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Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences

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Abstract

Legal conceptions of employment discrimination have become increasingly narrow over the past two decades as the law has adopted a “perpetrator” model of discrimination that emphasizes purposeful intent. This tendency runs counter to social scientific research that documents the pervasiveness of unintentional bias and the persistence of organizational processes that generate workplace discrimination. This narrow legal conception, coupled with a system of employment discrimination litigation that emphasizes individual claims and individual remedies, fails to support the organizational approaches that are most promising for redressing workplace discrimination. We review the literature on employment discrimination law, discrimination litigation, continuing patterns of racial and gender inequality, the organizational bases of discrimination, and the impact of equal employment law on organizations. We conclude by discussing the reasons for and implications of this divergence between law and social science.

This review analyzes recent developments in conceptions of employment discrimination in American law and social science. Plaintiffs gained new rights in the early 1990s, and the number of lawsuits filed in federal court rose, but the predominant trend in federal judicial opinions since the 1970s has been to narrow the definition of discrimination and the effective reach of legal remedies. Judicial opinion and state constitutional amendments also have limited the acceptable use of affirmative action to reduce workplace inequality. The increasingly narrow conception of employment discrimination that underlies this movement in the law stands in stark contrast to new research in sociology and psychology that conceives of discrimination with greater nuance and in broader terms. After summarizing these trends in law and considering social scientific critiques of them, we review empirical studies of the workplace structures that contribute to racial and gender inequalities.

NARROWING CONCEPTIONS OF DISCRIMINATION IN LEGAL DOCTRINE

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination and segregation by race, color, religion, national origin, and sex, and the Equal Employment Opportunity Commission (EEOC) oversees and monitors enforcement of Title VII. Executive Order 11246, signed by President Lyndon Johnson in 1965, prohibits government contractors from such discrimination, as well. The order also obliges contractors to "take affirmative action" that ensures fair treatment of employees by aggressively recruiting racial minorities and women into the applicant pool (Graham 1992). Historically, these antidiscrimination laws were motivated by and prioritized race discrimination in the workplace (Burstein 1985). Both jurisprudence and social scientific research concerning employment discrimination have focused on race and gender (e.g., Blakenship 1993), and, since the early 1970s, race and gender have been the most common

forms of discrimination alleged by individuals who file claims of discrimination in federal court (Donohue & Siegelman 1991, Nielsen et al. 2008). For these reasons, our review emphasizes race and gender discrimination.

American antidiscrimination law historically has been characterized by two contradictory tendencies (Freeman 1998). One tendency, which we call a "systemic" model, emphasizes the historical disadvantage of people of color. It looks for evidence of discrimination in exclusionary patterns—particularly in the unequal numerical outcomes for traditionally disadvantaged groups—and embraces systemic remedies to achieve more equal results.¹ The second tendency, a perpetrator model, looks for intentional discrimination by particular perpetrators and seeks individually tailored remedies for specifically harmed individuals. The models differ in terms of causation, intent, and remedy.

Over the past 30 years, courts have preferred the perpetrator model (see also Graham 1990, Haney Lopéz 2000). Freeman (1998) shows that, following *Brown v. Board of Education* (1954), federal courts gradually moved away from the systemic approach of establishing the existence of unfair practices and remedying these practices. With this shift, legal doctrine became narrower and more focused on intent, and it has limited the remedial reach of law. The dichotomy and trajectory that Freeman identifies characterize specific changes in antidiscrimination employment law over the past 50 years. This shift has been driven by a growing neoconservative countermovement in the 1970s and by a federal judiciary that became more politically conservative under the administration of President Ronald Reagan (Burstein 1991b, MacLean 2006, Wood 1990). It also reflects employers' influence on the content and reach of law and the courts' deference to employer organizations' interpretations of law and compliance (Albiston 1999, Edelman 2005).

¹ Freeman (1998) refers to this as the "victim" model. We believe that the term "systemic" is a more accurate description and does not reinforce the negative association with being a victim.

Notably, the *Griggs* (1971) decision gave rise to disparate impact theories of discrimination under Title VII by stating that employers had to justify, as a business necessity, any formally neutral tests that have a disproportionate impact on minorities (Freeman 1998). Having taken a bold step in the direction of a systemic approach to discrimination, however, the Court began to retreat from that view in a series of cases. In *Washington v. Davis* (1976), the Court did not extend the principle of disparate impact to the constitutional realm, emphasizing equal protection from purposeful racism rather than protection from institutional practices that create racially discriminatory outcomes (Haney López 2000). This decision made it more difficult to prove racial discrimination and easier for defendants to assert their innocence (Wellman 2007). And in *Wards Cove Packing Co. v. Antonio* (1989), the Court held that statistical disparities by themselves do not lead to an inference of discrimination absent evidence of discriminatory intent. This presented major challenges to plaintiffs, who have relied on such evidence to demonstrate and challenge patterns of job segregation. The Court also revised doctrines on the burden of proof to increase the burdens carried by plaintiffs and lessen the burdens carried by defendants (Freeman 1998). For example, the courts have defined the key terms of disability and reasonable accommodation in ways that limit employer liability (Colker 2005, Krieger 2000).

As Freeman shows, Supreme Court decisions on workplace affirmative action followed a similar movement away from the systemic model as the courts grew more hostile to race- and sex-based affirmative action more generally. Again following an early decision that approved affirmative action in a training program to overcome the traditional underrepresentation of racial minorities in skilled jobs (*United Steelworkers of America v. Weber* 1979), the Court began to limit the acceptable range of affirmative action. It rejected the application of affirmative action in a consent decree that would have led to layoffs of white workers with more seniority than some African Americans hired

under the decree (see also *Wygant v. Jackson Board of Education* 1986). It then began to strike down as reverse discrimination minority set-aside programs, such as those created by the City of Richmond, where there was insufficient showing of particular acts of discrimination and the remedy was not tailored to help identifiable victims of past discrimination (*City of Richmond v. J. A. Croson Co.* 1989).

The Court requires employers using affirmative action to avoid quotas based on race or sex and to link their affirmative action plans with remedying obvious imbalances in the workforce (*Johnson v. Transportation Agency* 1987).² In decisions outside the realm of employment law, the Court has equated the open treatment of race with purposeful racism in a number of subsequent cases (e.g., *Shaw v. Reno* 1993, *Parents Involved v. Seattle* 2007). These various trends have led many analysts to characterize contemporary constitutional jurisprudence on race as colorblind racial ideology (Haney López 2000; see also Brown et al. 2003).

Sexual harassment law—which arose as a theory of discrimination under Title VII in the late 1980s as an innovation based on judicial interpretations of existing law (*Meritor Savings Bank v. Vinson* 1986)—follows the perpetrator model. In both quid pro quo and hostile work environment forms of sexual harassment, there are clear causal connections between workplace events, workplace harms, and straightforward remedies. The Supreme Court has limited the scope of potential sexual harassment claims by making employers immune to charges if they had policies and procedures in place to discourage harassment and provide an internal remedy (*Faragher v. City of Boca Raton* 1998, *Burlington Industries, Inc. v. Ellerth* 1998). In other words, the employing organization could escape liability if it is not seen as a perpetrator in the illicit practices. *Kolstad v. American Dental Assoc.* (1999) provides an affirmative defense against punitive damages in employment

²Lower courts remained divided on the level of scrutiny for affirmative action programs based on sex (Siegel 2004).

discrimination cases similar to *Faragher*. These are indicative of a broader trend of judicial deference to employers, as courts have allowed employers to use new affirmative defenses to avoid liability (Edelman 2005, Edelman et al. 1999).

Judicial decisions in the 1980s also narrowed the grounds upon which employees can challenge pay differences between predominantly male and predominantly female jobs. In *County of Washington v. Gunther* (1981), the Supreme Court held that Title VII could apply to between-job wage differences between men and women. A series of cases then were brought alleging that system-wide pay differences between men and women could not be explained by these employees' relative value to the organization. The courts rejected those cases by holding that pay decisions could not be subjected to disparate impact analysis and that between-job wage differences were the result of market forces, not organization-level discrimination. In these cases, the courts adopted and codified employers' promarket logic in a way that favored employers and, in effect, legalized sex-based, between-job wage inequality (Nelson & Bridges 1999).

Judicial support for the perpetrator model continued in the post-1990 era of antidiscrimination law. The 1990s was, on the face of it, a period of growing protections against workplace discrimination (Nielsen & Nelson 2005a,b). The Americans with Disabilities Act of 1990 granted people with disabilities the right to employment with reasonable accommodation, and the Civil Rights Act of 1991, a political compromise between President George H.W. Bush and Congress (Stryker 2001, Stryker et al. 1999), reversed the *Wards Cove* decision and included such provisions as an expanded right to jury trials in discrimination lawsuits. At the same time, antidiscrimination law became more limited, both substantively and procedurally, and put greater emphasis on demonstrating individual intent (Nielsen & Nelson 2005a, Post & Siegel 2000). For example, the courts became more receptive to defendants' arguments that claims of discrimination should be disaggregated below the level of the entire employing organization

and limited to particular locations within an organization (*Reid v. Lockheed Martin* 2001).

Many doctrinal changes in employment law have favored employer defendants, while creating greater challenges for plaintiffs and their advocates. For example, in a number of high-profile cases in which the courts considered statistical evidence (e.g., *Wards Cove Packing Co. v. Antonio* 1989, *EEOC v. Sears, Roebuck & Co.* 1986), they used this evidence to favor defendants. The courts have developed judicial presumptions that make it difficult for plaintiffs to prevail. The "honest belief" rule holds that the reason an employer gives for a decision need not be true, only that they honestly believed it to be true (Krieger 1995, Krieger & Fiske 2006). The "same actor" doctrine creates a strong presumption that if the same employment decision maker hired or promoted a member of a protected group and then later gave that individual an adverse employment decision, it is not due to their protected characteristic. In Krieger & Fiske's (2006) analysis, these two judge-made doctrines have resulted in more rulings against plaintiffs, typically at the summary judgment stage of litigation, that is, before the plaintiff has an opportunity to present their evidence at trial.

The growing influence of the "perpetrator" model is evident in the system of employment civil rights litigation, which is largely structured around individual legal claims of discrimination. In this system, individuals who believe they have been targets of discrimination must file a complaint with the EEOC or a state and local Fair Employment Practices Agency (FEPAs) and then pursue litigation. The number of complaints of discrimination filed with the EEOC exhibited a significant rate of growth in the 1990s, jumping from 72,000 in 1992 to 91,000 in 1994. It then leveled off at about 76,000 to 84,000 for the subsequent 11 years (EEOC 2003, 2007). Much of the increase was due to the addition of disability cases, which the EEOC began to enforce in July 1992. The number of discrimination lawsuits filed in federal court tripled from 8,000 in 1990 to 23,000 in 1998 and then dropped to 15,000 by 2006 (AOUSC 2006, Nielsen & Nelson 2005a).

By 2000, employment discrimination litigation also became very prominent in the entire federal civil docket. Employment discrimination constitutes the largest single category of cases filed in federal courts (about 10%) and are the most common types of civil filing to go to trial (Clermont & Schwab 2004). Thus, although employees gained some new rights and the sheer number of people pursuing discrimination claims increased, the 1990s were a period of growth of a system largely devoted to individual, intentional claims of discrimination (Nielsen et al. 2008).

Social scientists and legal scholars have criticized the historical shift to a narrow, individualistic, intent-oriented focus in employment civil rights law and litigation on different grounds. We first consider some of these critiques, and then we turn to sociological conceptions of discrimination, which locate discrimination in the broader structure of employment.

The Limits of Rational Intent

Legal scholars and civil rights advocates have challenged *Washington v. Davis* (1976) and the notion of purposeful intent for relying on a motive-based doctrine of discrimination, which is difficult or impossible to prove, and for failing to recognize that racial injury could occur absent perpetrators with intent to discriminate (Lawrence 1987). Social scientific research and theory supports these criticisms by demonstrating that the notion of purposeful intent does not accurately describe how people act or think. This notion assumes that individuals act (and discriminate) rationally and instrumentally and in isolation from their social, institutional, and organizational contexts.

Social scientific research shows that people often do not base their decision-making processes on a calculated interest, such as withholding a resource from people of color, or on internalized values, such as prejudice against older workers (Haney Lopéz 2000). Likewise, people frequently make decisions without any specific reference to race, gender, or another protected status. Yet human behavior often produces dis-

criminatory effects. More subtle but systemic organizational and institutional behaviors and the unexplained beliefs held by organizational participants can produce discriminatory outcomes, regardless of an individual's intentions or deeply held prejudices.

Building on sociological research in the new institutionalist tradition (e.g., Friedland & Alford 1991), Haney Lopéz (2000) shows that legal actors commonly make decisions in nonintentional ways, following complex scripts and well-worn paths. These scripts and paths are based on actors' unquestioned understandings, and they shape the range of action that people consider acceptable and appropriate. For example, in two major trials of activists in the Mexican American community, judges selected grand juries that included no Mexican Americans. The judges consistently nominated their white friends, neighbors, and comembers of clubs and churches to serve as grand jurors, although each judge proclaimed that he had no intention to discriminate. In this and other instances, unexamined influences on decision making can produce discrimination—regardless of whether the individual participants subscribe to racist, sexist, or other discriminatory beliefs—but such influences are not necessarily actionable under the Fourteenth Amendment.

Haney Lopéz labels such behavior as institutional racism. He argues that the legal standard of purposeful intent fails to account for institutional racism and other institutional influences on people's behaviors. Under current legal doctrine, judges and other legal actors often treat actions that seem to be race- or gender-neutral as evidence of a lack of discrimination. Likewise, they consider conscious treatment of race in decision making to be evidence of discrimination. In so doing, legal actors fail to address such nonpurposeful influences on discriminatory behavior and even can exacerbate them.

A related critique of Title VII doctrine is that it fails to account for historical changes in workplace organization, the structure of occupations such as professions, and corporate governance,

given the rise of knowledge-based and service sector economies and global corporate competition. Women have higher rates of employment in service sector positions, which tend to be lower paid, but studies show mixed results about whether sex segregation is higher or lower in such jobs (Charles & Grusky 2004). Green (2003) argues that the steps to career advancement in hierarchical and bureaucratic organizations are characterized by discernable decisions and documented policies (however symbolic those policies may be, e.g., Edelman 1992). Many employers now rely heavily on temporary and part-time employees and have put greater emphasis on organizational flexibility, teamwork, and catering to consumer demand. Conceivably, employment discrimination law is tailored to workplaces where an employee's work performance is evaluated by her supervisor, rather than by her fellow team members, but further empirical research is needed to understand the specific mechanisms of discrimination and the consequences of discrimination law within such contexts.

Other scholars have criticized the courts' explanations of individual prejudice. Many scholars have noted that the court's understanding of prejudice in employment discrimination law is inaccurate and not grounded in empirical reality, as it treats prejudice as "crude, explicit, obvious, and motivated by individual bias" (Wellman 2007, p. 40).

Many psychologists have pointed to the inaccurate understanding of bias in employment, particularly the exaggerated importance of motivation (Dovidio et al. 1996, Krieger 1995). As Krieger (1995) and others (e.g., Fiske 2002, 2005) have shown in studies of what is commonly called implicit prejudice or cognitive bias, discrimination can be unconscious and unintentional. Krieger (1995) argues that categorization and similar automatic cognitive biases can lead to and reinforce stereotypes of which decision makers may not be aware. These stereotypes often support discriminatory patterns by race and gender. Yet the common judicial standard does not account for the unin-

tentional categorization and related errors of judgment common in typical human cognitive functioning. According to Krieger (1995), motive or intent not to discriminate is necessary to prevent such stereotyping and related discriminatory actions.

The courts' explanations of prejudice may rely on unfounded assumptions about employees. Absent a finding that employers purposefully created barriers to advancement for women and racial minorities, courts have assumed that women prefer low-paying jobs to protect their feminine identity whereas racial minorities favor such jobs because they do not require discipline and motivation (the lack-of-interest defense in *EEOC v. Sears, Roebuck & Co.* 1986, e.g., Schultz 1992, Schultz & Petterson 1992). These assumptions rely on romanticizing and demeaning stereotypes. They suppose that women and people of color form their views of work in private, independent of their participation in the labor market and of their employers' actions (Schultz & Petterson 1992).

The current standard of employment discrimination also does not consider historical changes in bias (Green 2003). Social norms and antidiscrimination law now dictate against open expressions of racism, sexism, and other prejudiced views in workplace settings and elsewhere (Schuman et al. 1997). By the early 1970s, white support for formal discrimination and segregation had collapsed. White Americans today broadly endorse the notion of equal treatment and equal opportunity, although their stated values and their actual behaviors are fraught with inconsistencies (Sears et al. 2000). Purposeful intent, as a standard, fails to account for contemporary social and legal sanctions against public displays of prejudice.

Discrimination Litigation and Social Change

The social science critique of the legal conception of discrimination takes on greater significance when we consider social science literature about the system of employment discrimination

litigation. The policy for enforcing employment rights in the United States is litigious, so lawsuits brought by private citizens are the primary mechanism for exercising and implementing these rights (Burke 2002; Burstein 1991a,b). Rather than employing mandates or quotas to ensure employment civil rights, law gives individuals civil rights that they may enforce in the courts. Research working from a legal mobilization framework suggests that class-action litigation, cases that the government is prosecuting, and lawsuits that are part of organized social movement activity are more likely to succeed than other cases (Burstein 1991a, McCann 1994). Skaggs (2008) documents the impact of high-profile class-action litigation alleging gender discrimination in the supermarket industry. Reskin & Roos (1990) find gains in certain industries for women as a result of successful litigation (see also Kalev & Dobbin 2006, Kalev et al. 2006).

Yet it is critical to observe that litigation involving any form of collective action is exceedingly rare. Nielsen et al. (2008) report that only 1.1% of federal employment civil rights filings between 1988 and 2003 sought class certification. Only 4.1% of filings alleged a theory of disparate impact. In the mid-1990s, the EEOC adopted a Priority Case Handling Procedure to deal with a growing backlog of individual charges (Hirsh 2008). The EEOC established this system so it could devote greater resources to a smaller percentage of cases that had a better chance of success. In effect, the agency conceded that it did not have the resources to provide meaningful investigation or efforts at conciliation in the majority of their cases.

The literature on civil litigation in general and employment discrimination litigation in particular suggests that a system of individual claiming is inadequate for addressing the sources of discrimination. First, most targets of discrimination will not pursue a claim (Bumiller 1988). Second, if they do, they will pay a heavy price in terms of how their employer and even fellow employees will view them (Kaiser & Miller 2001). Third, individual plaintiffs

face the problems of one-shot players in litigation, including inadequate representation, lack of knowledge of the system, and lack of resources (Albiston 1999, Edelman & Suchman 1999, Galanter 1974).

The result is that most plaintiffs in discrimination lawsuits get nothing or a small settlement (Nielsen et al. 2008). If plaintiffs do win, defendants often appeal and obtain relatively high success rates in overturning plaintiff victories (Clermont & Schwab 2004).

Thus, just as the legal conception of employment discrimination fails to consider fully the systemic sources of workplace discrimination, most discrimination litigation does not address systemic discrimination. Although a few class-action lawsuits and high-profile cases may create an image of discrimination litigation as a powerful engine for change (Nielsen & Beim 2004), most discrimination cases raise only individual issues and result in modest individual awards. Such lawsuits are not likely to produce significant changes in workplace practices.

The narrowing of employment discrimination law and the focus on individualized claims of discrimination stand in stark contrast to sociological research, which locates discrimination in the structure of employment and the workplace.

THE SOCIOLOGY OF DISCRIMINATION IN ORGANIZATIONS

The sociological literature on employment discrimination seeks to explain patterns of racial and gender inequality that remain prevalent in American society. Black, Latino, and Asian men and women and, especially, white women have made some inroads into craft production, managerial, and professional jobs since 1966. However, the index of dissimilarity between white men and these groups was still in the high 50s in 2002, meaning that more than 50% of people in each of these groups would need to change positions with white men to achieve equal representation in their occupational

category (Tomaskovic-Devey & Stainback 2007). Within specific types of jobs, black and Hispanic men gained the greatest access to craft production jobs over this period, whereas white women's representation in managerial and professional positions increased considerably.

Despite some progress in closing the earnings gaps across gender and racial groups since the inception of civil rights laws, other groups of workers still made significantly less than white male earners in 2006. White females had the closest parity, earning 73.5% of what white men earned that year, and Hispanic females had the greatest earnings gap, earning 51.7%, with black males, black females, and Hispanic males falling in between these groups (U.S. Current Population Survey 2008). Indeed, what is striking is the lack of progress or relative declines in the last 10 years. For example, in 1996, white females were at 73.3% of white males' earnings. Black males actually lost ground, with 72.1% of white males' earnings in 2006, compared with 80% in 1996. These earnings figures do not control for education, occupation, or other significant factors that affect earnings, but they nonetheless demonstrate the persistence of substantial economic inequality.

Nor are these data directly linked to the locus of responsibility in employment discrimination law: the employing organization. Some studies provide insights into labor markets and, specifically, the practices and attitudes of employers concerning minorities. Among the most striking is Pager's (2007) audit study of Milwaukee employers. She finds that black job applicants without criminal records were less likely to be called back for a job interview than white applicants with criminal records. Her research updates and confirms audit studies conducted in the early 1990s showing similar patterns (Neckerman & Kirschenman 1991, Neumark 1996). Research that compares the employment prospects of African Americans to immigrant Latinos finds that employers prefer immigrants over African Americans for certain jobs because they perceive that immigrant workers will be more productive (Waldinger 1997).

Another indirect measure of the continuing prevalence of employment discrimination may be found in the perceptions of African American workers. In a study by Dixon et al. (2002), 28% of African American workers and 22% of Hispanic workers reported being treated unfairly at work in the last year because of their race or ethnicity, compared with 6% of white workers. A majority of African American workers (55%) reported that they knew of instances when coworkers felt they had been treated unfairly owing to their race, compared with 13% of white respondents. These numbers suggest that discrimination is not limited to a few isolated contexts, but remains a widespread, if more subtle, phenomenon than at the beginning of the civil rights era.

Organizational Bases of Employment Discrimination

A substantial sociological literature exists on the organizational dynamics of discrimination. This research indicates that employing organizations often are an important source of discrimination, not just repositories of societal sexism or racism, for which they arguably are less responsible. These organizational processes sometimes produce discrimination when combined with common patterns of gender and racial bias, but often remain outside the definition of intentional discrimination. Moreover, although many of these organizational processes are widespread throughout American personnel systems, they cannot be assumed to exist in all contexts or to have the same consequences. Thus, the particular manifestation of these processes must be studied and documented—and proven in the courts—on a case-by-case basis.

In what follows, we review the literature on organizational sources of systemic discrimination. We then look at the sociological literature that addresses what seems effectively to reduce discrimination. We conclude the section by considering whether the law is supporting the most promising policy approaches.

Sex and race segregation by job. Although civil rights laws made it illegal for employers to assign jobs or pay workers who hold the same jobs different wages based on their race or sex, we continue to see high levels of sex and race segregation by job. When using broad occupational categories, the index of dissimilarity by gender is 31, meaning that 31% of males and females would need to change occupational categories for there to be equal distributions of gender by occupation (Gabriel & Schmitz 2007). Earlier studies indicate that job segregation is even greater at the organizational level, where jobs are defined more narrowly (Baron & Bielby 1980, Bielby & Baron 1986, Treiman & Hartmann 1981). Several studies indicate that workplace dynamics continue to reproduce gender hierarchies in job structures, as male supervisors and coworkers actively resist the hiring and promotion of women into positions traditionally held by men (Gutek & Morasch 1982, O'Farrell & Harlan 1982, Reskin 1988, Reskin & Padavic 1988, Wright & Jacobs 1994). Experimental studies document a process of sex-role spillover in which the working conditions of women in predominantly male occupations are negatively affected (Burgess & Borgida 1997). These dynamics may well drive women away from traditionally male jobs.

Patterns of job segregation will vary by organizational context. Among the most thorough treatments of the dynamics of gender and race mobility within an organization is the work by Baron and colleagues on the California Personnel System (Baron et al. 1991; Baron & Newman 1989, 1990; Strang & Baron 1990). They find that those organizational units that are more sensitive to environmental influences exhibit lower levels of gender inequality and that several other organizational variables tend to be associated with greater gender inequality: organization age, size, and exposure to the external labor market. Job segregation also varies within and across region and industry (Beggs 1995, McCall 2001), although racial segregation also is shaped by geographic differences in where different racial groups live (Catanzarite 2000, cited in Tomaskovic-Devey et al. 2006).

Subjective evaluations for hiring and performance. Given the prevalence of gender and racial stereotypes, and their often implicit or unconscious character, research finds that subjective evaluations for hiring and performance tend to produce biased results (Bersoff 1988a,b; Bielby 2000; Nieve & Gutek 1980). The studies find that the effects are exacerbated when evaluators rely on ambiguous or arbitrary criteria for judging performance but are reduced when evaluators are asked to base evaluations on specific aspects of an individual's past performance.

Gorman's (2005) research on large law firms demonstrates this tendency in a natural setting. She found that large law firms hire lower proportions of females when hiring in fields that are stereotypically male than when they hire in stereotypically female fields. Female decision makers are more likely to hire females than are male decision makers (see also Cohen et al. 1998).

Hiring by networks. Evidence suggests that when employers rely on networks of employees to obtain applicants, it increases the odds that new hires will share the same gender and ethnic characteristics of the current workforce (Reskin & McBrier 2000). Petersen et al. (2000) found that hiring at a large Silicon Valley firm was entirely meritocratic in terms of gender, but that ethnic minorities were much less likely to have network connections to current employees and as a result were less likely to get hired (see also Fernández et al. 2000).

Lack of information and influence. Employees have differential access to information about hiring, promotions, pay, company decisions, and opportunities at work, depending on employer policies, the structure of jobs and workgroups, and friendship networks. Historically, private sector employers have jealously guarded information on the pay of individual employees. In *Ledbetter v. Goodyear Tire & Rubber* (2007), the Supreme Court limited pay claims to 180 days from the time a charge was filed with the EEOC, regardless of when the

allegedly invidious salary differential originated.³ Nelson & Bridges (1999) report evidence of such concerns by the employing organizations they studied. Employees who do not have information about relative pay are not in a position to investigate whether they are being paid fairly compared with other workers. When information on group pay differences becomes available, it often is a catalyst for litigation or social movement activity seeking fairness adjustments (McCann 1994, Nelson & Bridges 1999).

Organizational politics that favor males over females and some racial and ethnic groups over other groups. Several studies of organizations reveal that systems for allocating rewards within organizations explicitly or implicitly benefit some gender and racial groups over others. Nelson & Bridges (1999) demonstrated some of the mechanisms at work in four large organizations and their effects on gender inequality. For example, male workers at a state university (referred to informally as the meatpackers because some workers had previously worked in local, unionized meatpacking firms) gained pay advantages that female clerical workers did not primarily by being vocal (Acker 1990, Reskin 1988, Reskin & Padavic 1988).

Organizational policies that favor traditionally advantaged groups. Organizational scholars have demonstrated that seemingly neutral employment policies sometimes have disparate effects on women and minorities, without adequate justification for business purposes (Bielby & Bielby 1988). For example, a nepotism rule for a virtually all-white labor union works to the disadvantage of workers

of color (Freshman 2000, note 142). Employers' tendency to create more detailed job descriptions for positions held by male workers than those held by female workers illustrates a more subtle way in which organizational policies can systemically reinforce discrimination (Baron 1991, Steinberg & Jacobs 1994).

Internal labor markets. Although sociologists often assert that labor markets penalize women and minorities owing to society-wide sexism and racism (England 1992), some research indicates that pay systems that are tied less directly to market forces may produce more pay discrimination. Internal labor markets are an ideal type of such a market-insulated pay system in that only certain jobs can be compared to jobs in an external market, while other job ladders consist of firm-specific positions (Doeringer & Piore 1971; Treiman & Hartmann 1981, p. 47). DiPrete (1989) found that minorities and women were disadvantaged in a large federal bureaucracy because they faced barriers to moving into positions with different pay (see also Bridges & Nelson 1989). Employers are more clearly responsible for pay differentials among jobs in an internal labor market than for jobs in which pay levels are determined by market rates.

Inertia in organizational inequality systems. Organizational research has found, consistent with Stinchcombe's (1965) classic argument about the persistence of features of organizations at the time of their founding, that patterns of organizational inequality persist. Policies that limit the opportunities of women and minorities, once they have become institutionalized, are difficult to change (Baron 1991, Baron et al. 1991).

Institutionalist Studies of Law and Organizational Change

A large body of organizational research analyzes the forces that have shaped organizations' adoption of formal equal employment opportunity (EEO) practices (Dobbin & Sutton 1998;

³In her dissent, Justice Ginsburg argued that pay discrimination often occurs without the knowledge of the workers involved. She cites an online survey that found that 36% of employers had policies forbidding their employees from discussing their pay with coworkers, whereas 15% permitted such discussions, and 51% had no policies on the matter (Bierman & Gely 2004). However, this research is somewhat suspect in that it comes from an online survey of 361 human resources officers with no indication of the response rate.

Dobbin et al. 1993; Edelman 1990, 1992; Sutton & Dobbin 1996; Sutton et al. 1994). It demonstrates that organizations adopted EEO structures more rapidly if they faced greater legal risks and if they were in the public sector, subject to government compliance programs, and larger and more bureaucratically organized. Although these studies document the increasing legalization of the workplace in the sense that more employers follow formal procedures in dealing with workers, this research has found it more problematic to determine whether more legal formality in fact reduces workplace discrimination.

In a series of studies, Edelman and colleagues find that employment rights were compromised in organizational settings. Through internal grievance procedures, employers transformed employee claims of rights violations into misunderstandings that could be resolved without litigation (Edelman et al. 1993). Managers began to redefine the dictates of equal opportunity as diversity management, which covered a broader range of social differences and thus weakened their organizations' efforts to prevent discrimination against women and minorities (Edelman et al. 2001). As law became more incorporated into organizational policies and routines, it also became more managerialized.

This research also finds that the courts have begun to assign legal significance to certain employer policies in discrimination cases. This process, in which courts and organizational personnel practices are mutually constituted, is referred to as legal endogeneity (Edelman 2005, Edelman et al. 1999). It reverses the usual posture of courts with respect to employers in the field of antidiscrimination law. Rather than courts serving as a corrective to employing organizations when their policies stray from legal requirements, the courts' rulings on law have been influenced by the compliance structures that employers have developed within an organizational field. Examples include the deference that courts have begun to show to the internal grievance procedures of employers in sexual ha-

rassment, racial harassment, and constructive discharge cases (see Edelman 2005).

The endogeneity perspective calls attention to the fact that the courts are making empirical assumptions about how the internal legal structures of organizations operate. This is a form of systemic analysis at the organizational level. The courts are making inferences about whether the procedures offered employees provide meaningful protection within the meaning of civil rights law. In these cases, the interests of courts and employers may be aligned. If the courts legitimate internal grievance procedures, they may see it as a means of reducing the number of discrimination claims they will see on their dockets. Although employers may face additional administrative burdens to develop internal procedures that will pass legal muster, they limit exposure to external legal scrutiny and gain further leverage in future disagreements with employees.

Organizational Approaches to Reducing Discrimination

The sociological literature on organizations and inequality points to a wide variety of organizational processes that may result in unfair treatment of women, minorities, and other less advantaged groups or that minimize burdensome aspects of employment discrimination law. In the absence of efforts to change or counter these tendencies, organizations will systematically disadvantage women and minorities. Although the presence and significance of these tendencies vary across and within particular organizations, these aspects of organization personnel systems are widespread at the organizational level.

Given the accumulation of research findings and the growing methodological sophistication of the field, several prominent social scientists have begun to offer suggestions about what does and does not influence ascriptive inequality in organizations (Bielby 2005, Kalev & Dobbin 2006, Kalev et al. 2006, Reskin 2003). From this perspective, the empirical literature

identifies policy implications for efforts to reduce discrimination.

Many of the mechanisms that have been found to reduce discrimination are the reverse of the sources of organizational inequality we identified above. Gender and race segregation by jobs can be mitigated by formalized processes for posting job openings, by establishing clear criteria for selecting candidates for jobs, by holding administrators accountable for improving the representation of women and minorities, and by requiring employers to defend the bases for their decisions (Baron et al. 1991; Pferrer & Salancik 1978; Pugh & Wahrman 1983; Reskin & McBrier 2000; Swim et al. 1989; Tetlock 1983, 1992). Blind auditions sometimes can control the danger of bias in subjective decisions. Such auditions proved effective in reducing gender bias in hiring by major symphony companies (Goldin & Rouse 2000). Diversifying the group within the organization that makes hiring and promotion decisions improves the prospects for favorable evaluations for women and minorities (Gorman 2005). When people have information about organizational decisions on earnings and other rewards that enables them to assess whether the decisions were biased against the group, they are likely to exert a powerful influence against bias. Major (1989) found that when earnings were reported by group, it made members of disadvantaged groups more likely to notice and object to the decisions.

Kalev & Dobbin (2006) and Kalev et al. (2006) systematically assess the relative effectiveness of lawsuits, compliance reviews, and various kinds of affirmative action and diversity programs in increasing the presence of women and minorities in managerial positions in a large random sample of private firms from 1971 to 2002. They find that compliance reviews have long-lasting effects on the rate of integration in management ranks and that the total number of discrimination lawsuits a company experiences has a significant positive effect on female and minority representation. Efforts to establish responsibility for diversity have the broadest effects on female and minority rep-

resentation, and such efforts make other diversity programs more effective. Employers who are subject to affirmative action requirements establish clear responsibility for diversity and succeed in achieving results. Diversity training, by itself, has relatively little impact. Targeted recruitment and a greater proportion of minorities and women in top management have positive effects on the representation of female and minority managers.

Reskin (1998, 2003) and Bielby (2005) reach similar conclusions in their efforts to synthesize the social scientific evidence on the sources of and cures for employment discrimination. Reskin (1998) argues that affirmative action is an effective remedy that can redress a variety of organizational processes that limit the opportunities of women and minorities. Bielby offers his synthesis from his position as an expert witness in the *Dukes v. Wal-Mart* (2007) case in which female plaintiffs are seeking class certification for their claims of discrimination in pay and promotion by the retailing giant. Bielby (2005, p. 408) asserts that "subjective and discretionary features of the company's personnel policy and practices" and "inadequate oversight and ineffective antidiscrimination efforts" created striking statistical disparities both in the proportion of women in management jobs at Walmart and in their compensation.

Reskin, Bielby, and Kalev, Dobbin, and Kelly seem to agree that systemic remedies are required to eliminate workplace discrimination. Whether it is through affirmative action, through a lawsuit demanding more effective oversight of personnel decisions, or mandates that create clear managerial responsibility to hire and support female and minority employees, these scholars see discrimination as a persistent problem in organizations that must be dealt with through strong organizational policies.

As we have described, the trends in the law—including the narrowing of the legal definition of employment discrimination, the erosion of support for affirmative action, and the expansion of discrimination litigation in the form of individualized claims rather than

litigation based on collective action that seeks systemic remedies—largely do not support the most promising organizational approaches to reducing discrimination. The courts deference to employers' internal EEO procedures, as identified by Edelman and colleagues, does not appear to represent meaningful organizational change but rather symbolic compliance and managerialized versions of employment civil rights (Edelman 2005). Proponents of new governance approaches to the problems of workplace discrimination, which emphasize organizational problem solving over legal intervention, are more sanguine about these developments (Sturm 2001). Some class-action lawsuits have had a significant effect on certain industries and organizations (Skaggs 2008). Yet across the broader landscape of law, organizations, and inequality, we do not see legal actors pursuing the organizational avenues most likely to reduce workplace discrimination.

CONCLUSION

In this review, we have suggested that the conception of employment discrimination that increasingly dominates judicial opinions, coupled with the overwhelmingly individualistic character of discrimination litigation, is at odds with the psychological and sociological literature on the nature of discrimination and how it can best be addressed in work organizations. Although the courts continue to adopt a perpetrator model of discrimination and seek evidence of purposeful intent to discriminate, the social science evidence points to the pervasiveness of bias and the persistence of organizational mechanisms that will give effect to those biases in the unequal treatment of protected groups. Ironically, in some of the cases in which the courts pay explicit attention to the presence of organizational structures for dealing with claims of harassment or discrimination, they make idealized assumptions about how these systems will protect rights, and they thereby limit employer responsibility.

The current regime of employment discrimination law appears to entail both more law and

more inequality. Undeniably, the workplace has become more legalized, in the form of more EEO structures and policies. Claims of discrimination in the EEOC and in the courts have risen, despite some downturn in the past ten years. Although the representation of women and minorities in the management ranks of employing organizations has improved somewhat, a significant earnings gap remains—a gap that has been relatively stable for women in the past decade and has grown for African American men. This stalled progress on workplace inequality cannot simply be attributed to ineffective employment discrimination law, but the growing apparatus of employment discrimination law has not been able to sustain progress toward equality. Our analysis suggests that employment discrimination law could do more to redress inequality if it did not define discrimination so narrowly and if it supported policies and forms of litigation that have a greater likelihood of effectiveness.

Do we expect this divergence between the law, as interpreted by the courts and enforced by the EEOC, and psychological and sociological research to continue? If so, what are the explanations for this divergence? And what are the implications for law and social science?

Just as the conservative turn in presidential policies and appointments to the federal bench led to the narrowing of definitions of discrimination, political reversals for conservatives eventually could lead to changes in employment discrimination law through new legislation, new EEOC policies and programs, and new judicial opinions. The courts conceivably could change course and open a new line of cases based on systemic analyses of workplace inequality and systemic remedies. The *Dukes v. Wal-Mart* case (2007), which is pending before the Ninth Circuit Court of Appeals, presents a moment in which the courts could take a more systemic approach to discrimination. The Ninth Circuit could give credence to the expert testimony by seriously considering discrimination claims that combine strong statistical evidence of disparities in pay and promotion and a clear record of personnel policies

and practices that permit the operation of invidious bias. However, given the overall trends in the courts, such a dramatic reversal in the near future is unlikely.

In the short term, courts probably will continue to gravitate toward a perpetrator model in employment discrimination cases, largely unpersuaded by the trends in psychological and sociological research. Judges tend to grant little credence to social science, in large measure because their worldview and legal training is inconsistent with the behavioral realist perspective that is the norm in social scientific research. Blasi & Jost (2006, p. 1166) offer this supposition:

A behavioral realist assessing the prospects for behavioral realism in the judiciary will attend to the possibility that cognitive dissonance, implicit biases, and system justification motives affect judges, just like the rest of us. Behavioral realism challenges the rational actor models upon which both folk psychology and the dominant free market ideologies in law are based. One might expect some resistance, then, to incursions by behavioral realists into any area of law, even those that have relatively little to do with power and privilege.

Blasi & Jost (2006, p. 1164) observe that Krieger's work on implicit bias has gone largely unnoticed by the courts, with only two cites to two major articles in the ten years since they were published. One of these citations however, was in Justice Ginsberg's concurrence in *Grutter v. Bollinger* (2003).

Recall the findings of Major, Kaiser, and their collaborators discussed above. People often derogate those who claim to have been the target of discrimination. Such a tendency appears to be stronger among people who are more committed to a belief in a just world or the Protestant work ethic, in which success is explained by individual effort (Major & Kaiser 2005, p. 298). The judges who preside over discrimination claims have become increasingly politically conservative, given that Republican

presidents have held office for 18 of the last 30 years. Schultz & Petterson (1992, pp. 1170–80) found that Democratic judges were less likely to accept "the lack of interest defense" in sex and race discrimination cases than were Republican judges (see also Sunstein et al. 2004). As discrimination cases have taken up a larger share of the federal docket and have become the target of conservative commentary, courts may well become less hospitable to discrimination plaintiffs.

The individualized character of employment discrimination litigation also is connected deeply to the failure of law to take a systemic approach to discrimination. The growth of the antidiscrimination claiming system in the past 15 years has been in individual claims. With a proliferation of difficult-to-prove claims, which typically produce no or very small monetary recoveries, both the claims and the claimants in this system arguably have become more marginalized. The courts and the EEOC, faced with extreme caseload burdens, have developed heuristics for processing large numbers of cases (Hirsh 2008). Judges and regulators cannot seriously consider all these claims but rather dispose of as many as possible on procedural grounds or through settlement. Although we should not doubt the value of a forum for adjudicating individual rights claims (Williams 1991), the U.S. government and employers could develop systemic programs of reporting, investigation, and enforcement that would have greater impact on inequality at less cost.

The divergence between the treatment of employment discrimination in the law and in the social sciences has profound implications. The social sciences have not gained authority within law, even regarding issues on which scholars have produced an enormous body of published, refereed research. This divergence also suggests that legal actors are willing to rely on law as the authoritative adjudicator of employment discrimination claims, without taking advantage of current knowledge about how law might best redress workplace discrimination.

DISCLOSURE STATEMENT

The authors are not aware of any biases that might be perceived as affecting the objectivity of this review.

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