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Small Numbers, Black Men, Precipitous Responses, Big Problems

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SMALL NUMBERS, BLACK MEN, PRECIPITOUS RESPONSES, BIG PROBLEMS

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Professor Culp has aptly warned us that in our discussion of employment discrimination we should not lose sight of the need to address the spectrum of policies affecting the status of African-Americans. Without serious efforts in all aspects of American life (e.g., housing, education, health care, political and economic empowerment) our chances of significantly improving the future for African-American men are slim.[1]

Professor Culp, in his article, focuses on the federal mechanism for enforcement of Title VII of the Civil Rights Act of 1964 as amended.[2] He concludes that the Title VII enforcement mechanism has failed to significantly change the status of African-American men in the workplace and attributes this failure to narrow interpretations of the law by the Supreme Court and several lower courts. Culp asserts that these narrow rulings are the result of an excessive concern of courts to avoid erroneous findings of discrimination against employers and a lack of concern about erroneous findings of no discrimination.[3] Culp concludes that the courts will not be helpful, and proposes a two step solution. His solution entails removing large numbers of Title VII cases to an administrative process modeled after the National Labor Relations Board and expanding some of the Court's narrow interpretations of substantive law.[4] Professor Culp asserts that these steps will reduce the cost of defending Title VII cases, and will provide legal authority more favorable to plaintiffs in discrimination cases.[5] He suggests that these positive results would encourage employers to hire greater numbers of

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1. Similarly, this Symposium's focus on African-American men should not suggest any lack of concern for the condition of African-American and other women and other Americans disadvantaged by the various "-isms" that plague us all.

2. Jerome M. Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After* Hicks, 23 CAP. U. L. REV. 241 (1994).

3. *Id.* at 246.

4. *Id.* at 262.

5. *Id.*

African-Americans, and would create the political coalitions necessary to support his recommended substantive changes in the law.[6] While I agree that there is much to be said in favor of rethinking the way in which we enforce the antidiscrimination mandate, I believe that Professor Culp's characterization of the problem may be somewhat distorted, and that his proposed solution is potentially dangerous.

Professor Culp has accurately described the perspectives of Title VII plaintiffs and defendants in explaining their concerns over what he terms Type 1 and Type 2 errors. No doubt the victims of employment discrimination and their proponents are primarily concerned with Type 1 errors—the finding of no discrimination when in fact it has occurred. Employers are legitimately concerned with Type 2 errors—the finding of discrimination when none has occurred. Culp has accurately noted that the problem of Type 2 errors has attracted more of the Supreme Court's attention in recent years.[7]

In *Watson v. Fort Worth Bank & Trust Co.*[8] and in *Wards Cove Packing Co. v. Atonio,*[9] the Court was clearly concerned over the employers' alleged fear of Type 2 errors. The employers' "fears" were expressed through the not so veiled threat that quota systems would be employed in order to avoid the establishment of a prima facie case of disparate impact. The Court was so receptive of the employers' argument that it modified disparate impact theory in order to afford employers a significantly diminished defensive burden.[10] This concern is so great among some members of the Court that it led Justice Scalia in his dissent in *Johnson v. Transportation Agency* to the incredible conclusion that as disparate impact theory had historically been interpreted, it might be a "breach of duty to shareholders" for an employer to fail to violate Title VII by "engag[ing] in reverse discrimination."[11] The Court's rejection of the "bottom line" defense in *Connecticut v. Teal*[12] is apparently insufficient to alleviate its fear of quotas.[13] As professor Culp notes, "the fear that an employer's

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6. *Id.*
7. *Id.* at 243.
8. 487 U.S. 977 (1988).
9. 490 U.S. 642 (1989).
10. *See Watson*, 487 U.S. at 992-93; *Atonio*, 490 U.S. at 651.
11. Johnson v. Transportation Agency, 480 U.S. 616, 676 (1987) (Scalia, J., dissenting).
12. 457 U.S. 440 (1982).
13. The Court apparently saw *Teal* as doing little to discourage employers from (*continued*)

apprehension regarding Type II errors will force it to implement a quota system"[14] has indeed driven the Court to modify an entrenched and fundamental component of antidiscrimination jurisprudence—adverse impact theory.[15] Yet, it is important to note that it is the employer's reaction to allegedly anticipated Type 2 errors, and not the errors themselves, that has been of concern to the courts. The modifications in disparate impact theory that were crystallized in *Watson* and *Atonio* did not develop out of experience with a large number of Type 2 errors. Rather, these modifications arose from an unwillingness to call the bluff of employers that they were willing to engage in widespread preferential treatment of blacks in order to avoid the cost of defending against a prima facie disparate impact case.

Culp asserts that a similar concern with minimizing Type 2 errors has resulted in an unduly narrow reading of disparate treatment theory. This narrow reading has, in his view, made it difficult for Title VII plaintiffs to avoid Type 1 errors when proving intentional discrimination through the inferential model of proof formulated in *McDonnell Douglas Corp. v. Green*.[16] Professor Culp uses the Court's recent decision in *St. Mary's Honor Center v. Hicks*[17] to make his point. The Type 2 problem that the Court in *Hicks* was trying to avoid, however, was not the Type 2 problem that has resulted in the modification of disparate impact theory. In the disparate treatment cases that Professor Culp criticizes, the Court was reacting not to the threat of engaging in possibly inappropriate quota hiring to avoid the making of a prima facie case, but rather to the possibility that actual Type 2 errors would occur if fact-finders relied too

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engaging in inappropriate efforts to avoid the establishment of a prima facie impact case, because it only denied employers an illegitimate defense to the disparate impact claims of those blacks not included in the bottom line.

14. Culp, *supra* note 2, at 245.

15. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971).

16. 411 U.S. 792 (1973). In *McDonnell-Douglas Corp.*, the Court established a method of analysis that enables a plaintiff to prevail without direct evidence of intentional discrimination. *Id.* at 802. Intentional discrimination is proved to be the cause of an individual adverse employment action where the plaintiff establishes membership in a protected class, qualification, application and rejection for a position or benefit, and availability of the position or benefit and where the employer fails to articulate a legitimate nondiscriminatory reason for the adverse action. *Id.* Where the employer does articulate a legitimate nondiscriminatory reason, the plaintiff may still prevail upon showing that the articulated reason was not the real reason but a pretext for intentional discrimination. *Id.* at 802-03; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

17. 113 S. Ct. 2742 (1993).

heavily on the presumptions and burden shifting of the *McDonnell-Douglas* model of proof.[18] Justice Scalia's opinion in *Hicks* reflects a desire of the Court to enable fact-finders to avoid Type 2 errors. Judge Posner's opinion in *E.E.O.C. v. Consolidated Service Systems*,[19] also cited by Professor Culp in support of his conclusions, reflects the same concern. Both cases give the fact-finder in disparate treatment cases the flexibility to find no discrimination where, in that fact-finders judgment, discrimination does not exist. Neither *Consolidated Service Systems* nor *Hicks*, however, constitutes a major doctrinal shift in Title VII jurisprudence comparable to the Court's recent effort in the disparate impact area. Judge Posner in *Consolidated Service Systems* merely concluded that a disparity between a workforce and a relevant labor market coupled with passive recruitment policies may establish a prima facie impact case, however, disparity alone may not give rise to an inference of intentional discrimination.[20] Despite Judge Posner's dictum bemoaning the horrors of Title VII's application to small ethnically identifiable employers, the case is consistent with established Title VII law.

Justice Scalia in *Hicks* does no more than give the fact-finder the flexibility to disbelieve the presumption that intentional discrimination was the cause of an adverse employment decision, even in the face of a finding that the reason offered by the defendant is false. Critics, Justice Souter and Professor Culp included, have charged that the decision constitutes a reversal of a long line of Title VII precedent.[21] While it may be true that the decision is inconsistent with the often quoted language in *Texas Department of Community Affairs v. Burdine*, describing the pretext stage,[22] I believe the *Hicks* decision is doctrinally consistent with established disparate treatment analysis. If we accept the notion that intentional discrimination is required for a finding of disparate

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18. *See* Culp, *supra* note 2, at 248-50.

19. 989 F.2d 233 (7th Cir. 1993).

20. *Id.* at 236.

21. *Hicks*, 113 S. Ct. at 2761 (Souter, J., dissenting). Justice Souter was joined by Justices White, Blackmun and Stevens in a dissent asserting that "[d]espite the Court's assiduous effort to reinterpret our precedents, it remains clear that today's decision stems from a flat misreading of *Burdine* and ignores the central purpose of the *McDonnell Douglas* framework . . . ." *Id.*

22. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (allowing plaintiff to prove pretext "indirectly by showing that the employer's proffered explanation is unworthy of credence").

treatment, and we understand the *prima facie* case for what it is–an evidentiary trigger for shifting the burden of production to the defendant to come forward with evidence sufficient to have the presumption "drop from the case,"[23] the defendant may have sufficient evidence to meet its burden of production;[24] therefore we must give the fact-finder the opportunity to make the ultimate determination whether intentional discrimination was the cause of the adverse employment decision.[25] Justice Scalia's opinion in *Hicks* was unfortunate in that given the facts in that case, it is difficult to imagine that the adverse employment decision at issue was based on anything other than the plaintiffs' race.[26] Nevertheless, under existing Title VII jurisprudence, it is inappropriate to find a Title VII violation under disparate treatment theory unless the fact-finder concludes that intentional discrimination caused the adverse employment decision.

It is clear that the Supreme Court has recently interpreted Title VII in a way that minimizes its utility as a vehicle for maximizing black employment. In the disparate treatment area, the Court appears to be attempting to limit Title VII to its "antidiscrimination" focus only—treating Title VII as a statute designed only to prevent employers from making employment decisions based on impermissible factors. Using this antidiscrimination focus, the Court in *Hicks* applied Title VII's disparate treatment model in a way that expands the fact-finder's flexibility in determining whether intentional discrimination occurred in a given situation. This development should be distinguished, however, from the Court's treatment of disparate impact theory. As noted above, the Court's modification of disparate impact theory grew out of a concern

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23. *Id.*; United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

24. The defendant must articulate a legitimate nondiscriminatory reason. *Burdine*, 450 U.S. at 254-55.

25. *Aikins*, 460 U.S. at 715.

26. The district court implied that the adverse employment decision was based on personal animosity rather than racial discrimination. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993). Nevertheless the alleged discriminating official testified that there was no personal animosity between himself and the plaintiff. 113 S. Ct. at 276 (Souter, J., dissenting). I suppose that the district court found that the official was lying when he articulated his legitimate nondiscriminatory reason, *and* he was lying when he asserted that there was no personal animosity. In the face of these lies, it is difficult to see how, or more importantly why, the district court believed a legitimate nondiscriminatory reason existed.

that employers might adopt unlawful preferential hiring practices to avoid the cost of defending a disparate impact action. This yielding to threats of unlawful responsive discrimination as a justification for a major modification to established antidiscrimination law is a cause for much concern.[27] The Court's effort in *Hicks* to refine disparate treatment theory in an attempt to ensure that the fact-finder is not unduly bound by the *McDonnell-Douglas* presumptions raises different issues.

The Court's effort to refine disparate treatment theory may, as Culp suggests, grow out of a desire to avoid Type 2 errors and will undoubtedly make it more difficult for plaintiffs to prevail. Nevertheless, this refinement does not represent the kind of wholesale shift in civil rights jurisprudence that the modifications to disparate impact theory entail. The Court's modification of impact theory in *Wards Cove* can be seen as an attempt to reverse 25 years of precedent largely in response to employer assertions that instead of complying with the law, they will engage in preferential hiring to avoid liability. The Court's refinement of disparate treatment theory in *Hicks* can reasonably be seen as a mere fine tuning of existing precedent in order to avoid erroneous findings of discrimination.[28] The *Hicks* decision seems to be an effort to ensure that Title VII is confined to its original narrow antidiscrimination focus. The *Watson* and *Atonio* decisions sought to redefine the concept of unlawful employment discrimination.[29] While both developments, absent Congressional action, have the effect of hampering a plaintiff's chances of successfully proving discrimination, enhancing the likelihood of Type 1 error and minimizing the likelihood of Type 2 error, they do not grow out of the same concerns and do not necessarily call for the same response.

Professor Culp would like to see Title VII have a far greater impact on the American workplace than it has had in the past. Culp recognizes

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27. The Court's modification of disparate impact theory in *Antonio* has been largely addressed by Congress through its reaffirmation of the *Griggs* standard in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. How one can be assured that the courts do not modify established law due to threats that absent modification the law will serve as an incentive for other violations is a subject beyond the scope of this paper.

28. While some of the language in *Hicks, Consolidated Service Systems,* and other cases may reflect a lack of appreciation on the part of some judges for the social and policy goals that proponents of vigorous Title VII enforcement seek to advance, the decisions themselves are not so ominous as to justify precipitous modifications to the Title VII enforcement mechanism.

29. *See* Michael A. Middleton, *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?,* 42 OKLA. L. REV. 187, 223-35, 239-41 (1989).

that the economic status of African-Americans as a group has not changed dramatically in the 30 years since the passage of Title VII. Consequently, he suggests that Title VII should be interpreted in a manner that operates to maximize the employment of African-Americans. He would adopt broad goal-oriented legal theories that would operate to impose a sanction on employers who fail to employ "a certain percentage of black workers."[30] In Professor Culp's view, "antidiscrimination policy attempts to . . . tell employers that if they meet appropriate standards, they will not be responsible for paying discrimination claims."[31] He sets as the primary goal of his reform proposal an increase in the number of black employees hired, and advocates "a program that gives employers the proper incentive to hire black workers and not to balance that hiring with litigation expenses."[32] The proper incentive, in his view, is to retain Title VII's sanctions, but to reduce the costs associated with getting to the sanction point.[33]

Because he views the Court as overly concerned with avoiding Type 2 errors and unconcerned with avoiding Type 1 errors, he has concluded that "we are unlikely to be freed by interpretations of the Court."[34] Therefore, in addition to modifying substantive Title VII law, he proposes adjudicating Title VII claims outside of the Article III Courts. His specific proposal involves two basic components. First, he would alter the Equal Employment Opportunity Commission so that it functions similarly to the National Labor Relations Board in that claims would be investigated and prosecuted by the agency's General Counsel and adjudicated before administrative law judges. Second, he would adopt the "bottom line" defense which was rejected by the Court in *Teal*. Moreover, he would repeal *Hicks* through legislation requiring that the real reasons for adverse employment decisions be put forward by defendants in disparate treatment cases. These changes, Culp suggests, "improve the incentives we give to employers to deal with, hire, and promote black men and women."[35]

I agree that the present state of affairs for African-Americans might well justify a national program or policy dedicated to the maximization of

30. Culp, *supra* note 2, at 255-56.

31. *Id.* at 257.

32. *Id.* at 260.

33. *Id.* This in itself seems a *non sequitur* since historically under Title VII, the cost was the sanction.

34. *Id.* at 254 (citing GIRADEAU SPANN, RACE AND THE COURTS (1992)).

35. *Id.* at 262.

black employment. My difficulty with Professor Culp's proposal is that I question whether it is feasible or advisable to attempt an expansive interpretation of Title VII, beyond its antidiscrimination focus, in order to make it the primary mechanism for accomplishing that result.[36] Moreover, even if I were willing to concede that Title VII interpretation should be driven by the anticipated collateral consequences of its enforcement rather than a strict adherence to non-discrimination principles, I would question whether Professor Culp's reform proposals would accomplish the goals he has set.

In saddling Title VII with the responsibility for significantly increasing the employment of African-Americans, rather than providing remedies for the denial of equal employment opportunity, Culp sets Title VII up for failure. Clearly Title VII has not achieved, and was not designed to achieve, full employment of blacks.[37] In establishing broad economic goals for Title VII, Culp simultaneously establishes its failure and, having done so, submits a "modest reform proposal" that he asserts will accomplish his goals.[38] There is no doubt that the existing Title VII enforcement mechanism could be improved. A number of commentators have made thoughtful and constructive proposals for change that deserve serious consideration.[39] These proposals have recognized the utility of the current enforcement model and offer modifications designed to make it more efficient and effective. My fear regarding Professor Culp's proposals is that they fundamentally alter the existing enforcement mechanism, thus reducing Title VII's effectiveness in enforcing its

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36. Few would disagree that a fundamental goal of Title VII is to improve the economic position of African-Americans or that Title VII's design was to accomplish that goal through strict enforcement of the antidiscrimination principle. *See, e.g.*, Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C. L. REV. 531 (1981); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

37. Culp, *supra* note 2, at 256.

38. *Id.* at 260.

39. *See, e.g.*, Leroy D. Clark, *The Law and Economics of Racial Discrimination in Employment by David A. Strauss*, 79 GEO. L.J. 1695 (1991); Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659 (1991); Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223 (1990); David L. Rose, *Twenty-five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121 (1989).

antidiscrimination mandate, while only potentially serving the broad economic goals intended.

I believe that Professor Culp has fallen into much the same trap that the Court has fallen into, particularly in connection with his treatment of disparate impact analysis. Both Culp and the Court apply an economic analysis to what is fundamentally a justice issue, and thereby attempt to answer questions of fundamental justice on the basis of the expected reaction of the parties affected by the decision. Culp recognizes the trap in his suggestion that federal judges have altered Title VII into legislation less concerned with justice and more concerned with minimizing the costs imposed on employers for not hiring black individuals.[40] Ironically, while Culp recognizes that Title VII deals fundamentally with questions of justice and faults it for having failed to operate in a manner that advances his broader policy goals, he, much like the federal judges he criticizes, proposes reform that reduces its concern for justice and seeks to minimize the costs imposed on employers. While this type of outcome based approach to the development of legal principle may work to advance some short term interests, my view is that consistency and clarity of principle must control when dealing with the fundamental justice issues involved in Title VII interpretation. This is particularly so in light of the need to generate the supportive political coalitions that are so important to the success of any reform effort.[41] Any interpretation of an antidiscrimination statute that suggests a sanctioning of discrimination in any form will result in a loss of support for that statute and its goals. One need only reflect on the public mischaracterization of affirmative action programs as "reverse discrimination" to understand the difficulty that we have in speaking of non-discrimination and affirmative action in the same breath.

The Court, in an attempt to avoid what it perceives as the adverse consequences of Title VII enforcement—the threat by employers to use quotas as a means of avoiding the high cost of defense—has attempted to utilize Title VII analysis as an incentive to prevent employers from carrying out the threatened use of quotas. Professor Culp, focusing on the broad economic goals he sets for Title VII, wishes to use it not as an antidiscrimination statute, but as an incentive for hiring more African-Americans. Professor Culp and the courts seem to be at opposite ends of what I believe to be the same inappropriate law-and-economics model. In

40. Culp, *supra* note 2, at 258 n.51.
41. *Id.* at 260.

my view, racial discrimination in employment is a fundamental injustice that in only the most limited of circumstances can be justified.[42] Any interpretation of Title VII or any modification to its enforcement mechanism that operates to undermine its effectiveness in identifying such discrimination is unacceptable.

I fear that Professor Culp's call for a revision of *Connecticut v. Teal* to establish the bottom line as a defense[43] is inconsistent with the antidiscrimination principal. It is also dangerous in the sense that by encouraging employers to engage in what inevitably will be perceived as inappropriate discriminatory hiring, it will regenerate a strong coalition in opposition. Moreover, as already noted, the bottom line defense does nothing to advance the interests of those who were excluded by a discriminatory device that has been insulated through the creation of an appropriate bottom line.

Professor Culp's proposal that *Hicks* be repealed is reasonable. To the extent that the *Hicks* decision can be viewed as encouraging employers to offer fabricated reasons for disparate treatment, it should be legislatively modified—not because the decision is wrong, but because the decision impedes the process of finding the truth.

Culp's proposal that the Equal Employment Opportunity Commission be altered to take on functions similar to the National Labor Relations Board poses the most serious problems. I fear that this proposal will result in the institutionalization of a "claims adjustment" approach to Title VII enforcement. The proposal may well reduce the cost to employers of defending discrimination claims and will surely reduce the burden on the federal courts of adjudicating those claims. Nevertheless, an administrative enforcement process, that denies the charging party the opportunity to independently file their complaint, places too much control in the hands of an administrative agency. This agency is at least as subject to political influence as are the federal courts, which Culp has concluded cannot be trusted to dispense justice impartially. Whether such an administrative mechanism will do anything in terms of enhancing a plaintiff's chances of avoiding Type 1 errors, or encouraging employers to employ more African-Americans, is highly speculative. The administrative mechanism employed by the NLRB has been subject

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42. *See, e.g.*, Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987).

43. Culp, *supra* note 2, at 262.

to harsh and legitimate criticism which makes replication of that process a questionable venture at best.[44]

CONCLUSION

Individual cases of employment discrimination, no matter how small, reflect the evil that Congress intended to eliminate through the passage of the Civil Rights Act of 1964. That evil is the consideration of race in employment decision making to the detriment of employees and potential employees. Because of the societal discord generated by race-based decision making, these cases should be given the highest priority in the judicial system. While it may be appropriate to delegate some classes of cases to an administrative process, the implications of race-based decision making and racial subordination in this country are so significant that the strongest signal must be sent both to wrongdoers and the general public that such conduct will not be tolerated. In my view, it is critical that the signal sent be one grounded in a fair and just application of sound antidiscrimination principles.

There is indeed much to be said about the permanence of racism in American life,[45] but there is much more to be said about the importance of the struggle against it.[46] We should not accept that racial discrimination will occur in the American workplace, set up an administrative process to manage it, and consider our jobs completed. We should reject all forms of unjustifiable discrimination, develop an analysis and an enforcement mechanism that is structured both to ensure impartial fact-finding and provide the sanctioner sufficient information to make the difficult determination of whether illegal discrimination exists. Finally, we should make such findings of fact in a forum that has the power to effect meaningful remedies.

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44. *See, e.g.*, Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992).

45. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 47-64 (1992).

46. *Id.* at 195-200.