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AIN'T IT A SHAME (HOW DISCRIMINATION LAW PERPETUATES INEQUALITY)

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Introduction

ALFAI's 2021 International Client Seminar invites us to "Rid[e] the Wings of Transformation" by exploring "The Power of Radical & Fundamental Change." In this session, we ask whether radical and fundamental changes – either to American law addressing employment discrimination or in employer management practices – can transform our workplaces into more diverse and productive environments.

The members and clients of ALFA oppose racial and sexual discrimination because we are a diverse group of people who believe we and others should be evaluated and respected as individuals, because our firms operate in many different communities and therefore need to embrace talented people who will help our firms succeed in those communities, and of course, because our firms need to minimize exposure to litigation.

The #BlackLivesMatters protests last year and the #MeToo demonstrations three years earlier abolished any doubt that women and people of color continue to experience discrimination. While most people agree America is a better place for protected classes in 2021 than it was in the 1960s, when the United States adopted the first of the civil rights laws that prohibit discrimination, most of us are also very aware of how far short we are falling of our stated goals of non-discrimination.

Even so, three social scientists who probed how American civil rights litigation works in practice have found the laws that were intended to reduce inequality are actually making the situation worse.[1] After analyzing over 1,800 cases and interviewing 100 civil rights plaintiffs, defendants, and attorneys, they wrote a report and gave it a title that highlights their conclusion: *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality*.[2]

Their conclusion that discrimination law perpetuates inequality echoes what critics of the civil rights laws have been saying for decades. Of course, even though there seems to be some convergence about American antidiscrimination laws begetting further discrimination, there is no agreement about how the system might be improved.

To try to find a better way, we first offer a brief description of the civil rights landscape and then look more closely at how the parties involved in civil rights litigation describe their experiences. We then discuss how America's current laws addressing discrimination might be improved. Because neither the authors of *Rights on Trial* nor critics of the civil rights laws propose viable

[1] ELLEN BERREY, ROBERT L. NELSON, & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 269 (2017).
[2] *Id.*

alternatives to America's current legal structure, we suggest that employers look at the writings of Dr. Brené Brown and others who encourage using empathy as an antidote to shame.[3]

#BlackLivesMatter and #MeToo

Anyone who has watched or read the news over the past few years could reasonably think discrimination has not abated in America. Last year, following the death of George Floyd on May 25, 15 million Americans demonstrated in 2,500 cities and towns in support of #BlackLivesMatter. The demonstrations have been called the largest protests in America's long history of mass movements for civil rights and racial justice.[4] The protests resonated with many Americans. Within days, polls showed that 96% of Americans acknowledged it is difficult for black Americans to get ahead and 47% said systemic racism created conditions that make it difficult for black Americans to get ahead."[5]

The protests in the United States also set off a "tidal wave" of support around the world.[6] Hundreds of thousands of people in London, Sydney, Cape Town, Rio de Janeiro, Stockholm, Tokyo, and many other communities took to the streets in solidarity."[7]

Three years earlier, world-wide protests had gone viral in support of #MeToo as women came forward to accuse powerful men of harassment and misconduct.[8] Both movements started much earlier, #MeToo in 2007 and #BlackLivesMatter in 2013.[9] Neither movement caught fire right away, but when they did, both attracted international attention and support. According to the Washington Post, by 2020, "#MeToo ha[d] evolved into a global movement, generating new or spinoff hashtags in many languages. It has impacted countries around the world — and has also been transformed by them. In the midst of the coronavirus pandemic, activism on women's rights and gender-based violence has not ceased. If anything, in some cases, it has gained new urgency online."[10]

Unfortunately, the #MeToo activism had little impact on policy in the eight countries the Washington Post focused on. According to the Post's articles, China still lacks robust laws against

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[3] See, e.g., BRENÉ BROWN, DARE TO LEAD: BRAVE WORK, TOUGH CONVERSATIONS, WHOLE HEARTS 119-63 (2018).
[4] Abigail Haworth, *The Global Fight for Black Lives*, MARIE CLAIRE (Nov 23, 2020), https://www.marieclaire.com/politics/a34515361/black-lives-matter-international/#.
[5] Rebecca Morin, *Percentage grows among Americans who say black people experience a 'great deal' of discrimination, survey shows*, USA TODAY, June 11, 2020.
[6] Haworth, *supra* note 4.
[7] ***Error! Main Document Only.*** *Id.*
[8] *#MeToo is at a crossroads in America. Around the world, it's just beginning*, WASHINGTON POST, May 8, 2020.
[9] *Id.*; Haworth, *supra* note 4.
[10] *#MeToo*, *supra* note 8.

sexual harassment, women in India still have limited access to justice, momentum has stalled in Australia, and the Muslim community in the Middle East continues to defend Muslim men and tries to silence Muslim women. In Nigeria and Mexico, the Post says #MeToo sparked national conversations but describes no concrete change in women's lives. The Post did note tangible progress in Japan, where women no longer have to wear high heels. But in France, Brigitte Bardot bashed the #MeToo movement as "hypocritical and ridiculous," and Catherine Deneuve supported protecting men's desires over the safety of women.[11]

Of course, it is no surprise that little has changed in those countries in the three years since #MeToo made news. The fact is that little has changed in the United States despite legislation that dates back to President Johnson signing the Civil Rights Act of 1964. Over the next 56 years, Congress adopted and the President signed the Age Discrimination in Employment Act (1967), the Americans with Disabilities Act (1990), the Civil Rights Act of 1991, the Family and Medical Leave Act (1993), the ADA Amendments Act of 2008, and the Lilly Ledbetter Fair Pay Act of 2009.[12] Similar laws have been adopted in most if not all states. Yet discrimination is still a problem, as illustrated by two surveys of women lawyers taken in 2020. Women Lawyers On Guard just published a survey that found "significant, current evidence of sexual misconduct and harassment" and concluded, "The system of addressing sexual harassment in the legal profession is 'still broken.'"[13] Also, a survey of 5,300 New York lawyers concluded the treatment of women in New York courts has improved markedly since 1986, "[b]ut significant areas of bias remain."[14] If five decades of discrimination law has not eliminated discrimination against female lawyers by male lawyers and courts, it is easy to believe it has accomplished even less for women who work in other businesses and professions.

American Discrimination Law in Practice

The authors of *Rights on Trial* made a unique contribution to the research on discrimination law by interviewing 100 plaintiffs, defendant representatives, and attorneys in discrimination cases, printing excerpts from their responses, and making the recordings available on-line. While it is not possible to summarize the interviews here, we have distilled themes we detected into four fictional soliloquies.[15] And because the authors of *Rights on Trial* did not interview individuals

[11] *Id.*
[12] See, generally, BERREY ET AL., *supra* note 1, at Chapter Two.
[13] *Still Broken: Sexual Harassment and Misconduct in the Legal Profession, a National Study*, WOMEN LAWYERS ON GUARD 4 (2020), https://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf.
[14] New York State Judicial Committee on Women in the Courts, *Gender Survey 2020*, NEW YORK COURTS 3-5 https://www.nycourts.gov/LegacyPDFS/IP/womeninthecourts/Gender-Survey-2020.pdf (last visited Dec. 14, 2020).
[15] *Id.* at 78-81, 155.

who were accused of discrimination or harassment,[16] we also created a fifth soliloquy to express what an employee accused of discriminatory conduct might experience.

Carl Harris, Claimant:

- I had worked for Big Corp. for more than seven years when Norbert was promoted and became my supervisor. He is German, speaks with an accent. He is an engineer and has no background at all in what I did. In our first face-to-face interaction I shook his hand and said, "Congratulations, I hear you're the new boss." He said, "I hate being called boss. Don't ever use that word to me again." It seemed like a slap in the face. The next day, he met with the staff. He said, "Well, the first thing I want to tell you is I'm a Christian. I'm going to run this place on Christian values." A lot of people turned to look at me because they know I'm gay. Norbert started meeting with my subordinates. They told me he asked, "What should we do to change Carl's unit?" Sometimes he'd tell me to do stuff that was illegal. After one conflict, Norbert called me into his office. He put his hand on the Bible he always kept open on his desk and told me, "You know, I've prayed on this, and I just think your staff is out of control. You're out of control. I'm going to write a negative evaluation about you because of this." I went to the human resources director. She made it clear it was her job first, you know. She worked for Norbert. I had confided in her and she privately agreed that the situation was just horrible, but she also said, "If you quote me on that, I'll call you a liar." And that's exactly what happened.

Josephine Sharps, Attorney for Carl Harris:

- I don't take many discrimination cases. They usually aren't worth much. Most people aren't paid enough to generate a decent recovery or an adequate fee, and they can usually find another job pretty quickly, which means the damages are small. And even though attorney fees can be recovered if these cases go to court, most cases settle before that. I took Carl's case because his salary was high enough to give us a chance for a significant recovery. Also, I've dealt with Big Corp. before and I knew their legal and personnel operations are shockingly amateurish. I was impressed by Carl's story about his supervisor openly

[16] *Id.* at 21. The authors also focused exclusively on claims against large corporations, so they presented no narratives from owners or employees of small businesses. It seems likely that a discrimination claim asserted against a small business will generate feelings of shame for all parties that are similar to, if not more intense than, those arising from claims asserted against large businesses.

expressing fundamentalist Christian values that seemed to be hostile to gay people. Carl told me the employees he supervised knew he was gay and were very supportive. He also told me what the HR director had said about Norbert's actions being horrible. He told me the HR director would deny saying that, and she did. And Carl's co-workers were pretty ambivalent too. I think they were protecting their jobs. That happens a lot in these cases. And it didn't help that Big Corp. had some evidence that Carl had been involved in a physical altercation of some kind with a subordinate. It ended up being a tough case. We were able to get a settlement, but Carl was pretty disappointed. And so was I.

Lucinda Gregson, Human Resources Director at Big Corp.:

- The idea that anyone at Big Corp. discriminates against LGBTQ is ridiculous. Big Corp. was one of the first Fortune 1000 companies to extend health care benefits to LGBTQ employees. My wife and I were able to get insurance through my work before we were able to get married. This is a great place to work. When employees come to me complaining about discrimination, I always try to remember that these are real people, so the problem is not only legal. You know, you can't just solve the legal problem. You're trying to solve the whole problem. The personalities, the job structure, you know, whatever is going on that is causing these issues. We're trying to resolve all of that, because, essentially, what we're looking for is productivity, and productivity comes from people understanding what they are being asked to do and doing it together and not undermining each other. Now, we still get sued. We still have a number of EEO charges, for example, and eventually a certain number of them become lawsuits. Most of the time, these cases arise when Human Resources and in-house counsel are not involved at the early stage. Either somebody didn't recognize it, or the employee didn't give us a warning that there was a problem, and all of a sudden, there you go: now we're sued. By the time Carl came to talk to me, he had burned all the bridges with Norbert. I listened and was sympathetic, but I didn't say anything to suggest I accepted his allegations as fact. And I certainly didn't threaten to call him a liar. I would never do that. We investigated his claims and determined they were unfounded.

Carlos Alvarez, Attorney representing Big Corp.:

- Carl Harris's case should never have been filed. His attorney, Josephine Sharps, has been lucky on a few of these claims so she files them all the time now. She's not a very good lawyer. She probably didn't realize that Carl would have had a stronger case if he had filed in state court, where the law was more favorable to

him. Or maybe she was worried about bringing the case before a jury, given Big Corp.'s strong engagement with the community, and the likelihood that a local jury in a conservative and very Christian community would believe Norbert, who was named as an individual defendant. Norbert is a devout Christian, a church elder and Sunday school teacher, and instantly likeable. Really the opposite of Carl Harris in almost every way. I think the plaintiff's attorney evaluated his client rightfully as someone who wasn't very likeable. So, it made sense for both of us to try to dispose of the claim quickly. The company offered far more than the case was worth to buy its peace. Of course, the company demanded a confidential settlement, and Harris eventually agreed. I assume he is breaching it anyway, talking to his friends in the LGBTQ movement about how he got soaked by the company. If he is, that may be not be a big deal, since it could discourage that crowd from targeting Big Corp. Anyway, there was a lot of drama around the wording of the settlement agreement, which is typical of Josephine, but we got the deal done. I understand Harris has turned down a couple of positions that he thought were beneath him and is still looking for work.

Norbert Hodgkins, manager accused of harassing gay employee:

- It never happened. What Carl Harris says I did, I didn't do. I don't know why he is saying these things about me. HR said the investigation was confidential, and made me promise not to talk about anything, but his lies spread through the company quickly. And they ruined me. When I left my office to go to the bathroom, co-workers stared at me – people I'd worked with for years. They wouldn't talk to me, even when I asked a direct question. And it went beyond work. My wife and kids treated me like a stranger. My church stopped asking me to teach Sunday school. And it makes no sense. I mean, I don't care whether Carl is gay. It's none of my business. I don't care what he does with his free time. When I took over, he seemed like a good worker. I let him manage his department. But then the people he managed came to me with complaints. They said he was trying to undermine my authority. And there was a report we couldn't confirm that he had taken a swing at a co-worker who said something negative about gays. If we could figure out who the co-worker was … but we couldn't. Regardless, I didn't use any slurs about gays around Carl or point at my Bible and threaten him. This is just so wrong!

What these soliloquies suggest, we think, is that America's discrimination laws are not working for any of the parties who are involved. In the next two sections, we will review the reasons for the laws' failure according to the authors of *Rights on Trial* and to the critics of the civil rights laws, and we will summarize the ways they propose to address that failure.

Rights on Trial – An Overview

Rights on Trial was written by three academics: Ellen Berrey, an assistant professor of sociology at the University of Toronto; Robert L. Nelson, a professor of sociology and law at Northwestern University; and Laura Beth Nielsen, a professor of sociology at Northwestern University. The authors also hold positions at the ABA Foundation. All have written extensively about discrimination and law.[17]

In the introduction to *Rights on Trial*, the authors note that academic research on workplace discrimination has recognized for years that the U.S. laws on employment discrimination are not effective. They say there has been no consensus about why but suggest "the prevailing argument … has been that animus-based discrimination is *not* the primary mechanism perpetuating inequality in the workplace," and that "implicit bias, structural mechanisms held over from the past, subtle favoritism toward white people, and a few 'bad apples'" are the major challenges antidiscrimination law should address.[18] The authors reject that view emphatically and insist "overt racism, sexism, ableism, and ageism must remain part of the scholarly and activist agenda."[19] They cite the election of Donald Trump in 2016 as evidence that racial hatred and animus "have not been eliminated," but were "merely deemed inappropriate for 'polite conversation.'"[20] They go on:

> The system of employment civil rights litigation reflects a paradox in American society. At some level, America's commitment to workplace fairness has never seemed so obvious. …[G]overnment, business, universities – indeed, a whole professional subgroup of equal employment officers – articulate a normative commitment to equal opportunity and inclusion across a range of traditionally disadvantaged groups. For over five decades, employment civil rights litigation has been seen as an instrument to achieve greater workplace opportunity – first for people of color and women, and more recently for the aged and those with disabilities. ….
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> Yet we also see stalled progress (if not retrenchment) on the ladder to more influential and better paying jobs for disadvantaged groups, as well as signs of growing economic inequality in the American workplace. We continue to see

[17] BERREY ET AL., *supra* note 1, at 314, 328-29 (The authors cite 17 of their own articles).
[18] BERREY ET AL., *supra* note 1, at xiii (emphasis in original).
[19] *Id*.
[20] *Id*.

> attacks on employment civil rights litigation from critics who decry such litigation as a frivolous, costly, excuse factory.[21]

The authors' stated goal in writing *Rights on Trial* was to determine how rights-based litigation actually operates. Their report begins with a chapter looking at "fifty years of employment civil rights," which concludes that: (1) A "miniscule percentage of African Americans who feel they are discriminated against in the workplace … make a charge with the EEOC or in court"; (2) "Only about 15% of those who complain to the EEOC receive some kind of positive outcome"; and (3) Most plaintiffs who file lawsuits never reach trial, and "[i]f they do go to trial, they lose more than 60% of the time."[22]

The Report then explains what the authors call their "original, comprehensive mixed-methods research design," which combined a quantitative analysis of almost 1,800 federal court filings and 100 "in-depth interviews of parties and their attorneys."[23] Their "quantitative analysis" is a relatively brief summary of case characteristics, plaintiff characteristics, and legal outcomes in the civil rights cases they studied.[24] From that analysis, the authors conclude "that law fails to seriously address discrimination, not because it excuses discriminatory behavior, but because of how it organizes the enforcement of legal rights."[25] The authors note that most discrimination cases are filed as individual claims asserting disparate treatment rather than as class actions "that attack policies that have a widespread impact on protected groups."[26] And they describe an "asymmetry of power" between corporate defendants defended by experienced counsel and individual claimants, who are often not represented by counsel and even when represented grossly outmatched in resources.[27]

The authors expound on the interviews they conducted in a chapter called "Narratives of Civil Rights Litigation," which consumes more than half of the book.[28] The authors explain they are presenting the narratives in order to "examine the[] two very different perspectives on the

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[21] *Id.* at 9.
[22] *Id*. at 50.
[23] *Id.* at 10. The authors drew on three data sets. One, from each of seven federal district courts, they collected and analyzed a random sample of approximately 300 cases filed between 1988 and 2013. Two, from that sample of cases, the authors classified the cases into 16 "cells" based on the type of discrimination alleged and the case outcome, and then drew a random subsample of cases from each "cell" and interviewed 100 parties and attorneys who had participated in those cases. Three, the authors made "limited use of the confidential charge data file obtained from the EEOC for the years 1991-2002, which contains all complaints made to the EEOC or state fair-employment agencies." *Id.*, at 20-23.
[24] *Id.* at 54-73.
[25] *Id.* at 72.
[26] *Id.* at 72.
[27] *Id.* at 73.
[28] *Id.* at 77-222.

workplace conflicts that give rise to the filing of civil rights lawsuits," and to explore the "power asymmetries and early dynamics of legal reinscription, particularly in the efforts by HR personnel and inside counsel to head off disputes before they become legal claims."[29]

They recognize the legal system usually "cannot answer what is often posed as the core legal question in these cases: *did discrimination happen?* Because most cases settle or are decided on technicalities, there is usually no official adjudication of the facts of the case."[30] Of course, even a judicial finding of discrimination does not resolve the question. As the authors acknowledge, "Discrimination is a contested event, told from multiple perspectives. These stories carry different weight and legitimacy depending on who is telling them, in what venue, and with what support. …. [W]hether the target has legal support, social networks, and knowledge of the law can influence both formal and informal determinations that discrimination did or did not occur."[31] Since "the problem of discrimination is as much structural as intentional, … finding evidence of it in individual cases is fraught with difficulty. … [I]ndividual claims of discrimination often are complicated and ambiguous."[32]

The Report concedes that the legal system's inability to tell us whether discrimination did or did not occur "poses a central quandary for [their] analysis and for the system of employment civil rights litigation,"[33] especially when that system is also "reinscrib[ing] the invidious hierarchies it was created to ameliorate."[34] And, despite finding that the law governing employment civil rights "limits the realization of rights and may even contribute to greater workplace inequality," the authors "do not advocate dismantling or weakening the system."[35] On the contrary, they suggest strengthening the system only to "benefit plaintiffs in pursuing their employment civil rights," even as they acknowledge that their proposals are unlikely to be adopted, and assert that "the prospects for finding win-win, commonsensical ways to improve the system of employment civil rights litigation will likely prove elusive.[36] And, of course, they never claim that strengthening the system to benefit plaintiffs will reduce discrimination or inequality.

The opening chapter of *Rights on Trial* "suggests the need for a re-examination of the system of employment civil rights litigation as a policy matter," and asks whether "the system so flawed that it must be remade from scratch," but the book never answers the question.[37] The final

[29] *Id.* at 77.
[30] *Id.* at 25.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 19
[35] *Id.* at 269.
[36] *Id.* at 272-73.
[37] *Id.* at 19-20.

chapter contains no re-examination of the system and the only reform it even mentions is a more worker-friendly "collectivist orientation" they say has been adopted in other countries.[38] They don't explain how that orientation works, whether it would benefit any parties other than workers, or how it could fit in America's non-collectivist culture.[39] They simply dismiss all alternatives because "[t]he differences across national histories and national contexts make it unlikely that we can borrow more effective models of antidiscrimination law from other countries."[40]

So, even though the Report notes "both plaintiffs and defendant spokespeople express ambivalence about the outcomes of these cases," and despite concluding that "the litigation process takes a much higher emotional, physical, and financial toll on plaintiffs than it does on defendants and their representatives,"[41] *Rights on Trial* proposes no reforms that will make outcomes more predictable or lessen the toll on plaintiffs or anyone else.

Some Contrary Views

Searches on Google turn up a few laudatory reviews of *Rights on Trial*, but nothing written by conservative critics of America's anti-discrimination laws even though the subtitle of *Rights on Trial* endorses an argument those critics have been advancing for decades: American discrimination law doesn't reduce inequality; it perpetuates it. Of course, the path the critics follow to reach that conclusion is very different than the path of *Rights on Trial.*

Consider the writings of Drs. Thomas Sowell and Shelby Steele, both fellows at Stanford University's Hoover Institution. Sowells' most recent book, *Discrimination and Disparities,* is an extended argument that equal outcomes never occur in nature and cannot be induced by government programs.[42] Sowell suggests inequality can be reduced only when government refrains from intervening to protect racial minorities, and he cites economic studies showing that "[p]overty among blacks declined far more in the two decades ***before*** 1960 than in the two decades afterwards."[43]

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[38] *Id.* at 276.
[39] Curiously, the only authority they cite is an article by one of them comparing American and Canadian discrimination law. *Id.* at n. 28 (*citing* Laura Beth Nielsen, *Paying Workers or Paying Lawyers: Employee Termination in the United States and Canada*, 21(3) LAW AND POLICY 247-82 (1999)).
[40] *Id.* at 276, n. 28 (*citing* Laura Beth Nielsen, *Paying Workers or Paying Lawyers: Employee Termination in the United States and Canada*, 21(3) LAW AND POLICY 247-82 (1999)).
[41] *Id.* at 222.
[42] THOMAS SOWELL, DISCRIMINATION AND DISPARITIES (2019).
[43] *Id.* at Chap. 6 at n. 115 (*citing* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICAN IN BLACK AND WHITE, 233-34) (emphasis in original).

Forty years ago, Sowell published another book called *Ethnic America: A History* in which he argued that since 1863, when slaves were emancipated, black Americans "as a whole" had "moved from a position of utter destitution – in money, knowledge, and rights – to a place alongside other groups emerging in the great struggles of life."[44] But he also noted the sharp increase between the 1950s and the late 1970s in unemployment among black Americans and the proportion of black Americans on welfare, during the same time that American governments were adopting policies intended to advance minority interests. He was particularly critical of affirmative action programs, noting those programs had little or no positive economic effect for black Americans and generated resentment among white Americans that boosted interest in racist organizations such as the Ku Klux Klan.[45]

Dr. Shelby Steele released a book in 2015 called *Shame* that excoriates liberalism's "legacy of failed, even destructive public policies," including "[a]ffirmative action[, which] presumed black inferiority to be a given, so that racial preferences actually locked blacks into low self-esteem and hence low standards of … achievement."[46] Steele argues the civil rights laws were a product of "white guilt" that gave American minorities powerful leverage, but "at the price of taking on, and then living with, an identity of grievance and entitlement" that put their fate "in the hands of contrite white people."[47] He calls the bargain liberals offered "a terrible trap" that "required minorities to see white goodwill as the great transformative force that would lift them into full equality they could never reach on their own. It enmeshed their longings for equality with white longings for redemption. Through this liberalism, the government took a kind of benevolent dominion over the fate of minorities and the poor, not to genuinely help them (which would require asking from them the hard work and sacrifice that real development requires), but to achieve immunity for the government from the taint of the past."[48]

Obviously, Steele and Sowell advance positions that are anathema to the authors of *Rights on Trial*, but it is striking that they also argue forcefully that American discrimination law is not reducing inequality and is actually exacerbating it. Unfortunately, they propose little in the way of solutions. Steele argues that "today's political Right has the best roadmap to the future – free markets, free individuals in a free society, and the time-tested apparatus of principles and values that make freedom possible," but he also acknowledges that to attain the freedom he thinks necessary, the "Right will have to subsume some of the Left's territory – that is, it will have to give clear and heartfelt witness to the struggles of the middle and working classes and to the

[44] THOMAS SOWELL, ETHNIC AMERICA: A HISTORY 224 (1981).
[45] *Id.* at 222-23.
[46] SHELBY STEELE, SHAME: HOW AMERICA'S PAST SINS HAVE POLARIZED OUR COUNTRY Chapter 16 (2015).
[47] *Id.* at Chapter 17.
[48] *Id.*

alienation … of those groups that have suffered America's hypocrisy for generations."[49] How the "Right" is supposed to give "heartfelt witness" Steele does not say.

Thus, neither supporters America's civil rights laws such as the authors of *Rights on Trial* nor critics such as Sowell and Steele have suggested viable options to those laws. They do agree the laws are perpetuating inequality. They also recognize that the laws often induce shame.

Ain't It a Shame

Steele's book is called *Shame*. He claims "political correctness tries to bully and shame Americans – on pain of their human decency – into conformity with [an] ugly view of their society.[50] Of course, Steele himself could be accused of trying "to bully and shame" people into accepting his views on race in America by using terms such as "white guilt" and by ignoring the role that black Americans played in enacting our civil rights laws.

Rights on Trial also addresses shame, albeit in a different context. The book notes that only a "miniscule percentage of African Americans who feel they are discriminated against in the workplace … make a charge with the EEOC or in court."[51] Why so few? The Report says:

> [Targets of discrimination] may have a sense of shame, or they may reject victimhood, because friends, family, and coworkers discourage them from thinking they were victims of discrimination, or they may perceive the interpersonal costs associated with making a discrimination claim.[52]

Of course, employers and critics of the laws will see the same statistics as proof that the vast majority of discrimination complaints have no merit, and that the few meritorious claims cause little monetary damage. Employers will also complain about the toll civil rights claims impose on them, and they may argue that bringing a complaint is not difficult enough. But no one can seriously question the author's assertion that the party filing a civil rights complaint will endure "shame."

When Steele and *Rights on Trial* use the word shame, it seems fair to say they are using the word as Dr. Brené Brown does, to mean the fear of disconnection. Brown has doctorate and is a research professor at the University of Houston, in addition to being a best-selling author and popular speaker. According to Brown, the fear of disconnection matters because "we are physically, emotionally, cognitively, and spiritually hardwired for connection, love, and belonging.

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[49] *Id.* at Chapter 18.
[50] *Id.* at Chapter 1.
[51] BERREY ET AL., *supra* note 1, at 50.
[52] *Id.* at 46.

Connection … is why we are here, and it is what gives purpose and meaning to our lives."[53] The fear of losing our connections – "the fear that something we've done or failed to do, an ideal that we've not lived up to, or a goal that we've not accomplished makes us unworthy of connection" is shame.

Shame is not guilt. We feel guilt when we do something wrong. That's a healthy emotional response because it motivates us to improve. We feel shame when we not only believe we have failed at a particular task, but also absorb the message that we are never good enough."[54]

When Brown asked people to give examples of shame, she received responses such as these:

- Shame is covering up a mistake at work and getting caught.
- Shame is getting a promotion, then getting demoted six months later because I wasn't succeeding.
- Shame is my boss calling me a loser in front of our colleagues.
- Shame is getting sexually harassed at work but being too afraid to say anything because he's the guy everyone loves.
- Shame is constantly being asked to speak on behalf of all Latinos in marketing meetings. I'm from Kansas. I don't even speak Spanish.
- Shame is being proud of a completed project, then being told it wasn't at all what my boss wanted or expected.
- Shame was my response to seeing my parents' shame when I came out.[55]

As those responses suggest, shame is a common reaction. It is no surprise that a person who asserts a discrimination claim will feel shame. Although most Americans may now revere people such as Rosa Parks and Martin Luther King, Jr., who battled for their rights, that was never a universal reaction and, as *Rights on Trial* observes, in the workplace, "we regard those who claim to be the victim of discrimination with suspicion and tend to denigrate them."[56]

People tend to give less thought to the other parties who are affected when a discrimination claim is filed, but a theme that runs through the soliloquies presented above is defensiveness borne of shame. None of the players will confess their contribution to a costly fiasco that ended badly for everyone. They shift blame to someone else. They are defensive because they feel vulnerable. They know their participation in the discrimination process could give them a negative label – as a complainer, a victim, a victimizer, a bigot, an abettor of bigots, a loser, an

[53] BROWN, *supra* note 3, at 126.
[54] *Id.* at 128.
[55] *Id.* at 126-27.
[56] *Id.* at 9-10.

ineffective advocate, an incompetent manager or HR professional, or a socially irresponsible corporation. The fear of such a label sticking to them is shame.

- Carl Harris, the plaintiff, feels shame for losing his job, for being told he did a bad job, for defining himself as a victim, and for being defined by his sexual orientation.
- Harris's attorney feels shame for misevaluating the case, for disappointing her client, and because she is not a more successful attorney.
- The HR Director feels shame for encouraging employees to report discrimination and then being unable to do anything to help them, or for lying about the conversation with Harris in order to protect her own job. Every EEO claim or lawsuit filed against the company may seem like a personal failure to her.
- Big Corp.'s attorney feels shame because he is relying on the testimony of the HR Director and other employees who he knows could be shading their testimony to protect their jobs or the company. He feels shame because he knows discrimination occurs and believes it is wrong, but he prospers by defending claims in a system that is rigged in his clients' favor.
- Norbert feels shame because of the social opprobrium resulting from being accused of homophobia and religious zealotry. His relationships at work, church, and home have been damaged and he will never be able to prove that the accusations were false. He may lose his job. And even if he keeps his job, he will be the reason that Big Corp. requires him and other managers to go through more non-discrimination training.

When people like those portrayed in the soliloquies experience rejection, the pain the shame inflicts is as real as physical pain, according to Brown. She cites neuroscience research that shows emotions can actually hurt.[57] And, she says, where shame exists, empathy is almost always absent. That's what makes shame dangerous.[58] Shame drives destructive, hurtful, immoral, and self-aggrandizing behavior.[59]

How does shame play out in the soliloquies? Carl lambasts Norbert and the company while insisting he was a high performer. Norbert lashes back at Harris and feels sorry for himself. The attorneys duck their heads and blame each other, or the system. And the HR Director tries to take responsibility for nothing. The case gets settled subject to a confidentiality clause, Norbert and possibly others will spend a couple of hours in anti-discrimination training, which they will

[57] *Id.* at 127.
[58] *Id.* at 129.
[59] *Id.*

understand as signaling that they are bigots, and Big Corp. will go back to business as usual as other cases grind through the civil rights litigation mill.

Nothing really changes because no one admits they did anything wrong. In fact, the players are all rewarded to the extent they can say the fault lies somewhere else – lifting themselves from shame by shifting the blame. Thus, America's civil rights litigation process uses shame as a social justice tool.[60] Rather than accepting the labeling inherent in that process, corporations and governments attempt to prevent, police, and investigate harassment and discrimination by establishing human resources departments. [61] Instead of preventing harassment and discrimination, which remains "widespread" and "persistent" according to the EEOC, HR departments serve as the employers' first line of defense against lawsuits.[62] They create instructional films, computer training modules, seminars, and written policies even though there is no evidence that such training affects the frequency of harassment in the workplace.[63] Thus, as Caitlin Flanagan concluded in an article published in *The Atlantic*:

> HR is no match for sexual harassment. It pits male sexual aggression against a system of paperwork and broken promises, and women don't trust it. For 30 years, we've invested responsibility in HR, and it hasn't worked out. We have to find a better way.[64]

Of course, the same criticisms might be leveled at the criminal justice system, or at the tort system. But murder, assault, theft, and most torts involve both an act that leaves clear evidence of physical or financial harm and an intent (that may be inferred depending on the circumstances). Discrimination requires neither. Thus, as *Rights on Trial* explains, discrimination claims are "complicated and ambiguous."[65] Few claims are adjudicated, and even when they are, victory depends less on the evidence that is presented than on which side "has legal support, social networks, and knowledge of the law."[66] A system operating in that way cannot produce results that approximate justice or reduce the injustices of unfair discrimination.

Will Empathy Help?

When shame is being used as a social justice tool within an organization, Brené Brown offers this advice: "You have to figure out how and why it's happening and deal with it immediately (and

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[60] *Id.* at 131.
[61] Caitlin Flanagan, *The Problem With HR*, THE ATLANTIC, 49 (July 2019).
[62] *Id.* at 52, 53.
[63] *Id.* at 53-54.
[64] *Id.* at 54.
[65] BERREY ET AL., *supra* note 1, at 25.
[66] *Id.*

without shame)."[67] Brown says the antidote to shame is empathy.[68] "Empathy is about connection," so there is no decision tree model for empathy – "being connected is the best navigation system. If we make a wrong turn in our attempt to be with someone in their struggle, connection is not only forgiving, it's quick to reroute."[69] Empathy is "a matter of the right person, at the right time, on the right issues."[70]

Brown doesn't offer a formula for empathy, but she does identify several barriers to empathy, including feeling "for" the other person instead of "with them;" confirming the shame the person already feels; getting angry at someone else and blaming them; saying nice things to make the person feel better; or trying to one-up the person's experience with one of their own.[71] Brown says empathy is a skill that doesn't come naturally to many, but can be built with practice.[72] Even so, she observes, even she fails at empathy regularly, as we all do.[73]

Brown argues that empathetic leaders can "cultivate a culture in which people feel safe, seen, heard, and respected."[74] Brown is not alone in arguing that effective organizational leadership requires empathy. Simon Sinek of the RAND Corporation gives presentations on the theme that are incredibly popular.[75] Empathy seems to offer the best recipe for restoring social trust, which has been in "major decline" in America for more than 20 years.[76] As Sam Walker, author of *The Captain Class: The Hidden Force that Creates the World's Greatest Teams* (named one of the best business books of 2017), wrote last year, "Empathy has arrived in a big way, and it's time to deal

[67] BROWN, *supra* note 3, at 131.
[68] *Id.* at 160.
[69] *Id.* at 149.
[70] *Id.* at 152.
[71] *Id.* at 153-56.
[72] *Id.* at 156.
[73] *Id.* at 157.
[74] *Id*. at 12.
[75] *See*, *e.g*., Simon Sinek, *Leaders practice empathy*, SIMON SINEK, https://simonsinek.com/commit/leaders-practice-empathy/ (last visited Jan. 10, 2021).
[76] Kevin Vallier, *Why Are Americans So Distrustful of Each Other?*, WALL ST. J., Dec. 19, 2020, at C3, https://www.wsj.com/articles/why-are-americans-so-distrustful-of-each-other-11608217988?mod=searchresults_pos1&page=1. "Strikingly, the U.S. is the only established democracy to see a major decline in social trust. In other nations the trend was in the opposite direction." *Id.* The author says a decline in a country's level of social trust tends to correlate with increases in corruption, ethnic segregation, and economic inequality. *Id.*

with it. The prevailing view is that empathy is a good thing for humans to possess: a positive and unifying social force for good."[77]

But Walker also observes that, "empathy is both a blessing and a curse."[78] While empathetic leaders are often more attuned to the concerns of employees, better at collecting information needed to diagnose problems and at comforting others and repairing a team's ability to work together, and adept at convincing outsiders the company cares, they can be so susceptible to the emotions and perspectives of others that they struggle to assign blame, may worry more about relationships than fixing problems, and are sometimes biased to make decisions that reduce the level of anxiety and pressure.[79] Walker summarizes research showing that empathy is linked "to better work climates [and] higher retention rates," but also that, in a crisis, "the magic wears off" and empathetic leaders tend to focus on the wrong things and struggle with hard choices. Instead of urging empathy on CEOs, Walker recommends that top bosses embrace "rational compassion," which means listening to everybody, delivering criticisms carefully, and announcing decisions with a poker face.[80] And, since CEOs have far less influence and engagement with employees than their direct managers, he believes empathy matters more in the middle levels than at the top.[81]

How does empathy work in organizations that have adopted policies mandating employees report to HR any inappropriate conduct they experience or observe? If there is research on that issue, we did not find it. Of course, organizations may feel compelled to adopt the policies in order to comply with the law. They also may think the policies are important to show they are taking a strong stand against discrimination. But it is worth asking whether those policies may actually contribute to the problem. They could do that by trying to prompt employees to obey by instilling fear of the consequences.

Fear tactics may prompt people to act appropriately for a short time, according to experts in cybersecurity who have conducted studies, but fear will not motivate employees to be vigilant over the long term.[82] In an article called "Stop Scaring Employees!," Karen Renaud, a professor of cybersecurity at Abertay University in Dundee, Scotland, says scaring people about on-going

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[77] Sam Walker, *Do Good Leaders Need Empathy?,* WALL ST. J., Nov. 14, 2020, at B1, https://www.wsj.com/articles/joe-biden-promises-empathy-but-thats-a-difficult-way-to-lead-11605330019?mod=searchresults_pos6&page=1.
[78] *Id*. at B2
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Karen Renaud, *Stop Scaring Employees!*, WALL ST. J., Dec. 7, 2020, at R1 & 4, https://www.wsj.com/articles/why-companies-should-stop-scaring-employees-about-cybersecurity-11607364000?mod=searchresults_pos1&page=1.

cyber threats tends to leave them "in a constant state of anxiety, which makes them unable to think clearly about [those] threats. Alternatively, such heavy-handed scare messaging can make employees disgruntled and uninterested in security, thinking the threats are exaggerated – and that bosses don't trust them to do the right thing."[83]

Consequently, instead of thinking about how to keep their employers' information safe, employee worry about being fired, punished, or publicly-embarrassed for their mistakes. And, an employee who is required to memorize a unique, complex password for each software program she uses is likely to ignore the rule, which both exposes the network to attacks and creates worry each time she logs in of being caught or of causing a data breach.[84] Dr. Renaud's research suggests policies that impose unworkable requirements or that threaten to punish or embarrass employees will actually discourage employees from being diligent and increase the risk of cyberattacks.[85]

Do those cybersecurity policies backfire for the same reason America's civil rights laws and policies are perpetuating discrimination? Both depend on fear; both try to use shame to change behavior, which research and common sense say does not work. Like Brené Brown, Dr. Renaud offers an alternative approach based on "[c]reativity and trust."[86] She suggests creating a buddy system. Instead of training everybody, she proposes appointing one employee in each department who is trained both in cybersecurity and in motivating employees by, for example, thanking them when they ask for help and praising them for being alert to risks (empathetic actions). She also suggests providing tools employees can use to protect the company. She suggests giving employees a password manager so they are not forced to memorize multiple passwords, or setting up an instant messaging system that can be used to alert all employees whenever a phishing message is identified. Instead of banning memory sticks, she suggests providing encrypted ones that authenticate using fingerprints.[87] As she says, "The idea is to work with your employees rather than against them."[88]

Dr. Renaud says her approach has been applied successfully by businesses. Assuming that is true, we should ask if there are elements of her approach that can be applied to address unfair discrimination? Discrimination and cybersecurity are different in at least one important respect. Most cybersecurity threats are directed at the company, rather than an individual; whereas, discrimination is usually perceived as a personal threat. Dealing with conflicts between

[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

employees is obviously harder than confronting a common enemy like cybersecurity. Of course, for the same reasons, the anxiety employees feel about discrimination claims will be much greater than their anxiety about cybersecurity. Discrimination claims are likely to distract workers more, so finding a better approach seems that much more essential.

Are there tools that should be provided to employees to reduce discrimination? The default options today are diversity training, hiring tests, performance ratings, and grievance systems. Most companies and many government agencies have adopted them, and EEO enforcement agencies routinely require training as part of any case resolution. But two sociology professors at Harvard who analyzed data from 829 firms over three decades found that those tools "tend to make things worse, not better" because "force-feeding can activate bias" and prompt employees to "do the opposite just to prove that I'm my own person."[89] Musa al-Gharbi, a fellow in sociology at Columbia University concurs that mandatory training programs "are generally ineffective, and often bring negative side-effects," including "more negative feelings and behaviors, both towards the company and minority co-workers."[90] Dan Ariely, a well-known and prolific professor of psychology and behavioral economics at Duke University, also says, "training in any subject seldom solves the real problem, since there's a big gap between knowing the right thing to do and actually doing it."[91]

The alternative Ariely suggests is removing structural barriers to racial equity by creating a "behavioral map" that identifies every obstacle hindering minorities from succeeding in the entity's environment and addressing them.[92] That isn't something that can be compelled by government or implemented on a company-wide basis. It will have to be implemented at departmental or lower levels, as Drs. Renaud and Brown suggest, and it will be time-consuming and expensive. In the words of Ashindi Maxton, of Donors of Color Network, "diversity is inefficient."[93] Of course, removing structural barriers may not be as time-consuming or expensive as our current litigation-based system.

And how would a buddy system be applied to address unfair discrimination? Not by hiring a vice president of diversity and inclusion, establishing quotas, or pledging billions of dollars, as major banks and corporations did last year after the George Floyd killing.[94] Those initiatives may grab

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[89] Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail,* HARV. BUS. REVIEW, July-Aug. 2016, https://hbr.org/2016/07/why-diversity-programs-fail. (The authors note that "voluntary training evokes the opposite response ("I chose to show up, so I must be pro-diversity"), leading to better results ….").

[90] Musa al-Gharbi, *Diversity-Related Training: What Is It Good For?*, HETERODOX: THE BLOG (Sept. 16, 2020), https://heterodoxacademy.org/blog/diversity-related-training-what-is-it-good-for/.

[91] Dan Ariely, *How to Get Beyond Small Talk*, WALL ST. J., July 18, 2020, at C5.

[92] *Id.*

[93] Ashindi Maxton, *Diversity is Inefficient,* https://institute.coop/sites/default/files/resources/Diversity%20is%20Inefficent.pdf (last visited Jan. 10, 2021).

[94] Lauren Weber, *Gauging Race-Equity Goals Poses Challenge*, WALL ST. J., Dec. 22, 2020, at B1.

headlines, but they seldom result in long-term change. Coca-Cola agreed to implement far-reaching changes to its hiring, promotion, and compensation practices as part of one of the largest settlements of race-discrimination class-action lawsuit in U.S. history. The company vowed to become the "gold standard" of fairness, and a decade later "Coke's efforts looked like an unqualified success."[95] However, by 2020, "that progress ha[d] reversed." Coke now employs fewer black employees and has a smaller proportion of black executives than it did 20 years ago.[96]

Compare Coke's experience with what happened in universities after California voters approved Proposition 209 in 1996. The initiative put non-discrimination language into the state constitution, thereby prohibiting affirmative action. After that, the number of blacks admitted to the University of California doubled, the number of Chicano/Latino students admitted increased nearly five times, four-year graduation rates for those minority groups more than doubled, and the number graduating with STEM degrees also doubled.[97] However, despite that notable progress, the California Legislature asked voters to overturn Proposition 209 last November.[98] The initiative failed despite being endorsed by most of California's elected officials, including then-U.S. Senator Kamala Harris.[99] The opposition, led by Asian-Americans and Republicans, defeated the measure by a 15% margin,[100] surprising and disappointing supporters of affirmative action.

At the same time the campaigns for and against the initiative were heating up, California was beset by #BlackLivesMatter protests.[101] Clearly, the tangible progress toward equality in California's higher education system failed to convince many people that systemic racism has been eradicated there. And those people may interpret the defeat of the initiative to overturn Proposition 209 as confirmation that systemic racism still prevails, even in a state as liberal as California.

As California's experience demonstrates, trying to Ignore racial differences doesn't solve the problem. France, for example, collects no census or other data on the race or ethnicity of its

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[95] Jennifer Maloney & Lauren Weber, *Coke's Elusive Goal: Boosting Its Black Employees*, WALL ST. J., Dec. 16, 2020, https://www.wsj.com/articles/coke-resets-goal-of-boosting-black-employees-after-20-year-effort-loses-ground-11608139999?mod=searchresults_pos2&page=1.
[96] *Id.*
[97] Review & Outlook, *California's Racial Scare Campaign*, WALL ST. J., Oct. 26, 2020, at A16.
[98] See *California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_16,_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020) (last visited Jan. 6, 2021).
[99] *Id.*
[100] *Id.*
[101] *See George Floyd protests in California*, WIKIPEDIA, https://en.wikipedia.org/wiki/George_Floyd_protests_in_California (last visited Jan. 6, 2021).

citizens,[102] does not recognize quotas, and bars employers from practicing affirmative action or instituting measures designed to favor diversity in the workplace,[103] but Paris was one of many cities around the world visited by #BlackLivesMatter protests last summer,[104] just as it and other places saw #MeToo protests in 2017.[105]

The protestors apparently do not believe American society – and particularly its more conservative voices – have given what Shelby Steele calls "clear and heartfelt witness to the struggles of the middle and working classes and to the alienation and bad faith of those groups that have suffered America's hypocrisy for generations."[106] Of course, if the most outspoken critics of American civil rights laws were to give clear and heartfelt witness as Steele suggests (which seems unlikely), that will make no difference unless the groups that have suffered America's hypocrisy for generations would both listen and believe what they hear (which seems equally unlikely). Thus, changing the process America has adopted to enforce civil rights seems like a faint hope.

Even so, by relying more on empathy – especially in mid-level management – and less on fear and shame, businesses and other organizations may make some progress toward providing equal opportunity to people regardless of their race, ethnic background, gender, orientation, or disabilities. And that, eventually, may open the door to better laws.

Conclusion

Rights on Trial agrees with what critics of the civil rights system have been saying for decades, yet no "radical and fundamental change" to that system seem feasible. Still, perhaps our own businesses can ride "the wings of transformation" by working to address unfair discrimination within our own organizations and communities through empathy, instead of shame.

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[102] *See* Erik Bleich, *Race Policy in France*, BROOKINGS (May 1, 2001) https://www.brookings.edu/articles/race-policy-in-france/#:~:text=France%20therefore%20collects%20no%20census,that%20race%20and%20ethnicity%20matter.
[103] *See Anti-Discrimination Laws in France*, L&E GLOBAL (Nov. 17, 2020) https://knowledge.leglobal.org/anti-discrimination-laws-in-france/.
[104] *See* Guy Sorman, *Black Lives Matter in Paris: An American Movement in France*, FRANCE-AMÉRIQUE (Sept. 10, 2020) https://france-amerique.com/en/black-lives-matter-in-paris-an-american-movement-in-france/.
[105] *#MeToo*, *supra* note 8.
[106] STEELE, supra note 41, at Chapter 18.