUT TITLE VII

The task of employing language to inspire people to work on the problem of inequality generally without understating the severity of the problem, although difficult, is clearly different from the task of formulating and interpreting the law’s response to just one aspect of that problem—employment inequality. Government officials charged with the latter task, however, choose the language they use to talk about the law. Subsequently, the choices they make impact the law’s message about the problem the law seeks to address; a message with a substantial potential impact on how the public perceives the problem. This Part explores how the official language regarding Title VII has evolved and assesses the changes in the message accompanying that evolution.


Although I am not aware of any significant empirical data from which to assess the impact of this training, the anecdotal evidence of the training’s impact on bias consciousness appears promising. In an anti-racism college course, white students, who at the beginning of the course had verbally distanced themselves from problems associated with race, began to identify their own unwanted attitudes about race, to understand the pervasiveness of race as an institutional force and to see parallels between racism and other institutional biases. See DERMAN-SPARKS & PHILLIPS, supra note 34, at 44-45, 107-18. Meanwhile, students of color have developed a better understanding of how institutions operate to affect the attitudes of others. See id. at 120-22.

See supra notes 27-31 and accompanying text.

DERMAN-SPARKS & PHILLIPS, supra note 34, at 3; A Workplace of Difference Diversity Training Program, supra note 35.
A. Prologue to Arrogance: Official Rhetoric and the Enactment of Civil Rights Legislation

In responding to the persuasive power of and pressure from "outsider" voices in the Civil Rights Movement demanding change,42 "inside" political leaders attempted to persuade the broader public of the need for change through the use of language often resembling the rhetoric of civil rights leaders like Douglass, DuBois and King.43 For example, following World War II, President Truman, having investigated civil rights abuses, attempted to initiate a civil rights program which included comprehensive antidiscrimination legislation.44 In his address to Congress, Truman discussed "equal opportunity" as an aspiration while emphasizing the contradiction between existing inequality and constitutional ideals.45 Similarly, on the heels of the civil

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43 See supra notes 20-31 and accompanying text.
44 Graham, supra note 7, at 14-16. The sacrifice made by citizens of all backgrounds during the war highlighted the contradictions and injustice of a state sanctioned second class status at home. See Henry Steele Commager, Editorial Note, in The Struggle for Racial Equality 42 (Henry Steele Commager ed., 1967). These contradictions became a catalyst for increased African-American pressure on the government for legislative action. See id.; see also Vincent Harding, We the People: The Long Journey Toward A More Perfect Union, in The Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts from the Black Freedom Struggle, 1954-1990, at 1, 29-32 (Clayborne Carson et al. eds., 1991) (pointing out that, in response to the contradictory messages sent by the government in calling for African-Americans to join in the war effort against Hitler’s racism while sanctioning segregation in America, black newspapers protested and threatened a march on Washington unless a Presidential order was made ending discrimination in the defense industry).
45 President Harry S. Truman, Civil Rights Message to Congress (1948), in The Struggle for Racial Equality 45-46 (Henry Steele Commager ed., 1967). After some introduction of the founding ideals of the nation, Truman’s speech provided:

We shall not, however, finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result of his race, or religion, or color, or the land of origin of his forefathers.

Unfortunately there still are examples—flagrant examples—of discrimination which are utterly contrary to our ideals. Not all groups of our population are free from the fear of violence. Not all groups are free to live and work where they please or to improve their conditions of life by their own efforts. Not all groups enjoy the full privileges of citizenship and participation in the Government under which they live.

We cannot be satisfied until all our people have equal opportunities for jobs, for homes, for education, for health, and for political expression, and until all our people have equal protection under the law ... .

Id.
rights demonstrations in Birmingham, President Kennedy delivered a nationally televised speech in which he emphasized the contradiction between the national ideal of equality and the oppression experienced by so many because of their color. The two speeches differed substantially, however, in how they depicted the complexity of racial inequality and the corresponding difficulty of addressing the problem in the law.

With respect to the role of civil rights legislation in addressing racial inequality, Truman stated as follows:

If we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy. We know the ways. We need only the will.

Truman's characterization of the inequality of opportunity which he had previously described in his speech as "the remaining imperfection" of the American system, and his statement that the means of correcting the problem were "known" certainly conveyed the impression that the appropriate legislation would solve the problem.

In sharp contrast, Kennedy's expression of aspiration in equal opportunity depicted a more distant and elusive goal; one which would be reached only through moral transformation as well as legislation:

This is not even a legal or legislative issue alone. It is better to settle these matters in the courts than on the streets, and new laws are needed at every level. But law alone cannot make men see right. We are confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities;

47 See Truman, supra note 45, at 48.
whether we are going to treat our fellow Americans as we want to be treated.48

By stating that the law, regardless of its content, would not be a panacea for inequality of opportunity, Kennedy challenged individuals to look for inequality in their lives and to consider their own role in working toward a more just society. As the process of enacting civil rights legislation began, this contrast between the message that legislation was a needed, but necessarily insufficient, step for addressing inequality of opportunity and the message that legislation was the solution to the problem reappeared in the public rhetoric.

When the bill that was eventually enacted as the Civil Rights Act of 1964 was introduced, Attorney General Robert Kennedy’s remarks included a message consistent with the more cautious message previously communicated by his brother: “With respect to the bill [H.R. 7152] in its entirety, it must be emphasized that racial discrimination has been with us since long before the United States became a nation, and we cannot expect it to vanish through the enactment of laws alone.”49 President Johnson’s comments regarding equality of opportunity when he signed the bill into law, however, were more reminiscent of Truman’s message in portraying the law as solution to the problem rather than as a step toward a distant goal.50 Johnson also sent the following direct message to the nation’s citizens:

This Civil Rights Act is a challenge to all of us to go to work in our communities and our states, in our homes

48 See Kennedy, supra note 46, at 161.
50 Johnson’s remarks at 6:45 p.m. EST on July 2, 1964 were in pertinent part as follows:

I am about to sign into law the Civil Rights Act of 1964. I want to take this occasion to talk to you about what the law means to every American . . . . We believe that all men are created equal, yet many are denied equal treatment. We believe that all men have certain unalienable rights yet many Americans do not enjoy those rights. We believe that all men are entitled to the blessings of liberty, yet millions are being deprived of those blessings, not because of their own failures but because of the color of their skin . . . . But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.

Johnson’s Address on Civil Rights Bill, N.Y. TIMES, July 3, 1964, at 9 [hereinafter Johnson’s Address]. See also WHALEN, supra note 49, at 227.
and in our hearts to eliminate the last vestiges of injustice in our beloved country . . . . I urge every American to join in this effort to bring justice and hope to all our people and to bring peace to our land.\footnote{See Johnson's Address, supra note 50, at 9.}

Like President Kennedy, Johnson appealed to the country’s citizens to take responsibility for working to end discrimination; but, by linking the effort urged to the legislation itself, he implied that cooperation and compliance with the legislation might suffice to resolve the problem.\footnote{Johnson delivered a very different message a year later in conjunction with the enactment of the Voting Rights Act of 1965: But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, do as you desire, choose the leaders you please. You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “You are free to compete with all the others,” and still justly believe you have been completely fair. President Lyndon B. Johnson, Howard Commencement Address: Equality as a Fact and as a Result (1965), quoted in Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy, 1960-1972, at 174 (1990)\footnote{See Truman, supra note 45, at 48.}} Moreover, his reference to “the last vestiges of injustice,” like Truman's reference to “the remaining imperfections,”\footnote{William McCulloch, the senior Republican on the House Judiciary Committee, who played an important role in pushing the bill through, expressed concern about sending an overly ambitious message about the efficacy of the statute: “To create hope of immediate and complete success can only promote conflict and result in brooding despair.” WHALEN, supra note 49, at 229.} seemed to grossly underestimate the pervasiveness of inequality of opportunity between groups and the corresponding difficulty of addressing that inequality. Within the ambitious message of what the law would accomplish were the seeds of an arrogance affirming message that compliance with the law would produce equality of opportunity.\footnote{B. The EEOC’s Message of Arrogance: “Equal Employment Opportunity” is the Law

With the enactment of Title VII, “equal employment opportunity” became a part of the language of formal law itself, and control of the message to the regulated public about the meaning of equal employment opportunity was left in the hands of the agencies and courts which...}
would interpret the language of the statute thereafter.55 Alfred Blumrosen, the first Chief of Conciliations for the EEOC, has described the history of Title VII and its interpretation as an illustration of the "law transmission system," defined as "the process by which legal policy is translated into 'real world' changes in socio-economic behavior."56 According to Blumrosen, the EEOC shaped the initial interpretation of what Title VII prohibited.57

Title VII requires aggrieved parties to file a complaint with the EEOC as the first step in seeking relief for alleged workplace discrimination.58 Once a complaint is filed, the EEOC must investigate the complaint and, based on that investigation, make an initial determination of whether "reasonable cause" exists to believe that the statute has been violated.59 Because making this determination at first necessarily required the agency to interpret Title VII without the benefit of court precedent, reasonable cause determinations were the principal means through which the agency communicated the interpretation of the statute to both the courts and the regulated community.60 The EEOC also

55 The statute's actual use of the phrase, however, was limited to its incorporation in the name of the agency created to administer the statute, the EEOC. The name of the EEOC arose in the House Education and Labor Committee chaired by James Roosevelt, son of the late President, who later became the first Chairman of the EEOC. See id. at 22. The phrase "equal employment opportunity" probably first appeared as a matter of formal law in the name of the Committee on Equal Employment Opportunity set up by President John F. Kennedy in 1961 in conjunction with his executive order prohibiting discrimination in government employment. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961). Upon signing the order, President Kennedy said: "I have dedicated my administration to the cause of equal opportunity in employment by the government or its contractors." GRAHAM, supra note 7, at 40 (quoting Statement by the President Upon Signing Order Establishing the President's Committee on Equal Employment Opportunity, PUB. PAPERS (Mar. 7, 1961)). Before Kennedy, the phrase "fair employment practices" referred to both national and state antidiscrimination efforts. Id. at 10-23.


57 The initial interpretation of the legislation is the third of Blumrosen's eight stages of law transmission. Id. at 10-11. The first two stages are "social impulse" and "legislative consideration," respectively. Id. at 10. The best example of the EEOC's use of the reasonable cause determination and the issuance of guidelines together to push effectively for a broad interpretation of discrimination occurred in the agency's handling of the issue of employment testing, a practice which had become a major barrier to the improvement of minority employment opportunity. See Alfred W. Blumrosen, Strangers in Paradise: "Griggs v. Duke Power Co." and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 59-61 (1972).


60 See BLUMROSEN, MODERN LAW, supra note 56, at 70.
communicated its initial interpretation of what Title VII prohibited through administrative guidelines.  

During the years before the Supreme Court heard its first Title VII case, the EEOC made a conscious policy choice to interpret Title VII broadly "so as to maximize its impact on employer practices." Of course, the most critical issue was interpreting discrimination, the prohibited conduct. Although it appeared that the legislature had focused on intentional adverse treatment of outgroup members in prohibiting discrimination, the agency perceived that limiting discrimination to intentional conduct would inhibit the law's capacity to cause employers to address the broader range of conduct that restricted outgroup employment opportunity. In order to encourage employers to modify or eliminate practices with such restrictive "effects," the agency's administrators worked for an interpretation of Title VII that would prohibit at least some of those practices that would be provable without evidence of an intent to discriminate. The agency believed that such a broad administrative interpretation provided the best hope for the legislation to be a catalyst for progress toward equal employment opportunity.

The EEOC's policy decision to interpret Title VII broadly was vindicated when the Supreme Court, in its first Title VII decision, recognized that the conduct prohibited by the statute included practices with discriminatory effects on outgroup members, and not just decisions

61 See id. at 74.
62 Id. at 67.
63 Graham and Blumrosen disagree on what the legislative history indicates about the scope of conduct which the legislature intended to prohibit in Title VII. Graham asserts that the compromise reached in the legislature indicated an intent to prohibit only conduct motivated by conscious prejudice, in part because "the concept of invidious discrimination had always been premised upon the intent to do harm to the individual." GRAHAM, supra note 7, at 20. Blumrosen, on the other hand, asserts that there really was no debate on the meaning of discrimination and thus that the legislature left it to the courts and the administrative process to decide that meaning. BLUMROSEN, MODERN LAW, supra note 56, at 50. Blumrosen nevertheless acknowledges that the legislators were primarily focused on discrimination as the intentional adverse treatment of outgroup members. Id. at 73. "The legislators, to the extent that they thought about discrimination, emphasized the deliberate restriction of opportunities of blacks which had characterized the South." Id.
64 See BLUMROSEN, MODERN LAW, supra note 56, at 72-75. In particular, the EEOC was concerned that industry would never respond constructively to accusations of moral wrongdoing in conjunction with discrimination. See id. at 73.
65 See id. See also infra notes 133-45 (discussing the intent requirement).
66 See BLUMROSEN, MODERN LAW, supra note 56, at 75.
overtly based on outgroup membership.67 In reaching its unanimous decision, the Court relied heavily on the EEOC’s interpretation of the statute as communicated through administrative guidelines.68 The EEOC’s Guidelines on Employment Testing Procedures and Employee Selection Procedures, to which the Court referred specifically, required that employers demonstrate the job-relatedness of procedures used to select and place employees.69 Through these types of guidelines and the reasonable cause determinations applying them, the EEOC effectively communicated and obtained a broad construction of discrimination without the use of language suggesting that Title VII would solve the problem of employment inequality.70 Instead, the EEOC, in the Guidelines, employed language limited to describing specific steps for employers to follow for testing or any other kind of process used to select or place employees.71 The message from the agency was merely that practices which were not overtly exclusionary might nevertheless unjustifiably obstruct employment for outgroup members. The agency’s language neither limited the law’s coverage to such practices, nor portrayed the law as a comprehensive provider of equal employment opportunity. Eventually, however, the agency became involved in more sweeping statements to the regulated community about the law and its aspiration.

The EEOC’s role in assisting employers with their efforts to comply with Title VII soon placed it at the forefront of the debate over affirmative action. In response to both agency activities and the initial interpretation of Title VII by the courts, public and private employers alike changed many of their employment practices.72 Some initiated

68 Griggs, 401 U.S. at 434 ("Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.").
69 See id. at 433 n.9 (quoting Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, 35 Fed. Reg. 12333 (1970)).
70 See id. The Court cited the EEOC’s application of the testing guidelines in CCH Empl. Prac. Guide ¶ 17,304.53 (EEOC Dec. 2, 1966). See id. at 430 n.6. This EEOC decision itself merely explains the application of the guidelines to the specific facts of the case. See BLUMROSEN, MODERN LAW, supra note 56, at 108.
71 See supra note 69.
72 By the mid-70s, employers in major industries like telecommunications and steel were "moving toward policies of inclusion of minorities and women, which [they] would not have considered a decade earlier." See BLUMROSEN, supra note 56, at 218. Moreover, statistics indicate that minorities were moving into more desirable positions from labor and service positions at a higher rate in 1970 than they had in 1960. Id. at 292.
voluntary affirmative action type programs which were subject to challenge as reverse discrimination. After the Supreme Court confirmed the possibility of reverse discrimination in affirmative action under Title VI,73 key employees at the EEOC realized the need to provide some kind of safe harbor as guidance for private employers attempting to fully comply with the spirit of Title VII through voluntary affirmative measures.74 Here, the agency’s task was particularly challenging because of the tension between the law’s prohibition of discrimination and the nature of affirmative action as decision-making based on protected class status.

After considerable deliberation and the receipt of public comments, the EEOC adopted Guidelines on Affirmative Action as a means of protecting voluntary affirmative efforts of employers.75 The EEOC built its support for voluntary affirmative action on an aggressive articulation of Title VII’s purpose: “Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place.”76 The agency employed the rhetoric of equating the aspiration and the law in order to facilitate a broad reading of the statute; and, if judged by the opinion of the Supreme Court in United Steelworkers of America v. Weber,77 the first Title VII reverse discrimination case, the approach succeeded.78

While the rhetoric may have accomplished its short term persuasive purpose, however, describing Title VII as “the provider” of equal employment opportunity may have been, in hindsight, a less than optimal use of language. By portraying equal opportunity as the product of Title VII, the EEOC appeared to send a message about equal opportunity quite different from the less arrogant depiction of a distant aspiration connected to a complicated legacy of inequality. The nature of

74 See BLUMROSEN, MODERN LAW, supra note 56, at 238.
75 Id. at 242.
76 Id. at 243 (quoting 29 C.F.R. § 1608.1(b) (emphasis added)). The Equal Employment Opportunity Coordinating Council, established by Congress in 1972 to facilitate coordination between all federal and state agencies in this arena, employed similar rhetoric in its policy statement on affirmative action, including the following: “Equal employment opportunity is the law of the land.” 29 C.F.R. § 1607.17(1) (1999).
78 In Weber, the Court upheld the employer’s plan to increase the percentage of African-Americans in its skilled workforce through the use of percentage-based hiring. Id. at 208-09. The Justice Department’s brief in the case quoted the EEOC’s guidelines in their entirety. See BLUMROSEN, MODERN LAW, supra note 56, at 246.
the affirmative action guidelines indicates that the limited segment of the workforce that is exposed to them is probably unaffected by the subtle distinction therein between equal employment opportunity (EEO) as aspiration and EEO as legal result, but the shift in language and message represents a troubling development.

Regardless of the impact of the EEOC's guidelines on affirmative action, virtually all employees have received the message: "EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW." These words are located in large bold type at the top of the poster which all employers engaged in interstate commerce must place in a prominent location. Thus, the rhetoric is likely to reach not only employees who actually read the poster but also those who merely pass it in the hallway. This simple phrase clearly conveys the message that the law is the solution to employment inequality. For those who choose to review the fine print in the poster, three columns of more specific information cover (from left to right) federal contractors, all private and public employers, and programs receiving federal financial assistance, respectively. The language under the heading for Executive Order 11,246 states that the order "requires affirmative action to ensure equality of opportunity in all aspects of employment." The message of both statements affirms arrogance because it suggests that compliance with the law takes care of employer responsibility for employment inequality.

\footnote{Even employees responsible for their employers' compliance with Title VII would not necessarily be familiar with the affirmative action guidelines. Moreover, the substantive "message" of the guidelines as a safe harbor for voluntary affirmative efforts is not affected by the distinction between EEO as aspiration and EEO as solution. As a result, it is questionable whether those who read the guidelines actually pick up this distinction.}


\footnote{Although Title VII only covers employers with fifteen or more workers, the Equal Pay Act, which has no numerical coverage restriction, also requires covered employers to put up the Consolidated EEO Poster. See \textit{id.} at 441:151; Equal Pay Act of 1963, 29 U.S.C. § 206(a), (d) (1994).}

\footnote{ Consolidated EEO Poster, supra note 80.}

\footnote{ 30 Fed. Reg. 12,319 (1965).}

\footnote{ Consolidated EEO poster, supra note 80. Apparently, according to the poster, equal employment opportunity (and therefore the law) requires affirmative measures by government contractors that are not required for other employers, who are merely subject to an obligation not to discriminate. \textit{Id.} This distinction between federal contractors and other employers is clearly contrary to the EEOC's stated policy that affirmative action is needed in both private and public employment to reach the goal of equal employment opportunity. \textit{See} Guidelines on Affirmative Action, 29 C.F.R. § 1608 (1999).}
The emergence of EEO as a common term in the workplace has further aided this portrayal of compliance as the producer of equal employment opportunity. After broadly defining what Title VII required in its formal guidance to employers, the EEOC pursued a strategy of using more specific guidelines and the conciliation process to induce employers to utilize their own internal mechanisms to improve the workplace opportunities of minorities and women. One result of these very positive measures was the development of corporate EEO programs with EEO officers responsible for disseminating EEO policies to employees. Kimberlé Williams Crenshaw has described how this development contributes to complacency about the problem of employment inequality:

Company X can be an equal opportunity employer even though Company X has no Blacks or any other minorities in its employ. Practically speaking, all companies can now be equal opportunity employers by proclamation alone. Society has embraced the rhetoric of equal opportunity without fulfilling its promise; creating a break with the past has formed the basis for the neoconservative claim that present inequities cannot be the result of discriminatory practices because this society no longer discriminates . . .

Thus, aided by the spread of EEO as familiar rhetoric in the American workplace, the message that EEO is the law has reached a broad spectrum of the American public. Meanwhile, the message that equal employment opportunity is actually a very distant aspiration toward which the law is directed, and the potential of that message to both educate and inspire action have been lost.

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85 See BLUMROSEN, supra note 56, at 90.
86 Increased employer focus on EEO clearly produced some positive changes in employer behavior. See id. at 89-92.
87 See id. at 91-92. Also contributing to the corporate EEO phenomenon was enforcement by the Office of Federal Contract Compliance Programs (“OFCCP”) of Executive Order 11,246, which required federal contractors to take affirmative action to “ensure” nondiscrimination in their respective workplaces. 3 C.F.R. § 340 (1965). For example, the OFCCP required government contractors to identify a particular manager responsible for organizing and running the contractor’s “equal employment program.” 41 C.F.R. § 60-2.22 (1965).
IV. TITLE VII DOCTRINE: THE LAW'S INCOMPLETE RESPONSE TO EMPLOYMENT INEQUALITY

Language that portrays the law as the solution to the complex problem of employment inequality plainly misrepresents what the law does under Supreme Court doctrine interpreting Title VII. Contrary to what the EEOC's poster says, the Title VII doctrine does not fully respond to employment inequality. Thus, "equal employment opportunity" or the ideal of the level workplace playing field is not the law,89 and the EEOC's message to the contrary appears both arrogant and plainly inaccurate today.

The inconsistency between the Title VII doctrine and the EEOC's message about the law is demonstrated in the Supreme Court's interpretation of discrimination the conduct prohibited by the statute. Although the concept of discrimination under Title VII remains somewhat murky,90 the courts clearly recognize two "types" or theories of discrimination: disparate treatment and adverse or disparate impact.91 Under the disparate treatment theory, an employer's conduct constitutes discrimination when it involves adverse treatment of an individual or group of individuals on the basis of their membership in a protected class.92 In other words, discriminatory intention renders the employer's

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89 Cf. MYRDAL, supra note 36, at 209 (discussing "equality of opportunity" as one aspect of the set of ideals comprising "the American Creed").

90 See George Rutherford, Discrimination and Its Discontents, 81 VA. L. REV. 117, 117-18 (1995) (arguing that the concept of discrimination is undefined or at least incompletely defined by the law).

91 See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971). See also Ronald Turner, Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities, 46 ALA. L. REV. 375 (1995) (tracing the history of Title VII analysis). The most comprehensive treatise on employment discrimination law divides employment discrimination into four categories: "(1) disparate treatment; (2) policies or practices that perpetuate in the present the effects of past discrimination; (3) policies or practices, not justified by business necessity, causing an adverse impact on a protected group; and (4) failure to make 'reasonable accommodation' . . . to the religious observations or practices of an employee or applicant." 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 4 (3d ed. 1996). The second of these categories specifically relates to whether a particular practice qualifies as a bona fide seniority system under Section 703(h) of Title VII. Id. at 51-77. Although this issue triggers a distinct analysis under the doctrine, it does not represent a theory on the wrong of discrimination truly distinct from adverse impact. Under Title VII, the fourth category applies only to religion, and although "reasonable accommodation" is an explicit theory under the Americans with Disabilities Act, 42 U.S.C. § 12113(a) (1994) (incorporating amendments of the Civil Rights Act of 1991, 42 U.S.C. § 1981).

92 See LINDEMANN & GROSSMAN, supra note 91, at 9.
conduct in violation of Title VII. Under the adverse impact theory, even if the employer's practice is not based on discriminatory intent, the practice is prohibited, if it has a disproportionate impact on a protected group, unless the employer can justify the practice as a business need. Thus, adverse impact focuses on the inequitable results flowing from ostensibly neutral or even well-intentioned practices.

Under this two theory structure, two aspects of the Title VII doctrine working together demonstrate the incompleteness of the doctrine as a description of and response to employment inequality. First, the language that describes the problem which adverse impact analysis addresses fails to connect adverse impact to disparate treatment as two different manifestations or ways of proving employment inequality. Instead, the language suggests that the two theories represent the two distinct "types" of conduct prohibited by the statute. By failing to describe in language how disparate treatment and adverse impact are merely different ways of determining the same thing—that employer decision making is contributing to inequality in the workplace—the doctrine fails to recognize the possibility that the two different analyses may not cover the full range of decision making behavior causing inequality in the workplace. As a result, aspects of employer decision making, which are part of employment inequality but are not covered by one of the two theories, can slip through the doctrine not only unaddressed by law but unrecognized as part of the problem.

The second aspect of the doctrine addressed herein follows the first as an example of how the incompleteness of the two theories can allow components of employment inequality to slip through the doctrine quietly. Specifically, disparate treatment analysis, which focuses on specific personnel decisions (rather than the general policies and procedures that adverse impact analysis targets), fails to account for the influence of unconscious bias in those types of decisions. As a result, the doctrine sends a message to the public about discrimination which is incomplete as a description of the larger and more complex problem of employment inequality. This incompleteness of the law's response to employment inequality demonstrates the inappropriateness of the EEOC's message about the law and contributes further to that message's

93 See infra notes 133-38 for discussion of whether motivation and intent are distinguishable concepts.
95 See infra notes 99-101 and accompanying text.
affirmance of a "complacency with compliance" attitude among the regulated public.

A. The Lack of an Articulated Link Between Theories of Discrimination

Although the Supreme Court's decision in Griggs v. Duke Power Co.96 was unanimous, not all of the legal community viewed the interpretation of Title VII to include as prohibited conduct "neutral" practices with discriminatory effects as a sound interpretation of Title VII.97 The decision was a major victory for civil rights advocates98 and the EEOC, whose employee selection guidelines were heavily relied on by the Court.99 The guidelines required that selection procedures for jobs be validly related to requirements for performing those jobs.100 The intuitive good sense of the guidelines combined in Griggs with a set of facts which indicated how an employer might establish "facially neutral" requirements and accomplish the kind of exclusionary results previously obtained through overt exclusion. Specifically, the employer's requirement of high school education and satisfactory performance on two aptitude tests had the same effect on the employment status of black employees as its previous overt selection process, pursuant to which the employer openly limited consideration of black applicants to the least skilled positions.101 Thus, "easy facts" helped to make "good law."102

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97 For analysis of the development of adverse impact analysis from Griggs to the Civil Rights Act of 1991, see Turner, supra note 91, at 444-56. As Turner points out in his analysis, the recognition of adverse impact analysis was controversial in part because it was so difficult to reconcile with the statutory language. Turner, supra note 91, at 449-51. See also Rabideau v. Osceola Ref. Co., 584 F. Supp. 419, 428 (E.D. Mich. 1984), aff'd, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) ("[D]isparate impact theory--[has] no real basis as far as statutory language goes."). The decision also did not appear to be supported by the legislative history of Title VII. See supra note 49-51; see also Hugh Steven Wilson, A Second Look at "Griggs v. Duke Power Company": Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts, 58 VA. L. REV. 844, 852-58 (1972) (asserting and supporting the proposition that the legislative history is inconsistent with the interpretation of a job relatedness requirement for employment tests).
98 The NAACP Legal Defense Fund, Inc. wrote the brief and argued the case for Griggs, advocating for an interpretation consistent with the Court's opinion. See BLUMROSEN, MODERN LAW, supra note 56, at 99 n.10.
99 See Griggs v. Duke Power Co., 401 U.S. 424 (1971). Notably absent from the decision was any citation either to the statute or its legislative history. See id.
100 Id. at 432.
101 See id. at 427-28, 430. The district court found that the employer in Griggs had overtly discriminated against blacks in hiring and job assignment before Title VII's effective date. See id. at 426-27.
While Griggs represented life for a broader interpretation of the concept of discrimination than might otherwise have survived, the decision became the foundation for a doctrinal dichotomy with some negative implications for the message of the law. Although the opinion did not explicitly discuss adverse impact as a type of discrimination to be distinguished from disparate treatment, the Court implied that it was recognizing a basis for liability under Title VII as an alternative to, rather than inclusive of discriminatory intent. The language in cases interpreting Griggs has tended to distinguish more explicitly the target of the Griggs analysis from disparate treatment analysis, rather than to describe it in relation to disparate treatment as part of an overall concept of discrimination. Because of this linguistic line drawing, a categorical

102 This is, of course, the flip side of the maxim, “hard facts make bad law,” which originated in Oliver Wendell Holmes’s dissenting opinion in Northern Securities Co. v. U.S., 193 U.S. 197 (1904). See Lawrence Ponoroff, Exception Limitations: A Tale of Two Solutions, 71 AM. BANKR. L.J. 221, 235 n.66 (1997). What Holmes actually wrote was that “[g]reat cases, like hard cases, make bad law.” Northern Securities, 193 U.S. at 364.

103 See BLUMROSEN, MODERN LAW, supra note 56, at 100, 122; see also Griggs, 401 U.S. at 424.

104 See Griggs, 401 U.S. at 424. Justice Burger’s opinion included no discussion of disparate treatment. The opinion merely recognized that “[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” See Id. at 432.

105 Id. (“Congress directed the thrust of the Act [Title VII] to the consequences of employment practices, not simply the motivation.”).

106 In International Bhd. of Teamsters v. United States, the Court set forth an explanation of the two theories which provided in pertinent part as follows:

“Disparate treatment” such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical . . . . Claims of disparate treatment may be distinguished from claims that stress “disparate impact.” The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

431 U.S. 324, 335 n.15 (1977) (citations omitted) (emphasis added). This explanation thereafter became and continues to be the definitive description cited for what constitutes discrimination under Title VII. See, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993); Goodman v. Lukens Steel Co., 482 U.S. 656, 665 n.10 (1987), Anderson v. Zubieta, 180 F.3d 329, 338 (D.C. Cir. 1999); Hayden v. County of Nassau, 180 F.3d 42, 52 (2d Cir. 1999). But see Watson v. Fort Worth Bank and Trust, in which the Court attempted to discuss the two theories as different manifestations of the single wrong of conduct which produces an adverse effect linked to a protected characteristic. 487 U.S. 977, 992 (1988).
division has emerged between “mutually exclusive” theories of discrimination under Title VII.107

The analyses that correspond to the two types of discrimination address a common wrong, but the doctrine never articulates that wrong as a unified concept and, therefore, misses the opportunity to promote a better understanding of the wrong. Under adverse impact analysis, once the plaintiff has identified a particular practice and demonstrated its discriminatory effect on individuals of a protected class, the employer must prove the “job relatedness” of the practice.108 Under disparate treatment analysis, once the plaintiff presents the prima facie case at least theoretically creating an inference of discriminatory intent,109 the employer must articulate a “legitimate, nondiscriminatory reason” for the challenged decision.110

Although the language and the evidentiary burdens differ,111 both analyses inquire into whether an employment decision unjustifiably contributes to inequality in the workplace. Yet the doctrine never really communicates this common problem or wrong as part of an overall description of discrimination. Instead, the doctrine communicates that one type of employment decision may be wrong because of its effects, while the other, as discussed in the next section, is wrong because of the

107 See BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 27 (3d ed. Supp. 1998) (“Although the plaintiff can, and frequently will, combine disparate treatment and adverse impact claims as alternative theories of liability, the two are mutually exclusive; the former theory applies to intentional discrimination, the latter to attacks on rules ‘fair in form, but discriminatory in operation.’”) (quoting Griggs, 401 U.S. at 431).


109 See Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 Mich. L. Rev. 2229, 2236-37 (1995) (“[T]he Supreme Court never succeeded in setting the prima facie case threshold high enough to permit the proven prima facie case to support a sufficiently strong inference of discrimination to mandate judgment for the plaintiff when combined only with disbelief of the employer's stated justification.”). The requirements for the plaintiff’s prima facie case are probably not sufficient to create an inference of discriminatory intent. Id; William R. Corbett, Of Babies, Bathwater, and Throwing Out Proof Structures: It is Not Time to Jettison McDonnell Douglas, 2 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 361, 370 (1998) (agreeing on this point).

110 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)

111 See LINDEMANN & GROSSMAN, supra note 91, at 17-22 (stating that the employer's disparate treatment burden is merely one of production). In contrast, the employer’s burden in adverse impact cases to show “business necessity” is a burden of proof in the nature of an affirmative defense. See id. at 106-10.
decision maker’s intent. Thus, although Griggs represented much needed recognition of some of the complexity of employment inequality as a matter of substance, its language started a doctrinal division which paradoxically prevents the doctrine from improving public understanding of employment inequality over time.

Given the division of discrimination into two types subject to different analyses, the doctrine necessarily will not address or recognize any aspects of the problem of employment inequality which the two analyses do not cover. To the extent any such aspects exist, Title VII is not the solution to the problem of employment inequality, and equal employment opportunity cannot be the law.

B. Disparate Treatment, Unconscious Bias and Doctrinal Incompleteness

Disparate treatment analysis uniquely applies to claims of discrimination aimed at specific personnel decisions that do not involve the use of any general policy or procedure with a disproportionate adverse impact on a protected group.112 For example, individual termination decisions, most of which focus on the conduct or performance of the discharged employee, are not usually subject to challenge under adverse impact theory.113 As discussed hereafter, the Supreme Court’s focus on intent in describing disparate treatment analysis fails to recognize the ways in which unconscious bias in specific personnel decisions, like individual terminations, contributes to employment inequality. The doctrine’s incompleteness in this area establishes the inappropriateness of the message that Title VII is the solution to employment inequality. Moreover, the doctrinal focus on intent and the courts’ use of other language vilifying the disparate treatment discriminator tend to affirm complacency in the regulated community by suggesting that only bad people engage in disparate treatment discrimination.

In McDonnell Douglas Corp. v. Green,114 the Supreme Court introduced the proof scheme for disparate treatment claims based on

112 See supra notes 90-94 and accompanying text.
113 See LINDEMANN & GROSSMAN, supra note 91, at 857-59. Terminations that involve the use of particular selection criteria (as in many layoffs) or the violation of a particular policy or rule of the employer could be subject to challenge under adverse impact theory, but these types of challenges are rare in the individual termination decision context. Id. at 858-59.
114 411 U.S. 792 (1973)
circumstantial evidence.\textsuperscript{115} In describing the plaintiff's ultimate burden of proof, the Court, although it did not actually use any form of the word "intent," implied that the wrong to be demonstrated was the employer's intent to discriminate.\textsuperscript{116} Since that seminal decision, the Court and lower courts interpreting McDonnell Douglas consistently have used "intentional"\textsuperscript{117} or "purposeful"\textsuperscript{118} to describe the wrong targeted by disparate treatment. Within the law, "intent" is a slippery concept which defies a single precise definition, but regardless of the legal context in which it is used, "intent" generally refers to a level of conscious desire or will.\textsuperscript{119} Similarly, "purposeful" carries the message that the discriminator must mean to discriminate.\textsuperscript{120} Thus, to the extent the decisions describe what the employment discrimination plaintiff must prove as "intentional" or "purposeful" discrimination, the decisions send the message that what decision makers must avoid is consciously

\textsuperscript{115} See id. at 802. Under the proof scheme, in the usual case where a plaintiff does not have available "direct evidence" (evidence which will prove the discriminatory intent behind a challenged employment decision without the need for inference, such as comments by the decision maker that a protected characteristic motivated the decision), a plaintiff must first set out a prima facie case. Id. Although the nature of the prima facie case varies somewhat depending on the nature of the decision challenged, it generally consists of presenting evidence that the plaintiff was qualified for the position in question, that an adverse action was taken against the plaintiff with respect to that position, and that the employer filled the position with someone else. Id. Once the plaintiff has crossed this minimal hurdle, the burden rests on the employer to articulate a legitimate nondiscriminatory reason for the decision. Id. at 802. The plaintiff then must carry the ultimate burden of proving that the protected characteristic motivated the decision. Id. at 804-05.

\textsuperscript{116} See id. at 802-05 (stating that the plaintiff's ultimate burden was to show that the employer's proffered legitimate reasons "were in fact a coverup for a racially discriminatory decision"). Clearly, proving a "coverup" for a discriminatory decision requires proof of intent to discriminate. Id.

\textsuperscript{117} See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515-17 (1993) (stating that the plaintiff's proof of pretext may or may not satisfy the ultimate burden of proving intentional discrimination).

\textsuperscript{118} See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) ("The Government's theory of discrimination was simply that the company, in violation of § 703(a) of Title VII, regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons.").

\textsuperscript{119} Black's Law Dictionary defines intent generally as "[t]he state of mind accompanying an act, esp. a forbidden act." BLACK'S LAW DICTIONARY 328 (pocket ed. 1996). Intention is similarly defined to refer to a conscious mental phenomenon: "The willingness to bring about something that one plans or foresees; the state of being set to do something." Id.

\textsuperscript{120} If anything, "purposeful" is even more clearly exclusive of unconscious motivation than intent. The use of both terms together conveys the message that the sense of intent intended is "specific intent," or "[t]he intent to accomplish the precise act with which one has been charged . . . ." Id.
basing adverse treatment of employees on one of the protected characteristics.\textsuperscript{121}

The focus of the disparate treatment doctrine on conscious bias in the context of specific personnel decisions (which are not covered under adverse impact doctrine) provides a very clear example of the doctrine's incompleteness as a response to the problem of employment inequality.\textsuperscript{122} Given that employment decision making involves the exercise of brain function, it is not surprising that studies in psychology have made an important contribution to the study of employment inequality in the law. Numerous law review articles discussing the role of prejudice in the law have cited Gordon Allport's now classic exhaustive study,\textsuperscript{123} which defines prejudice as the belief in the inferiority of those who belong to outgroups.\textsuperscript{124} Allport explains prejudice as having a variety of psychological antecedents including: personality,\textsuperscript{125} thinking aspects of brain function, commonly referred to as cognition,\textsuperscript{126} and emotional aspects of brain function, commonly referred to as affect.\textsuperscript{127} Since Allport, psychologists have continued to study discrimination extensively, and their work speaks volumes about

\textsuperscript{121} The view of discrimination as consciously biased decision making also may have been consistent with the most commonly understood meaning of discrimination at the time the statute was enacted. See generally GRAHAM, supra note 7.

\textsuperscript{122} Numerous scholars have criticized the intent-based paradigm for disparate treatment. See, e.g., Crenshaw, supra note 87; Alan Freeman, Antidiscrimination Law: The View from 1989, in THE POLITICS OF LAW, 121-50 (David Kairys ed., 1998); Patricia Williams, supra note 34, at 129; D. Marvin Jones, The Death of the Employer: Image, Text and Title VII, 45 VAND. L. REV. 349 (1992).


\textsuperscript{124} ALLPORT, supra note 123, at 6-9.

\textsuperscript{125} Id. at 395-441 (discussing the relationship between character structure and prejudice).

\textsuperscript{126} See id. at 165-218 (discussing the role of perception and thinking).

\textsuperscript{127} See id. at 343-92 (discussing the role of emotions). Prejudice is also described as an attitudinal link to the behavioral problem of discrimination, defined as the detrimental treatment of members of “outgroups.” Id. at 14-15.
the difficulty of getting to the roots of how characteristics like race influence decision making.128

Linda Hamilton Krieger provided an excellent, well-researched, and thorough discussion of what cognitive psychological studies of how human brains confront, interpret and remember information indicate about the nature of the type of decision making called discrimination.129 Krieger explains that at a very early age, human beings develop psychological categories which become filters through which all subsequent information is processed and remembered.130 Stereotypes under this theory are particular categories which give rise to expectancies affecting the perception of new information.131 These categories, which are developed and enhanced over time, operate largely at an unconscious level.132 Thus, to the extent categories operate to bias decision making, the employer may make a decision which unjustifiably results in adverse treatment of outgroup members without any awareness of the underlying bias which causes the adverse decision.133

130 Id. at 1190.
131 See id. at 1198. See also David L. Hamilton & Tina K. Trolier, Stereotypes and Stereotyping: An Overview of the Cognitive Approach, in PREJUDICE, DISCRIMINATION AND RACISM 127, 127-58 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (asserting that the categorization of information causes stereotypes or expectancies that influence how we interpret, process, and remember information and that, without such categorization, our cognitive processes would be overloaded by the overwhelming amount of information about each individual we see).
133 The body of research supporting the impact of cognitive categorization on intergroup perception and judgment is substantial and has grown since the publication of Krieger's article. For a comprehensive summary of this body of research, see Susan T. Fiske, Stereotyping, Prejudice and Discrimination, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357-411 (Daniel T. Gilbert et al. eds., 4th ed. 1998). According to Fiske, studies have consistently supported the theory that the unconscious development of categories of people, which is part of normal cognitive functioning, alters the way people process information about others, impacting how new events are interpreted and how causation of those events is understood. Id. at 364-71. Moreover, people tend to remember information which is consistent with categorical expectancies more than information which tends to conflict with those expectancies; thus, categories once formed are somewhat resistant to change over time. Id. at 371-72.
As Krieger concludes, the doctrinal focus on intent fails to account for the impact these unconscious processes have on inequality in the workplace.\textsuperscript{134}

While principally articulating the target of disparate treatment discrimination through the concept of "intent," the Supreme Court has also used "motive" or "motivation" concurrently with "intent."\textsuperscript{135} Unlike "intent," which is generally defined to include a conscious component, motivation may be descriptive of any cause of a particular behavior.\textsuperscript{136} Although requiring discriminatory motivation and distinguishing it from discriminatory intent might have sent the message that the role of a protected characteristic as even an unconscious factor in an employment decision would be prohibited, the Court's use of both terms interchangeably seemed to erase any meaningful distinction between them.\textsuperscript{137} Title VII, as amended now incorporates a "motivating factor" test for liability in "mixed motive" cases,\textsuperscript{138} but intent and its

\textsuperscript{134} Krieger, supra note 129, at 1247-48.

\textsuperscript{135} See, e.g., Kolstad v. American Dental Ass'n, 527 U.S. 526, 538 (1999) ("Most often... eligibility for punitive awards is characterized in terms of a defendant's motive or intent."); see also Watson, 487 U.S. at 986 (stating that what the plaintiff must prove in a disparate treatment case is "discriminatory intent or motive").

\textsuperscript{136} Motive is "[s]omething, esp. willful desire, that leads one to act... Cf. 'INTENT.'" BLACK'S LAW DICTIONARY 1034 (7th ed. 1999). In other words, motive includes, but is not limited to, the willful desire concept associated with intent. See D. Don Welch, Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent, 60 S. CAL. L. REV. 734, 736-39 (1987) (distinguishing motive as a causal concept not necessarily including the consciousness which accompanies intent).

\textsuperscript{137} But cf. EEOC v. Wyoming, 460 U.S. 226 (1983), in which the Court clearly recognized the role of subconscious processes of stereotyping in the context of interpreting disparate treatment under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1) (1994): "Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact..." 460 U.S. at 231.

\textsuperscript{138} 42 U.S.C. § 2000e-2(m) (1994) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). The Court initially recognized a category of cases which came to be known as "mixed motive" cases in Price Waterhouse v. Hopkins, 490 U.S. 228, 246-47 (1989). Although the division between "mixed motive" cases and other kinds of disparate treatment cases was and remains far from clear, whether a particular case qualified for treatment as a mixed motive case depended on the presentation of evidence indicating that the protected characteristic was at least a factor in the challenged employment decision. See id. at 246-47 & n.12. Once it is determined that the plaintiff can satisfy this burden, the burden of persuasion shifts to the defendant to establish an affirmative defense that the same decision would have been made even absent the protected characteristic. See id. at 246. In Price Waterhouse itself, the Court determined that the plaintiff had successfully demonstrated, through evidence indicating an employer's stereotypical attitude towards

https://scholar.valpo.edu/vulr/vol34/iss3/1
association with conscious motivation have continued to dominate the courts’ articulations of the wrong in disparate treatment cases. Indeed, intent may be so ingrained in the public understanding of disparate treatment discrimination that even exclusive use of motivation would not change the message communicated.

The doctrinal focus on intent, in addition to demonstrating the law’s incompleteness as a response to employment inequality, tends to create the impression that the disparate treatment discriminator is a bad person. The courts have strengthened this impression by employing other language vilifying the disparate treatment discriminator. After asserting discriminatory intent as the wrong of discrimination under disparate treatment theory, the Supreme Court, in International Brotherhood of Teamsters v. United States, stated that “[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII...”. By describing disparate treatment discrimination as an “obvious evil,” the Court not only depicted the wrong as conscious but also conjured up images of the kind of blatant bigotry practiced by “those other people” in the South, images widely publicized during the year before the statute was enacted. Consistent later use of terms like “invidious” as a quality of disparate treatment discrimination and “animus” as a motivation of the discriminator

women, that gender had influenced the decision and that the employer had failed to prove that the woman in question would have been denied the promotion regardless of her gender. See id. at 258.  

139 See, e.g., EEOC v. Yenkin-Majestic Paint Corp., 112 F.3d 831, 835 (6th Cir. 1997); Kolstad v. American Dental Ass’n, 108 F.3d 1431, 1436-37 (D.C. Cir. 1997); Krenik v. County of Le Sueur, 47 F.3d 953, 958 (8th Cir. 1995).  

140 Moreover, as a matter of common understanding, there probably is no meaningful distinction between the terms. Thus, the mere difference in language would have to be accompanied by an explanation of difference in meaning in order to change the message of the doctrine. But cf. Welch, supra note 136, at 778-82 (proposing the possible effective use of a discriminatory motive test for what constitutes discrimination under Title VII).  


142 Id. at 335 n.15.  

143 See BURSTEIN, supra note 42, at 72, 80-82.  

144 In conjunction with discrimination, “invidious” means “offensive or objectionable, esp. because it involves prejudice or stereotyping.” BLACK’S LAW DICTIONARY, supra note 136, at 195.  


146 Although “animus” may be used as a synonym for “intention,” it is most commonly used to mean “ill will” or “animosity.” BLACK’S LAW DICTIONARY 86 (7th ed. 1999).  

have helped affirm an attitude of complacency by painting a picture of the discriminator inconsistent with what employment decision makers see in the mirror each day.\textsuperscript{148}

V. Hindsight Lessons and the Prospects for Doctrinal Reform

The development of adverse impact doctrine in the initial interpretation of Title VII represented official recognition of an aspect of employment inequality which neither the legislators as a group nor the voting public apparently contemplated when the legislation was enacted.\textsuperscript{149} Thus, by successfully advocating for a broad interpretation of the statute, the EEOC may have helped to increase public awareness of at least some of the complexity of employment inequality.\textsuperscript{150} For purposes of analyzing language and message, a more important lesson is to be found in how the EEOC succeeded than in the success itself. The EEOC helped to produce a positive educational message in the doctrine by setting forth specific guidelines to be applied in particular factual circumstances.\textsuperscript{151} Although a broad interpretation of the concept of "discrimination" was implicit in the guidelines, they contained no general language, arrogant in tone, about what the law accomplished.\textsuperscript{152} Accordingly, the public language of the EEOC in this early phase avoided sending an ambiguous message which could close minds at the same time as it was trying, with some success, to open them.

In contrast to the guidelines and reasonable cause determinations cited in Griggs, the EEOC's rhetoric of "equal employment opportunity," although similarly aimed at fostering a broad understanding of discrimination, has communicated the arrogance affirming message that

\textsuperscript{148} Cf. Krieger, supra note 129, at 1247 (concluding that the disparate treatment doctrine "holds the problem of intergroup bias at a safe distance, something those 'other people,' those 'bad people' do").

\textsuperscript{149} See BLUMROSEN, MODERN LAW, supra note 56, at 50-51, 73, 101-02.

\textsuperscript{150} Although the Supreme Court modified the content of the analysis of adverse impact discrimination from its initial formulation in Griggs in a series of controversial decisions, see generally Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), and Wards Cove Packing Co. Inc. v. Antonio, 490 U.S. 642 (1989), the modifications were, for the most part, legislatively overruled in the Civil Rights Act of 1991, pursuant to which the original formulation of the analysis has been restored. 42 U.S.C. § 1981 (1994). Regardless of the doctrinal modification, the consistent presence of adverse impact, as a part of employment inequality addressed by Title VII since 1972, indicates at a minimum public acceptance of if not support for the concept that some policies with discriminatory effects on protected groups, even if well-intentioned, should be prohibited.

\textsuperscript{151} See supra note 93-94 and accompanying text.

\textsuperscript{152} See supra notes 55-87 and accompanying text.
compliance with the law fulfills the employer's responsibility to the goal of equal employment opportunity. In particular, the agency's extensive publication through mandatory posting of the statement that "equal employment opportunity is the law" has portrayed compliance with Title VII as the solution to employment inequality, rather than as a mere step toward addressing that very complex problem. The difference between these two portrayals of the law's relationship to employment inequality, although subtle in language, is significant in message. The message of "law as solution" focuses the employer and citizens at large on compliance, while the message of "law as step towards aspiration" reminds them that, while compliance is important, much more work has to be done.

The inconsistency between the message of "law as solution" and the complexity of employment inequality, which was present from the outset, is even more clear following the development of doctrine interpreting discrimination. Because of the absence of definitive language in the doctrine linking the two "types" of discrimination, the doctrine portrays discrimination as two separate problems, rather than as one enormous and complex problem with multiple layers. Moreover, the description of disparate treatment discrimination as a consciously biased act has confined public understanding of the connection between specific personnel decisions and discrimination to the realm of conscious bias.¹⁵³ The result of the combined message of "equal employment opportunity" rhetoric and Title VII doctrine is the affirmation of an attitude that employment inequality is someone else's problem.

Despite the myriad scholarly lamentations of the doctrinal focus on "intent," many of which offer suggestions for doctrinal reform,¹⁵⁴ any

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¹⁵³ See supra note 119.
¹⁵⁴ See, e.g., Krieger, supra note 129, at 1242 (suggesting that the requirement of intent be replaced by requirement to show that group status "played a role" in the challenged decision); Malamud, supra note 108, at 2232-38 (proposing that the McDonnell Douglass proof structure be abandoned); Williams, supra note 27, at 146 (suggesting that law could make unconscious racism conscious by criminalizing racism); Judith Olans Brown et al., Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue, 46 Emory L.J. 1487, 1531 (1997) (proposing that the courts educate jurors about unconscious bias through jury instructions in Title VII cases); Jessie Allen, Note, A Possible Remedy for Unthinking Discrimination, 61 Brook. L. Rev. 1299, 1342-43 (1995) (proposing that the courts specifically interpret the intent requirement to include "inferred intent" and thus recognize the role of unconscious prejudice in discrimination). But cf. Justin D. Cummins, Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice, 41 How. L.J. 455, 468 (1998) (suggesting that problem is
significant change in the interpretation of discrimination appears unlikely. The message of the doctrine is now well-established in over twenty-five years of precedent, and the public shows no sign of supporting legislation expanding the definition of prohibited discrimination to include all of the ways in which employment decisions unjustifiably contribute to workplace inequality. Moreover, doctrinal reform targeted at conduct about which the perpetrator is unaware is unlikely to positively impact employer behavior in a way which would promote employment equality. If, as I suggest, the interpretation of discrimination under Title VII is practically set, then the message that Title VII is the solution to employment inequality is a particularly harmful one, because it affirms complacency rather than the kind of self-examination necessary for more widespread awareness of the more subtle causes of employment inequality. This message may be the most immediate obstacle to moving further on the path to "equal employment opportunity." Perhaps, then, it is time to remove the obstacle and to humbly restore "equal employment opportunity" to its rightful status as an aspiration.

VI. THE REST OF THE DREAM

Hopeful that I will be able to rejoin the dream which my alarm interrupted before, I manage to go back to sleep. I'm back on my porch, my daughter and grandson are gone, it's raining and my wife and I are watching the local news. There's some story about an employment discrimination claim against a local employer, but I cannot make out the details. Somewhat frustrated by the cloudiness of the television, I reach

not the requirement of intent but how discriminatory intent is defined and proposing that a more comprehensive intent standard, which includes unconscious bias, be adopted).

155 Cf. William H. Chafe, The End of One Struggle, The Beginning of Another, in THE CIVIL RIGHTS MOVEMENT IN AMERICA, supra note 20, at 147 ("If the history of the civil rights movement teaches anything, it is the importance of linking programs for change to values that are widely shared in the dominant culture."). Public opinion regarding the importance of the civil rights issue relative to other issues increased dramatically in the year before the legislation's passage. See BURSTEIN, supra note 42, at 42-68.

for one of the news magazines on the coffee table. Unfortunately, I cannot even see who's on the cover, much less what the articles are discussing. There are two books on our bookshelves discussing the history of affirmative action and developments in residential housing patterns in the 21st century, but when I open them, I cannot tell what has happened in either area since the year 2000. Although there are copies of articles written by colleagues about Title VII doctrine, I cannot glean from them either the current doctrine interpreting it or the existence or status of any legislative reform efforts directed to employment discrimination more generally. It's as if they are written in an unfamiliar foreign language. What started out as such a clear picture of my daughter and grandson has become a cloudy haze, and I begin to muse in the dream about why.

Given the extent to which the general absence of bias awareness and the arrogance of confidence in fairness permeate decision making at so many different levels today, perhaps it is difficult even to dream of what things might look like if some critical mass of citizens was more aware of how individual and institutional biases lead to employment inequality between groups. Perhaps without knowing what changes in behavior would result from such a transformative shift in consciousness, I cannot predict (or dream) what changes, if any, in law will be needed to create a more just workplace.\(^{157}\) Perhaps I am just a fool for thinking about these things. Anxious for something tangible which I might be able to use when I awaken, I look about the room one more time. In the corner of my old desk, I spot what appears to be a draft of a letter, and I advance quickly towards it. I am pleased to see that the letter, unlike so many of the other writings in the room, is clear and legible. This is what I read:

January 1, 2000

Office of the Chair
Equal Employment Opportunity Commission\(^{158}\)

\(^{157}\) For example, current understandings of the pros and cons of affirmative action, including its psychological impact, may have little application in a world in which the whole notion of affirmative action is perceived differently.

\(^{158}\) 1801 L Street, N.W., Washington, D.C. 20507
Dear Chair:

I write to you today as a fellow educator concerned with the education of our citizens regarding the manner in which race and other characteristics like gender and national origin continue to operate as obstacles to opportunities in employment and elsewhere, despite formal protection of citizens within certain categories under the statute which it is your mandate to enforce. The purpose of my letter is to offer some thoughts on the Commission’s role, not as enforcer or advocate, but as public educator on the nature of “equal employment opportunity,” with the hope of stimulating further discussion aimed at increasing public awareness of individual and institutional barriers to achievement of that lofty goal.¹⁵⁹

The role the EEOC plays in creating public understanding of “equal employment opportunity” is already significant. Through various kinds of communications from the EEOC to employers (posters, publications, training, etc.), the nation’s citizens obtain much of their knowledge about Title VII and “equal employment opportunity.” The most prominent communication to employees about “EEO” is the bold statement at the top of the poster the agency requires in every covered workplace that “equal employment opportunity is the law.” This phrase suggests that an employer’s compliance with Title VII and the other laws mentioned in the poster ensures equality of employment opportunity in that employer’s workplace.¹⁶⁰ The widespread use of the acronym “EEO” to describe everything from forms issued by the Commission¹⁶¹ to employers, their policies and officers reinforces the message equating legal compliance with equal employment opportunity.

My concern is that the message that “equal employment opportunity is the law” has been and continues to be an impediment to improved public understanding of the complexity of continuing workplace inequality. To the extent citizens perceive that the law has created or will create a true level playing field in the workplace, they are less likely to learn about how they may contribute to employment inequality in ways which legal doctrine does not address. Stated more simply, the

¹⁶⁰ Clearly, this represents a literal interpretation of the language, but the vast majority of citizens who read the language lack sufficient familiarity with legal rhetoric to read the language any differently.
danger of articulating current law as the solution to inequality of workplace opportunity is that it seems to promote complacency, rather than to encourage the kind of self-examination and awareness which are needed for the nation's workplaces to move closer to the aspiration of equal employment opportunity. That aspiration, in a sense, is being erased by its synonymousness with what the law does.

Given the absence of a consensus awareness of the degree to which characteristics like race, gender and national origin continue to impact employment opportunity, immediate attention to doctrinal reform of Title VII appears futile and in any event an ineffective means of increasing that awareness. The immediate danger is that continued affirmation of the arrogant belief that workplace inequality will be eliminated by a statute enacted in 1964 will only further widen the divide between ethnic groups and reduce the possibility of working together toward real equality of opportunity in the workplace. The immediate challenge, then, for the Commission is to determine how it can continue advocating for the broadest coverage of Title VII possible while avoiding the transmission of a message which affirms complacency within the regulated community about equality. A couple of brief avenues are suggested for further discussion and development.

First, the Commission should try to reassert "equal employment opportunity" as a distant aspiration and goal towards which Title VII is directed. An important initial step would be changing the EEO Consolidated Poster's heading from "equal employment opportunity is the law" to "discrimination is against the law." The new phrase would use the law's language and more accurately depict what the law actually does—prohibit discrimination, not create equal employment opportunity. At the bottom of the poster could be added in the same sized print as the heading: "Aspire to work for equal employment opportunity in your workplace." This addition at the end of the poster would send the message that equal employment opportunity is a long term aspiration to which employers and employees alike should be dedicated. A policy statement explaining the reasons for the change should accompany the announcement of the change and the delivery of the new language.162

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162 The policy statement could perhaps include some brief perspective on the legacy of the civil rights movement and the pervasiveness of unequal treatment in American society. Some enduring quotations from civil rights speeches or writings might be appropriate to communicate "the dream" of equal employment opportunity in the real life context from which it was born. See D. Marvin Jones, No Time for Trumpets: Title VII, Equality, and the Fin
Second, the agency could become even more involved in encouraging institutions to invest in training designed to increase their employees' awareness of different cultural perspectives and their own culturally transmitted biases. Several government publications listing the numerous private organizations engaged in this work and describing their services are available\(^5\), and the agency could start by simply making employers aware of the availability and importance of this type of training. The agency has an opportunity here both to enhance its educative function regarding discrimination and to encourage the regulated community to engage in the kind of self-analysis which is necessary to further the aspiration of equal opportunity in employment. As an important outgrowth of these kinds of measures, greater consensus support may be built for the position the agency has already taken on affirmative action. These measures will not end discrimination or level the playing field, but, in helping to build greater awareness of how far away these goals are, they might just restore some hope that the goals are worth working for.

Best of luck to you in your continuing important work.

Very truly yours,

Barclay D. Beery\(^6\)
5342 Coliseum St.
New Orleans, LA 70115

\( ^5 \) De Siele, 92 MICH. L. REV. 2311, 2368 (1994) (suggesting that we need to adjust the language of the discourse of equality, developing "perhaps a new canon in which Ellison and Delany, Du Bois and Malcolm, Douglass and Franklin take center stage").

\( ^6 \) The President’s Initiative on Race has identified numerous organizations across the country which are engaged in facilitating greater consciousness of self through the perspectives of others. See ADVISORY BOARD’S REPORT TO THE PRESIDENT, supra note 32, at app. H1-1 to H1-45.

\( ^6 \) The dream continues . . . . Long live the dream.