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INNOCENCE AND *THE SOPRANOS*

SETH D. HARRIS\*

## I. INTRODUCTION

“Innocence” bears more than one meaning. “Innocence” can be defined in a narrow, even technical way: “[f]reedom from specific guilt; the fact of not being guilty of that which one is charged; guiltlessness.”<sup>1</sup> In this definition, “innocence” describes a positive state. But “innocence” can also take on a larger meaning that extends beyond technicality into morality: “[f]reedom from sin, guilt, or moral wrong in general; the state of being untainted with, or unacquainted with, evil; moral purity.”<sup>2</sup> This broader definition conveys a larger idea that is more powerful and evocative than the former’s narrow literalism. It is not merely an absence of guilt beyond a reasonable doubt in the style of criminal law’s “not guilty.” It is not the mere absence of preponderant fault in the style of neg-

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\* Associate Professor of Law, New York Law School. J.D., New York University School of Law, 1990; B.S., Cornell University School of Industrial & Labor Relations 1983. This essay had its genesis in classroom discussions of *The Sopranos*, remedies, and affirmative action with students in my Employment Discrimination Law classes at New York Law School. I benefited immensely from presenting an earlier draft of this essay at New York Law School’s Faculty Presentation Day and from the comments of my fellow panelists Robert Blecker and Elizabeth Rosen and members of our Law & Humanities Panel’s audience, particularly New York Law School students Adam Gana and Michael Dillon. I subsequently received thoughtful and valuable comments on earlier drafts from Thomas Ross and my colleagues David Chang, Arthur Leonard, Carlin Meyer, Denise Morgan, and David Schoenbrod. Research assistants Amelia Baker, Amanda Gaynor, Daniel Gershburg, Greg Rutstein, and Heather Volik made important contributions to this and other projects. Nonetheless, all errors are mine. I am grateful to New York Law School for its continuing financial support of my research through its generous summer grants program. I dedicate this essay to my brother Paul in thanks for his love and the many ways he has helped me to better understand popular culture.

1. 7 OXFORD ENGLISH DICTIONARY 995 (2d ed. 1989) [hereafter OXFORD]; see also WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1166 (3d ed. 1993) [hereafter WEBSTER’S] (“the state of not being chargeable for or guilty of a particular crime or offense.”). For a thoughtful discussion of the role of “innocence” in the criminal context, see William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995).

2. OXFORD, *supra* note 1, at 995; see also WEBSTER’S, *supra* note 1, at 1166 (“Freedom from guilt or sin esp. through being unacquainted with evil: purity of heart: blamelessness . . .”).

ligence law's "not liable." It bestows no special legal status. Yet, it is a positive attribute with normative consequences.

"Innocence," in this more expansive sense, evokes the sleeping infant, wholly dependent and pure of thought and deed. No avoidable harm can be justifiably inflicted on this type of "innocent."<sup>3</sup> To the contrary, the infant demands and receives care and protection from harm.<sup>4</sup> Thus, "innocence" in its moral sense is not a passive state. It includes the power to command others to action — that is, to require the care and protection of those deemed "innocent."

"Innocence" has played an important role in judicial decisions addressing claims of workplace discrimination.<sup>5</sup> Most litigation involves two parties or, perhaps more accurately, two sides. One party claims that a second party has wronged him in some way. If the claim is proven, the first party is entitled to relief from his injuries. Those workplace discrimination cases in which "innocence" has played an important role have emphasized the importance of third

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3. To the contrary, any such harm may produce either legal guilt or legal liability. See, e.g., N.J. STAT. ANN. § 9:6-1 (2002) (New Jersey's criminal law prohibiting child abuse). Since the Sopranos live and "work" in New Jersey, this essay will assume that New Jersey and federal law are most relevant to the Sopranos and, therefore, this essay.

4. "Innocence" may suggest cultural references other than the sleeping infant proposed here. See, e.g., Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 34-37 (1990) (contrasting the "innocent" as a virginal antithesis of the "sexual defiler") [hereinafter Ross, *Rhetorical Tapestry*]; Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 308-10 (1990) (same, but also emphasizing that women and children are cultural reference points for "innocence") [hereinafter Ross, *Innocence*]; or even allegories that rely upon different images. See, e.g., Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1006-10 (1989). Nonetheless, these alternative images of "innocence" do not alter the basic point that the "innocent" is perceived to be entitled to protection from harm which, in turn, gives the "innocent" power over others.

5. The role of "innocence" in discrimination cases, particularly affirmative action cases, has been the subject of substantial scholarly comment. See, e.g., Kathleen M. Sullivan, *The Supreme Court, 1985 Term: Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989) [hereinafter Ross, *Richmond Narratives*]; Ross, *Rhetorical Tapestry*, *supra* note 4; Ross, *Innocence*, *supra* note 4; Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15 (1991); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790 (1991); Ansley, *supra* note 4; John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994).

parties who are neither the actor in the drama nor the acted upon. While these third parties may be relevant to determinations regarding appropriate remedies, the Supreme Court has wielded the power of “innocence” to give these third parties a decisive role in determining whether and how the injuries caused by discrimination will be remedied.

From the Supreme Court’s perspective, the relevant third parties in workplace discrimination cases are the white and male co-workers of the African-American and women workers who have been the victims of discrimination. The African-American and women workers who seek remedies for the injuries resulting from race and sex discrimination want to change an unjust status quo. They seek promotions or job opportunities or raises they would have received absent discrimination. Their white and male co-workers may prefer to preserve the status quo because they, in some number of cases, have received the promotions, job opportunities, and raises that should have gone to the African-American and women workers; that is, they have received the proceeds of discrimination and would like to keep them. The question for the Supreme Court, therefore, has been whether the proceeds of discrimination must be returned to the victims of discrimination or if their “innocent” co-workers should be permitted to keep them.

The Supreme Court has repeatedly relied on the “innocence” of white and male workers to preserve the status quo and deprive African-American and female discrimination victims of complete relief from discrimination. By wrapping workers who have not suffered discrimination in the cloak of “innocence,” the Court has effectively declared the victims of discrimination and their co-workers to be morally equivalent.<sup>6</sup> As a result, the victims of discrimination do not, when compared with their “innocent” co-workers, own a superior claim to the care and protection of the law. Ill-gotten

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6. See Devins, *supra* note 5, at 20 (describing the view of affirmative action opponents that “minorities and whites are *always* alike”); Ross, *Richmond Narratives*, *supra* note 5, at 397-98 (discussing moral equivalence as “symmetry”). Cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (“I believe that there is a ‘moral and constitutional equivalence,’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.”) (internal citation omitted).

proceeds from discrimination need not be returned to the victims of discrimination. The discriminatory status quo can be preserved.

This essay will argue that the Supreme Court's "innocence" jurisprudence, at least in the workplace discrimination cases, amounts to nothing more than a subtle bait-and-switch of one definition of "innocence" for the other. The white and male co-workers of the victims of discrimination are "innocents" only in the sense that they satisfy the narrow definition: "freedom from specific guilt" or, in the words of one Supreme Court justice, "not the wrongdoers."<sup>7</sup> Even though these workers satisfy only the narrow definition of "innocence," however, the Supreme Court has afforded them almost parental care and protection appropriate only for the sleeping infant who exemplifies the broader, moral definition of "innocence." Further, by casting their co-workers as "innocents," the Supreme Court re-casts the victims of discrimination in the role of perpetrators — in this metaphor, baby-bottle thieves or, worse, child abusers — who would harm "innocents." In this morality play, a neutral and beneficent judiciary restrains the perpetrators and thereby fulfills its obligation to care for and protect the "innocent."<sup>8</sup> "Innocence" thereby alchemizes cases about discrimination against disadvantaged groups into narratives in which African-Americans and women seek to deprive white and male workers of their rightful interests.<sup>9</sup> In this way, the debate over workplace discrimination minimizes discrimination and its victims, while emphasizing the purported plight of "innocent" co-workers.<sup>10</sup>

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7. See *infra* notes 125-26 and accompanying text (discussing Justice Powell's definition of "innocence" in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976)).

8. See Ross, *Innocence*, *supra* note 4, at 301 (describing the dialectical nature of "innocence"); see also Ross, *Richmond Narratives*, *supra* note 5, at 398, 401-03 (discussing how "innocence" evokes images of African-Americans oppressing whites).

9. In a private memorandum to his brother justices discussing *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), Justice Brennan expressed his deep frustration with the false characterizations of the victims of discrimination as perpetrators and their white co-workers as "innocents." The memorandum argued Brennan's view that the victims of discrimination were undeniably as "innocent" as their co-workers. See Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 WM. & MARY L. REV. 473, 538-39 (1995).

10. See Ross, *Innocence*, *supra* note 4, at 301 ("[T]he rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways."); see also Ansley, *supra* note 4, at 1013-22 (arguing that

Beyond re-shaping the debate over discrimination and giving white and male workers protection which their limited claim to “innocence” does not justify, this misuse of the power of “innocence” has deprived the victims of discrimination of the complete justice they deserve. With the introduction of “innocence” into the cases, the question was no longer how the workplace manifestations of racism or sexism should be ameliorated or even eliminated, but how to divide a small and fixed pie among morally equivalent workers. The central issue became how best to resolve a struggle between the victims of discrimination and their co-workers over jobs, promotions, and wages.<sup>11</sup> The Court’s answer has been to constrain the lower courts and other branches and levels of government from preferring the victims of discrimination over their “innocent” co-workers in the assignment of burdens and benefits in the workplace. The Court’s use of “innocence” to re-frame the question dictated this answer — the wrong answer to the question of how to remedy discrimination in the American workplace.

The purported moral equivalence of the victims of discrimination and their “innocent” co-workers is one residue of a willful misreading of *Brown v. Board of Education*’s legacy.<sup>12</sup> Of course, *Brown* mandated formal, legal equality in the public schools; that is, government could not segregate public-school students on the basis of race.<sup>13</sup> *Brown*’s mis-interpreters treat formal equality as indistinguishable from social and economic equality.<sup>14</sup> After *Brown*, and

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the rhetoric in the Supreme Court’s race cases has shifted focus from public purposes to private conflict).

11. See Ansley, *supra* note 4, at 1014-19.

12. 347 U.S. 483 (1954). Thomas Ross made a troubling but convincing argument that the rhetoric of “white innocence” which pervades the modern Supreme Court’s race-related decisions essentially echoes similar rhetorical devices employed in the most widely derided Supreme Court decisions relating to race, like the *Dred Scott* decision, the Civil Rights Cases, and *Plessy v. Ferguson*, as well as in the arguments of the pro-segregation forces in *Brown v. Board of Education*, 347 U.S. 483 (1954). Ross, *Rhetorical Tapestry*, *supra* note 4, at 7.

13. See *Brown*, 347 U.S. at 495.

14. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1750-57 (1993) (discussing *Brown*’s legacy); Ansley, *supra* note 4, at 999-1001 (same); see also Ross, *Rhetorical Tapestry*, *supra* note 4, at 24-25 (arguing that the *Brown* Court’s failure to confront the pro-segregationists’ “white innocence” argument had lasting consequences). For a comprehensive discussion of the “color-blindness” argument that serves as the rhetorical leading edge of this failure to distinguish formal from socio-

perhaps the Civil Rights Act of 1964, the mis-interpreters offer a seductive syllogism: all Americans are equal under law, therefore, all Americans are equally entitled to the law's care and protection.<sup>15</sup> Yet, *Brown* was a beginning, not an end. *Brown* prohibited *de jure* segregation, but did not ratify the *de facto* inequality that remained after school desegregation. Equality under the law did not assure social or economic equality. Equality under the law also did not require the government to ignore social or economic inequality whenever "innocence" might be invoked. But the Supreme Court has repeatedly chosen to tacitly ratify the social and economic inequality produced by discrimination by leaving it unremedied. Invoking "innocence" has provided the Court with rhetorical cover for its policy choice.

This essay will argue that the Supreme Court's misuse of "innocence" in the workplace discrimination cases has led to unjust results inconsistent with the equal opportunity goal codified in our nation's employment discrimination statutes and implied in our Constitution. It will begin by disclosing how the Supreme Court has wielded the power of "innocence" in its workplace discrimination cases. But this essay will also respond to the Supreme Court's subtle bait-and-switch of one form of "innocence" for another with a resounding "fuhgeddaboutit!" It recruits America's favorite TV mob family — the Sopranos — to help in the assessment of what it means to be "innocent." Fictional New Jersey crime boss Tony Soprano, his wife Carmela, his oldest child Meadow, and only son Anthony, Jr. ("AJ") challenge the role that "innocence" plays in the resolution of disputes over workplace discrimination and help us to

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economic equality, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

15. For good measure, they may even enlist an out-of-context quotation from Dr. Martin Luther King's "I Have a Dream" speech: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character." Martin Luther King, Jr., *I Have A Dream* (Aug. 28, 1963), in *A TESTAMENT OF HOPE, THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 218 (James M. Washington ed., 1986). Another oft-invoked quotation misinterpreted to support this claim to equality in all respects comes from Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . The law regards man as man, and takes no account of his surroundings or of his color. . . ." *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting).

understand that “innocence,” as defined in the only manner appropriate to the white and male co-workers of the victims of discrimination, is and should be irrelevant to the resolution of these disputes. In the process, the Sopranos offer a competing vision of what it means to genuinely and fully remedy workplace discrimination. It’s an offer we can’t refuse.<sup>16</sup>

## II. THE POWER OF “INNOCENCE” IN THE WORKPLACE

Although child labor laws prohibit introducing infants into the workplace,<sup>17</sup> the Supreme Court has found an abundance of “innocents” in the American workforce. This section will describe the prominent roles these “innocents” have played in the Supreme Court’s decisions in three lines of discrimination cases. First, in cases where an employer has been held liable for workplace discrimination, the Supreme Court circumscribes the remedies available to the victims of workplace discrimination when certain remedies might threaten the interests of their “innocent” co-workers. Second, in cases where a governmental body has sought to remedy societal discrimination through affirmative action, the Supreme Court has interpreted the Constitution to strictly limit the use of affirmative action purportedly to protect “innocent” people from harm. Third, in cases where an employer has voluntarily undertaken affirmative action, the Supreme Court has interpreted Title VII to require courts to consider and protect the interests of “innocent” co-workers when assessing the validity of an affirmative action plan. These three lines of discrimination cases, which first developed in the 1970s and 1980s but largely survive today, give evidence of the power of “innocence.”<sup>18</sup>

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16. Admittedly, I am mixing iconic and fictional Mafia patriarchs here. In *The Godfather*, Vito Corleone assured his crooner godson Johnny Fontane that a movie producer would cast the godson in an upcoming movie because the Godfather would “make him an offer he can’t refuse.” See J. Geoff Malta, *The Godfather Trilogy: The Unofficial Site*, at <http://www.jgeoff.com/godfather.html> (last visited May 26, 2004).

17. See, e.g., 29 U.S.C. § 212 (2000) (the child labor provisions of the Fair Labor Standards Act).

18. See generally Ansley, *supra* note 4, at 1013-22 (arguing that the Court began paying heed to “innocent” workers only in the 1970s and 1980s after a substantial body of constitutional jurisprudence paid little attention to the effects of anti-discrimination law on purported “innocents”).



### A. Remedies Cases

#### 1. *Franks v. Bowman Transportation*

Justice Lewis Powell's partly concurring, partly dissenting opinion in *Franks v. Bowman Transportation Company*<sup>19</sup> introduced "innocence" into the debate over what constitutes an appropriate remedy for workplace discrimination. Bowman Transportation discriminated against classes of African-American job applicants and transfer-seeking incumbents. Both groups were denied jobs as over-the-road truck drivers. The question before the Supreme Court was whether the district court should have granted the successful plaintiffs' proposed remedy of retroactive seniority in addition to the other remedies it found appropriate.

Seniority loomed large at Bowman Transportation. Layoffs and recalls of employees, as well as job assignments and, therefore, earnings, were determined according to seniority. Seniority also determined the length of employees' vacations and the size of their pension benefits.<sup>20</sup> Thus, the Supreme Court held that Title VII's mandate to provide "make whole" relief required the district court to order retroactive seniority for the African-American victims of Bowman Transportation's discrimination. But the Court stopped short of ordering the "complete relief" that would have come from stripping seniority from the white workers whose jobs would have gone to African-Americans absent the employer's discriminatory hiring practices:

[E]ven if the seniority relief . . . is awarded, most if not all [discrimination victims] will not truly be restored to the actual seniority that would have existed in the absence of the illegal discrimination. Rather, [they] will still remain subordinated in the hierarchy to a position inferior to that of a greater total number of employees than would have been the case in the absence of discrimination.<sup>21</sup>

Even though its decision perpetuated an ill effect of discrimination, the Court's majority refused to deprive white workers of the seniority they accrued as a result of Bowman Transportation's discrimina-

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19. 424 U.S. 747, 780 (1976) (Powell, J., concurring in part, dissenting in part).

20. See *id.* at 767.

21. *Id.* at 776.

tory hiring practices. For Justice Powell, however, even this incomplete relief was too generous to the victims of Bowman Transportation's discrimination.

The law of remedies explains why the *Franks* Court's majority approved incomplete relief for the victims of Bowman Transportation's discrimination and why Justice Powell disapproved. Remedies law holds that judicial grants of injunctive relief should generally aim to put the plaintiff in his rightful position — that is, to grant complete relief.<sup>22</sup> In employment discrimination cases, the plaintiff's rightful position would be the workplace outcome that would have resulted absent the employer's discriminatory act.<sup>23</sup> Yet, this general goal is subject to judges' exercise of equitable discretion to grant injunctions which put the plaintiff in a less-than-rightful position through a process called "balancing the equities." Balancing the equities involves weighing the benefits of putting the plaintiff in his rightful position against the costs. If the costs substantially outweigh the benefits, the judge may be justified in ordering an injunction which puts the plaintiff in something less than his rightful position.<sup>24</sup>

When shaping remedies for statutory violations, however, courts' discretion is constrained by the statute's purposes.<sup>25</sup> The equities must be balanced in a manner consistent with the statute's

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22. See DAVID SCHOENBROD ET AL., *REMEDIES: PUBLIC AND PRIVATE* 38 (2002) ("An injunction's primary mission must be to protect the plaintiff's rightful position. This phrase encompasses preventing future wrongdoing and, if the wrong has already occurred, repairing the harm done to the plaintiff.")

23. See generally *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977) (discussing how to assess a plaintiff's rightful position).

24. See David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 633 (1988). Other factors may also be relevant to the court's decision, such as the comparative fault of the parties. See SCHOENBROD, *supra* note 22, at 97.

25. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193-95 (1978); *Hecht Co. v. Bowles*, 321 U.S. 321, 330-31 (1944). Even outside the statutory context, balancing the equities must take into account the goals of the underlying law. For this reason, there is a danger in generalizing from equities balances struck in cases involving claims of nuisance, for example, since "[e]fficiency and fairness are . . . the chief concerns of the law of nuisance." SCHOENBROD, *supra* note 22, at 105-06 (discussing *Smith v. Staso Milling Co.*, 18 F.2d 736 (1927) and *Boomer v. Atlantic Cement Co.*, 26 N.Y. 2d 219 (1970)). Judges assessing remedies for violations of other laws which do not have efficiency and "fairness" as their preeminent goals must strike different balances in service of different goals.

goals and means, and courts should add into the balance only those factors which the legislature did not consider.<sup>26</sup> The debate between the *Franks* majority and Justice Powell, therefore, properly addressed how Congress intended for courts to address appeals for retroactive seniority. The debate began with agreement on two basic points. First, Title VII gives courts the authority to order retroactive seniority.<sup>27</sup> Second, Title VII preserves some equitable discretion for courts when deciding about awards of retroactive seniority.<sup>28</sup> The *Franks* majority and Justice Powell disagreed, however, about what weight should be assigned to various factors in courts' equities balancing. This disagreement, and Justice Powell's position in particular, disclose the power of "innocence."

In the majority's view, Congress intended that Title VII prohibit "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, and ordained that its policy of outlawing such discrimination should have the 'highest priority.'"<sup>29</sup> In order to effect this goal, Congress intended that courts make the victims of discrimination whole.<sup>30</sup> The majority acknowledged that Title VII specifically preserved courts' equitable discretion to shape remedies, but interpreted Congress' preservation of courts' discretion as a means to the statute's desired end — that is:

[To] fashion the most complete relief possible. . . . [T]he Act is intended to make the victims of unlawful employment discrimination whole, and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they

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26. See Schoenbrod, *supra* note 24, at 647.

27. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764-66 (1976); see also *id.* at 781-82 (Powell, J., concurring in part, dissenting in part).

28. *Id.* at 764-66, 781-82.

29. *Id.* at 763 (citations omitted); see also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202-04 (1979) (Title VII's purpose is to effect equal employment opportunity); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288-89 (1987) (Title VII's purpose, and the purpose of the Pregnancy Discrimination Act which amended Title VII, is to effect "equal employment opportunity").

30. *Franks*, 424 U.S. at 763; see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").

would have been were it not for the unlawful discrimination.<sup>31</sup>

The majority also cited legislative history demonstrating that Congress intended for courts to include retroactive seniority in make-whole remedies.<sup>32</sup> The majority explained that awarding retroactive seniority would effect make-whole relief for the victims of discrimination while also serving Title VII's goal of preventing further discrimination:

Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual who applies for and obtains employment as an [over-the-road] driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors.<sup>33</sup>

In other words, in the absence of a retroactive seniority award, the employer's future decisions would necessarily be affected, if not dictated, by the employer's discriminatory hiring practices.

In sum, the majority's view was that Congress intended courts to award retroactive seniority to the victims of discrimination unless denying seniority would not frustrate the central statutory purposes of eradicating discrimination and making persons whole for inju-

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31. *Franks*, 424 U.S. at 764 (quoting Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972 Conference Report, 118 Cong. Rec. 7166, 7168 (1972)); *see also id.* at 770-71 ("Discretion is vested not for purposes of 'limit[ing] appellate review of trial courts, or . . . invit[ing] inconsistency and caprice,' but rather to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case.") (quoting *Albemarle*, 422 U.S. at 421) (alterations in original).

32. *Id.* at 764 n.21.

33. *Id.* at 767-68; *see also id.* at 768 n.28 ("[T]he issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination in a way that backpay, for example, can never do. '[S]eniority, after all, is a right which a worker exercises in each job movement in the future, rather than a simple one-time payment for the past.' Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 UCLA L. REV. 177, 225 (1975).").

ries suffered due to past discrimination.<sup>34</sup> Applying this understanding of Title VII's purposes, the majority balanced the equities in favor of retroactive seniority generally and for the African-American victims of Bowman's discrimination in particular. Yet, the majority permitted Bowman's white employees to keep the seniority they earned in jobs they would not have obtained absent that discrimination. In the majority's view:

The burden of the past discrimination in hiring is with respect to competitive status benefits divided among discriminatee and nondiscriminatee employees under the form of relief sought. . . . We are of the view . . . that the result which we reach today — which, standing alone, establishes that a sharing of the burden of the past discrimination is presumptively necessary — is entirely consistent with any fair characterization of equity jurisdiction. . . .<sup>35</sup>

Justice Powell concluded that the *Franks* majority's opinion required courts to balance the equities too favorably to the victims of discrimination. Powell based his argument on a difference he found between "benefit-type seniority" and "competitive-type seniority." Benefit-type seniority decides certain economic questions between the employer and the employee: vacation pay, pension vesting and value, and the availability and amount of insurance coverage and unemployment benefits, for example.<sup>36</sup> Workers earn greater benefits through longer tenure. Competitive-type seniority, on the other hand, decides certain questions between employees and their co-workers, such as layoffs, recalls, job and trip assignments, and promotions.<sup>37</sup> As a general matter, workers are less susceptible to bad outcomes (e.g., layoff, undesirable assignments or relocations) and better situated for good outcomes (e.g., promotions) as their tenure increases.<sup>38</sup>

Powell offered no complaint regarding an award of benefit-type seniority to the victims of Bowman Transportation's discrimination: "Benefit-type seniority, like backpay, serves to work com-

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34. *Franks*, 424 U.S. at 771.

35. *Id.* at 777.

36. *See id.* at 786-87 (Powell, J., concurring in part, dissenting in part).

37. *Id.* at 787.

38. *Id.*

plete equity by penalizing the wrongdoer economically at the same time that it tends to make whole the one who was wronged.”<sup>39</sup> But Powell, joined by Chief Justice Burger and Justice Rehnquist, balked at awarding competitive-type seniority to the discrimination victims:

Competitive seniority benefits, as the term implies, directly implicate the rights and expectations of *perfectly innocent employees*. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers. Putting it differently, those disadvantaged — sometimes to the extent of losing their jobs entirely — are not the wrongdoers who have no claim to the Chancellor’s conscience, but rather are *innocent third parties*.<sup>40</sup>

Thus, Justice Powell’s “perfectly innocent employees” should not merely retain their seniority, as the majority allowed, even though their seniority was made possible by the employer’s discriminatory refusal to hire African-Americans for over-the-road truck-driving positions. In Justice Powell’s view, a court could properly (and probably should) exercise its discretion to allow these “innocent” white workers to retain *superior* seniority with respect to layoffs, recalls, promotions, assignments, and perhaps earnings. In sum, “innocents” could, perhaps should, be permitted to keep their place in line ahead of the victims of discrimination.

Justice Powell readily conceded that “[i]t is true, of course, that the retroactive grant of competitive-type seniority does go a step further in ‘making whole’ the discrimination victim, and therefore arguably furthers one of the objectives of Title VII.”<sup>41</sup> Nonetheless, Powell pressed his argument that the remedies issues in *Franks* pitted the victims of discrimination against their co-workers. In particular, Powell disagreed with the majority regarding whether retroactive competitive-type seniority would protect against future acts of discrimination: “a retroactive grant of competitive-type seniority usually does not directly affect the employer at all. It causes

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39. *Id.*

40. *Franks*, 424 U.S. at 788-89 (Powell, J., concurring in part, dissenting in part) (emphasis added) (footnote omitted).

41. *Id.* at 787.

only a rearrangement of employees along the seniority ladder without any resulting increase in cost.”<sup>42</sup> Thus, according to Powell, retroactive seniority for the victims of discrimination harmed only their “innocent” co-workers without effecting greater compliance with Title VII.

Powell was plainly correct that awards of retroactive competitive-type seniority “usually” would not directly affect an employer. But Powell overstepped when he declared that “Title VII’s ‘primary objective’ of eradicating discrimination is *not served at all*. . . .”<sup>43</sup> Bowman Transportation was not entirely disinterested in awards of retroactive competitive-type seniority. In particular, Bowman Transportation had a strong interest in its workers’ productivity and, therefore, any effects an award of retroactive seniority might have on productivity. For example, Bowman Transportation certainly would have been concerned if awards of retroactive competitive-type seniority prevented it from using promotions or transfers to match white workers with jobs in which their productivity would increase.<sup>44</sup> Bowman Transportation also would have been affected by any decline in morale among its white workers resulting from their loss of comparative advantage over the victims of discrimination, particularly if these “innocent” workers quit or shirked in their jobs.<sup>45</sup> Given the opportunity, Bowman Transportation and other employers would want to avoid these negative effects; therefore, awards of retroactive competitive-type seniority very well might deter future discriminatory decisions.

Nonetheless, after mistakenly describing retroactive competitive-type seniority awards as nothing more than a zero-sum game between the victims of discrimination and their “innocent” co-workers, Powell turned to two provisions of Title VII in search of support for his position. While not directly applicable to *Franks*, Powell argued that these provisions gave evidence of Congress’ intent to allow courts to exercise their discretion to protect “innocent”

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42. *Id.* at 787-88.

43. *Id.* at 778 (emphasis added).

44. For a discussion of “job match” theory that posits this productivity effect, see Seth D. Harris, *Re-Thinking the Economics of Discrimination: US Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 158 (2003).

45. For a discussion of the potential relationship between morale, quits, and shirking, see *id.* at 157-64.

workers. Instead, Powell's arguments disclosed the important role "innocence" played in his analysis.

Powell conceded that section 703(h) established only a defense from liability for employers maintaining "bona fide seniority system[s]" that "perpetuate the effects of pre-Act discrimination."<sup>46</sup> The plainest reading of section 703(h) would hold that Congress intended nothing more than to insulate pre-Act discrimination from liability by applying Title VII only prospectively. Nonetheless, Powell asserted that section 703(h) must have evidenced a congressional intent that courts should protect seniority rights earned by "innocent" workers.

Powell's reading of section 703(h) disclosed his willingness to wield the power of "innocence" on behalf of Bowman Transportation's white workers. Even if Powell's interpretation found support in Title VII's legislative history, as Powell claimed,<sup>47</sup> he offered no argument as to why his interpretation suggested that Congress intended his preferred equities balancing to the majority's view that Congress favored retroactive seniority. The majority's opinion preserved seniority rights. Specifically, it preserved the white workers' seniority within Bowman's seniority system and left that system in place.<sup>48</sup> The only change wrought by the majority was to deprive the "innocent" workers of a seniority *advantage* made possible by discriminatory acts. Powell viewed this seniority advantage differently. The "innocent" white workers earned their advantage, Powell suggested, as though Bowman Transportation's discrimination had never occurred.<sup>49</sup> Powell treated the "innocent" workers and the victims of discrimination as wholly equivalent. Because they

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46. *Franks*, 424 U.S. at 781 (Powell, J., concurring in part and dissenting in part). Section 703(h) reads, in pertinent part: "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system. . . ." 42 U.S.C. § 2000e-2(h) (2000).

47. The *Franks* majority disagreed with this characterization of the legislative history: There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved. . . ." *Franks*, 424 U.S. at 761-62.

48. For a general discussion of the role seniority plays in the internal labor market, see Harris, *supra* note 44, at 156-59; see also Seth D. Harris, *Coase's Paradox and the Inefficiency of Permanent Strike Replacements*, 80 WASH. U. L.Q. 1185, 1250-52 (2002).

49. See *Franks*, 424 U.S. at 790 & 788 n.7 (Powell, J., concurring in part, dissenting in part).



were equivalent and equivalent parties must be treated the same, granting retroactive competitive-type seniority would have deprived “innocent” workers of a well-deserved benefit, while providing the victims of discrimination with an unearned windfall.

Powell’s reliance on section 703(j) further illustrates the importance of “innocence” to his *Franks* opinion. Section 703(j) holds that employers cannot be required “to grant preferential treatment to any individual . . . because of the race . . . of such individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in [the surrounding area].”<sup>50</sup> Powell conceded that the precise form of preferential treatment addressed in section 703(j) was not at issue in *Franks*.<sup>51</sup> Nonetheless, in Powell’s view, retroactive competitive-type seniority for the victims of discrimination would be a form of “preferential treatment” and, therefore, disfavored by Congress: “It constitutes a preference in the sense that the victim of discrimination henceforth will outrank, in the seniority system, the incumbents hired after the discrimination . . . The incumbents, who in fact were on the job during the interim and performing satisfactorily, would be seriously disadvantaged.”<sup>52</sup>

Powell’s re-casting of the seniority remedy as an unfair and unwarranted “preference” does not withstand even mild scrutiny. Any “preference” resulting from a remedial award of retroactive competitive-type seniority would not have been “because of the race . . . of such individual,”<sup>53</sup> as Congress specifically provided in section 703(j). Rather, the “preference” would have arisen because one group had suffered discrimination while the other — Powell’s “innocents” — had not.<sup>54</sup> But more important, there was no prefer-

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50. 42 U.S.C. § 2000e-2(j) (2000).

51. *Franks*, 424 U.S. at 792-93 (Powell, J., concurring in part, dissenting in part).

52. *Id.*

53. 42 U.S.C. § 2000e-2(j) (2000).

54. See Chang, *supra* note 5, at 810-12; see also *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579-80 (1984) (only a victim of illegal discrimination is entitled to a remedy); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 371-376 (1977) (“A nonapplicant must show that he was a potential victim of unlawful discrimination [in order to receive a remedy].”); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982) (“[W]e should be wary of any rule that encourages job offers that compel innocent

ence. “Preference” implies treating like cases differently. Again, the victims of discrimination and their “innocent” co-workers were alike only if viewed through a prism that reduces discrimination to insignificance. The victims of Bowman Transportation’s discrimination would receive retroactive seniority because they were the victims of discrimination, unlike their white co-workers. The only way to reach the conclusion that discrimination victims and their co-workers must be treated the same — that is, must receive the same care and protection from the law — was to view the two groups as morally equivalent. For Powell, this was the meaning of “innocence.” Because they were morally equivalent to the proven victims of discrimination, the “innocent” white workers were entitled to demand and receive the law’s protection from losing their place in the seniority queue.

Powell’s false equation of the victims of discrimination with their “innocent” co-workers becomes even clearer after factoring in one of the most important background principles of workplace law. In the absence of a contract, collective bargaining agreement, or specific statutory protection, workers do not have an enforceable interest in their expectations of continued employment, a specific wage, or a particular place in a seniority order. This legal principle, which was the default rule governing the employment relationship between Bowman Transportation and its white workers, is commonly known as the “employment at-will” doctrine. This doctrine famously offers no protection to workers’ expectations in these circumstances and almost all others.<sup>55</sup>

Taken together with the employment at-will doctrine, Justice Powell’s “innocence”-inspired position in *Franks* would have resulted in two anomalies. First, Powell would have given effect to the seniority-based expectations of Bowman Transportation’s “innocent” white workers against the victims of Bowman Transportation’s discrimination; however, these “innocent” workers’ expectations would not be given any effect against Bowman Transportation because of the employment at-will doctrine. Second, neither Powell

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workers to sacrifice their seniority to a person who has only claimed, but not yet proved, unlawful discrimination.”).

55. See generally Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000) (discussing the employment at-will doctrine).

nor the employment at-will doctrine would give any effect to the expectations of Bowman Transportation's African-American job and transfer applicants *against anyone*. Instead, Powell's invocation of "innocence" pits white worker against African-American worker and casts the employer-discriminator as a disinterested bystander.<sup>56</sup> It is a single-edged sword permitted to cut in only one direction.

## 2. After *Franks*

The muscular form of "innocence's" power flexed in Justice Powell's *Franks* opinion weakened slightly as Powell's view evolved into the majority's rule in subsequent Supreme Court remedies decisions under Title VII and beyond. But Justice Powell's view of how courts should balance the equities between the victims of discrimination and their "innocent" co-workers plainly prevailed in subsequent cases. In *Wygant v. Jackson Board of Education*,<sup>57</sup> the Court proclaimed that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."<sup>58</sup> The question thereafter became, how much is "some"? The Court answered that question by distinguishing between three categories of remedies for discrimination.<sup>59</sup> The categories themselves illustrate the great weight given to "innocence" in the Court's balancing of equities in workplace discrimination cases. The categories were not delineated based on how well the remedies served Title VII's purposes,

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56. See generally Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 840 (2003) (discussing how pitting white workers against African-American workers "treats advancement within the working class as a zero-sum game in which redistribution is only possible among working class people, not between them and other classes"); Ansley, *supra* note 4, at 1055 (proposing a class-focused model which acknowledges that the white worker may have been victimized, but that the African-American worker is not the victimizer); see also Harris, *supra* note 14, at 1741-43 (discussing the history of racial exclusion and how it served "to stifle class tensions among whites. White workers perceived that they had more in common with the bourgeoisie than with fellow workers who were Black.").

57. 476 U.S. 267 (1986).

58. *Id.* at 280-81.

59. The Court also answered the question in some later cases by deemphasizing the importance of assuring make-whole relief to the victims of discrimination. See, e.g., *Ford Motor Co.*, 458 U.S. at 230 ("Title VII's primary goal, of course, is to end discrimination; the victims of job discrimination want jobs, not lawsuits. But when unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries.").

particularly its overriding purpose of achieving equal employment opportunity through the provision of make-whole relief. Rather, the Court drew its lines based on the remedies' effects on "innocent" co-workers.

The first category consists of remedies that would open job opportunities for the victims of discrimination by effectively limiting the number of white (or male) workers that a particular employer could hire. These "hiring" remedies generally have not troubled the Court's defenders of "innocence": "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally."<sup>60</sup> Labor economists would explain this conclusion by observing that the "external labor market" (i.e., where workers seek jobs from employers who do not yet employ them) consists of large numbers of workers with generally fungible skills offering themselves for employment to a large number of employers making essentially fungible job offers. Since neither the workers nor the employers in the external labor market have made any significant investment in an employment relationship (e.g., by sinking costs into skills and knowledge acquisition), there are very few or no transaction costs associated with an employer choosing one worker over another, or a worker choosing one employer over another. Thus, a worker will not be better off making a deal with Employer A than with Employer B. Similarly, an employer will not be better off making a deal with Worker A or with Worker B.<sup>61</sup>

As a result, even a remedy which made it impossible for one employer to hire *any* white male workers — the extreme hypothetical case of a 100% remedial hiring goal — would have only a *de minimis* effect on the excluded workers' job prospects. These excluded white workers could, at low cost, find another employer in the external labor market. Hence, the Supreme Court has grudgingly concluded that allowing a remedy with this *de minimis* effect on "innocent" workers does not unbalance the equities associated with remedying workplace discrimination.

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60. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282 (1986).

61. *See Harris, supra* note 48, at 1203 (discussing the operation of the external labor market).

The second category, “layoff remedies,” occupies the other end of the spectrum of consequences for “innocents.” Remedies that would effectively require an employer to lay off additional white (or male) workers in order to protect victims of discrimination from losing their jobs have been effectively prohibited by the Court: “While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.”<sup>62</sup> The labor economics explanation for this conclusion would be that incumbent employees invest heavily in a continuing relationship with their employer and expect dividends from that investment, including not only continued employment, but also wages that rise until retirement. Layoffs deprive employees of some or all of those expected dividends.<sup>63</sup>

Rather than depriving their co-workers of expected dividends with a layoff remedy, the Court has essentially concluded that the victims of discrimination must bear the consequences of discrimination:

Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a nonminority employee laid off to make room for him. He may have to wait until a vacancy occurs, and if there are nonminority employees on layoff, the court must balance the equities in determining who is entitled to the job.<sup>64</sup>

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62. *Wygant*, 476 U.S. at 283. Of course, *Wygant* decided a claim based on the 14th Amendment rather than Title VII; however, its discussion of layoff remedies relied almost entirely on Title VII cases. See *id.* at 282-84 (citing and discussing *Franks* and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984)).

63. See *Harris*, *supra* note 44, at 180 (2003) (discussing the operation of the internal labor market); see also *Wygant*, 476 U.S. at 283 (discussing how layoffs become highly burdensome and intrusive for employees).

64. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579 (1984) (citations omitted). Without ever being expressly invoked, “innocence” played a similar part in a recent Supreme Court decision interpreting the Americans with Disabilities Act (ADA). In *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Court considered whether an employer would be required to provide a workplace accommodation proposed by an employee with a disability which violated the employer’s seniority system. The Court held that such an accommodation would “ordinarily” not be “reasonable” and, therefore, not mandated by the ADA. *Id.* at 394. “[A] demand for an effective accommoda-

In essence, the Court's balancing of the equities takes as its premise that equivalently situated workers should be subjected to equivalent effects. The Court will permit a hiring remedy because its *de minimis* effects on "innocent" workers approximate the position occupied by the victims of discrimination who have been forced by discrimination to wait for a job they will eventually get. But the Court will not authorize a layoff that deprives co-workers of their expected dividends because this result represents an unfair shifting of the consequences of discrimination from the victims of discrimination to their "innocent" co-workers. Instead, the victims of discrimination must wait to be recalled to their jobs and, if a recall happens, compete on an even playing field with their "innocent" co-workers.

The unavailability of a layoff remedy perpetuates the costs which discrimination imposes on its victims. In the first instance, they are deprived of the pay, benefits, and self-respect that attend a return to work. In the longer term, they are deprived of the skills, knowledge, and relationship-building opportunities — the investments that yield dividends in the long term — that play an important role in further advancement in many workplaces.<sup>65</sup> Thus, even if the victims of discrimination eventually secure employment, they suffer losses which cannot be recouped. Opportunities for equal employment are lost. The victims are not made whole.

The third category of remedies involves promotions. Promotions-related remedies occupy a middle ground between hiring

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tion," wrote Justice Breyer for the Court's plurality, "could prove unreasonable because of its impact, not on business operations, but on fellow employees. . . ." *Id.* at 400. In essence, co-workers have settled expectations based on the seniority system and depriving the co-workers of their expected benefits might impose an undue hardship on the employer. *Id.* at 404-05. Since the ADA obligates employers to provide only "reasonable accommodations" that do not impose an "undue hardship," the employee with a disability is not entitled to his accommodation unless he can show, in effect, that "special circumstances" exist such that his co-workers will suffer no ill effects from the accommodation. *Id.* at 405-06. The ADA's emphasis on balancing "accommodation" and "hardship" distinguishes it from Title VII and, therefore, means that courts must weigh the effects of proposed remedies differently under the two statutes. For a fuller discussion of the *Barnett* decision, see Harris, *supra* note 44.

65. See Harris, *supra* note 48, at 1203-05 (discussing firm-specific skills and knowledge in the internal labor market).

remedies and layoff remedies. In *United States v. Paradise*,<sup>66</sup> the Supreme Court upheld the district court's order requiring the Alabama Department of Public Safety, which had never hired an African-American employee before a court required it, to remedy discrimination in its ranks, in part, by promoting one African-American state trooper to the rank of corporal for each white trooper promoted to that rank.<sup>67</sup> Yet, the Court upheld the remedy only after assuring that white state troopers would not suffer undue effects:

The one-for-one requirement did not impose an unacceptable burden on innocent third parties. . . . [T]he temporary and extremely limited nature of the requirement substantially limits any potential burden on white applicants for promotion. It was used only once at the rank of corporal and may not be utilized at all in the upper ranks. Nor has the court imposed an 'absolute bar' to white advancement. . . . Because the one-for-one requirement is so limited in scope and duration, it only postpones the promotions of qualified whites.<sup>68</sup>

Thus, a sharply limited "promotion remedy" will not deprive "innocent" co-workers of the dividends they expect from a continuing relationship with their employer. Instead, the victims of discrimination are entitled to equal opportunity in the workplace through make-whole relief if, and only if, a promotions remedy requires nothing more than postponing dividends for a brief time for a small number of "innocent" workers.

These three categories of remedies help quantify how much is "some of the burden of the remedy" for discrimination which the *Wygant* Court suggested may be imposed on "innocents." A brief postponement of expected dividends is permissible. A deprivation of some dividends is not. The *de minimis* cost of losing one job out of many fungible jobs is permissible. A greater cost is not. Such is

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66. 480 U.S. 149 (1987). Like *Wygant*, this case involved a constitutional claim, but the principles for which it is cited here also apply in Title VII cases. See, e.g., *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1541-42 (11th Cir. 1994).

67. See *Paradise*, 480 U.S. at 163-64 (describing the district court's order).

68. *Id.* at 182-83. For a further explanation of a similar effect, see Harris, *supra* note 44, at 156-57.

the equities balance when “innocence” puts a finger on the scales. Such is the power of “innocence” in these remedies cases. It is a potent shield against all but the smallest consequences for “innocents.”

*B. Constitutional Affirmative Action Cases*

A second line of cases illustrating the power of “innocence” addresses the constitutionality of public actors’ voluntary, race-based affirmative-action efforts. These cases have not always involved workplace disputes. Nonetheless, the cases discussed in this section plainly govern workplace affirmative action in the public sector. They also offer further relevant evidence of the power of “innocence” in the context of workplace discrimination.

The power of “innocence” has two manifestations in the cases considering race-based affirmative action under the Constitution. First, the Supreme Court has expressed deep skepticism that the African-American beneficiaries of affirmative action are, in fact, victims of discrimination at all. If they are not, of course, their claim to the law’s care and protection is no more powerful than a claim by other “innocent” non-victims. The Court’s skepticism on this point has resulted in the creation of a powerful presumption that the victims of societal discrimination and “innocent” white workers are morally equivalent. Only compelling evidence of actual and immediate discrimination propounded by a competent governmental entity acting within the scope of its authority may overcome this presumption.<sup>69</sup>

Second, the Supreme Court has seemingly constitutionalized Derrick Bell’s “interest-convergence” principle; that is, “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>70</sup> In the constitu-

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69. David Chang explained the flaw in this reasoning; that is, why governmental classifications based on racial prejudice are not morally equivalent to governmental classifications seeking to compensate for the effects of past discrimination: “When disadvantaged by an affirmative action program designed to remedy the lingering effects of past racial discrimination . . . an ‘innocent white victim’ is passed over not *because* he is white, but because there is little or no reason to believe — *based on* his being white — that he suffers from the effects of past racial discrimination.” Chang, *supra* note 5, at 805-06.

70. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).



tional affirmative action cases, even if the Court concludes that the African-American beneficiaries of public-sector affirmative action have been victimized by societal discrimination, the Court will uphold governmental affirmative action plans when they serve the interests of white citizens as well as the victims of societal discrimination.

The power of “innocence” in the constitutional affirmative action cases emerged at a low ebb in *Fullilove v. Klutznick* when a splintered majority of the justices upheld the “minority business enterprise” provision of the Public Works Employment Act of 1977 (PWEA). This provision required that 10% of federal funding for local public-works projects be used to employ minority-owned businesses.<sup>71</sup> The *Fullilove* plurality’s opinion, penned by Chief Justice Burger, seemingly did not endorse the suggestion that the set-aside program’s beneficiaries and their white counterparts were morally equivalent:

[A]lthough we may assume that the complaining parties [i.e., non-minority contractors who did not benefit from the set-aside program] are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.<sup>72</sup>

Even after acknowledging that white contractors had benefited from discrimination, however, Chief Justice Burger upheld the PWEA’s set-aside program only after taking pains to explain that white contractors would experience only slight effects.<sup>73</sup>

Justice Powell agreed that the effect on non-minority contractors — echoing his *Franks* opinion, he dubbed them “innocent

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71. *Fullilove v. Klutznick*, 448 U.S. 448, 453 (1980). A majority was achieved by patching together the three-member plurality, *id.* at 453 (plurality opinion), a concurrence by Justice Powell, *id.* at 495 (Powell, J., concurring), and a concurrence by Justice Marshall joined by Justices Brennan and Blackmun. *Id.* at 517 (Marshall, J., concurring).

72. *Id.* at 484-85.

73. *Id.* at 484.

third parties” — was slight, if that great.<sup>74</sup> But he concurred with allowing the white contractors to be subjected to these slight effects only after being satisfied that the African-American beneficiaries of the PWEA’s set-aside program were, indeed, victims of discrimination. In the jargon of constitutional affirmative action jurisprudence, “the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a [constitutional or statutory] violation has occurred.”<sup>75</sup> More simply, Justice Powell wanted powerful proof of discrimination from someone he could trust. Without this proof, Powell would presume that the African-American beneficiaries of affirmative action had not been the victims of discrimination and, therefore, African-American contractors and white contractors were morally equivalent.

By proposing what amounted to a rebuttable presumption of moral equivalence between the African-American beneficiaries of public-sector affirmative action and their “innocent” white counterparts, Justice Powell foreshadowed the growing power of “innocence” in constitutional affirmative action cases. A governmental body advancing an affirmative action plan must have the requisite authority to make a finding of race discrimination and it must actually make a finding that is sufficient in the Court’s eyes to rebut the presumption of moral equivalence.<sup>76</sup> In *Fullilove*, Justice Powell reviewed the evidence and concluded that “a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received.”<sup>77</sup> But the power of Powell’s rebuttable presumption, and hence the power of “innocence,” grew in subsequent cases.

For example, the Court concluded that the presumption of moral equivalence had not been rebutted in *City of Richmond v. J. A.*

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74. *Id.* at 514-15 (Powell, J., concurring). As described by Justice Powell, the effect on white contractors in *Fullilove* resembles the effect on white workers in “hiring” remedies cases. See *supra* text accompanying notes 38-40.

75. *Fullilove*, 448 U.S. at 498 (Powell, J., concurring); see also *Wygant*, 476 U.S. at 274 (the Equal Protection Clause requires “some showing of prior discrimination by the governmental unit involved”).

76. See *Fullilove*, 448 U.S. at 498 (Powell, J., concurring).

77. *Id.* at 506 (Powell, J., concurring).

*Croson Co.*<sup>78</sup> The *Croson* plurality<sup>79</sup> endorsed Justice Powell's view that a competent governmental entity must find a constitutional or statutory violation before a public-sector affirmative action plan may be upheld.<sup>80</sup> Mere assertions of "societal discrimination" would not be sufficient to justify affirmative action.<sup>81</sup> Rather, the City of Richmond needed "a 'strong basis in evidence for its conclusion that remedial action was necessary.'"<sup>82</sup> Without this evidence, "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."<sup>83</sup>

No member of the *Croson* Court voiced doubts about the history of race discrimination in the United States. To the contrary, Justice O'Connor proclaimed that "there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs."<sup>84</sup> Even Justice Scalia, arguably the Court's most consistent and vigorous opponent of affirmative action at that time, conceded the existence of race discrimination: "blacks have suffered discrimination immeasurably greater than any directed at other racial groups."<sup>85</sup> But Justice Marshall, in his dissent in *Croson*, accused the Court's majority of sending "signals that it regards racial discrimination as

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78. 488 U.S. 469 (1989).

79. The *Croson* Court was also splintered. *See id.* Justice O'Connor authored the plurality's opinion. *Id.* at 476 (plurality opinion). Justice Rehnquist, joined by Justice White, concurred separately. *Id.* at 476 (Rehnquist, C.J., concurring in part). Justice Kennedy also concurred separately and was joined by Chief Justice Rehnquist and Justice White. *Id.* at 518 (Kennedy, J., concurring). *See also id.* at 511 (Stevens, J., concurring); *id.* at 520 (Scalia, J., concurring).

80. *Id.* at 496-97. In constitutional equal protection jargon, this debate focuses on whether "strict scrutiny" must be applied to any racial classification, or merely to racial classifications that disadvantage groups that have suffered a history of victimization. *Id.* at 493. *See Adarand Constructors, Inc.*, 515 U.S. at 218-27 (describing the history of constitutional affirmative action jurisprudence).

81. *Croson*, 488 U.S. at 497-98 (citing *Wygant*, 476 U.S. at 276). Even the phrase "societal discrimination" diffuses responsibility for the modern condition of African-Americans and women thereby reinforcing the idea that "innocents" are blame-free and deserve protection from any harm. *See Ross, Innocence, supra* note 4, at 313.

82. *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

83. *Id.* at 505-06.

84. *Id.* at 499.

85. *Id.* at 527 (Scalia, J., concurring).

largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice.”<sup>86</sup> The Court’s majority offered no explanation why, if racial discrimination was the expected condition, it should enforce a powerful presumption that all discrimination had disappeared. Further, why must state and local governments prove that discrimination persists when even the Court’s most conservative members acknowledge our society’s history of discrimination and proffer no evidence that discrimination has disappeared from the American workplace? Viewed from this perspective, this counterfactual, counter-intuitive requirement resembles an obstacle erected for its own sake.

Nonetheless, the *Croson* Court essentially held that the presumption of moral equivalence between the African-American victims of discrimination and white “innocents” must be rebutted or the principle of treating equivalent people equally would be unavoidably offended. In *Croson*, the City of Richmond did not produce sufficient evidence to rebut this powerful presumption of moral equivalence.<sup>87</sup> Thus, the power of “innocence” required striking down the City’s construction set-aside program.<sup>88</sup>

The Court might have reconciled the conflicting outcomes in *Croson* and *Fullilove* by holding that the Fourteenth Amendment mandated judicial deference to Congress because of its unique competence to find evidence rebutting the presumption of moral

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86. *Id.* at 552 (Marshall, J., dissenting); see generally Ross, *Rhetorical Tapestry*, *supra* note 4, at 5-6 (discussing how Justice Taney in the *Dred Scott* decision evaded responsibility by assigning it to preceding generations); Mahoney, *supra* note 56, at 813-14 (discussing how “innocence” rhetoric casts responsibility for discrimination into the past).

87. *Croson*, 488 U.S. at 480 (“There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”); see also *id.* at 479-80 (discussing the evidence propounded by the City). *But see id.* at 528-29 (Marshall, J. dissenting) (as “the former capital of the Confederacy . . . [a]s much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city’s disgraceful history of public and private racial discrimination.”).

88. *Id.* at 493 (“The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”).

equivalence. This principle would have implied that other governmental entities, like the City of Richmond, could not rely on the same deference because they lacked equal constitutional stature.<sup>89</sup> In part, the Court relied on this distinction when it upheld a federal broadcasting set-aside program in *Metro Broadcasting, Inc. v. FCC*.<sup>90</sup> Yet, the Court finally rejected this distinction in *Adarand Constructors v. Peña* when it struck down a congressionally mandated federal construction set-aside program.<sup>91</sup> The Court reaffirmed the “innocence”-inspired presumption of moral equivalency by effectively requiring that courts approach any evidence purporting to rebut the presumption — without regard to its source — with the deepest skepticism.<sup>92</sup>

The Court has increasingly suggested that acceding to Congress’ or some other governmental body’s finding of discrimination is not enough to justify upholding a public-sector affirmative action plan. As in the remedies cases, courts faced with powerful evidence of discrimination must decide how much “innocent” third parties may be affected in the effort to remedy that discrimination. In several constitutional affirmative action cases, the Court has strongly implied it will not sustain public-sector race-based affirmative action for African-Americans when “innocent” whites experience even slight effects — that is, the very low level effects adjudged permissible in the remedies cases. Rather, beginning with Justice Powell’s concurrence in *Regents of the University of California v. Bakke*,<sup>93</sup> the Court has effectively required a showing that affirmative action benefits *everyone* — victims of discrimination and “innocents” alike.

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89. Congress’ role as the factfinder in this case loomed large in the *Fullilove* plurality’s opinion. See *Fullilove*, 448 U.S. at 475-78; see also *id.* at 516-17 (Powell, J., concurring); see also *Croson*, 488 U.S. at 490 (holding that a similar construction set-aside program established by the City of Richmond was unconstitutional, in part because “Congress . . . has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment” while states and cities do not).

90. 497 U.S. 547, 565-66, 572 (1990). In addition to Congress’ special authority and the quantum of evidence rebutting the presumption of moral equivalency, the *Metro Broadcasting* Court also found the effect on non-minorities to be “slight.” See *id.* at 553-54, 597-600. In the jargon of equal protection jurisprudence, the Court also held that “benign” racial classifications are subject to heightened scrutiny rather than “strict scrutiny.” See *id.* at 564, 620 (O’Connor, J. dissenting).

91. 515 U.S. 200, 230-01 (1995).

92. See *id.* at 228-30, 237.

93. 438 U.S. 265 (1978).

In *Bakke*, speaking only for himself, Justice Powell voted to strike down the University of California's affirmative action plan for admissions to the UC Davis medical school. He also signaled his willingness to approve future affirmative action efforts by public higher education institutions if they served interests which Powell considered compelling.<sup>94</sup> Powell concluded that affirmative action to expand access to medical education for socially, economically, and educationally disadvantaged groups — that is, benefiting the victims of societal discrimination — could not be legitimate, much less compelling.<sup>95</sup> But universities have a compelling interest in the “attainment of a diverse student body”<sup>96</sup> when they exercise their “right to select those students who will contribute the most to the ‘robust exchange of ideas,’”<sup>97</sup> thereby enhancing “[t]he atmosphere of ‘speculation, experiment and creation’ — so essential to the quality of higher education.”<sup>98</sup> Institutions of higher education provide a better learning environment — like Harvard, Justice Powell's affirmative action exemplar<sup>99</sup> — when students from diverse backgrounds share their experiences.<sup>100</sup> In sum, Justice Powell was willing to approve affirmative action if it improved the education provided to all students, not merely students from disadvantaged backgrounds.

A majority of the Court recently endorsed Justice Powell's *Bakke* position in *Grutter v. Bollinger*.<sup>101</sup> The University of Michigan's lawyers obviously read Justice Powell's opinion closely. They offered “only one justification for their use of race in the admis-

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94. The Supreme Court has acknowledged that a governmental entity has a compelling interest in remedying its own discrimination. *See, e.g., Croson*, 488 U.S. at 492-93. This interest was not asserted in *Bakke*.

95. *Bakke*, 438 U.S. at 310. This judgment was bound up with Justice Powell's view that the faculty of the UC-Davis medical school was not a competent governmental authority entitled to deference on the question of whether the beneficiaries of its affirmative action plan had been the victims of discrimination. *See id.* at 307-10. Thus, the presumption of moral equivalence had not been rebutted.

96. *Id.* at 311.

97. *Id.* at 313.

98. *Id.* at 312.

99. *See id.* at 321 (appendix discussing Harvard's affirmative action plan).

100. *Bakke*, 438 U.S. at 314 (explaining why all medical students and graduates will benefit from a heterogeneous student body). Justice Powell also required that race and ethnicity not stand as the only “diversity” factors considered. *Id.* at 315.

101. 539 U.S. 306 (2003).

sions process: obtaining ‘the educational benefits that flow from a diverse student body.’”<sup>102</sup> Relying heavily on the reasoning in Justice Powell’s opinion, the Court’s majority agreed with the University that the school’s interest in “viewpoint diversity” was compelling.<sup>103</sup>

Justice O’Connor, writing for the majority, muddied these waters slightly by introducing a second definition of “diversity” — “representational diversity” — to justify the Court’s conclusion. Representational diversity differs from Justice Powell’s viewpoint diversity because it would require that “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”<sup>104</sup> This definition harkens back to the UC Davis medical school’s argument in *Bakke* that it had a compelling interest in benefiting the victims of societal discrimination by expanding access to higher education for socially, economically, and educationally disadvantaged groups. Justice Powell made clear in his *Bakke* opinion that representational diversity could never be sufficiently compelling to justify governmental affirmative action.

Justice O’Connor overcame this complication with the same interest-convergence argument that allowed her to conclude that viewpoint diversity is a compelling interest. More precisely, representational diversity perfects democracy for all Americans: “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>105</sup> In sum, every citizen of the United States benefits from representational diversity just as every student attending the University of Michigan’s law school benefits from viewpoint diversity. Both forms of diversity, therefore, are compelling interests. The law school’s affirmative action plan could be upheld.<sup>106</sup>

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102. *Id.* at 328.

103. *Id.* at 328-33.

104. *Id.* at 331.

105. *Id.* at 332.

106. Justice O’Connor reiterated Justice Powell’s requirement that “diversity” programs in higher education admissions must take into account non-racial factors when they take race into account, and may only treat race as one “‘plus’ factor.” *See id.* at 336-42.

A question remains whether the Court's holding in *Grutter* applies broadly outside the higher education context.<sup>107</sup> Both Justice O'Connor's majority opinion in *Grutter* and Justice Powell's opinion in *Bakke* justified their conclusions, in part, by relying on universities' "special niche in our constitutional tradition" rooted in the First Amendment's implicit protection of academic freedom.<sup>108</sup> But no such question remains with respect to the Court's requirement that governmental affirmative action plans benefit "innocents" and victims of discrimination alike. In *Croson*, Justice O'Connor derided the City of Richmond for turning to race-conscious remedies for societal discrimination when it had "at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to *small entrepreneurs of all races*."<sup>109</sup> Justice Stevens concurred and distinguished Richmond's program from the Jackson Board of Education's efforts, upheld in *Wygant*, to increase diversity in its public school faculty: "the city makes no claim that *the public interest* in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises."<sup>110</sup> Of course, the Court struck down the City of Richmond's set-aside program.

Similarly, the *Metro Broadcasting* Court upheld the FCC's minority set-aside program, in part, because "the viewing and listening public suffers when minorities are underrepresented among owners of television and radio stations."<sup>111</sup> The Court explained that "expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more

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107. See, e.g., *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2426 (2004) (upholding city police department's affirmative action plan and relying on *Grutter*); see generally Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 Ky. L.J. 263 (2003-04) (discussing *Grutter*'s application to workplace cases).

108. *Grutter*, 539 U.S. at 330; see also *Bakke*, 438 U.S. at 311-15.

109. *Croson*, 488 U.S. at 509 (emphasis added); *id.* at 526 (Scalia, J., concurring).

110. *Id.* at 512 (Stevens, J., concurring) (emphasis added); see also *Bakke*, 438 U.S. at 312-13 ("The atmosphere of 'speculation, experiment, and creation'— so essential to the quality of higher education — is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples.").

111. *Metro Broadcasting*, 497 U.S. at 554.



variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.”<sup>112</sup> Thus, “[t]he benefits of such diversity are not limited to the members of the minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience.”<sup>113</sup> Reading *Bakke*, *Grutter*, *Croson*, *Wygant*, and *Metro Broadcasting* together strongly supports the conclusion that the Court will uphold governmental affirmative action when it benefits morally equivalent “innocents” and victims of discrimination.

The Supreme Court has never explained why serving the interests of “innocents” is “compelling,” while serving the interests of the victims of societal discrimination, or even society’s interest in eliminating the vestiges of societal discrimination, is not. Similarly, the Court has never explained why and how the Constitution establishes that white workers and male workers have a “fundamental right” to continue receiving benefits denied to them by affirmative action policies.<sup>114</sup> Apparently, such traditional forms of constitutional analysis are not required when “innocence” is at play.

The constitutional affirmative action cases show the power of “innocence” at its peak. It is powerful enough to require acute and barely rebuttable skepticism that African-Americans have been victimized by discrimination in American society. Absent powerful evidence to rebut the presumption, the victims of societal discrimination and their “innocent” co-workers are morally equivalent and, therefore, entitled to the same care and protection from the law. In the remedies cases, where discrimination against identified parties has been proven, “innocence” yields to a remedy only if “innocent third parties” experience nothing worse than slight effects. In these governmental affirmative action cases, “innocence” will not yield absent an equivalent finding by a competent governmental authority. Further, even in the face of such a find-

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112. *Id.* at 579. The Court made the connection between this argument and Justice Powell’s *Bakke* opinion explicit in another part of its decision. *See id.* at 567-68. Although *Metro Broadcasting* was subsequently partly overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the *Adarand* Court did not expressly reject this aspect of the *Metro Broadcasting* decision.

113. *Metro Broadcasting*, 497 U.S. at 568.

114. *See Chang, supra* note 5, at 810-13; *see also Harris, supra* note 14, at 1769-76.

ing, public-sector affirmative action plans must benefit the innocent as well as the victimized. If not, they risk being struck down. In other words, “innocence” under the Constitution is more than a shield against harms real and perceived. “Innocence,” at least in this context, demands the same degree of care and protection to which a sleeping infant would be entitled.

C. *Title VII's Affirmative Action Cases*

The power of “innocence” is at its comparative weakest when white or male workers bring claims under Title VII of the Civil Rights Act of 1964 challenging their employers’ voluntary affirmative action plans. Although Title VII protects both white workers and African-American workers against discrimination because of race,<sup>115</sup> the Supreme Court’s decision in *United Steelworkers of America v. Weber* rejected the argument that Title VII presumed the moral equivalence of white workers and African-American workers: “[I]t was clear to Congress that ‘[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,’ and it was to this problem that Title VII’s prohibition against racial discrimination in employment was primarily addressed.”<sup>116</sup> Thus, voluntary affirmative action, to the extent it serves the goal of promoting equal employment opportunity, must be permitted:

[I]t would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had “been excluded from the American dream for so long,” constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.<sup>117</sup>

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115. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (confirming that both men and women may bring sex discrimination claims under Title VII). Of course, the applicability of Title VII to voluntary private-sector affirmative action means that the employment at-will rule does not inform this analysis in the same way it informed the discussion of the Title VII remedies cases.

116. 443 U.S. 193, 203 (1979) (citation omitted).

117. *Id.* at 204 (citation omitted). See also *Johnson v. Trans. Agency*, 480 U.S. 616, 645 (1987) (Stevens, J., concurring) (“The logic of antidiscrimination legislation re-

By recognizing that Congress rejected any presumption of moral equivalence between the victims of discrimination and their co-workers, the Supreme Court has given little power to “innocence” in its Title VII affirmative action cases. In the constitutional affirmative action cases, the Supreme Court required the public-sector purveyors of affirmative action to rebut the presumption of moral equivalence by offering compelling evidence of discrimination found by a competent governmental authority. Under Title VII, employers may implement a voluntary affirmative action plan without establishing a *prima facie* case that they have violated anti-discrimination law, or even that there was an arguable violation.<sup>118</sup> Instead, they can demonstrate the validity of their affirmative action plans by showing only “the existence of a ‘manifest imbalance’ that reflected under-representation of [a disadvantaged group] in ‘traditionally segregated job categories.’”<sup>119</sup>

In the absence of a presumption of moral equivalence, Title VII also frees the purveyors of voluntary affirmative action from the obligation imposed in the constitutional affirmative action cases of proving that their plans benefit the “innocent” as well as the victims of discrimination. To the contrary, affirmative action plans may have consequences — sometimes significant consequences — for white and male employees, as long as the plans do not “unnecessarily trammel the interests of white [and male] employees.”<sup>120</sup> Trammeling prohibited by the Constitution is permitted by Title VII. Only “unnecessary” trammeling is forbidden by the statute.

Further, the Court’s Title VII affirmative action jurisprudence gives substantially greater latitude in the creation of affirmative action plans than the remedies cases have afforded to courts seeking to provide relief for proven workplace discrimination. In the remedies cases, the Supreme Court decreed that courts may allow “innocent” workers to be subjected to *de minimis* effects. Hiring remedies are permitted, while promotions remedies are acceptable only if

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quires that judicial constructions of Title VII leave ‘breathing room’ for employer initiatives to benefit members of minority groups.”).

118. See *Johnson*, 480 U.S. at 630-33; see also *Weber*, 443 U.S. at 210-15 (Blackmun, J., concurring) (discussing the “arguable violation” standard rejected by the majority).

119. *Johnson*, 480 U.S. at 631. A proper comparison with the relevant labor market is, of course, essential to this inquiry. See *id.* at 636.

120. *Weber*, 443 U.S. at 208.

strictly limited, and layoff remedies are essentially prohibited.<sup>121</sup> In the Title VII affirmative action cases, employers are prohibited from “requir[ing] the discharge of white workers and their replacement with new black hires.”<sup>122</sup> Of course, firing a white worker in order to hire an African-American worker is a qualitatively different action than laying off a white employee to retain an incumbent African-American employee.

Under Title VII, employers voluntarily implementing affirmative action plans are also prohibited from “creat[ing] an absolute bar to the advancement of white employees.”<sup>123</sup> Again, absolutely barring advancement is qualitatively different from and far more serious than a promotion remedies’ elevation of an African-American before a white employee who remains eligible for a later promotion. Finally, Title VII requires that any affirmative action plan must be temporary because, while it is permissible “to eliminate a manifest racial imbalance,” it is not legitimate to “maintain racial balance.”<sup>124</sup> This loose constraint does nothing more than require that affirmative action plans eventually expire, although there is no obligation to schedule the sunset in advance.

In sum, the power of “innocence” in Title VII affirmative action cases does not award “innocent” workers a strong presumption of moral equivalence with the victims of discrimination. Without this presumption, the Title VII affirmative action cases protect white and male workers only from truly significant harms that might result from an affirmative action plan. The power of “innocence” is at its weakest when confronted with Congress’ directive to assure equal employment opportunity.

### III. THE SOPRANOS AND THE IRRELEVANCE OF “INNOCENCE”

As the preceding section demonstrates, the power of “innocence” in these workplace discrimination cases is evident. The Supreme Court’s definition of “innocence” is less so. Most of the cases discussed in the preceding section do not explicitly choose between the different definitions of “innocence” with which this es-

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121. *See supra* text accompanying notes 39-47.

122. *Weber*, 443 U.S. at 208 (1979) (emphasis added).

123. *Id.*

124. *Id.* at 208.

say began. But Justice Powell almost certainly spoke for all of the Court's defenders of "innocence" when he described the "innocent" co-workers of the victims of discrimination as "not the wrongdoers."<sup>125</sup> More precisely, "[a]bsent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else."<sup>126</sup> Thus, Powell claimed only the narrow, technical definition of "innocence" for his "innocents," that is, "[f]reedom from specific guilt; the fact of not being guilty of that which one is charged; guiltlessness."<sup>127</sup> But Powell did not and could not claim that his "innocents" fit the broader, moral definition: "[f]reedom from sin, guilt, or moral wrong in general; the state of being untainted with, or unacquainted with, evil; moral purity."<sup>128</sup>

Workers who are "not the wrongdoers" do not, without more, deserve the same type of care and protection that might be afforded the sleeping infant who exemplifies the broadest definition of "innocence." Yet, as the preceding section demonstrates, Powell and many of his brother and sister justices were willing to vest white and male workers who were merely "not the wrongdoers" with the power suggested by the metaphor of the sleeping infant: a claim to

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125. *Franks*, 424 U.S. at 789 (Powell, J., concurring in part, dissenting in part); see also *Fullilove*, 448 U.S. at 514 (Powell, J., concurring) (defining "innocent third parties" as "innocent of wrongdoing").

126. *Franks*, 424 U.S. at 789 (Powell, J., concurring); accord *Croson*, 488 U.S. at 516 (Stevens, J. concurring) ("The ordinance is equally vulnerable because of its failure to identify the characteristics of the disadvantaged class of white contractors that justify the disparate treatment. That class unquestionably includes some white contractors who are guilty of past discrimination against blacks, but it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. Indeed, even among those who have discriminated in the past, it must be assumed that at least some of them have complied with the city ordinance that has made such discrimination unlawful since 1975. Thus, the composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law, and some who have never discriminated against anyone on the basis of race."). Cf. *Fullilove*, 448 U.S. at 525 (Stewart, J., dissenting) ("The color of a person's skin and the country of his origin are immutable facts that bear no relation to . . . moral culpability, or any other characteristics of constitutionally permissible interest to government.").

127. See *supra* note 1 and accompanying text.

128. See *supra* note 2 and accompanying text.

the care and protection of the law equal, or even superior, to the claims of discrimination's victims. In essence, the Court has conflated the narrow definition of "innocence" with the broader definition. Or, more precisely, the Court has demonstrated that it will exercise the immense moral power that may be derived from the broader definition and its exemplar, the sleeping infant, on behalf of white and male workers to whom that broader definition simply does not apply.

This section challenges the Supreme Court's bait-and-switch of these two qualitatively different definitions of "innocence." Specifically, this section challenges the Court's implicit conclusion that workers who are "innocent" only because they have not committed a specific wrongful act deserve the same care and protection from the law as the victims of discrimination. This section concludes that white and male workers do not, merely because of their "innocence," deserve such care and protection. Rather, this section will show that these workers' "innocence" is and should be almost entirely irrelevant to the question of how discrimination should be remedied. "Innocence" amounts to little more than an elaborate cover for the Court's own policy preference with respect to remedying discrimination in the workplace. Finally, this section proposes a different approach to remedying workplace discrimination that, without reference to "innocence," would require white and male workers to relinquish any ill-gotten gains from discrimination and return them to the victims of discrimination.

The Soprano family offers a helpful framework for this examination. Tony Soprano is the *de facto* boss of an organized crime "family" in northern New Jersey.<sup>129</sup> He is also the *de jure* head of a dysfunctional nuclear family consisting of his wife, Carmela; his college-age daughter, Meadow; and his son, AJ. Each member of Tony's nuclear family has a different relationship to Tony's life of crime. It is the relationship between each family member and Tony's crimes, rather than the Sopranos' complex intra-familial relationships or Tony's relationship with his crime family, that pro-

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129. Corrado "Junior" Soprano, Tony's uncle, is technically the "boss" of the Soprano "family." Tony is the "underboss" and "acting boss." See ALLEN RUCKER, *THE SOPRANOS: A FAMILY HISTORY* ch. 4 (2001) ("Soprano Crime Family Tree"). Yet, Tony actually runs the "family." His uncle is little more than a figurehead. *Id.* at ch. 4 ("He's a hands-off Don.").

vides special insight into the idea and power of “innocence.” The questions to be answered in this section are, which Soprano is “innocent,” why, and should it matter.

A. *Is Tony Soprano “Innocent”?*

Tony Soprano is both the starting place for this inquiry and its easiest case. Tony has personally committed murder, assault, extortion, and grand theft, among other crimes.<sup>130</sup> He also runs illegal gambling operations and corrupts union and public officials.<sup>131</sup> Even as a teenager, Tony stole cars and committed other offenses.<sup>132</sup> Consistent with his leadership role in his crime “family,” Tony also directs “capos,” “soldiers,” and “associates,” whether directly or indirectly, to commit these crimes and others.<sup>133</sup> No definition of “innocence” can maintain the concept’s integrity and encompass Tony Soprano. If innocence means anything, it cannot be synonymous with criminal guilt.<sup>134</sup>

Criminal law enthusiasts might retort that Tony suffers from diminished capacity that would be relevant to any adjudication of his guilt. Yet, Dr. Jennifer Melfi, Tony’s psychiatrist,<sup>135</sup> has diagnosed Tony only with panic attacks, anxiety, and depression.<sup>136</sup> Tony is not a psychopath.<sup>137</sup> While he may evidence Freudian “splitting,” which allows him to harbor contradictory attitudes and

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130. See *id.* at ch. 8 (explaining how the mob will steal money from and through a legitimate business — a so-called “bust out” — thereby driving the business into a planned bankruptcy to settle the owner’s gambling or other debts).

131. See *id.* (“With the Sopranos, they’re heavily into organized labor, but their main thing is gambling. . . .”); see also *id.* (explaining the connection between illegal gambling operations, and extortion and loan sharking).

132. See *id.* at ch. 3 (“[W]e busted the kid a few times in high school, stealing cars, mostly.”).

133. See *id.* at ch. 4 (“Almost no one does anything without checking with Tony.”).

134. See *supra* notes 1-2 and accompanying text. At the time of this writing, Tony faces an indictment for wire fraud arising out of illegally obtained and distributed airline tickets; however, his case has not yet gone to trial. See RUCKER, *supra* note 129, at ch. 4; see also *id.* at ch. 10 (“indictment” filed in U.S. District Court for New Jersey).

135. See RUCKER, *supra* note 129, at ch. 7.

136. See GLEN O. GABBARD, *THE PSYCHOLOGY OF THE SOPRANOS: LOVE, DEATH, DESIRE, AND BETRAYAL IN AMERICA’S FAVORITE GANGSTER FAMILY* 24-26 (2002). There is some question whether Tony’s depression is organic, environmental, or a product of toxicity from drugs prescribed by Dr. Melfi. *Id.* at 25.

137. See *id.* at 28-31; see also AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 645-50 (4th ed. 1994) (describing “Antiso-

beliefs,<sup>138</sup> his condition would not satisfy either the federal criminal code's or New Jersey's definition of "insanity."<sup>139</sup> Thus, regardless of his emotional problems, Tony cannot satisfy even Justice Powell's "not the wrongdoers" definition of "innocence."

Quite apart from any legal claim of diminished capacity, an argument could be raised that Tony's parentage frees him from any moral blame for his actions. Tony's father — "Johnny Boy" Soprano — was a "capo" in the DiMeo family.<sup>140</sup> Tony merely followed him into the family business with the encouragement of his father's morality teachings. For example, when Tony witnessed Johnny Boy chopping a finger off the hand of pork-store owner Mr. Satriale, Johnny Boy instructed Tony that Mr. Satriale was "a gambler. He got over his head in debt. He owed me money, and he refused to pay. He avoided me . . . What was I supposed to do? That's my livelihood. That's how I put food on the table . . . Let this be a lesson to you. A man honors his debts."<sup>141</sup> Violence is not a sin; gambling and not paying debts are. Tony adopted this moral code as his own, despite its lasting emotional imprint manifested in his panic attacks.<sup>142</sup>

Tony's mother was a mob Medea.<sup>143</sup> During Tony's childhood, she threatened Johnny Boy that she would smother their children with a pillow if Johnny Boy moved the family to Reno, Nevada.<sup>144</sup> She threatened to gouge young Tony's eyes out with a fork when he pleaded for an electric organ.<sup>145</sup> Most significant, in Tony's adult-

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cial Personality Disorder"). Even if Tony were a psychopath, it is unlikely that he would evade culpability under criminal law. See *infra* note 139 and accompanying text.

138. See GABBARD, *supra* note 136, at 36-39.

139. See 18 U.S.C. § 17 (2000) (federal law's "insanity" defense); N.J. STAT. ANN. § 2C:4-1 (1995) (New Jersey's "insanity" defense).

140. See RUCKER, *supra* note 129, at ch. 4 ("DiMeo decided to give Johnny his own crew."). The DiMeo family was the precursor to the Soprano crime family. See *Cast and Crew: Tony Soprano (played by James Gandolfini)*, at [http://www.hbo.com/sopranos/cast/character/tony\\_soprano.shtml](http://www.hbo.com/sopranos/cast/character/tony_soprano.shtml) (July 13, 2004); Mark McGuire, *Anything You Can Do, I Can Do Badder*, THE TIMES UNION (Albany, NY), Mar. 7, 2004, at S2; Robert Bianco, *The Family*, USA TODAY, Sept. 13, 2002, at 2A.

141. See GABBARD, *supra* note 136, at 114.

142. See *id.* at 114-15.

143. While I wish I could claim authorship of this insight, Glen Gabbard cites Ellen Willis as suggesting Medea as an appropriate metaphor for Livia. See *id.* at 99-100.

144. See *The Sopranos: Down Neck* (HBO, Feb. 21, 1999), available at <http://www.sopranoland.com/episodes/ep07/transcript/index2.html>.

145. See GABBARD, *supra* note 136, at 101.



hood, she conspired with Uncle Junior to have Tony killed.<sup>146</sup> Dr. Melfi believes that Livia suffered from borderline personality disorder.<sup>147</sup> Regardless, Livia haunts Tony.<sup>148</sup>

Nonetheless, while Tony's background complicates his psychological profile, it does not give him a legitimate claim to "innocence." Of course, Tony's parentage would not require a verdict of "not guilty" for any crime with which he might be charged. Tony's argument for moral "innocence" pursuant to the broader definition of that term would be equally unavailing. The infant — the paradigmatic moral "innocent" — makes no choices. Infants are pure instinct and reflex. Any parent could testify at length that infants occasionally commit unwelcome acts like spitting up, crying in the middle of the night, and excreting unexpectedly. But each of these acts is wholly involuntary. Infants are incapable of volitional acts. Tony Soprano is. Tony chose to become a mobster. He pursues each criminal act willingly, often with malice aforethought. Each act serves either his goal of amassing greater power and wealth or a Mafia code of revenge or loyalty. Bad parenting may help explain Tony's choices, but it does not excuse them or keep his acts from being wrongful.<sup>149</sup> By any reasonable definition of the word, Tony Soprano is not "innocent."

### B. *Is Carmela Soprano "Innocent"?*

Carmela Soprano has never engaged in a volitional wrongful act.<sup>150</sup> She does not "collude" with Tony in the commission of his

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146. See RUCKER, *supra* note 129, at ch. 4 ("The FBI has hard evidence that Junior and Tony's mother, Livia, decided to have him killed.")

147. See, e.g., GABBARD, *supra* note 136, at 72; see also *id.* at 104 ("Dr. Melfi tells Tony that his mother probably has a borderline personality disorder. This diagnosis might actually be charitable because Livia is much closer to being a true psychopath than Tony.")

148. See, e.g., *id.* at 68-69, 95, 99-100, 102, 110.

149. See *id.* at 82 ("[C]an 'bad behavior' be understood as growing out of conflict and adverse childhood experience without completely absolving the patient of responsibility for his actions? Of course it can. You are not responsible for what happened to you as a child. But you are responsible for what you do as an adult, no matter how much you are influenced by unconscious forces stemming from childhood experiences.")

150. This sentence may overstate the case slightly. Carmela has helped hide guns and money from the FBI. See *id.* at 133. Also, one of the most entertaining aspects of Carmela Soprano's character is that she has been eager to commit the wrongful act of adultery for several years, but only recently succeeded in consummating her desires

crimes.<sup>151</sup> In Justice Powell's language, she is "not the wrongdoer." A superficial understanding of Justice Powell's assignment of the moral power of the sleeping infant to workers who are "not the wrongdoers" would suggest that Carmela Soprano satisfies the narrow definition of "innocence" and, therefore, can legitimately claim a special entitlement to the law's care and protection. Yet, this understanding of "innocence" rather quickly becomes untenable and, in fairness, does not give Justice Powell and his high court colleagues their best argument.

If society conferred the power to demand superior care and protection on an individual simply because that individual had not committed a volitional criminal act, the overwhelming majority of Americans who never commit a crime or misdemeanor would have a legitimate claim. Since virtually every American could properly compete with every other American, a claim to the power of "innocence" would become meaningless. It would decide no cases because it would be available to just about every party in just about every case. This definition cannot be what Justice Powell and his colleagues had in mind.

But there are two types of "not the wrongdoers." Carmela Soprano exemplifies the type of "not the wrongdoer" who should be least entitled to a special claim on the law's care and protection. Carmela has benefited tremendously from Tony's crimes. She lives in an expensive house, drives a nice car, and owns a mink coat and a lot of expensive jewelry.<sup>152</sup> All of her high living is made possible

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and, perhaps predictably, it ended in unhappiness for her. *See, e.g., id.* at 127-28 (describing Carmela's sexually charged, but chaste, relationship with "Father Phil"); *The Sopranos: Bust Out* (HBO, Mar. 19, 2000), available at <http://www.hbo.com/sopranos/episode/season2/episode23.shtml> (describing Carmela and Vic Musto's romantic kiss in her bathroom); *The Sopranos: The Strong Silent Type* (HBO, Nov. 17, 2002), available at <http://www.hbo.com/sopranos/episode/season4/episode49.shtml> (Carmela confessing to Rosalie Aprile that she lusts after Furio, one of Tony's "soldier[s]"); *The Sopranos: Sentimental Education* (HBO, Apr. 11, 2004), available at <http://www.hbo.com/sopranos/episode/season5/episode58.shtml> (Carmela finally succeeds in committing adultery with Bob Wegler, AJ's school guidance counselor).

151. In one episode, Carmela visited a psychiatrist who, after hearing her description of Tony's criminality followed by her claim that he is a good man and a good father, called her "an enabler" rather than "an accomplice." *See* GABBARD, *supra* note 136, at 129-30.

152. *See Sopranos May Get an Offer They Can't Refuse*, THE IRISH TIMES, Sept. 21, 2002, at 53 (discussing the value of the Sopranos' home); David Zurawik, *The Pleasure and*

by Tony's criminal conduct. Further, Carmela knows about Tony's occupation. While she has never participated in his crimes and probably does not know the specific details of particular crimes, there is no doubt that she knows he commits crimes and that those crimes finance her lifestyle.<sup>153</sup>

It is essential to note, however, that Carmela is not just a passive recipient of the proceeds of crime. Carmela chose to marry Tony, at least in part, because she knew he was going to become a mobster and she wanted to live that lifestyle.<sup>154</sup> It seems that she was exposed to the mob lifestyle during her childhood. Her cousin Dickie Moltisanti was an associate of the DiMeo family.<sup>155</sup> Carmela also grew up in a neighborhood where mobsters like "Johnny Boy" Soprano were well known and admired, at least by some.<sup>156</sup> Carmela made her choice of spouse with a good understanding of the consequences of that choice.

Like Tony, Carmela is capable of volitional acts. Carmela had other choices before she married Tony, but she chose a man she knew was aiming for a life of crime. Further, any time after Tony succeeded fabulously in the mob and richly financed her comfortable lifestyle, Carmela could have made other choices. Carmela is an emancipated adult capable of making independent decisions. She could have divorced or simply abandoned Tony at any point after

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*Pain of Gunning Down Capitalism*, THE BALTIMORE SUN, May 20, 2001, at 2F (the Sopranos drive luxury cars); Jennifer Boeth et al., *Sopranos/Season 1*, ENTERTAINMENT WEEKLY, Sept. 6, 2002, at 29 (some of Carmela's jewelry is stolen).

153. See GABBARD, *supra* note 136, at 127 (Carmela confesses to Father Phil); DAVID CHASE, THE SELECTED SCRIPTS FROM THREE SEASONS 109-10 (2002) (Carmela confesses that she has "committed the sin of omission" through her knowledge that Tony "has committed horrible acts," but that she did so because she wanted a good life for her family: "I wanted this house, money in my hands, money to buy anything I ever wanted"); *The Sopranos: Mergers and Acquisitions* (HBO, Nov. 3, 2002), available at <http://www.sopranoland.com/episodes/ep47/> (Carmela steals \$40,000 in cash from Tony's hidden stash in his duck food bin); see also Matthew Gilbert, *The Beauty of Edie Falco: Her Stellar Portrayal of Carmela Soprano is Complex, Subtle*, THE BOSTON GLOBE, June 3, 2004, at D1 (to resolve their separation, Carmela allows Tony to move back into their house only on the condition that he invest \$600,000 in Carmela's real estate venture).

154. See RUCKER, *supra* note 129, at ch. 6 ("Mary and Hugh strictly forbade Carmela from associating with Tony but she did it anyway.").

155. See *id.* at ch. 6 ("Cousin Dickie' . . . was a thug. . .").

156. See *id.* ("She grew up in the same Italian-American world that [Tony] did.").

his criminal conduct began.<sup>157</sup> Yet, until his adultery finally humiliated her beyond her capacity for denial, Carmela chose to remain with Tony Soprano and benefit from his wrongdoing. In fact, even after separating from Tony, Carmela continued to benefit from Tony's crimes. And then she took him back.<sup>158</sup>

No one who knowingly and willfully puts herself in a position to benefit from the criminal conduct of another person should be permitted to stake a legitimate claim to the power of "innocence." Carmela is not guilty. But as an active seeker of wrongfulness' proceeds, she does not stand on the same moral plain as a discrimination victim.

Carmela's active pursuit — rather than passive receipt— of the proceeds of crime distinguishes her from Justice Powell's "not the wrongdoers." In most cases, perhaps many cases, white male workers do not knowingly and willfully put themselves in a position to reap the benefits of workplace discrimination against women and people of color. They simply seek available jobs and receive the benefits of their "whiteness" or "maleness" when their applications are accepted, their promotions are granted, or their seniority protects them from a layoff. Thus, while Carmela Soprano is "not the wrongdoer," she is a different type of "not the wrongdoer" from the "innocents" receiving care and protection from the Supreme Court in the workplace discrimination cases.

### C. *Are Meadow Soprano and AJ Soprano "Innocent"?*

#### 1. "Innocence," Volition, and Knowledge

If Carmela Soprano's active pursuit of the proceeds of crime suggests one understanding of "not the wrongdoer," then Meadow Soprano exemplifies another. Like her mother, Meadow has not

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157. I do not mean to suggest that she could have done so without risk. Because of her knowledge of Tony's criminal conduct, her life could be in danger if she were to leave Tony. Cf. *The Sopranos: Long-Term Parking* (HBO, May 23, 2003), available at <http://www.hbo.com/sopranos/episode/season5/episode64.shtml> (Christopher Moltisanti's fiancée Adriana is killed by Tony Soprano's consigliere Silvio Dante because she had been meeting with the FBI).

158. See Gilbert, *supra* note 153, at D1 (Carmela takes Tony back in return for a \$600,000 investment in a real estate venture); see also *The Sopranos: Long-Term Parking*, *supra* note 157.

committed a wrongful act<sup>159</sup> or colluded in Tony's crimes. Meadow is "not the wrongdoer." She also does not know the details of the crimes Tony has committed. Nonetheless, Meadow strongly suspects Tony's true occupation and eventually her suspicions have been confirmed, at least in part. There have been a lot of clues over time.<sup>160</sup> Yet, when Meadow asked Tony whether he is in the Mafia, he lied to her and claimed to be in the "waste management business."<sup>161</sup> Eventually, Tony admitted that "some of [his] money . . . comes from illegal gambling,"<sup>162</sup> but justified this conduct as necessary to overcoming anti-Italian-American discrimination.<sup>163</sup> In sum, Meadow has some knowledge of a small piece of Tony's criminal activity, but her knowledge of the scope and content of her father's activities is ambiguous or, at least, more ambiguous than the state of Carmela's knowledge.

Meadow differs from her mother in another fundamental regard. Meadow did not choose to be a Soprano. None of us chooses our parents. It is an accident of birth for which she cannot be held responsible. Meadow's circumstances are not the product of volition. They result from serendipity. In this significant way, Meadow differs from both of her parents. She did not actively pursue a life of crime or the proceeds of crime. Perhaps Meadow could have

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159. See RUCKER, *supra* note 129, at ch. 9. Again, this sentence may overstate the case slightly. Meadow has used illegal drugs and hosted a drug party at her grandmother's empty house. See *id.* at ch. 9 ("a little party at my grandma's old house got, you know, a little whacky last nite."). But these transgressions are not part and parcel of the Soprano crime family's operations.

160. See, e.g., CHASE, *supra* note 153, at 77 (Meadow gives voice to her suspicions during a college tour with her father, and explains why she is suspicious: police searches of the Sopranos' house, and finding Krugerrands and a gun while hunting for Easter eggs); *id.* at 123-25 (on the college tour, during which Tony killed a mob informant, Meadow notices his strange late-night behavior and phone calls from a pay phone, as well as his bloody hand and scuffed shoes); see also *infra* note 172 (Meadow talking with AJ about her father's profession); see also *infra* note 175 and accompanying text (discussing the Scatino SUV incident). Meadow clearly communicates that she believes her suspicions have been confirmed when her erstwhile boyfriend Jackie Aprile, Jr. is murdered. Meadow blamed her father and "the family life." See *Cast and Crew: Meadow Soprano* (played by Jamie-Lynn DiScala), at [http://www.hbo.com/sopranos/cast/character/meadow\\_soprano.shtml](http://www.hbo.com/sopranos/cast/character/meadow_soprano.shtml) (last visited July 13, 2004).

161. See CHASE, *supra* note 153, at 77.

162. See *id.* at 78. Of course, illegal gambling is only a small portion of the Soprano crime family's activities.

163. See *id.* at 91 ("There was a time . . . when the Italian people didn't have a lot of options. . . . I put food on the table.").

made the choice to escape her parents and their life. During the TV life of “The Sopranos,” Meadow reached majority age and, at that point, could have functionally divorced her parents.<sup>164</sup> But certainly before her eighteenth birthday, Meadow exercised no choice with respect to her family.

For both of these reasons, Meadow more closely resembles the white workers Justice Powell proclaimed were “not the wrongdoers” than does Carmela. Justice Powell’s “innocent” workers did not themselves commit the discriminatory acts that required a remedy, just as Meadow has committed no wrongful acts. Like Meadow and her father’s crimes, the white workers probably did not have precise knowledge about the instrumentalities of their employers’ discriminatory acts or the details of how they occurred.<sup>165</sup>

But, like Meadow, white workers in a discriminatory work environment must suspect that something is amiss. A white truck driver with the most lucrative routes who looks around at his co-workers and finds that all of the well-paid drivers are white, while the least paid drivers and other low-wage workers are African-American or Latino, must have doubts.<sup>166</sup> A white teacher in a suburban school district must wonder why she has very few African-Americans colleagues when the nearby city’s school district staffs half of its classrooms with African-American teachers.<sup>167</sup> A white union member could not have believed that a total absence of African-American apprentices in his union is the product of pure happenstance when the surrounding city has a sizable African-American population.<sup>168</sup> Even without confirmed, precise knowledge, these purported “innocents” certainly must have suspicions, just like Meadow.<sup>169</sup>

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164. See *The Sopranos: No Show*, (HBO, Sept. 22, 2002), available at <http://www.mob-story.com/scripts/ep41.html> (Meadow says, “I’m over 18 now, I’m a grown woman. I can go where I want and do what I want.”).

165. I disagree with Frances Ansley’s suggestion that “white victims are likely to be at least partially complicit, rather than purely ‘innocent’ . . .” Ansley, *supra* note 4, at 1058. This assertion is not true in many circumstances and unnecessary to the conclusion that white workers must return the proceeds of discrimination to its victims.

166. See *Int’l Bhd. of Teamsters*, 431 U.S. at 324.

167. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

168. See *Local 28 Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421 (1986).

169. *But see* Mahoney, *supra* note 56, at 806-07 (“One of the privileges of whiteness is a freedom not to notice privilege.”).

Also, like Meadow and her family circumstances, most white male workers were born into an American society where African-Americans, women, and others were already subjected to discrimination. Most white workers do not live in this society as a result of choice. The immigrants who made that choice probably did not knowingly seek to avail themselves of the benefits of discrimination. Theoretically, any American worker could leave the United States and search for a discrimination-free society in which to live, just as Meadow could have divorced her parents at the age of eighteen. But a worker's failure to emigrate is not the same as Carmela's active pursuit of the proceeds of crime. It more closely resembles Meadow's conflicted and continuing, but passive, relationship with her father and his business.

Like his sister Meadow, AJ Soprano is "not the wrongdoer." AJ has never committed a criminal act or colluded in any of Tony's crimes.<sup>170</sup> Also, like his sister, he does not know the details of Tony's crimes. Like all of us, AJ did not choose his parents, so his position is not the product of volition. Further, AJ turned eighteen only during the most recent TV season of *The Sopranos*, and so remained a minor until very recently.<sup>171</sup> Only in the most difficult circumstances could he have escaped his gilded cage. AJ and his sister seem to be very similar.

There is, however, one apparently relevant difference between AJ and his sister. Meadow is very smart. AJ is not. As a result, AJ does not have as much insight into Tony's true occupation as does his older sister. He has had unmistakable hints from his sister and others.<sup>172</sup> But AJ does not seem to understand or, if he under-

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170. See RUCKER, *supra* note 129, at ch. 9.

171. AJ turned thirteen during the pilot episode of *The Sopranos* and so, five seasons later, he is a high-school senior and, most likely, eighteen years old. See CHASE, *supra* note 153, at 7 (pilot episode); Dave Larsen, *NUMBER FIVE WITH A BULLET: Violence, Dark Humor Return With 'Sopranos' Fifth Season*, THE DAYTON DAILY NEWS, Mar. 7, 2004, at F1 (AJ is a high-school student).

172. For example, AJ challenged a classmate named Jeremy Piocosta to a fight over some allegedly borrowed money. When the time came for the fight, Jeremy backed out and handed over the money AJ had demanded. AJ was told that Jeremy backed out of the fight because he was "scared." When AJ asked Meadow for an explanation, she mockingly asked: "You know any other garbage men who live in a house like this? Uncle Jackie. Why do we call him uncle when he's not even related? He's in Dad's other family." *The Sopranos: Meadowlands* (HBO, Jan. 31, 1999), available at <http://www.sopranoland.com/episodes/ep04/transcript/index2.html>. See also *The Sopranos: Everybody*

stands, remains largely indifferent to, the import of all he has seen and been told. There are no infants in the Soprano family, but AJ comes closest to the sleeping infant who exemplifies the broader, moral definition of “innocence.” Giving him every benefit of the doubt, AJ does not know that his father has engaged in wrongful acts to support his family. AJ simply lives his life in a not-atypical adolescent haze. Thus, AJ may be the only Soprano with a legitimate claim to some similarity with the sleeping infant and the moral power that status suggests.

## 2. Meadow, AJ, and the Supreme Court’s “Innocence” Jurisprudence

With all of their differences from Carmela, Meadow and AJ share their mother’s most important characteristic: Meadow and AJ have benefited richly from Tony’s crimes. Among other things, they live in a nice suburban house, Meadow received a gift of a sports utility vehicle from her father and attends an expensive Ivy League university where Carmela paved her way with a generous financial donation, and AJ eats all he wants, attends a private school, and receives expensive gifts.<sup>173</sup> This lifestyle is made possible by Tony’s wrongful acts.<sup>174</sup> Meadow and AJ are living well off the proceeds of Tony’s crimes, just like their mother.

It is here that the Supreme Court’s wielding of the sleeping infant’s power to the benefit of mere “not the wrongdoers” faces its most direct and difficult challenge. Meadow and AJ are “not the

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*Hurts* (HBO, Oct. 20, 2002), available at <http://www.hbo.com/sopranos/episode/season4/episode45.shtml> (AJ’s girlfriend expresses her excitement at being “a gangster dude’s girlfriend”); GABBARD, *supra* note 136, at 38 (AJ learns his father’s Uncle Junior got arrested); *id.* at 153-54 (AJ notices federal agents at Jackie Aprile’s funeral).

173. See *Sopranos May get an Offer They Can’t Refuse*, *supra* note 152 (discussing the value of the Sopranos’ suburban house); *Columbia U. Gives The Sopranos a Pass for Using Its Name All Season*, NEW YORK OBSERVER, May 28, 2001, at 3 (discussing Meadow’s college and the Sopranos’ gift); see also GABBARD, *supra* note 136, at 128-29 (Meadow responds to Columbia’s solicitation of a \$50,000 donation: “How corrupt!”); see *infra* note 175 (discussing Meadow’s SUV); RUCKER, *supra* note 129, at ch. 9 (AJ attended Verbum Dei Middle School); *The Sopranos: Two Tony’s* (HBO, Mar. 8, 2004), available at <http://www.hbo.com/sopranos/episode/season5/episode53.shtml> (Tony buys AJ a \$5,000 drum set); *The Sopranos: All Happy Families* (HBO, Mar. 28, 2004), available at <http://www.sopranoland.com/episodes/ep56> (Tony gives AJ a SUV).

174. See CHASE, *supra* note 153, at 191 (Tony says, “everything this family has come from the work I do.”).



wrongdoers,” and they did not actively pursue the proceeds of crime with full knowledge of their source, but they undeniably possess the proceeds of crime. Even if we concede that Meadow and AJ are “innocent” according to Justice Powell’s narrow definition, is their claim to the proceeds of their father’s crimes equivalent or superior to a claim by the victims of Tony’s crimes from whom money and other valuables have been stolen? Should Meadow’s lack of volition and lack of confirmed knowledge, and AJ’s lack of volition and deeper lack of knowledge, make them immune from any obligation to return the criminal proceeds that support their comfortable lifestyle? In other words, is it relevant that Meadow and AJ can satisfy the narrower, “not guilty” definition of “innocence”?

The Supreme Court must answer “yes,” if its “innocence” jurisprudence can be taken seriously. And this affirmative answer helps to disclose how the Court has given greater protection to “innocent” workers than their status justifies. In the remedies cases, the Court would likely analogize Meadow’s and AJ’s situation to a layoff remedy. Depriving Meadow and AJ of the proceeds of their father’s crimes would effect a serious disruption of a lifestyle they expected would continue without interruption. Unlike job-seeking “innocent” workers in the external labor market encountering a hiring remedy, Meadow and AJ cannot move easily and costlessly to a new family that would support them in the same lifestyle. Unlike advancement-seeking “innocent” employees facing a promotions remedy, Meadow and AJ cannot expect that an equally lucrative means of support for their lifestyle will come along in a brief time. The power of “innocence” in the moderate form suggested by the remedies cases would require that Meadow and AJ be permitted to retain their father’s criminal proceeds.

Applying the lessons of the constitutional affirmative action cases would lend even greater support to Meadow’s and AJ’s claim. A court or other competent governmental authority would have to adjudge the crime’s victims as such. Since no such adjudication of Tony’s crimes has yet occurred, Meadow and AJ are home free. But even if Tony were found guilty of a crime and the crime’s victims were clearly identified by the court, Meadow and AJ would be required to return the money and goods stolen from these proven

victims only if the return somehow benefited Meadow and AJ. For example, Meadow would be required to return classmate Eric Scatino's SUV — acquired by Tony through illegal gambling operations and extortion of Eric's father<sup>175</sup> — only if the vehicle's return would have resulted in Eric being willing to sustain his friendship with Meadow and, perhaps, becoming Meadow's boyfriend. Thus, "innocence" in the strongest form suggested by the constitutional affirmative action cases would also permit Meadow and AJ to retain their father's criminal proceeds.

In the Title VII affirmative action cases, it might appear that Meadow and AJ would be required to surrender the criminal proceeds they possess to their rightful owners. No adjudication of Tony's guilt would be required. Instead, a mere showing that Meadow and AJ possess something that belonged to someone else would be sufficient. With that showing, Meadow and AJ would be required to return the criminal proceeds as long as they did not suffer a truly significant harm as a result. For example, depriving Meadow and AJ of all opportunities to acquire other sources of support for their lifestyle in the future might be a sufficiently significant harm. But no such remedy is required. Meadow and AJ need only disgorge the proceeds of Tony's crimes and then go on with their lives.

Even given the weak form of "innocence" it suggests, Title VII's affirmative action jurisprudence presents another obstacle to requiring Meadow and AJ to return the proceeds of their father's crimes. Title VII permits only *voluntary* affirmative action — that is, affirmative action that is not imposed by government.<sup>176</sup> Voluntary affirmative action in this scenario would consist of Tony making the uncoerced choice to return the proceeds of his crimes to his victims, including the money and goods he has conveyed to Meadow and AJ. The question would then become, does the power of "innocence" *prohibit* Tony from voluntarily returning the proceeds to their original owners? This question certainly would not arise. Tony's character would not permit the return of anything he has

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175. See *id.* at 189-91 (Tony gives Eric Scatino's SUV to Meadow after receiving it in payment for gambling debts from Eric's father, but Meadow confronts Tony regarding how he obtained the car); see also *id.* at 192-93 (Meadow and Eric argue about the car and whose father is at fault).

176. See *Weber*, 443 U.S. at 200-08.

stolen, particularly if it involved depriving his daughter or son of anything at all.

If Meadow and AJ are analogous to the white and male “innocent” workers of the workplace discrimination cases, then the Sopranos metaphor suggests how powerful “innocence” has been in the workplace discrimination cases and how it has affected the Court’s decision making. The “innocent” must be permitted to retain the proceeds of wrongdoing in almost all cases because any other outcome might cause harm to the “innocent.” “Innocence” vests workers with a superior claim to care and protection from the law.

### 3. Innocence’s Irrelevance

The foregoing consideration of the Supreme Court’s “innocence” jurisprudence helps to disclose how “innocence” produces this excess of care and protection for “innocent” workers in the workplace discrimination cases: Meadow’s and AJ’s circumstances and expectations are considered in a vacuum.<sup>177</sup> The power of “innocence” causes courts to minimize the victim’s perspective. Yet, the victims of Tony’s crimes also had expectations.<sup>178</sup> They certainly expected they would continue to enjoy their money and goods without illegal interruption. Further, they probably expected that their money and goods would be returned to them if they were taken illegally. As a result, Meadow and AJ Soprano and the victims of Tony’s crimes appear to have conflicting expectations which, if considered only superficially, seem to support competing claims to the law’s care and protection.

These superficially competing claims appear to present a dilemma of moral equivalence. Why should courts value the discrimination victims’ expectations more than they value the expectations of workers who are “not the wrongdoers”? This problem becomes a

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177. Although I do not discuss it here, there is also the troubling possibility that the expectations of white and male workers are themselves rooted in racism and, therefore, illegitimate and unworthy of any legal protection. See Harris, *supra* note 14, at 1777-78; Ansley, *supra* note 4, at 1010-13.

178. I will ignore the possibility that the people from whom Tony has stolen and extorted money are themselves criminals to avoid unnecessarily complicating this argument with facts that are not analogous to the workplace discrimination cases.

dilemma,<sup>179</sup> however, if and only if the background facts supporting these expectations are morally equivalent. But they are not. American society is not morally indifferent to the means by which Meadow and AJ obtained the resources that support their lifestyle and which they expect to retain, and it should not be morally indifferent to the fact that white and male workers have received some workplace benefits as a consequence of discrimination.

Society has a deep concern about how money and goods are acquired. The most obvious example is that the law strongly disfavors individuals engaging in criminal acts to acquire money and goods. When an individual makes an acquisition through criminal means, the criminal law usually takes away that individual's wrongfully acquired money and property either by requiring the payment of restitution to the victim, disgorgement of criminal proceeds to the government, or financial penalty paid to the government.<sup>180</sup> The law also strongly disfavors individuals engaging in tortious acts that have the effect of depriving another person of something valuable. When an injury has been wrongfully inflicted, tort law provides a mechanism for compensating the injured party.<sup>181</sup> Because society abhors the criminal means by which Tony acquires his livelihood, Meadow's and AJ's claim to the proceeds of Tony's crimes is not equivalent to claims by the victims of Tony's crimes. Meadow and AJ must return the proceeds of Tony's crimes. Any assertions that Meadow and AJ are "innocent" because they are "not the wrongdoers" are and should be irrelevant.

This same principle applies to workplace discrimination and the role of "innocence" in the three lines of cases discussed above.

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179. I am fond of the following aphorism without knowing its source: "Problems have solutions; this is a dilemma." I use "problem" and "dilemma" in this sentence to suggest precisely this meaning.

180. See MANDATORY RESTITUTION ACT, 18 U.S.C. § 3663A (2000) (federal law providing for restitution for crime victims); 18 U.S.C. § 3571 (2000) ("A defendant who has been found guilty of an offense may be sentenced to pay a fine."); U.S. SENTENCING GUIDELINES MANUAL § 8C2.9 (2003) (if the cost of remedial efforts is less than the gains to the organization from an offense, disgorgement shall be added to the fine); N.J. STAT. ANN. § 2C:43-3 (Supp. 2003) (New Jersey sentencing provisions that provide for fines and restitution).

181. See DAN B. DOBBS, THE LAW OF TORTS § 1 (2000) ("The essence of tort is the defendant's potential for civil liability to the victim for harmful wrongdoing and correspondingly the victim's potential for compensation or other relief.").

Generalizing from observations by Chief Justice Burger for the *Fullilove* plurality,<sup>182</sup> Justice Stevens in *Martin v. Wilks*,<sup>183</sup> the *Franks* Court,<sup>184</sup> and simply accepting common sense and plain observation,<sup>185</sup> white workers and male workers respectively have benefited richly from discrimination against African-American workers and women workers both by individual employers and society at large. At a minimum, white and male workers benefit from more and better job opportunities, higher pay, and greater competitive-type seniority which brings with it greater opportunities for good occupational outcomes like promotions, recalls, and desirable assignments, and lesser susceptibility to bad occupational outcomes like layoffs, undesirable assignments, and involuntary relocations. White and male workers reap some of the proceeds of discrimination. Like Meadow and AJ, they should be required to return these ill-gotten gains as part of the process of remedying discrimination.

#### 4. Pausing to Re-Consider the Sopranos Metaphor

A potentially important criticism of this essay's analogy between the Sopranos and workplace discrimination requires a preemptive response. The Sopranos metaphor posits that the proceeds of crime and discrimination are directly traceable from their possessor to their source. Tony steals money from a victim and gives it to Meadow who has no other source of support; therefore, Meadow's money is the victim's money. In the workplace discrimination context, an employer discriminates against an African-American worker by denying her a job to which she would otherwise be entitled and hires a white worker instead; therefore, the

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182. See *supra* text accompanying note 71.

183. 490 U.S. 755, 791-92 (1989) (Stevens, J., dissenting) ("The white respondents in these cases are not responsible for that history of discrimination, but they are nevertheless beneficiaries of the discriminatory practices that the litigation was designed to correct. Any remedy that seeks to create employment conditions that would have obtained if there had been no violations of law will necessarily have an adverse impact on whites, who must now share their job and promotion opportunities with blacks. Just as white employees in the past were innocent beneficiaries of illegal discriminatory practices, so is it inevitable that some of the same white employees will be innocent victims who must share some of the burdens resulting from the redress of the past wrongs.")

184. See *supra* text accompanying notes 33-34.

185. See *infra* note 198 (generally discussing how whites have benefited from discrimination against African-Americans).

white worker's job should have been the African-American worker's job. This supposition about the proceeds of discrimination is subject to challenge and requires further explanation.

The analogy to the remedies cases works well. Before a remedies issue can arise, the court must make a liability determination consisting of findings that identified victims have suffered discrimination which deprived them of particular workplace benefits that were given to others.<sup>186</sup> The analogy to affirmative action, however, is subject to two challenges. One criticism would attack the analogy drawn between the victims of Tony Soprano's crimes and the beneficiaries of affirmative action. As noted above, some critics charge that affirmative action benefits workers who are not themselves the victims of discrimination. This criticism would suggest that affirmative action benefits the progeny of the victims of discrimination or, in some cases, workers without any relationship to past discrimination victims; therefore, the proper analogy would be drawn to the children of Tony's victims or members of their generation unrelated to the crime victims.

This first criticism is overbroad. In some cases, workplace affirmative action benefits workers who are themselves the victims of discrimination that cannot be remedied through other means. In the public sector, affirmative action may be the only remedy available to workers who have suffered from discrimination, but cannot prove that their governmental employer discriminated intentionally.<sup>187</sup> Even in the private sector, affirmative action may remedy

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186. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (discussing the prima facie case for a disparate treatment claim — "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246-47 (1989) (setting forth the prima facie case for "mixed motive" cases); 42 U.S.C. § 2000e-2(m) (2000) (codifying and modifying *Price Waterhouse*); 42 U.S.C. § 2000e-2(k) (2000) (setting forth the prima facie case for disparate impact claims).

187. See *Washington v. Davis*, 426 U.S. 229, 246 (1976) (a test which is neutral on its face and with a neutral rationale may be said to serve a purpose the Government is constitutionally empowered to pursue, even though there may be a disproportionate impact upon African-Americans).

discriminatory acts born of unconscious racism and sexism that cannot be reached through the traditional anti-discrimination tools of disparate treatment and disparate impact claims.<sup>188</sup> In many cases, therefore, affirmative action serves to eradicate discrimination. The beneficiaries of affirmative action, who are also the victims of discrimination, occupy a position analogous to Tony Soprano's victims.

In some cases, however, the beneficiaries of workplace affirmative action may not have been directly victimized by the discriminatory acts of an employer or prospective employer. Instead, workplace affirmative action may redress the present effects of the employer's past behavior. For example, affirmative action may seek to induce African-Americans or women to seek employment in a skilled job category that has been traditionally segregated because prior generations of African-Americans or women were either prohibited or discouraged from seeking the skilled jobs themselves and even the skills needed to obtaining those jobs.<sup>189</sup> In these circumstances, the proceeds of discrimination stolen from an earlier generation of African-Americans or women are being returned to a later generation through affirmative action. Thus, the beneficiaries of affirmative action should not stand in the place of Tony's crime victims; rather, they are more closely analogous to the children or grandchildren of Tony's crime victims.

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188. CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 77-80 (1997) (describing how most behavior that produces racial discrimination is influenced by unconscious racial motivation and the courts have done little to address our continuing racial issues by "tout[ing] a legal ideology of 'formal equality'" that is equal in theory but not in fact and whose effect "makes it possible to pretend that racism does not exist.").

189. See *Weber*, 443 U.S. at 198-99 ("Until 1974, Kaiser hired as craftworkers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black."); *Johnson v. Transp. Agency*, 480 U.S. 616, 621-22 (1987) ("Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women . . . none of the 238 Skilled Craft Worker positions was held by a woman . . . this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them.").

This criticism has a further logical extension: the proceeds of the employer's past discrimination did not flow to the white or male co-workers of affirmative action's beneficiaries. Rather, these proceeds flowed in the first instance to the white and male contemporaries of the earlier generation of African-Americans and women who were victimized by the employer's discrimination. For example, the skilled jobs which the African-American and women workers of an earlier generation did not get went to their white and male co-workers. As a result, the "innocent" co-workers of affirmative action's beneficiaries, because they have not directly benefited from discrimination, are not analogous to Meadow and AJ. Rather, they are more like Meadow's and AJ's children or grandchildren.

Taken in tandem, these two sides of the same criticism suggest that the proper question in some number of affirmative action cases is not whether the proceeds of discrimination should be taken from Meadow and AJ and returned to Tony's victims. Instead, the question is whether the "return all ill-gotten gains" principle should require Tony Soprano's grandchildren to return whatever proceeds of Tony's crimes they may possess to the grandchildren of Tony's victims.

For the purposes of this essay, the best answer is that "innocence" does not provide us with an answer. The children and grandchildren of the beneficiaries of workplace discrimination are no more "innocent" than their forebears, if "innocence" as defined by Justice Powell even has degrees. Contemporaneity is not synonymous with guilt any more than the passage of time assures greater moral purity. To the contrary, this essay accepts the basic premise of the Supreme Court's "innocence" jurisprudence that all of these workers — past and present — are "not the wrongdoers." Thus, the current generation of "innocent" workers is no more entitled to keep the proceeds of discrimination solely on the strength of their "innocence" than were their forebears. On these grounds, this criticism offers a distinction without a difference. These "innocent" workers are similarly situated to Meadow and AJ, at least with respect to their "innocence." The concern with applying the "return



all ill-gotten gains” principle in these circumstances must have other sources.<sup>190</sup>

A second criticism would strike at drawing an analogy between the employer and Tony Soprano in the affirmative action context. More precisely, in some cases, the beneficiaries of affirmative action were victimized by discrimination, but the discriminator was not their employer or prospective employer. Disparate workplace outcomes for African-Americans, Latinos, and whites, or for men and women, may be the product of discrimination in the education system or the economic system, or other aspects of society that are beyond the employer’s control. If the employer is not the wrongdoer, this criticism would suggest, then the employer is not analogous to Tony Soprano, since he is undeniably the wrongdoer in the Sopranos metaphor.

This criticism can be easily dismissed. The identity of discrimination’s perpetrator matters not at all, just as the identity of the perpetrator of a crime does not matter to the question of whether a crime’s proceeds must be returned to its victim. If Paulie “Walnuts,” a member of Tony Soprano’s crew,<sup>191</sup> gave Meadow or AJ the proceeds of his crimes, Meadow’s and AJ’s obligation to return those criminal proceeds would not be any less than if the proceeds had come from Tony. The same can be said about workplace discrimination. It does not matter who stands in Tony Soprano’s place — the perpetrator’s place — in this analogy. It may be a particular employer, society as a whole, or an identifiable group of societal actors such as educational systems. The analogy succeeds as long as there is one discriminator (or more) taking something valuable

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190. Some of these other sources of concern are addressed below. For example, an implausible argument might be advanced that the white and male workers of today have not benefited from past discrimination. But the evidence required to support an employer’s resort to affirmative action would disprove this argument, at least with respect to a particular workplace. *See infra* Part III.C.5.C. Further, an argument could be made that, even if the modern generation of workers may have benefited in some manner from past discrimination, it is impossible to trace the proceeds of prior acts of discrimination to their modern possessors and, therefore, impossible to know what (or, perhaps, how much) should be returned to whom. It is worth noting that this argument presents a problem of proof unrelated to “innocence.” Also, it concedes that “innocent” workers possess some proceeds of discrimination which is sufficient to trigger the “return all ill-gotten gains” principle. *See infra* note 198.

191. *See* RUCKER, note 129, at ch. 8.

from one group (i.e., African-Americans, women workers) and delivering it to another (i.e., white workers, male workers). That valuable something must be returned.

#### 5. Preemptive Responses to Criticisms of the “Return All Ill-Gotten Gains” Principle

Drawing analogies between a society and employers that discriminate and white or male workers who benefit from that discrimination, on the one hand, and Tony Soprano and Meadow Soprano (and to a lesser extent AJ), on the other hand, also invites criticisms of the “return all ill-gotten gains” principle. This sub-section will suggest several non-trivial criticisms of the principle and seek to respond to them in a manner that further discloses the role of “innocence” in the workplace discrimination cases.

##### a. Punishment vs. Ill-Gotten Gains

The first criticism would begin with the normative assertion that Tony’s crimes are worse than any employer’s discriminatory act. Building on this normative judgment, this argument would suggest that serious offenders deserve harsh treatment while less egregious offenders should suffer lesser punishments; therefore, Tony’s crimes should be punished more severely than should workplace discrimination. Further, “innocent” workers who have, by definition, not committed any wrongdoing, should not be punished at all.

One response to this criticism might challenge the normative premise that all of Tony’s crimes are worse than all workplace discrimination. While there is certainly no workplace discrimination analog to murder, an argument might be constructed that some cases of employment discrimination occupy the same moral plain as theft, fraud, or extortion. Yet, entering into this unendingly controversial normative argument might not be necessary. It also may not adequately address the problem that white and male workers have not necessarily played any role in an employer’s discrimination beyond benefiting from it.

An alternative response would disclose a problematic, yet essential, premise underlying this first criticism: returning ill-gotten gains is not “punishment.” Requiring Meadow and AJ, and the

white and male “innocents” in the workplace discrimination cases, to return the proceeds of crime and discrimination which they respectively possess is not “punishment.” This essay’s argument concedes the assumption heavily relied upon in the Supreme Court’s “innocence” jurisprudence that Meadow, AJ, and the “innocent” workers have done nothing wrong and, therefore, should not be punished.<sup>192</sup> While true, this point is irrelevant to the larger question of whether the Court has wielded the power of “innocence” fairly and appropriately.

Meadow, AJ, and the “innocent” workers possess valuables that belong to someone else. Meadow, AJ, and the “innocent” workers have never had and cannot acquire a property interest in these proceeds of others’ criminal and civil wrongs, respectively.<sup>193</sup> Taking these proceeds from Meadow, AJ, and the “innocent” workers does not unsettle vested interests. Rather, it merely restores property to its rightful owners. As a result, the suggestion that Tony Soprano deserves worse punishment than the employment discriminator, and that “innocents” deserve no punishment at all, proves to be irrelevant to this argument. The criticism fails because its premise is flawed.

This first criticism may help explain “innocence’s” role in the workplace discrimination cases. The Court’s invocation of “innocence” obfuscates the important distinction between “punishment” and “returning ill-gotten gains.” “Innocents” cannot be justifiably punished. But an argument can be made, as in this essay, that improperly obtained money and other items of value should be returned. The Supreme Court’s “innocence” jurisprudence avoids the difficult questions of whether and when “innocents” may be properly allowed to keep the proceeds of discrimination. The Court might have constructed an argument to support its apparent conclusion, implied in the workplace discrimination cases, that “in-

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192. See *supra* notes 125-26 and accompanying text; see also Sullivan, *supra* note 5, at 93-95 (explaining that affirmative action need not be viewed either as “punishment” or “compensation to past victims,” but as an acknowledgment that discrimination produces windfalls that should be returned).

193. See generally 63C AM. JUR. 2D *Property* § 34 (1997) (“The theft of goods or chattels does not divest one who owns, or has title to, such property from his or her ownership of the property.”). This proposition is subject to limitation by the bona fide purchaser for value principle. See *infra* text accompanying notes 194-96.

nocents” should rarely, if ever, be required to return the proceeds of discrimination. Of course, the Court has never offered such an argument. Instead, the Court has used “innocence” to hide incomplete judicial reasoning justifying unjust results.

b. When Might “Innocents” Keep Ill-Gotten Gains?

A second criticism would suggest a direct answer to the question which the Supreme Court’s “innocence” jurisprudence has steadfastly avoided. This argument would suggest that some circumstances exist in which the possessors of ill-gotten gains *should* be permitted to keep the proceeds of others’ wrongdoing. In other words, the “return all ill-gotten gains” principle, in its purest form, goes too far. Two circumstances might support this criticism: circumstances analogous to property law’s “bona fide purchasers for value” concept, and situations in which the “innocent” party’s own property is inextricably mixed with ill-gotten gains.

A “bona fide purchaser for value” makes a good-faith purchase of real property by exchanging fair value for the property without actual or constructive notice of any infirmities, claims, or equities against the title.<sup>194</sup> Bona fide purchasers generally must have no suspicions about competing interests which would inspire a prudent person to make further inquiry.<sup>195</sup> If so, then the bona fide purchaser takes title to the purchased property “free and clear” of hidden claims or title defects.<sup>196</sup>

Meadow, AJ, and the “innocent” white and male workers could not claim a bona fide purchaser’s status. Obviously, they are not buying real property. But more generally, they are not “purchasers” exchanging fair value for the proceeds of crime and discrimination respectively. They have given no consideration in return for the proceeds of wrongdoing. White and male workers receive better jobs, higher wages, and more opportunities because they are white or male and, for these reasons alone, benefit from discrimination.<sup>197</sup> They exchange their labor only for the benefits they would

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194. See generally RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.01[2][b] (Michael Allen Wolf ed., 2004) (offering a general definition of “bona fide purchaser” for value).

195. *Id.* at § 82.01[3].

196. *Id.*

197. See, e.g., *supra* notes 33-34 and text accompanying notes 182-84.

have received absent discrimination, and not the windfall generated by their employers' or society's discriminatory acts. Similarly, these workers' progeny — that is, the co-workers of the beneficiaries of affirmative action — cannot claim to have given consideration in exchange for any benefits they have derived from discrimination.<sup>198</sup> Meadow and AJ Soprano live well off the proceeds of their father's crimes only because of the serendipity of birth. They have given no new consideration to their father in return for the proceeds of his crimes. There is also good reason to doubt that either Meadow (and perhaps, but less certainly, AJ) or the white and male workers, or even their progeny, could satisfy the requirement that they harbor no suspicions or, perhaps more precisely, should not be charged with constructive notice that they are the beneficiaries of discrimination.<sup>199</sup> Thus, the bona fide purchaser concept does not undermine the "return all ill-gotten gains" principle in its instant application. It is inapposite.

It is fair to ask, however, whether the "return all ill-gotten gains" principle should apply to workers whose circumstances are more closely analogous to the bona fide purchaser for value. Modifying the Sopranos metaphor, once again, will help to illustrate. Imagine that Meadow hires a housekeeper to clean her New York City apartment. The housekeeper diligently and thoroughly cleans the apartment. Meadow pays her with a \$50 bill for each cleaning. Of course, since Meadow has no other source of income, each \$50 bill comes from the proceeds of Tony Soprano's crimes which he has, in turn, conveyed to Meadow. Yet, the housekeeper has exchanged fifty dollars' worth of honest labor in return for each \$50 bill without any reason to suspect its source. Thus, she can draw a

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198. For example, contemporary white workers' families probably experienced better economic outcomes (e.g., wealth, home ownership, skills acquisition) than did the families of discrimination victims because of unrestricted job and educational opportunities, among other factors. These superior economic and social positions may have, in turn, provided them with networks of professional contacts and role models which, in turn, produced substantially improved job prospects. Contemporary white workers may benefit from the better educational opportunities that result from either greater wealth or the lasting effects of de facto and de jure housing discrimination which put them in wealthier school districts. *See, e.g.*, MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 50-52 (1995).

199. *See supra* text accompanying notes 166-69.

clean analogy between her situation and the bona fide purchaser for value.

Should the housekeeper be required to return the \$50 bill to the victims of Tony's crimes, as the "return all ill-gotten gains" principle seems to suggest? This issue reduces to the question of which party — the victims of Tony's crimes or the housekeeper — should bear the risk that a claim against Tony or Meadow will fail. If the housekeeper must surrender her \$50 bill to Tony's victims, then the housekeeper has a legitimate claim against Meadow for \$50 of compensation. If the housekeeper is permitted to keep the \$50 bill, then Tony's victims have a legitimate claim against Tony for \$50 of restitution. Should each of these claims succeed, the question of whether the "return all ill-gotten gains" principle applies to the housekeeper's case is moot. The housekeeper and the crime victims would each get their \$50 by some means. If either claim could fail, however, or if either Tony or Meadow could not pay \$50 to the housekeeper or the crime victims, then the principle's applicability to the housekeeper's situation becomes most important.

Fortunately, the argument in this essay does not depend upon making this Hobson's choice between Tony's victims and the housekeeper. It does not seem likely, apart from the "mixed property" circumstances discussed below, that any white or male co-worker of a discrimination victim will be able to legitimately claim a status analogous to the housekeeper's position. Even if such a white or male co-worker could be found, however, for the purposes of this essay, it is sufficient that the housekeeper's "innocence" does not decide the question of whether she must return the \$50 bills which are ill-gotten gains. Like Meadow, the housekeeper is "not the wrongdoer." But the housekeeper's "innocence" is not sufficient, even if it is not entirely irrelevant. The provision of the housekeeper's labor — that is, her arms' length exchange of something valuable for something of equal value — is the characteristic which gives the housekeeper a claim that might compete with the victims' claims. We can acknowledge that the bona fide purchaser for value concept might limit the "return all ill-gotten gains" principle without also conceding that "innocence" defines those limits. It does not.

A slightly different modification to the Sopranos metaphor suggests another possible limitation of the “return all ill-gotten gains” principle. Imagine that Meadow has completed her bachelor of arts degree at Columbia University. Again, Meadow has no other means of support; therefore, we are safe in assuming that Meadow’s tuition was paid entirely from the proceeds of Tony’s crimes. Unlike a parcel of real property, however, something more than money is typically required to acquire a college degree. Meadow must also have successfully completed Columbia University’s degree requirements to the satisfaction of her professors. These requirements presumably include a long list of intellectually challenging tasks of various types. Thus, Meadow’s college degree is the product of both the proceeds of Tony Soprano’s crimes and Meadow’s honest educational labors. In other words, Meadow’s legitimate interest in her diploma and the ill-gotten gains are mixed.

Should Meadow be required to surrender her college degree as part of the proceeds of her father’s crimes?<sup>200</sup> Any honest answer would have to acknowledge that the “return all ill-gotten gains” principle does not decide this case. A court order directing Tony and Meadow to return every penny Tony had stolen from his victims would not reach the portion of Meadow’s college diploma that is the product of her honest work. Meadow’s school work is not an ill-gotten gain. It never belonged to Tony’s victims. It did not belong to Tony. It is Meadow’s property, and Meadow’s property alone. Of course, there is a complicating factor. As a practical matter, a court cannot return the ill-gotten portions of the Meadow’s college diploma to Tony’s victims and leave Meadow to enjoy the honestly produced portions. A diploma simply cannot be disaggregated in this way. A Solomonic judge might cut the diploma in half, but this solution adds little more than another metaphor involving infants.

Analogous circumstances may well arise in workplace discrimination cases. White and male workers’ promotions, wages, and job opportunities may be the products, at least in part, of their honest labor and superior job performance or skill and, therefore, utterly independent of discrimination and its effects. To the extent that

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200. For obvious reasons, I am dispensing with the inconvenient fact that college diplomas ordinarily are not transferable.

this is true, some portion of the workplace benefits awarded to white and male workers are not ill-gotten gains. They are mixed. Like Meadow, these workers have a legitimate argument that their workplace benefits need not be surrendered even under the most unadulterated application of the “return all ill-gotten gains” principle. Similarly, the progeny of discrimination’s beneficiaries may well believe that all of the wealth they have accumulated is the product of their own “merit,” rather than the proceeds of discrimination. Thus, they would view affirmative action as depriving them of something they have earned, rather than the return of ill-gotten gains.<sup>201</sup>

There are two answers to this argument. First, and most important to the central issue in this essay, “innocence” does not decide the white and male workers’ claim to retain the proceeds of their honest labor. The fact that they are “not the wrongdoers” is not sufficient to allow the just resolution of these difficult cases. Rather, the independent fact that these workers’ honest labor contributed to the workplace benefits they possess gives these workers a claim which might compete with the discrimination victims’ demands for those same benefits. Unlike the bona fide purchaser for value concept, this argument does not limit the “return all ill-gotten gains” principle. Instead, it reinforces the background principle that all parties should be entitled to keep what is legitimately theirs. “Innocence” is irrelevant.

Second, employment discrimination law suggests a rule that can be used to resolve disputes of this sort. When assessing the liability of an employer that acted on both legitimate and discriminatory motives — that is, “mixed motive” cases — a court will inquire into whether discriminatory intent played “a motivating part” in the employer’s decision.<sup>202</sup> If discriminatory intent was a moti-

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201. See, e.g., DARIEN A. MCWHIRTER, *THE END OF AFFIRMATIVE ACTION: WHERE DO WE GO FROM HERE?* 56-57 (1996) (“It is generally assumed that white men are the major victims of affirmative-preference programs. In one poll, 10 percent of white males said that they felt they had lost a promotion because of quotas. Almost every white man who has looked for a job as a college professor since 1975 has been a victim of affirmative preference.”).

202. See 42 U.S.C. § 2000e-2(m) (2000) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for an employment practice, even though other factors also motivated this practice.”). This provision of the 1991 Civil Rights Act codi-



vating factor, then the employer may avoid certain damages by demonstrating that it would have made the same decision absent its discriminatory motive.<sup>203</sup>

This “same decision” defense suggests a rule that will help courts decide how to treat legitimate interests and ill-gotten gains that are mixed. White and male workers should be allowed to retain any workplace benefits to which they would have been entitled absent discrimination.<sup>204</sup> Similarly, any workplace benefits derived from discrimination, including benefits passed from one generation to another, are ill-gotten gains that must be returned. In Meadow’s case, the question should be whether Columbia University would have conferred a college degree on her absent the ill-gotten gains used to pay her tuition. Although a difficult thought exercise, this rule is familiar to courts considering employment discrimination cases and it clearly informs the parties regarding what must be proved. The question of who bears what evidentiary burden should, again, follow the existing rule of the same decision defense. Because discrimination is the understood and expected background condition, the proponent of the view that the workplace benefits were not tainted by discrimination should bear the burden.<sup>205</sup>

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fied the rule proposed in the plurality’s opinion in *Hopkins*, 490 U.S. at 250 (plurality opinion). See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (holding that Congress adopted the plurality’s rule in *Hopkins* when it enacted the 1991 Civil Rights Act).

203. See 42 U.S.C. § 2000e-5(g) (2000) (court may grant injunctive or declaratory relief, and shall not order damages, if “respondent demonstrates that [he] would have taken the same action in the absence of the impermissible motivating factor”). This rule applies to claims brought under Title VII because of a legislative amendment contained in the Civil Rights Act of 1991, The Civil Rights Act of 1991, 42 U.S.C. § 1981 (2000), but not necessarily to claims brought under the Age Discrimination in Employment Act or the Americans with Disabilities Act because they were not similarly amended. In *Hopkins*, this “same decision” defense was a defense to liability. *Hopkins*, 490 U.S. at 244-45.

204. Cf. *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 285-86 (discussing a rule similar to the “same decision” defense in determining a plaintiff’s rightful position).

205. See 42 U.S.C. § 2000e-5(g) (2000) (after the complainant proves a violation, respondent must “demonstrate[ ] that [he] would have taken the same action in the absence of the impermissible motivating factor”). “Demonstrate,” as used in Title VII, means to bear the burden of production and the burden of persuasion. See 42 U.S.C. § 2000e(m) (2000).

### c. The Adjudication Criticism

The final criticism arises out of this essay's reliance on criminal law and tort law to support the argument that Meadow and AJ would be required to return the proceeds of Tony's crimes and, by analogy, that "innocent" workers should be required to return the proceeds of discrimination. This criticism would rely on the undeniable fact that both criminal law and tort law would require Meadow and AJ to return the proceeds of their father's crimes only after Tony's guilt or liability had been finally adjudicated. Thus, drawing an analogy between workplace discrimination and criminal and tort law appears to suggest that the "innocent" workers of the workplace discrimination cases should not be required to yield the benefits of their employers' and society's discrimination absent a judicial determination that discrimination has, in fact, occurred.

An adjudication requirement would not undermine this essay's analysis of the remedies cases because, by definition, an employer must have been adjudicated liable for workplace discrimination before it can be subjected to a remedial order. Affirmative action, however, typically does not involve any formal adjudication of liability. Affirmative action generally arises out of the voluntary act of an employer, or an employer and union engaged in collective bargaining, or the political branches of government. Courts intervene only after the fact when considering a challenge by an allegedly aggrieved "innocent."

This final criticism — the "adjudication criticism" — poses a serious challenge to this essay's critique of the affirmative action cases. The adjudication criticism also appears to justify the requirement imposed in the constitutional affirmative action cases that a competent governmental entity acting within the scope of its authority propound evidence of actual discrimination to support any public-sector affirmative action plan. It may even suggest that the Title VII affirmative action cases are wrongly decided because they do not require any governmental entity to find discrimination before an employer may voluntarily engage in affirmative action.

A preliminary response to this adjudication criticism would note that it offers no support to the powerful, almost irrebuttable, presumption at work in the constitutional affirmative action cases that the victims of discrimination and their co-workers should be

treated as moral equivalents.<sup>206</sup> Tort law provides no analogous presumption. Criminal law fosters a presumption of the defendant's innocence that has equivalent power. But the innocence presumption in criminal law is the product of our democracy's fundamental interest in creating an effective check on the government's power to deprive accused citizens of their liberty. There is no equivalent policy interest justifying a presumption that discrimination does not exist in our society.<sup>207</sup> The only purported policy interest supporting this presumption would be in sustaining a pretense that our society is both color-blind and gender-blind and, therefore, does not need affirmative action. Pretense hardly makes for legitimate policy.

But this initial response leaves the adjudication criticism standing, at least in weaker form. Even tort law, lacking any presumption, requires some formal adjudication of liability before restitution may be ordered. This weaker criticism would still suggest that affirmative action of any kind should be permitted only after a court has found evidence of discrimination in need of remedy.

Even in its weaker form, the adjudication criticism does not sufficiently respect the evidence that justifies employers resorting to affirmative action. Employers voluntarily engaging in affirmative action have determined that their workplaces foster "manifest imbalances in traditionally segregated job classifications."<sup>208</sup> In other words, the employer can amass direct evidence that white or male workers have received jobs, job opportunities, promotions, or other benefits of the workplace over an extended period of time which, under ordinary and fair circumstances, would have gone to African-Americans or women. This is direct evidence that white or male workers possess property which belongs to someone else, even if this maldistribution was the product of discrimination in the past.

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206. See *supra* text accompanying notes 75-88.

207. See *supra* text accompanying notes 84-85.

208. An employer would have to be prepared to offer evidence of this fact in the event their plans are challenged by white or male workers under Title VII. See *supra* notes 118-19 and accompanying text (discussion of *Weber* and *Johnson*) Under Title VII, the employee challenging an affirmative action plan bears the burden of persuasion on this question; however, the employer would almost certainly offer some evidence to satisfy a burden of production on these questions. See *Johnson*, 480 U.S. at 626-27 (discussing employee's burden of persuasion).

Employers' evidence that workplace benefits are maldistributed need not support an inference that this "manifest imbalance" is the product of discriminatory intent,<sup>209</sup> but our background understanding of discrimination's pervasiveness and power generally supports such an inference.<sup>210</sup> Further, under Title VII, the employer must guard against "unnecessary trammeling" of white or male workers' interests or the creation of an "absolute bar" to these workers' advancement. This evidence that the employer has constructed its affirmative action plan narrowly negates any suggestion that the employer is motivated by animus against white people and/or men and, in turn, further supports the conclusion that the employer created its affirmative action plan only to remedy a discriminatory distribution of workplace benefits.

With direct evidence in hand that white or male workers possess something that rightfully belongs to someone else, probably as a result of their employer's or society's intentional or unconscious discriminatory act or practice, and lacking any evidence that the employer's decision to re-distribute those ill-gotten gains to their rightful owners is motivated by discriminatory animus against white people or men, the question becomes why an employer should be forced to obtain judicial pre-approval for its affirmative action plan.

The likeliest argument in favor of subjecting affirmative action plans to judicial pre-certification is that white and male workers should be protected from the risk either that the employer does not have any evidence or that the evidence is insufficient to justify an affirmative action plan. This argument presupposes that white and male workers will be temporarily deprived of some workplace benefit and, therefore, suffer some harm during the period between the employer's implementation of the affirmative action plan and a court's final adjudication of the legitimacy of the affirmative action plan. Assuming away temporary injunctive relief during the pendency of the challenge to the affirmative action plan, and the equal likelihood that the employer would suspend operation of its *sub judice* plan to avoid the imposition of excessive damages should it lose, a possibility of temporary harm to white and male workers remains.

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209. See *supra* note 118 and accompanying text (discussion of "arguable violation").

210. See *supra* text accompanying notes 21, 33-34, 72, 84-85, and notes 183, 198.

There is, however, a far more powerful argument against judicial pre-certification. Litigation introduces sometimes substantial transaction costs into the employer's calculation about whether to go forward with an affirmative action plan.<sup>211</sup> As Ronald Coase might have explained, higher transaction costs very likely would result in fewer employers engaging in affirmative action and, therefore, fewer proceeds of discrimination being returned to discrimination's victims.<sup>212</sup> Thus, the likeliest consequence of judicial pre-clearance of voluntary affirmative action plans, when post hoc challenges are available, would be to increase the likelihood that the ill effects of discrimination will remain undisturbed.

Thus, a choice is presented regarding which risk is more acceptable: the slight risk of a small and temporary harm to certain white and male workers should an affirmative action plan be wrongfully adopted or the risk that some employers will not choose to adopt affirmative action plans and thereby fail to remedy the stubborn effects of discrimination. The Supreme Court has interpreted Title VII as reflecting a congressional judgment erring in favor of eliminating discrimination and its vestiges by allowing only post hoc challenges to affirmative action plans. Yet, the Court has made a very different choice through its interpretation of the Constitution.

The Court could have required governmental entities that undertake voluntary affirmative action efforts to validate their affirmative action plans using the same evidence Title VII requires of private-sector employers: a manifest imbalance in traditionally segregated classifications and no unnecessary trammeling on "innocents'" interests or "absolute bars" to their advancement while trying to achieve balance in the workforce. This evidence would support the inference that the governmental entity had undertaken affirmative action to return the proceeds of discrimination to its victims. Yet, the Court has imposed a much higher burden on government when it seeks to implement affirmative action. Although not quite judicial pre-clearance, the Court has dictated both the process by which the political branches must arrive at their deci-

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211. See Harris, *supra* note 48, at 1191-92 (explaining how high transaction costs can frustrate otherwise efficient deals).

212. See Ronald Coase, *The Problem of Social Cost*, in R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* 114-19 (1998).

sions regarding affirmative action and, to a large extent, what the content of those decisions must be in order to pass constitutional muster.

Public-sector affirmative action discloses how courts justify playing a substantial and invasive role in their self-defined capacity as neutral protectors of “innocents,” even when the political branches of government have legislated based on sufficient evidence to demonstrate that an affirmative action program serves a legitimate purpose and is not the product of discriminatory animus against the purported “innocents.” Thus, the adjudication criticism discloses important, if subtle, aspects of the power of “innocence.” The Supreme Court has made public-sector affirmative action substantially less likely by piling obstacles and attendant transaction costs in the way of the political branches of government. Like employers, governmental bodies are less likely to take an action if the cost of taking the action is substantially increased. The Court has thereby made a policy choice that society should not risk affecting white and male workers even if the cost is substantial harm to the African-American and female victims of discrimination.

In sum, Meadow and AJ Soprano have helped us to understand both the irrelevance of “innocence” to the merits of decisions about remedies for workplace discrimination and the true role of “innocence” in the workplace discrimination cases. “Innocence,” defined properly and precisely, should not decide whether discrimination in the workplace is remedied and how. The principle that all ill-gotten gains of discrimination must be returned offers a better starting place for a just rule, although some limitations and caveats may apply. A further debate might suggest other limitations, variations, and modifications. But the debate would start with a different premise than “innocence.” Rather than assuming that remedying discrimination deprives white and male workers of their legitimately earned interests, it would assume instead that discrimination has misallocated workplace burdens and benefits. Thus, government’s role would not be to protect the interests of those who have not suffered discrimination, but to reallocate workplace burdens and benefits in a fair way.

Instead, the Supreme Court has avoided an honest debate over the nature and power of “innocence.” It has employed the power

implicit in one definition of “innocence” in cases where a different, narrower definition better fits the facts. As a result of the Court’s bait-and-switch, “innocence” has been a tool of obfuscation and judicial supremacy. “Innocence” has allowed the Court to gloss over the important difference between “punishment” and “returning ill-gotten gains” and thereby cast the victims of discrimination as perpetrators unjustly stealing benefits earned by their co-workers. “Innocence” has been a proxy, if not a cover, for the Court arrogating to itself the power to impose its policy choice — a choice in direct conflict with evidence-supported decisions by the political branches — that workers who have not faced discrimination (i.e., white and male workers) should be allowed to keep the proceeds of discrimination.<sup>213</sup> “Innocence” has allowed the Court to sustain a status quo that leaves social and economic inequalities produced by discrimination in place without taking responsibility for its choice. And “innocence” has hidden the fact that the Court has imposed its choice in the absence of any clear grant of constitutional or statutory authority.

#### IV. CONCLUSION

The Court’s “innocence” jurisprudence amounts to an *a fortiori* argument: white and male workers are “innocent”; therefore, they cannot be required to return property or interests derived from discrimination. But there is “innocence” and there is “innocence.” The Supreme Court’s workplace discrimination cases have implicitly evoked the sleeping infant — the paradigmatic “innocent” — to justify strictly limiting the remedies allowed to the victims of discrimination. Yet, the “innocents” being protected by the Court cannot be fairly analogized to the sleeping infant. They are merely “not the wrongdoers.” This essay expressly invoked television mobster Tony Soprano and his family to examine what it means when workers are “not the wrongdoers” and how much care and protection they are owed because they can satisfy this narrow definition of “innocence.”

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213. See Ross, *Richmond Narratives*, *supra* note 5, at 409-10 (discussing how judicial opinion-writers can deceive the reader by “obscuring the notion of choice that is at the heart of their work”).

The Sopranos metaphor suggests an alternative approach to the question of how courts should take account of “innocent” workers when remedying injuries inflicted on the victims of discrimination. Remedies for employers’ discrimination and societal discrimination should begin with the premise that the ill-gotten gains of discrimination should be returned to the victims of discrimination. This essay does not purport to answer every possible legitimate critique of this “return all ill-gotten gains” principle. Rather, it is a device which serves principally to remind us that the purported “innocence” of third parties is neither an inevitable starting place for discussions about just remedies for workplace discrimination nor an appropriate ending point. The “return all ill-gotten gains” principle offers an opportunity to think anew about remedies for workplace discrimination from a perspective that takes the interests of discrimination victims at least as seriously as the interests of their co-workers.

These battling metaphors directly suggest lessons about how workplace discrimination remedies cases, constitutional affirmative action cases, and Title VII affirmative action cases should be decided. But they also indirectly raise difficult questions about the use of language and metaphor in legal decisions.<sup>214</sup> In part, anti-discrimination statutes and constitutional provisions seek to eradicate the harmful consequences of passions, both conscious and unconscious, born of prejudice. One means to this end is to require employers to replace discriminatory choices with rational decision-making rooted in facts and evidence. To the extent that the Court’s invocation of “innocence” excites our passions or elicits visceral rather than reasoned responses, it undermines this central purpose of anti-discrimination law. “Innocence,” as it has been misused in the workplace discrimination cases, exploits our elemental instinct to protect the most vulnerable while preventing us from pausing to consider whether the object of our concern actually needs or deserves protection and whether someone else, equally vulnerable and actually victimized, holds a better claim to care and

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214. This essay makes no generalized claims about the proper uses of metaphor in the law, although there is a good deal to be said about this subject. See, e.g., Ross, *Rhetorical Tapestry*, *supra* note 4, at 40 (proposing edifying narrative as a remedy for obfuscatory metaphor).



protection. Thus, “innocence” distracts us from the reasoning function that our policy goals hold should lie at the core of judicial decision-making and, in the workplace discrimination realm, employers’ decision-making. As a result, one important antidote to workplace discrimination — rationality — is frustrated by “innocence.”

This essay seems to suggest that the remedy for this malady is the “hair of the dog”; that is, remedying the ill-effects of one evocative phrase and its metaphorical exemplar with a different metaphor which evokes different images and emotions. But this essay illustrates the great difficulty with using a metaphor to explain or justify legal points. The Sopranos metaphor required several variations to permit a full consideration of many of the complex issues raised by these cases, and even these variations do not add up to a global or thorough solution to all of the problems that might be identified. Thus, the cure risks bearing some resemblance to the disease.

There is a risk that replacing one evocative phrase or metaphor with another merely replaces one set of irrational prejudices or incomplete judgments with another, in the worst case, or incomplete consideration of the issues, in a better case. In either case, the threat to accomplishing the goals of our nation’s anti-discrimination laws remains. But if a confrontation over language and metaphors results in full disclosure of the policy choices underlying judicial decision making and greater insight into the appropriate choices, then this endeavor is well worth the effort, in spite of the attending risks.