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SYSTEMIC EMPATHY

by Michael J. Zimmer*

*Empathy, n. the ability to understand and share the feelings of another.*¹

In Professor Terry Smith's article, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, he calls for the development, within the structure of Title VII retaliation law, of greater tolerance toward and understanding of the stresses endured by people of color.² Smith's claim is that those who suffer retaliation for opposing employment discrimination may act out their stress in ways that some may consider unconventional.³ I agree with Smith that the system of antidiscrimination law lacks sufficient tolerance, not only for victims of retaliation, but for victims of discrimination more generally. More precisely, the system lacks *empathy* for victims of discrimination. Part I of this response explores why the law currently lacks empathy. Part II then considers why sympathy for African Americans and other traditional victims of discrimination has declined. Part III sets the stage for my proposal that judges ought to adopt an approach to victims of discrimination rooted in what I call "systemic empathy." Finally, Part IV explores how the existence of discrimination can be used to educate judges in the hopes that they will develop this sort of empathy.

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1. The New Oxford American Dictionary 557 (2001).
2. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 Colum. Hum. Rts. L. Rev. 529 (2003).
3. *Id.* at 534. Other recent works looking at subtle employment discrimination from different aspects includes Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. C.R.-C.L. L. Rev. 91 (2003), and Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001).

I. WHY ANTIDISCRIMINATION LAW LACKS SUFFICIENT EMPATHY

Before discussing the legal system's treatment of discrimination and the operation of the antidiscrimination laws, it might be helpful to outline the history of how the American legal system has treated workers generally. Simply put, it has treated workers poorly. Without explicitly saying so, the original Constitution countenanced race-based slavery and did not allow women to be full participants in society.⁴ Much of the labor force was not free, and the law played an important part in maintaining that oppressive system.⁵ In addition, many workers who were not slaves were nonetheless indentured servants.⁶

In the nineteenth century, the conspiracy doctrine, a doctrine deeply suspicious of all forms of collective action, governed labor relations.⁷ Essentially, the system did not even allow workers to try to alter the conditions under which they worked. For example, in 1805, the journeymen shoemakers of Philadelphia went on strike for higher wages, leading to the arrest, prosecution, and conviction of the strike leaders for the common law crime of conspiracy.⁸

In *Commonwealth v. Hunt*,⁹ the Massachusetts Supreme Judicial Court, in an opinion by Justice Lemuel Shaw, took a step toward legitimizing collective action by refusing to find the formation of worker associations criminal conspiracies per se. However, that decision did not set workers free to organize. In place of threats of criminal prosecution came the labor injunction,

4. Laurence H. Tribe, *American Constitutional Law* 4–5 (3d ed. 2000).

5. See Eugene D. Genovese, Roll, Jordan, Roll: The World the Slaves Made (1974). Eugene Genovese argues that: "In southern slave society, as in other societies, the law, even narrowly defined as a system of institutionalized jurisprudence, constituted a principle vehicle for the hegemony of the ruling class The slave-holders as a socio-economic class shaped the legal system to their interests." *Id.* at 26–27.

6. See generally, Bruce Laurie, *Artisans into Workers: Labor in Nineteenth-Century America* (1997) (suggesting that the American working-class developed differently from their European counterparts because the ideology of radicalism lasted much longer in the United States, and industrialists antipathetic to unions were supported by state and local governments that were also hostile to organized labor).

7. See Victoria C. Hattam, *Courts and the Question of Class: Judicial Regulation of Labor Under the Common Law Doctrine of Criminal Conspiracy*, in *Labor Law in America: Historical and Critical Essays* 44 (Christopher L. Tomlins & Andrew J. King eds., 1992) (discussing the development of labor law from its origins in the common law doctrine of conspiracy).

8. *Id.* Hattam notes that, "[i]n convicting the journeymen of conspiracy, the judge followed English common law precedent. However, the judge was unable to provide a way to distinguish lawful combinations from unlawful combinations, leaving future courts vulnerable to charges of judicial arbitrariness." *Id.* at 52.

9. 45 Mass. (4 Met.) 111, 134 (1842).

used to restrain workers' collective action for their own benefit. In Massachusetts, picketing by workers was held to be intimidating and coercive and, therefore, subject to injunction.¹⁰ The Sherman Antitrust Act,¹¹ supposedly aimed at busting business monopolies, came to be a source of federal law for enjoining workers' collective acts, as courts viewed collective activity as a "combination . . . or conspiracy in restraint of trade."¹² In *Loewe v. Lawlor*, the Supreme Court approved an application of the Sherman Act that enjoined secondary collective action by workers.¹³ With the Clayton Act of 1914, Congress amended the Sherman Act to instruct the federal courts that labor was not a commodity and that labor unions, therefore, were no longer to be subject to the antitrust laws.¹⁴ Nevertheless, the Supreme Court gave the Clayton Act a narrow reading and legitimated the continued application of the antitrust laws—and therefore injunctions—in labor cases.¹⁵ In 1932, Congress took another stab at the application of antitrust laws on unions with the Norris-LaGuardia Act.¹⁶ This law attempted to remove from the jurisdiction of federal courts the power to issue injunctions in labor disputes.¹⁷

By 1935, with the passage of the Wagner Act,¹⁸ the focus of federal labor policy shifted sharply. It shifted from the goal expressed in Norris-LaGuardia—of protecting workers from untoward regulation by hostile federal judges—to a starkly different goal, that of using federal law as a vehicle for bringing about protective collective bargaining.¹⁹ In addition, labor policy adopted the new goal of protecting workers generally in the exercise of their collective rights. Section 13 of the Wagner Act, as originally enacted, protects the right to strike as follows: "Nothing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to

10. *Vegelahn v. Guntner*, 44 N.E. 1077 (Mass. 1896).

11. 15 U.S.C. §§ 1–7 (2000).

12. 15 U.S.C. § 1 (2000).

13. 208 U.S. 274, 301 (1908).

14. 15 U.S.C. § 17 (2000).

15. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

16. 29 U.S.C. §§ 101–15 (2000).

17. Even after that, the Supreme Court interpreted the Norris-LaGuardia Act narrowly to allow federal courts to issue labor injunctions where a collective bargaining agreement with an arbitration clause has been breached by a strike. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

18. National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2000)).

19. As evidence of this shift, compare the statement of policy in the Norris-LaGuardia Act, 29 U.S.C. § 101 (2000), with the statement of policy in the Wagner Act, 29 U.S.C. § 151 (2000).

strike”²⁰ Section 7 of the Wagner Act affirmatively protects employees who strike (i.e., “who engage in other concerted activities for the purpose of collective bargaining”), as a means of pressuring their employers to agree to collective bargaining agreements.²¹ It is clear that discharging an employee for going out on an economic strike violates the Wagner Act.²²

Early on, however, workers were again constrained in their exercise of their collective rights by narrow interpretations of the Wagner Act. For example, in the 1938 case of *NLRB v. Mackay Radio & Telegraph Co.*, the Supreme Court stated summarily that employees who went out on economic strike—quitting work collectively in order to pressure the employer to agree to a collective bargaining agreement—faced the risk of permanent replacement by their employers.²³ Permanent replacement operates in nearly the same manner as discharge. The only difference between them is that permanently replaced workers remain employees under Section 2(3) of the Wagner Act and stay on a preferential recall list.²⁴ Once a striker unconditionally applies for reinstatement, she should be reinstated once a vacancy opens for which she is qualified.²⁵ If, however, the economic striker finds substantially equivalent employment elsewhere in the meantime, the employer no longer has a duty to recall the striker.²⁶ Because few workers have the means to remain unemployed for long in hopes that vacancies will occur at their prior place of employment, it must be assumed that most economic strikers who are permanently replaced will eventually lose their jobs.²⁷ Because permanently replaced employees are in the same position as discharged employees, permanent replacement, like discharge, should violate the Wagner Act.

20. 29 U.S.C. § 163.

21. 29 U.S.C. § 157. As originally enacted it provided that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Id.*

22. See, e.g., *NLRB v. Kaiser Steel Corp.*, 700 F.2d 575, 576–77 (9th Cir. 1983) (noting that Section 8(a)(3) of the Wagner Act prohibits an employer from discouraging union employment in its hiring, firing, or tenure practices).

23. 304 U.S. 333, 345–46 (1938).

24. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967).

25. *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 103 (7th Cir. 1969).

26. *Fleetwood Trailer Co.*, 389 U.S. at 381.

27. *Mackay Radio & Telegraph Co.*, 304 U.S. at 345–46 (“[An employer] is not bound to discharge those hired to fill the places of strikers, upon the election of [strikers] to resume their employment, in order to create places for them.”); see also *Fleetwood Trailer Co.*, 389 U.S. at 381 (stating that reinstatement may be delayed due to the fact that the strike may have had a negative impact on both overall production levels and the number of total jobs).

In 1939, in *NLRB v. Fansteel Metallurgical Corp.*, the Court further diminished workers' rights by holding that the rights of strikers under the Wagner Act were outweighed by the property interests of the employer in possession of its factory.²⁸ Thus, the Court found that sit-down strikers were not protected from discharge. Other potentially effective tactics, such as work slowdowns²⁹ and "quickie" or partial strikes,³⁰ have also been declared unprotected against employer retaliation. Even anti-employer propaganda—in the form of handbills distributed to enlist community support for collective bargaining agreements—have been held unprotected where the handbills did not disclose that labor disputes were ongoing.³¹

As for the plight of African-American and other minority group workers, the Wagner Act said nothing.³² Although Congress failed to address race discrimination in employment, the Supreme Court did impose a duty of fair representation on unions if federal labor legislation protected the unions' status as the workers' representatives. In *Steele v. Louisville & Nashville Railroad Co.*, the Court held that a union could not use its position as an exclusive bargaining representative under the Railway Labor Act to force the discharge of black firemen, who were employees in the unit represented by the union, but who were not allowed to become union members due to their race.³³ However, in *Emporium Capwell v. Addition Community Organization*, the Court held that black workers could be discharged for allegedly trying to "end run" their union when they sought to negotiate with their employer over the discriminatory working conditions they faced.³⁴

28. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

29. *Elk Lumber Co.*, 91 N.L.R.B. 333, 336–39 (1950).

30. *Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, Lodge 76, 427 U.S. 132 (1976).

31. *NLRB v. Local 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464 (1953).

32. David E. Bernstein, *Only One Place of Redress: African-Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (2001) (making the surprising claim that African-American workers were better off without New Deal social legislation). For a critical review of David Bernstein's thesis, see Davison M. Douglas, *Contract Rights and Civil Rights*, 100 Mich. L. Rev. 1541 (2002), which argues that Bernstein overstates certain effects of labor market regulation on economic opportunity for African Americans, while understating the significance of other, highly influential factors, like unequal education, pervasive racism, and the poverty that followed centuries of enslavement.

33. 323 U.S. 192, 199 (1944); see also *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (holding that the duty of fair representation applied to unions covered by the Wagner Act).

34. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

If history shows inadequate judicial protection of workers' collective rights, the treatment of individual workers' claims can be seen as equally dismal. Though modified in many ways, the prevailing rule of individual employment remains the at-will rule.³⁵ A clear articulation of the at-will employment rule comes from the 1967 decision of the Wisconsin Supreme Court in *Forrer v. Sears, Roebuck & Co.*³⁶ In *Forrer*, the plaintiff had been promised a permanent job if he returned to work full-time as the manager of the hardware department of a Sears store. Relying on this assurance, the plaintiff sold his stock of hogs and cattle, rented his barn to a neighbor—all at a loss—and placed his farmland in the U.S. Department of Agriculture's feed-grain program.³⁷ After four months of working at Sears, Sears discharged him without cause.³⁸ The Wisconsin Supreme Court described the at-will rule as follows: "Generally speaking, a contract for permanent employment . . . amounts to an indefinite general hiring terminable at the will of either party, and a discharge without cause does not constitute a breach of such contract justifying recovery of damages."³⁹ Although the dictionary defines "permanent" as "lasting or intended to last or remain unchanged indefinitely,"⁴⁰ the court instead defined "permanent" in such a way as to mean "impermanent."⁴¹ Obviously, "impermanent" means the exact opposite of "permanent," or more specifically, "not permanent." This is an absolute contradiction that, by comparison, makes the distinction in *Mackay Radio* between being discharged and being permanently replaced seem almost robust. It is not as if the courts define all contracts—even those of indefinite duration—to be terminable at-will. For

35. The "American Rule" of at-will employment is usually traced to Horace G. Wood, A Treatise on the Law of Master and Servant § 134 (1877), which discusses the American "inflexible" rule that a general or indefinite hiring is prima facie a hiring at will). But see Jay M. Feinman, *The Development of the Employment-At-Will Rule*, 20 Am. J. Legal Hist. 118 (1976) (describing the development of American conceptions of the master-servant relationship); Jay M. Feinman, *The Development of the Employment-At-Will Rule Revisited*, 23 Ariz. St. L.J. 733 (1991) (responding to Freed and Polsby by arguing that debates over employment at-will must be argued within the context of the modern world); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 Ariz. St. L.J. 551, 558 (1990) (claiming that the "employment-at-will rule was the natural offspring of a capitalist economic order reflecting the value of individualism, the growth of competition, and the mobility of labor").

36. 153 N.W.2d 587 (Wis. 1967).

37. *Id.* at 588.

38. *Id.*

39. *Id.* at 589. The actual holding of the case is that the promise of permanent employment was not breached by the employer so there was no claim, based on the promise, for recovery by promissory estoppel.

40. The New Oxford American Dictionary 1273 (2001).

41. 153 N.W.2d at 590.

example, in *Des Moines Blue Ribbon Distributors v. Drewrys Ltd., U.S.A.*, the court held that a beer distributorship contract with no definite term could be canceled only upon reasonable notice.⁴² The claim of an employee that he was promised “permanent” employment would seem to justify more protection than the beer distributorship contract which stated no term and seemed to operate indefinitely. Oddly, though, the courts appear to value beer distributors as entitled to more legal protection than employees.

Not only is the at-will rule at odds with what people would normally expect when they are told they have permanent jobs, it is also at odds with the employment laws of most other countries. Neither Canada nor Mexico, our partners in NAFTA, follow the at-will rule.⁴³ Nor does Japan, or any of the countries in the European Union (including the United Kingdom).⁴⁴ The at-will rule is truly an example of American exceptionalism. The principal academic defender of the at-will rule, Professor Richard Epstein, explains that the at-will rule is valuable to the employee as well as the employer:

The reason why these contracts at will are effective is precisely that the employer must always pay an implicit price when he exercises his right to fire. He no longer has the right to compel the employee's service, as the employee can enter the market to find another job. The costs of the employer's decision therefore are borne in large measure by the employer himself, creating an implicit system of coinsurance between employer and employee against employer abuse.⁴⁵

In other words, the alternative employment opportunities available to an individual employee—her ability to enter the labor market and find a job—are the only limits on employer abuse over and above the transaction costs of finding a replacement. Putting the at-will rule of individual employment together with the *Mackay Radio* rule of collective action⁴⁶ means that American workers, individually and collectively, are only protected to the extent that they are in demand by other employers. From the perspective of the individual employee who is not represented by a union, the calculation as to whether she should quit is determined by the demand for individuals like her in the labor

42. *Des Moines Blue Ribbon Distrib. v. Drewrys Ltd., U.S.A.*, 129 N.W.2d 731 (Iowa 1964).

43. Int'l Labor Law Comm'n, Am. Bar Ass'n, *International Labor and Employment Laws* 21-5, 22-11 (William L. Keller ed., 1997).

44. *Id.* at 1-23, 32-9.

45. Richard Epstein, *In Defense of the Contract-At-Will*, 51 U. Chi. L. Rev. 947, 973 (1984).

46. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938).

market. She can be successful negotiating with her employer to improve her situation only if she has good prospects for finding a job elsewhere. Collectively, unions and their members are really only protected in the exercise of their statutory right to strike if the labor market is strong for persons with their qualifications. In these situations, the employer will have great difficulty in permanently replacing the strikers and is thus more likely to yield in collective bargaining.⁴⁷

But what should be done in a weak labor market, where the supply of potential workers is high and the demand low? Whether individually or collectively, the answer is that the employee or groups of employees have to put up with their present employment because they lack a ready alternative source of employment. Professor Regina Austin has powerfully demonstrated that where the at-will rule governs, the level of protection available to employees, at least under the common law, is the tort of the intentional infliction of emotional distress.⁴⁸ Given that it is difficult to prove intentional infliction of emotional distress, workers in a weak labor market are required to tolerate quite a bit of abuse before they become entitled to common law protection. Thus, in a weak labor market, employees are left to “suck it up” and endure abuse by their employers, because that is the “least bad” employment choice they have.

Relying on the free market also causes inequality in wealth and earnings. An extreme disparity between the wealth and income of the rich and the poor currently exists in the United States.⁴⁹ This is not without its social consequences. Once a threshold of development has occurred in a country, studies have shown that as inequality increases, the health of its citizens decreases:

In the developed world, it is not the richest countries which have the best health, but the most egalitarian Looking at a number of different examples of healthy egalitarian societies, an important characteristic they all seem to share is their social cohesion These societies have more of what has been called “social capital” which lubricates the workings of the whole society and economy. There are fewer signs of anti-social aggressiveness, and society

47. Presumably, even in a relatively weak market for workers, workers acting collectively will have an advantage over any individual because of the greater difficulty an employer would have in replacing a group all at once, rather than individual by individual.

48. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 Stan. L. Rev. 1 (1988).

49. See Paul Krugman, *For Richer: How the Permissive Capitalism of the Boom Destroyed American Equality*, N.Y. Times, Oct. 20, 2002 (Magazine), at 62 (describing the “new Gilded Age” in America marked by an ever-widening gap between rich and poor).

appears more caring. In short, the social fabric is in better condition.⁵⁰

Death rates are higher in the more unequal societies because physiological and psycho-social causes afflict the comparatively poor with greater frequency than they do the wealthy. Where there is less inequality, these phenomena are less prevalent:

Although all of the broad categories of causes of death—cardiovascular diseases, infections, respiratory diseases, cancers, etc.—seem to be related to income distribution, the most strongly related are social causes such as alcohol-related deaths, homicides, and accidents. These causes are highly suggestive of the effects of social disintegration [T]here is a large body of evidence demonstrating that various forms of psychosocial stress can have a powerful influence on death rates and rates of illness [T]here is increasing evidence of the physiological channels through which chronic stress can effect endocrine and immunological processes.⁵¹

As discussed above, employees working under the “suck it up” rule (because they cannot find other employment) are often subject to employer abuse. This abuse causes stress for the individual which, as the foregoing demonstrates, can be very harmful to one’s health.

II. WHY SYMPATHY FOR VICTIMS OF DISCRIMINATION HAS DECLINED

As we begin to look at discrimination law, I hope I have demonstrated that the United States has created a legal regime of employment that shows a general lack of sensitivity for and protection of employees. My point is not to conclude that the victims of employment discrimination should accept what they get and expect no better. Rather, I hope to use this situation as a baseline from which a coherent approach can be developed to enhance empathy systematically in the judicial system for the victims of discrimination. Before that can be done, it will be necessary to review whether there has been a decline

50. Richard G. Wilkinson, *Unhealthy Societies: The Afflictions of Inequality* 3–4 (1996). One of the reasons that our society lacks social cohesion and tolerates inequality and its consequences is that the majority has refused to accept the presence of people of color as full members of the community. Of course, there may be many other reasons. Many of the more egalitarian societies are more homogeneous than the United States. In these societies most people can look back at their forbears as having been in their same “blood line” (e.g. French, German, Scottish, etc.) for time immemorial. Other than Native Americans, most Americans lack this sort of long-standing, homogenous ethnic heritage. Maybe that helps to explain our predisposition to think that we each must make our place in this world on our own.

51. *Id.* at 4–5.

in sympathy for victims of discrimination in the judicial system and why that might be so.⁵²

First, a personal story: in the dim mists of the past—in the Sixties—when I graduated from high school, five of my friends and I borrowed one family's station wagon for a road trip that included a run through parts of the Old South. Before that trip, I knew of enforced public segregation and, like many Northerners, had sympathy for its victims. But that knowledge did not prepare me for the reality of experiencing enforced public segregation. The issue of race and the oppression of African Americans was overpowering whenever we were in public places. For the first time, I knew what it was to be white.⁵³ Eleven years later,⁵⁴ I got my first position teaching law at a school in the Old South. By the time I arrived, it had been transformed into the New South: all the vestiges of legally enforced segregation in public places were gone. I soon lost consciousness of being white.

Given that I am a white male of a certain age,⁵⁵ I am in some ways a baseline for the reaction of many judges who are now full participants in our present legal culture.⁵⁶ The decision in *Brown v. Board of Education*,⁵⁷ the civil

52. Sympathy is defined as "feelings of pity and sorrow for someone else's misfortune." The New Oxford American Dictionary 1720 (2001). The difference between sympathy and empathy is that someone who is sympathetic feels sorry for a person who has suffered, while someone who is empathetic, to paraphrase former President Clinton, "feel[s] the pain" of that person. Heidi Evans, *The Road to the White House: Clinton Finally Blows Up at "Snotty-Nosed" Critics*, Seattle Times, Mar. 27, 1992, at A3. Many majority group members of society have been, and continue to be, sympathetic to the plight of African Americans and other victims of discrimination. In my opinion, however, it is questionable whether many have reached beyond sympathy to empathy.

53. See Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953 (1993) (discussing the discriminatory intent requirement and challenging white readers to become conscious of the "transparency" of whiteness); see also George A. Martinez, *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 Harv. Latino L. Rev. 321 (1997) (discussing the legally defined race of Mexican Americans in relation to whiteness).

I certainly sympathized with African Americans subjected to segregation. I wish I could say that I had developed empathy. But the reality of being African American in that society at that time seemed so extreme that it was impossible for me to comprehend. It was just too different.

54. Among my motivations for going to law school was my respect for the Warren Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and other major civil rights cases.

55. See generally Thomas Ross, *The Richmond Narratives*, 68 Tex. L. Rev. 381, 399-406 (1989) (discussing the "cultural baggage of the white man").

56. To understand the reaction more fully, try to get someone to review her preconceptions: get her to play the following mind game, employing a hypothetical that is the converse of the veil of ignorance made famous by philosopher John Rawls. See John Rawls, *A Theory of Justice* (1971). Rather than assuming ignorance about the world, let us start by assuming all of us know the

rights movement, and the Civil Rights Act of 1964⁵⁸ came amidst critical and exciting times. But that period is long over. Now that it is, one reaction is to let the problems of discrimination regress, leaving society unsympathetic toward all workers, including women, African Americans, and members of other minority groups. In a system that lacks sympathy, it is easy to articulate the effect of antidiscrimination statutes: the at-will rule has been modified so that either party may terminate employment at any time for a good, bad, or no reason, but not for a discriminatory one.⁵⁹ Although reasonably activist judges might be willing to find discrimination in certain situations under this scheme, adopting this as the rule could lead to the assumption that, by and large, the problem of discrimination no longer exists, but for the occasional bad actor.⁶⁰ Professor Alan Freeman made this point by distinguishing two points of view for judging antidiscrimination law: the victim's perspective and the perpetrator's perspective.⁶¹ He characterized the predominant perspective as that of the perpetrator:

condition of the world, but each of us is ignorant of our particular status in terms of race and gender. Further assume that each person would desire as hassle-free and easy a life as possible. In the employment discrimination classes where I have used this exercise to reach the issue of how prevalent discrimination is, I have come to call the point of view I want the "slacker" perspective. Doing this has prompted some interesting discussions, with much emphasis on what exactly this "slacker" perspective means, especially in terms of commitment to civil rights and the like. In this discussion, some students realize that they are more committed to enhancing civil rights than perhaps they had thought they were, and expressed a greater level of support for civil rights than they thought generally would be expressed by educated people (e.g., their fellow law students). But once it is clear that the "slacker" perspective is the desire for a good life with as few obstacles as possible, then I ask whether a rational person would prefer to be African American or white, female or male. The intuitive answer is that the "slacker" would take the path of least resistance and pick being a white male. This may help develop a reality check against which we can judge our estimates of continuing discrimination and the level of our potential empathy for the victims of discrimination.

57. 347 U.S. 483 (1954).

58. 42 U.S.C. § 2000e (2000).

59. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that Title VII protects all races, including whites, against race discrimination). Although Title VII protects members of all races against race discrimination, it falls far short of requiring employers to have good cause for taking adverse action against all workers. European law provides good cause protection generally, while U.S. law protects everyone against some forms of discrimination but does not provide general good cause protection. See Bob Hepple, *European Rules on Dismissal Law*, 18 Comp. Lab. L.J. 204, 220 (1997).

60. Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *The Politics of Law: A Progressive Critique* 121, 124-26 (David Kairys ed., 1990).

61. *Id.*

Its concern is with rooting out the behaviors of individual bad actors who have engaged in "prejudicial" discriminatory practices Its job is to isolate and punish racial discrimination viewed as an instance of individual badness in an otherwise nondiscriminatory social realm A corollary of this fault principle is that those who, under applicable legal doctrines, are not labeled perpetrators have every reason to believe in their own innocence and noninvolvement in the problem.⁶²

The background assumption about the prevalence of discrimination may well influence a judge or a jury member in evaluating a case presented to him or her for decision.

Even more limiting than the perpetrator perspective is the view articulated by conservative author Dinesh D'Souza. His view is that African Americans are the cause of their own problems; any discrimination against them is a rational response by the majority to the dysfunction of the African American culture.⁶³ He writes:

The End of Racism refutes the widely shared belief that racism is the primary explanation for black failure in the United States today. I argue that the main problem faced by blacks is neither deficient IQ, as suggested in *The Bell Curve*, nor racial discrimination, as alleged by Jesse Jackson and other civil rights activists. Rather, the book contends that African Americans have developed a culture that was an adaptation to historical oppression that is, in several important respects, dysfunctional today. I point out that some pathologies, such as extremely high African American crime rates, have the effect of legitimizing "rational discrimination"⁶⁴

This view supports an even narrower role for the application of anti-discrimination law than the perpetrator assumption. Employing this assumption, antidiscrimination law should allow for "rational" discrimination.

At least one court appears to have adopted a variant of this "rational" discrimination line. In *EEOC v. Consolidated Service Systems*,⁶⁵ the Court of Appeals for the Seventh Circuit considered an employment discrimination case concerning a Korean-owned business. In support of its case, the Equal Employment Opportunity Commission (EEOC) offered evidence that seventy-three percent of those who applied to, and eighty-three percent of those who

62. *Id.* at 125.

63. Dinesh D'Souza, *The End of Racism*, at xiii (1995).

64. *Id.*

65. 989 F.2d 233 (7th Cir. 1993).

were hired by, Korean-owned Consolidated Service Systems were Korean.⁶⁶ This despite the fact that less than one percent of the total workforce in Cook County was Korean.⁶⁷ Nevertheless, the court found that the evidence was insufficient to prove the defendant discriminated against non-Koreans, as the disparity likely resulted from the owner's reliance on word-of-mouth recruiting by current employees who were mostly Korean:

If an employer can obtain all the competent workers he wants, at wages no higher than the minimum that he expects to have to pay, without beating the bushes for workers—without in fact spending a cent on recruitment—he can reduce his costs of doing business Of course if the employer is a member of an ethnic community, especially an immigrant one, this stance is likely to result in the perpetuation of an ethnically imbalanced work force.⁶⁸

The court found that the employer's use of passive recruiting was rational for two reasons:

The first is that an applicant referred by an existing employee is likely to get a franker, more accurate, more relevant picture of working conditions than if he learns about the job from an employment agency, a newspaper ad, or a hiring supervisor. The employee can give him the real low-down about the job Second, an employee who refers someone for employment may get in trouble with his employer if the person he refers is a dud⁶⁹

This use of the concept of rational discrimination is not as pernicious as D'Souza's claim—that discrimination against African Americans is rational because African Americans cause their own problems. But it does reveal that, according to the Court in *Consolidated Service Systems*, simple economics trumps the right to be protected against discrimination. That position surely is not consistent with sympathy, much less empathy, for the victims of discrimination.

The Supreme Court, in its recent structural, non-Eleventh Amendment state sovereignty cases, has adopted the theme that discrimination is rational.⁷⁰

66. *Id.* at 235.

67. *Id.*

68. *Id.*

69. *Id.* at 236.

70. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act of 1993, which largely sought to prevent State targeting and discrimination on the basis of religious beliefs, was an unconstitutional encroachment on "rational" state action); see also *United States v. Morrison*, 120 S. Ct. 1740 (2000) (invalidating elements of

In *Board of Trustees of the University of Alabama v. Garrett*,⁷¹ the Court, in an opinion by Chief Justice Rehnquist, held that Congress lacked the power under Section Five of the Fourteenth Amendment to enact the Americans with Disabilities Act (ADA),⁷² because disability classifications are subject only to rational basis scrutiny for equal protection purposes. Although the ADA would require state employers to reasonably accommodate individuals with disabilities, their failure to do so would be rational discrimination, and therefore lawful: “[W]hereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to ‘mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities.’”⁷³ This unsettling conclusion fuels skepticism concerning the Court’s approach towards antidiscrimination law.

Professor Jed Rubenfeld has uncovered what he claims to be an anti-antidiscrimination agenda among five of the Justices on the current Supreme Court.⁷⁴ Rubenfeld compared Court jurisprudence across a number of areas within constitutional law to find an explanation that is consistent when applied to each of them.⁷⁵ His analysis involved juxtaposing the Court’s affirmative action decisions with decisions in areas such as congressional power under both the Commerce Clause and Section Five of the Fourteenth Amendment,⁷⁶ recent Eleventh Amendment cases,⁷⁷ and the decision in *Boy Scouts of America v. Dale*.⁷⁸ In doing so, Rubenfeld found that the only way to put these cases together into a coherent whole was to see them all as advancing an anti-antidiscrimination agenda. He writes:

The anti-antidiscrimination view need not openly contest “traditional” antidiscrimination law. It can embrace the idea that everyone should have equal opportunities regardless of race, sex, creed, or color. But it is hostile to the more “radical” extensions of

the Violence Against Women Act on the grounds that institutional bias in state prosecutions of gender-motivated violence is insufficient to demonstrate irrational discrimination in the operation of state laws or proceedings).

71. 531 U.S. 356 (2001).

72. 42 U.S.C. §§ 12,112–117 (2000).

73. 531 U.S. at 372 (quoting 42 U.S.C. §§ 12,112(5)(B), 12,111(9) (2000)).

74. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 Yale L.J. 1141 (2002).

75. *Id.* at 1143.

76. *Id.* at 1147–48.

77. *Id.* at 1148–52.

78. 530 U.S. 640 (2000) (holding that the free expression right of private association trumps state law prohibiting discrimination on the basis of sexual preference).

antidiscrimination law, especially those that seek to protect traditionally unprotected groups, extend antidiscrimination ideas to unusual contexts, or push the law beyond the principle of formal legal equality.⁷⁹

Professor Rubinfeld's masterful job of juxtaposing the Court's jurisprudence across all these areas persuasively documents his thesis, even in the absence of any direct expression of the anti-antidiscrimination agenda by any member of the Court.

The Second Circuit has been more direct in its expression of ennui when faced with the possibility that the law protected so many groups against discrimination. In *Fisher v. Vassar College*,⁸⁰ Judges Jacobs and Leval, writing for six members of the court sitting en banc, concluded that proof of a prima facie case of individual disparate treatment discrimination

[does] not necessarily support a reasonable inference of illegal discrimination. In our diverse workplace, virtually any decision in which one employment applicant is chosen from a pool of qualified candidates will support a slew of prima facie cases of discrimination. The rejected candidates are likely to be older, or to differ in race, religion, sex, and national origin from the chosen candidate. Each of these differences will support a prima facie case of discrimination, even though a review of the full circumstances may conclusively show that illegal discrimination played no part whatever in the selection.⁸¹

While purporting to be reviewing the full circumstances of the case, the court was actually taking the case away from the fact finder, overturning a finding for the plaintiff.

Other academic commentators have noted the shift in attitude by federal judges toward a narrower view of the problem of discrimination in our society. For example, Professors Vicki Schultz and Stephen Petterson have demonstrated that the "lack of interest" argument—that the shortfall of women and minority men in various jobs reflects their lack of interest in those jobs—has increasingly resonated with federal judges, regardless of whether they are Democratic or Republican appointees. They write:

During the 1965–89 period as [a] whole, the courts have required sex discrimination plaintiffs to meet more difficult standards of proof than race discrimination plaintiffs to refute the lack of interest

79. See Rubinfeld, *supra* note 74, at 1143.

80. 114 F.3d 1332 (2d Cir. 1997) (en banc).

81. *Id.* at 1337.

argument. Since the late 1970s, the courts have also changed their approach to the lack of interest argument in race discrimination cases to one less favorable to plaintiffs. They have moved toward a conservative understanding of racial segregation that converges with the way they have always understood sex segregation in employment That this conversion occurred among judges of all political affiliations . . . suggests a significant transformation in judicial consciousness. After [the first] decade of efforts to enforce Title VII, federal judges apparently began to share the general public's belief that employment discrimination against minorities had been largely eradicated.⁸²

In her criticism of *St. Mary's Honor Center v. Hicks*,⁸³ an employment discrimination case involving race, Professor Deborah Calloway argued that the Supreme Court had revised its underlying assumption about the pervasiveness of discrimination:

Hicks is significant, not for its narrow legal holding, but for the attitude underlying that holding [T]his case is about what evidence is sufficient to meet the plaintiff's burden of persuasion on discriminatory intent. What evidence makes it "more likely than not" that the defendant discriminated? The answer to this question depends on one's beliefs about the prevalence of discrimination.⁸⁴

Additionally, Professor Deborah Malamud critiqued district court judges' use of summary judgment to dispose of individual disparate treatment cases without allowing plaintiffs to have a trial,⁸⁵ as have Professor Ann McGinley⁸⁶ and Professor Kenneth R. Davis.⁸⁷

82. Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. Chi. L. Rev. 1073, 1180–81 (1992).

83. 509 U.S. 502 (1993).

84. Deborah Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 Conn. L. Rev. 997, 1008–09 (1994).

85. Deborah Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2237 (1995).

86. Ann McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203 (1993) (arguing that the current trend of using summary judgment erodes the role of the fact finder in employment discrimination cases).

87. Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 Brook. L. Rev. 703, 753 (1995) (arguing that, in marginal cases, summary judgment decreases the likelihood that plaintiffs will get beyond the first step of the test the Supreme Court developed for proving discrimination in *McDonnell-Douglas Corp. v. Green*, 411

More recently and very tellingly, Professor Michael Selmi compared federal courts' dispositions of employment discrimination cases with those of insurance cases, among others.⁸⁸ At the pretrial stage, plaintiffs were much less likely to be successful in employment discrimination cases than in insurance cases—ninety-eight percent of discrimination cases were decided for defendants as compared with sixty-six percent of insurance cases.⁸⁹ At trial, plaintiffs had a slightly lower success rate in employment discrimination cases.⁹⁰ Most startling, however, was the difference in outcome between cases tried before judges and those tried before juries:

Plaintiffs [in employment discrimination cases] are . . . half as successful when their cases are tried before a judge than a jury, and success rates are more than fifty percent below the rate of other claims.⁹¹

These statistics show that judges are much more hostile toward plaintiffs in employment discrimination cases than are juries.⁹² This is so despite the commonly accepted belief, at least by the white majority, that discrimination is no longer prevalent. The 2001 Pulitzer-Prize-winning book compiled by correspondents of the *New York Times*, *How Race is Lived in America: Pulling Together, Pulling Apart*, reports the result of a public opinion poll that asked the following: "Just your impression, are blacks in your community treated less fairly than whites on the job or at work?"⁹³ Seventy-three percent of whites said that African Americans were not treated less fairly than whites, while only forty percent of African Americans reached that conclusion.⁹⁴

U.S. 792 (1973). The first step requires the plaintiff to establish a prima facie case of discrimination by showing that she is part of a protected group, that she was qualified for the job, and that she did not get the job while someone else did.).

88. Michael Selmi, *Why Are Employment Discrimination Cases so Hard to Win?*, 61 La. L. Rev. 555 (2001) (showing the lower courts' hostility to employment discrimination cases as compared to insurance and personal injury cases, based on plaintiff success rates).

89. *Id.* at 560.

90. *Id.*

91. *Id.* at 560–61.

92. *Id.*

93. *The New York Times Poll on Race: Optimistic but Enduring Racial Division*, in *How Race is Lived in America: Pulling Together, Pulling Apart* 365, 385 (N.Y. Times ed., 2001).

94. *Id.* at 385; see also, Kaiser Family Found., Pub. No. 3143, *Race and Ethnicity in 2001: Attitudes, Perceptions, and Experiences* (2001), available at <http://www.kff.org/content/2001/3143/RacialBiracialToplines.pdf> (reporting similar disparities between perceptions of whites and African Americans about equal treatment on the job).

This data shows that, like judges, members of the public adopt the perpetrator, or “bad actor,” perspective. Yet a jury is two times more likely than a judge to find for a plaintiff alleging employment discrimination.⁹⁵ Although this astounding statistic might be explained by the fact that stronger plaintiffs’ cases usually go to juries, while weaker cases are tried before judges as fact finder,⁹⁶ it is also important to note that jury members are always charged, by a judge, to decide the case before them based solely on the evidence in the record. As a result, they may be less likely than judges to act on preconceptions about the prevalence of discrimination in general. Jurors may set aside these preconceptions when they take on the unusual and important civic duty of deciding a case.⁹⁷ Judges, meanwhile, may treat any particular discrimination case as just one more in a long line of cases on the docket that need to be handled as efficiently as possible.⁹⁸ They may not focus as intensely on each case, the record of evidence in it, and the reasonable inferences that can be drawn from that evidence.

95. Selmi, *supra* note 88, at 560–61.

96. *Id.* at 559.

97. See Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts and Jury Nullification*, 86 Iowa L. Rev. 467, 472 (2001). Todd Pettys describes how a jury proceeds in deciding a case as follows:

No one acquainted with the dynamics of the courtroom will quarrel with the claim that jurors generally want to do what they believe is morally right, that jurors are most likely to be persuaded when they are told a compelling story, and that a trial lawyer must be attuned to jurors’ beliefs and expectations. Every good trial lawyer knows, for example, that she maximizes the likelihood of victory if she tells the jurors a credible story that makes them feel morally compelled to return a verdict for her client.

Id.

98. Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 178 (1958). Professor Harry Kalven describes the difference in the approach of judges and juries:

The judge and jury are two remarkably different institutions for reaching the same objective—fair, impersonal adjudication of controversies. The judge represents tradition, discipline, professional competence and repeated experience with the matter. This is undoubtedly a good formula. But the endless fascination of the jury is to see whether something quite different—the layman amateur drawn from a wide public, disciplined only by the trial process, and by an obligation to reach a group verdict—can somehow work as well or perhaps better.

Id. For a description of the value of the jury system, see Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 Geo. Wash. L. Rev. 183 (2000).

III. HOW TO GET JUDGES TO EMPLOY "SYSTEMIC EMPATHY" IN CASES INVOLVING VICTIMS OF DISCRIMINATION

Returning to the dichotomy set by Professor Freeman, he suggests that the dominant perpetrator or occasional bad actor perspective must be replaced with the perspective of the victims of discrimination. Freeman describes his recommendations as follows:

Central to the victim perspective is an insistence on concrete historical experience rather than timeless abstract norm. For black Americans, that experience has been one of harsh oppression, exclusion, compulsory reduced status, and of being perceived not as a person but as a derogatory cultural stereotype. Years of oppression have left their mark in the form of identifiable consequences of racism: residential segregation, inadequate education, overrepresentation in lowest-status jobs, disproportionately low political power, and a disproportionate share in the least and worst of everything valued most in our materialistic society The victim perspective focuses on the persistence of conditions traditionally associated with racist practice If [racist practices] exist in virtually identical form after antidiscrimination laws have prohibited racial discrimination, the law has not yet done its job.⁹⁹

Refocusing discrimination toward the perspective of the victim seems like a daunting task. *Brown v. Board of Education*, the Civil Rights Movement, and the Civil Rights Act of 1964 in the aggregate seem to be a relatively brief moment in the long history of judicial insensitivity to the rights of workers generally, and of the victims of discrimination specifically.¹⁰⁰ Adding to the difficulty of the task is the relatively recent negative reaction against our so-called "victimization culture." The gist of the complaint is that by characterizing ourselves as all being victims of one sort or another, we collectively reject personal responsibility for our lives, and instead blame our plight on society. At its core, it is a claim that our culture has become so narcissistic, that we have become so focused on ourselves as woebegone individuals in need of treatment or deliverance, that we have precluded concern for others and for society.¹⁰¹ In contrast, the goal of developing "systemic

99. Freeman, *supra* note 60, at 124–25.

100. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

101. For a strong statement of this position, see Charles J. Sykes, *A Nation of Victims* (1992), which argues that the American culture of victimization encourages people to use personal resentments to their social advantage and avoid personal responsibility. For a less ideological approach, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991),

empathy” is to develop general concern for those who have been treated the worst over time. Rather than leading to an atomistic society of separated, helpless individuals, this should lead to a cohesiveness greater than any we have experienced in the past. Thus, developing “systemic empathy” for the victims of discrimination is the antithesis of victimization as it has come to be used, as an inward-looking sense of powerlessness and helplessness. Establishing a culture of “systemic empathy” will be empowering for all.

After this gloom and doom, there is still some hope on the horizon; I hope that it is more than just a slender reed. In *Reeves v. Sanderson Plumbing Products, Inc.*, the Court, in a unanimous decision, exposed litigation of individual disparate treatment cases to more intense scrutiny of the evidence in the record, and to the inferences of discrimination that could be drawn from that evidence.¹⁰² This new approach replaced an increasingly formalistic and formulaic approach that resulted in many good cases being thrown out of court on summary judgment before going to trial, or on judgment as a matter of law after a plaintiff’s victory before a jury.¹⁰³

There were two parts to the *Reeves* decision. First, the Court rejected the so-called “pretext-plus” rule.¹⁰⁴ This rule required that a plaintiff introduce additional evidence of discrimination, even after having proven a prima facie case of discrimination, and after demonstrating that the defendant’s asserted nondiscriminatory reason for the adverse employment action was illegitimate.¹⁰⁵ The approach underlying the “pretext-plus” rule was to “slice and dice” the evidence in the record that supported the plaintiff’s case until there was not enough left to go to trial or to uphold a verdict if the case was tried.¹⁰⁶ Thus, the evidence that proved a prima facie case was dropped from the record once the defendant introduced evidence of a nondiscriminatory reason for the challenged decision.¹⁰⁷ Testimony of discriminatory statements made by defendant’s decision makers were excluded from the record if it did not meet the strict

which asserts that the current discourse on rights has hindered the development of political debate by focusing on individual rights, not focusing on the correlative duties that rights entail, and ignoring the need to balance particular rights.

102. 530 U.S. 133 (2000).

103. See Michael J. Zimmer, *Slicing & Dicing Individual Disparate Treatment Law*, 61 La. L. Rev. 577 (2001) (contending that lower courts have continued to be skeptical of victims of discrimination).

104. *Id.* at 587–88.

105. *Id.*

106. *Id.* at 585.

107. *Id.* at 587–88.

standards of “direct” evidence of discrimination, even though the testimony was obviously circumstantial evidence of discrimination.¹⁰⁸

Second, in reviewing the evidence in the record, the Court indicated that the court of appeals should have drawn every inference that could be drawn in support of the jury’s verdict.¹⁰⁹ Because of the operation of the misguided “pretext-plus” rule, the Court found that the Fifth Circuit had in effect given only lip-service to the rule by misapplying it in two significant ways. First, “the court disregarded critical evidence favorable to [Reeves]—namely, the evidence supporting [Reeves’s] prima facie case and undermining [Sanderson’s] nondiscriminatory explanation.”¹¹⁰ Second, the “court also failed to draw all reasonable inferences in favor of [Reeves].”¹¹¹ In addition to the unchallenged evidence of a prima facie case, the evidence included the age-based comments of the one superior, Chesnut, and the evidence that Chesnut was the actual decision maker behind Reeves’s firing:

[W]hile acknowledging “the potentially damning nature” of Chesnut’s age-related comments, the court discounted them on the ground that they “were not made in the direct context of Reeves’s termination.” And the court discredited petitioner’s evidence that Chesnut was the actual decision maker by giving weight to the fact that there was “no evidence to suggest that any of the other decision makers were motivated by age.” Moreover, the other evidence on which the court relied—that Caldwell and Oswald were also cited for poor recordkeeping, and that respondent employed many managers over age 50—although relevant, is certainly not dispositive *In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury’s.*¹¹²

To emphasize the seriousness of the Fifth Circuit’s blunder, the Court found that no retrial was necessary and that the original verdict should be reinstated.¹¹³

108. *Id.* at 583–84.

109. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

110. *Id.*

111. *Id.*

112. *Id.* at 152–53 (emphasis added) (quoting decision of the Court of Appeals for the Fifth Circuit).

113. *Id.* at 153–54.

In *Reeves*, the Court did not go the final step and say that a showing by the plaintiff of a prima facie case plus sufficient evidence to dismiss the employer's stated non-discriminatory reason would "always be adequate to sustain a jury's finding of liability."¹¹⁴ The Court concluded that sometimes, despite plaintiff's evidence, "no rational fact finder could conclude that the action was discriminatory."¹¹⁵ Justice Ginsburg concurred, and indicated that it should be "uncommon" for a case to be taken from the jury where the plaintiff introduced evidence sufficient to support a finding of a prima facie case and reject the defendant's explanation.¹¹⁶ This should happen only if "it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law that . . . discrimination could not have been the defendant's true motivation."¹¹⁷ Because of the effect that *Reeves* has on both summary judgment and on post-verdict motions for judgment as a matter of law, more cases should be submitted juries than were prior to the *Reeves* decision. In addition, more jury verdicts for plaintiffs will likely stand despite motions for judgment as a matter of law.¹¹⁸

Rejecting the "pretext-plus" rule and requiring that a case be focused on the evidence in the record, and inferences be drawn from that evidence, are important steps toward the development of a more empathetic approach to the victims of discrimination.¹¹⁹ Together, the two principles operate to direct federal judges away from the formalistic, rule-driven approach to discrimination, one that largely works to the disadvantage of the victims of discrimination. Instead, judges should shift their attention toward review of the evidence in the record and the inferences that can properly be drawn from that evidence.

IV. CAN *REEVES* BE USED TO EDUCATE JUDGES?

In my view, the two variables set forth in *Reeves*—evidence of discrimination and the inferences to be drawn from that evidence—can be used to develop "systemic empathy" for the victims of discrimination. The dictionary

114. *Id.* at 148 (emphasis in original).

115. *Id.*

116. *Id.* at 154 (Ginsburg, J., concurring).

117. *Id.* at 154–55 (Ginsburg, J., concurring).

118. Charles F. Thompson, Jr., *Juries Will Decide More Discrimination Cases: An Examination of Reeves v. Sanderson Plumbing Products, Inc.*, 26 Vt. L. Rev. 1 (2000).

119. For my earlier efforts at explaining *Reeves*, see Zimmer, *supra* note 103 (concluding that *Reeves* "goes a long way to putting the law of individual disparate treatment back on track as a functional method to help remedy discrimination").

defines “evidence” as “the available body of facts or information indicating whether a belief or proposition is true or valid.”¹²⁰ “Inference” is defined as “a conclusion reached on the basis of evidence and reasoning.”¹²¹ “Reason” is “the power of the mind to think, understand, and form judgments by a process of logic.”¹²² Some contemporary evidence theorists add imagination as a crucial part of the process of drawing inferences based on evidence.¹²³

Is there evidence that discrimination remains a problem significant enough to justify a victim’s perspective—an empathetic point of view—by federal judges? Professors Alfred W. Blumrosen and Ruth G. Blumrosen have undertaken a major study that offers insight into this matter. In designing their study, they decided to use data from the Equal Employment Opportunity Commission’s EEO-1 Form, a form documenting workforce demographics that employers with over fifty employees are required to submit annually.¹²⁴ Looking at the data from 1975 through 1999, the authors found some good and bad news. First, the good news was that minorities and women had made significant gains in employment since 1975. Although the whole workforce grew during this period, the proportion of women and minority men in the workforce grew as well.

The bottom line . . . is that minorities increased their proportion of the EEO-1 Labor Force between 1975 and 1999 by more than 4.6 million workers. These Minorities were 57% Black, 27% Hispanic, 9% Asian and .2% Native American. The net inflow of minorities in the EEO-1 Labor Force was an additional seven million workers, nearly doubling the minority labor force of 1975.

Women increased their proportion of the EEO-1 Labor Force by nearly 3.8 million workers. The net inflow of women was an additional 9 million women, more than doubling the female labor

120. The New Oxford American Dictionary 589 (2001).

121. *Id.* at 869.

122. *Id.* at 1419.

123. See, e.g., Vern R. Walker, *Theories of Uncertainty: Explaining the Possible Sources of Error in Inferences*, 22 Cardozo L. Rev. 1523 (2001) (explaining how jurors derive conclusions from evidence that may be incomplete or conflicting).

124. Alfred W. Blumrosen & Ruth G. Blumrosen, *The Reality of Intentional Job Discrimination in Metropolitan America—1999*, at <http://www.newark.rutgers.edu/~ronchen/blumrosen-eeo.html> (2002). The EEO-1 Form requires that private employers with one hundred or more employees compile gender, race, and ethnicity information about their employees, as mandated by the Civil Rights Act of 1964. 29 C.F.R. § 1602.7 (2002). The purpose of the form is to assist the Equal Employment Opportunity Commission in ensuring that employers are not engaged in unlawful employment practices. *Id.*

force of 1975. The women workers were 69% White, 17% Black, 9% Hispanic, 5% Asian and 1% Native American.¹²⁵

More important than increasing their density in the workforce, women and members of minority groups “increased their share of ‘better jobs’ as officials, managers, professional, technical and sales workers.”¹²⁶

The bad news starts with the fact that one third of the employers who were legally obligated to file EEO-1 Forms failed to do so.¹²⁷ Presumably, employers not willing to provide the information have reason to fear disclosure. That group no doubt includes many of the most persistent discriminators.

Proceeding to their methodology, the authors reviewed the data submitted by employers from over 160,000 establishments within common metropolitan areas.¹²⁸ They next analyzed the representation of women and minority men holding jobs in common occupational areas by using the binomial distribution technique approved in *Hazelwood School District v. United States*.¹²⁹ The limitations of the study—excluding establishments with fewer than fifty employees and excluding employers not within any “Metropolitan Statistical Area”—meant that fewer than half of all employees were covered by the study.¹³⁰ But based on the comparison of the establishment of individual, though unidentified, employers against their peers in the same industry and metropolitan area, the study nonetheless found that considerable discrimination persisted:

For 1999, 75,793—or 37%—of establishments discriminated against Minorities in at least one occupational category. This discrimination affected 1,361,083 Minorities who were qualified and available to work in the labor markets, industries and occupations of those who discriminated. These Minorities were 57% Black, 27% Hispanic, 9% Asian and .2% Native American.

For 1999, 60,425—or 29%—of establishments discriminated against Women in at least one occupational category. This discrimination affected 952,131 Women who were qualified and available to work in the labor markets, industries and occupations of those who discriminated. Women were 69% White, 17% Black, 9% Hispanic, 5% Asian and 1% Native American.

125. Blumrosen & Blumrosen, *supra* note 124, at 26.

126. *Id.* at xvi.

127. *Id.* at 1.

128. *Id.*

129. 433 U.S. 299 (1977).

130. See Blumrosen & Blumrosen, *supra* note 124, at 29.

A “hard core” of 22,269 establishments appear to have discriminated over a nine year period against Minorities, and 13,173 establishments appear to have done so against Women. This “hard core” is responsible for roughly half of the intentional discrimination ones we have identified.¹³¹

The EEO-1 Form data indicates that much work remains to be done to address discrimination. It does justify, however, asking federal judges to reexamine their preconceptions about the prevalence of discrimination. At least some judges, being convinced of the continuing gravity of the problem of discrimination, may learn to adopt a victim’s perspective in employment discrimination cases.¹³² The challenge then is twofold: 1) to gain the attention of these judges; and 2) to get them to reevaluate their preconceptions in their daily work—the job of deciding actual cases, such as employment discrimination ones—during the pre-trial, trial, and post-trial settings.¹³³

My proposal is to declare a new Civil Rights Movement, at least in the courts.¹³⁴ Some large-scale employment discrimination cases have already had an impact on perceptions of the prevalence of discrimination.¹³⁵ One notorious case involving Texaco was settled after a great deal of negative publicity about the company.¹³⁶ More recently, Coca-Cola settled a massive class action case

131. *Id.* at 74. “Hard core” discriminators were defined as employers:

[S]o far below average in an occupation that there is only one in one hundred chances that the result occurred by accident (2.5 standard deviations [versus the 2 standard deviation or 5% chance standard used in *Hazelwood*]) in 1999 and in either 1998 or 1997, and in at least one year between 1991 and 1996, and was not above average between 1991 and 1999.

Id. at 95.

132. It would be very optimistic to assume that all judges are educable.

133. Appellate judges reviewing the actions of trial judges also need to adopt a more empathetic perspective.

134. A renaissance of a more general Civil Rights Movement would likely be the most effective means to heighten federal judges’ sensitivity once again towards the problems of discrimination and the difficulties faced by the victims of discrimination.

135. See Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. Pitt. L. Rev. 389 (2002) (looking at employment discrimination cases from the viewpoint of corporate governance and what the response of corporate directors ought to be).

136. See Kurt Eichenwald, *Texaco Executives, on Tape, Discussed Impeding a Bias Suit*, N.Y. Times, Nov. 10, 1996, at A1. For the terms of the ultimate settlement of the case, see Court TV Legal Documents, *Texaco Settlement Agreement*, at <http://www.courtTV.com/legaldocs/business/texaco/settlement.html> (last visited Apr. 23, 2003); see also *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (documenting the final settlement agreement).

brought by black employees alleging discrimination in promotions, compensation, and performance evaluations.¹³⁷ Other impact litigation against major employers is pending.¹³⁸ So far these cases have not been described as part of a reinvigorated Civil Rights Movement, whereby the battle is taken to the courts, but such a conceptualization might help increase their weight in society. Describing them as an element of a campaign for justice and equality can affect the way all Americans, including judges, look at these cases, the problem of discrimination, and the status of its victims.¹³⁹

Because statistical evidence is a major element supporting the proposition that discrimination is a continuing problem worthy of a sensitive and empathetic approach by judges, a useful strategy would be to bring more systemic disparate treatment cases.¹⁴⁰ These cases would be based on statistical proof demonstrating patterns and practices of discrimination by employers.¹⁴¹ If many of the “hard core” discriminators identified in the abstract, but not named by the Blumrosens’ study, were sued successfully in systemic disparate treatment cases,¹⁴² the overall amount of discrimination would decline (or at

137. *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001).

138. See Deborah Durham-Vichr, *Microsoft Lawsuit Pits Johnnie Cochran vs. Bill Gates*, Newsfactor Network, at <http://www.newsfactor.com/perl/story/8718.html> (Apr. 5, 2001) (reporting on a racial and sexual discrimination suit being brought against Microsoft Corporation); Robert Luke, *Heavy Hitters: Bias Litigation Involves Taking Big Risks for Big Rewards*, Atlanta J.-Const., Aug. 4, 2002, at 1C (discussing the risks of class action bias cases and highlighting those currently in litigation).

139. There has recently been a considerable attempt to undermine the significance of the federal courts in the Civil Rights Movement and, therefore, in the social change that resulted from that movement. See Gerald N. Rosenberg, *The Hollow Hope* (1991). Gerald Rosenberg focuses his analysis beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954), but fails to see that *Brown* was one of a long series of cases litigated by the NAACP Legal Defense Fund, which developed a strategy for challenging the separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Jack Greenberg, *Litigation and Social Change: Methods, Limits and Role in Democracy* 16–23 (1974) (summarizing the litigation efforts of the NAACP up to and including *Brown*). The long-term litigation strategy gave the issue of racial equality an official forum outside the African-American community. The interaction of the ongoing litigation and civil rights groups brought about what we now call the Civil Rights Movement, culminating in the March on Washington and Dr. Martin Luther King’s “I Have a Dream” speech. Taking the federal courts out of this would have changed the story enormously and, perhaps, would have changed its ending as well.

140. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 989 (1991) (showing the comparatively few systemic cases among all the employment discrimination cases brought in the federal court system).

141. *Id.*

142. See 1 Charles A. Sullivan et al., *Employment Discrimination: Law and Practice* §§ 3.01–.07 (3d ed. 2002) (describing the general approach to proving systemic disparate treatment

minimum its victims would be vindicated). Similarly, statistical evidence of discrimination is at the core of proving systemic disparate impact discrimination. Convincing statistical evidence would bring discrimination to the attention of the courts at a broad level.¹⁴³ The presence on the docket of a considerable number of systemic cases would help undermine the perpetrator perspective of judges and make them more receptive to the idea that discrimination remains a considerable problem deserving their closest and most exacting scrutiny. This might even tend to develop empathy among judges for the victims of discrimination, empathy that would carry over to all the discrimination cases on their dockets, from individual disparate treatment cases to suits for retaliation and harassment.

Even in individual disparate treatment cases, statistical evidence at a fairly general and abstract level can prove useful though it does not by itself prove that the plaintiff in any particular case was discriminated against.¹⁴⁴ There is support for the proposition that such non-individualized evidence is useful in individual disparate treatment cases. In *McDonnell Douglas Corp. v. Green*,¹⁴⁵ the Court indicated that a broad range of evidence is admissible to prove pretext. This includes proof of the defendant's "general policy and practice with respect to minority employment. On [this] point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether [defendant's] refusal to rehire [plaintiff] in this case conformed to a general pattern of discrimination against blacks."¹⁴⁶ Just as the employer's own statistics are relevant to an individual disparate treatment case, statistical evidence demonstrating the general problem of discrimination is relevant in order to put the particular facts of a case into context.¹⁴⁷

An expanded scope of relevance for the admissibility of statistical evidence, including evidence of the prevalence of discrimination in society and

discrimination).

143. See *id.* §§ 4.01–.09 (providing the general approach to proving systemic disparate impact discrimination).

144. That an employer has "bad" statistics does not mean that it discriminated against this plaintiff. So, too, an employer with "good" statistics may have in fact discriminated against the particular plaintiff.

145. 411 U.S. 792 (1973).

146. *Id.* at 804–05 (footnote omitted). The Court may have cut back on this aspect of *McDonnell Douglas* in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), where, in discussing the remand for proof of pretext, neither the majority opinion nor the two dissenting opinions mentioned statistical evidence.

147. "Bad" statistics support the inference that the employer discriminated in plaintiff's case, while "good" statistics do not support that inference.

at the defendant's place of employment, would aid the judge or the jury in drawing the appropriate inference of whether or not the defendant discriminated in the plaintiff's case. In *Old Chief v. United States*,¹⁴⁸ the Court, in an opinion by Justice Souter, described the breadth of inference-drawing:

[Evidence] has a force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them A syllogism is not a story¹⁴⁹

The scope of relevant evidence also stretches to evidence that satisfies the expectations "about what proper proof should be."¹⁵⁰ Justice Souter states:

[T]here lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about.¹⁵¹

The ideas a judge or jury have about the prevalence of discrimination are expectations that need to be established or, where they are wrong, need to be confronted with evidence. Studies like the Blumrosens' should be admissible for confronting the prevailing bad actor or perpetrator perspective regarding the prevalence of discrimination. Finally, expert testimony can be useful to help educate judges, and juries, as to the nuances of discrimination.¹⁵² Although its holding was controversial, the Supreme Court, in *Price Waterhouse v. Hopkins*, upheld the introduction of an expert witness to analyze the language used by the defendant's decision makers.¹⁵³ Dr. Susan Fiske, a social psychologist and psychology professor, testified that based on the overt sex-based comments as well as even gender-neutral remarks of some decision makers, the partner

148. 519 U.S. 172 (1997) (finding that the prejudicial effect of prosecutorial evidence of prior written statements of criminal defendant as to his thoughts and acts outweighs its probative effect).

149. *Id.* at 187, 189.

150. *Id.* at 188.

151. *Id.* at 188.

152. Typically, an expert statistical witness is used to prove systemic cases based on statistical evidence. See *Bazemore v. Friday*, 478 U.S. 385 (1986).

153. 490 U.S. 228 (1989).

promotion process of defendant was “likely influenced by sex stereotypes.”¹⁵⁴ Such testimony is relevant because it helps the fact finder draw inferences based on the evidence.¹⁵⁵

V. CONCLUSION

In the exercise of their craft, judges need to develop more empathy towards the victims of discrimination. While a social movement similar to the 1960s Civil Rights Movement would likely influence judges’ willingness to exercise empathy, something less dramatic and difficult to achieve might nevertheless yield positive results. A mini-Civil Rights Movement in the courts—undertaking more systemic cases and using expertise to help draw the inference of discrimination—may prove useful for developing a more empathetic federal judiciary.

154. *Id.* at 235.

155. Experts are not always necessary. In his 1992 campaign for the presidency of the United States, Ross Perot spoke at the NAACP National Convention. His use of the phrase “your people” did not require the testimony of an expert to decipher its meaning. *See The Reform Party—Ross Perot: Political Timeline*, at <http://www.cnn.com/ALLPOLITICS/1996/conventions/long.beach/perot/political.timeline.shtml> (last visited Mar. 23, 2003).

