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Access to Counsel: Psychological Science Can Improve the Promise of Civil Rights Enforcement

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Abstract

Employment discrimination claimants in general, and racial minority claimants in particular, disproportionately lack access to legal counsel. When employment discrimination claimants lack counsel, they typically abandon their claims, or if they pursue their claims, they do so *pro se* (without counsel), a strategy that is seldom successful in court. Access to counsel is, hence, a decisive component in whether employment discrimination victims realize the potential of civil rights enforcement. Psychological science analyzes access to counsel by identifying psychological barriers—such as threatened social identity, mistrust in legal authorities, and fear of repercussions—that prevent employment discrimination victims from pursuing counsel. The analysis also identifies how cultural beliefs and practices concerning justice—such as meritocracy beliefs, perceived post-racialism, and organizational diversity initiatives—shape how judges, jurors, and lay people think about discrimination. Furthermore, counsels' perceptions of other's beliefs about discrimination shape their assessed likelihood of prevailing. These psychological barriers intersect with structural barriers to shape counsels' evaluation of each case's likely financial viability, which can prevent counsel from accepting cases that they otherwise deem meritorious. Policy can help those who experience employment discrimination obtain legal representation and meaningful redress for civil rights violations.

Keywords

employment discrimination, discrimination claims, legal representation, social justice, legitimacy, civil rights, postracial, diversity, racial disparity, psychology and law

Tweet

Psychological science on claiming discrimination identifies opportunities to improve the promise of civil rights enforcement.

Key Points

- Employment discrimination claimants have difficulty obtaining legal representation.
- Legal representation is critical for receiving meaningful redress for civil rights violations.
- Psychological processes and structural barriers combine to diminish discrimination claimants' access to counsel.
- This analysis identifies how to improve the promise of civil rights enforcement.

Introduction

This year, the United States marks the 50th anniversary of the Civil Rights Act of 1964. Title VII of this act outlawed many forms of employment discrimination and created the

Equal Employment Opportunity Commission (EEOC) to guide victims of employment discrimination toward accessing their rights. Despite the significant strides made in access to workplace civil rights in the ensuing 50 years, the promise of Title VII remains largely unfulfilled for many victims of employment discrimination. This article explores psychological science on claiming discrimination, examining the barriers that prevent victims of employment discrimination from achieving meaningful redress and access to justice. We focus on the process of obtaining legal representation. Accessing counsel is critical in the dispute pyramid, which largely dictates whether a claimant will vindicate unlawful discrimination, and as yet, is underexplored by psychological inquiry.

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Dispute Pyramid

Analyzing how experiences of discrimination become legal cases, Miller and Sarat's (1980) Pyramid of Disputes highlights where grievances fall out of the legal system (Galanter, 1983). Grievances reside at the pyramid's broadest point, the base. Grievances are convictions of being unjustly treated. When individuals experience a grievance, they can scale up to the next level of the pyramid by making a claim for redress or they can fall from the pyramid by choosing not to pursue the grievance. Claims can be either accepted as legitimate by the other party (and the claimant receives redress) or they can be contested, and move up another level in the pyramid to become a dispute. The claimant can then choose either to abandon the dispute or to bring it to a lawyer. If the lawyer chooses to represent the claimant, the dispute ascends the pyramid. If the lawyer turns down the case, the dispute typically falls off the pyramid, or it can remain, but as a *pro se* case, whereby the claimant forgoes counsel.

Compared with other kinds of grievances, discrimination-related grievances have steep attrition from the pyramid, disproportionately falling out of the legal system at all levels of the pyramid (Miller & Sarat, 1980). Another dispute pyramid analysis reached a similar conclusion, estimating that only 1% of African Americans' discrimination-related grievances ultimately become lawsuits (Nielsen & Nelson, 2005). To be sure, the dispute pyramid is steeper for discrimination-related grievances than other grievances, but why?

Psychological science has focused almost exclusively on the grievance and claim stages of the dispute pyramid, identifying psychological barriers that prevent people from perceiving and asserting discrimination-related grievances (Kaiser & Major, 2006; Major & Kaiser, 2005). Here, we investigate the psychology of what happens after victims perceive and publicly assert discrimination-related grievances and then attempt to obtain legal counsel. Specifically, discrimination claimants are disproportionately likely to end up without legal counsel, so we examine why this occurs. Given that individuals who file *pro se* legal cases fare far worse than counseled claimants (Berger, Finkelstein, & Cheung, 2005; Miller & Sarat, 1980; Quintanilla, 2011), this lack of legal representation poses an access-to-justice problem, preventing discrimination claimants from ascending the pyramid of disputes and obtaining meaningful redress for civil rights violations (Nielsen, Nelson, & Lancaster, 2010).

Plaintiffs' Counsel as Civil Rights Gatekeepers

To obtain legal representation, an individual must convince a lawyer that the case is legitimate and that legal decision makers will perceive the case as meritorious. Many who cannot obtain representation exit the dispute pyramid without meaningful redress. Yet, a fraction forges ahead and files a case *pro se*. Analyses of 25 years of federal employment discrimination

cases reveal that compared with other disputes, many employment discrimination plaintiffs file legal cases without legal representation (20%), as *pro se* plaintiffs (Myrick, Nelson, & Nielsen, 2012). Although the Administrative Office of U.S. Courts reports that the uncounseled rate in U.S. federal district courts across *all* civil cases (excluding prisoner petitions) is 10.9%, our own review of federal employment discrimination cases within Bloomberg Law's database reveals that of the 12,619 employment discrimination cases filed in 2013, 24.1% were filed *pro se*. Furthermore, *pro se* status shows racial disparities, with African Americans, Hispanic Americans, and Asian Americans less likely than Whites to obtain representation (Myrick et al., 2012). These disparities persist even controlling for plaintiffs' occupational status, gender, age, type of discrimination, and EEOC assessment of the case's strength (Myrick et al., 2012). Thus, the very groups most likely to experience discrimination are least likely to receive legal representation, a structural impediment within our system of civil rights protections that operates against those most in need of equal employment opportunity.

Both the high rate of *pro se* representation in discrimination cases and the racial disparities in *pro se* filing pose an access-to-justice problem. Among claimants who reach dispositive motion litigation stages, those who advance *pro se* almost invariably lose (Berger et al., 2005; Nielsen et al., 2010; Quintanilla, 2011). As such, plaintiffs' lawyers are civil rights gatekeepers who control meaningful access to the rights and remedies that the law provides (Albiston & Nielsen, 2006).

This article offers a three-stage analysis, examining how psychological factors related to employment-discrimination victims, lawyers, and their interaction shape legal representation outcomes. The three stages involve the following: (a) the employment-discrimination claimant's decision to seek counsel; (b) counsel's initial assessment of the potential client's claim; and (c) counsel's assessment of whether others (e.g., judges, juries, defense counsel) will deem the claim meritorious, coupled with an evaluation of the claim's financial viability. The analysis highlights how psychological processes shape discrimination claimants' experiences with the legal system and lawyers' decisions about whether to represent them. The analysis also connects legal decisions to structural factors and underlying psychological processes, considering law and policy relevant to increasing the likelihood that those who face unlawful discrimination will obtain legal representation and, in turn, meaningful redress.

Stage I: Pursuing Counsel

After navigating organizational dispute procedures and federal channels, those aggrieved by unlawful discrimination are responsible for identifying counsel to consider their case. Yet, this is when a significant proportion of employment discrimination cases fall from the dispute pyramid (Nielsen & Nelson, 2005). Why would people who acknowledged

discrimination within their organization or received a Notification of the Right to Sue Letter from the EEOC be reluctant to speak with a lawyer?

Psychological Barriers

Costs of claiming discrimination. Some claimants may hesitate to confer with counsel because of the interpersonal costs of claiming discrimination. Although most people believe that they will speak up when they experience discrimination, in fact, few do (Shelton & Stewart, 2004; Swim & Hyers, 1999; Woodzicka & LaFrance, 2001). Victims report being reluctant to speak about their experiences of discrimination because they anticipate that others will react negatively (Kaiser & Miller, 2004). These concerns are understandable, as members of high-status groups often do respond negatively toward those claiming discrimination, even when claims are warranted (Kaiser, Dyrenforth, & Hagiwara, 2006; Kaiser & Miller, 2001; Shelton & Stewart, 2004).

For example, in one experiment (Kaiser & Miller, 2003), White participants viewed the job application of an African American man who was denied employment. Some participants saw that the hiring manager made extremely racist remarks (e.g., that African Americans are unintelligent and that he would never hire an African American), and others saw statements that were either subtly racist or race neutral. When the job applicant blamed his adverse outcome on racism, Whites perceived him as a troublemaker, compared with when he blamed his experience on other causes. This negative reaction occurred even given the employer's blatant racism.

Interpersonal costs from asserting discrimination are likely a barrier to seeking counsel. Even if victims overcome the obstacles of filing an internal grievance and an EEOC charge, recruiting counsel greatly amplifies the potential costs of claiming discrimination, as any lawsuit becomes public and the claimant's credibility becomes central to deciding the merits of a case. Anticipating these interpersonal costs (from defense attorneys, juries, judges, media, coworkers) may make victims' discrimination forgo seeking counsel, abandoning their claims.

Trust in legal authorities. The decision to seek counsel may also be shaped by expectations of how fairly one anticipates being treated by the legal system (Tyler, 2006). If people anticipate encountering unfair legal procedures, they are less likely to turn to the legal system to resolve their grievances. Victims of employment discrimination need to believe that they will experience procedural fairness (Tyler, 2006)—treatment as procedurally fair as the employer they are suing—and that the court will behave unbiasedly toward them. For some disadvantaged groups, their long-standing history of mistreatment and disenfranchisement in the legal system undermines faith in the fairness of the legal system (Tyler, 2006). This may cause them to abandon their claims,

or to exert more personal control over their predicament by forgoing counsel and representing themselves.

Structural Barriers

Besides psychological barriers, structural barriers dampen and prevent seeking counsel. First, because discrimination claimants are overrepresented among society's marginalized segments, they may have fewer resources to retain a lawyer, or to absorb lawyers' fees should they lose, and might instead choose to pursue cases as *pro se* plaintiffs or to abandon their claims (Myrick et al., 2012). Second, because people tend to live and work with others of the same social class, many victims of discrimination may not have social networks that connect to sympathetic lawyers, offering fewer opportunities to obtain legal representation (Myrick et al., 2012). Last, claimants from society's margins unduly lack the access, ability, and means to identify and hire counsel.

Stage II: Gaining Credibility in the Eyes of Plaintiffs' Counsel

If employment discrimination claimants pass these psychological and structural barriers to seeking counsel, they then describe their experiences to plaintiffs' counsel, who considers the credibility of their account. Here, psychological processes that characterize potential client-lawyer discussions about discrimination can affect initial assessment of the potential client's credibility.

Psychological Barriers

Social identity threat. Discussing experiences of discrimination is stressful, especially when the conversation occurs between individuals whose groups differ in social status (Richeson & Shelton, 2007). Such discussions can lead to a predicament known as "social identity threat," the concern with being viewed through the lens of stereotypes or being devalued because of group membership (Steele, Spencer, & Aronson, 2002). As much research reveals, social identity threat results in anxiety, stress, and physiological arousal (Major & O'Brien, 2005). Social identity related stress harms its targets, undermining test performance, decision making, and behavior regulation (Major & O'Brien, 2005; Richeson & Shelton, 2007; Steele et al., 2002).

Social identity threat may impair the initial screening meetings between employment-discrimination victims and lawyers. When disenfranchised potential clients (e.g., minority, elderly, female, disabled, or an immigrant) communicate with lawyers (often from higher social status), they are vulnerable to social identity threat. Social identity threat may occur even if the lawyer harbors no animosity toward the client: Simply discussing one's experience with

discrimination could induce this threat (Richeson & Shelton, 2007).

When a potential client experiences social identity threat, the resulting physiological arousal and taxed cognitive capacities may affect their ability to communicate clearly with a lawyer. They may, for example, disclose less, speak more awkwardly, respond less effectively to questions, avoid eye contact, or otherwise behave anxiously (Burgess, Warren, Phelan, Dovidio, & Van Ryn, 2010). Thus, social identity threat may challenge potential clients' ability to discuss their experiences confidently and credibly. When this process unfolds, lawyers may find clients' accounts of discrimination insufficiently compelling, and the conversations may weaken interpersonal rapport. This psychological phenomenon may hinder discrimination cases, and in particular, racial minorities' cases, from ascending the pyramid of disputes.

Fortunately, the potential for social identity threat in client-lawyer interactions can be remedied. Lawyers could be educated about how social identity threat can impair performance in intergroup interactions and could become more aware that awkward behavior or weak rapport may stem in part from social identity threat, rather than from credibility issues with the potential client's case. Legal education could draw on identity-safety research, which shows that potentially threatening contexts can improve when they convey valuing disadvantaged groups (Steele et al., 2002). For example, lawyers' office space can highlight past success representing disadvantaged clients, or present service to minority-advocacy groups. Furthermore, increased diversity of the legal profession can result in more lawyers from similar backgrounds to many discrimination claimants, increasing claimants' comfort with discussing discrimination. These welcoming environments relax discrimination claimants, improving communication with lawyers.

Structural Barriers

Structural barriers also impede employment-discrimination victims from convincing attorneys that their cases are credible. As discrimination claimants often come from disadvantaged backgrounds, they may have insufficient status within an organization to access information about the history of their group's treatment within the organization. This could undermine gathering evidence about potential discrimination and result in furnishing lawyers with less convincing evidence. In addition, clients from disadvantaged backgrounds might have few personal connections to legal professionals in their everyday social networks, and they may lack advice on how to hunt for compelling evidence of discrimination (e.g., requesting personnel documents, maintaining a detailed journal about discriminatory experiences).

Stage III: Counsel's Projection of Legal Merit and Financial Viability

For employment discrimination claimants who do convince a lawyer that their case is credible, the next obstacle in ascending the pyramid of disputes involves the lawyer projecting the case's legal merit, as well as its financial viability. Because only *successful* litigation mainly compensates lawyers, their willingness to represent the claimant must assess both likelihood of establishing liability and winning monetary recovery (Farhang & Spencer, 2014). Lawyers derive these judgments by predicting how *others*—juries, judges, and defense attorneys—will react to the case, that is, whether they will find the claims credible and the victim worthy of legal redress. This process involves “meta-perceptions,” inferences about how others will perceive the claimant and the case (Laing, Phillipson, & Lee, 1966). Lawyers' meta-perceptions may derive partly from widespread beliefs that shape how both everyday people and legal thinkers understand discrimination. Plaintiffs' counsel is in a precarious position when drawing meta-perceptions because many powerful cultural beliefs inhibit legal decision makers and lay people from perceiving discrimination directed against disadvantaged groups. These shared but inaccurate beliefs can pose barriers to successfully litigating discrimination cases, perhaps leading lawyers to decline cases that they otherwise see as legitimate.

Psychological Barriers

Meritocracy beliefs. Discrimination claims occur in the context of shared beliefs that the United States is a meritocracy: a place where anyone, irrespective of background and circumstances, can get ahead through hard work, determination, and talent (Kaiser & Major, 2006). The more strongly individuals endorse meritocracy, or the more the situation makes those beliefs salient, the less likely they are to detect discrimination against members of disadvantaged groups, such as minorities and women (Major, Quinton, & McCoy, 2002). Furthermore, the more people endorse meritocracy, the more they derogate minorities who air discrimination grievances (Kaiser et al., 2006; Schultz & Maddox, 2013). Discrimination against minorities threatens a core meritocracy belief that anyone in the United States can succeed if he or she simply works hard enough. Rather than abandoning meritocracy beliefs, people often preserve them by denying discrimination and rejecting those who challenge their beliefs (Kaiser & Major, 2006).

Faced with this cultural backdrop about meritocracy, plaintiffs' counsel may experience a dilemma between their personal conviction that a potential client experienced discrimination and their meta-perception of how others will view the case. Thus, they may decline cases that they personally deem credible. They may instead selectively choose

cases that are likely to overcome cultural perceptions that the workplace is a meritocracy. For example, they may be more willing to pursue collective cases that involve an aggrieved class of claimants (Nielsen et al., 2010), rather than a single individual: Attributing a single person's misfortune to lack of merit is easier than doing so for an entire class of aggrieved people (Crosby, Clayton, Alksnis, & Hemker, 1986).

Post-racialism. Discrimination claims also occur in the context of a cultural belief that the United States has achieved a phase of post-racialism, a period in which racism no longer poses serious problems for minorities (Norton & Sommers, 2011). When people perceive the United States as post-racial, minorities' discrimination claims appear less credible, and people question whether efforts to address discrimination are still necessary (Kaiser, Drury, Spalding, Cheryan, & O'Brien, 2009; Plaut, 2011). Post-racialism allows meritocracy beliefs to flourish, as this climate communicates that past barriers no longer remain.

Furthermore, post-racialism beliefs shape which groups seem most affected by discrimination (Wilkins & Kaiser, 2014). For example, recent U.S. Supreme Court cases dismissing both affirmative action and disparate impact theory cited a substantial decline in the racism faced by disadvantaged groups (*Grutter v. Bollinger*, 2003; *Ricci v. DeStefano*, 2009; *Fisher v. University of Texas*, 2013). At the same time, they characterized efforts to address remaining societal racism against minority groups as deliberate "reverse discrimination" against Whites. Over time, these cultural shifts have resulted in many Whites now perceiving that Whites, rather than minorities, are more likely to be the targets of race discrimination (Norton & Sommers, 2011).

The cultural climate of post-racialism poses a barrier for plaintiffs' counsel. If judges and juries now believe that racism against disadvantaged groups is disappearing, plaintiffs' counsel will have greater difficulty convincing them that minority clients' cases are credible. Indeed, a recent analysis of judges' summary judgment decisions in federal discrimination cases revealed that Black claimants' race discrimination claims were more likely to be dismissed than those of White claimants, and that the race of the judge exacerbates this effect (Nielsen et al., 2010; Weinberg & Nielsen, 2011). A similar pattern emerges at the motion-to-dismiss stage, under the new pleading standard that instructs judges to draw on their own experience and common sense when screening cases (Quintanilla, 2011). These patterns may emerge because judges' intuitions are shaped by participating in a culture that believes it has become post-racial.

Ironically, beliefs in post-racialism might make it easier for some types of discrimination claimants to be viewed as credible. To the extent that Whites now view Whites as the primary targets of discrimination (Norton & Sommers, 2011), plaintiffs' counsel might anticipate that these cases will be perceived more favorably by legal decision makers,

and "reverse discrimination" claimants may more easily recruit lawyers (Myrick et al., 2012).

Organizational diversity initiatives. Defendants' lawyers may mount a defense highlighting organizational diversity initiatives as evidence of nondiscrimination, and this may shape plaintiffs' counsel's meta-perceptions. Diversity initiatives promoting egalitarian values (e.g., pro-diversity mission statements, diversity training) are prevalent in U.S. organizations (Dobbin, 2009). Despite their prevalence, most diversity initiatives do not result in fairer organizational outcomes for disadvantaged groups (Kalev, Dobbin, & Kelly, 2006). Instead, many diversity initiatives serve only as symbolic markers of fairness (Dobbin, 2009). Ironically, however, research in law and psychology has observed that diversity initiatives, even those that are purely window dressing, impede detecting discrimination against members of disadvantaged groups (Edelman, Krieger, Eliason, Albiston, & Mellema, 2011; Kaiser et al., 2013).

For example, in recent decades, federal judges have increasingly displayed *deference* to organizations' diversity initiatives when deciding employment discrimination cases (Edelman et al., 2011). Increasingly, judges conclude that merely possessing diversity initiatives makes organizations compliant with civil rights laws, without evaluating whether these initiatives actually create fairer environments. U.S. Supreme Court decisions also reveal judicial deference. In *Faragher v. City of Boca Raton* (1998), the Court absolved organizations of responsibility for employees' meritorious charge of sexual harassment when employees are aware of an organization's diversity initiative but do not navigate its internal dispute process. Yet, these rulings do not require that organizations show that their diversity initiatives are actually effective at protecting civil rights.

Psychological science also reveals that people assume organizations with diversity initiatives are unlikely to discriminate, even when faced with evidence that discrimination occurred. Across six experiments (Kaiser et al., 2013), the presence (vs. absence) of organizational diversity initiatives (e.g., diversity training, diversity mission statement) caused advantaged groups (e.g., Whites, men) to become less sensitive to discrimination directed at disadvantaged groups (racial minorities, women). For example, after seeing women disproportionately passed over for promotions in favor of equally qualified men, men told that the company offered gender-related diversity training were less likely to see disparate treatment against women as stemming from sexism, compared with men who did not see evidence of diversity training. Sometimes, even disadvantaged groups show these same responses to diversity initiatives. For example, women are less likely to detect sexism against women when an organization offers gender-related diversity training, compared with when it does not (Brady, Kaiser, Major, & Kirby, 2014; see Dover, Major, & Kaiser, 2014, for data on Latinos).

Studies from law and psychology converge to suggest that defense attorneys who introduce evidence that an organization offers diversity initiatives will inhibit juries and judges from detecting discrimination against disadvantaged groups. Plaintiffs' counsel might be constrained by this "diversity defense," making it more difficult to demonstrate the merits of their case. In the face of this, plaintiffs' counsel may decline credible cases involving disadvantaged clients.

Structural Barriers

Beyond psychological processes, several structural barriers block meaningful redress of potentially meritorious discrimination claims and dampen their financial viability. Adequate compensation is the "fuel that makes the machinery of adjudication work. If the fuel runs out, the machinery does not function and civil rights do not have the effect of protecting people whose interests are at stake" (Civil Rights Act, 1990, House Report).

Over recent decades, the U.S. Supreme Court has raised substantive, procedural, and fee-recovery barriers that dampen the financial viability of representing discrimination claimants, which Congress has attempted with incomplete success to dislodge. In 1975, the Court forbade federal courts from exercising equitable powers to provide fee awards to prevailing civil rights claimants. One year later, Congress responded by enacting a statute authorizing fee shifting, the Civil Rights Attorney's Fees Awards Act. In 1989 and 1990, the Court issued seven decisions that curtailed Title VII's private enforcement regime, reshaping burdens of proof, standards of evidence, standing, statute of limitations, and attorneys' fees. In turn, Congress responded by enacting the Civil Rights Act of 1991, which attempted to restore Title VII's private enforcement regime (Civil Rights Act, 1990, House Report; Civil Rights Act, 1990, Senate Report). Afterward, the Court imposed severely restrictive time periods for claimants to challenge equal pay discrimination (Brake & Grossman, 2007), which Congress unwound in the Lilly Ledbetter Fair Pay Act. Since the early 1990s, the Court has also reshaped Title VII's proof structures, narrowing the legal contours of actionable discrimination, harassment, and retaliation (Brake & Grossman, 2007; Nelson, Berrey, & Nielsen, 2008). And the Court has reinterpreted procedural rules, including pleading rules, making Title VII cases more difficult to commence (Quintanilla, 2011), while dampening the ability to redress discrimination on a class-wide basis (Resnik, 2011), and diminishing the likelihood of collecting attorneys' fees when lawsuits force defendants to voluntarily halt discrimination (Albiston & Nielsen, 2006). The cumulative effect of these structural barriers disincentivizes lawyers from representing victims of discrimination and contributes to the access-to-justice problem.

Policy Implications

Our three-stage analysis of obtaining legal representation highlights the psychological and structural barriers that prevent employment discrimination claimants from obtaining legal representation and scaling the dispute pyramid. Surmounting these barriers can strengthen civil rights enforcement, providing employment-discrimination victims with the meaningful redress promised in Title VII. This final section connects psychological science, law, and policy, offering suggestions for increasing discrimination claimants' access to counsel.

First, psychological scientists can contribute toward legal education by providing guidance on framing arguments in ways that increase jurors' and judges' receptivity toward evidence that discrimination continues to pose barriers for disadvantaged groups. Doing this may help lawyers overcome barriers posed by meta-perceptions of judges, juries, and defense attorneys that prevent them from taking on discrimination cases. However, legal education may be insufficient, as financial realities constrain representation decisions.

Instead, public interest law can provide a powerful path toward overcoming some obstacles to representation highlighted here. For example, with increased public funding for legal services and to agencies such as the EEOC, public service lawyers could accept risky cases. They could introduce arguments that overcome the obstacles described, and if successful, could provide precedent for other employment discrimination cases. If these cases are successful, private lawyers may be more willing to take on subsequent cases, providing future victims of employment discrimination with the ability to realize the promise of civil rights laws. Funding would also enable public interest groups' efforts to address judicial rulings and laws that dismantle Title VII.

Third, legal empiricists can contribute by closely evaluating the cumulative effect of the Supreme Court's decisions on counsel's decision to represent claimants. Many recent rulings construe federal statutes. As such, if these rulings dismantle access to justice, Congress may amend Title VII, attorneys' fees laws, and procedural rules to reconstruct the private enforcement scheme. The Court's decisions comprehensively affect the system of private enforcement and need to be evaluated cumulatively for their effect on access to justice.

Fourth, greater diversity within the legal profession can contribute toward resolving the access-to-counsel problem. If lawyers more broadly represented the backgrounds of employment discrimination victims, claimants may have more access to lawyers, through networks and community organizations, and claimants may feel more comfortable discussing discrimination with lawyers from similar backgrounds. And, if a diverse legal profession channels into a diverse judiciary, the pluralistic experiences and views of a diverse judiciary will broaden inclusive perspectives on justice and discrimination (Weinberg & Nielsen, 2011).

Finally, scientists, legal practitioners, and policy makers can translate scientifically grounded approaches to managing diversity into regulated diversity practices that comply with civil rights laws. Indeed, the French Government, for example, has recently regulated diversity and equality labels that companies can earn if they maintain diversity practices that are empirically grounded as effective. These labels are difficult to earn, requiring substantial oversight, evaluations, and regular renewal. Time will tell whether they increase equal opportunity. Such an approach would benefit current diversity management, which, although well-intentioned, is often ineffective and sometimes harmful (Dobbin, 2009).

By regulating diversity practices and separating those that are empirically based from those that are not, juries and judges will find it easier to render judgments about whether a “diversity defense” is credible. For example, if an organization used empirically validated diversity initiatives, and examined their organizational data regularly to examine effectiveness and adjusted policies accordingly, a “diversity defense” may be a reasonable inference. Indeed, organizations may then be motivated to implement best evidence-based diversity practices, as the law would recognize their stringent effort to combat bias. This approach would also recast as less compelling arguments from organizations that use window-dressing diversity approaches, making it easier for lawyers to convince juries and judges to view non-evidence-based approaches more critically.

Conclusion

The United States has witnessed remarkable progress in access to equal opportunity in the 50 years since Title VII was signed into law; yet, extensive employment discrimination persists. Women are still paid less than men for the same work, field experiments in the labor market still reveal discrimination against disadvantaged groups, and disadvantaged groups lag behind advantaged groups in ascending the ranks within organizations (Banaji & Greenwald, 2013; Eagly & Carli, 2007). The civil rights promise of Title VII is still needed. Today, this promise goes unfulfilled for many victims of employment discrimination. Psychological science can examine one place where the civil rights process goes awry for discrimination claimants: access to counsel. By understanding why discrimination claimants, and in particular, minority claimants, experience difficulty accessing legal counsel, psychological scientists, legal scholars, and policy makers can work together to enhance access to justice and improve the potential of civil rights enforcement.

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