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### **Author**

Franklin, Cary

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## ***DISCRIMINATORY ANIMUS***

**Cary Franklin**

*University of Texas School of Law*

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## Discriminatory Animus

Cary Franklin\*

In addition to barring employers from discriminating on the basis of race, sex, and a number of other protected categories, Title VII of the 1964 Civil Rights Act provided for the creation of a new federal agency, the Equal Employment Opportunity Commission.<sup>1</sup> The EEOC's powers were relatively limited in the years after Title VII was enacted; the political compromises necessary to secure the law's passage deprived the agency of any real enforcement authority.<sup>2</sup> From the very beginning, however, the EEOC had the power to collect data from employers regarding the number of women and racial and ethnic minorities in their workforce.<sup>3</sup> One of the first regulations the EEOC issued required large employers and government contractors to submit EEO-1 reports supplying this information to the agency on a yearly basis.<sup>4</sup> The EEOC continues to require EEO-1 reports from employers to this day, meaning the agency now has nearly half a century's worth of data documenting changes and fluctuations in the racial and gender composition of a substantial percentage of American workplaces.<sup>5</sup>

Sociologists Kevin Stainback and Donald Tomaskovic-Devey recently decided to analyze four decades of EEO-1 reports to determine what these reports could tell us about the successes and failures of the project of racial and gender integration inaugurated by Title VII.<sup>6</sup> They found that from the time Title VII went into effect until 1980, American workplaces were desegregating, sometimes significantly, along lines of both race and gender, due in no small part to the implementation and enforcement of antidiscrimination law.<sup>7</sup> At the start of the 1980s, however, progress began to stall—and it has not picked up since then.<sup>8</sup> In fact, over the past

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\* Assistant Professor, University of Texas School of Law.

<sup>1</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258-59 (codified as amended at 42 U.S.C. § 2000e-4 (2000)) (providing for the creation of the EEOC).

<sup>2</sup> Initially, the statute gave the Commission the power to receive, investigate, and conciliate complaints where it found reasonable cause to believe that discrimination had occurred, but not to file lawsuits. In 1972, Congress extended to the EEOC the power to initiate lawsuits when it believed an employer had engaged in a discriminatory pattern or practice in violation of Title VII. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5(e), 86 Stat. 107 (codified at 42 U.S.C. § 2000e-6(c)).

<sup>3</sup> Section 709(c) of Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000e-8(c)), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed, to preserve such records, and to produce reports as the Commission prescribes.

<sup>4</sup> See Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855, 870 (2006) (The EEOC requires EEO-1 reports from employers in the private sector with one hundred or more employees, and government contractors and subcontractors with fifty or more employees and contracts worth at least \$50,000.).

<sup>5</sup> See Corre L. Robinson et al., *Studying Race or Ethnic and Sex Segregation at the Establishment Level: Methodological Issues and Substantive Opportunities Using EEO-1 Reports*, 32 WORK & OCCUPATIONS 5, 16 (2005) (noting that EEO-1 reports cover more than 40% of private sector employees nationwide).

<sup>6</sup> See KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT (2012). Stainback and Tomaskovic-Devey analyze EEOC-1 reports from 1966 to 2005, a data set that includes more than five million American workplaces.

<sup>7</sup> *Id.* at xxiv; see also *id.* at 118-54.

<sup>8</sup> *Id.* at 167-69. Progress stalled earlier for African Americans than it did for white women, but even the gradual increases in workplace integration between white men and white women petered out at the turn of the century. *Id.* at 168-69.

decade or two, numerous industries in the United States have begun to resegregate. Thus far in the twenty-first century, nearly a third of all industries have witnessed racial resegregation among white and black men<sup>9</sup>; racial resegregation among white and black women has been even more “disturbingly widespread.”<sup>10</sup> Moreover, resegregation and exclusion have tended to rise with higher income opportunities<sup>11</sup>—a trend that has contributed to growing economic inequality and led Stainback and Tomaskovic-Devey to the rather dispiriting conclusion that “[t]he United States is no longer on a path to equal opportunity.”<sup>12</sup> Put succinctly, the EEO-1 reports tell a story of early success and subsequent decline: Title VII got off to a promising start, but progress under the statute began to stall within two decades of its enactment and has not yet shown much sign of reviving.<sup>13</sup>

Stainback and Tomaskovic-Devey attribute the decline in Title VII’s efficacy as a tool for desegregating American workplaces to the major political and policy changes that accompanied Ronald Reagan’s ascendance to the White House.<sup>14</sup> They argue that white voters’ exhaustion with, and frustration over, civil rights projects such as affirmative action, busing, and government aid to the poor helped contribute to Reagan’s victory in the presidential election of 1980, and that the new Administration’s stance toward civil rights enforcement mirrored the attitudes of these constituents.<sup>15</sup> The policy implications of this new stance were immediately apparent in the sections of the federal government tasked with enforcing Title VII and other civil rights provisions. The Reagan Administration reduced the budget of the Office of Federal Contract Compliance Programs—the office within the Department of Labor charged with ensuring that federal contractors comply with the government’s affirmative action and equal employment guarantees—so significantly that the OFCCP was forced to cut more than half its staff and drastically reduce the number of compliance reviews it conducted; this resulted, *inter alia*, in a 77% reduction in back pay awards between 1980 and 1982.<sup>16</sup> The scene at the EEOC

<sup>9</sup> *Id.* at 232; *see also id.* at 233 tbl. 7.9.

<sup>10</sup> *Id.* at 235; *see also id.* at 234 tbl. 7.10; *id.* at 245 (“[S]egregation between white women and black women shows the most disturbing industry-specific trends. We found only eight industries in which the average workplace was systematically hiring or promoting white women and black women into equal-status employment. These were the exceptions . . . . [T]he long list of industries . . . in which the average workplace was hiring or promoting white women and black women into increasingly segregated roles is a bleak testament to the widespread reversal of racial desegregation among women.”).

<sup>11</sup> *Id.* at 238-39.

<sup>12</sup> *Id.* at xxxiv; *see also id.* at 320 (“At this point in the history of private-sector equal opportunity, the dominant pattern is inertia. Little or no national aggregate progress is being made in terms of either desegregation or access to good jobs. Nationally, progress toward workplace equal opportunity has stalled. Moreover, it is disturbing to note that in many workplaces, communities, and industries segregation is increasing . . .”).

<sup>13</sup> In fact, Stainback and Tomaskovic-Devey suggest that their account likely understates the amount of segregation in the American workforce because it takes into account only large firms subject to EEOC reporting requirements and government contractors, which are required to have affirmative action programs. Small private firms, which account for nearly 60% of private sector employment, are more segregated along both race and gender lines than larger firms, and since the 1960s, white men have increasingly been moving out of the government and regulated private sector into this nonregulated private sector. *Id.* at 41-44.

<sup>14</sup> *Id.* at 155.

<sup>15</sup> *Id.* at 157-59.

<sup>16</sup> STAINBACK & TOMASKOVIC-DEVEY, *supra* note 6, at 158; *see also* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 136-37 (2009) (noting that after 1980, contractor debarments and findings of violations dropped, and those who were charged with violations were less likely to be required to take any action in response); James P. Sterba, *Completing Thomas Sowell’s Study of Affirmative Action and then Drawing Different Conclusions*, 57 STAN.

was similar; in the first two years of the Reagan Administration, the EEOC's budget was reduced by 10%, its staff was cut by 12%, and travel funds for EEOC investigations were eliminated.<sup>17</sup> The agency's new head, Clarence Thomas, declared himself "unalterably opposed to programs that force or even cajole people to hire a certain percentage of minorities,"<sup>18</sup> and suggested that employment policies that have a disparate impact on protected groups ought not to count as discrimination under Title VII.<sup>19</sup> By 1983, the EEOC was bringing less than half the number of Title VII lawsuits it had brought during the mid-1970s, despite the fact that the number of discrimination claims it received was substantially greater in the later period.<sup>20</sup>

Stainback and Tomaskovic-Devey use numbers (EEO-1 reports, data regarding agency funding and staffing) to tell a story about the history of Title VII over the past fifty years. This essay tells a similar story about the history of Title VII over the past half-century, not by analyzing vast demographic shifts in the workplace, but by focusing on the shifting meaning of a single word—"animus"—over the same period of time. The concept of "discriminatory animus" plays a central role in the interpretation of Title VII.<sup>21</sup> Thus, examining how the meaning of this phrase evolves over time can provide additional purchase on the historical trajectory documented in the EEO-1 reports. It can help to illuminate the change in mindset, in attitude and understanding, that accompanied the cessation of progress the EEO-1 reports reveal. It can tell us something about how courts and regulators thought about the concept of discrimination in the decade or two after Title VII was enacted, and how these actors came to think about discrimination after what Stainback and Tomaskovic-Devey call the "short regulatory decade"<sup>22</sup> from 1973 to 1980 came to an end.

One of the reasons the word "animus" functions as such a useful barometer for measuring attitudinal change over time is that it admits of multiple meanings. In this sense, it is like the

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L. REV. 657, 667 (2004) (book review) ("During the Reagan era, affirmative action under the federal government's contract compliance program virtually ceased to exist except in name only.").

<sup>17</sup> See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 51 (2002); Sterba, *supra* note 16, at 667.

<sup>18</sup> Ernest Holsendolph, *Skills, Not Bias, Seen as Key for Jobs*, N.Y. TIMES, July 3, 1982, at A5.

<sup>19</sup> See Clarence Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON L. REV. 29, 35-36 (1985).

<sup>20</sup> David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1159 (1989); see also STAINBACK & TOMASKOVIC-DEVEY, *supra* note 16, at 158 (noting that this era also witnessed the virtual demise of the class action lawsuit, as the number of class actions fell from 1,106 in 1975 to a mere 51 in 1989).

<sup>21</sup> See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 637 (2007) (rejecting plaintiff's claims under Title VII and the Equal Pay Act in part because she failed to adduce any evidence that her employer "initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (concurring in the holding that the plaintiff had established a claim of sex discrimination under Title VII in part because she adduced "direct evidence of discriminatory animus" on the part of her employer).

<sup>22</sup> STAINBACK & TOMASKOVIC-DEVEY, *supra* note 16, at xxxii (describing the years from 1973 to 1980 as "an era of relatively strong federal regulatory oversight, increased legislative, judicial, and regulatory emphasis on women's employment rights, effective legal challenges to employer discrimination, and the institutionalization of equal opportunity human resource practices").

word “age.”<sup>23</sup> The Supreme Court has noted that “the word ‘age’ standing alone can be readily understood either as pointing to any number of years lived, or as common shorthand for the longer span and concurrent aches that make youth look good.”<sup>24</sup> So, for instance, the word may mean something very different in “a sentence like ‘Age can be shown by a driver’s license,’ [than it does in] . . . the statement, ‘Age has left him a shut-in.’”<sup>25</sup> The Court has been highly attentive to these variations in the meaning of the word “age” when interpreting the Age Discrimination in Employment Act.<sup>26</sup>

As we shall see, however, courts have not been as attentive to such semantic differences when deploying the word “animus” in Title VII cases. They almost never take note of the fact that “animus” also has two primary, and quite distinct, meanings. It can mean basic attitude, governing spirit or motivation; this meaning carries no negative connotations. But it can also mean prejudiced or spiteful ill will, hostility, dislike, or hatred. Animus, in this second sense, connotes something far less innocuous; to harbor animus against someone, or against an entire group of people, is actively to wish them harm, and—in the context of antidiscrimination law—seems tantamount to bigotry.

From the perspective of a plaintiff in a Title VII lawsuit, it matters very much which type of animus one is required to prove. It is not easy to prove that an employer’s actions were motivated by hatred or animosity toward a protected group, if only because most contemporary employers are too savvy to confess openly to harboring such attitudes and judges are often hesitant to find employers guilty of outright bigotry.<sup>27</sup> If animus, defined in this way, were the legal standard, few plaintiffs would win Title VII suits. Officially, of course, it is not the standard. Plaintiffs alleging disparate treatment under Title VII are not required to prove that an employer acted out of hostility toward a protected class, but simply that race or sex or one of the other protected categories animated, or played a role, in the employer’s decision.

In practice, however, courts in Title VII cases have not always maintained a clear division between these two meanings of the word “animus.” As frustration with the traditional project of antidiscrimination law mounted in the late 1970s and throughout the 1980s, Americans increasingly began to view race and sex discrimination as phenomena of an earlier era, which surfaced now only as aberrant conduct perpetrated by a few malevolent employers in a generally

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<sup>23</sup> *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (observing that some words, such as “age,” have “several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g., Smith v. City of Jackson*, 544 U.S. 228 (2005); *General Dynamics*, 540 U.S. at 595-98.

<sup>27</sup> *See, e.g., Chad Derum & Karen Engle, The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1233-36 (2003) (discussing courts’ tendency to characterize even blatantly racist and sexist comments by employers as “stray remarks” or evidence of personal animosity rather than evidence of a Title VII violation); *cf. U.S. v. Clary*, 846 F. Supp. 768, 779 (E.D. Mo. 1994) (“When counsel first argued that overt racism was really the basis for the discriminatory crack penalties, this Court rejected that approach out-of-hand, for the Court did not believe that such outrageous and outmoded ideas would affect legislators of this day and age. . . . There is a realization that most Americans have grown beyond the evils of overt racial malice. . . .”), *rev’d* 34 F.3d 709 (8th Cir. 1994). The district court in this case went on to find that race had actually influenced the legislators responsible for the vast distinction in the way criminal law treats crack as opposed to powder cocaine, but that finding was later overturned by the Eighth Circuit. *Id.*

egalitarian labor market. Against this backdrop, Title VII increasingly came to be seen not as a tool for combating the kinds of structural problems that continue to generate vast racial and gender-based inequalities in the labor market, but rather, as a mechanism for policing outliers. Today, this is all too often precisely how Title VII functions. This essay argues that if Title VII is to accomplish the broader, more structural purposes for which it was enacted, we need to engage in a new conversation—or really, reinvigorate an older conversation—about what constitutes discrimination under the law.

## I. The Emergence of “Animus” in Title VII Law

The word “animus” does not appear in the text of Title VII. Nor does it appear in early Title VII case law: From the mid-1960s through the mid-1970s, judicial opinions almost never use the word when discussing discrimination by employers.<sup>28</sup> For the first decade of Title VII’s existence, “animus” simply did not play a significant role in the law’s implementation or the adjudication of employment discrimination cases.

This is not to say, however, that the word “animus” never surfaces in discourse about Title VII in the years after the statute was enacted. Legal scholars and lawyers at the EEOC sometimes used the term in this period to refer to the old, outdated conception of discrimination Title VII was designed to replace. Alfred Blumrosen, who assisted in the organization of the EEOC in 1965 and served as its first chief of conciliations and director of federal-state relations from 1965 to 1967, asserted that, in the post-World-War-II era, before the enactment of Title VII, “[d]iscrimination was seen as the evil act of the misguided,”<sup>29</sup> or as “conduct [that was] motivated by the dislike of the group or class to which the victims of discrimination belonged.”<sup>30</sup> Blumrosen noted that governmental actors who attempted to police this form of discrimination were not terribly successful, in part because “evil motive” was extremely difficult to prove, even in midcentury America.<sup>31</sup> Neither employees nor judges have access to employers’ minds, and courts were generally loath to find that employers had acted with malice or ill will toward racial minorities. For this reason, among others, antidiscrimination law in the post-War period did little to improve the status of racial minorities at work.<sup>32</sup>

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<sup>28</sup> A review of all Title VII cases decided in the first decade of Title VII’s existence (and available in Westlaw) indicates that the word “animus” appears only a handful of times.

<sup>29</sup> Alfred W. Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675, 679 (1974).

<sup>30</sup> *Id.* at 681; see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1175 (1995) (“After World War II . . . prejudice was seen as stemming from a particular pathological personality structure. Thus the problem confronting students of intergroup relations became identifying the prejudice-prone personality—the bigot.”).

<sup>31</sup> Alfred W. Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy?*, 49 NOTRE DAME L. REV. 46, 53 (1973) (“The concept of ‘discrimination’ historically was that of conduct animated by an ‘evil motive’ of distaste for the group to which the individual victim of the discrimination belonged. This search for ‘evil motive’ was difficult, and in the period 1945-1965 meant that there was little law enforcement activity by the state civil rights agencies.”).

<sup>32</sup> Indeed, Congress cited the failure of antidiscrimination laws to ameliorate the vast economic disparities between whites and racial minorities in the post-War period as a central reason for enacting Title VII. See S. Rep. No. 867, 88th Cong., 2d Sess. 6-8 (1964) (“[T]he vast amount of work yet to be done is apparent from the economic facts

Commentators—and courts—in the late 1960s agreed that Title VII had moved antidiscrimination law beyond this search for animus.<sup>33</sup> The House Report that recommended passage of Title VII asserted that the law was necessary not in order to protect minorities from racial animosity on the part of employers, but to ameliorate the following three problems: 1) black unemployment rates were double those of whites; 2) black workers were concentrated in the lowest-paid, least stable job classifications; and 3) given comparable age, education, and experience, the median annual wage and salary income of black workers was 60% that of white workers.<sup>34</sup> Commentators pointed to these passages as evidence that Congress had identified the racial stratification of the American labor market as a pervasive and urgent social problem and had passed Title VII to ameliorate it.<sup>35</sup> They asserted that the law's goal is to ensure that those who had historically encountered discrimination and exclusion would now be full and equal participants in the workplace. The law aimed to accomplish this goal, they argued, by providing American workers and lawyers advocating on their behalf with tools to dismantle structural practices that perpetuate inequality—not simply to identify and censure a few renegade employers with sinister motives.<sup>36</sup>

In keeping with this understanding of Title VII's purpose, the lawyers tasked with enforcing the statute in the years after its enactment targeted the kinds of structural practices,

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developed in the course of the hearings on the bill. Gross disparities in earnings and employment opportunities continue to prevail in States having fair employment practice legislation and statewide unemployment rates do not appear to differ substantially from those in States without such legislation.”); *see also Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J.L. & SOC. PROBS. 1, 2 (1969) (“Title VII . . . was designed to inaugurate a full-scale attack on racial discrimination in employment. Twenty years of experience under state fair employment practice laws had proved them to be of little efficacy in most cases. . .”).

<sup>33</sup> *See, e.g.,* Newsweek Mag. v. D.C. Comm’n on Human Rts., 376 A.2d 777, 785-86 (1977) (“Prior to the early 1960’s courts viewed racial discrimination as an attitude based on an ‘evil motive’, ‘mens rea’, or ‘state of mind’. Under this concept it was necessary to show that a person was actively motivated by dislike or hatred of the group to which the complainant belonged. . . . When Title VII of the Civil Rights Act of 1964 . . . was being considered it was argued that some earlier concepts [such as this] were too restrictive.”); *U.S. v. Gulf-State Theaters, Inc.*, 256 F. Supp. 549, 552 (N.D. Miss. 1966) (“The Civil Rights Act is not concerned with the subjective racial prejudices of the people affected.”); George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1670-71 (1969) (arguing that “[t]his shift away from a restrictive focus on the state of mind of the employer is essential to the effective enforcement of fair employment laws,” in part because seniority and testing practices—not necessarily enacted with explicit or provable discriminatory animus—are “the most important contemporary obstacles to the employment and promotion of qualified black workers”).

<sup>34</sup> H.R. Rep. No. 914, pt. 2, 88th Cong., 1st Sess. 26-27 (1963); *see also* S. Rep. No. 867, 88th Cong., 2d Sess. 6-8 (1964) (making similar observations about the relative position of racial minorities and whites in the labor market and the need for a federal law designed to address this problem).

<sup>35</sup> *See, e.g.,* Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 473 (1968) [hereinafter Blumrosen, *Duty of Fair Recruitment*] (“Both House and Senate committee reports cited the unemployment statistics and indicated that these were the fundamental grounds for the adoption of [T]itle VII.”); Blumrosen, *supra* note 29, at 684 (asserting that antidiscrimination laws enacted in the post-War period did little to improve the employment opportunities of racial minorities as measured by income, unemployment ratio, or occupational distribution, and that Title VII was intended to address these “the three indices of minority exclusion and subordination”); *see also* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 240 & n.7 (1971) (citing commentary asserting that the goal of Title VII is “to improve the relative economic position of blacks” and to equalize “the actual distribution of employment opportunities”).

<sup>36</sup> *See* Blumrosen, *Duty of Fair Recruitment*, *supra* note 35, at 475 (“Title VII is not a criminal statute requiring *mens rea*.”).

such as employment tests and seniority systems,<sup>37</sup> that locked historically subordinated groups out of good jobs. In the late 1960s and early 1970s, a number of federal courts issued key rulings holding that such practices violate Title VII because they continue to freeze out members of the groups the law is designed to protect.<sup>38</sup> The reasoning in these decisions reveals that there was not a sharp conceptual divide between discriminatory effects and discriminatory intent in this period.<sup>39</sup> If an employer's policy had the effect of depriving members of protected classes of employment opportunities, that was considered sufficient—by courts, by the EEOC, and by many academic commentators—to show intent. Courts in this era repeatedly explained that if an employer implements a policy or practice it can reasonably foresee will have a deleterious effect on the job prospects of minorities protected by Title VII, its cognizance of the probable outcome of its actions satisfies any intent requirement in the statute.<sup>40</sup> In other words, courts held, it is fair to assume that an employer intends the likely consequences of its actions. Foreseeable effects were deemed sufficient to show intent in this period because interpreters of the law were not focused on what was transpiring inside the employer's head. They had a *thin* conception of intent: The focus was on eradicating instances in which race or sex was functioning as a barrier to employment, not on plumbing the depths of employers' mind to determine their motivations.<sup>41</sup>

In the mid-to-late 1970s, in the constitutional context, courts began to define discriminatory intent differently, and more narrowly, than they had in the preceding decade. By 1980, evidence that a decisionmaker could reasonably foresee the deleterious effects a particular policy or practice would have on a protected class was no longer deemed sufficient evidence of

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<sup>37</sup> See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 248 (1990) (“High on such a list [of targets for the EEOC] were two formidable barriers to black advancement: employee tests and seniority systems.”); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 397, 395 (2010) (asserting that the EEOC in the 1960s “focus[ed] on ‘systems and effects’ rather than tort-like individual wrongs” and quickly “identified seniority systems as one of the major causes of systemic racial disparities in many sectors of the workforce”).

<sup>38</sup> See, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *U.S. v. Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970); *Local 189, United Papermakers v. U.S.*, 416 F.2d 980 (5th Cir. 1969); *Armstead v. Starkville Mun. Separate Sch. Dist.*, 325 F. Supp. 560 (N.D. Miss. 1971); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); see also, of course, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (“Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

<sup>39</sup> For more on the lack of differentiation between discriminatory effects and discriminatory intent in Title VII law in the 1960s and early 1970s, see Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 U.C.L.A. L. REV. 701 (2006); see also Reva B. Siegel, *The Supreme Court, 2012 Term—Foreward: Equality Divided*, 127 HARV. L. REV. 1, 9-15 (2013) (discussing the parallel lack of differentiation in this period between discriminatory effects and discriminatory purpose in the context of equal protection law).

<sup>40</sup> See, e.g., *Papermakers*, 416 F.2d at 997 (“The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them. Section 707(a) demands no more.”); see also ALFRED W. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* 176 (1971) (explaining that “the intent requirement in Title VII is the intent requirement of a civil action in tort—that the defendant be aware of the consequences of his action which are reasonably certain to flow from his behavior.”).

<sup>41</sup> See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1798 (2012) (arguing that “[d]uring the civil rights era, the Court was not on the hunt for individual bigots,” and that “[i]ntent,” if it is to be used to describe the Court’s racial jurisprudence through at least 1977, must not be construed as a reference to the motives of particular individuals. . . . [but rather] as a term of art, connoting a judicial conclusion regarding the illegitimacy of certain racial practices”).

discriminatory intent. The Court suggested in *Washington v. Davis*<sup>42</sup> that discriminatory intent and discriminatory effects were conceptually distinct categories that involved separate structures of proof.<sup>43</sup> A few years later, the Court held in *Personnel Administrator of Massachusetts v. Feeney*<sup>44</sup> that to prove discriminatory intent for the purposes of equal protection law, a plaintiff was required to demonstrate that the state had adopted a particular course of action not simply “in spite of” its adverse effects on a protected group, but at least in part “because of” those effects.<sup>45</sup> In other words, *Feeney* defined “intent” as acting not simply with an awareness of impending harm, but out of a base desire to cause such harm. As a result, courts began to understand discriminatory intent, for purposes of equal protection law, as a “state of mind akin to malice.”<sup>46</sup>

*Davis* and *Feeney* were not Title VII cases; they concerned state action and the meaning of discrimination under the Constitution. But they reflected a turn inward—a turn toward the mental state of the discriminator—that was also occurring in Title VII law.<sup>47</sup> By this time, courts had made it clear that disparate treatment and disparate impact were also to be treated as distinct doctrines under Title VII. And it is at this moment, in the late 1970s, that the word “animus” first enters Title VII case law. For the first decade of the law’s existence, “animus” played no role in judicial discourse about employment discrimination. But by the late 1970s, courts begin to assert, in dozens of Title VII cases each year, that an allegation of disparate treatment requires proof of “discriminatory animus.”<sup>48</sup> By the 1980s and 1990s, the word “animus” starts to appear in hundreds of Title VII cases each year.<sup>49</sup> After the turn of the century, such appearances start to number in the thousands.<sup>50</sup> Today, it has become routine for courts in disparate treatment cases to ask whether an employer has acted with “discriminatory animus.”<sup>51</sup>

## II. The Double Meaning of “Animus” and its Implications for Title VII

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<sup>42</sup> 426 U.S. 229 (1976).

<sup>43</sup> *But see id.* at 253-54 (Stevens, J., concurring) (“Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. . . . My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume.”).

<sup>44</sup> 442 U.S. 256 (1979).

<sup>45</sup> *Id.* at 279.

<sup>46</sup> See Haney-López, *supra* note 41, at 1783; Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997).

<sup>47</sup> See Krieger, *supra* note 30, at 1168 (observing that as disparate treatment law developed, discrimination came to be understood as the product of “discriminatory animus towards members of the plaintiff’s racial or ethnic group”).

<sup>48</sup> See, e.g., *Turner v. Tex. Instruments, Inc.*, 555 F.2d 1251, 1257 (5th Cir. 1977) (“Title VII . . . [does] not protect against unfair business decisions—only against decisions motivated by unlawful animus.”).

<sup>49</sup> See, e.g., *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 236 (W.D. Tex. 1999) (“An allegation of disparate treatment requires proof of racial animus.”).

<sup>50</sup> See, e.g., *Candelario Ramos v. Baxter Healthcare Corp. of Puerto Rico, Inc.*, 360 F.3d 53, 61 (1st Cir. 2004) (“Even with reasonable inferences drawn in plaintiffs’ favor, the district court correctly held that there was no evidence of animus—and that means that the discriminatory treatment claim fails.”).

<sup>51</sup> See, e.g., *Allen v. Radio One of Tex. II, LLC*, 515 F. App’x 295, 300 (5th Cir. 2013) (rejecting plaintiff’s claim on the ground that she failed to “demonstrate her termination was motivated by sex-based animus”).

To be perfectly clear: Title VII doctrine does not require the plaintiff in a disparate treatment case to demonstrate that an employer acted with animus defined as hostility or ill will.<sup>52</sup> A plaintiff is required to show only that an employer acted with discriminatory intent. Thus, when courts assert, as they frequently do, that proof of “discriminatory animus” is required under Title VII, they are ostensibly using the word “animus” as a synonym for “intent.” In the late 1970s, when courts first began to deploy the word “animus” in antidiscrimination cases, they sometimes took care to explain this. One court explained, for instance, that when it used “[t]he term ‘animus,’ [it meant that term] to be synonymous with ‘motivation,’”—as in, race animated the decision—and did not mean to refer to “‘animus’ in its secondary sense of personal hostility or enmity.”<sup>53</sup>

In practice, however, it has proven difficult to maintain a strict separation between these two senses of the word. It is difficult to hear the word “animus” without also hearing its negative or malicious connotations. The phrase “discriminatory animus” or “racial animus” seems to point to a thicker conception of intent. So when courts routinely declare that disparate treatment claims under Title VII require evidence of “discriminatory animus,” this cannot help but shade our understanding of the kind of conduct that violates the law, because the term “animus” seems to describe a particular mental state, with overtones of ill will or hostility toward a particular group. Indeed, this usage is far more common in normal everyday discourse than the more innocent use of the word “animus” to mean, simply, intent.

Not surprisingly, courts often seem to find it difficult fully to eradicate the negative connotations of the word “animus” from their thought process when determining whether a plaintiff has succeeded in meeting the burden of proof in a Title VII case. This second layer of meaning seems regularly to spill over into judges’ consideration of what constitutes discriminatory intent, and thus, what counts as discrimination under the law. Consider, for instance, the rhetoric the First Circuit deploys when discussing discrimination in *Candelario Ramos v. Baxter Healthcare*,<sup>54</sup> a Title VII case in which the Puerto Rican employees of a healthcare products manufacturer alleged they had been discriminated against on the basis of their national origin. The court rejects this claim on the ground that “there is simply no evidence that Baxter management acted out of animus to Puerto Ricans.”<sup>55</sup> The court notes that “there are no statements by Baxter management disparaging Puerto Ricans,”<sup>56</sup> nor any evidence that the reasons proffered by the employer for its actions were pretexts for “wicked motives.”<sup>57</sup> There is simply no evidence, the court concludes, that the company’s management “harbored animus toward Puerto Ricans.”<sup>58</sup>

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<sup>52</sup> Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 501 (2001) (“For years, it has (or should have) been clear that discriminatory intent or motive is not coextensive with hostile animus.”).

<sup>53</sup> Local No. 1 v. Int’l Bhd. of Teamsters, 419 F. Supp. 263, 277 n.23 (E.D. Pa. 1976). This case did not involve a Title VII claim, but the court’s observations regarding the term “animus” are perfectly applicable in the context of Title VII.

<sup>54</sup> 360 F.3d 53 (1st Cir. 2004).

<sup>55</sup> *Id.* at 61.

<sup>56</sup> *Id.* at 57.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 59.

My point is not that the plaintiffs in *Candelario Ramos* should have won their case, but rather, that this kind of rhetoric, in which there seems to be considerable slippage between the two meanings of the word “animus,” subtly or not-so-subtly affects our understanding of what constitutes discrimination. Such rhetoric is not unusual in contemporary Title VII cases.<sup>59</sup> Courts today sometimes reject disparate treatment claims on the ground that the plaintiff failed to produce any evidence of “racial animus”<sup>60</sup> or “sex-based animus,”<sup>61</sup> and it is hard not to conclude that the word “animus” does some work in these instances. For instance, when courts find for an employer on the ground that the plaintiff has “offer[ed] no evidence . . . of antipathy towards Hispanics”<sup>62</sup> or “anti-Hispanic animus”<sup>63</sup>—or when a court observes that a plaintiff has failed to show that an employer acted with “invidious racial animus”<sup>64</sup>—it seems clear that the more negative connotations of the word “animus” have conditioned the way adjudicators think about the kind of conduct Title VII prohibits. Doctrinally speaking, these courts must simply mean that there is no evidence in these cases that race or sex played a role in the adverse employment actions the plaintiffs allege. But by framing intent as “animus,” courts may allow a lack of evidence of group-based hatred or ill will to bring them most of the way to a decision. Thus, although Title VII law has not formally incorporated the notion that plaintiffs must prove evil motive (indeed, the law explicitly rejects this idea<sup>65</sup>), the word “animus” can nonetheless ambiguate the meaning of “intent” in a way that allows it to slide in that direction.

It is not a coincidence that the word “animus” began to appear in Title VII case law with increasingly frequency at precisely the same moment workplace integration began to stall. The emergence of this word coincided with a new (or, perhaps, renewed) understanding of discrimination as conduct perpetrated by bad apples—a relatively circumscribed number of employers with evil motives—rather than a pervasive and deeply entrenched social problem Title VII was designed, and urgently needed, to address. The hunt for animus makes sense if one believes discrimination is largely a thing of the past—if one believes there may still be isolated bad actors, but conditions in the workplace are now generally fair, and any inequalities along lines of, say, race are likely attributable to factors other than discrimination. In fact, by the late 1970s, the Court *had* started to reason about discrimination in this way. This conception of discrimination led the Court, in the context of affirmative action, to invalidate a series of programs designed to integrate institutions of higher education and sectors of the labor market previously reserved to whites.<sup>66</sup> In the context of public education, it motivated the Court to

<sup>59</sup> See White & Kriger, *supra* note 52, at 501 (noting that “the equation of discriminatory intent with hostile animus still powerfully shapes the decisions of many lower courts”).

<sup>60</sup> Grillo v. N.Y.C. Transit Auth., 291 F.3d 231, 234-35 (2nd Cir. 2002).

<sup>61</sup> Allen v. Radio One of Tex. II, LLC, 515 F. App’x 295, 300 (5th Cir. 2013).

<sup>62</sup> Castro v. City of N.Y., No. 05 Civ. 593(LAK)(MHD), 2009 WL 2223037, at \*8 (S.D.N.Y. July 22, 2009).

<sup>63</sup> *Id.*

<sup>64</sup> Hyman v. Atlantic City Med. Ctr., No. Civ. A. 97-795(JEI), 1998 WL 135249, at \*12 (D.N.J. Mar. 16, 1998).

<sup>65</sup> See, e.g., EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1283-84 (11th Cir. 2000) (“To prove the discriminatory intent necessary for a disparate treatment or pattern or practice claim, a plaintiff need not prove that a defendant harbored some special ‘animus’ or ‘malice’ towards the protected group to which she belongs.”); Doe v. City of Belleville, 119 F.3d 563, 583 n.19 (7th Cir. 1997) (“[W]e have expressly rejected the argument that proof of a gender-based animus is required to make a claim of sex discrimination.”); King v. Bd. of Regents of the Univ. of Wis. Sys., 898 F.2d 533, 539 (7th Cir. 1990) (“All that is required is that the action taken be motivated by the gender of the plaintiff. No hatred, no animus, and no dislike is required.”).

<sup>66</sup> See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292, 295 (1978) (asserting that the United States is now “a Nation of minorities” and that “[t]he clock of our liberties . . . cannot be turned back to 1868,” when African

curtail the pursuit of desegregation through busing and other race-conscious integrative measures.<sup>67</sup> Today, this narrative features quite prominently in Supreme Court jurisprudence: it recently played a central role in the Court's decision to eviscerate Section 5 of the Voting Rights Act.<sup>68</sup> Title VII law has not formally incorporated the more restrictive definitions of discrimination historically subordinated groups now confront in the context of equal protection law; but, as the past several decades of EEO-1 reports reveal, employment discrimination law has not remained untouched by these conceptual shifts.<sup>69</sup>

The only way to revive the project of workplace integration inaugurated by the passage of Title VII is to begin to tell a different story about discrimination than the one that has currently captured the Court's imagination. It is not a new story, exactly—it is the story that lawyers at the EEOC and academic commentators told in the 1960s, just after the enactment of the Civil Rights Act. These commentators looked to the 1963 House Report as a guide to the statute's interpretation. That Report concluded that discrimination in the workplace was an urgent social problem—and that a new federal employment discrimination law was necessary—because: 1) black unemployment rates were double those of whites; 2) black workers were concentrated in the lowest-paid, least stable job classifications; and 3) given comparable age, education, and experience, the median annual wage and salary income of black workers was 60% that of white workers.<sup>70</sup> Statistics like these do not come about through the conduct of a few bad actors. They are evidence of major structural problems. Early proponents of Title VII—and indeed, many courts—viewed the law as a means of combatting such problems—not by targeting employers with bad motivations, but by dismantling policies and practices that impede equality in the workplace.

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Americans faced more discrimination than other groups); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499–500, 503 (1989) (finding no evidence of discrimination in a Southern city where blacks comprise 50% of the population and minority-owned prime contractors are awarded .67% of city construction contracts because “[t]here are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices,” in addition to possibility that “[b]lack[s] may be disproportionately attracted to industries other than construction”).

<sup>67</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (striking down a remedial interdistrict busing plan designed to integrate a highly segregated metropolitan area on the ground that it pulled students from white suburbs innocent of any responsibility for the current state of segregation); *Mo. v. Jenkins*, 515 U.S. 70 (1995) (striking down a court-ordered intradistrict remedy on the ground that it attempted to attract students from white suburbs that did not bear any responsibility for school segregation in the metropolitan area).

<sup>68</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2625, 2626 (2013) (finding the Voting Rights Act's preclearance formula hopelessly outdated in part because “things have changed dramatically” and “our Nation has made great strides” since the Act was passed); *id.* at 2626 (suggesting the burdens Section 5 places on the South are no longer fair or necessary because the nation has come a long way since 1965, when police “in Selma, Alabama . . . beat and used tear gas against hundreds marching in support of African-American enfranchisement”).

<sup>69</sup> Indeed, the trajectory of integration and resegregation documented by the EEO-1 reports parallels almost exactly the trajectory of integration and resegregation in public schools documented by political scientist Gary Orfield. See ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 30–31 & fig. 5–6 (2004) (showing that the desegregation of black and white school children ended in the early 1980s and that schools have been resegregating along racial lines in the decades since then); *id.* at 18 (arguing that school desegregation ended and resegregation began in the early 1980s in large part due to the Reagan Administration's new ideas about discrimination and the law's proper role in combatting it).

<sup>70</sup> See *supra* note 34 and accompanying text.

Today, fifty years after the passage of Title VII: 1) black unemployment rates remain double those of whites<sup>71</sup>; 2) blacks, and other racial minorities, are still concentrated in the lowest-paying, least stable job classifications<sup>72</sup>; and 3) black households earn on average just 59% as much as white households.<sup>73</sup> Thus, we might echo the academics and EEOC lawyers of the 1960s in saying: workplace inequality is an urgent social problem. Statistics like these do not come about through the conduct of a few bad actors. They are evidence of major structural problems. I believe antidiscrimination law still has a role to play in addressing these sorts of problems, but it will not—it cannot—do so if we conceive of its goal as the policing of outliers who harbor “animus” against protected groups.

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<sup>71</sup> See Brad Plumer, *These Ten Charts Show the Black-White Economic Gap Hasn't Budged in Fifty Years*, WASH. POST, Aug. 28, 2013 (noting “[t]he black unemployment rate has consistently been twice as high as the white unemployment rate for 50 years” and that “this gap hasn’t closed at all since 1963”); see also Michael A. Fletcher, *Fifty Years After March on Washington, Economic Gap Between Blacks, Whites Persists*, WASH. POST, Aug. 27, 2013 (noting that “racial economic disparities are mostly unchanged [since the 1960s] and in some cases are growing,” and discussing the role of discrimination in perpetuating these disparities).

<sup>72</sup> See U.S. DEPT. OF LABOR, *THE AFRICAN-AMERICAN LABOR FORCE IN THE RECOVERY* (2012), available at [http://www.dol.gov/\\_sec/media/reports/blacklaborforce/](http://www.dol.gov/_sec/media/reports/blacklaborforce/).

<sup>73</sup> PEW RESEARCH CENTER, *KING’S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES* (2013), <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/> (“Expressed as a share of white income, black households earn about 59% of what white households earn, a small increase from 55% in 1967.”). Neither of these figures controls for variables such as age, education, and experience.