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Norman W. Spaulding

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PERFECTIONISM AND MAXIMUM CONSCIOUSNESS IN ANTI-DISCRIMINATION LAW: A TRIBUTE TO JUDGE BETTY B. FLETCHER

Norman W. Spaulding*

Abstract: What follows is a speech on the significance of Judge Betty Binns Fletcher's opinions in the area of race and anti-discrimination law delivered at the University of Washington School of Law's symposium, *A Tribute to the Honorable Betty Binns Fletcher*, honoring Judge Fletcher's thirtieth year on the bench. I argue that, in an era when the Supreme Court has increasingly refused to recognize anti-discrimination claims, Judge Fletcher's intensely fact-sensitive method of deciding such cases is as important as the results she has reached. Against the Supreme Court's perfectionist jurisprudence, predicated on the assumption that by excising race from law, one can eliminate discrimination in society, Judge Fletcher has developed a jurisprudence of maximum consciousness, predicated on the assumption that judicial officers are obliged by the Fourteenth Amendment and our history to remain acutely aware of the risk of slippage between seemingly rational, neutral social action and irrational stereotype, cognitive bias, and animus.

I am honored to have the invitation to speak about Judge Betty Fletcher. I should say up front that I am not an empiricist. My method of reflecting on the Judge's decisions on race and the law is the fruit of an impressionistic doctrinal survey, supplemented by something like reverse autobiographical free association. I am not an anti-discrimination expert either, though I have followed some of the doctrine in this area with interest. It is also possible and perhaps more honest to say that anti-discrimination law brought me to law school, though not in any conventional sense. I have not told this story to the Judge before, but I am prompted by reading her cases on race to share it now.

My parents are mixed. My mother is lily white, grew up in a small New England town. My father is black, grew up on the South Side of Chicago. Spauldings, black Spauldings, have always been mixed. Family records go back to North Carolina in the early 1800s and a series of interracial encounters: between a white plantation owner and his slave, the Indian woman the slave married, and the son of the plantation owner who freed the slave by formal court petition in 1825. The slave,

* Nelson Bowman Sweitzer & Marie B. Sweitzer Professor of Law, Stanford Law School, and law clerk to Judge Betty B. Fletcher, 1999–2000. I would like to thank Trevor Morisson for the invitation to give this speech, Samantha Bateman and Caroline Jackson for excellent assistance with research, and the editors of the University of Washington Law Review for agreeing to and assisting in its publication.

Benjamin Spaulding, was born in Duplin County in 1773. Deed records show him owning property as early as 1817, and the 1820 census lists him as a “free man of color,” so the later court petition merely may have recognized a prior understanding between master and slave.¹ Benjamin Spaulding and his wife Edith had ten children, and those children eventually married Indians, whites, and other blacks.²

So, a complicated history of miscegenation was in place long before my parents met in college and decided to marry. Still their choice was not easy. They married within a year of the Supreme Court decision in *Loving v. Virginia*.³ My mother’s family initially disowned her, and it took years before many of them could even so much as meet my father’s eye. My parents told me about *Loving*, and I remember feeling dumbstruck by the idea that a law of any kind might have prevented my parents’ marriage if they had lived in the wrong state. Even though the decision struck down anti-miscegenation laws, the thought of it—of such laws and of the need for judicial intervention in something so intimate, so idiosyncratic, so private—provoked a kind of vertiginous feeling I can now identify as bordering on the existential. The proximity between law and my being, my parents’ well-being, was revealed in a way that made my identity seem more fragile and contingent than I think any child’s should.

If I had not already, at that moment, resolved to be a lawyer, to master the thing that seemed then so opaque and powerful, meeting my father’s friend, a black lawyer from Los Angeles who in the 1970s was working entertainment deals with black musicians, sealed the deal. I have long since lost the pre-release Stevie Wonder LP of *Hotter Than July* he gave me for my ninth birthday, but the idea that law could offer access both to the Constitution and racial equality on the one hand, and to Stevie Wonder on the other, was too much to resist. My father’s friend was a Porsche-driving Thurgood Marshall in my imagination, and the poorer my family became, the more being a lawyer came to symbolize the ultimate professional endeavor—justice, Rhythm & Blues, and a good salary.

Those of you old enough to remember the *Hotter Than July* album will perhaps understand how I conjured this fantastic mélange of social justice and Motown professionalism. The song “Happy Birthday” on the album was dedicated to Martin Luther King, Jr., and the sleeve liner

1. LOUIS D. MITCHELL & JOHN A. SPAULDING, A STORY OF THE DESCENDANTS OF BENJAMIN SPAULDING (1773–1862) WITH GENEALOGY 29 (1989).

2. *Id.* at 30.

3. 388 U.S. 1 (1967).

featured a large photograph of Dr. King with text below making an impassioned plea to make January 15th a national holiday in recognition of “what he achieved and as a reminder of the distance which still has to be traveled.”⁴ On the back of the sleeve liner was a collage of photographs depicting bloody moments in the civil rights movement. In the center is a shot of Dr. King walking, head up, leading a throng of marchers. In my mind at the time, he seemed to be walking toward the law, and it seemed that the vindication of his claims in the law would draw the country out of the racial terror and chaos visible in the surrounding shots.

I say all of this because, having been asked to talk about Judge Fletcher’s influence in the area of race and the law, and in sitting down to read her opinions stretching back thirty years, I have been struck anew by the tension between what I then saw as the promise of civil rights law, and what it has become. I was not naïve about the promise of law. *Loving* taught me not that anti-miscegenation laws were unconstitutional, but that they had been perfectly legal for three hundred years of our history. Seeing my mother and father arrested on false charges when our white landlord called the sheriff because my father had the audacity to refuse to pay rent on grounds of the implied warranty of habitability had already revealed the double-jointedness of formally neutral legal rights and procedures, had already shown me how discriminatory practices move in, through, and beyond legal categories to find expression in and reinforce entrenched social norms.

But there was a real promise in the momentum depicted at the center of the collage on the back of the sleeve liner, a sense that law could vindicate justice, not just stand in the way. To identify law with the photograph of King marching, as I did, rather than with the helmeted white cops in the surrounding scenes of riot and bloodied black bodies, was a promise in itself. The most ambitious term of the promise was that in a constitutional democracy that rather embarrassingly came to have to formally guarantee equal protection of the laws, the institutions of law could work to make that guarantee something more than a glittering constitutional generality.

The appointment of Judge Fletcher to the Ninth Circuit Court of Appeals was a manifestation of this promise, but we all know what happened with anti-discrimination law in the Supreme Court in the decades following.

In the area of school desegregation, the Court moved from conferring

4. STEVIE WONDER, *HOTTER THAN JULY*, Liner Notes (Motown Records 1980).

generous discretion on lower courts to enter effective remedial decrees in *Swann v. Charlotte-Mecklenburg Board of Education*⁵ in 1971 to a series of more restrictive standards in *Milliken v. Bradley I*⁶ and *II*⁷ in the mid-1970s and the *Missouri v. Jenkins* cases⁸ in 1990 and 1995, and finally to striking down even *voluntary* desegregation decrees in *Parents Involved in Community Schools v. Seattle School District*⁹ in 2007.

In the area of affirmative action, the fairly narrow windows opened by *Regents of the University of California v. Bakke*¹⁰ in 1978 and *Fullilove v. Klutznick*¹¹ in 1980 were closed in a series of decisions, most prominently *Wygant v. Jackson Board of Education*¹² in 1986, *Richmond v. Croson*¹³ in 1989, and *Adarand Constructors v. Peña*¹⁴ in 1995, in

5. 402 U.S. 1, 15 (1971) (finding mathematical ratios of white to black students, grouping of non-contiguous school zones, and court-ordered busing to be appropriate measures falling within the district courts' broad remedial powers "to eliminate from the public schools all vestiges of state-imposed segregation").

6. 418 U.S. 717, 744–47 (1974) (holding that busing and other remedies could extend across district lines only where there was actual evidence that multiple school districts had deliberately engaged in a policy of segregation).

7. 433 U.S. 267, 282 (1977) (approving a remedial plan going beyond pupil assignments because the plan was "tailored" to cure the constitutional violation—Detroit's de jure segregated school system—and therefore did not exceed the violation).

8. 515 U.S. 70, 90, 93 (1995) (interpreting *Brown v. Board of Education*, 347 U.S. 483 (1954), to deal only with de jure segregation, and striking down an order that aimed to correct de facto racial inequality on the grounds that the lower courts had used improper guidelines to justify broad relief); 495 U.S. 33, 56–58 (1990) (holding that a district court had abused its discretion by imposing a property tax increase in order to enhance the quality of local schools and thereby attract white students from the suburbs).

9. 551 U.S. 701, 710–11, 747–48 (2007) (prohibiting the assignment of students to public schools based upon racial classifications, even where the school district voluntarily adopted the plan in an effort to achieve racial diversity); *id.* at 730–31 (Roberts, C.J., plurality) (refusing to recognize racial balance as a compelling state interest).

10. 438 U.S. 265, 315–19 (1978) (opinion of Powell, J.) (concluding that the use of rigid quota systems in college admissions is impermissible, but upholding the constitutionality of affirmative action programs that use race as a plus factor).

11. 448 U.S. 448, 482–92 (1980) (concluding that Congress need not act in a completely colorblind manner when exercising its Spending Clause powers to remedy racial discrimination, and upholding a 10% set-aside program for minority business enterprises as a constitutional exercise of congressional authority).

12. 476 U.S. 267, 279–84 (1986) (striking down a provision in a teachers' union collective bargaining agreement that protected less-senior minorities from layoffs as violative of the Equal Protection Clause).

13. 488 U.S. 469, 477–486, 498 (1989) (finding a "generalized assertion that there has been past discrimination in an entire industry" to be an insufficient basis for remedial action, and holding Richmond's minority set-aside program, which reserved 30% of the city's construction contracts for minority business enterprises, unconstitutional under the Equal Protection Clause); *cf.* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 600 (1990) (upholding, by a vote of 5–4, FCC policies giving preference to minorities in the awarding of licenses and providing for "distress sales" to minority buyers

which the Court insisted that even benign and remedial reliance on race would be subjected to “the strictest judicial scrutiny.”¹⁵

In the area of Title VII and other litigation involving statutory civil rights, the Court has eviscerated the continuing violation doctrine, rigidly enforced statutes of limitation, and constrained remedies.¹⁶ Even when Congress has used its enforcement powers under the Reconstruction Amendments to expand statutory remedies for unequal treatment, the Supreme Court has revived a robust antebellum federalism doctrine as a limiting principle.¹⁷

In most of these areas, the case names alone resonate without extended parenthetical elaboration. Reading Judge Fletcher’s anti-discrimination cases against the Supreme Court’s retreat from the

without FCC review because Congress has a legitimate interest in diversity in broadcasting and the programs were narrowly tailored).

14. 515 U.S. 200, 224–27, 239 (1995) (holding that all racial classifications, including those imposed by the federal government, are subject to strict scrutiny and that current disadvantage may not be presumed based merely upon race or proof of past discrimination, remanding for review under this standard a challenge to a financial incentive program in federal contracts for contractors who hired minority subcontractors).

15. *Id.*; *cf.* Grutter v. Bollinger, 539 U.S. 306 (2003) (applying a version of strict scrutiny to affirmative action programs at colleges and universities); Gratz v. Bollinger, 539 U.S. 244 (2003) (same).

16. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628–29 (2007) (barring a female employee’s employment discrimination suit because it was not filed within the 180-day statute of limitations period for Title VII claims); Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002) (limiting the continuing violation doctrine by holding that “discrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges”); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151–52 (2002) (holding that undocumented alien employees may not receive back pay as a remedy for their employers’ violations of the National Labor Relations Act).

17. *See, e.g.*, Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that sovereign immunity principles inherent in the Eleventh Amendment protect state defendants against suit under the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598, 625–27 (2000) (striking down the Violence Against Women Act as an unconstitutional use of Congress’s remedial powers under Section 5 of the Fourteenth Amendment because the Act was not a congruent and proportional remedy to gender-based discrimination by the states); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–91 (2000) (concluding that Congress cannot constitutionally abrogate state sovereign immunity to enforce rights under the Age Discrimination in Employment Act because age is not a suspect classification); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643–47 (1999) (invalidating Congress’s attempt to abrogate state sovereign immunity under the Patent Act because Congress had failed to identify a pattern of pervasive, unremedied constitutional violations); *cf.* Tennessee v. Lane, 541 U.S. 509, 516–34 (2004) (permitting abrogation of state sovereign immunity under the Americans with Disabilities Act in limited circumstances where the fundamental right of access to the courts was involved and there was a sufficient record of the denial of that fundamental right to disabled individuals); Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 728–35 (2003) (allowing abrogation of sovereign immunity under the Family and Medical Leave Act because gender-based discrimination receives heightened scrutiny and the record established a history of such discrimination).

promise of the second reconstruction, two things become very clear. First, Judge Fletcher evinces a very different understanding of what that promise was and what it called upon the judiciary to do. Second, despite the Supreme Court's retreat through the hypocrisy of "strict" scrutiny, she has steadfastly insisted upon exercising meaningful judicial review in anti-discrimination cases. The methodology of her analysis reflects the highest standards of judicial integrity, independence, and fidelity to the principle of due process. More importantly, it reflects one of the animating principles of the second reconstruction—that law can be made proprioceptive, by which I mean made aware of and responsive to its own movement in, and influence on, social action.

First, with respect to the different understandings of what the second reconstruction calls upon judges to do, I want to borrow a criticism Ralph Ellison offers in a book review he wrote in 1945 of an anthology of essays on race provocatively entitled *Primer for White Folks*.¹⁸ Ellison notes his disappointment that notwithstanding the sympathetic attitude of many of the contributors regarding the problem of racism, their normative stance avoids the threshold challenge racism presents to our democratic legitimacy. The authors appear to fear genuine equality, to want to believe that it already exists, or to displace responsibility for bringing it about. As Ellison puts it:

Since hardly any aspect of our culture escapes the blight of hypocrisy implicit in our social institutions, it is not surprising that many of the pieces mix appeal for fair play with double-talk; or that most are much too fearful of that absolute concept "democracy," circling above it like planes being forced to earth in a fog. They seem concerned most often with patching up the merry-go-round-that-broke-down than with the projection of that oh-so-urgently-needed new American humanism.¹⁹

Patching up the merry-go-round that broke down. The metaphor perfectly captures the position of the Rehnquist and Roberts Courts on race. The Court has been much more concerned with patching up neutral constitutional principles, repairing the formal system of the Framers, and protecting private and social institutions from judicial intervention, than in practically securing the guarantee of equality. It has understood the second reconstruction as a mandate to undo discrimination, but by way of a foundational assumption that racism is an exceptional and

18. RALPH ELLISON, *Beating That Boy*, in THE COLLECTED ESSAYS OF RALPH ELLISON 145 (1995).

19. *Id.* at 147.

historically aberrant social practice readily overcome by eliminating race as a legal category. In a word, it is a jurisprudence of perfectionism.

But if the basic promise of the second reconstruction is to humanize the law of equality, to draw it away not only from state-sanctioned subordination but also private subordination under the color of law, it surely calls for a different kind of judicial review. Ellison was not concerned with judicial review, but he was deeply concerned with the kind of historical, moral, and practical consciousness that could move the nation in a more democratic, by which he meant, at least in part, more egalitarian, direction. And he believed that people of all colors would have to make this shift in consciousness animated by a new humanism. In another essay, one of his most elegant and provocative, he describes the effect of this shift as a kind of “maximum consciousness.”²⁰

Maximum consciousness is a provocative term. Ellison uses it to reveal one of the effects of comedy, quoting Kenneth Burke’s observation that comedy can “enable us to be observers of ourselves while acting. Its ultimate end would not be passiveness but maximum consciousness. [It should allow] one to ‘transcend’ himself by noting his own foibles . . . [and should] provide a rationale for locating the irrational and the non-rational.”²¹ To this, Ellison, acutely aware of the reversals in understanding of oneself and others that comedy makes possible, adds, “[t]he greater the stress within society the stronger the comic antidote required.”²²

Judge Fletcher’s anti-discrimination decisions display the operation of a kind of maximum consciousness. The method, if I may generalize, has three key features: 1) a presumption that neither status nor circumstance creates any immunity from anti-discrimination law; 2) an acute awareness of social context, particularly the ubiquitous risk of slippage between seemingly rational, neutral social action and irrational stereotype or cognitive bias; and 3) exhaustive attention to factual nuance.

From one of the Judge’s earliest opinions, a 1981 case holding that black enlisted navy officers have a right under *Bivens v. Six Unknown Named Agents*²³ to judicial review of racial discrimination in duty

20. RALPH ELLISON, *An Extravagance of Laughter*, in THE COLLECTED ESSAYS OF RALPH ELLISON, *supra* note 18, at 613, 647.

21. *Id.*

22. *Id.* It is no accident that the essay from which this quote is drawn explores the place of comedy in race relations.

23. 403 U.S. 388 (1971).

assignments,²⁴ to a case decided shortly after the 9/11 attacks in which she upheld the right of a Lebanese school teacher to challenge her suspension for false allegations that she made a bomb threat,²⁵ the Judge has been adamant that, with narrow exceptions, no social role is too privileged and no emergency too dire to warrant immunity from constitutional and statutory anti-discrimination guarantees. Judge Fletcher was reversed in the navy officers' case two years later, but the Supreme Court had to duck inconvenient nineteenth-century case law in order to conclude that superior military officers have a constitutionally unique status.²⁶

The Judge's acute sensitivity to social context and the risk of cognitive bias works in and through her attention to factual nuance. In opinion after opinion, one sees painstaking, elaborately detailed review of the record below. In the process, overt but overlooked or subtle biases in the defendant employer's decision making, or in the defendant public institution's policies, come sharply into relief. More than that, unconscious biases and missteps in trial court decisions under review are revealed. And one suspects that the Judge's scrupulous attention to context and factual nuance has the effect of checking even her own presuppositions and the assumptions of her colleagues in conference.

Some of the most striking anti-discrimination cases the Judge has decided involve the reversal of summary judgment or judgment as a matter of law for defendants in Title VII cases. An apparently compelling and legitimate non-discriminatory business reason suddenly evaporates when a fact ignored or improperly dismissed by the trial court is carefully extracted from the record to establish pretext. As the Judge delicately admonished in a 1989 retaliation case:

As a summary procedure, a directed verdict should be used judiciously, particularly in cases involving issues of motivation or intent. An employee's claim of retaliatory discharge requires a determination of an employer's true motivation, an elusive factual question which is difficult to ascertain and generally

24. *Wallace v. Chappell*, 661 F.2d 729, 730 n.1, 736 (9th Cir. 1981).

25. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1189 (9th Cir. 2003).

26. *See Chappell v. Wallace*, 462 U.S. 296, 305 n.2 (1983) (purporting to distinguish an 1851 case, *Wilkes v. Dinsman*, 48 U.S. 89 (1851), in which the Supreme Court upheld a common law cause of action by a marine against his commanding officer for damages suffered as a result of punishment and illegal detention on board after the expiration of his term of enlistment). Judge Fletcher later maintained that the Court had not fully reversed course in *Chappell*. *See Gonzalez v. Dep't of Army*, 718 F.2d 926, 929 (9th Cir. 1983) ("Implicit in the court's order of remand is the recognition that, in some situations at least, uniformed members of the Armed Services may assert that their constitutional and statutory rights have been violated by their superiors.").

unsuitable for summary disposition.²⁷

This was a “delicate” admonition because in the preceding three-and-a-half pages, the Judge offered a comprehensive reconstruction of evidence indicating that the two black plaintiffs had been laid off within weeks of filing EEOC discrimination charges by the very same company officers whose actions had prompted the EEOC complaints, and that the employees had been laid off on economic grounds when they had quite heavy workloads while other employees were transferred in order to avoid layoffs.²⁸ Her opinion also takes four pages to individually review and overturn the district court’s erroneous exclusion of relevant evidence.²⁹

In an era of appellate adjudication in which overloaded dockets have inspired a new level of judicial imperialism and deference to managerial district court judges,³⁰ it is refreshingly retro-chic to see skepticism about the legitimacy of pre-verdict disposition in factually controverted cases. The point is not that all the plaintiffs were entitled to prevail, and I don’t take that to have been the Judge’s point either. What is significant is her disposition with respect to uncertainty, particularly uncertainty regarding a social problem precious few are capable of admitting we still have. Like Ellison, the Judge understands that we cannot locate the irrational and the non-rational if we don’t bother to look.

Too few appellate judges order and review the entire record below for each case they hear on appeal. But this simple practice, to which the Judge religiously adheres, operates to forestall the seemingly irresistible and ubiquitous temptation to conclude that racial motive is absent, to believe that good intentions cannot be mixed with bad, to believe, in short, the perfectionist thesis that we have overcome, or are on the verge of overcoming, racial subordination.³¹ Maximum consciousness.

27. *Miller v. Fairchild Indus.*, 885 F.2d 498, 506 (9th Cir. 1989) (internal citation omitted).

28. *Id.* at 503–06.

29. *Id.* at 511–15. In a 2002 case reversing summary judgment for the employer, she carefully reviewed the record to show that the plaintiffs could not legitimately have been denied promotions on the ground that they were not qualified when the employer had, over a period of years, systematically excluded them from work details that would have given them the necessary training and skills for the positions they were denied. *Lyons v. England*, 307 F.3d 1092, 1115–16 (9th Cir. 2002).

30. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1950–53 (2009) (following the new pleading standard of *Bell Atlantic Corp. v. Twombly* and dismissing as implausible claims of supervisory liability against government officers who allegedly designed a policy of targeting Arab and Muslim men for detention and harsh treatment after the attacks of September 11, 2001); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560–64 (2007) (rejecting the notice pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), and adopting a new “plausibility” standard).

31. Or, as Justice O’Connor has suggested, that we shall have overcome it in twenty-five years.

There is a deep humanism in the Judge's method of maximum consciousness as well. One could give many examples, for there are many cases insightfully construing civil rights laws, and they are regularly cited in other courts around the country.³² But the example I'd like to give in closing is one I suppose most of us would consider an unremarkable case.

Clement Sumner was a black postal worker fired for insubordination.³³ The trial court entered a defense verdict after a five-

See Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

32. There are a number of examples in the area of racial discrimination. *See, e.g.*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) (citing *Raad v. Fairbanks N. Starborough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003) (B. Fletcher, J.) (holding that discrimination in hiring can be found on the basis of qualifications alone when the complaining applicant's qualifications are “clearly superior” to those of the selected job applicant—a more lenient standard than in some other circuits)); *Smith v. Berghuis*, 543 F.3d 326, 335 (6th Cir. 2008) (citing and following *U.S. v. Rodriguez-Lara*, 421 F.3d 932, 940 (9th Cir. 2005) (B. Fletcher, J.) (holding that, when alleging discrimination in jury selection, “the fair cross-section claim does not require a showing that the selection procedure is susceptible of abuse or not race-neutral; the defendant must only show that the exclusion of his or her group is ‘systematic’”)); *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) (citing and following *B.K.B. v. Maui Police Dep't.*, 276 F.3d 1091, 1103 (9th Cir. 2002) (B. Fletcher, J.) (authorizing sanctions under 28 U.S.C. § 1927 contingent upon a finding of recklessness or bad faith; allowing plaintiffs more leniency in pleading requirements for discrimination claims, as “[c]omplainants filing discrimination charges are acting as laypersons and should not be held to the higher standard of legal pleading by which [a court] would review a civil complaint”)); *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1257 (10th Cir. 2001) (citing and relying upon *Pavon v. Swift*, 192 F.3d 902, 910–11 (9th Cir. 1999) (B. Fletcher, J.) (holding that compensatory damages awards under 42 U.S.C. § 1981 are not subject to the statutory cap contained in 42 U.S.C. § 1981a(b)(3))).

In the area of anti-discrimination law more generally, *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000) (B. Fletcher, J.), adopted the EEOC's definition of an “adverse employment action” under Title VII—that is, that such action need not constitute an ultimate employment action, but may instead constitute “any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity,” with the severity of the retaliatory action determining damages and not liability. 217 F.3d at 1242–43. Several courts have cited and relied upon *Henderson*. *See, e.g.*, *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 61 (2006); *Jensen v. Potter*, 435 F.3d 444, 448 (3d Cir. 2006); *Rochon v. Gonzales*, 438 F.3d 1211, 1217 (D.C. Cir. 2006); *Noviello v. City of Boston*, 398 F.3d 76, 89 (1st Cir. 2005); *White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789, 809 (6th Cir. 2004) (Clay, J., concurring); *Gregory v. Daly*, 243 F.3d 687, 701 (2d Cir. 2001); *Thomas v. Ragland*, 324 F. Supp. 2d 950, 975 (W.D. Wis. 2004); *Johnson v. Milwaukee Sch. of Eng'g*, 258 F. Supp. 2d 896, 906 (E.D. Wis. 2003); *Gonsalves v. Nissan Motor Corp.*, 58 P.3d 1196, 1209 (Haw. 2002); *Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 69 (Haw. 2001); *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 679 (Iowa 2004); *Madeja v. MPB Corp.*, 821 A.2d 1034, 1044 (N.H. 2003). Another example in this area is *Yamaguchi v. U.S. Department of the Air Force*, 109 F.3d 1475 (9th Cir. 1997) (B. Fletcher, J.), which held that employers are liable for employees' harassing behavior if they know the conduct is taking place and fail to take adequate remedial measures to address it. *Yamaguchi* was cited with approval in *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998).

33. *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 205–06 (2d Cir. 1990) (B. Fletcher, J., sitting by

day bench trial, stating that Sumner's race discrimination claims were "conclusory and generalized" and that he had failed to substantiate his claim of retaliation.³⁴ The case tracks an all-too-common workplace pattern. Sumner is regularly given disproportionate sanctions for minor infractions on the job. When he begins to complain, and to identify preferential treatment given to white co-workers, inflated write-ups escalate to suspensions. With a disciplinary record in place, one of his former supervisors confronts Sumner over a trumped-up safety violation. Sumner walks away, but is re-confronted, accused of insubordination, and then fired.³⁵

The evidence at trial showed that flagrant insubordination by white employees was regularly overlooked, that the former supervisor accused Sumner of having a "war-like attitude" but could only give as evidence the fact that Sumner had complained about racial discrimination in the distribution of assignments.³⁶ Combined with the disputed safety violation that might have been enough to reverse, but the Judge looked even deeper, uncovering direct evidence of discrimination in the testimony of another supervisor at the initial EEOC hearing. The supervisor conceded that his boss "didn't care for . . . Black, Hispanic, and Latin background people."³⁷

Judge Fletcher reversed the judgment in the *Sumner* case, but what strikes me about the opinion is less the result itself than the effect of the careful narrative rendering of the workplace conflict. Sumner is freed from the stereotype of the angry black employee, and seen instead as an employee struggling to preserve his dignity in a racially charged environment. When read against the context of the inflated prior write-ups, the moment of confrontation between Sumner and his former supervisor shifts from insubordination to a kind of set-up toward which the supervisor, wittingly or not, had been steering Sumner for months. Sumner saw the set-up and tried to avoid it, but he was still fired.

This moment is one of the most basic and insidious aspects of racial subordination, the moment when it becomes clear that any course of action will be arbitrarily punished. The moment is crushing, an open

designation).

34. *Sumner v. Postmaster Gen.*, No. 86 CIV. 9301(KC), 1989 WL 66674, at *7 (S.D.N.Y. June 15, 1989).

35. *Sumner*, 899 F.2d at 205–08.

36. *Id.* at 210.

37. *Id.* at 211. The same move of unearthing ignored facts appears throughout her 1984 decision reversing the district court's refusal to order desegregation of the San Jose School District, in *Diaz v. San Jose Unified School District*, 733 F.2d 660 (1984).

invitation to despair, to anomie. The Judge not only sees it, sees that the district court missed it entirely, she represents that moment in a detail that reverses the logic of subordination by reversing the perspective that systematically renders these moments invisible. Maximum consciousness.

To reconstruct the plaintiff's experience from the record in this way is itself humanizing, drawing a counter-narrative to the disgruntled troublemaker the district court too quickly assumed was before it, demonstrating that the counter-narrative is in fact the dominant, if not uncontested, narrative located in the record evidence. This method is Ellison's new humanism in action: humble, inquisitive, constitutively attentive to the fallibility of all human endeavors, and most importantly, off the merry-go-round of racial perfectionism. The effect is to turn the law toward democracy, toward equal dignity, not just equal rights—in short, toward the vindication of promises we have already made.

Thank you, Judge Fletcher. Thank you for being so careful with these cases. Thank you for bringing maximum consciousness to the law. And warmest congratulations on thirty years on the bench. I could not be more honored to have served as your clerk.