

This kind of advocacy has not only come from appointees of elected officials, but also from some groups representing people of color. For example, while fighting for classical liberalism and affirmative-action liberalism, some local civil rights groups have supported integration of police departments with racial realist intents.<sup>134</sup>

Though it is not clear how often hiring occurs with racial realist motivations, it is clear that the hiring of nonwhite officers rose dramatically following the 1960s' racial violence and the strong advocacy of racial realist hiring and placement. Specifically, in the years between 1967 and 2000, minority employment increased in several police forces, including those in New York City (from 5% to 35%); Chicago (20% to 40%); Philadelphia (20% to 40%); Detroit (5% to 65%); and San Francisco (5% to 40%).<sup>135</sup>

#### **IV. THE PEOPLE AND RACIAL REALISM, PART II: THE PRIVATE SECTOR AND THE RACIAL REALIST STRATEGY**

In the private sector, it might be said that The People acted on their own: racial realism appears to be just as entrenched as in government employment. It is a prominent strategy and is often advocated in several fields, including medicine, business (especially marketing), and entertainment. It may be a part of any business that has some interaction with diverse populations, and where employers may perceive that racial abilities help them understand customers or use racial signaling to make customers feel a sense of trust.<sup>136</sup>

Medicine is an especially compelling sector for racial realism because the stakes are so high. Here, there was some vague statutory acknowledgement of

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134. NICHOLAS ALEX, *BLACK IN BLUE: A STUDY OF THE NEGRO POLICEMAN* 28-29 (1969); LEONARD MOORE, *BLACK RAGE IN NEW ORLEANS* (2010).

135. Sklansky, *supra* note 90, at 1214.

136. See the discussion of how minorities can provide "access and legitimacy" to businesses dealing with diverse populations in David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, 74 HARV. BUS. REV. 79, 83 (1996). For a sense of how widespread employer use of racial realism may be, consider the findings of sociologists Eric Grodsky and Devah Pager, who observed that African Americans may earn opportunities but lower pay than whites in occupations when their clients are also black. Black clients are, on average, poorer than nonblack clients, and this depresses income when employers place blacks with same-race clients based on their perceived racial abilities or signaling. Grodsky and Pager find that there are fewer racial disparities in earnings when customer relations are not a measure of productivity, as in the case of bus drivers. Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC. REV. 542, 561 (2001).

the value of physicians' varying racial abilities. The Minority Health and Health Disparities Research and Education Act of 2000 contains provisions to encourage the training and hiring of nonwhite physicians,<sup>137</sup> and Senator Edward Kennedy (D-MA) argued for the bill to his colleagues with racial realist arguments emphasizing white physicians' inability to give the same treatment to African American patients that they give to white patients.<sup>138</sup>

There has been considerable action on this outside of government as well. A vice president of a Boston HMO, Harvard Pilgrim Health Care, explained very clearly a racial realist hiring rationale when she told *Fortune* magazine that the company had a "diversity imperative" because "[m]any of these [minority] customers demand health care workers who aren't judgmental—and we have to make sure we provide them."<sup>139</sup> Various foundations, commissions, and professional organizations have also promoted racial realism in the employment of physicians and other health workers, including the Commonwealth Fund,<sup>140</sup> the Kellogg Foundation's Commission on Diversity in the Healthcare Workforce (headed by George H.W. Bush's Health and Human Services Secretary, Louis W. Sullivan),<sup>141</sup> the American Medical Student Association,<sup>142</sup> the Institute of Medicine's Committee on Institutional and Policy-Level Strategies for Increasing the Diversity of the U.S. Health Care Work Force,<sup>143</sup> the American Hospital Association,<sup>144</sup> and the American College

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137. Minority Health and Health Disparities Research and Education Act of 2000, Pub. L. No. 106-525, 114 Stat. 2495 (codified at 42 U.S.C. § 287c-32 (2006)).
138. 145 CONG. REC. S14,288 (daily ed. Nov. 8, 1999) (statement of Sen. Kennedy).
139. Kenneth Labich & Joyce E. Davis, *Making Diversity Pay*, FORTUNE, Sept. 9, 1996, [http://money.cnn.com/magazines/fortune/fortune\\_archive/1996/09/09/216617/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1996/09/09/216617/index.htm).
140. JOSEPH R. BETANCOURT ET AL., *Cultural Competence in Health Care: Emerging Frameworks and Practical Approaches*, COMMONWEALTH FUND 17 (Oct. 2002), [http://www.commonwealthfund.org/usr\\_doc/betancourt\\_culturalcompetence\\_576.pdf](http://www.commonwealthfund.org/usr_doc/betancourt_culturalcompetence_576.pdf).
141. *Missing Persons: Minorities in the Health Professions*, SULLIVAN COMM'N ON DIVERSITY HEALTHCARE WORKFORCE 18-25 (Sept. 2004), [http://health-equity.pitt.edu/40/1/Sullivan\\_Final\\_Report\\_000.pdf](http://health-equity.pitt.edu/40/1/Sullivan_Final_Report_000.pdf).
142. Chris Rauber, *Shortage of Minority Doctors Proves Hard to Cure*, S.F. BUS. TIMES, Mar. 19, 2004, <http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2004/03/22/focus2.html>.
143. INST. OF MED., IN THE NATION'S COMPELLING INTEREST: ENSURING DIVERSITY IN THE HEALTH-CARE WORKFORCE (Brian D. Smedley et al. eds., 2004), [http://www.nap.edu/openbook.php?record\\_id=10885](http://www.nap.edu/openbook.php?record_id=10885).
144. EMILY FRIEDMAN, WHITE COATS AND MANY COLORS: POPULATION DIVERSITY AND ITS IMPLICATIONS FOR HEALTH CARE: AN ISSUE BRIEFING PREPARED FOR THE AMERICAN HOSPITAL ASSOCIATION 40-42 (2005), [http://www.scha.org/files/documents/WhiteCoatsManyColors\\_o.pdf](http://www.scha.org/files/documents/WhiteCoatsManyColors_o.pdf).

of Physicians.<sup>145</sup> In the *Grutter v. Bollinger* Supreme Court case regarding racial preferences in law school admissions, thirty different groups (including the American Medical Association and associations representing dentists, pharmacists, and nurses) signed on to an amicus brief that used racial realist rationales for physician employment.<sup>146</sup> According to a 2006 report of the Department of Health and Human Services,

[G]reater health professions diversity will likely lead to improved public health by increasing access to care for underserved populations, and by increasing opportunities for minority patients to see practitioners with whom they share a common race, ethnicity or language. Race, ethnicity, and language concordance, which is associated with better patient-practitioner relationships and communication, may increase patients' likelihood of receiving and accepting appropriate medical care.<sup>147</sup>

Racial realism is also a prominent strategy in marketing. Nonwhite marketing professionals have promoted their own racial abilities to reach racially concordant consumers since the middle years of the twentieth century; in 1953, African American marketers formed their own association, the National Association of Market Developers, to promote the use of blacks to market to blacks.<sup>148</sup> Firms dominated by whites have also seen the hiring of nonwhites to market to nonwhites as smart business strategy.<sup>149</sup> This was becoming common by the 1990s, and so it was unremarkable for *Fortune* magazine to state in 1996, "a company with a diverse work force will have an easier time serving markets that themselves are becoming more

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145. AM. COLL. OF PHYSICIANS, RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE, UPDATED 2010, 13-14 (2010), [http://www.acponline.org/advocacy/current\\_policy\\_papers/assets/racial\\_disparities.pdf](http://www.acponline.org/advocacy/current_policy_papers/assets/racial_disparities.pdf).

146. Brief of the Ass'n of Am. Med. Colls. et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

147. Bureau of Health Professions, *The Rationale for Diversity in the Health Professions: A Review of the Evidence*, U.S. DEP'T HEALTH & HUM. SERVS. 3 (2006), <http://bhpr.hrsa.gov/healthworkforce/reports/diversityreviewevidence.pdf>.

148. JASON CHAMBERS, MADISON AVENUE AND THE COLOR LINE: AFRICAN AMERICANS IN THE ADVERTISING INDUSTRY 66 (2009).

149. SKRENTNY, *supra* note 17, at 63-65.

multicultural.”<sup>150</sup> The notion of racial abilities extends beyond marketing strategy to customer relations in general.<sup>151</sup>

In sociologist William Bielby’s analysis of a major finance firm, the practice of matching African American financial advisors with African American clients was described in a 2005 internal report as something that occurred “always.” It led to frustrations among the clients, who resented the higher turnover among the African American financial advisors. The report stated:

Advisors and managers criticized always trying to fit an African American client with an African American advisor, especially when an advisor leaves the business. Because of the high turnover of African American advisors, this often results in a client being paired with 2 or 3 advisors just because they are African Americans. Ultimately, this “shuffling” results in the client becoming frustrated and requesting a white advisor, because they feel they will provide a more stable relationship.<sup>152</sup>

Racial realist arguments were made explicit in a legal context in the amicus brief of the Fortune 500 companies in the 2003 *Grutter v. Bollinger* case.<sup>153</sup> That brief argued that firms with many nonwhite employees “are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to these consumers” and “a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world.”<sup>154</sup>

Another prominent racial realist strategy in the business sector is to leverage racial abilities for the innovation and dynamism that “diversity” is thought to confer to any phase of the business operation.<sup>155</sup> As explained by a personnel executive of the Cummins Engine Company in 1986, “differences

150. Labich & Davis, *supra* note 139.

151. Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 244 (2001).

152. William T. Bielby, *Minority Vulnerability in Privileged Occupations: Why Do African American Financial Advisers Earn Less than Whites in a Large Financial Services Firm?*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 13, 24 (2012).

153. 539 U.S. 306 (2003).

154. Brief for 3M et al. as Amici Curiae in Support of Defendants-Appellants at 10, *Grutter*, 539 U.S. 306 (No. 01-1447).

155. SKRENTNY, *supra* note 17, at 71-74.

among people of various racial, ethnic, and cultural backgrounds generate creativity and innovation as well as energy in our work force.”<sup>156</sup>

Firms made similar arguments in amicus briefs for the *Grutter* case. MTV Networks submitted a brief that stated, “[t]he continual innovation required for success in the industry depends on heterogeneity in MTV’s creative work-teams.”<sup>157</sup> The Fortune 500 companies’ brief stated, “a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives.”<sup>158</sup> More recently, Fortune 100 corporations submitted a brief in the *Fisher v. University of Texas* case making a more vague but nevertheless racial realist argument, stating that “[f]or amici to succeed in their businesses, they must be able to hire highly trained employees of all races, religions, cultures and economic backgrounds.”<sup>159</sup>

Perhaps nowhere is racial realism more openly practiced than in the advertising and entertainment sectors. Here, employers seek to cater to customer tastes by deploying racial signaling, typically seeking to appeal to different consumers by using models or actors of concordant racial phenotypes.<sup>160</sup> When I say it is openly practiced, I am referring to the still-common practice of specifying race in casting calls, or “breakdowns,” where race is frequently specified as a way to achieve organizational goals (optimal audience reaction) rather than opportunity or justice goals for models and actors.<sup>161</sup>

It took several decades and much pressure from civil rights groups for advertisers to begin to cast nonwhites with regularity,<sup>162</sup> but by the 1990s it became commonplace. For example, a study of 813 morning and daytime

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156. BUREAU OF NAT’L AFFAIRS, AFFIRMATIVE ACTION TODAY: A LEGAL AND PRACTICAL ANALYSIS 93 (1986).

157. Motion for Leave to File Brief Amicus Curiae Out of Time and Brief of MTV Networks in Support of Respondents at 6, *Grutter*, 539 U.S. 306 (Nos. 02-241 & 02-516).

158. Brief for 3M et al., *supra* note 154, at 10.

159. Brief for Fortune-100 and Other Leading American Businesses as Amici Curiae Supporting Respondents at 2, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). This brief also emphasized a less racial realist argument, stressing at several points that these firms wanted employees, presumably of any race, who had been educated in a racially diverse environment.

160. SKRENTNY, *supra* note 17, at 158-59.

161. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 10 (2007).

162. SKRENTNY, *supra* note 17, at 158.

children's television commercials in 1997 found that African Americans appeared in about 51% of all commercials, Asian Americans appeared in 9%, and Latinos in about 9%.<sup>163</sup> Advertisers appear unwilling to risk making whites feel unwelcome, however, as this group appeared in 99% of the ads.<sup>164</sup>

This suggests another feature of racial realism in media and entertainment: it is in this sector that racial realism for *whites* is most prominent.<sup>165</sup> Movie studios are afraid of casting too many nonwhites in a film, and this leads to the common practice of a black *and* a white actor sharing lead roles.<sup>166</sup> The *Los Angeles Times* appeared unaware that it might be discussing a violation of classical liberalism's ban on catering to customer discrimination when it reported, "[s]tudios are more comfortable casting actors of color, such as Jennifer Lopez and Will Smith, despite their popularity, when they include a white star to ensure 'mainstream' appeal."<sup>167</sup>

In the low-skilled sector—in jobs in construction, manufacturing, food service, and other fields—a racial and often immigrant realist strategy may be admitted in interviews with social scientists or journalists.<sup>168</sup> Employers in these fields state that Latinos and Asians make the best workers, often or especially when they are foreign-born, because they have abilities that other groups lack.<sup>169</sup> Typically, the most prized quality is the ability to work long and hard despite poor working conditions and low pay.<sup>170</sup> Though racial realism in this sector uses the perceived abilities of nonwhites, as in the other sectors, it is the least defensible because it reproduces the same hierarchies in nearly all jobs (Asians and Latinos above whites and especially above blacks, and immigrants above American-born workers), and it might even be said (following

163. Hae-Kyong Bang & Bonnie B. Reece, *Minorities in Children's Television Commercials: New, Improved, and Stereotyped*, 37 J. CONSUMER AFF. 42, 55 (2003).

164. *Id.*

165. Some use of race in casting may be based on artistic considerations related to historical authenticity, and though Title VII does not appear to authorize racial realism in this context, it is unlikely to be challenged. I thank Christine Jolls for emphasizing this point to me. On the complexity of "social geography" and how this may lead to selective enforcement of discrimination law, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 25 (2000).

166. SKRENTNY, *supra* note 17, at 168.

167. Robinson, *supra* note 161, at 19 n.74 (describing the implication of the *Los Angeles Times* article).

168. SKRENTNY, *supra* note 17, at 222-27.

169. *Id.*

170. *Id.*

Ackerman) to humiliate not only the excluded, but also the preferred, who are often exploited, especially when they are migrants. Because of the EEOC's recent efforts to challenge racial realism in low-skilled employment, there is a growing list of successful cases and settlements against employers using racial realist preferences for Asian and Latino immigrants.<sup>171</sup>

#### V. IS RACIAL REALISM THE PEOPLE'S AMENDMENT TO THE CIVIL RIGHTS REVOLUTION?

Ackerman argues that the Civil Rights Revolution was a movement of the American people to remake the foundational legal framework of the nation. It resulted in statutes, administrative regulations, and court rulings that worked toward the ends of justice, and it achieved justice by eliminating systematic, race-based humiliation of minority groups, as well as humiliation of persons marked by sex, national origin, and religious differences.

Is the movement toward racial realism similarly a movement of The People? And how are we to assess its fit with the Civil Rights Revolution?

First, as stated above, federal, state, and local governments have through their actions and/or words shown at least some support for racial realism. They have done so in their use of appointments to executive, judicial, and party leadership posts, and in the hiring of law enforcement officers and teachers. Government use of racial realist strategies, especially by elected officials, at least implies the support of The People.

In other ways, racial realism appears to be a movement of The People. Specifically, employers are part of The People, as are advocates, activists, members of professional organizations, and others affiliated with medicine, business, and media and entertainment, and they have in various ways shown their support for racial realism.

When the government and private organizations and employers have used racial realist strategies—or advocated for their usage—objection, criticism, and controversy is typically limited to specific instances of hiring and placement, at least since the 1980s. Supporters of racial realism in skilled and professional

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171. See, e.g., *EEOC v. Paramount Staffing, Inc.*, No. 2:06-cv-2624 (W.D. Tenn. Aug. 19, 2010); *EEOC v. Propak Logistics, Inc.*, No. 1:09-cv-311, 2010 WL 3081339 (W.D.N.C. Aug. 6, 2010); *EEOC v. Little River Golf, Inc.*, No. 1:08-cv-546 (M.D.N.C. Aug. 6, 2009); *EEOC v. E & T Foods, L.L.C.*, No. 3:06-cv-318 (W.D.N.C. Jan. 28, 2008). For a discussion of racial realism in the low-skilled sector and legal challenges to it, see SKRENTNY, *supra* note 17, at 216-64.

jobs typically are proud of what they are doing, and appear to expect to be praised rather than criticized.

Yet there are reasons to question the constitutional equivalence of racial realism and the Civil Rights Revolution. First, there are no government spokespersons clearly articulating why the nation should be moving toward racial realism. Presidents or members of Congress may mention it in passing, but there are no speeches comparable to those of Martin Luther King, Jr., Lyndon Johnson, or Hubert Humphrey that show how racial realism fits with American traditions and why it is the right thing for employers to be doing. It has happened slowly, in a piecemeal fashion, mostly in the background, until it has become commonplace while rarely being acknowledged.

Second, and relatedly, racial realism lacks an authorizing statute. Racial realism has come up in Congress, such as when Senator Kennedy argued for the Minority Health and Health Disparities Research and Education Act of 2000, but no senator recognized its distinctiveness from classical liberalism or affirmative-action liberalism at that time. The wisdom or justice of racial realism has never really been debated in Congress or any public venue that I am aware of, nor has its fit with the Civil Rights Revolution.

Moreover, in addition to the lack of an official, acknowledged “green light” for racial realism, there appear to be red lights ordering it to stop, or warning lights suggesting this strategy of management is not a good idea. There are court decisions denying its legality or constitutionality, including at the Supreme Court level. The EEOC guidelines at best suggest “caution” when using racial realism<sup>172</sup>—and at some points appear to deny the legality of racial realism altogether.<sup>173</sup>

There is a third way that racial realism is distinct from the Civil Rights Revolution. If Ackerman is correct that a goal of that revolution was to end institutionalized humiliation of minority groups, then it is very much a problem that some nonwhites have resisted some racial realist strategies. While I have thus far emphasized the humiliation that comes about from the practice of racial realism in the low-skilled employment sector, the humiliation of people of color is also apparent in some studies of business and professional employees. Some complain poignantly of being “dead ended” in jobs that are intended to leverage racial abilities or signaling but have little direct connection

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172. EEOC COMPLIANCE MANUAL, *supra* note 25, § 15.

173. *Id.*

to profit generation and thus lack promotion possibilities.<sup>174</sup> Racial realism can also be used in strategic ways that nevertheless do not lead to hiring of nonwhites beyond token levels.<sup>175</sup> Most importantly, some nonwhites have challenged their racial realist work assignments in court—a dynamic that is apparently quite rare (or nonexistent) when employers use classical liberal or affirmative-action liberal strategies to hire and place workers.<sup>176</sup>

Finally, while private employers are themselves members of The People, it is difficult to argue that they are acting with the same kind of authorization and spokesperson status that the leaders of the Civil Rights Revolution had. These employers and various civil society advocates are unelected, and they are accountable to shareholders, funders, or to no one. When employers and other elites are creating their own version of employment law,<sup>177</sup> it at least suggests that we have moved beyond the Civil Rights Revolution, but it also suggests that perhaps we should not have made this move. At the very least, the phenomenon needs to be acknowledged, and brought in line with the justice and opportunity goals that are still widely embraced.

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174. COLLINS, *supra* note 49, at 77.

175. See Shin & Gulati, *supra* note 50, at 1053; David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1594 (2004) (“My interviews are replete with examples of black lawyers who have been trotted out to impress a black politician or corporate counsel and then trotted back into the oblivion from whence they came, never to see the work that their diversity helped to procure.”).

176. This was the case with *Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999), discussed above. For a challenge by nonwhites to a racial realist policing strategy, see *Patrolmen’s Benevolent Ass’n v. City of New York*, 74 F. Supp 2d 321, 329 (S.D.N.Y. 1999). The Walgreens drugstore chain had a strong record of hiring African American store managers and placing them in African American neighborhoods, but this practice was challenged by some African American managers, and the EEOC took up the case. Walgreens settled out of court, agreeing to pay 10,000 black employees a total of \$24 million. Press Release, EEOC, Final Decree Entered with Walgreens for \$24 Million in Landmark Race Discrimination Suit by EEOC (Mar. 25, 2008), <http://www.eeoc.gov/eeoc/newsroom/release/3-25-08.cfm>; Press Release, EEOC, Walgreens Sued for Job Bias Against Blacks (Mar. 7, 2007), <http://www.eeoc.gov/eeoc/newsroom/release/3-7-07.cfm>.

177. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 138–58 (2009).