sociology finds discrimination in the law

by ellen berrey

In 1988, Chris Burns, an African American man who built machinery for the military, injured his back on the job while carrying a heavy metal plate. He requested different work responsibilities and was fired soon after.

He first tried to find a lawyer, appealing to legal aid clinics, congressional representatives, even the President of the United States, all to no avail.

"I been searching for a lawyer to fight the government for 12 years, and there's no point," he said. With assistance from his wife and his uncle, Burns, who had only a high school diploma, filed a lawsuit. He claimed the military had discriminated against him based on his race, age, and physical handicap and had retaliated against him for seeking an accommodation.

The U.S. federal district court initially didn't consider Burns's arguments, citing his "failure to exhaust administrative remedies." While the court gave him 30 days to revise his original complaint, Burns didn't understand that part, he thought the case was over.

"I got so, you know, depressed. They send you through all this red tape gobbledy-goo, and they say these big 25-cents words. And you know without a lawyer degree that you don't understand a thing that they are telling you," he recalled.

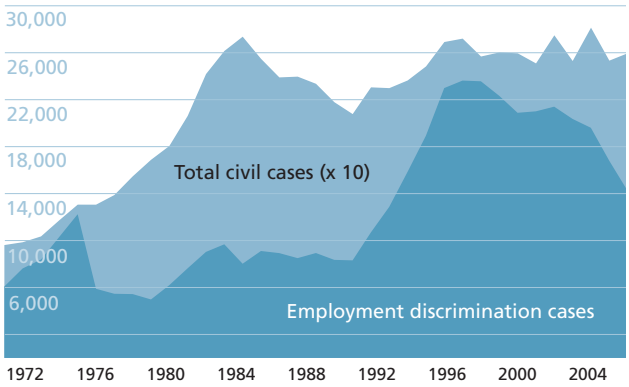
Sociologist Laura Beth Nielsen told Burns's story at the Discoveries of the Discrimination Research Group conference last November. Held at Stanford Law School, the two-day conference showcased some of the latest research by social scientists who study employment discrimination and the law.

The findings spoke to why workplace inequalities persist despite the civil rights reforms enshrined in Title VII of the U.S. Civil Rights Act of 1964 and other subsequent laws. They reveal the complex nuances, challenges, and contradictions of the law and its implementation.

Good sociology often does this—it complicates our understanding of important institutions, such as law, and basic concepts, such as discrimination. It raises as many provocative questions as it answers.

Take Burns's experience. He was one of 41 plaintiffs interviewed for a study of employment discrimination litigation led by Nielsen and fellow sociologists Robert Nelson and Ryon Lancaster (I also collaborated with them). In interviews, plaintiffs recounted how they quickly found themselves in what seemed a maze of manipulative lawyers, judges in cahoots with employ-

Employment discrimination and total civil cases



ers, and unreasonable or mysterious rules that prevented them from ever telling their stories. For Burns and many others in similar situations, the law provides partial protection and inadequate recourse, and it can inflict its own harms.

We developed our study in conjunction with the Discrimination Research Group (DRG), a network of many of the top social scientists, lawyers, and policymakers who study the changing dynamics of employment discrimination. Legal studies is an interdisciplinary field, so although most DRG participants are sociologists, our projects often incorporate questions, concepts, and methods from outside sociology.

The panelists at this conference spoke on topics ranging from the effects of civil rights legislation to workplace strategies that increase equality to the insight social science can offer when drafting laws. The sociological findings highlighted tensions, exposed ironies, and posed new ways of thinking about the layers of contradictions operating in anti-discrimination initiatives.

unfairness in the workplace

While workplace discrimination is prevalent, white women and black, Latino, and Asian men and women have made some inroads into well-paying and high status jobs since 1966, when the U.S. government began to collect these data. Yet, most of these groups remain underrepresented (some grossly) in craft production, managerial, and professional jobs, according to a 2007 study by sociologists Donald Tomaskovic-Devey and Kevin Stainback.

The U.S. Current Population Census reveals that in 2006, white men still earned significantly more than white women, African Americans, and Latinos. White women had the closest parity, earning 73.5 percent of what white men earned that year, while Hispanic women had the greatest earnings gap, 51.7 percent. Although these figures don't control for significant factors that affect earnings, such as education, they nonetheless demonstrate the persistence of substantial economic inequity.

Sociological research on discrimination not only documents these patterns of inequality, it tries to explain them. And it shows that our explanations can't just point to sexism and racism in society at large. Rather, workplaces are a significant source of discrimination, which can take many forms.

Sometimes discrimination involves flagrant acts of racism or sexism. Employment law today is designed to adjudicate this intentional discrimination. Often, however, people discriminate unintentionally and unconsciously, or in ways that obscure their prejudice.

Sociologist and social psychologist Cecelia Ridgeway, one of the conference panelists, has shown in her research how unconscious bias operates. Popular gender stereotypes contain assumptions about people's status and competence. Such stereotypes may lead those making decisions to an "implicit bias" in their judgments and actions, such as their willingness to listen to another person's opinion. These biases tend to work to the disadvantage of women, people of color, and other marginalized groups.

Organizations' own practices also generate much inequity at work, especially when combined with widespread patterns of gender and racial bias. Many jobs continue to be segregated by race and gender, even though civil rights laws make it illegal for employers to consider race or sex when they assign positions and set wages. Employers who rely on their employees' networks to obtain applicants are more likely to hire people of the same gender and ethnic characteristics of their current workforce.

Here, sociological research provides a compelling explanation for why the law fails to remedy much workplace inequality: the legal definition of intentional discrimination leaves out implicit bias, hiring by networks, and other influential organizational practices.

the litigation system

Under the current system, people who believe they have been targets of discrimination must file a complaint with the Equal Employment Opportunity Commission (EEOC), or a state or local agency, and then pursue litigation. Despite the challenges plaintiffs like Chris Burns face when pursuing a lawsuit, the volume of employment discrimination litigation ballooned in the 1990s, Nielsen and her colleagues have shown. The number of discrimination lawsuits filed in federal court tripled from 8,000 in 1990 to 23,000 in 1998, but then dropped to 15,000 by 2006.

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Some of the rise in litigation can be explained by the 1991 Civil Rights Act and the 1992 Americans with Disabilities Act (ADA)—legislation whose track record of helping its intended beneficiaries is mixed, but which nonetheless spurred attention.

Law professors John Donohue and Peter Siegelman sur-

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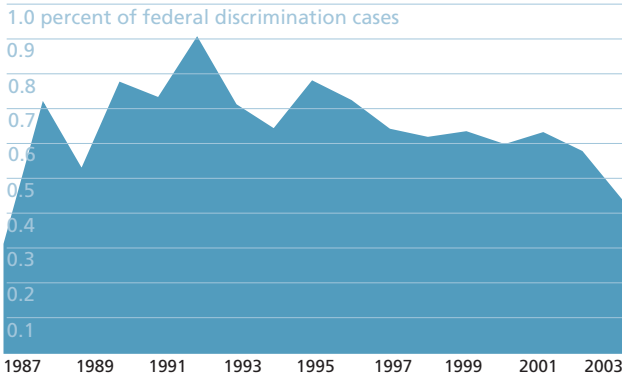
Discrimination class actions filed in federal court



veyed a wide range of social scientific studies and found the early federal employment discrimination laws of 1964 and 1972 generated significant benefits—African-Americans and white women, for example, made inroads into jobs that previously had shut them out—but later interventions in the 1990s had less encouraging results.

One study, by Donohue and colleagues, suggested the ADA didn't actually result in more people with disabilities becoming employed, nor did it stem the decline in their wages that had begun in 1986. This research raises a troubling possibility: in some cases, the newer extensions of employment discrimination law may have serious drawbacks, such as business costs for compliance, but no clear benefits. They may even harm the employment prospects of their intended beneficiaries.

Employment law is designed to adjudicate intentional discrimination. Often, however, people discriminate unintentionally and unconsciously, or in ways that obscure their prejudice.

If litigation is workers' primary option, how do they fare once they've filed suit? The literature on litigation (both civil in general and employment discrimination in particular) suggests the system of individual claims is inadequate. Most targets of discrimination won't pursue a claim. Many who do face the common problems of inadequate legal representation, lack of knowledge, and lack of resources.

The law can lead to social change only when individuals choose to mobilize it, according to Nielsen and her colleagues. A group of plaintiffs can opt to file a class-action lawsuit, and these can have far-reaching consequences. Class actions are most likely to claim disparate impact—that an employment practice like a height requirement might seem neutral but, in fact, systematically hurts a protected group—so they're able to help far more people. Class actions also are more likely to succeed. Yet, they made up less than 1 percent of the federal cases between 1987 and 2003, Nielsen and her colleagues reported in their presentation.

Moreover, most litigation doesn't address systemic patterns of discrimination. The vast majority of cases—93 percent—consist of a single plaintiff. Many plaintiffs, especially those without a lawyer, are dismissed by the court or lose early in the process on summary judgment.

If we got our information on these discrimination cases from the news alone, we might conclude that all plaintiffs reap a windfall. Some 96 percent of media reports cover successful plaintiff wins at trial, but just 2 percent of cases filed actually result in a plaintiff win. As well, media reports tend to focus on big wins—more than $1 million—but the actual median award in these cases is just $150,000, Nielsen has also found. The litigation study shows plaintiffs are far more likely to settle, and for a median award of $30,000.

Although employers complain about the hassles of employee lawsuits, employment discrimination law favors employers in both overt and subtle ways. Since the inception of equal employment opportunity law, employers have created departments, positions, policies, and other programs that allegedly prevent or mitigate workplace inequality. But, employers' willingness to follow formal and legal procedures when dealing with workers—what sociologist Lauren Edelman and her colleagues call the "legalization of the workplace"—doesn't necessarily translate into less workplace discrimination.

In fact, formal legality can make the law work to an employer's benefit. The courts have developed legal standards based on the very policies and programs employers have created to signal their workplaces are "fair," according to a study by Edelman, and law professors Catherine Albiston and Linda Krieger, sociologist Scott Eliason, and EEOC administrative judge Virginia Mellema.

Judges treat the mere existence of personnel practices, non-discrimination policies, and diversity programs as evidence discrimination hasn't been taking place. They fail to question whether these practices are really implemented or truly effective at protecting workers from discrimination.

promising alternatives

Social scientists are now beginning to identify systemic practices that can promote greater equality in organizations. Many are the reverse of the routine organizational practices that generate inequality. Job segregation, for example, can be mitigated when employers formalize their processes for posting job openings, establish clear criteria for selecting candidates, and hold administrators accountable for improving the representation of women and people of color.

Other effective practices may come as a surprise. After analyzing more than 800 private employers since the early

Photo by John Sheretz

Sociologist Alexandra Kalev at the Discoveries of the Discrimination Research Group conference.

1970s, sociologist Alexandra Kalev has demonstrated that some employee involvement programs adopted by companies to increase worker efficiency actually end up helping white women, black women, and black men enter managerial ranks.

"Most women and minorities are channeled into low-visibility jobs with little opportunity for advancement. When companies create self-directed work teams and cross-training programs, these women and minorities suddenly have more opportunities to demonstrate their skills and smarts," she said.

Sociological research also reveals the law can, in surprising ways, thwart organizational interventions. Sociologist Frank Dobbin presented new results from his study with Kalev showing that most corporate diversity programs fail to improve the numbers of female and African American managers.

Managers aren't persuaded by mandatory diversity trainings nor by company statements that justify support for women and people of color because of the risks of lawsuits or other legal issues. Diversity trainings can be effective, though. When training references the "business case" for cultural differences—that workplace diversity leads to better products and greater profits—and when it avoids any mention of the law, more women and African Americans move into management positions.

These findings are significant because the less effective diversity trainings are more popular: roughly 80 percent of companies make training mandatory and nearly 75 percent refer to law in their training curricula. These practices are a mainstay of the estimated $8 million diversity management industry.

Despite popular rhetoric about the business case for diversity, though, the number of racial minority corporate board members and senior executives still remains limited. This finding came from a study of corporate boardrooms by sociologists Clayton Rose and William Bielby. When large American companies systematically manage the racial composition of their boards, they focus on African Americans and ignore other groups. "Race is about black ... all boards need an African American today," one white board member interviewed for their study said.

In even the best corporate diversity management programs, many workers fall through the cracks. In my own study of a Fortune 500 company, I've found the company measures "diversity" by the number of women and people of color who earn annual salaries more than $24,000 from non-unionized, non-hourly positions. The company's diversity networking groups are for senior managers and professionals, and they hold events during business hours, which means a worker who assembles products on a factory line can't attend. Such an approach assumes female and minority representation at the top will "trickle down" to benefit everyone else.

the discrimination frame

With all these new employer interventions, it may seem like there's no reason to retain traditional concepts of discrimination. But participants in the final roundtable considered discrimination as an analytical and legal frame, suggesting different ways to think about it.

Since the 1950s, sociologist Sam Lucas explained, civil rights law and activism have renounced prejudice with considerable success. Discrimination, however, remains deeply entrenched.

"We should still care about the results of discrimination," he insisted. Moreover, the law focuses on assigning blame for discrimination, but blame "is not helping the social scientific analysis." Sociologists should instead analyze discrimination in terms of the conditions under which it tends to occur and the actual parties involved.

Some of those at the discussion fiercely defended the legal model of discrimination. Miranda Massie, a civil rights attorney, argued political activism and class-action lawsuits together can create disincentives for discrimination. One of her legal cases helped end sexual harassment in a car manufacturing plant where a male manager repeatedly revealed himself to female employees and abuse of women seemed to be a management perk. Their win created a better workplace for female employees in that factory, Massie said, and these legal victories must be continually reinforced.

> What this sociological research shows us, however, is that law has both real payoffs and serious limitations as a strategy for promoting equality.

Law professor Susan Sturm's current project examines institutional innovation, specifically initiatives that address structural inequalities and promote inclusion. She and her colleagues look at "institutional change on the cutting edge" in such areas as low-wage work, housing, and criminal justice to understand how

AP Photo/Noah Berger

These plaintiffs were among the 1.6 million current and former female employees who filed a class-action lawsuit alleging Wal-Mart discriminated against female employees.

change happens. They see success among institutions "that take up diversity as part of their core mission." In these models, legal action is just one of many possible strategies for achieving change, not the primary one.

The debate continued on the role law can, and should, play in achieving social change.

"Rights aren't only about litigation," Edelman argued. "And if you move too far away from rights, what do you lose?"

"This is not a move away from rights," Sturm replied. "It's about situating rights in a broader context, but people hear this as abandoning rights and litigation." She added that the risk comes from the current political context: "There are risks both in moving towards the innovation model and letting go of rights and in holding on to court-enforced rights and missing the train."

"All frames have costs and benefits," sociologist Robin Stryker interjected. "We need to ask: what do we get and what do we lose?"

social science and the law

A pressing question remained after two days of presentations and debate: can sociological findings like these improve the law? After all, the social sciences haven't gained authority within the law, which sometimes wholesale disregards an enormous body of published, refereed research. Judges, too, tend to minimize or ignore social scientific literature. And, many basic legal concepts are at odds with sociological findings on inequality, workplace discrimination, and effective solutions.

Scientific evidence doesn't always fit neatly within a legal framework. For example, in court, expert witnesses have cited research findings on implicit bias, but they rarely, if ever, can prove it exists in any particular workplace or that it produces the specific instances of discrimination an employee experiences. Social science can, however, influence the content, implementation, and effects of civil rights law, Stryker argued.

In the 1960s and 1970s, for example, industrial psychologists played a critical role in preventing employers, especially in the south, from discriminating against African American job applicants and workers. Many employers used general thinking tests to screen blue collar jobs, but to the disadvantage of people of color. Industrial psychologists were able to convince courts that these tests didn't predict job performance, and the EEOC and the Supreme Court adopted their scientific definitions as the basis of disparate impact, which is a very effective legal doctrine for ending workplace discrimination.

We still need a legal system that frees Chris Burns and others like him from discrimination in the jobs they need—a system that fully hears and fairly considers the cases of aggrieved parties and that ultimately brings greater parity in wages, career opportunities, and other key measures of social equality. Without such change, civil rights law will perpetuate, rather than remedy, workplace injustice.

What this sociological research shows us, however, is that law has both real payoffs and serious limitations as a strategy for promoting equality. We learn from sociology that discrimination is a tricky concept. Tools to combat it can be easily co-opted, and even good policies have limitations. Sociology reveals the subtleties, nuances, tensions, and contradictions that abound when law is put into practice in the real world. The value of sociology lies in its ability to complicate our assumptions about law and demonstrate both its promises and pitfalls.

recommended resources

Lauren B. Edelman, Christopher Uggen, and Howard S. Erlanger. "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth," *American Journal of Sociology* (1999) 105: 406–454. Shows how courts incorporate organizations' norms and ideas into legal rules.

Sam Lucas. *Theorizing Discrimination in an Era of Contested Prejudice* (Temple University Press, 2008). Draws on critical scholarship to explain racial and gender discrimination as an insidious social dynamic in many social contexts.

Laura Beth Nielsen, Robert L. Nelson, Ryon Lancaster, and Nicholas Pedriana. *Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation, 1987–2003* (American Bar Foundation, 2008). Unique documentation of the latest trends in federal employment discrimination lawsuits and their outcomes in court.

Robert L. Nelson, Ellen Berrey, and Laura Beth Nielsen. "Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences," *Annual Review of Law and Social Science* (2008) 4: 103–122. An overview of socio-legal research on workplace discrimination.

Nicholas Pedriana and Robin Stryker. "The Strength of a Weak Agency: Early Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity," *American Journal of Sociology* (2004) 110: 709–760. Shows how the EEOC, in its early years, took advantage of broadly constructed legislation to expand and enforce civil rights law aggressively.

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