BOOK REVIEW

Governing the Workplace: The Future of Labor and Employment Law

Paul C. Weiler*

Cambridge, Mass.: Harvard University Press, 1990

Reviewed by Marc Linder**

At the height of the first Reagan administration's antiunion campaign, Paul Weiler published two long and critical articles in the Harvard Law Review,[1] in effect briefing labor's complaints against the biased and dysfunctional structure and operation of the National Labor Relations Act (NLRA). He lent fresh authority to a coalescing sense of discontent with the state of labor-management relations in the United States. Now, some half-dozen years later, with the publication of his first book for a general American audience,[2] Weiler has signaled a partial retreat.

Weiler's ambiguous and ambivalent position is in large part a function of his decision to structure his book as a response to what he views as "the fundamental challenge to . . . labor and employment law" posed by the law and economics movement (vii). This "coherent and powerful" doctrine, Weiler admonishes his allies, "should awaken liberal reformers from a rather dogmatic slumber" (63). Such proponents as Richard Epstein and Richard Posner have inspired Weiler to reconsider the virtues of an unfettered labor market (vii, 63).[3] And although Weiler has by no means

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1. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769 (1983); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351 (1984).

2. Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law (1990). All parenthetical page references are to the book under review.

3. In referring to "the comparative advantages of the market" (vii), Weiler misuses a technical economic term: "Comparative advantage" has, from Ricardo to present-day elementary textbooks, been used to justify specialization and exchange between countries (or persons), one of which has an absolute advantage over the other in the production of two commodities (or services), but which is more effi-

awakened as an advocate of laissez-faire in the labor market,[4] he is willing to make concessions. Thus, the claim that "market incentives . . . place significant restraints on management's personnel policies is much more plausible than is commonly conceded by the left-liberal critique of the exercise of corporate power over the worker" (18). But because the impact of economic incentives within the labor market is subject to significant limits, Weiler deems exclusive reliance on it "unwise public policy" (19).

Weiler formulates reform proposals for three principal areas of labor law: first, wrongful dismissal (48-104); second, the NLRA (225-81); and third, a new statutory right guaranteeing "a basic level of internal participation in a specified range of decisions" in all firms (282-98). The first is a moderate suggestion designed to accommodate employers' objections and the efficiencies of "the unregulated labor market," which "[e]ven granted its shortcomings . . . provides a good deal more protection to workers than is popularly supposed" (95). The complex of proposals amending the NLRA, largely distilled from his earlier publications,[5] combines antipaternalistic deregulation of the representation process (113),[6] incisive removal of the encrustations of decades of pro-employer rulings by the Supreme Court[7] and the National Labor Relations Board, and rejection of further-reaching provisions enacted in Canada. The proposed statutory participation, ahistorically modelled on the postwar (West) German works councils, would reinforce the latter's weaknesses in the American context.

Weiler's ambivalent stance on wrongful dismissal legislation largely rests on his view that the burden that litigation imposes on employers is not balanced by benefits that accrue to plaintiff-employees (81-82, 101). Weiler advocates tort litigation without

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cient in one than the other. For a brief critique, see Guy Routh, The Origin of Economic Ideas 118-20 (1977). Weiler pleonastically uses the term repeatedly (e.g., 2, 28) to mean an ordinary advantage, which is inherently comparative.

4. Perhaps the most powerful nineteenth-century condemnation of laissez-faire stemmed from—of all people—Samuel Smiles, who characterized it as " 'Let wretchedness do its work; do not interfere with death.' " H. Scott Gordon, *The Ideology of Laissez-Faire*, in The Classical Economists and Economic Policy 180, 184 (A. Coats ed. 1971).

5. *See supra* note 1.

6. Weiler agrees with Judge Posner and the Reagan-era National Labor Relations Board concerning the need to dismantle regulation of employer speech (274 n.60) and of union access to employees (242-43).

7. Weiler, for example, trenchantly criticizes a unanimous Supreme Court decision that a union may not spend nonmembers' dues on organizing new workers because that activity was insufficiently connected to representing bargaining unit members (277 n.64). Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, 466 U.S. 435 (1984).

capped awards for dismissals for bad cause—or at least those causes "that contravene public policy in the stronger sense" (100).

> But if one wants to penetrate more deeply into the employment relationship and establish an employee right to be fired only for good and sufficient reason . . . there are real grounds for concern that enforcing such a right in the courts may do more harm to the employer (and thence to the general economy) than good for its individual beneficiaries (82-83).

Even if the free-marketeer claim is plausible, that employers would not fire employees for no reason because such nonrational behavior would harm the firm (59), employers still (reasonably) object to wrongful dismissal statutes because juries would second-guess their decisions, thus leading to inefficient defensive employer practices (60, 157).[8]

This limited character of Weiler's engagement is most poignantly reflected in the fact that he rejects an at-will regime only to the extent that it defeats the vested rights of long-term employees: "[A]s modern employment has evolved from a casual to a career relationship between worker and firm,[9] the traditional at-will legal concept has become morally untenable" (68).[10] But with regard to the bulk of the work force, who never secure a twenty-year position[11] (and who presumably are largely the lowest paid and unor-

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8. For a strong statement of the position that "[w]hile the promise to terminate employment only for cause includes the right to have the employer's decision reviewed, it does not include the right to be discharged only with the concurrence of the communal judgment of the jury," see Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 896 (Mich. 1980).

9. For evidence that even in the nineteenth century many employees worked for long periods for the same employer, see Susan Carter, *The Changing Importance of Lifetime Jobs, 1892-1978*, 27 Indus. Rel. 287 (1988); Susan Carter and Elizabeth Savoca, *Labor Mobility and Lengthy Jobs in Nineteenth-Century America*, 50 J. Econ. Hist. 1 (1990). The nineteenth-century data, which are very thin—being restricted to one year in one city—, suggest that the share of the oldest cohort of the native-born male labor force that worked twenty years or more for the same employer was somewhat more than half as great as the current level.

10. For an early statement of the life-tenure position, see Frederic Meyers, Ownership of Jobs 6-7, 15 (1964).

11. In 1981, of the race-sex-age cohort with the longest job tenure, white men 55 to 64 years old, 39.9% had been in their " 'present job or business' " at least 20 years. U.S. Bureau of Labor Statistics, Bulletin 2161 Job Tenure and Occupational Change, 1981, at 1 n.1, and at 16 table B-2 (1983). The corresponding length of tenure for women is only half that for men. In 1983, 44.7% of all men aged 55 to 64 had been working 20 years or more continuously with their then employer. Ellen Sehgal, *Occupational Mobility and Job Tenure in 1983*, Monthly Lab. Rev., Oct. 1984, at 18, table 1 at 19. By 1987, this figure had declined to 42.2%, although the corresponding figure for men 65 years and older rose slightly. *See* U.S. Bureau of Labor Statistics, News Release 87-452, table 4 (Oct. 22, 1987). For the purposes of Weiler's discussion, these figures are inflated because they include the self-employed, who have above-average lengths of tenure. Thus in 1987, 18.7% of self-employed males reported having been self-employed continually for 20 years or more, while only 11.5% of wage and salary workers had been working continually for

ganized) (63, 141),[12] Weiler is receptive to Epstein's argument that their best friend is competition among employers for their labor. Weiler therefore appears unconcerned with the effects of labor-market failures on such workers, who do not have the luxury of choices because of oligopsony at their end of the labor market.[13]

Weiler prefers to focus his analysis on an aspect of the uniqueness of the labor market that is precisely the opposite of that facing the most fungible workers[14]—namely, that the employee cannot diversify her risk by working for different employers

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twenty years or more with their current employer. Calculated according to data in U.S. Bureau of Labor Statistics, Job Tenure, at 10, table 3, 12 (1987) (unpublished data made available by BLS).

12. Long-tenure jobs, however, "are not necessarily good jobs in any absolute sense." Robert E. Hall, *The Importance of Lifetime Jobs in the U.S. Economy*, 72 Am. Econ. Rev. 716, 720 (1982). This lack of correlation is suggested by the fact that black men exhibit only a marginally lower length of tenure. *See id.* at 722-23; Bulletin 2161, *supra* note 11, at 16 table B-2. A further indicator of the skewed distribution of tenure is the fact that, in 1987, 16.2% of all male managerial, executive, and professional employees of all ages had worked for the same employer for 20 years or more compared with only 5.6% of male handlers, equipment cleaners, helpers, and laborers, and 6.0% of male service workers. Calculated according to data in Bulletin 2161, *supra* note 11, at 4-5 table 2. For a description, from the 1950s, contrasting the lifetime tenure of executives with the transiency of semi-skilled employees at a large corporation, see Theodore Caplow, The Sociology of Work 87 (1964 [1954]). If, in fact, significant numbers of workers fear losing long-term jobs not because of the loss of seniority-rooted benefits, but for the same reasons that burden all fungible unskilled and low-paid workers, the empirical basis of Weiler's position would be weakened. Whether such a result would bring him closer to Epstein's position is unclear. *See* Robert Hall, *Employment Fluctuations and Wage Rigidity*, 91, 101-02 (Brookings Papers on Economic Activity, No. 1, 1980).

13. *See* Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. Legis. 151, 165-66 (1990). One hundred fifty years ago, Mill was more attentive to this kind of vulnerability:

> [W]hen the supply of labour so far exceeds the demand that to find employment at all is an uncertainty, and to be offered it on any terms a favour . . . [d]esirable labourers . . . can still exercise a choice. The undesirable must take what they can get. The more revolting the occupation, the more certain it is to receive the minimum of remuneration, because it devolves on the most helpless and degraded, on those who from squalid poverty, or from want of skill and education, are rejected from all other employments.

2 John Stuart Mill, Collected Works: Principles of Political Economy 383 (J. Robson ed. 1965). Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. Chi. L. Rev. 947, 968 (1984), whose reasoning impresses Weiler, offers this undifferentiated picture of choice:

> If coworkers perceive the dismissal as arbitrary, they will take fresh stock of their own prospects, for they can no longer be certain that their faithful performance will ensure their security and advancement. . . . Inferior employers will be at a perpetual competitive disadvantage with enlightened ones and will continue to lose in market share. . . .

14. *See, e.g.*, David M. Beatty, *Labour is Not a Commodity*, in Studies in Contract Law 313 (B. Reiter & J. Swan eds. 1980).

(142).[15] Weiler accepts the plausibility of the market-knows-best claim that employees in the labor market occupy an analogous position to consumers in the sense that the presence of other employers bidding for their services is a more effective source of protection than a union (18, 162-63). But because he emphasizes the golden cage of nonportable seniority-rooted benefits into which the employee becomes locked and which reduce her bargaining power because she fears their loss, Weiler argues, against law-and-economics proponents, that the firm's power over the employee is greater than that over a consumer (21-22, 64-67, 76).[16]

Weiler relates the law-and-economics view that employers need freedom to fire for good reason—"that is, because an employee has not been meeting the minimum standards of performance and behavior required for the productive operation of the enterprise"—if the labor market is to operate efficiently; such discretion has nothing to do with "capitalist domination or management hierarchy"—even worker-owned firms require it (59). Weiler affords some indirect support for this view by expressing concern that productivity and wages would decline if workers spent working time governing their workplace (177-78). Reluctantly, he accepts contract-based private rights of action, provided that judges do not go overboard in transforming expectations of tenure for good behavior into rigid barriers against at-will employment through "a mandatory, nonwaivable, and open-ended requirement of employer good faith in termination actions" (101).[17]

Weiler appears to honor the employer's (or the market's) definition of appropriate on-the-job conduct by workers. He also re-

15. Simon Rottenberg, *Property in Work*, 15 Indus. & Lab. Rel. Rev. 402, 405 (1962), anticipated Richard Epstein by arguing that workers can protect themselves against the obsolescence of their labor as readily as manufacturing firms can hedge against declining product markets by diversifying their skills. For non-long-term employees, perversely, Weiler might well accept the force of such a position. The unreality of the pro-free-labor-market position was underscored at the turn of the century by critics of the judicial and economic view that the hazardousness of various employments was adequately reflected in existing wage rates. *See, e.g.*, E. H. Downey, History of Work Accident Indemnity in Iowa 76-77 (1912).

16. For a more precise statement of the difference in authority between consumer and employment relationships, which does not rely on seniority benefits but which blinks at conceptualizing authority in an employment relationship in the absence of capital, see Oliver Hart and John Moore, *Property Rights and the Nature of the Firm*, 98 J. Pol. Econ. 1119, 1150 & n.29 (1990).

17. Weiler applauds the Montana Wrongful Discharge From Employment Act of 1987 for capping awards and excluding reinstatement in the nonunion firm, but pleads for attorney fees for prevailing plaintiffs (96-97, 85-87). For a devastating attack on the statute for cutting back on already existing common-law remedies, see Meech v. Hillhaven West, Inc., 776 P.2d 488, 507-17 (Mont. 1989) (Sheehy, J., dissenting).

jects, on efficiency grounds, detailed involvement by workers themselves or intervention by the community in the form of judges and juries. It is unclear, consequently, what sort of political-economic democratization Weiler believes his proposal might promote.[18] Weiler's ambivalence regarding wrongful dismissal statutes and litigation may also be a function of his general skepticism about the efficacy of legislative or judicial action that must ultimately be enforced on a day-to-day basis by the affected workers themselves. But whereas other observers of this potentially weak link have focused on the disparity of resources between employers and employees,[19] Weiler emphasizes the disparity among workers (28). Moreover, because the new model of employee involvement and union cooperation that he is propagating presupposes a qualitatively higher level of mutual trust (36)[20] and the sort of local flexibility (69) that will overcome employers' traditional objections to legislative standards (27), Weiler's position implicates a de-emphasis of litigation with its adverse impact on harmonious relations.[21]

That Weiler offers even halfhearted support for wrongful dismissal statutes is ultimately dictated by his view of the unique imperfections of the labor market, which make it very hard for jobshoppers to secure adequate information ex ante concerning the comparative risks of unfair dismissal; in consumer markets, by way of contrast, a small critical mass of comparison shoppers generates satisfactory market controls (74). Yet despite the fact that this defect weighs most heavily on the most vulnerable workers, Weiler would restrict coverage to the "long-service employee" (95), excluding "still mobile employees who invested a relatively short

18. In referring to Robert Dahl as a supporter of worker control, Weiler asserts that "a necessary precondition to such a political position is the evidence and analysis from contemporary labor economics on the nature and significance of the career employment relationship" (174 n.85). Dahl, offering a much broader critique of capitalism as an undemocratic system, does not condition worker control as does Weiler. *See* Robert Dahl, A Preface to Economic Democracy (1985).

19. "Capitalist law cannot break the dependence of rightholders when it is founded on conditions existing outside of the law: the dependence . . . of workers on the market, on their own limited capacities, funds, and mobility, on their employers, and their unions and works-councils." Inga Markovits, *Pursuing One's Rights Under Socialism*, 38 Stan. L. Rev. 689, 757 (1986).

20. Weiler presumes that many workers will prefer independent but not "antagonistic" representation (211).

21. While capitalist law . . . may provide only limited redress for losses, the confrontation and contrariness it reflects may invite people to try to take control of their own lives. But it can come as no surprise that this kind of law, which reaffirms plaintiffs in their confrontation with opponents, is of no use in establishing mutual cooperation and trust.

Markovits, *supra* note 19, at 758.

period of service with their employer" (102).[22]

Weiler reports the market-knows-best argument that a better way of dealing with problems of at-will employment would be implementation of a policy of full employment "that would make it easy for the worker dismissed from one job to find another quickly" (62). But he rejects this notion of job fungibility because "the job rather than the state has become the source of the social safety net on which people must rely when they are not employed" (3). Ironically, then, Weiler resists the very kind of important economic change that would bolster workers' ability to threaten their employers with exit[23] and that would do so in such a way as to reduce disparities among workers. Instead of advocating a European-style social wage, Weiler thus reinforces the "feudal" tendency to bind workers to individual firms.[24] And even when he draws attention to permanent layoffs against which few if any firms can protect their employees financially (70),[25] Weiler fails to appreciate the need for a classwide social wage or solidaristic wage policy so that workers' standards of living would be less dependent on the fortuity of where they happen to work.[26]

Weiler's principal proposals for reconstructing the NLRA fo-

22. In this regard Weiler's proposal is even less generous than the current draft of the Uniform Employment Termination Act § 3(b) (Draft Dec. 31, 1990) (exempting employees with less than one year of employment with the same employer).

23. Because capital benefits crucially from the fact that unemployment increases the penalty associated with being fired, it seems counterintuitive that pro-marketeers would advocate "artificially" full employment. On the functionality of unemployment, see Carl Shapiro and Joseph E. Stiglitz, *Equilibrium Unemployment as a Worker Discipline Device*, 74 Am. Econ. Rev. 433 (1984).

24. *See* Arthur M. Ross, *Do We Have a New Industrial Feudalism?*, 48 Am. Econ. Rev. 903 (1958). Ross expressed concern that reduced mobility might have an adverse impact on the efficiency of the labor market. For another early discussion of the causes and effects of immobilization, see Paul F. Brissenden, *Labor Mobility and Employee Benefits*, 6 Lab. L.J. 762 (1955).

25. Weiler overlooks the irony—or perhaps even the fact—that the "theoretical success" of the " 'new economics of personnel,' " which focuses on such practices as career labor markets, "has come just at the time when the facts themselves are changing rapidly—including mass permanent layoffs "eliminating many previously secure jobs." Sanford Jacoby and Daniel Mitchell, *Sticky Stories: Economic Explanations of Employment and Wage Rigidity*, Am. Econ. Rev., May 1990, at 33, 35.

26. *See, e.g.*, Gösta Rehn, *Swedish Active Labor Market Policy: Retrospect and Prospect*, 24 Indus. Rel. 62 (1985); Andrew Martin, *Trade Unions in Sweden: Strategic Responses to Change and Crisis*, in Peter Gourevitch, Andrew Martin, George Ross, Christopher Allen, Stephen Bornstein, and Andrei Markovits, Unions and Economic Crisis: Britain, West Germany, and Sweden, 189, 205-208, 274 (1984) [hereinafter Unions and Economic Crisis]; David Granick, The European Executive 174-75 (1964[1962]). Even when Weiler tentatively broaches the issue of compulsory severance pay in a footnote, he hedges by conceding that such an obligation might deter employers from hiring workers in the first place (102 n.100). He appears to believe that Congress's failure to enact such a provision is a result of drafting problems (154-55) rather than of opposition by employers.

cus on instant elections and enhancement of workers' ability to strike. The former would effectively exclude employers from participation in election campaigns on the grounds that certification of unions by the National Labor Relations Board confers no authority on them over employers (253-61).[27] Weiler hopes to rectify the "serious imbalance" in the legal treatment of the right to strike by readjusting both employers' judicially created entitlement to replace economic strikers permanently with strikebreakers and statutory restrictions on secondary boycotts (261-73). With regard to each he fashions a moderate compromise.

While presenting an incisive challenge to the so-called *Mackay* doctrine (264-68),[28] Weiler does not advocate "cushion[ing] strikers" against the consequences of an employer's actions to defend itself (264).[29] Because he concedes the employer's right to continue to operate during strikes, he also opposes what he sees as the extremism of a Quebec statute that prohibits even temporary strike replacements (265 n.46, 269). The compromise Weiler devises—which is more cautious than a pending congressional bill[30]—would permit strikers to return to work without consequences within six months after a strike begins even if they dislodge replacements (268-69).[31] His approach to secondary boycotts is similar. After demolishing the traditional arguments for protecting secondary employers (271-72), Weiler again settles for compromise. He therefore calls for an expansion of the *Tree Fruits*

27. In exchange for instant elections, Weiler is willing to permit unilateral employer changes in working conditions without bargaining to impasse (258 n.40).

28. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (holding it not an unfair labor practice for employer permanently to replace strikers in order to carry on business)(dictum).

29. It is unclear whether Weiler includes unemployment compensation and food stamps among these cushions.

30. H.R. 3936 and S. 2112, 101st Cong., 2d Sess. (1990), would amend the NLRA to make it an unfair labor practice "to offer, or to grant, the status of a permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute." S.55 and H.R. 5, 102d Cong., 1st Sess. (1991), have reoffered this amendment. On the background to this initiative, which was sparked by the strike replacement practices of the International Paper Co., see H.R. 4552 and the *Issue of Strike Replacements: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. (1988); *Preventing Replacement of Economic Strikers: Hearing Before the Subcomm. on Labor of the Sen. Comm. on Labor and Human Resources on S. 2112*, 101st Cong., 2d Sess. (1990); *Legislative Hearing on H.R. 3936: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 101st Cong., 2d Sess. (1990). For a critique of the *Mackay* doctrine that takes as its starting point the strike as a functional part of collective bargaining, see Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. Ill. L. Rev. 547.

31. Weiler also believes that employers should enjoy an effective means of enforcing no-strike clauses (215).

doctrine[32] to permit the striking union to ask secondary employees to refrain from working only on struck products, but rejects "a general sympathy strike against the entire line of business of the secondary firm" (272).

While unwilling to support a new remedy of first contract arbitration where the employer refuses to bargain with a newly certified union, Weiler does propose a private right of action for employees against employers who deny the employees' right to meaningful collective bargaining (249-51). Weiler also opposes interim injunctions for reinstatement of illegally discharged union sympathizers as too controversial and politically untenable (243-47), although he proposes tort damages for thwarting the right to join a union, which he would assimilate to those for wrongful discharge (247-49).

By means of a provocative thought experiment, Weiler underscores the crucial importance of initial presumptions and inertia within the NLRA: Even if, in the "natural" state, employees started out with representation by a union, which they would have to vote out, formally the employees' freedom of choice would not be affected (114-16). Not only does Weiler "not for a moment suggest" implementation of such a reversal "in order to expand the scope of union representation" (116), but also he offers his "pessimistic judgment" that only if the bone of contention is removed—namely, "hierarchical" unions, which are a red flag to "a good many workers" and employers—can workers secure "meaningful involvement and influence" at work (282). Thus despite the fact that he defends the principle established by the Supreme Court that the NLRA does not require employers to agree to any substantive proposal by a union (231 and 231 n.5), Weiler is prepared to move toward substantive state paternalism by taking away the choice regarding representation from employees and employers and conferring instead a guarantee "as a matter of moral right" of "a basic level of internal participation in a specified range of decisions" in all firms (282-83).

That Weiler hits upon the West German works council as his model is hardly surprising in light of the fact that they "[b]y all accounts . . . have played a valuable role in the evolution of West German human resource policy" (284). They fit, moreover, the other ideological needs of trust, flexibility, and decentralized enterprise unionism (36-37) that he emphasizes throughout. Because

32. NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58 (1964) (approving picketing of retailer designed to encourage consumers to boycott products of primary employer).

labor and capital share a "joint enterprise" constantly at the risk of conflict (4), most employee "concerns" must and should be "solved" within the particular enterprise and industry rather than through broad-ranging statutory programs (161). In his brief account, Weiler neglects the fact that the labor movement in West Germany strenuously opposed the institutionalization of works councils precisely because they represented an effort to conjure up that "fundamental community of interests" (211)[33] propagated by Weiler at the expense of working-class mobilization.[34]

The Employee Participation Committees (EPC) he proposes would have major responsibility for administering safety laws, plant closings, equal employment, and wrongful dismissals, and would receive information and financial support from employers (286-89). Unlike the German works council, however, the EPC would not be entitled to binding arbitration where it did not consent to an employer's action. Weiler rules out this mechanism because an EPC is, after all, designed for employees who do not have and may not want collective bargaining: If workers complain that the EPC would be too weak and timid to impose change on a recalcitrant employer, they can "join a real union" (290). Yet Weiler's argument that unorganized and unrepresented workers cannot enforce statutory protections (159-61) undermines his claim that nonunionized works councils would achieve their aforementioned goals. Thus the circle Weiler hoped to break out of remains intact.

Although Weiler urges reform of certain dysfunctions in the regulation of the operation of the labor market, he reflects the prevailing political and ideological acceptance of the wage-labor or master-servant relationship as such. As intensified international competition becomes paired with a revitalized faith in capitalism as the only plausible social formation under modern economic conditions, the quality of socialization associated with the capital-labor relationship, which prompted vigorous protest in the middle of the nineteenth century, is no longer a subject of discussion.

To work at the bidding and for the profit of another, without

33. On the Nazi roots of the West German labor law doctrine of the plant community, see Marc Linder, The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis 95-137 (1987).

34. *See, e.g.*, 1 Wolfgang Däubler, Das Arbeitsrecht 184-319 (1976); Horst Thum, Mitbestimmung in der Montanindustrie: Der Mythos vom Sieg der Gewerkschaften (1982); Alfred L. Thimm, The False Promise of Codetermination: The Changing Nature of European Workers' Participation (1980); Andrei Markovits and Christopher Allen, Trade Unions and the Economic Crisis: The West German Case, in Unions and Economic Crisis, *supra* note 26, at 89, 95-98, 162-64; Horst Kern and Michael Schumann, Das Ende der Arbeitsteilung? Rationalisierung in der industriellen Produktion: Bestandsaufnahme, Trendbestimmung 117-36, 218-34 (1984).

> any interest in the work—the price of their labour being adjusted by hostile competition, one side demanding as much and the other paying as little as possible—is not, even when wages are high, a satisfactory state for human beings of educated intelligence, who have ceased to think themselves naturally inferior to those whom they serve.[35]

Despite Weiler's forthright stand in favor of creating real bases of power for employees that will underwrite their enhanced participation in the firm (309), his proposals accommodate the latest stage of Taylorism,[36] inasmuch as they are animated by a renewed "appreciat[ion] that labor is a peculiarly challenging factor of production" (3) and are designed to "enable the firm to tap the insights and ingenuity of the work force in improving the efficiency of its operations and the quality of its product in a fast-changing and highly competitive marketplace" (192). Unionization, according to Weiler, is not suited to new knowledge workers, who need a more cooperative model of direct employee involvement "through structures devised by human resource managers, who realize that this is the best way to maximize the firm's investment in its valuable human capital" (206). Apparently oblivious to the notion that "to think of a man as a 'human resource' is to affront his personality,"[37] Weiler lauds firms such as IBM that have pioneered this form of worker participation: "This unfolding pattern in human resource management is a testimonial to the real benefits that the free market can provide to workers" (31-32). Indeed, Weiler goes so far as to suggest that in such "contemporary collegial approaches to production . . . in which the firm seeks . . . to involve all employees in at least some aspect of management," the "conflict of interest" between labor and capital, which "assumedly" exists in the "traditional hierarchical firm," may have

35. 3 John Stuart Mill, Collected Works: Principles of Political Economy 766 n.c. (J. Robson ed. 1965 [1848]). On why Mill deleted this passage from editions after 1849, see Pedro Schwartz, The New Political Economy of J.S. Mill 293 n.38 (1972). Even such a hardheaded Realpolitiker as Max Weber insisted on the vast cultural consequences of the peculiar capitalist form of industrialization. *See* Max Weber, *Methodologische Einleitung für die Erhebungen des Vereins für Sozialpolitik über Auslese und Anpassung (Berufswahl und Berufsschicksal) der Arbeiterschaft der geschlossenen Industrie*, in Max Weber, Gesammelte Aufsätze zur Soziologie und Sozialpolitik 1, 17-18, 46, 60-61 (2d ed. 1988 [1924]) (first published in 1908).

36. On Taylor's system of "scientific management," see Frederick Taylor, The Principles of Scientific Management (1911); Samuel Haber, Efficiency and Uplift: Scientific Management in the Progressive Era 1890-1920 (1973[1964]).

37. Philip Selznick, Law, Society, and Industrial Justice 96 (1969). William Lazonick, Competitive Advantage on the Shop Floor (1990), parallels Weiler's views from a supra-Marxist position of cooperative value-sharing between labor and capital.

become implausible (217).[38]

In mapping out "Alternative Futures for Worker Participation" (186), Weiler specifies that even an advanced Employee Involvement Plan (EIP) "is really a distinctive style of *managing* the work force. The employer devises procedures for learning from its employees and for motivating them in their jobs for the benefit of both" (211). Driven by his priority to rid firms of "the rigid restraints on the sensible operation of individual enterprises" (309) that have been associated with unions, Weiler strongly urges dismantling § 8(a)(2) of the NLRA because it can be interpreted to include EIPs among the prohibited company unions[39]: "I see no reason why our labor laws should . . . send to nonunion employees the message that they can participate in workplace decision-making only if they opt for unionism as well" (47). Weiler takes this position even though he concedes that EIPs for nonunion employees represent "participation without real power" (33). Indeed, he favors legalizing EIPs in nonunion firms—despite the fact that he acknowledges that they are not fundamentally different from pre-NLRA welfare-capitalist employee representation plans (213)—because workers know a company union when they see one (214).

Of worker control that transcends the limits of the human-assets-management approach, Weiler appears skeptical.[40] To begin with, he states that statutory recognition of workers' right to vote directly on such "key strategic decisions . . . is not a viable possibility in a political economy based on fundamental premises . . . antithetical to the idea of worker control" (173). The possibility of any such democratic transformation, however, is rejected once Weiler

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38. Because Weiler's pragmatism is irreconcilable with existentialist romanticism, he cannot wrap himself in the plasticity that Unger detects in the neo-Taylorist silver lining:

> An American manager in the late twentieth century . . . may think that he can get his workers to produce more willingly and effectively if he opens up opportunities for more independent teamwork in the production process. He may see such experiments as innovations that represent no real threat to the distribution of power and profit. He may also be moved by ideas that underline the horrors of unmediated personal subjection and the lure of pseudointimacy. Once in place, these modest reforms may serve as points of departure for conflicts and inventions that not only unsettle established social arrangements but enable people to imagine untried ways of working and living together. Such discoveries highlight the gap between humanitarian delicacy or bureaucratic impersonality and civic engagement and equality.

Roberto Mangabeira Unger, False Necessity 113-14 (1987).

39. *See, e.g.*, Donna Sockell, *The Legality of Employee-Participation Programs in Unionized Firms*, 37 Indus. & Lab. Rel. Rev. 541, 549 (1984).

40. Weiler gives low priority to employee representation on corporate boards because it would make little difference until an organized employee base exists in the firm (297).

characterizes these "obstacles" as "enduring and neutral values of the American political economy" (228) and "attractive features of the overall legal regime"—namely, respect for free speech and free markets, "deference to managerial judgments about the selection and assignment of personnel and the operations of the firm" (241), and the laws of property, inheritance, and incorporation (263). He worries, moreover, about the conflict between consumers, who prefer lower prices and faster service, and workers, who want a more leisurely pace of work (178). Weiler fails to see that most consumers are also workers and that such tradeoff decisions should be made macrosocietally and not only by plant-egotistical workers (whether they be worker-owners or works councillors) or egotistical consumers. Weiler also overlooks the fact that worker control as an enclave in a capitalist economy is bound to reproduce plant-egotism even though he (misleadingly) analogizes workers' structural dominance to the present "tilt" toward shareholders vis-à-vis a firm's other "constituencies" (180).

Although Weiler cites public opinion poll data showing strong support for unions as institutions of collective defense against exploitation by employers (299-300), he urges packaging his reform proposals as protecting "individual workers" with long-term service (301). Because "more and more firms . . . now feel a strong need for worker autonomy" (46), Weiler envisions an alliance with them and with those whose employees' human capital is more expensive and indispensable to them than the firms' own physical and financial capital (32). Weiler also pitches his political appeal to political leaders, whose support he anticipates as soon as the macroeconomic benefits of labor reform become visible (311).

This class-unconscious public relations approach finds its counterpart on the analytical level, where Weiler fails to operate with a concept of class or class conflict. A faint recognition of class relations can be gleaned in two discussions of authority within the firm, which are curious and mutually contradictory. In the first, Weiler argues that, although employees and shareholders could share the advantages accruing from contractual agreements concerning unfair dismissal, the cost would be borne by managers, who "would lose the felt benefit . . . from wielding unreviewable power over their subordinates" (77). Here Weiler hypostatizes a "phenomenon . . . much more easily explained by certain elementary facts of human psychology" than by any plausible description of rational market behavior (77).[41] Although even economic prin-

41. By the same token, Weiler neglects the fact that certain methods of managerial general deterrence (disciplining some in order to discourage the others) may

cipals have been known to cut off their noses to spite their faces, Weiler appears not to notice that such non-profit-oriented vigilante activity by agents refutes the law-and-economics claim—which he accepts—that the market gives employers the incentive not to abuse their power. Later Weiler reminds himself of and reaffirms this position: "One does not have to assume that the managers' exercise of authority will be ideal in every respect to conclude that it is certainly better than . . . the government. Lodging essentially unilateral control in management is *not* a recipe for exploitation of workers" (162).

Weiler can arrive at this opposite conclusion precisely because of his belief that where senior managers are insulated from shareholders, they can consider claims of other stakeholders, including employees. Indeed, even under the alternative EIP model, management would remain the "monitor and mediator of all the competing constituencies of the firm," with ultimate authority to devise the employment package (192). Weiler himself blinks at his bold transmogrification of management, finally admitting that managers have limited empathy and altruism because in deciding how much of the firm's resources will be expended on the work force, they are subject to "the basic conflict of interest between labor and either consumers or capital," which they mediate but not as neutral arbiters (164). Yet even when he touches on the most profound class antagonisms of material distribution, Weiler remains so tentative that he fails to see that this "war is what labour law is largely about . . . what a good deal of politics is about":[42] "Perhaps, though, there is in fact an inherent conflict of interest between the employees and the other constituencies of the enterprise about precisely where to draw the line between work and leisure, investment and consumption, hierarchy and collegiality" (211).

The question that lurks in the background of Weiler's book—the reason for the decline during the last twenty years of the modicum of political-economic power that the working class had ever been able to mobilize in the United States[43]—remains unresolved.[44] His reform proposals, built on superficial class com-

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only seem to be irrational. *See* Marc Linder, *Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to "Law and Economics" Agency Doctrine*, 15 N.Y.U. Rev. L. & Soc. Change 435, 461-68 (1986-87).

42. Otto Kahn-Freund, Labour and the Law 16 (2d ed. 1977).

43. *See, e.g.*, Kim Moody, An Injury to All: The Decline of American Unionism (1988).

44. Dogmatic Marxist approaches, such as Michael Goldfield, The Decline of Organized Labor in the United States (1987), also fail to advance the debate.

promises, appear unlikely to revivify the workers' movement. Appropriately, then, the fact that such a pragmatic[45] and mainstream[46] observer's criticisms and reform proposals sound radical and are concededly incapable of political adoption[47] is perhaps a more powerful commentary on the current state of capital-labor relations and labor law than the book itself.

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45. "I have always believed that in analyzing policy problems one should be wary of sweeping analytical generalizations, whether they are drawn from economic or philosophical theory" (133). *See also id.* at 227-28.

46. *See* Paul Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 Ohio St. L.J. 825 (1989) (author is chief reporter for American Law Institute's Project on Compensation and Liability for Process and Product Liability).

47. For an example of hostility by employers to reform of the NLRA, see Robert Thompson, *An Anti-Worker Labor Bill*, Wall St. J., Aug. 31, 1990, at A10, col. 4. Weiler himself acknowledges that his "somewhat farther-reaching ideas" would be intensely opposed by employers (300) and have no chance of being approved by President Bush or surviving a veto (302). Yet he takes comfort from the contribution that intellectuals made toward enlightening the public regarding tax reform (310). It is unclear whether Weiler has reflected on the potential analogy between the ultimate redistributive effects of tax reform of the 1980s and those of his labor reform proposals.

Shelby Steele and the Subtext of Our Developing Civil Rights Laws

Roy L. Brooks*

I.

Judges are sometimes influenced in their judicial decisions by the things they read off the bench as much as by the things they read on the bench. This may be especially true in civil rights cases, where the subtext of the cases is too complex and too "non-legal" to be adequately treated in briefs, during oral arguments, or in a footnote to an opinion. Reading Shelby Steele's book, *The Content of Our Character: A New Vision of Race in America*,[1] which has been widely praised in the media, judges can easily come to the conclusion that the Supreme Court's current approach to civil rights — generally one of retrenchment — is the proper way to go.[2]

In *The Content of Our Character*, Shelby Steele attempts to explain why so many African Americans are worse off today than they were prior to the civil rights triumphs of the 1960s. His explanation meanders but is essentially a psychological one: More than racism or discrimination, African Americans suffer from what Mr. Steele calls "inferiority anxiety," i.e., self-doubt and a fear of competing with white Americans. While advancing this argument, Mr. Steele manages to denigrate just about everything sacred to African Americans: their heroes and leaders; African American self-help, identity, pride, culture, and soul; affirmative action; and even the use of the term "African American" as a self-describing nomenclature.[3] I shall, however, address only his central argument in this article.

Slavery and Jim Crow, according to Mr. Steele, have given African Americans a powerful sense of ambivalence about their abilities. This fear of failure was heightened when the racial climate changed from segregation to integration in the 1960s, requir-

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* Yale University Law School, 1975, © Roy L. Brooks Professor of Law, University of Mn Law School.

1. Shelby Steele, The Content of Our Character (1990).

2. For a discussion of different models of judicial decision making, see Roy L. Brooks, Rethinking the American Race Problem 31-32, 183-84 (1990).

3. *See, e.g.*, Steele, *supra* note 1, at 47, 55, 62, 63, 68-70, 108-9, 113-25, 156-57.

ing African Americans to compete toe-to-toe with whites. Thus, since the 1960s, African Americans have been experiencing "[i]ntegration shock (those shocks of racial doubt that come to blacks in integrated situations)."[4]

Rather than jettison this self-defeating self-perception, African Americans have consciously or unconsciously repressed it. They have buried it in racial identity, pride, and culture. Until inner doubt is exposed for what it is, until its racial pretexts are torn down, African Americans will, according to Mr. Steele, continue to hold back effort and avoid opportunities. And they will go on blaming their problems on white racism. Thus, Mr. Steele is able to characterize "black identity, painted in the colors of pride and culture" as "a repressive identity that generates a victimized self-image, curbs individualism and initiative, diminishes our sense of possibility, and contributes to our demoralization and inertia. It is a skin that needs shedding."[5]

African Americans who refuse to shed their "blackness," their group identity, wage a kind of guerrilla warfare on white America, Mr. Steele believes. Looking for an explanation for their failures, these African Americans search outward, rather than inward. They exaggerate white racism, manipulate white guilt, and then retreat into group innocence in numerous ways —self-segregated college dormitories, eating tables, student associations, and professional organizations. These small-scale harassing tactics have caused whites to suffer a degree of "racial anxiety" that often expresses itself in racist behavior or rhetoric.[6] "Racism," Mr. Steele states, "becomes a means of rejecting racial guilt, a way of showing that they [whites] are not, ultimately, racists."[7]

Mr. Steele gives a renewed and seductive voice to the old refrain of blame the victim. For that, conservatives will cheer him, while liberals will condemn him. But what about the analysis on which his conclusions are grounded? Is it solid? The answer, I shall argue, is no.

Mr. Steele is an English teacher by profession, but he employs pop psychology to support his conclusions. Indeed, there is very little scientific method to Mr. Steele's analysis. He externalizes his own racial paranoia; that is, he looks within himself to draw large-scale psychological and sociological propositions about African Americans, especially about their alleged inferiority anxi-

4. *Id.* at 60. *See id.* at 28, 46, 48-53, 170, 173.
5. *Id.* at 55, 172. *See id.* at 45-47, 49-53.
6. *See id.* at 143.
7. *Id.* at 145.

ety.[8] He provides no hard evidence to buttress his bold assertions about white behavior and attitudes, particularly assertions concerning white racial anxiety and excuses for white racism.[9] His analysis, in short, is based almost entirely on anecdote and impression.

There are even deeper problems with Mr. Steele's analysis. His central argument — that African American identity protects, nurtures, and perpetuates self-doubt and a fear to compete with whites — contains two very dangerous and incorrect assumptions. The first is that African Americans in large part have equal opportunities, that the availability of employment, housing, and other opportunities are roughly the same for African Americans and white Americans.[10] The second assumption is that African American culture provides no antidote for inferiority anxiety and, thus, it is a limiting or impoverished culture.[11] I shall use the balance of this article to challenge these assumptions.

II.

In a sense, the first assumption — that African Americans and whites have roughly equal opportunities — calls into question the validity of an important tenet on which judicial protection (and indeed civil rights legislation) for African Americans and other racial minorities is based.[12] In famous footnote 4 of the Supreme Court's 1938 decision in *United States v. Carolene Products Co.*,[13] the Court suggested that the political powerlessness of "discrete and insular minorities" warranted the most "exacting judicial scrutiny" of legislation deemed harmful to such minorities. By stating that African Americans now enjoy equal opportunities,

8. *See supra* notes 3-5 and accompanying text.

9. *See supra* notes 5-7 and accompanying text.

10. *See supra* note 1, at 23-28, 39, 169-170, 174, 175.

11. *See id.* at 24-25, 28-30, 45-47, 49-53, 55, 139, 167, 170.

12. *See*, John Ely, Democracy and Distrust (1980); Louis Lusky, By What Right? (1975); Bruce Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985); J.M. Balkin, *The Footnote*, 83 Nw. U.L. Rev. 275 (1989); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 Iowa L. Rev. 1059 (1974); Lea Brilmayer, *Carolene, Conflicts and the Fate of the "Insider-Outsider"*, 134 U. Pa. L. Rev. 1291 (1986); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L.J. 1287 (1982); Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 Colum. L. Rev. 1093 (1982); Lewis S. Powell Jr., *Carolene Products Revisited*, 82 Colum. L. Rev. 1087 (1982). My collegues, Daniel Farber and Philip Frickey question whether footnote 4's rationale has been as important to judges as other commentators have suggested. *See* Daniel Farber & Philip Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 78 Calif. L. Rev. (1991).

13. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

Mr. Steele suggests that they are no longer a "discrete and insular" minority in a political, social, or economic sense.

Even if Mr. Steele's challenge to footnote 4 were correct, it would be wrong to argue for fewer civil rights laws. For the removal of laws that provide a measure of equal opportunity would return African Americans to the state of vulnerability envisioned in footnote 4. African Americans would have no governmental protections against even the most overt acts of racial discrimination and segregation.

Like others who challenge the current validity of footnote 4,[14] Mr. Steele in large part equates a decrease in racial prejudice with an increase in "equal" opportunities for African Americans. Although one could certainly challenge the notion that racial prejudice among individuals is declining,[15] there is clearly less government-sanctioned racism today than there was thirty, forty, or fifty years ago.[16] One cannot, however, use racism as the primary measure of the availability of opportunities for African Americans, as Mr. Steele seems to do.[17] Indeed, racism is not even the most important measure; racial discrimination is a far more important determinant of racial opportunities. For example, the racist employer who treats its African American and white employees the same (i.e., does not discriminate) provides equal employment opportunities for African Americans; whereas the nonracist employer whose facially neutral employment practices have a disproportionately negative impact on its African American employees (i.e., engages in institutional discrimination) does not provide equal employment opportunities.[18]

Thus, the distinction between racism and racial discrimination is crucial. Racism is a state of mind, defined in *Webster's Seventh New Collegiate Dictionary* as "a *belief* that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race."[19] Discrimination, on the other hand, is a behavior, treatment, or con-

14. *See, e.g.*, Ackerman, *supra* note 12.

15. *See, e.g.*, Walter Leavy, *What's Behind the Resurgence of Racism in America?*, Ebony, April 1987, at 132-139; Janice C. Simpson, *Campus Barrier?: Black College Students Are Viewed as Victims of a Subtle Racism*, Wall St. J., April 3, 1987, at 1, col. 1. *See generally* Harry Ashmore, Hearts and Minds: The Anatomy of Racism from Roosevelt to Reagan (1982).

16. *See, e.g.*, Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (1982); The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3617 (1982), as amended by Act of September 13, 1988, Pub. L. No. 100-430, § 1-5, 102 Stat. 1619 (1988).

17. *See, e.g.*, *supra* note 1, at 27.

18. *See* Roy L. Brooks, *The Structure of Individual Disparate Treatment Litigation After Hopkins*, 6 Lab. L.J. 215, 222-223 (1990).

19. Webster's Seventh New Collegiate Dictionary 704 (7th ed. 1966).

dition — social, economic or political — to which racism may or may not be an antecedent.[20] In assessing the availability of opportunities, the focus should be on discrimination rather than on racism.

Looking at racial discrimination, it is clear that Mr. Steele's assumption that African Americans enjoy roughly equal opportunities as whites is erroneous. This assumption deflates even when class division is taken into account. To illustrate, I shall compare middle-class African Americans with middle-class whites in the employment context and working-class African Americans with their white counterparts in the housing arena.[21]

Disparity between middle-class African Americans and middle-class whites in the incidence of racial discrimination in employment is manifested in several ways.[22] Among the most telling evidence is the percentage of employment discrimination cases that are brought by African American plaintiffs and the percentage of judgments won in those cases. A recent survey of employment discrimination cases reported by the federal courts in 1987 found seventy-seven cases dealt exclusively with racial discrimina-

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20. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

21. For a more detailed analysis, *supra* note 2.

22. Establishing the existence of disproportionate employment discrimination can be a bit tricky for two reasons. First, the term *discrimination* is a term of art, that is, it has special legal definitions: "disparate treatment" (unfavorable treatment because of one's race or color) and "disparate impact" (racially neutral employment policies, practices, or procedures that have a disproportionately negative effect on a racial group). *See* Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

Second, discrimination does not exist, at least not in a legal sense, until a court (and, really, the Supreme Court) says so. A judicial finding of discrimination, however, has an uncertain quality about it. The finding is empirical (a question of fact), analytical (a question of law applied to the facts), and policy-driven (a question of who bears the burden of proof). In addition, a lower court's finding of discrimination is subject to reversal either on direct appeal or years later when and if the issue comes before the court again in another case. Thus a careful review of judicial determinations (the "best" evidence available) is inconclusive evidence of the existence of even a legally controlled concept of discrimination.

Given the uncertainty inherent in judicial determinations, I consider *claims* of discrimination as well as *proofs* (judicial determinations) of discrimination. Claims include personal perceptions of discrimination, government agency filings of discrimination cases in federal courts, and private cases of discrimination filed and reported in the federal case reporters at all three federal levels — trial level (district courts), intermediate appellate level (circuit courts of appeal), and highest appellate level (Supreme Court).

Personal perceptions of discrimination cannot be ignored. Even if they are "wrong" or exaggerated, they are real to the perceiver. More importantly, these perceptions affect an African American's behavior and chances for success and personal happiness. Also, socio-psychological evidence shows that these perceptions are mostly accurate; see, e.g., Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

tion. Of those cases, sixty-five (slightly more than 84 percent) were filed by African American plaintiffs alone, compared to seven (9 percent) filed by white plaintiffs alone. (Five cases were filed by other minorities.) Virtually all of these cases involved middle-class jobs: teachers, chemists, engineers, journalists, physicians, business managers, and the like.[23]

These statistics, it should be noted, represent only *reported* cases, not the total number of employment discrimination cases actually filed in the district courts or appealed to the circuit courts or the Supreme Court in 1987, to say nothing of the claims that never made it to court in that year. District court judges usually report only cases deemed "significant."[24]

Although a small fraction of the employment discrimination cases appearing in 1987, the seventy-seven reported cases tend to undermine Mr. Steele's assumption that African Americans enjoy equal employment opportunities.[25] Given the fact that these cases survived the weeding-out process and were reported (indicating that the discrimination claims were not shams) they suggest that middle-class African Americans are far more likely — nine times more likely — to encounter racial discrimination on the job, and hence unequal employment opportunities, than are middle-class whites. Thus, the percentage of African American plaintiffs in these race-based employment discrimination cases provides substantial empirical evidence against Mr. Steele's assumption that African Americans and white Americans enjoy roughly equal employment opportunities.

If we take the analysis one step further and compare the number of victories by African American plaintiffs with the

23. My research assistant, Lincoln B. Smith, and I conducted what might be called "juri-statistical" research of employment discrimination cases brought before the federal courts in 1987. We used Westlaw, a standard research tool in law, accessing its database of primary and secondary legal authorities through the "allfed" library (see Westlaw 1989 version). For a more detailed description and analysis of this research, see Lincoln B. Smith, *Juri-Statistical Methods in Legal Research* (December 1989) (typescript copy on file with Law & Inequality). *See generally* Westlaw: Introductory Guide to Legal Research (1988). Our survey revealed 1248 employment discrimination cases alleging discrimination on the basis of race, sex, religion, age, nation original, and other bases. *See infra* note 24.

24. It should also be noted that of the 1,248 employment discrimination cases (including sex, religion, age, national origin, and several other discriminatory bases as well as and in combination with race) filed in the district courts from July 1, 1986 to June 30, 1987 (the United States Courts Administrator's most relevant reporting period), only 11.7 percent reached trial. This is a relatively high percentage; on average, only 5 percent of all civil cases filed in the district courts during this period reached trial. *1987 Annual Report of the Director of the United States Courts*, table C4 at 208.

25. *See supra* text accompanying note 10.

number of victories by white plaintiffs, we get an even more definitive sense of the racial distribution of employment discrimination and, hence, employment opportunities. African American plaintiffs won fourteen of the cases they brought; white plaintiffs won none of their cases.[26]

Other legal reference sources support the claim that employment discrimination falls more heavily on African Americans than on whites. A perusal of all the federal employment discrimination cases reported between 1975 and 1989 reveals that a majority of cases involved African American plaintiffs and that far more African American plaintiffs won their cases than did whites.[27] The major employment discrimination casebooks are in accord.[28]

Litigation brought by the federal government's Equal Employment Opportunity Commission (EEOC) provides further evidence. EEOC annual reports briefly describe the lawsuits the commission is authorized to file in federal court as a plaintiff. Since at least 1980, the great majority of the race cases allege discrimination against African Americans or Hispanics.[29]

Racial wage gaps offer compelling evidence that racial discrimination faced by middle-class African Americans is more than an intermittent phenomenon. They provide at least prima facie proof that such discrimination is regular and systemic in places of middle-class employment, from corporations, law firms, law faculties, and newsrooms, to the motion picture and television industries.[30]

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26. *See* sources cited *supra* note 23.

27. *See* West's Federal Practice Digest Edition, 1975 to Date, Sec. 9.10 (1984). This case digest, consisting of several volumes, is updated weekly with advance sheets published by West.

28. For example, in Michael Zimmer, Charles Sullivan, and Richard Richards, Cases and Materials on Employment Discrimination (2d ed. 1988), the chapters dealing with the concept of discrimination (chaps. 1-4) report a few major federal cases involving a white plaintiff. Casebooks, of course, provide limited and purposeful case collections.

29. *See, e.g.*, 1988 E.E.O.C. Ann. Rep. 23 (1989); 1983 E.E.O.C. Ann. Rep. 18 (1984).

30. On corporations, see *Social Issues—Progress Report on the Black Executive: The Top Spots Are Still Elusive*, Business Week, Feb. 20, 1984, at 104-105; Derek T. Dingle, *Will Black Managers Survive Corporate Downsizing?*, Black Enterprise, March 1987, at 49-55. On law firms, see Edward J. Burke, *3,700 Partners. 12 Are Black*, Nat'l L.J., July 2, 1979, at 1; Smith, *The Invisible Lawyer*, Barrister, Fall 1981, at 42-49. On law faculties, see Derrick Bell, *The Price and Pain of Racial Perspective*, Stan. L. Sch. J., May 9, 1986, at 5.

On the news media, see David Hatchett, *Blacks and the Mass Media*, Crisis, June/July 1989, at 18; Noah Griffin, *Broadcasting*, Crisis, June/July 1989, at 28; Wiliam A. Henry, III, *Double Jeopardy in the Newsroom: Despite Progress, Minority Journalists Face Stubborn Obstacles*, Time, Nov. 29, 1982, at 90; Richard M. Levine, *The Plight of Black Reporters: Why 'Unconscious Racism' Persists*, TV Guide,

Despite dramatic improvements in the occupational status of African Americans since the 1960s — mainly as the result of improvements in education and affirmative action[31] — a wage gap still exists between African American and white males of comparable ages and with comparable education and experience. For example, Farley and Allen,[32] in *The Color Line and the Quality of Life in America*, report that in 1979 young African American lawyers averaged about two dollars less per hour in earnings than young white lawyers.[33] Unfortunately, the authors do not indicate whether they took account of differences in type and size of law practice or even regional differences in the practice of law.

Other studies offer more cogent evidence of a racial wage gap. One, published by the Rand Corporation in 1986, found that African Americans earned twenty to thirty percent less than comparably educated whites in 1980.[34] Another, published by *Money* magazine in 1989, reported that this gap may have shrunk somewhat, to ten to twenty-six percent, in 1987, the latest figures available.[35] One important lesson to be drawn from these studies is that *"simply equalizing the number of years of schooling alone would [still] leave a sizable racial wage gap*.[36]

Employment is simply one area of American life in which the opportunities for African Americans and whites of the same socioeconomic class are not evenly distributed. Housing provides yet another example.

The unequal distribution of housing opportunities in American society can be determined by focusing on housing discrimination within the American working class. Such housing

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July 25, 1981, at 22. On the motion picture and television industries, see Erwin Washington, *Racism and the Movie Industry*, Crisis, June/July 1989, at 34; Joy Horowitz, *Hollywood's Dirty Little Secret*, American Visions, Aug. 1989, at 16; Scott Hays, *Capturing the Black Experience*, TV Guide, Nov. 29, 1986, at 10.

31. *See, e.g.*, James Smith and Finis Welch, Closing the Gap: Forty Years of Economic Progress for Blacks at xx-xxi, 85-91 (1986); Barbara R. Bergmann, *An Affirmative Look at Hiring Quotas*, N.Y. Times, Jan. 10, 1982, B3, col. 1. *See also*, Michael Wright and Caroline R. Herron, *The Nation: Affirmative Word from Washington*, N.Y. Times, Dec. 13, 1981, § 4 (Week in Review). An unpublished study by the U.S. Labor Department clearly documents the effectiveness of affirmative action; for discussion of the study see Robert Pear, *Study Says Affirmative Rule Expands Hiring of Minorities*, N.Y. Times, June 19, 1983, at A1; Mary Thornton, *Affirmative Action Found to Diversify Work Force*, Wash. Post, June 20, 1983, at A1.

32. Reynolds Farley and Walter Allen, The Color Line and the Quality of Life in America (1987).

33. *Id.* at 317

34. Smith and Welch, *supra* note 31, at 23.

35. *See* Walter Updegrave, *Personal Finance: Race and Money*, Money, Dec. 1989, at 152.

36. Smith and Welch, *supra* note 31, at 23 (emphasis added).

discrimination is evidenced in several ways. Although the great majority of the plaintiffs in housing cases filed in federal court since 1975 were African American or Hispanic,[37] the record of housing discrimination judgments is probably not the best source of information; in 1987, at least, the number of race-only housing discrimination cases decided by the federal courts was too small to be statistically significant.[38]

Evidence of housing discrimination is readily available, however, in the dozens of fair housing studies conducted periodically by local and regional offices of the Department of Housing and Urban Development (HUD).[39] These studies are designed to test the rental housing market for housing discrimination. A typical study begins with a telephone survey of advertised apartment vacancies, followed by a site survey conducted by both minority and white teams. Each test team usually consists of two or three "apartment hunters" (a couple and an individual), one of whom would normally be identified by telephone voice either as white or as an African American or other minority. Usually, after one team has inquired about a vacancy by telephone and made a follow-up visit to the site, the other team duplicates this procedure. The teams do not exchange information during testing.

In Boston, forty-two tests were conducted on eighteen apartment houses. The white team was invited to the apartment complex to see a unit in every test, whereas in thirty-one of the tests the minority team was told *not* to come to the apartments building, because no units were available. A Detroit study of eleven rental complexes, each of which was tested four times, yielded similar results: white teams were treated more favorably than minority teams in thirty of the forty-four tests. According to HUD, these and other studies conducted in cities throughout the nation "produced firm evidence" of housing discrimination.[40]

Housing discrimination today can also be more subtle. In fact, like much discrimination in the post-1960s, it often takes the form of complex racial discrimination, which is subtle in the sense

37. West's Federal Practice Digest Edition, 1975 to Date, Civil Rights § 11.5. *See supra* note 23, at § 11.5.

38. African Americans were plaintiffs in eight of the fifteen available cases (53.33 percent) and won five of these cases (62.5 percent). There were no white-only plaintiffs. For further discussion see Juri-Statistical Methods in Legal Research, *supra* note 23.

39. The studies reported in the next several paragraphs are collected, along with others, in several sources. One of the best is Department of Housing and Urban Development, Fair Housing Enforcement Demonstration 23-28, and 37-44 (1983).

40. *Id.* at 23-28.

that it may be sophisticated, unconscious, or institutionalized and is sometimes accompanied by nonracial factors.[41] In contrast to those who suffer from what might be called the "Al Campanis syndrome,"[42] practitioners of complex racial discrimination are usually clever enough to hide racist feelings.

Housing officials have noted, for example, that African Americans "often encounter discrimination with a smile." As one official describes: "Many times people are denied [housing] and know they've been denied, but don't know it's discrimination. . . . The person may be very nice and may never directly say anything that leads [prospective tenants or homeowners] to know it's something about them . . . but [they are] told that a unit is not available."[43]

The lack of opportunities for African Americans in such areas as employment and housing are clear beyond peradventure. Had Mr. Steele bothered to look at the data, perhaps he would have been more circumspect in making assumptions about the availability of opportunities for African Americans.

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41. Overt acts of racism today are less common, although incidents such as those in Howard Beach, New York, and in Forsythe County, Georgia, should not be discounted. In December 1986, three African Americans who walked into a diner in the Howard Beach neighborhood of Queens to use a telephone were chased and beaten by a gang of whites. One of the African Americans was killed when his attackers forced him into the path of an oncoming car. In Forsythe County, in January of 1987, the Ku Klux Klan stoned a predominantly African American group marching to commemorate Dr. Martin Luther King's birthday. *See* Richard Stengel, *Black vs. White in Howard Beach*, Time, Jan. 5, 1987, at 48; *Fear of Blacks, Fear of Crime*, N.Y. Times, Dec. 28, 1986, sec. 4 (Week in Review), *see also* Walter Leavy, *What's Behind the Resurgence of Racism in America?*, Ebony, Apr. 1987, at 132-39; Samuel Freedman, *New York Race Tension is Rising Despite Gains*, N.Y. Times, March 29, 1987, sec. 1, col. 1 (city ed.); Janice Simpson, *Black College Students Are Viewed as Victims of a Subtle Racism*, Wall St. J., Apr. 3, 1987, sec. 1, at 1, col. 1; Ezra Bowen, *Wrong Message from Academe*, Time, Apr. 6, 1987, at 57; Joe Davidson, *Private Schools for Black Pupils Are Flourishing*, Wall St. J., Apr. 15, 1987, at 6, col. 3.

42. Al Campanis, a former major-league baseball player, was fired from his position as vice-president for player personnel for the Los Angeles Dodgers, the third-highest position in the organization, for the bush-league bigotry he displayed in a television interview on ABC's "Nightline" on April 6, 1987. When asked by anchor Ted Koppel why there were no African American managers, coaches, or owners in baseball, Campanis responded that African Americans may lack "some of the necessities" for holding managerial positions. After a "flabbergasted" Koppel gave him a chance to remove his foot from his mouth, Campanis stuck it in deeper by remarking—from out of left field—that "blacks are not good swimmers because they don't have the buoyancy." *Grapevine*, TV Guide, Apr. 18-24, 1987, at A-2 San Diego ed.; Sam McManis, *Campanis Fired in Wake of Racial Remarks*, L.A. Times, (San Diego ed.) Apr. 9, 1987, pt. 3, at 1, col. 1.

43. John DeMott, *The Racism Next Door*, Time, June 30, 1986, at 40.

III.

Mr. Steele's second assumption — that African American identity or culture is limiting or impoverished because it cultivates rather than counteracts an inferiority complex among African Americans — is equally without merit. Mr. Steele's error in this regard is far more egregious than his first. He is an educated African American, and one would think that he would have taken the time to study and practice his own culture more faithfully than he has.[44] Had he taken the time, he would have discovered that African American culture is so replete with antidotes for racial inferiority — that the culture moves resolutely *against* inferiority — the clear solution to the problem of inferiority anxiety, or integration shock, is to embrace African American culture, rather than jettison it.

Moreover, had Mr. Steele investigated African American culture before writing his book, he would have seen evidence that African Americans today, perhaps due to the success of African American culture, do not in large part suffer from inferiority anxiety. The integration shock Mr. Steele posits may be his own. But the lack of material success many African Americans — including those farthest removed from mainstream society —experience in our "integrated" society may well be a function of limited opportunities and feelings of anger and despair.

Historians have grappled with the question of African American culture for decades. Some, like Stanley Elkins, have argued that the arduous ocean voyage during slavery robbed African Americans of their African culture.[45] Others have claimed that the slaves retained much of their African culture, which in turn developed into a distinct, autonomous African American culture.[46] Still others, such as C. Vann Woodward[47] and Mechal Sobel,[48] have modified this theory, arguing that the African American culture developed as (and perhaps continues to be) a shared culture— African-English in the 18th century and African-Southern thereafter.

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44. Mr. Steele makes a revealing confession: "We are the only black family in our suburban neighborhood . . . . For me to be among large numbers of blacks requires conscientiousness and a long car ride, and in truth, I have not been very conscientious lately." *Supra* note 1, at 21.

45. *See* Stanley M. Elkins, Slavery: A Problem in American Institutional and Intellectual Life 89-98 (1959).

46. *See, e.g.*, Charles E. Becknell, Black Culture in America (1987); Lawrence W. Levine, Black Culture and Black Consciousness (1977).

47. *See* C. Vann Woodward, Origins of the New South (1951).

48. *See* Mechal Sobel, The World They Made Together: Black and White Values in Eighteenth-Century Virginia 64-67, 165-67, 226-29 (1987).

To understand African American culture today, one must begin with the traditional definition of culture. Culture is defined as the sum of behaviors, values, and attitudes (in other words, customs) that differentiates one group of people from another. Culture is transmitted intergenerationally through stories, poems, songs, and other forms of written and spoken language; family structure, religious practices, and similar institutions; art, sculpture, architect, and other physical objects; and rituals, such as dance, holidays, and celebrations. Although a group can choose its own culture, many aspects of culture are often thrust upon a group by external conditions, such as by poverty and physical isolation from the dominant culture. Culture has "good" and "bad" elements. The work ethic is a positive cultural trait in the American dominant culture; racism and sexism are not.[49]

Based on this understanding of culture, one could reasonably conclude that there are several cultures within African American society, each of which is manifested roughly along class lines. For example, the African American underclass culture is distinctly different from that of the African American middle class, working class, and even other groups of poor African Americans (such as the working poor). In addition, some of the behaviors, values, and attitudes of the African American underclass culture — such as crime, drugs, and welfare — are clearly "bad" in the sense that they are dysfunctional in American society or are otherwise harmful to individuals in the group. Many of these customs are influenced by the underclass's isolation from mainstream society and by the paucity of opportunities available to members of the class. The group has no choice but to make its own opportunities in order to survive with some degree of happiness.[50]

African American culture is by no means a balkanized culture, however. There are certain customs among African Americans that transcend socioeconomic boundaries. Some of these cultural phenomena replicate those of the larger, mainstream American society. Others are quite unique to African Americans.

Both African Americans and whites value excellence, education, work, and the work ethic. Next to political values fundamental to the American way of life (such as liberty and democratic process), these values may be the most important shared or common cultural beliefs of African Americans and whites.

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49. *See, e.g.*, Richard Schaefer, Sociology 63-83, 86, 182, 202, 609 (1989).

50. For further discussion of the African American underclass, see, e.g., William Wilson, The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy (1987); and Brooks, *supra* note 2, at 106-30.

The African American desire for excellence is limited only by the opportunities foreclosed by racial discrimination. In sports and the arts, particularly music, where opportunites have traditionally been most available to African Americans, the drive toward excellence is most in evidence. African American artists and athletes — from James Brown, the "godfather of soul music," Aretha Franklin, the "Queen of Soul," to Julius Erving, "Dr. J" on the basketball court — have set high goals for themselves. And, along the way, they have transformed their crafts, raising them to higher levels. Rightfully, they bristle at the oft-stated remark that they relied on natural ability (connoting a degree of easy acquisition) rather than hard work to succeed.

On any given day, one can see the desire for excellence in the myriad endeavors undertaken by African Americans. Not only on the playgrounds, where youngsters strive to be Reggie Jackson or Michael Jordan, or in apartment houses or basements, where the future Janet and Michael Jacksons are developing their talents, but also in schools and in work places, can one find expressions of the desire for excellence among African Americans. Too often these high expectations are smothered, not by the fear to compete with whites, but by unnurturing integrated environments—the junior high school teacher who is quick to discipline African American students or place them in slow learning tracks;[51] the high school curriculum that ignores or trivializes the contributions of African Americans in literature and history;[52] or the supervisor who steers the young executive away from choice assignments so as not to upset clients who are not ready to work closely with an African American.[53]

Education has always been highly valued in African American society. Indeed, education is one of the most deeply rooted values in African American society. During slavery, when it was against the law to educate slaves and, in some states, free persons of color, African Americans risked their lives to educate themselves.[54] The legal struggle for equal educational opportunity that climaxed in the Supreme Court's 1954 decision of *Brown v. Board*

51. *See supra* note 2, at 75-76.

52. *Id.* at 77, 79.

53. *Id.* at 46-47.

54. *See* John Hope Franklin, From Slavery to Freedom 200-201 (1947); Philip S. Foner & Josephine F. Pacheco, Three Who Dared xiv-xv (1984); Carter G. Woodson, The Education of the Negro Prior to 1861 at 24-29 (1919). *See, e.g.*, Education and the Rise of the New South (Ronald K. Goodman & Arthur O. White eds. 1981); Thomas L. Webber, Deep Like The Rivers: Education in the Slave Quarter Community, 1831-1865 (1978).

of Education,[55] and which in large part continues today, traces back to colonial America where Prince Hall and other African Americans in Boston complained persistently about the quality of education available to African American children.[56]

Clearly, some African American teenagers choose not to attend school or to take seriously the education offered in their schools. These individuals may view education as a white or "Uncle Tom" value, which simply attests to the degree to which some young African Americans have been miseducated about their heritage. Alternatively, they feel that the education they receive is so inferior to what is provided elsewhere in society that their best chance for succeeding is to use school time to pursue more productive activities (such as drug dealing). Or they may feel that the teaching, curriculum, and atmosphere in their schools are so unsupportive of and even hostile to their individual needs that to show up for classes is tantamount to receiving an emotional whipping several times a day.[57]

Like education, work and the work ethic are common values. They are values that are not held by white Americans alone. Nor are they only middle class or working class (African American or white) values. A recent study published by the Rand Corporation demonstrates that although society as a whole may view drug dealing as a form of criminal or recreational activity, adolescent African American males who live in poverty and deal in drugs view drug dealing as "an important career choice and major economic activity."[58] Drug dealing is what they do for a living. It is not simply their job (they view themselves as capitalists, not as laborers), it is their *business*. And despite the extraordinary risks involved in this occupation—jail, and even death—these African Americans continue to work seriously at building their businesses. Not unlike those formally educated in Harvard Business School principles of finance, they consciously seek to establish the optimum level of risk and return. As the report states:

> Drug selling was widely perceived by respondents as both profitable and risky. . . . Perceptions of returns from drug selling were reasonably accurate. A high percentage of adolescents

55. 347 U.S. 483 (1954).

56. *See supra* note 2, at 75-76.

57. *See, e.g.*, Visions of a Better Way: A Black Appraisal of Public Schools (S. Lightfoot ed. 1989); Jennifer Hochschild, The New American Dilemma: Liberal Democracy and School Desegregation (1984). *See also supra* text accompanying notes 50 and 51.

58. Peter Reuter, Robert MacCoun, & Patrick Murphy, Money from Crime: A Study of the Economics of Drug Dealing in Washington, D.C. xi (1990) [hereinafter "Rand Report"].

> believed that earnings of $1000 per week were readily obtainable; in fact, such earnings are available to those who work steadily in the drug trades (though most participants, by working only occasionally, earn much less). Persons who had sold five or more times saw the risks as lower and the returns as higher than did those who were nonsellers or who sold only very rarely. Nonetheless, even among sellers, 38 percent reported that a person selling drugs for a year would very likely be caught by the police, and half thought that such a person was very likely to be injured seriously or killed. Thus, it is not for lack of awareness of risks that so many are going into this criminal business.[59]

Another study, *Drug Abuse in the Inner City*, also underscores the business aspect of drug dealing: "The structure of drug-dealing organizations is complex and contains many roles with approximate equivalents in the legal economy."[60]

Although the work ethic is clearly manifested among those African Americans farthest removed from mainstream society, it is equally clear that they are in the wrong line of business, that the work they do is self-defeating in the long run. Why, then, do they do it, especially considering the risks involved? Is it because they are acting out a fear of failure or self-doubt when going up against whites? No, they must compete against white dealers and the white legal establishment—police, prosecutors, judges—to operate their businesses. Is it because they fear the challenges of integration in legitimate businesses? No, being the capitalists that they are and as adverse to risk as the next person, they would work in legitimate businesses if there were economic incentives. "Drug selling by inner-city youths has had major effects on low-income communities by offering substantial economic opportunities that undermine the willingness of such youths to work at *low-wage* legal jobs."[61] The Rand Report concurs: "A substantial percentage of those who sell drugs earn much more than they can earn from legitimate activities."[62] Drug dealing, in short, offers economic opportunities to low-income communities that cannot be found anywhere else.

Work and the work ethic are not newly acquired African American values. They are values African Americans have traditionally and unabashedly believed in and practiced for years. African American women have scrubbed floors, washed clothes, and

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59. *Id.* at x.

60. Bruce Johnson, Terry Williams, Kojo Dei, & Harry Sanabria, Drug Abuse in the Inner City: Impact on Hard-Drug Users and the Community, Drugs and Crime 9 (Michael Tonry and James Wilson eds. 1990).

61. *Id.* (emphasis added).

62. Rand Report, *supra* note 57, at xi.

raised the children of whites from dawn to dusk for hundreds of years just to feed, clothe, and shelter their own children.[63] African American men, far from having an inborn adversion to work, have labored long hours at bone-breaking menial jobs. These good, decent men have often had to work under a constant barrage of racial insults that rip away at a man's dignity.[64]

Excellence, education, work, and the work ethic are common values; values that inhere in both the African American and white cultures. These values militate against the anti-self, inferiority anxiety. They speak to the African American individual in positive, uplifting, hopeful voices. Those who imbibe the messages are not likely to suffer inferiority anxiety.

This is not to say that African Americans do not suffer pangs of self-doubt or that some African Americans do not embrace self-destructive behaviors or attitudes (such as drug-dealing or dropping out of high school). But the self-doubt some experience, that all human beings experience on occasion, and the self-destructive acts that some undertake are not necessarily the products of inferiority anxiety. Anything from inadequate preparation for an assigned task to the uncertainty of a new job could produce self-doubt in an African American professional. The absence of opportunities in education, employment, or housing, a generalized anger against whites, or the act of expressing (*not* denying) one's self-importance could throw a young African American male into drug-dealing or some other form of self-destructive behavior. Mr. Steele fails to make these distinctions.

Mr. Steele also fails to recognize that many values or customs in African American society provide a powerful antidote to self-destruction, generalized self-doubt, and self-doubt caused by feelings of inferiority. These cultural phenomena are unique to the African American ethos.

Among the most prominent of these African American cultural traits are (1) adherence to certain survival skills for succeeding in a racist society—such as, the African American survival maxim, *soyez mefiant*, "masking," the belief in personal sacrifice and perseverence, and the belief in society as "the System" or "the Man"; (2) reliance on the church for leadership and direction in both secular and spiritual matters; and (3) self-help.

African Americans have developed many techniques designed to help them survive in a racist society, whether integrated or segregated. The African American survival maxim is one of these

63. *See, e.g.*, Brooks, *supra* note 2, at 145.
64. *Id.*

techniques, and a very important one. It states as follows: You have the right to be angry about centuries of racial exploitation as well as present-day racism and racial discrimination, but you do not have the right to dwell on that anger, to feel guilty about these matters, to suffer low self-esteem, or to react in other self-destructive ways.[65]

The African American survival maxim is a psychological device that helps African Americans deal with mixed-emotions about "buying into" a racist society. Some African Americans feel defiance and anger about the inertia of discriminatory and racist traditions in our society and about the vista of grayness they see down the road. But there are also strong feelings going in the opposite direction. Among these are the desire to excel and the sense that to succumb to the negative emotions plays into the hands of the white racists, dishonors the sacrifices of African American mothers, fathers, and heroes, and is otherwise a self-defeating attitude. The African American survival maxim is a vindication of the positive emotions and a cure for self-doubt, whatever its cause, and self-destructive attitudes.

Mistrust of whites, or what the French call *soyez mefiant* (be mistrustful), is another important suvival value taken from the African American experience. This value keeps African Americans at an arms-length distance from whites, and raises the issue of how close African American and white American friends can ever really become.

Leon Lewis reflects on mistrust in the following passage.

> Everything is different when you're black. It's amazing how the quality of one's life can be changed by what might happen, by what you think might happen and by what other people think might happen.
>
> Often I've been invited to cocktail parties, openings and other gatherings of a business or civic nature, and many times I've been the only black person in attendance. I can become very uncomfortable in that setting. My subconscious might start sending up smoke signals, and I think, say, "What if that lady standing near me should suddenly scream?" Every eye would be on me, and I could be in a world of trouble. Why should a thought like that enter my mind? The lady doesn't look as if she is about to scream, but it has happened and who is to say it will never happen again?[66]

It is instructive to contrast Lewis's situation with a similar one described by Mr. Steele in his book.

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65. *See id.* at 143-44.

66. Leon Lewis, *About Men: In On the Game*, N.Y. Times, Feb. 3, 1985, (Magazine), at 70.

> It is a warm, windless California evening, and the dying light that covers the redbrick patio is tinted pale orange by the day's smog. Eight of us, not close friends, sit in lawn chairs sipping chardonnay. A black engineer and I (we had never met before) integrate the group. A psychologist is also among us, and her presence encourages a surprising openness. But not until well after the lovely twilight dinner has been served, when the sky has turned to deep black and the drinks have long since changed to scotch, does the subject of race spring awkwardly upon us. Out of nowhere the engineer announces, with a coloring of accusation in his voice, that it bothers him to send his daughter to a school where she is one of only three black children. "I didn't realize my ambition to get ahead would pull me into a world where my daughter would lose touch with her blackness," he says.
>
> Over the course of the evening we have talked about money, past and present addictions, child abuse, even politics. Intimacies have been revealed, fears named. But this subject, race, sinks us into one of those shaming silences where eye contact terrorizes. Our host looks for something in the bottom of his glass. Two women stare into the black sky as if to locate the Big Dipper and point it out to us. Finally, the psychologist seems to gather herself for a challenge, but it is too late. "Oh, I'm sure she'll be just fine," says our hostess, rising from her chair. When she excuses herself to get the coffee, the psychologist and two sky gazers offer to help.
>
> With four of us now gone, I am surprised to see the engineer still silently holding his ground. There is a willfulness in his eyes, an inner pride. He knows he has said something awkward, but he is determined not to give a damn. His unwavering eyes intimidate even me. At last the host's head snaps erect. He has an idea. "The hell with coffee," he says. "How about some of the smoothest brandy you've ever tasted?" An idea made exciting by the escape it offers. Gratefully, we follow him back into the house, quickly drink his brandy, and say our good-byes.[67]

Did the African American engineer exhibit an attitude of accusation against his white friends, as Mr. Steele claims,[68] or a cry for help to work through a problem over which many middle-class African Americans agonize everyday? Was the "death" of the party caused by an African American harassing whites or by an unsupportive nonresponse to a matter of deep concern to a friend?

Whatever the answers to these questions, one thing is clear: *soyez mefiant* would have saved the African American; for it teaches African Americans to keep their distance in tight situations. Better to keep your deepest concerns in a warm corner of

67. *See supra* note 1, at 1-2.
68. *Id.* at 2-3.

your heart than to risk having them misunderstood or treated with cold indifference by your white friends.

"Masking" is closely related to *soyez mefiant*. The term comes from Ralph Ellison's book, *Invisible Man*,[69] but the concept goes back to slavery.[70] It asserts that African Americans must mask their true feelings around powerful whites. Showing your true face, your true feelings around whites in positions of authority only invites trouble. It may, for example, draw out white racism (e.g., feelings that you are acting uppity, that you are not staying in your place, that you are capable of causing "trouble") or induce other forms of white oppression.

Masking is an essential parenting technique in African American society. Two leading African American child psychiatrists, James P. Comer of Yale University and Alvin Poussaint of Harvard University, state that the African American child must be "trained to cope with white oppression." Parents must, among other things, pass on "to a growing child both the strengths of the old culture and the rules and techniques essential for successful adaptation in the modern world." These techniques include the art of being "practical as well as cunning," learning "how to win some sort of acceptance from belligerent whites," and even acquiring the habit of containing one's "aggression around whites while freely expressing it among blacks."[71]

Another survival value within African American society is the belief in personal sacrifice and struggle. Matriarchal sacrifice and struggle for children and family—such as, holding down two tiring jobs, one outside, the other inside, the home—is the basis for the deep respect African American mothers have in the culture. Often overlooked, African American men also have a tradition of sacrifice and struggle. They have been the fearless leaders of the race. Prince Hall, Nat Turner, Frederick Douglass, E. E. Just, Charles Houston, Paul Robeson, Martin Luther King, and countless other African American men have been the marines in the fight against racial injustice in our society—the first to go and the first to die. These sacrifices and struggles by both African American women and men were gallant. They were made for a noble cause (or "the Cause," as African Americans often say) and by individuals who have taken nothing for themselves but the hope for

69. Ralph Ellison, Invisible Man (1952).

70. *See, e.g.*, Gilbert Osofsky, Puttin' on Ole Massa (1969).

71. James Comer and Alvin Poussaint, Black Child Care: How to Bring Up a Black Child in America — A Guide to Emotional and Psychological Development 19-21, 22-23 (1975).

a better life for the next generation of African Americans.[72]

African Americans tend to have a negative or suspicious view of American society, often referred to as "the System" or "the Man" in African American society. Years of racial oppression have conditioned African Americans to see their relationship with American society similar to that of an abused child and an abusive parent. Society is unfair to African Americans; it is uncaring and leaves them vulnerable. African Americans are subordinated to whites. An old saying captures this idea: "When white folks get a cold, black folks get pneumonia."[73]

Langston Hughes's poem, "Mother to Son," reflects on "the System."

> Well, son, I'll tell you:
> Life for me ain't been no crystal stair.
> It's had tacks in it,
> And splinters,
> And boards torn up,
> And placed with no carpet on the floor—
> Bare.
> But all the time
> I'se been a-climbin' on,
> And reachin' landin's,
> And turnin' corners,
> And sometimes goin' in the dark
> Where there ain't been no light.
> So boy, don't you turn back.
> Don't you set down on the steps
> 'Cause you finds it's kinder hard.
> Don't you fall now—
> For I'se still going', honey,
> I'se still climbin',
> And life for me ain't been no crystal stair.[74]

"Mother to Son" is inspiring. It provides a powerful and elegant response to African American self-doubt and self-destructive attitudes.

Perhaps no other institution in African American society has provided a more constant countercheck to self-doubt or self-destructive attitudes, especially inferiority anxiety, than the African American church. The church plays a unique role in African American culture. African Americans have traditionally relied upon the church for wisdom and direction in the secular world. The church has never been simply a weekend spiritual retreat for African Americans. It has had an important and diurnal presence

72. *See, e.g.*, Rethinking the American Race Problem, *supra* note 2, at Ch. 5.
73. N.Y. Times, Sept. 30, 1990, § 7 (Book Review), at 7.
74. Langston Hughes, *Mother to Son*, The Weary Blues 107 (1926).

in the lives of African Americans, supplying a steady stream of well-educated, middle-class African American intellectuals and activists who were just as interested in reforming society as in reforming the soul. Adam Clayton Powell, Vernon Johns, Martin Luther King, Jesse Jackson and countless other ministers, operating on a smaller scale, are known more for their social engineering than for their religious crusades, although none of these heroes would endeavor to separate the two.[75]

Surely, Mr. Steele would not claim that these African American heroes suffer from an inferiority complex, or integration shock. And just as surely, Mr. Steele could not deny that these heroes draw strength not only from their spirituality, but from their culture — African American culture.

Not only does Mr. Steele fail to recognize the medicinal value of hands-on African American self-help (an important cultural tradition) in fighting the diseases of self-doubt and self-destruction, he denounces any form of participatory self-help or assistance from middle-class African Americans. He would only support self-help by example, a kind of arm-chair version of self-help or self-help at a safe distance. Mr. Steele argues that it is counterproductive for middle-class African Americans to provide direct, personal assistance to their less fortunate brethren. Such self-help, he believes, undermines individuality and personal responsibility.[76]

Hands-on assistance from the more successful members of the race, however, is a major feature of African American culture. Ever since the founding of this country, African Americans who have "made it" have consistently believed that they should work closely with those who have not in order to support individual achievement, racial development, and a racially just society. "Beneficial societies," the Underground Railroad, and countless other self-help institutions were formed for just this purpose.[77] Even the civil rights movement, wherein the African American middle class engineered protest marches and sit-ins and created new literary voices, fits this mold. And even Mr. Steele's book, with its

75. On the social role of the African American church *see, e.g.*, William L. Banks, The Black Church in the U.S., Its Origin, Growth, Contribution, and Outlook (1972); E. Franklin Frazier, The Negro Church in America (1964); Hart M. Nelsen and Anne Kusener Nelsen, Black Church in the Sixties (1975); James H. Cone, For My People: Black Theology and the Black Church (1984); Albert B. Cleage, Jr., Black Christian Nationalism: New Directions for the Black Church (1972); W.D. Weatherford, American Churches and the Negro (1957).

76. *See supra* note 1, at 108-09.

77. *See, e.g.*, Roy Brooks, *Re-packacing Noblesse Oblige*, Am. Visions, June 1987, at 12.

"middle class" formula for racial development, follows the tradition of middle-class involvement.

IV.

Mr. Steele argues that the major impediment to the advancement of African Americans today is not the enemy from without — racism, discrimination, inadequate civil rights protections — but the enemy from within — repressed feelings of racial inferiority and the fear to compete against whites. If judges and legislators believe Mr. Steele's "expert" opinion — his inside account about the people for whom our civil rights laws are primarily designed — one is terrified to think about what may happen to civil rights in the 1990s. Based on Mr. Steele's teachings, judges and legislators could easily conclude that any significant expansion or restoration of civil rights protections for African Americans would be futile and unnecessarily intrusive of the freedoms to which whites are entitled. Also, consistent with the Supreme Court's current approach to civil rights, well-established protections may be cut back by narrow construction or even by reversal. There is, however, another side to the story Mr. Steele tells.

Some African Americans do in fact suffer from inferiority anxiety or integration shock. This cannot be denied, unless we are to ignore the residual effects of centuries of slavery and Jim Crow and the negative racial images projected by contemporary society. But how much of the low socioeconomic status of African Americans is caused by other internal conditions — a generalized anger against whites, a feeling that succeeding in mainstream society legitimizes a morally bankrupt, oppressive system, a deep belief that racism and discrimination can overpower individual effort no matter how sincere the effort, an ill-advised conviction that African Americans should sit on their hands and wait for the government to rescue them from racial inequality. The enemy from within exists, but Mr. Steele may have cornered the wrong suspect or only a minor criminal.

Although African Americans face internal problems, Mr. Steele gives too little attention to their external problems. He is too quick to excuse white racism and, more importantly, he assumes, without considering relevant legal and socioeconomic data, that African Americans have adequate opportunities to compete with whites. Yes, racism and discrimination are problems for African Americans, Mr. Steele concedes,[78] but he makes it clear that in

78. *See, e.g.*, *supra* note 1, at 48, 49, 169.

the end African Americans are their own worst enemies.[79]

Racism and racial discrimination cannot be given such short treatment. They directly affect an African American's chances for worldly success and happiness. When an African American is paid substantially less than a white person of comparable education and experience,[80] she then has less money to educate her children or to buy quality housing, and African Americans as a group have less money for business investments and other vehicles of wealth creation. No amount of individual effort can resolve the problem of racial discrimination. Governmental effort through the creation and enforcement of effective civil rights laws is needed.

Finally, his style of analysis — anecdote and impression — fails to uncover the antidotal value of African American culture (particularly the unique features of that culture) for the inner problems of African Americans, including the problem of inferiority anxiety. Mr. Steele does not know his own culture, and that is a tragedy. But it will be a greater tragedy if *The Content of Our Character* should become the subtext for our developing civil rights law.

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79. *E.g.*, *id.* at 39, 49, 54, 61, 72, 106-07, 158, 165.

80. *See supra* text accompanying notes 26-31.