CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION

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PREFACE

Since its inception in the mid-1960s, employment discrimination has been a fast-developing and important legal area. Until recently, however, it frequently was viewed as lacking a coherent conceptual underpinning, often appearing to be only a loose collection of diverse statutory rights. But in the last several years employment discrimination has begun to come of age as a distinct legal discipline with its own unique analytical framework. In the process, it has progressed from its relatively simple analytical origins to become a highly sophisticated study, and teaching materials that reflect the study's emerging structure have become both possible to produce and necessary.

In Federal Statutory Law of Employment Discrimination (1980), we articulated in a treatise format what we perceived to be the structure of employment discrimination law. Like the treatise, this casebook attempts to develop an analytical approach to the entire field by first focusing on the concept of "discrimination," a focus that gives way to a more detailed examination of various statutory peculiarities. But this work is not a casebook version of the treatise; rather, it is a tool designed for law school teaching and learning. Indeed, the preparation of the casebook has caused us to stretch our thinking in several important respects.

A major thrust of this casebook reflects the fact that employment discrimination law has incorporated the use of statistical methodology to prove discrimination. We attempt to present the fundamentals of that methodology so that students of discrimination law unschooled in statistical techniques can nevertheless come to a sufficient understanding of that methodology to manipulate it in the context of litigation. In brief, we expect students of employment discrimination to be able to communicate intelligently with statisticians about the role of statistics in the law of employment discrimination.

Another thrust of this work is to offer materials that will be useful in analyzing "cutting edge" issues, such as equal pay for work of comparable value and gender distinctions in the toxic workplace. In such areas there is

little "law," but there is every sign that cases will necessarily follow industrial developments. As a result we have attempted to utilize "non-legal" materials, including excerpts from the field of industrial relations, to prepare the student for "next generation" questions that will demand from the law a new type of synthesis.

Although our use of nontraditional materials has given rise to some space problems, we have made every effort to keep the casebook to a manageable length. We believe it to be only mildly ambitious for a three-credit course. Since those teaching the more usual two-credit offerings, however, will necessarily omit some of the material, we have structured the book to provide maximum flexibility. Only Part I, The Concept of Discrimination, is central to our analysis. Having taught Part I, a professor might add the three chapters in Part II, Title VII: Special Problems, Procedures, and Remedies, and have a course limited to Title VII. Alternatively, professors interested in a more comprehensive coverage of various discrimination statutes could omit Title VII peculiarities relating to procedures (Chapter 5) and/or remedies (Chapter 6) and instead teach from Part III, Other Antidiscrimination Statutes. In that part, Chapter 7 treats the Equal Pay Act; Chapter 8 develops the Age Discrimination in Employment Act; Chapter 9 considers Reconstruction-era civil rights statutes; and Chapter 10 discusses the National Labor Relations Act as it bears on discrimination issues. Part IV is also available for those who wish to focus on the use of government contracting power to deal with the problem of discrimination. In particular, Chapter 12, focusing on handicap discrimination, offers considerable material on this developing area of the law.

Only one major discrimination area is consciously excluded from detailed coverage in this work. The use of equal protection law as a tool to attack employment discrimination seemed to us to be largely duplicative of the treatment of that area in Constitutional Law courses and also seemed to be of decreasing practical significance because of the broad sweep of statutes that are generally more restrictive of the government as employer than the Constitution would be. While that is not true in every case (for example, discriminations against homosexuals are actionable, if actionable at all, only under the Constitution), space considerations foreclosed development of this area. We do, nevertheless, make use of constitutional cases, both in developing the statutory concepts of discrimination and in notes for student exploration.

A final word about our editing of excerpted material seems appropriate. All omissions from the cases and materials are indicated by ellipses, except that footnotes, internal cross-references, parallel citations, and repetitive citations are deleted with no indication. Where footnotes are used, the original footnote number is normally retained. Footnotes added by the authors of this work are indicated by an asterisk, a dagger, or a double dagger.

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Finally, we thank Bobbs-Merrill, which granted us copyright permission to use selected portions of our treatise, Federal Statutory Law of Employment Discrimination (1980), which were particularly useful in areas where textual treatment is efficient pedagogically.

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INTRODUCTION

As the culmination of the massive civil rights movement of the 1960s, Congress enacted the Civil Rights Act of 1964. Although that statute had important provisions prohibiting racial discrimination in public accommodations (Title II) and in federally funded programs (Title VI), the centerpiece of the act was undoubtedly Title VII, which proscribed discrimination in employment on the basis of race, sex, religion, and national origin.

Title VII marked a legal watershed. Although the statute had precursors,* they had proved insufficient to deal with the problem of employment discrimination. Thus, state laws against discrimination were often inadequately enforced,** and many states where discrimination was most pronounced did not have such laws. Other federal efforts were either very limited (such as the Equal Pay Act, which outlawed sex discrimination but only in wage payments and only where the favored and disfavored sexes performed "equal work"), addressed discrimination issues obliquely (such as the National Labor Relations Act, in which racial discrimination questions typically arose only as part of the union duty of fair representation), or reached a very limited number of employers (such as Executive Order efforts to eliminate discrimination by government contractors). Title VII, then, marked the first comprehensive national attack on the problem of employment discrimination. It provided the federal courts with a means of reviewing the practices of employers of the vast bulk of the work force, since the statute now covers employers who have fifteen or more employees, as well as covering almost all unions and employment agencies.

In the wake of Title VII, two developments brought the federal courts' involvement with employment problems to an even higher level. The first development was the passage of additional statutes, most notably the Age

*See generally Jones, The Development of Modern Equal Employment Opportunity and Affirmative Action Law: A Brief Chronological Overview, 20 How. L.J. 74 (1977).

**See generally M. Sovern, Legal Restraints on Racial Discrimination in Employment (1966).

Discrimination in Employment Act of 1967, which prohibited discrimination against older workers, and the Rehabilitation Act of 1973, which restricted discrimination against the handicapped. The second development was the judicial resuscitation of civil rights statutes passed during the Reconstruction era following the Civil War. Sections 1981, 1983, and 1985 of Title 42 of the United States Code, passed to protect the newly freed slaves in the South by implementing the Thirteenth, Fourteenth, and Fifteenth Amendments, were eviscerated by the Supreme Court in the years shortly after their enactment. The Warren Court, however, perhaps influenced by a second Reconstruction, marked by the passage of the Civil Rights Act of 1964, revived the early statutes, creating a wide range of statutory tools to deal with employment discrimination.

But what precisely is the nature of the employment discrimination problem that has engendered such a variety of legal solutions? For the student, a complete answer must await completion of this volume, since an appreciation of the dimensions of the problem can emerge only from an understanding of the tools the law has developed to deal with it. Indeed, discrimination may not be one phenomenon but rather a series of related phenomena, and the problems associated with, say, race discrimination may differ from those associated with handicap discrimination. Nevertheless, some idea of the underlying difficulties of employment discrimination can be derived from an insight into the economic situation of various groups in American society.

L. THUROW, THE ZERO SUM SOCIETY
184-187 (1980)

The essence of any minority group's position can be captured with the answer to three questions: (1) Relative to the majority group, what is the probability of the minority's finding employment? (2) For those who are employed, what are the earnings opportunities relative to the majority? (3) Are minority group members making a breakthrough into the high-income jobs of the economy? In each case, it is necessary to look not just at current data, but at the group's economic history. Where has it been, where is it going, how fast is it going, and how fast is it progressing?

In terms of ethnic origin, there are three economic minorities in the United States — blacks, Hispanics, and American Indians. Of the almost 100 million other Americans who list themselves in the census as having an ethnic origin, all have incomes above those of Americans who list no ethnic origin. The highest family incomes are recorded by Russian-Americans, followed by Polish-Americans and Italian-Americans.[22] "Ethnic" Americans sometimes talk as if they were economically de-

22. U.S. Bureau of the Census, Current Population Reports, Population by Ethnic Origin 1972, Series P-20, no. 249, p. 26.

prived, but they are actually perched at the top of the economic ladder. Females constitute the other major economic minority. Many of them may live in families with high incomes, but when it comes to earnings opportunities, they do not participate in the same economic ball game as men.

If you examine the employment position of blacks, there has been no improvement and perhaps a slight deterioration. Black unemployment has been exactly twice that of whites in each decade since World War II. And the 1970's are no exception to that rule. Whatever their successes and failures, equal opportunity programs have not succeeded in opening the economy to greater employment for blacks. Given this thirty-year history, there is nothing that would lead anyone to predict improvements in the near future. To change the pattern there would need to be a major restructuring of existing labor markets.

Viewed in terms of participation rates, there has been a slight deterioration in black employment. In 1954, 59 percent of all whites and 67 percent of all blacks participated in the labor force. By 1978 white participation rates had risen to 64 percent and black participation rates had fallen to 63 percent.[23] This change came about through rapidly rising white female participation rates and falling participation rates for old and young blacks. In the sixteen to twenty-one age category, black participation rates are now fifteen percentage points below that for whites.

At the same time, there has been some improvement in the relative earnings for those who work full-time, full-year. In 1955 both black males and females earned 56 percent of their white counterparts. By 1977 this had risen to 69 percent for males and 93 percent for females.[24] While black females made good progress in catching up with white females, this has to be viewed in a context where white females are slipping slightly relative to white males. If black males were to continue their relative progress at the pace of the last twenty years — five percentage points every ten years — it would take black males another sixty years to catch up with white males.

While the greatest income gains have been made among young blacks and one can find particular subcategories that have reached parity (intact college-educated, two-earner families living in the Northeast), there still is a large earnings gap among the young. Black males twenty-five to thirty-four years of age earned 71 percent of what their white counterparts earned in 1977. Among full-time, full-year workers, the same percentage stood at 77 percent.[25] Young black males are ahead of older black males, but they have not reached parity. As with black females in general, young black females do better than males. Females twenty-five to thirty-four years of age earned 101 percent of what whites earned, and full-time, full-year black females earned 93 percent of what whites earned.

23. U.S. Department of Labor, Employment and Earnings 26, no. 1 (Jan. 1979): 156.
24. U.S. Bureau of the Census, Current Population Reports, Consumer Income 1977, Series P-60, no. 118 (March 1979), p. 234.
25. Ibid.

Using the top 5 percent of all jobs (based on earnings) as the definition of a "good job," blacks hold 2 percent of these jobs while whites hold 98 percent.[26] Since blacks constitute 12 percent of the labor force they are obviously underrepresented in this category. Relative to their population, whites are almost seven times as likely to hold a job at the top of the economy than blacks. At the same time, this represents an improvement in the position of blacks relative to 1960. Probabilities of holding a top job have almost doubled.

Separate data on Hispanics only started at the end of the 1960's and is not as extensive as that available for blacks, but during the 1970's Hispanics seemed to have fared slightly better than blacks in the labor market. Where their family income was once lower than that of blacks, it is now higher. This is probably due to the fact that Hispanics are much more heavily concentrated in the sunbelt, with its rapidly expanding job opportunities.

Instead of having unemployment twice that of whites, unemployment is only 45 percent higher.[27] Labor force participation rates are rising even more rapidly than those for whites. In terms of relative earnings, full-time, full-year males earn 71 percent of what whites earn, and females have reached 86 percent of parity.[28] While there are substantial differences in family income among different Hispanic groups, earnings are very similar among the major groups. In 1976 Cuban-Americans, Mexican-Americans, and Puerto Ricans were all within $200 of each other in terms of personal income, for those with income.

In terms of the best jobs, Hispanics hold 1 percent of these jobs but constitute 4 percent of the labor force. Relative to their population, whites are three times as likely to be in the top 5 percent of the job distribution as Hispanics.[29] In terms of breaking into the good jobs of the economy, Hispanics are far ahead of blacks.

American Indians are the smallest and poorest of America's ethnic groups. They are poorly described and tracked by all U.S. statistical agencies. Despite the existence of the Bureau of Indian Affairs, only the roughest estimate for their economic status is available. In terms of family income, reservation Indians probably have an income about one-third that of whites. Where nonreservation Indians stand no one knows.

Female workers hold the dubious distinction of having made the least progress in the labor market. In 1939 full-time, full-year women earned 61 percent of what men earned.[30] In 1977 they earned 57 percent as much.

26. Ibid.
27. U.S. Department of Labor, Employment and Earnings 26, no. 1 (Jan. 1979): 189.
28. U.S. Bureau of the Census, Current Population Reports, Consumer Income 1977, Series P-60, no. 118 (March 1979), pp. 218, 222.
29. U.S. Bureau of the Census, Current Population Reports, Persons of Spanish Origin, Series P-20, no. 339 (March 1978), p. 27.
30. U.S. Bureau of the Census, Current Population Reports, Consumer Income 1977, Series P-60, no. 118 (March 1979), pp. 227, 231.

Since black women have gained relative to black men, white women have fallen even more in relation to white men over this forty-year period. Adult female unemployment rose from 9 percent higher than men in 1960 to 43 percent higher in 1978. From 1939 to 1977 the percentage of the top jobs held by females has fallen from 5.5 percent to 4 percent although women rose from 25 percent to 41 percent of the labor force. Relative to their population, a man was seventeen times as likely as a woman to hold a job at the top of the economy in 1977.

With the exception of breaking into the top jobs in the economy, much of this decline can be attributed to rapidly rising female participation rates. With more women in the labor force, there is simply more competition, leading to lower wages and more unemployment. At the same time, the results indicate that the structure of the economy has not changed, and women have not broken through into a world of equal opportunity. In such a world they would compete with men and not just with each other.

At the bottom of the labor force stand the young — our modern lumpen proletariat. In 1978, 49 percent of all unemployment was concentrated among sixteen- to twenty-four-year-olds.[31] Unemployment rates were three times that of the rest of the population. Among male full-time, full-year workers, relative earnings stood at 40 percent for fourteen- to nineteen-year-olds and 65 percent for twenty- to twenty-four-year-olds.[32] Among females the same percentages were 64 and 104. In terms of holding the top jobs, sixteen- to twenty-four-year-olds held 0.5 percent although they constituted 24 percent of the labor force.

The causes of the economic plight of minorities and women are a matter of considerable dispute, especially the extent to which "discrimination" is responsible. Still more controversial is the degree to which various solutions should be societally oriented (perhaps through improved education or more transfer payments) or should focus on the activities of employers who are the source of most of the wealth in our society. Even more controversial is the issue of whether the law should merely prohibit "discrimination" by employers or go further and require "affirmative action."

FISS, A THEORY OF FAIR EMPLOYMENT LAWS

38 U. Chi. L. Rev. 235, 237-240 (1971)

A. The Aims of the Law: Securing Equality for Negroes

Laws prohibiting racial discrimination in employment are inextricably linked to the goal of securing for Negroes a position of "equality." There are, however, two senses to "equality" in this context. One is equal treat-

31. U.S. Department of Labor, Employment and Earnings 26, no. 1 (Jan. 1979): 156.

32. U.S. Bureau of the Census, Current Population Reports, Consumer Income 1977, Series P-60, no. 118 (March 1979), pp. 197, 198.

ment. Individual Negroes should be treated "equally" by employers in the sense that their race should be "ignored," that is, not held against them. This sense of equality focuses on the starting positions in a race: If color is not a criterion for employment, blacks will be on equal footing with whites. The second sense of equality — "equal achievement" — looks to the outcome of the race. It relates to the actual distribution of jobs among racial classes and is concerned with the quantity and the quality (measured, for example, by pay level and social status) of the jobs. Jobs should be distributed so that the relative economic position of Negroes — as a class — is improved, so that the economic position of Negroes is approximately equal to that of whites. Disproportionate unemployment and underemployment of blacks should be eliminated or substantially reduced.

These two senses of equality are linked in fair employment laws, but it is not clear which is the goal of the law. Under one interpretation, the aim of a fair employment law is to secure equal treatment, and although equal treatment might alter the actual distribution of jobs and lead to equal achievement, such a result would be only incidental. Under an alternative interpretation, the aim is equal achievement, and the guarantee of equal treatment — the antidiscrimination prohibition — is the chosen method for equalizing the distribution of jobs among racial classes.

The distinction between these two views of the aim of the law is of little moment if it can be assumed that equal treatment will lead to equal achievement. But the assumption may be incorrect. It is conceivable, and indeed likely, that even if color is not given any weight in employment decisions, and in that sense equal treatment obtained, substantial inequalities by race in the distribution of jobs will persist in the immediate and foreseeable future.

Persistent inequalities in job distribution may be attributable to factors unrelated to particular employment decisions (that is, the conduct regulated by fair employment laws). For example, at any one point in time, unemployment rates differ from industry to industry, from region to region, and from employer to employer; and disproportionate unemployment of blacks may be due to a heavy concentration of blacks in the industry, region, or business enterprise that has at any one moment the greatest unemployment. This unequal distribution may be due to custom, individual preference, or actual or imagined discrimination in areas other than employment, such as housing. It may simply be due to the fact that for blacks the starting point in the labor market was in the South and in agriculture. The concentration of blacks in nongrowth industries and regions, or business enterprises, may be corrected over time as the unemployed relocate themselves; but that takes time, and whites will also be relocating.

Inequalities in the actual distribution of jobs between the races might also be due to the decisions of individual employers — the subject regu-

lated by fair employment laws. One need not resurrect any notions of "innate inferiority" to explain this possibility. One need only be realistic about the historical legacy of blacks in America — one century of slavery and another of Jim Crowism. This legacy may result in inequalities in the actual distribution of jobs in several ways.

First, even if race is not used by an employer, his decisions may be based on criteria that do not seem conducive to productivity and that because of the legacy, give whites an edge. In an industrial system where whites have a preexisting edge, rules that prefer relatives of the existing work force (nepotism) or those who started working for the firm at an earlier point in time (seniority) are examples of such criteria. The color-blind version of fair employment laws emphasizes the negative proposition that race is not a permissible basis for allocating jobs, but it does not purport affirmatively to catalog the permissible criteria, requiring that they all be conducive to productivity.

Second, even if the employer does not use race and uses criteria apparently conducive to productivity in his employment decisions, the historic legacy may have left blacks with several types of disabilities. One disability might be motivational. Conceivably, this legacy of slavery and discrimination has been responsible for the lessening of motivation of the class, making its members less willing to compete aggressively for the opportunities that are open or less willing to submit to industrial discipline. The legacy may have also made it more difficult for Negroes to acquire the references necessary to evaluate future promise. Finally, the legacy may have left the class without the qualities, abilities, skills or experience that efficiency-oriented employment criteria demand. This impact of the legacy need not be confined to the older members of the class. For younger blacks, not directly exposed to slavery or Jim Crowism, the disabilities might be "inheritable." The disabilities may have affected family structure, which in turn has an impact on a child's aspirations and on the guidance available. The disabilities also may have affected family wealth, which has an impact on the child's ability to acquire the training or credentials necessary to compete more successfully.

Thus the distinction between the two views of equality is real. The question that has to be asked is whether the goal of the antidiscrimination prohibition is equal treatment or equal achievement, and a great deal may turn on the answer to that question. For the equal treatment goal will constitute one, though only one, of the pressures to depart from the norm of color blindness. If equal achievement is the goal of the law, and, as may be the case, it is not obtained by color blindness, the desire to improve the relative economic position of blacks will create a greater temptation to construe the legal obligation arising from the command not to base employment decisions on race in a more and more "generous" fashion. There will be considerable pressure to construe the central regulatory device in a manner that would bring the law closer to the attainment of the alleged

goal of equalizing the actual distribution of employment opportunities, and such a construction might well entail giving preferential treatment to blacks. On the other hand, the equal-treatment goal is more compatible with color blindness; it means that blacks are treated the same as whites and thus would seem to be achieved once all employment decisions are independent of the colors of the prospective employees.

The choice between these views of the aims of the law may be dictated by the language or history of the particular fair employment law in question. However, more likely than not, the relevant language or history, if any, will not be decisive. The choice will then reflect primarily what the decision-maker believes the goal of the law ought to be, and that in turn should depend, not on the decision-maker's self-interest, but on the ethical foundations of these goals.

Professor Fiss, after weighing the factors he thinks relevant to the choice between equal treatment and achievement, opts for a modified equal treatment test. He would find an employment criterion to be the functional equivalent of a formal racial criterion if the criterion has an adverse differential impact on blacks, is unrelated to productivity, and is beyond individual control. Subsequently, in an article addressing the purposes of the equal protection clause of the Fourteenth Amendment, Professor Fiss argued that a disadvantaged group principle was at the core of the equal protection principle. Fiss, Groups and the Equal Protection Clause, 5 Philosophical & Pub. Aff. 109 (1976). Beyond the fact that the Fourteenth Amendment and fair employment laws were passed in large part to protect blacks, the history of blacks' perpetual subordination and circumscribed political power justifies the protection of them as a social group.

There has been little dispute that employers should not violate an equal treatment test in the sense that black workers' race should not be held against them. In contrast, one of the most political issues in recent times has been the issue of affirmative action: if being black should not be used against a person, can it be used in favor of a person? Or does such affirmative action constitute "reverse discrimination" against whites, who are disadvantaged by the use of race, which favors blacks. Ultimately, the ethical decision on how far fair employment laws should reach depends on evaluation of the source, depth, and causes of discrimination in our society; the extent to which jobs and other benefits are presently distributed by real merit (see Fallon, To Each According to His Ability, from None According to His Race: The Concept of Merit in the Law of Antidiscrimination, 60 B.U.L. Rev. 815 (1980)); and the efficacy of legal techniques to end discrimination. Those who conclude that discrimination is now a substantially reduced problem that merely requires showing "irrational" employers the benefit of fine-tuning their organizations into "pure"

meritocracies will conclude that equal treatment is the preferred standard for fair employment. Those who conclude that discrimination remains one of the most serious injustices in our society and that, in our society's organizational lines, merit is only its own reward might favor the equal achievement model.

Dean George Schatzki, in United Steelworkers of America v. Weber: An Exercise in Understandable Indecision, 56 Wash. L. Rev. 51, 56-57 (1980), finds a broad purpose to Title VII, beyond the traditional rationales for an equal treatment view of discrimination — that race is innate, a circumstance over which an individual has no control and that race is irrelevant to ability to do a job:

> The stated two reasons, however, are not sufficient to explain the existence or purpose of Title VII. It is not clear we would want to outlaw racial employment discrimination, however irrational we believed it to be, if all persons were sometimes the discriminators and sometimes the discriminatees; if all ethnic groups had equal, statistical access to jobs; if all ethnic groups were equally affluent, prestigious, and influential. At least I am not sure we should want to outlaw a pluralism that allowed random ethnic discrimination. Although, on balance, I might prefer the "melting pot," or I might prefer some integration as well as some identifiable pluralism, it is not clear to me that we, as a society, desire to destroy ethnic pride, consciousness, and behavior. Destruction of that pluralistic attitude and behavior would be difficult; quick destruction might be possible, but only with involvement of the law.
>
> Since my judgment, albeit not empirically provable, is that pluralism is desired by large segments of our society and is not — in any event — a clear, indefensible evil, there must be another reason for the legislation called Title VII. The third reason for the passage of the Act is simply stated: in the United States, the burden of discrimination (in employment and elsewhere) has fallen on the members of certain ethnic groups. Racial discrimination is not random. Most of us do not suffer the burdens and barbs of ethnic discrimination; more importantly, whether or not we do suffer this irrationality sometimes, most of us have been treated most of the time by dominant persons or institutions without our race being a handicap. Saying that about blacks or chicanos, for example, would be an outright lie. These are people in our society — as a whole — who suffer in a vastly disproportionate way because of their ethnicity. The degrees of suffering and disparity are probably immeasurable, but few — if any — would deny their existence.
>
> A rational justification, then, for Title VII is that identifiable ethnic groups in our society have suffered in a vastly disparate way and that society, through Title VII, is determined to rectify that imbalance. The historical fact is, I think, that Title VII never would have been passed without notice of the obvious state of affairs that black people, specifically, were systematically prevented from participating usefully and gainfully in our culture. The political history of the Act is consistent with my ethical or moral observation that it is not necessarily racial discrimination alone that ought to generate a

response from law; what needs obliteration is racial discrimination which oppresses one or more particular groups.

Discrimination against blacks because of their race is the paradigm, but other groups also have a claim to special protection because they have shared in the treatment blacks have received. See, for example Ginsburg, Sex Equality and the Constitution, 52 Tul. L. Rev. 451 (1978), and Greenfield & Kates, Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866, 63 Calif. L. Rev. 662 (1965).

Needless to say, neither our society nor our legal system has definitively resolved the tension between equal opportunity and equal achievement. But some basics are clear. To whatever extent the economic plight of women and minorities can be attributed to discrimination in labor markets, the federal courts are charged with eradicating it. This book attempts to chart the judicial efforts to achieve that goal. Part I begins with the foundation problem — defining discrimination in terms of the three theories of liability the courts have evolved. Chapter 1 takes up the most basic concept, disparate treatment discrimination in both its individual and systemic varieties. Chapter 2 considers a broader test of discrimination, disparate impact. Finally, Chapter 3 attempts to synthesize the approaches previously developed into a coherent theory of discrimination.

Part II focuses more closely on particular questions that arise when Title VII, the basic antidiscrimination statute, is involved. Thus, Chapter 4 takes up special problems of differing types of discrimination; Chapter 5 considers the peculiar procedures under that statute; and Chapter 6 analyzes the remedies for a Title VII violation. Part III treats other statutory schemes for attacking different varieties of discrimination: Chapter 7 discusses the Equal Pay Act; Chapter 8, the Age Discrimination in Employment Act of 1967; Chapter 9, the Reconstruction-era civil rights statutes; and Chapter 10, the National Labor Relations Act.

Part IV concludes the casebook, focusing on more limited efforts to deal with employment discrimination by use of the government's power as a purchaser or as a dispenser of federal funds. Chapter 11 considers the program implemented under Executive Order 11,246, and Chapter 12 discusses federal efforts to deal with discrimination against persons with physical or mental handicaps.

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