

**POST RACE POSTHASTE:  
TOWARDS AN ANALYTICAL CONVERGENCE OF  
CRITICAL RACE THEORY AND MARXISM**

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**INTRODUCTION**

Viewing United States antidiscrimination law through a Marxist lens helps to reveal weaknesses in the American approach to combating racism. Although Marxist theory is salient to the perpetual problem of American racism, it has been essentially ignored in the American approach. Consequently, Title VII jurisprudence has floundered in its lack of attention to some basic Marxist principles that would require an examination of capital from the perspective of those whose bodies and labor are owned and consumed through the process of capital accumulation.

As Marxism reminds us, looking at discrimination from the perspective of the worker reveals that the myriad forms of discrimination experienced in and beyond the workplace are part of a system of subordination that is: (i) supported by faith in free markets, and (ii) not amenable to the narrowly-drawn parameters of the American anti-discrimination framework. The framework, however, does fit nicely into a view of discrimination from the perspective of those put in the position of defending their conduct (the employer, the capitalist, etc.) because it treats discrimination as an uncommon, solitary, or purposeful act done by someone to

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someone else, not as a regular, systemic and necessary element of a capitalist system.

African Americans and other people of color seek redress for their racial injuries. However, if we are living in a post-racial society, one that is blind to race, then widespread redress makes no sense since widespread discrimination allegedly is a thing of the past. Therefore, it is worth asking, “if racial justice is about remembering racial injury, ha[s] our law made that memory impossible, erased by official color-blindness?”<sup>1</sup> This question has been central to the study of law among Critical Race theorists since Critical Race Theory’s (CRT) inception. Therefore, an analytical convergence of CRT and Marxism should help disentangle the morass that is antidiscrimination law. The connection between Marxism and CRT can be appreciated by examining the limitations of civil rights laws in alleviating some of the most pressing social and political stresses on communities of color today. And yet, the connection seems to get lost beneath the din of those who claim that we are experiencing our first post-racial moment in a larger post-Marxist epoch. The aim of this Essay is to examine how a convergence of Marxism and CRT might enhance a critique of the U.S. Supreme Court’s interpretation of race discrimination under Title VII of the 1964 Civil Rights Act.<sup>2</sup>

## I. COLOR-BLINDNESS IN POST-RACIAL RHETORIC

Examination of the conservative judicial activism of the past few decades makes it apparent why Title VII has had little impact in addressing continuing employment discrimination and inequality. However, it is not simply conservative judges who are to blame for Title VII’s lack of success. It is the structural nature of racial oppression itself that makes Title VII an impotent tool in dismantling structures of oppression. This point is missing in popular depictions of the United States as entering a post-racial age. In the years leading up to the 2008 Presidential election and beyond, it was not uncommon to see, read, or listen to discussions about the new “post-racial” America. Newspaper and magazine headlines, blog entries, and television and internet news reports were full of discussions about what Barack Obama’s presidency meant for

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<sup>1</sup> Peter Halewood, *Laying Down the Law: Post-Racialism and the De-Racination Project*, 72 ALB. L. REV. 1047, 1048 (2009).

<sup>2</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

Americans' apparent evolving racial attitudes.<sup>3</sup> The term post-racial encompasses the idea that if racial attitudes today are the same as they were even in the last few decades, then it would have been impossible to even imagine a President of the United States of America being of African origin. The argument is that because Barack Obama was elected by a comfortable majority of voters, then surely the United States' racist legacy can be confined to the history books. According to this view, the United States finally has changed from a place where racial slavery and segregation were legally sanctioned, commonplace practices to a place in which the American people could put aside their racial prejudices and unite to elect a President of African origin. What other country in the West could have imagined the election of a black president?

Barack Obama himself made mention of the historical significance of his improbable story<sup>4</sup> and the great capacity of the American people to transcend informal racial barriers that only recently replaced formal racial barriers. Even before his presidential campaign, the then-Senator not only detected a note of change in the air but also was able to capitalize on the perception that the American people were "ready" to transcend their race-conscious beliefs and appealed to the desirability of a post-racial America. In one of the most celebrated parts of his speech at the 2004 Democratic National Convention in Boston, the speech that helped propel him onto the national political stage, he said, "there's not a black America and a white America and Latino America and Asian America; there's the United States of America."<sup>5</sup> His campaign

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<sup>3</sup> See, e.g., Wajahat Ali, *No Racism in Obama's Post Race America*, HUFFINGTON POST, July 28, 2009, [http://www.huffingtonpost.com/wajahat-ali/no-racism-in-obamas-post\\_b\\_245978.html](http://www.huffingtonpost.com/wajahat-ali/no-racism-in-obamas-post_b_245978.html); Uzodinma Iweala, *Race Still Matters*, L.A. TIMES, Jan. 23, 2008, available at <http://articles.latimes.com/2008/jan/23/opinion/oe-iweala23>; Sarah Netter, *Racism in Obama's America One Year Later*, ABC NEWS, Jan. 27, 2010, <http://abcnews.go.com/WN/Obama/racism-obamas-america-year/story?id=9638178>.

<sup>4</sup> In several of his campaign speeches, Barack Obama referred to the improbability of his journey to the White House. For example, at one of his stops in Iowa, he said, "I never expected to be here. I always knew this journey was improbable." Sharon Cohen, *Barack Obama: An 'Improbable' Journey into History*, USA TODAY, Nov. 1, 2008, available at [http://www.usa.today.com/news/politics/2008-11-01-2229444245\\_x.htm](http://www.usa.today.com/news/politics/2008-11-01-2229444245_x.htm).

<sup>5</sup> See Tim Wise, *Colorblind Ambition: The Rise of Post Racial Politics and the Retreat from Racial Equity*, RED ROOM WRITER PROFILE BLOG (June 18, 2010, 10:31 AM), <http://www.redroom.com/blog/tim-wise/colorblind-ambition-the-rise-post-racial-politics-and-retreat-racial-equity> (arguing that, "though one might welcome such a statement were it offered in the future and aspirational tense—as a heartfelt plea for true equality—Obama proclaimed it

made very little mention of race and his candidacy was constructed in terms that drew as little attention as possible to his own race, thus encouraging the perception that the United States had entered a post-racial era.

It is this “color-blindness”<sup>6</sup> that comes to mind with the term post-racial. Yet the term is not without political ambiguities and is therefore impossible to define. For liberals, the term holds hope that race is no longer a determining factor in how people live their lives and that discrimination is only a remnant of a bygone era only sporadically practiced by individual racists but that can nonetheless be cured by resort to civil rights laws. For conservatives, the term might mean that remedies such as affirmative action are no longer necessary (if they ever were) and that government “special” treatment of minorities can end.<sup>7</sup> Like the meaning of racism itself, the term post-racial will mean something different depending on political, cultural and socioeconomic factors. However, for both liberals and conservatives alike, the term means that “race” and color no longer have any social relevance.<sup>8</sup> If, however, the term is meant to describe a

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in the descriptive and present tense. In so doing he traded intellectual honesty for easy and predictable ovation. After all, 2004 was the same year that research from MIT and the University of Chicago found that job applicants with ‘white’ names were fifty percent more likely to be called back for an interview than those with ‘black’ names, even when all their qualifications were indistinguishable. And with black and brown unemployment standing at double the white rate, even as the new upstart from Chicago poured forth rhetoric professing national unity (and with the median white family possessing eight to ten times the net worth of the median black or Latino family), it should have been apparent that Obama was engaged in political science fiction rather than the description of sociological truth.”).

<sup>6</sup> See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 1 (1991) (arguing that the U.S. Supreme Court’s use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination).

<sup>7</sup> See Jeffrey Toobin, *Comment: Answers to Questions*, NEW YORKER, July 27, 2009, at 19-20 (discussing the effect that the Obama election has had in supporting the argument that the United States has now leveled the playing field and no longer requires racial remedial measures); see also Lawrence Auster, *What is Post-Racial America?*, VIEW FROM THE RIGHT (Feb. 25, 2008, 10:56 AM), <http://www.amnation.com/vfr/archives/010000.html> (arguing against preferences for African Americans).

<sup>8</sup> See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (defining post-racialism as reflecting “a belief that due to significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a centralizing principle of social action”).

current reality in the United States, then it falls far short of that reality. In fact, in the United States, it likely means nothing at all. From a cursory examination of conservative and liberal websites, it appears that no one believes that President Obama's election has transformed the United States into a post-racial utopia or that racism is dead.<sup>9</sup> Moreover, a brief jaunt through Supreme Court civil rights decisions will reveal that the Supreme Court has been relying on the same kind of post-racial understanding since deciding the *Civil Rights Cases*<sup>10</sup> and *Plessy v. Ferguson*<sup>11</sup> more than a century ago, and thereby undermining any particular salience of post-racialism today.

## II. POST-RACIAL DISCOURSE AND AMERICA'S ANTIDISCRIMINATION FRAMEWORK

The requiem for Marxism spurred by the collapse of the Soviet Union and China's increasing turn to capitalism also has been a familiar theme. This insistence on a post-Marxist moment, however, is also premature given Marxism's continuing relevance to contemporary discussions of oppression. The notion that we live in a post-racial reality is troubling, as very little, in terms of negative racial stereotypes and racial equality, has changed in the years before and since Obama's candidacy.

First, there is evidence that Whites, especially Whites associated with the Tea Party movement, still harbor negative attitudes towards African Americans and Latinos. A recent study of racial attitudes of Tea Party members illustrate these trends:

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<sup>9</sup> However, the perception of who is a victim of racism differs greatly depending on political allegiance. On conservative blogs, one is more likely to see whites as portrayed as victims of racism, while liberal blogs portray racial, ethnic and religious minorities as the favorite targets of racists. See Marisol LeBron, *Obama and Myths of Racial Democracy*, NORTH AMERICAN CONGRESS ON LATIN AMERICA (Nov. 17, 2008), <https://nacla.org/node/5229>; see also Bob VanDeHey, *Rajjpuut's Folly: Race-Baiting Obama and NAACP Worsen America's Race Relations*, TEA PARTY PATRIOTS (July 22, 2010, 6:00 PM), <http://www.teapartypatriots.org.ning.com/profiles/blogs/rajjpuuts-folly-racebaiting>; Joel Anderson, *Burying Post-Racial*, THE AMERICAN PROSPECT (July 28, 2010), [http://prospect.org/cs/articles?article=burying\\_post\\_racial](http://prospect.org/cs/articles?article=burying_post_racial); Netter, *supra* note 3.

<sup>10</sup> *Civil Rights Cases*, 109 U.S. 1 (1883).

<sup>11</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896); see Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 969 (2010) (demonstrating that the Supreme Court attempted "to negate the importance of race, alternatively finding it to be either of no moment or a legitimate basis to segregate").

Approximately 45% of Whites either strongly or somewhat approve of the [Tea Party] movement. Of those, only 35% believe Blacks to be hardworking, only 45% believe Blacks are intelligent, and only 41% think that Blacks are trustworthy. Perceptions of Latinos aren't much different. While 54% of White Tea Party supporters believe Latinos to be hardworking, only 44% think them intelligent, and even fewer, 42% of Tea Party supporters believe Latinos to be trustworthy. When it comes to gays and lesbians, White Tea Party supporters also hold negative attitudes.<sup>12</sup>

Moreover, these stereotypes and predispositions influence the public view of President Obama himself. As one report suggests, “the associative link between racial predispositions and Obama’s position as the first black presidential nominee was so strong that it virtually ensured these [negative] attitudes about African-Americans would strongly influence the public’s assessments of him regardless of how hard he tried to deactivate the salience of race.”<sup>13</sup>

Second, African Americans and Latinos are still disproportionately at the bottom of all economic and social well-being indicators in the United States.<sup>14</sup> For example, in figures measuring salaries and unemployment, African Americans and Latinos continue to fall behind.<sup>15</sup> They are disproportionately among those who have lost their homes and mortgages in the

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<sup>12</sup> CHRISTOPHER PARKER, UNIV. OF WASH. INST. FOR THE STUDY OF ETHNICITY, RACE & SEXUALITY, 2010 MULTI-STATE SURVEY ON RACE & POLITICS (2010), available at <http://depts.washington.edu/uwiser/racepolitics.html>.

<sup>13</sup> MICHAEL TESLER & DAVID O. SEARS, *Is the Obama Presidency Post Racial? Evidence from His First Year in Office*, in OBAMA’S RACE: THE 2008 ELECTION AND THE DREAM OF A POST-RACIAL AMERICA 142 (2010).

<sup>14</sup> See News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Usual Weekly Earnings Of Wage and Salary Workers—Third Quarter 2010 (Oct. 19, 2010), available at [http://www.bls.gov/news.release/archives/wkyeng\\_10192010.htm](http://www.bls.gov/news.release/archives/wkyeng_10192010.htm); see also BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, THE EMPLOYMENT SITUATION—MARCH 2011 (2011), <http://www.bls.gov/news.release/pdf/empstat.pdf> (for unemployment rates); see also U.S. CENSUS BUREAU, MONEY INCOME OF FAMILIES—NUMBER AND DISTRIBUTION BY RACE AND HISPANIC ORIGIN: 2007 (2010), available at <http://www.census.gov/compendia/statab/2010/tables/10s0679.pdf> (showing household incomes by race).

<sup>15</sup> See, e.g., U.S. CENSUS BUREAU, *supra* note 14.

housing crisis.<sup>16</sup> They are disproportionately the victims of crime,<sup>17</sup> lag behind in educational achievement,<sup>18</sup> and suffer disproportionately from ill-health and infant mortality.<sup>19</sup> Segregation in housing and public schools also continues unabated.<sup>20</sup> Can any of these problems be addressed through our current civil rights framework? Clearly, the answer is no.

Focusing on the narrow issue of Title VII's prohibition against employment discrimination is instructive in order to demonstrate the falseness of "post-racialism" and to make clear that our current anti-discrimination laws fall far short of ending systemic oppression of minorities. Title VII was not meant to, nor can it, address systemic oppression. It was designed to protect people

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<sup>16</sup> See Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617, 622-23 (2009) (examining the disparate impact of the sub-prime mortgage meltdown on communities of color); see also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (examining the persistence of racial housing segregation).

<sup>17</sup> See DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009: MURDER VICTIMS BY RACE AND SEX, 2009 (2010), available at [http://www2.fbi.gov/ucr/cius2009/offenses/expanded\\_information/data/shrtable\\_01.html](http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shrtable_01.html).

<sup>18</sup> U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT BY RACE AND HISPANIC ORIGIN: 1970 TO 2008 (2010), available at <http://www.census.gov/compendia/statab/2010/tables/10s0224.pdf>; see also GARY ORFIELD, THE CIVIL RIGHTS PROJECT, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE, available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf> (arguing that schools are more segregated today than fifty years ago).

<sup>19</sup> MARIAN F. MACDORMAN & T.J. MATHEWS, NATIONAL CENTER FOR HEALTH STATISTICS, RECENT TRENDS IN INFANT MORTALITY IN THE UNITED STATES (2008), available at [http://www.cdc.gov/nchs/data/data\\_briefs/db09.pdf](http://www.cdc.gov/nchs/data/data_briefs/db09.pdf) (showing infant mortality rates by race).

<sup>20</sup> See JOHN ICELAND, U.S. CENSUS BUREAU, BEYOND BLACK AND WHITE: METROPOLITAN RESIDENTIAL SEGREGATION IN MULTI-ETHNIC AMERICA (2002), available at [http://www.census.gov/hhes/www/housing/housing\\_patterns/pdf/beyond\\_black\\_and\\_white.pdf](http://www.census.gov/hhes/www/housing/housing_patterns/pdf/beyond_black_and_white.pdf) (describing residential segregation patterns in which African Americans continue to live in the most segregated neighborhoods); see also GARY ORFIELD, THE CIVIL RIGHTS PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (2001), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf> (finding that segregated public schools follow patterns of housing segregation).

from employment discrimination on account of their race, color, religion, sex or national origin.<sup>21</sup> It arguably has achieved this objective only in rare cases where the courts have found that the claim fits nicely into the analytic framework of disparate treatment discrimination (requiring a wrongful behavior, a person who has been wronged, and a wrong-doer).<sup>22</sup> The type of complaint that most people have will not fit within this very narrow framework and thus will not be considered discrimination at all.<sup>23</sup> Thus, “anti-discrimination law has . . . been ultimately indifferent to the condition of the victim.”<sup>24</sup> As Professor Anthony Farley has explained,

Today’s civil-rights statutes serve the same race-pleasure functions as did yesterday’s segregation

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<sup>21</sup> Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2 (2006).

<sup>22</sup> Moreover, Title VII requires the wronged to produce evidence of discrimination or a circumstantial showing of discrimination that can always be explained away by some explanation as long as the explanation is not determined by the court to be a pretext for discrimination. See *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), in which the Court sets out the nature and order of the burdens of proof for plaintiffs and defendants. This shifting of burdens is known as the *McDonnell Douglas* burden-shifting framework used for cases relying on circumstantial evidence of purposeful discrimination. There are other theories of discrimination that are available under Title VII, such as disparate impact theory, but given changes to the interpretation of Title VII in a series of Supreme Court cases in 1989, subsequent amendments to Title VII, Sections 703(K)(1)(A), (B) and (C), and the Supreme Court’s 2009 decision, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), it is more difficult than ever before for plaintiffs to succeed. Thus, disparate impact causes of action have almost completely disappeared. See Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1143 (2010) (arguing that the Robert’s Court decision in *Ricci* eviscerates statutory disparate-impact claims and unconstitutionally usurps Congressional policymaking authority); see also Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Raising Test Fairness*, 58 UCLA L. REV. 73, 81 (2010) (arguing that a “close reading of *Ricci* reveals how not all claims of race discrimination are evaluated on a level playing field. Although the holding in *Ricci* is not unambiguous[,] . . . *Ricci* reflects a doctrinal move towards converting efforts to rectify racial inequality into white racial injury.”).

<sup>23</sup> Later Supreme Court decisions undermined the *McDonnell Douglas* framework. See Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 424 (2010) (arguing that these later cases “made it extraordinarily difficult for plaintiffs to win employment discrimination cases based on circumstantial proof”).

<sup>24</sup> Alan D. Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29 (K. Crenshaw et al. eds., 1995).

statutes. The segregation statutes announced to the world that blacks were inferior. The attendant black pain was integral to the pleasure of whiteness. Our civil-rights statutes today serve to legitimate, not prevent, discrimination. Discrimination has continued, more or less unabated, despite the presence of these civil-rights statutes. Our civil-rights statutes serve mainly to delegitimize any claims that discrimination continues. This last task they do well- so well that discrimination today is spoken of only as a vestigial remnant of yesterday, not as the very pulse of morning. Thus, today's civil-rights statutes, like yesterday's segregation statutes, announce to the world that blacks are inferior.

Race works in mysterious ways. Our civil rights statutes are designed from a "perpetrator perspective," not from a victim perspective . . . . The victim perspective focuses on the problem of inequality, while the perpetrator perspective focuses on the problems of fault and causation. The victim lives in a toxic ocean of discrimination, but the perpetrator sees only the nets as problematic. By focusing on the problems of fault and causation, the perpetrator perspective guarantees that discrimination that is not located, litigated, and proved in a court of law will be protected and legitimated as non-discrimination. Thus, most anti-black behavior is legitimated as non-discrimination by today's civil-rights statutes.<sup>25</sup>

Accordingly, anti-discrimination laws, at best, have been ineffectual, and at worst, have encouraged the perpetuation of the very discrimination they were intended to prevent.

Current declarations in favor of a post-racial utopia intensify arguments already critical of civil rights laws and call into question the very need for such laws. Professor Peter Halewood contends that "[s]elf-congratulation on having achieved a post-racial society is both premature and suspect, for encoded in claims of post-racialism is a sort of white triumphalism, a sense that race and racism have

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<sup>25</sup> Anthony P. Farley, *The Poetics of Colorlined Space*, in *CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY*, 121 (Francisco Valdes et al. eds., 2002).

finally been delegitimized as the basis for black grievances.”<sup>26</sup> Moreover, the sense that racism has declined or indeed disappeared seems to have influenced the ways that courts understand discrimination claims. Professor Trina Jones argues that “the tendency of courts to summarily dismiss employment discrimination claims . . . under Title VII . . . is part of a broader movement against discrimination claims” and that post-racialism has led to a judicial skepticism towards discrimination claims in equal protection jurisprudence.<sup>27</sup> In addition to these interpretive barriers impeding civil rights laws from contributing to meaningful change and the rhetorical attractiveness of a post-racial society, there are tremendous practical barriers to accessing these laws even for relief from individual acts of discrimination.<sup>28</sup> What remains is an antidiscrimination system that makes little impact on racial oppression, or indeed one that makes matters worse. Prohibiting individualized, discreet, and distinct instances of intentional discrimination will do little to achieve racial equality.<sup>29</sup> As one scholar has argued, “because the nature of our racial discrimination problem is systemic rather than episodic in nature, it is unrealistic to

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<sup>26</sup> Peter Halewood, *Laying Down the Law: Post-Racialism and the De-Racination Project*, 72 ALB. L. REV. 1047, 1049 (2009).

<sup>27</sup> Jones, *supra* note 23, at 425.

<sup>28</sup> Some of these practical barriers include a complainant’s lack of resources and support and her ignorance of procedures and substantive laws regarding race discrimination. It is probable that there are other attitudinal barriers on the part of those processing race complaints that also interfere with bringing successful claims. An examination of the disposition of race-based claims at the Equal Employment Opportunity Commission (EEOC) reveals that after an investigation, the EEOC is much more likely to conclude that there is no reasonable cause to believe that discrimination has occurred. For example, in 2010, 70.1 percent of claims were found to have “no reasonable cause,” compared to less than 3.5 percent that were found to have “reasonable cause.” See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RACE-BASED CHARGES FY 1997—FY 2010, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm>. Unfortunately, these statistics are rather ambiguous since they do not explain the reasons for such determinations. From research I conducted on the treatment of race discrimination claims at the Ontario Human Rights commission, I determined that many of the no-cause findings were based on stereotypical assumptions about complainants rather than the lack of merit of the claim. See DONNA E. YOUNG, THE DONNA YOUNG REPORT: THE HANDLING OF RACE DISCRIMINATION COMPLAINTS AT THE ONTARIO HUMAN RIGHT COMMISSION (1992) (on file with author).

<sup>29</sup> See Freeman, *supra* note 24, at 30 (arguing that “the law views racial discrimination not as a social phenomenon but merely as the misguided conduct of particular actors”).

think that the problem could ever be resolved through the use of mere particularized remedies directed at identifiable bad actors.”<sup>30</sup> More problematic is the undeserved authority that Title VII earns by its mere existence. It makes credible the idea that we have solved our “past” discrimination problems.

### III. CONCLUSION: MARXIST THEORY IN POST RACIAL AMERICA

How might Marxist theory contribute to the understanding that antidiscrimination laws are ineffectual in the context of free markets and post-racial dialogue? Marxism tells us that the conflict between the capitalist class and the working class is inherent in a capitalist system.<sup>31</sup> Capitalists control the means of production and endeavor to increase profit by exploiting the working class. The working class sells its labor in return for wages.<sup>32</sup> This working class majority, then, is interested in increasing wages and improving working conditions. Because capitalists have superior bargaining power, especially within the legal framework of at-will employment, they also enjoy more economic, legal, political and social power.<sup>33</sup> Therefore, in order to end exploitation (the devaluation of their labor), the working class must work together to overthrow capitalists.<sup>34</sup> Absent this revolution, however, the working class at least must form unions and other organizations to improve the quality of work (better wages, hours, and working conditions).<sup>35</sup>

Racism has been and continues to be a constant and necessary component of American capitalism. It operates to divide the working class and indeed relegates large minorities to the underclass and thus prevents unified political action. The resulting weakness of bargaining power of the working classes maximizes profits by ensuring a wage system that undervalues the worth of labor. Ownership of capital is therefore equated with Whiteness and being owned or devalued with Blackness. Discrimination is a system not confined to the individual workplace, but one that permeates all workplaces and one that is essential to the structure of the free market itself. Yet because antidiscrimination laws have

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<sup>30</sup> Spann, *supra* note 22, at 1136.

<sup>31</sup> STEVEN SEIDMAN, *CONTESTED KNOWLEDGE: SOCIAL THEORY TODAY* 29 (3d ed. 2004).

<sup>32</sup> *Id.* at 31.

<sup>33</sup> *See id.* at 128.

<sup>34</sup> *See id.* at 31.

<sup>35</sup> *Id.* at 32.

been incapable of addressing inequities inherent in a presumed race-neutral free market, we cannot rely on existing antidiscrimination laws to address the many ways in which racism is practiced. Due to the embedded nature of racism in American capitalism, concerted, organized resistance may be a promising avenue for meaningful social change.