GETTING A LAWYER WHILE BLACK: A FIELD EXPERIMENT

by
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In this Article, I present new evidence that African-Americans face unique impediments in obtaining access to counsel. Using a randomized audit design, I show that those with black-sounding names receive only half the callbacks of those with white-sounding names in response to requests for legal representation. I design a larger, follow-up experiment to evaluate variations on the theory of "statistical discrimination"—that lawyers are merely responding to economically relevant signals correlated with race. I find no evidence supporting the expectations of the statistical discrimination theory but some evidence that racial preferences matter. I conclude by presenting a more nuanced theory of racialized service rationing that is consistent with the body of experimental evidence presented and is supported by observational data. I discuss the implications of these theories for potential policy responses, including debates about affirmative action and the size of the legal profession.

INTRODUCTION

Equal access to justice is a normative ideal of democratic government.[1] It requires that individuals with similar problems face similar chances of solving their problems through law.[2] Yet individuals do not enter the legal system as equals. Money, knowledge, and energy help individuals achieve better outcomes from any social system. Why should the law be different? So long as legal services are provided through markets and as a business, some inequality in access to justice is inevitable. More minimally, we might hope that legal problems with similar market values would have similar chances of being resolved, regardless of the identity of individuals to which those problems attach. Sadly, access to justice in America fails to meet even this modest standard.

This Article presents the results of several audit experiments exploring the extent and causes of racial discrimination in the market for legal services. The principal finding is that in response to cold email requests for representation, lawyers respond to individuals with white-sounding names twice as frequently as those with black-sounding names. Cold email requests are a common means for obtaining legal representation,[3] whose prevalence is only likely to increase. The existence of such discrepancies in search costs is, therefore, important on its own terms. More broadly, these findings also help inform expectations about potential disparities in the legal market that are harder to observe. Do lawyers put equal effort into serving their black clients as their white ones? Given the difficulty of observing effort, we are

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[1] *See* DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004); REGINALD HEBER SMITH, JUSTICE AND THE POOR 3 (1919).

[2] Rebecca L. Sandefur, *Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 951–78 (2009).

[3] *See* Donald B. Kramer, *Online Lawyer Directories: Do They Work?*, 53 WASH. ST. B. NEWS, 1999, at 30, 30–31.

unlikely to know for sure.[4] Nevertheless, finding racial disparities in one context makes it all the more likely that disparities are also prevalent in other areas that are harder to observe.

Getting a lawyer while black is harder. This fact conflicts with our intuitions about equal access to law. It seems to implicate the legal profession in the rampant and well-documented problems of inequality in our time. Even so, market realists may wonder whether the finding is surprising or even suggests failure in the market or the profession. State-sanctioned racism, from slavery to Jim Crow and more recently mass incarceration, has left African-Americans poorer than whites.[5] For lawyers, the richer the client the better. Therefore, lawyers acting as rational economic agents will inevitably use race to extract information about affluence. In this account, the market and profession by no means make up for prior inequality in society, but arguably one cannot and should not expect them to. The capacity of markets or the profession to overcome basic economic incentives is doubtful. For the market realist, the normative appeal of market intervention is also unclear. Any regulation strong enough to improve equality in outcomes is likely to create pernicious side effects. By pursuing equality for all, everyone may receive fewer and worse legal services, or so the argument might go. To convince a market realist that access to justice is unequal after considering the confounding role of prior economic inequality, one would need to know if the discrimination were due to race *directly* or merely *indirectly* through its information value about other traits that influence lawyer profits.

In order to explore whether the disparities identified in the first experiment are a result of economic profiling using race, I conduct a second field experiment. This experiment leverages two key ideas. First, I examine how African-American lawyers treat emails from black clients. In the simplest models of economic profiling, one would expect African-American lawyers to discriminate against black clients the same as white lawyers do.[6] Second, I exploit differences in funding models within tort, criminal, and divorce law, which are some of the most commonly practiced

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[4] To give a counter-example of where and how one might observe something like effort, consider the medical profession. In that context there are similar concerns about client race affecting the quality of service provision. Doctors, however, keep detailed administrative records on services rendered. According to multiple studies of multiple kinds of records, physicians are less likely to adequately address the needs of minorities complaining about pain than whites. In the legal context, nothing like these records exist, so we are likely to always remain in the dark about these issues. Alexie Cintron & R. Sean Morrison, *Pain and Ethnicity in the United States: A Systematic Review*, 9 J. PALLIATIVE MED. 1454, 1454 (2006).

[5] Derek Neal & Armin Rick, *The Prison Boom and the Lack of Progress After Smith and Welch* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 20283, 2014); *see also* Robert Manduca, *Income Inequality and the Persistence of Racial Economic Disparities*, 5 SOC. SCI. 182, 182 (2018).

[6] As explained below, some more complicated theories of statistical discrimination might allow or even predict racial sorting in markets.

areas for retail lawyers.[7] Each practice area introduces different levels and sources of payment risk. Different forms of economic profiling would cause racial disparities to emerge in different areas, so this experiment can help define the mechanism of economic profiling.[8] For example, if lawyers are concerned that racism among jurors affects their payout,[9] one might expect the highest disparities for clients seeking representation in personal injury and slim to no disparities in divorce law, where juries typically play no role.[10]

As it turns out, the broad predictions of the statistical discrimination theory fail to materialize. Black lawyers respond at *higher* rates to clients with black-sounding names than clients with white-sounding names. While this finding is hard to square with statistical discrimination, it is notably what one would expect to find if racial preferences had a significant role in driving client selection. Further, an increase in the odds that a client is black produces no discernible difference in the rates of response by practice area. Given the surprising lack of evidence supporting the predictions of the statistical discrimination theory, it appears more likely that the experimental signal is interpreted purely for what it suggests about the likely race of the client, rather than the market value of their legal issue.

While evidence of statistical discrimination fails to materialize, the two experiments also challenge the notion that racial preferences alone drive disparities. Rather, I argue that the best interpretation of the experimental evidence is that markets play a crucial role in constraining the expression of latent racial preferences. The most important piece of data favoring this more nuanced interpretation is that white lawyers in the second experiment treated black clients much more fairly than did the lawyers in the first experiment. This difference was so substantial that I chose to conduct both experiments once again and the same findings did indeed emerge. The design of this replication exercise was such that one cannot credibly attribute the difference to inadvertent changes in treatment instruments, timing of the experiment, or statistical chance.

The only credible explanation for the difference in degrees of market discrimination is that the experimental populations differ in ways that matter. The question is why. The simplest story is that the first population was more racist than the second population. Yet this simple story has some problems. The first study was applied to criminal lawyers in California while the second study was applied to Florida lawyers

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[7] DONALD D. LANDON, COUNTRY LAWYERS 29–30, 32 (1990); Mary Nell Trautner, *How Social Hierarchies Within the Personal Injury Bar Affect Case Screening Decisions*, 51 N.Y.U. L. REV. 215, 219 (2006).

[8] To give this idea more power to observe differences, the study varies the black or white soundingness of a name continuously, which has not to my knowledge previously been done in the literature.

[9] John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 479 (2002).

[10] *What, No Jury Trials in Divorce Court?*, RIGHT LAWYERS (Sept. 17, 2019), https://rightlawyers.com/what-no-jury-trials-in-divorce-court.

practicing criminal, divorce, and personal injury law.[11] If racial preferences alone drove the disparities between potential black and white clients, one surely would expect Florida to be worse than California. While California's history with race is problematic to say the least,[12] Florida was part of the secessionist and segregationist South. Until quite recently, Florida barred 40% of its black male citizens from voting.[13] Survey measures confirm that Floridians are more likely to subscribe to overtly racist views than Californians.[14] It strains credulity to believe that stronger racial preferences of California lawyers than Florida lawyers explains the greater disparities observed in California than in Florida.

A more nuanced, and I argue better, explanation for why the Florida and California lawyer populations differ is not that the lawyer populations have significantly different degrees of latent racial bias. Rather, the economic environments of these lawyers encourage them to behave differently. In particular, I argue that racial disparities in access to lawyers emerge as a correlate of economic rationing. Lawyers may prefer one sort of client over another for many idiosyncratic reasons. For some lawyers, race is undoubtedly a factor. If demand for legal services is high relative to supply, expressing racial preferences through client selection has little opportunity cost.[15] A busy lawyer can refuse to serve blacks without hurting the bottom-line. The same is not true for lawyers working below capacity. Underutilized attorneys bear the full opportunity cost from turning away clients. Market conditions primarily dictate how busy lawyers are, hence how much racialized rationing they can afford to do. This theory appears consistent with observational evidence; within Florida, counties with fewer lawyers per capita also appear to have greater disparities between black and white response rates. Future work leveraging econometric techniques such as Bartik instruments might be able to confirm this story in a causally credible fashion.

If the rationing explanation is accepted, then the solution to inequality of access is what access to justice scholars have been arguing for years: increase the supply of

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[11] The switch from California to Florida was made for data availability reasons and the difference was not considered theoretically significant during the design phase. In particular, the switch was made because the Florida bar directory was more complete and transparent, so that blocking on lawyer race and practice area was easier in Florida than in California.

[12] *See, e.g.*, Richard Walker, *California's Collision of Race and Class*, 55 REPRESENTATIONS 163, 163 (1996).

[13] Jennifer Rae Taylor, *Florida's Election Shows the True Promise of Restoring Voting Rights*, MARSHALL PROJECT (Nov. 7, 2018), https://www.themarshallproject.org/2018/11/07/florida-s-election-shows-the-true-promise-of-restoring-voting-rights.

[14] Stephen Ansolabehere & Brian Schaffner, *CCES Common Content, 2016*, HARV. DATAVERSE, https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi%3A10.7910/DVN/GDF6Z0; Paul M. Sniderman & Philip E. Tedlock, *National Race and Politics Survey 1991*, OPEN ICPSR (May 20, 2014), http://doi.org/10.3886/E100056V4.

[15] Trautner, *supra* note 7, at 223–24.

lawyers.[16] This is a tough pill for the profession to swallow. By restricting the supply of lawyers through bar and law school requirements, the profession is able to artificially inflate the value of their services.[17] The profession might like the idea of decreasing racial disparities, but it will want to find a way to do that which does not hurt its profits or perceived exclusivity. In light of the immense market and political power of the profession, less threatening alternatives have been advanced. Some have argued that paralegals need to be allowed to do more or that one should create a new profession of "legal technicians."[18] To the extent that such new market participants would absorb the less interesting and profitable work from the legal profession, the idea is more politically palatable.[19] By taking work off lawyers' plates, it might also help with the racialized rationing problems that may pervade current legal markets. The primary argument against increasing the size of the legal profession is that doing so might erode the quality of legal services.[20]

If increasing the number of legal service providers is impossible without damaging lawyer quality, then the experiments suggest that altering the racial composition of the bar may help decrease racial disparities in access. In particular, the experimental evidence shows that admitting lawyers from underrepresented demographics to the bar would likely help underserved demographics find lawyers that would otherwise not. The legal profession has for decades claimed that it is trying to correct its racial balance issues with mixed success.[21] Proposals to redouble the profession's efforts in this area are routinely made and should prove unproblematic.[22] Logically, one of the best ways to increase the number of black lawyers is to increase the number of black law students. Therefore, the experimental data presented here seems to suggest a new, empirically-backed justification for aggressive affirmative action policies in public law schools. With a few notable exceptions, state

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[16] Michael Bard & Barbara A. Bamford, *The Bar: Professional Association or Medieval Guild?*, 19 CATH. U. L. REV. 393, 425 (1969); Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 152–54 (2010); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 97–98 (1981).

[17] Charles A. Reich, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB L. REV. 363, 416 (2002).

[18] Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 716 (1996).

[19] BARLOW F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 17 (1970).

[20] *Id.* at 29.

[21] LAWRENCE M. FRIEDMAN & GRANT M. HAYDEN, AMERICAN LAW: AN INTRODUCTION 245–46 (2017).

[22] *See, e.g.*, Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, A.B.A. (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/.

law schools primarily train lawyers for practice within their state.[23] Many, if not most, states presumably have similar racial disparities in access to justice as were observed in California. Admitting more black lawyers to the bar appears especially likely to improve disparities in access to justice in such jurisdictions. Under this logic, affirmative action in public law schools is a sensible policy for redressing *contemporary* market failures, rather than one that compensates for past injustices or promoting educational values such as diversity. In light of the current direction of the Supreme Court,[24] such alternative rationales are particularly important to have available.

The Article builds this argument as follows. Section I provides background on the market for legal services, the prior literature on access to justice issues, and an overview of the social scientific literature on discrimination and audit studies. Section II describes the design and results of the initial California study, while Section III describes the design of the Florida study intended to identify mechanisms of statistical discrimination. Section IV presents the cross-over replication exercise and provides evidence that economic rationing is an important driver of racially disparate outcomes. The Article concludes by discussing the policy implications of this research, in particular its relationship to debates about affirmative action and the appropriate size of the legal profession.

I. RACE, DISCRIMINATION, AND LEGAL MARKETS

A. *Legal Service Provision*

In defining a market, the most basic question usually is "what's the product?" Unfortunately, in the case of the legal market, the answer is not very clear. As Donald Landon quipped, "for all the studies that have been done of law practice, the one thing we still don't know is what exactly lawyers do."[25] It is sometimes said, rather circularly, that the lawyer's job is to solve legal problems.[26] Yet, which problems are "legal" depends on historical and national context.[27] In decades past, one

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[23] *Employment Summary for 2017 Graduates*, ARIZ. ST. U. (May 6, 2018), https://law.asu.edu/sites/default/files/pdf/aba-employment-questionnaire-2017.pdf; *Employment Summary for 2017 Graduates*, S. TEX. C. L. HOUS. (May 23, 2018), http://www.stcl.edu/wp-content/uploads/2018/05/Employment-Summary-for-2017-Graduates-4-23-18-with-Change-Submitted-to-ABA.pdf; *Employment Summary for 2017 Graduates*, WAYNE ST. U. (June 28, 2018), https://law.wayne.edu/aba_pdfs/06-28-18_employmentsummary-_class_of_2017.pdf.

[24] Caleb Gayle, *Supreme Court Pick Could Put 40 Years of Affirmative Action Precedent at Risk*, GUARDIAN (July 7, 2018), https://www.theguardian.com/law/2018/jul/07/supreme-court-pick-affirmative-action-precedent.

[25] LANDON, *supra* note 7, at 5.

[26] Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811, 811 (1999).

[27] QUINTIN JOHNSTONE & DAN HOPSON, JR., LAWYERS AND THEIR WORK 3–11 (1967).

needed a lawyer to issue a bank check.[28] Today bank tellers can issue them. Pressing deeper, one might note that some attorneys solve client problems through courts and litigation. Others focus on facilitating transactions by producing written legal instruments. The transactional versus litigation distinction is important for describing the most prosperous attorneys at the "top-end" of the profession.[29] Yet a much larger number of attorneys are "retail" lawyers working in solo or small practices.[30] They do not rely on repeat business from a limited set of high volume clients, which are usually firms and wealthy individuals.[31] Rather, they rely on many clients who have infrequent legal needs. Repeat business and referrals are important for these lawyers, but so too are new clients walking through the door.[32] For retail lawyers, the distinction between litigator and transactional attorney is often murky. They may find themselves writing a contract in the morning and filing a motion in the afternoon.[33] At the same time, specialization is common even for lawyers working on Main Street.[34] Most would not try to do it all but instead cultivate an area of expertise and a reputation in that area for quality service.[35]

Frequently, retail attorneys provide assistance in obtaining benefits from the government—for example social security checks.[36] Actually, many top-end attorneys also work to obtain benefits from the government, but they may describe themselves as lobbyists rather than lawyers. Lawyer work focused on governmental benefits, at whatever end of the profession, may combine aspects of transactional and litigation practice without really being either. In many contexts, lawyers play the role of rabbi.[37] They provide advice to those in their social networks. They mediate conflicts between people not getting along.

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[28]   CHRISTENSEN, *supra* note 19, at 16.

[29]   THOMSON REUTERS LEGAL EXEC. INST., RISE OF THE TRANSACTIONALS: HOW TRANSACTIONAL PRACTICES ARE INCREASINGLY ASSUMING LEADERSHIP FOR LAW FIRM GROWTH 3 (2015), https://peermonitor.thomsonreuters.com/wp-content/uploads/2015/06/Transaction-Practices-Spotlight_2015.pdf.

[30]   FLA. B., RESULTS OF THE 2016 ECONOMICS AND LAW OFFICE MANAGEMENT SURVEY 6 (2017), https://www.floridabar.org/wp-content/uploads/2017/04/tfb-2016-economics-survey-report.pdf. For example, in Florida, 65% of lawyers practice in a firm with fewer than five attorneys.

[31]   RICHARD L. ABEL, AMERICAN LAWYERS 119–20 (1989).

[32]   *Id.*

[33]   LANDON, *supra* note 7, at 28.

[34]   ABEL, *supra* note 31, at 122.

[35]   LANDON, *supra* note 7, at 28.

[36]   KRIS SHEPARD, RATIONING JUSTICE: POVERTY LAWYERS AND POOR PEOPLE IN THE DEEP SOUTH 155–56 (2007).

[37]   LANDON, *supra* note 7, at 90–91.

The United States has long had a large number of lawyers.[38] Alexis De Tocqueville famously described them as America's natural aristocracy.[39] Up until the 19th century, most states lacked formal requirements preventing anyone from claiming to be a lawyer.[40] Despite increased barriers to entry such as bar exams and law school, the 20th century witnessed an exceptional growth in the prevalence of lawyers. According to the Bureau of Labor Statistics (BLS),[41] there are roughly 600,000 lawyers earning about $90 billion in wages annually.[42] Despite perceptions to the contrary, the profession is not shrinking on an absolute or per capita basis.[43]

While the number of lawyers in the United States is large, cross-nationally and historically, it is also important to recognize that there is a high and increasing level of inequality within the legal profession.[44] The median salary for a lawyer is $120,000,[45] yet the *starting* salary for an unbarred law school graduate in a big New York firm may go as high as $190,000.[46] While the economic dimensions of inequality are particularly glaring, professional inequality is also social and political. Potentially, this inequality may inform how lawyers think about client selection and how it relates to the lawyer's "brand" of legal service. It also explains why public and even lawyer perceptions of the profession may have a tendency to become warped, reflecting the view from the top-end that is becoming less and less representative.

While lawyers are the primary providers for legal services in the United States, there are also other professional actors that play an important role. Paralegals, secretaries, and other support staff may actually provide the bulk of some legal services by a law firm. As Van Hoy recounts from his study of real estate practice, attorneys

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[38] FRIEDMAN & HAYDEN, *supra* note 21, at 257–58; *ABA National Population Survey: Historical Trend in Total National Lawyer Population, 1878-2018*, A.B.A. (2018), https://www. americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Pop ulation_1878-2018.pdf.

[39] ALEXIS DE TOCQUEVILLE, CAUSES MITIGATING TYRANNY IN THE UNITED STATES, DEMOCRACY IN AMERICA 270 (Henry Reeve trans., 3d American ed. 1839) (1831).

[40] ABEL, *supra* note 31, at 5–6.

[41] Interestingly, the American Bar Association collects data from the various state bar associations and suggests a much larger number of lawyers, roughly twice as many as BLS. It is my view that the BLS numbers are probably closer to the truth. To give just one reason, the ABA's approach would double-count lawyers barred in two states, despite the fact that multiple bar memberships are commonplace.

[42] *Occupational Employment and Wages, May 2018*, BUREAU LAB. STAT., https://www.bls. gov/oes/current/oes231011.htm (last updated Mar. 29, 2019).

[43] FRIEDMAN & HAYDEN, *supra* note 21, at 238.

[44] ABEL, *supra* note 31, at 10.

[45] *Best Jobs: Lawyer Salary*, U.S. NEWS, https://money.usnews.com/careers/best-jobs/lawyer/ salary (last visited Jan. 29, 2020).

[46] Kate Gibson, *Milbank Law Firm Salary for First-Year Associate Raised to $190,000*, CBS NEWS (June 5, 2018), https://www.cbsnews.com/news/milbank-law-firm-salary-for-first-year-associate-raised-to-190000/.

often hand over a case file to their staff and do not look at it again until closing.[47] In some firms, staff play a crucial role in screening clients. In others, staff play little to no role in filtering clients.[48] Recently, various jurisdictions have experimented with the creation of new types of limited legal service providers, such as licensed legal technicians, limited practice officers, courthouse navigators or facilitators, or legal documentation assistants.[49] While the number of such professionals remains fairly small, it is possible that their numbers could increase as states explore ways to make legal services more affordable.

Although legal service provision is primarily provided through markets and by lawyers or law-adjacent professionals, non-market provision of legal services also occurs. It does so in two ways: through charity and by individuals proceeding pro se. Legal aid societies seeking to serve poor clients have existed for almost a century and a half in the United States,[50] although free legal assistance lags behind many comparable countries. Since the 1960s, the Legal Services Corporation (LSC) and its precursors have disbursed federal funds to support such organizations, bolstering the quality and quantity of services provided through such pro bono organizations.[51] In 2017, LSC grantees provided assistance on about one million legal matters.[52] Yet Congressional support for the LSC has proven fickle.[53] Indeed, after adjusting for inflation, the LSC's overall funding today is less than half what it was in 1980.[54] According to the LSC, if given adequate funding, it would resolve twice as many legal problems.[55] Although more ad-hoc than the institutionally organized legal aid provided by LSC or its partners, attorneys in private practice also provide a significant amount of legal services as charity. Such pro bono work is an important, if insufficient, way that the legal profession tries to help meet the excess demand in the market.[56]

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[47] Jerry Van Hoy, *The Practice Dynamics of Solo and Small Firm Lawyers*, 31 LAW & SOC'Y REV. 377, 386 (1997).

[48] Such screening does not appear to be a significant concern in the experiment, however, since the vast majority of responses in the experiments presented here were sent directly by lawyers.

[49] A.B.A., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 21–23 (2016), http://abafuturesreport.com/#download-full-report.

[50] SHEPARD, *supra* note 36, at 2.

[51] *Id.*

[52] *Executive Summary*, LEGAL SERVS. CORP. (June 2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-ExecutiveSummary.pdf.

[53] SHEPARD, *supra* note 36, at 225.

[54] A.B.A., *supra* note 49, at 13; *Congressional Appropriations*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/who-we-are/congressional-oversight/congressional-appropriations (last visited Oct. 16, 2019).

[55] A.B.A., *supra* note 49, at 13.

[56] *Id.* at 13–14.

If clients fail to obtain services in the market or through charity, then their only remaining avenues are to give up or serve themselves. Proceeding pro se is sometimes portrayed in media accounts as farcical,[57] perhaps giving the erroneous impression that such a means of representation is rare. In truth, it is extraordinarily common and deeply unfortunate. In New York alone, 1.8 million civil litigants per year do not have a lawyer.[58] In Utah, 97% of defendants in eviction cases defend themselves pro se.[59] People of color are much more likely to engage the legal system without the aid of a lawyer than whites are, and so are the poor.[60] Individuals who enter the judicial system pro se "confront procedures of excessive and bewildering complexity, and forms with archaic jargon leftover from medieval England."[61] Court clerks and other staff are unable to provide advice on what to do.[62] Judges may express hostility to these parties. [63] According to the Conference of Chief Justices, these tremendous numbers of pro se litigants impose huge externalities on the civil justice system of the United States.[64] Interestingly, and controversially, there are a number of studies that have sought to evaluate the extent to which outcomes differ for clients who proceed pro se and those with some form of charitable legal assistance.[65] In certain contexts, the difference in outcomes is minimal, which reflects somewhat badly on the amount of legal service provided through charity, the quality of the service provided, or the merits of these clients' matters.

As this discussion has shown, the supply side of the market for legal service is incredibly complex and varied. The demand side is correspondingly multi-faceted. As a theoretical apparatus for analyzing demand for legal services, scholars and policymakers might distinguish between three kinds of clients and matters.[66] First,

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[57]   *See, e.g.*, Bananas (MGM 1971).

[58]   A.B.A., *supra* note 49, at 12.

[59]   *Id.* at 12–13.

[60]   Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Pub. Pol'y 705, 705–58 (2012).

[61]   Rhode, *supra* note 1, at 14.

[62]   *Id.*

[63]   *Id.*

[64]   *See Conference of Chief Justices: Conference of State Court Administrators: Resolution 7*, http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/07252015-Reaffirming-Critical-Importance-Adequate-Funding-Legal-Services-Corporation.ashx [https://perma.cc/3DMP-2JLJ].

[65]   Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 Yale L.J. 2206, 2220 (2012); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 Yale L.J. 2118, 2124 (2012); Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 Yale L.J. Online 45, 45–67 (2012).

[66]   Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 Ann. Rev. Soc. 339, 339 (2008).

there are individuals who seek and acquire the services that lawyers actually render.[67] Second, there are individuals who want legal services but cannot afford them.[68] Finally, and most subtly, access to justice scholarship has shown that many individuals can afford a lawyer but do not realize that they have a legal problem.[69] Both of the latter types of client constitute the "unmet" demand for legal services,[70] but the cost impediments for these two sorts of clients are fundamentally different. Naturally, many individuals cannot obtain services due to some combination of these epistemic and economic hurdles.[71]

Logically, the easiest group of clients to study is those who actually succeed in obtaining lawyers. This group is easier to study because one can learn about them by asking lawyers about their client populations. Some of the most frequent ways that clients will find their attorneys include referrals, either from former clients or other lawyers, and direct marketing advertisements.[72]

While researchers have shown many ways that individuals successfully go about finding lawyers, there are also reasons why a search does not succeed or does not start. Most obviously, some individuals simply lack the economic resources necessary to hire a lawyer. According to a 2016 report, roughly seven in ten low-income households experience a civil legal issue in a given year, and about half of low-income households *annually* experience legal problems that they would describe as significant or severe.[73] The vast majority do not seek legal help, often citing costs.[74] While evaluations by a trained lawyer may reveal that these problems are not always justiciable, many are. About 60 million Americans live in such low-income households, so the unmet demand for legal services among the poor is, indeed, astounding.[75]

While liquidity and resource constraints are important for consumers, they are not everything. Indeed, some reports suggest that the majority of legal problems are resolved for less than $5,000.[76] When clients do pay more than $5,000, they tend

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[67] Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 108 (2013).

[68] *Id.* at 109.

[69] *Id.* at 118.

[70] *Id.* at 108.

[71] *Id.* at 117.

[72] Stephen Daniels & Joanne Martin, *"It's Darwinism – Survival of the Fittest:" How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients*, 21 LAW & POL'Y 377, 378 (1999).

[73] A.B.A., *supra* note 49, at 12–13.

[74] *Id.* at 15.

[75] *Id.* at 11–12.

[76] Teresa W. Carns & William T. Cotton, *Alaska Civil Cases: June 1999 – December 2000* 16, CIV. CASE DATA REP. (May 16, 2001), http://www.ajc.state.ak.us/sites/default/files/imported/reports/CivCase2.pdf.

to use contingency agreements to finance their litigation, so may pay little to nothing out of pocket.[77] Low-income individuals may certainly struggle to find a few thousand dollars out of pocket, but the magnitude of costs on addressing a legal problem is similar to other economic hurdles, such as moving or fixing a car, that sociological research suggests impoverished families somehow often do manage. Indeed, given this cost structure, it should not surprise us that when low-income individuals *do* seek legal assistance, they are about equally likely to turn to paid private attorneys as they are to legal aid organizations.[78] If economic resources were the sole or even the biggest problem, one would expect low-income individuals to use private attorneys almost never.

Indeed, just like the poor, the majority of moderate-income people do not receive the legal help they need, and probably the same is even true for upper-income individuals.[79] The costliness of solving problems through law is a separate and probably larger impediment to obtaining a lawyer than availability of economic resources. These costs often make it economically irrational to actually solve one's legal problems. Instead, the rational thing to do—as absurd as it may sound—is to take one's lumps and learn to live without a resolution at law.[80] Lawyer fees are surely one component of the overall costs of using the legal system, but they are far from alone. There are fees associated with filing cases, for example.[81] Similarly, there are costs associated with scheduling, deliberating, and more. Taken together, these costs may exceed the benefit of resolving the problem through law. Individuals without much experience in the legal system, or with too many negative experiences, may also overestimate the costs.[82] The natural solution of bundling claims into class actions is sometimes possible, but it is a highly imperfect solution for many reasons.[83] Besides the basic agency issues raised by class actions, legal problems are often too heterogeneous to solve all at once.[84]

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[77] *Id.* at 22.

[78] LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 31 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.

[79] RHODE, *supra* note 1, at 14.

[80] Sandefur, *supra* note 66, at 347.

[81] EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 14 (2010).

[82] Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1288–89 (2016).

[83] Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendation for Reform*, 58 U. CHI. L. REV. 1, 3 (1991).

[84] *Id.* at 12, 20.

The experimental data presented here relates most directly to cold email requests for representation. To which sort of demand are such requests for representation related? Potentially, they might relate to any kind of demand. Several studies have examined the pathways that real clients used to obtain their lawyers. Email or "cold call" requests are common paths.[85] For some individuals who obtain their lawyer through cold communication, failing to get a response from a lawyer is troubling only insofar as it means the search must continue. They will persevere to find a lawyer no matter the time and energy that the search for a lawyer requires. For other individuals, however, such search costs are pivotal for whether they actually obtain legal services. Those individuals who start and abandon the search have different types. Some really are determined to obtain a lawyer and give up after things prove tougher than expected. Others are not sure whether their problem is appropriate for a lawyer to solve but will commence after an extremely limited search fails to quickly yield the desired information. Knowledge about the ease or difficulty of obtaining a lawyer also appears to spread through social networks.[86] When one search fails arbitrarily, it makes it likelier that searches by other socially-linked individuals will not even start.

While the costs of searching for a lawyer over email figure importantly into many forms of client demand, it is important to remain cognizant of the limitations of this study for our overall understanding of legal service provision. Cold communications are commonplace, even ubiquitous, but more important to most practices are referrals from other lawyers,[87] friends or family, or because of work on a previous unrelated matter. In other words, most of the legal search is routed through preexisting social and professional networks. Given the more significant role of networks for those who do find lawyers, one could argue that a randomized controlled trial targeting lawyer acquisition through networks would represent a more important investigation than email. Implementing and analyzing experimental manipulations on networks is hard, however.[88] It also raises ethical issues that testing on single subjects would not.[89] Indeed, the relatively mild inconvenience for experimental subjects of responding to emails makes it an unproblematic approach to studying an issue that potentially has many ethical quandaries. Another reason to avoid network search is that it is probably less important for the most high-risk

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[85] *See* Kramer, *supra* note 3, at 30–31.

[86] Greene, *supra* note 82, at 1312–13.

[87] For the clients that ultimately secure representation from the most prestigious and best lawyers, lawyer referrals may well be the most common way that the clients find their representatives.

[88] *See, e.g.*, Paul R. Rosenbaum, *Interference Between Units in Randomized Experiments*, 102 J. AM. STAT. ASS'N 191, 194 (2007).

[89] Timothy J. Ryan, *On the Ethics of Facebook Experiments*, WASH. POST: MONKEY CAGE (July 3, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/07/03/on-the-ethics-of-facebook-experiments/?utm_term=.1b1f10bbcf34.

population of individuals who might fall out of the system. Cold calls, emails, and non-network searches are usually techniques of last resort. One only tries to find a lawyer using these means when asking one's friends, family, and colleagues has failed to produce any viable leads. The individuals who reach the point of network failure are probably at much higher risk of failing to get a lawyer entirely. Arguably, those seeking lawyers through email are the ones we should be most concerned will disappear entirely if they get no response or a bad response.

B.   *Why Racial Disparities Occur*

The social scientific literature on racial disparities is incredibly vast.[90] While scholars exploring these topics often work across disciplinary boundaries, there remain significant and stable fissures between researchers on discrimination. Inevitably, these reflect quasi-disciplinary differences in assumptions and methods for approaching similar problems. Broadly speaking, economists and economically-minded scholars in cognate disciplines are interested in how market and social processes mediate prior and fixed racial preferences, while psychology-minded scholars are interested in understanding racial preferences as such. Put differently, racial preferences are more likely to be an explanatory variable for economists, while racial preferences are more likely to be the dependent variable for social psychologists. This Section provides a synthesis of both these respective sub-literatures, beginning with economics and then considering psychology, paying particular attention to the contributions that have most directly informed the perspective of this research project.

The contemporary study of discrimination in economics arose out of the study of employment markets,[91] although it has since then expanded to look at other markets, including housing,[92] cars,[93] and even baseball cards.[94] Economic models commonly distinguish between two different kinds of discrimination: statistical and

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[90]   *See, e.g.*, Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 22014, 2016); John A. Garcia, *The Race Project: Researching Race in the Social Sciences Researchers, Measures, and Scope of Studies*, 2 J. RACE, ETHNICITY & POL. 300, 300 (2017); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 182 (2008).

[91]   GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 9 (2d ed. 1971).

[92]   Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143, 144–45 (1971). *See generally* Helen F. Ladd, *Evidence on Discrimination in Mortgage Lending*, 12 J. ECON. PERSP. 41 (1998).

[93]   Pinelopi Koujianou Goldberg, *Dealer Price Discrimination in New Car Purchases: Evidence from the Consumer Expenditure Survey*, 104 J. POL. ECON. 622, 623 (1996).

[94]   John A. List, *The Nature and Extent of Discrimination in the Marketplace: Evidence from the Field*, 119 Q. J. ECON. 49, 55, 73 (2004).

preferential.[95] Preferential discrimination occurs when a decision maker derives inherent benefit from selecting an individual solely because of his or her type.[96] Statistical discrimination occurs when there is no inherent difference in how individual types are valued, yet an individual's type contains information about other characteristics that do make a difference to the decision maker.[97] The root cause of the former kind of discrimination is bias in the decision maker's utility function, while the root cause of the latter kind of discrimination is bias in the environment.[98] One edge case that blurs the distinction is when decision makers are not biased themselves, but their ability to profit depends on the preferences of third parties. An unbiased employer with biased customers or a biased workforce may discriminate to avoid higher costs or lower sales. Thus, economic theory suggests several plausible explanations for observable differences in outcomes, all of which seem likely to be occurring to some degree in a field of any size. The relative strength of these concerns in particular or typical markets remains a topic of vigorous discussion.[99]

Besides providing a framework for interpreting empirical research, economic models also offer predictions as to the efficacy and desirability of different anti-discrimination policies. In a well-functioning market, preferential discrimination is likely to be competed away, as biased decision makers are, in effect, punished with higher costs.[100] By contrast, the market will punish decision makers who fail to engage in statistical discrimination if others are allowed to do so. Indeed, statistical discrimination can be welfare enhancing,[101] absent other considerations about a just social order that a fuller welfare analysis might accommodate.[102] Preferential discrimination is thus sometimes viewed as a self-correcting phenomenon, though interventions in the short term that aim at decreasing unjustified preference over types

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[95] Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. ECON. PERSP. 91, 95 (1998).

[96] *Id.*

[97] *Id.* at 96–97.

[98] *See* Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972).

[99] *See* Symposium, *Discrimination in Product, Credit and Labor Markets*, 12 J. ECON. PERSPS. 23, 23 (1998).

[100] BECKER, *supra* note 91, at 39; Arrow, *supra* note 95, at 95; *see* James J. Heckman, *Detecting Discrimination*, 12 J. ECON. PERSP. 101, 111–12 (1998); Devah Pager, *Are Firms that Discriminate More Likely to Go Out of Business?*, 3 SOC. SCI. 849, 850 (2016) (noting that this argument only holds in perfectly competitive markets where firms have no income, and discrimination is indulged in to some degree by biased employers whenever positive income is obtained).

[101] Hanming Fang & Andrea Moro, *Theories of Statistical Discrimination and Affirmative Action: A Survey*, *in* HANDBOOK OF SOCIAL ECONOMICS 133, 192 (Jess Benhabib et al. eds., 2011), http://dx.doi.org/10.1016/B978-0-444-53187-2.00005-X.

[102] Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331, 332 (2003).

may be advised. By contrast, the "public awareness" campaigns one might use to address preferential discrimination would not work to combat statistical discrimination. Instead, the best thing to do is to target the bias in the environment directly, for example, through investments in equalizing educational opportunity across types.[103]

Regulation that combats statistical discrimination by shaping decision makers' information channels must be done with care, as substitute channels that are even more imperfect will likely be used. It was for this reason that some academics feared a recent Massachusetts law[104] banning the consideration of criminal records in employment might *increase* racial disparities in employment, as the biggest winners from such a law are likely to be whites with criminal records and the biggest losers would be minorities who no longer have access to that signal of their reliability.[105]

Although the economic framework for discrimination is useful for designing empirical research and evaluating certain kinds of policies, one area where this framework still struggles is in identifying the sources of intergroup bias. Preferences for one group over another are typically treated as a fixed parameter, which might be smaller or larger, but ultimately has its origin outside the model and not in terms of strategic interaction.[106] One disadvantage of such a black-box approach is that, with no clues as to where preferences over types come from, it provides few clues as to what policies might serve to diminish them. A second problem is that, because the statistical theory of discrimination can explain virtually any pattern of disparities in outcomes, there is a tendency among some to assume that the effect of taste-based discrimination is no longer significant or is unnecessary to understanding discrimination as it actually occurs.[107]

Psychologists and psychology-minded researchers in political science and sociology, by contrast, have not taken a black-box approach to group preference. They describe group preferences as having different manifestations and modalities. In particular, group bias may manifest itself in terms of individual beliefs ("stereotypes"), emotions ("prejudice"), or behaviors ("discrimination").[108] Further, such bias may

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[103] *See, e.g.*, James J. Heckman, *The Economics of Inequality: The Value of Early Childhood Education*, AM. EDUCATOR, Spring 2011, at 31.

[104] MASS. GEN. LAWS ch. 151B, § 4 (2019).

[105] Devah Pager & Diana Karafin, *Bayesian Bigot? Statistical Discrimination, Stereotypes, and Employer Decision Making*, 621 ANNALS AM. ACAD. POL. SOC. SCI. 70, 72 (2009).

[106] BECKER, *supra* note 91, at 14; Kenneth J. Arrow, *The Theory of Discrimination*, *in* DISCRIMINATION IN LABOR MARKETS 3, 6 (Orley Ashenfelter & Albert Rees eds., 1973) [hereinafter Arrow II].

[107] Heckman, *supra* note 103, at 101 (claiming that taste-based discrimination is "no longer a first-order quantitative problem in American society").

[108] John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1084, 1084 (Susan T. Fiske et al. eds., 5th ed. 2010); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357 (Gardner

take the form of preference for in-group or preference against out-group. Finally, bias may be explicit and subject to an individual's awareness, or it may be implicit and not subject to awareness.

Far from leading to the conclusion that the natural or long run view of the world is one free of bias, research in this area suggests that group attachments sufficient to promote biased behavior are easily induced. In a series of famous and well-replicated[109] studies described by Tajfel,[110] English school boys were grouped on an arbitrary basis and exhibited marked preferences for those who had been similarly categorized, despite the absence of previous conflict, intergroup competition, or personal stake in outcome.[111] Replications of these studies consistently find that a significant proportion of individuals are even willing to trade off the welfare of their in-group so long as it means increasing the differential between the resources received by in-group as against out-group, a pattern sometimes called "Vladimir's choice," named after an Eastern European fable. Scholars working in this "minimal groups" paradigm posit that the strength of in-group versus out-group preference depends on numerous factors, including the degree to which participants see group boundaries as permeable and the importance they ascribe to group membership for obtaining benefits.[112] More troublingly, psychologists have long known that when such bias-producing group affections form, they are not easily unformed.[113]

With increased access to computing technology, psychologists have also developed new tools to study attitudes and stereotypes that are implicit and most likely

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Lindzey et al. eds., 4th ed. 1998); Vincent Yzerbyt & Stephanie Demoulin, *Intergoup Relations*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 1024, 1025 (Susan T. Fiske et al. eds., 5th ed. 2010).

[109] Richard Y. Bourhis et al., *Interdependence, Social Identity and Discrimination*, *in* THE SOCIAL PSYCHOLOGY OF STEREOTYPING AND GROUP LIFE 273, 275 (Russell Spears et al. eds., 1997); Sabine Otten et al., *Intergroup Discrimination in Positive and Negative Outcome Allocations: Impact of Stimulus Valence, Relative Group Status, and Relative Group Size*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 568 (1996).

[110] Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 SCI. AM. 96, 99–101 (1970).

[111] DAVID L. HAMILTON, COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 336 (1981).

[112] *See* Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 435–38 (1999) (describing factors that increase the salience of group membership for obtaining benefits); Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33, 34 (William G. Austin & Stephen Worchel eds., 1979); John C. Turner & Katherine J. Reynolds, *The Social Identity Perspective in Intergroup Relations: Theories, Themes, and Controversies*, *in* BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES 133, 138 (Rupert Brown & Samuel L. Gaertner eds., 2001).

[113] Muzafer Sherif, *Experiments in Group Conflict*, 195 SCI. AM. 54, 57 (1956).

beyond the awareness of individual subjects.[114] The Implicit Association Test ("IAT") is a computer-based procedure that measures the ease with which individuals associate two concepts. At times, the implicit associations can be very highly correlated with explicit evaluations, for example for presidential candidates ($r \approx 0.8$), while for race the relationship is much weaker but still far from negligible ($r \approx 0.4$).[115] Interestingly, IAT measures are also correlated with observable biological processes, including blinking and amygdala activation.[116] There seems little doubt that IAT measures something real, although what exactly that is remains murky and should not be overinterpreted as a measure of what people *really* think but refuse to reveal.[117] Even so, there is evidence that IAT scores are somewhat predictive of actual aggregate behaviors. For example, McConnell finds that respondents who have negative implicit attitudes toward blacks as measured by IAT also were found to have more negative structured interactions with black experimenters than with whites.[118] Two meta-analyses of similar studies found that there is typically a small but sizable correlation between IAT scores and actual discriminatory behavior against out-groups.[119] Although interventions aimed at equalizing racial response among adults can influence implicit associations over short periods, no intervention we know of is able to durably change existent attitudes over, say, a period as long as a day.[120] By contrast, some early childhood interventions aimed at influencing IAT persisted as long as two years after treatment.[121]

Survey researchers in political science and sociology for the most part use similar terminology to researchers in psychology who study the fundamentals of group cognition; however, their focus remains on explicit indicators of group bias as opposed to implicit measures like IAT. One advantage of the survey approach is that

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[114] *See, e.g.*, Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265, 267 (John A. Bargh ed., 2007).

[115] Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197, 210 (2003).

[116] Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 113, 123 (2012).

[117] *Id.* at 121.

[118] Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL & SOC. PSYCHOL. 435, 439 (2001).

[119] Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 559 (2015).

[120] Calvin K. Lai et al., *Reducing Implicit Racial Preferences: II. Intervention Effectiveness Across Time*, 145 J. EXPERIMENTAL PSYCHOL. GEN. 1001, 1012 (2016).

[121] *See, e.g.*, Antonya M. Gonzalez et al., *Reducing Children's Implicit Racial Bias Through Exposure to Positive Out-Group Exemplars*, 88 CHILD DEV. 123, 128 (2017); Félix Neto et al., *Can Music Reduce Anti-Dark-Skin Prejudice? A Test of a Cross-Cultural Musical Education Programme*, 44 PSYCHOL. MUSIC 388, 394 (2016).

it informs us as to how these explicit attitudes have developed over time. The Civil Rights Era witnessed a sea change in white racial attitudes in the United States. Explicit commitments to Jim Crow policies and beliefs in the biological inferiority of blacks collapsed and were replaced by norms of integration and equality. While in 1954 only 60% of whites favored integration of buses, by 1971 that figure was 88%—and similar shifts may be observed in support for having a black neighbor or integrating the school system.[122] And yet, after the 1980s progress in many areas has flatlined: in 2008 one in four whites would oppose a black person marrying into their family, and fewer whites support affirmative action today than in 1990.[123] Moreover, when it comes to policy preferences, there appears to be a great deal of inconsistency between whites' general interest in promoting racial equality and their decision to support actual policies aimed at addressing such problems.[124] Scholars disagree about how best to characterize the ambivalent attitudes of whites, but some preferred terms include "symbolic racism,"[125] "aversive racism,"[126] or "laissez-faire racism."[127] By contrast, minorities are overwhelmingly more likely to believe that they have been or will be exposed to white prejudice.[128]

II. PILOT STUDY: IS GETTING A LAWYER WHILE BLACK HARDER?

A. Design

To determine whether blacks and whites face equal barriers in acquiring legal services from lawyers, I adapt the now classic audit study methodology of Bertrand and Mullainathan,[129] which has been replicated many times in different contexts.

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[122] Lawrence D. Bobo et al., *The* Real *Record on Racial Attitudes*, *in* SOCIAL TRENDS IN AMERICAN LIFE 38, 41–42 (Peter V. Marsden ed., 2012).

[123] Frank L. Samson & Lawrence D. Bobo, *Ethno-Racial Attitudes and Social Inequality*, *in* HANDBOOK OF THE SOCIAL PSYCHOLOGY OF INEQUALITY 515, 516 (Jane D. McLeod et al. eds., 2014).

[124] *Id.*

[125] David O. Sears & P. J. Henry, *The Origins of Symbolic Racism*, 85 J. PERSONALITY & SOC. PSYCHOL. 259, 260 (2003) (emphasizing its targeting of blacks as "an abstraction" and its grounding in "abstract moral values").

[126] Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 316–17 (2009) (emphasizing the tendency of whites to wish to avoid contact with blacks).

[127] Lawrence D. Bobo & Ryan A. Smith, *From Jim Crow Racism to Laissez-Faire Racism: The Transformation of Racial Attitudes*, *in* BEYOND PLURALISM: THE CONCEPTION OF GROUPS AND GROUP IDENTITIES IN AMERICA 182, 186 (Wendy F. Katkin et al. eds., 1998) (emphasizing the view that blacks are responsible for their own problems).

[128] Bobo et al., *supra* note 122, at 67.

[129] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 994–97 (2004).

In such studies, written documents are sent to individuals who make decisions potentially susceptible to racial bias. Race is signaled through the use of a name highly correlated with a specific race. Names are assigned to documents at random. Besides the name signal, the documents are kept completely identical. As a result, there is no threat of confounding due to unobservable and unintended differences in treatment instruments. Further, random assignment of racial signals to documents in expectation balances the population on *unobservable factors* as well. Therefore, the estimates from the experiment are unbiased with respect to the true effect of the race signal.

In my adaption of this design, requests for representation from potential clients were sent to lawyers in private practice. The primary outcome of interest was whether they reply in any fashion at all. Outcomes of some secondary interest included how long it took to reply, the level of detail in the reply, the quality of the legal advice offered, the courteousness in response, and so forth. Darnell and Latoya Jackson were the names used to signal a potential client was black, while Brad and Laurie McCarthy were the names used to signal a potential client was white. According to Bertrand and Mullainathan, these names signal race with near certainty.[130] In particular, if one were to conduct a survey and ask people to guess a person's race based on these names, they would overwhelmingly say Darnell and Latoya are black while Brad and Laurie are white.[131] An analysis of individual birth certificates confirmed that survey respondents' beliefs were indeed reasonable.[132]

As the names such as Brad or Latoya indicate, race was not the only factor subject to random assignment. Gender was varied at random, as was a high or low income signal. Differences in response rates by gender and income signal were considered important secondary outcomes of interest as well, because they could shed light on the mechanisms driving the principal experimental outcomes. Under the statistical discrimination theory, one would expect response rates to increase with the income signal, especially if one focuses on a practice area where ability to pay is important. A fully factorial approach to treatment assignment was taken so that an equal number of emails would be sent carrying a male or female signal, a black or white signal, a higher or lower income signal, and the same for combinations of these factors.

In implementing this design, a significant concern was ensuring that the overall response rate from lawyers be as a high as possible. Low response rates threaten the

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130   *Id.* at 995.

131   *Id.*

132   *Id.*

credibility of experimentation.[133] Typically, the way one compensates for low response rates is to design a larger experiment.[134] Yet increasing the sample size usually increases the costs. Email experiments are relatively cheap to scale, so the primary cost concern was not on the researcher side. Rather, the more worrisome costs of experimentation lay on the participant side. If the treatment is designed credibly, then lawyers take costly actions on the mistaken assumption that the email was sent from someone who might become a paying client. Indeed, many of the replies exceeded 500 words and would have taken some time to compose. It is likely that lawyers who did not respond nevertheless spent time considering whether they might. Experimental ethics requires careful consideration of these costs.[135] Ultimately, the potential benefits of the experiment in terms of learning about racial inequalities in the market and improving the legal profession were considered substantial enough to merit proceeding. Nevertheless, every effort was made to increase response rates and inconvenience as few lawyers as possible throughout the study.

FROM: {Latoya-Jackson@comcast.net; Laurie-McCarthy@comcast.net; Darnell-Jackson@comcast.net; Brad-McCarthy@comcast.net}
SUBJECT: Looking for a lawyer

To Whom It May Concern,

My name is {Latoya Jackson; Laurie McCarthy; Darnell Jackson; Brad McCarthy} and I am a 34 year old medical sales representative (income around {$40,000; $80,000} per year). Two nights ago I was stopped for drunk driving by two policemen. I had my license suspended and my car towed. I had been drinking that night, but I did not feel I was too drunk to drive. If anything I was just tired. After I was pulled over they tried to give me a breathalyzer but I refused. Now they say I can't drive for a year, but that just can't work for me since my employer is located thirty-five minutes from my home and public transportation can't get me there. I am looking for a lawyer to overturn that suspension and get me back my license, and keep my record clean. Please let me know if you can take my case, and if so how we should go forward.

Best,
{Latoya; Laurie; Darnell; Brad}

Figure 1: Text of the email in the pilot experiment.

One strategy to increase response rates was to strongly signal relevance, in particular by sending an email describing a case in the recipient lawyer's practice area. Systematically identifying lawyers by practice area is hard to do. Bar directories are

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[133] JANET BUTTOLPH JOHNSON ET AL., POLITICAL SCIENCE RESEARCH METHODS 306 (8th ed. 2016).

[134] *Id.*

[135] ROBERT M. GROVES ET AL., SURVEY METHODOLOGY 380–81 (Robert M. Groves et al. eds., 2d ed. 2009).

often woefully incomplete in this regard. Interestingly, California allows its members to attain certifications in areas such as criminal law.[136] Lawyers who make the effort of obtaining such a certification would surely have expertise in criminal matters. Moreover, it was possible to determine based on email or physical address whether the lawyer was in private practice, a prosecutor, or a public defender. As a result, for this population it would prove easier to design a more facially legitimate treatment instrument. While California is different in some respects from many parts of the United States, it is a large and diverse state. At the time, its lawyer population was therefore considered a suitable proxy for the population of the lawyers in the United States at large.

Figure 1 shows the email template that was sent to lawyers in the experiment. There are a number of important aspects of the design of this instrument that deserve mention. First, the legal matter addressed is related to driving under the influence/driving while intoxicated ("DUI"). This criminal misdemeanor is commonly committed by individuals from diverse backgrounds and constitutes a staple of private criminal practice.[137] Requests for representation in DUI cases are relatively common for criminal lawyers, even those who do not tend to actually take these cases, so such an email would not be wholly unexpected or facially illegitimate.

The text of the template was developed from inspection of many emails provided to me by several lawyers in private practice. Due to confidentiality and ethical concerns, no part of the email actually corresponds to any email that was sent from a client to a lawyer; however, every effort was made to make the letters "realistic." The text was vetted with several lawyers in private practice. The only significant problem they identified is that the quality of the message might be conspicuously high. While some clients can compose a succinct and clear communication of their problem, the quality is unfortunately rare.[138]

The choice to err on the higher side of quality was made intentionally in order to increase response rates. The high overall response rate in the experiment indicates that the letter was indeed accepted as facially legitimate. More evidence to support the facial validity of the treatment instrument would emerge from subsequent experiments.

The final design question was how many lawyers to actually include in the experiment. Given the inconvenience of exposure to treatment, I opted for a sequential design.[139] All eight treatment combinations would be sent in batches of

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[136] CAL. RULES OF COURT § 9.35 (2020).

[137] Melissa George, *Let Sleeping Plaintiffs Lie: Restricting Attorneys' Rights to Make Direct-Mail Solicitation*, 22 J. LEGAL PROF. 251, 259 (1998).

[138] Maureen S. Binetti, *The Difficult Witness: The Plaintiffs' Perspective*, A.B.A., LAB. & EMP. SEC. (Nov. 2011), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/126.authcheckdam.pdf.

[139] David Siegmund, *Herbert Robbins and Sequential Analysis*, 31 ANNALS STAT. 349 (2003).

twelve (n=96). Similar batches would be sent bi-weekly until a substantial effect was identified or there was sufficient power to disprove a large effect. Sequential designs may require special techniques of analysis to reflect the more complex assignment mechanism than in non-sequential experiments.[140] In this case, however, there was no need to deal with such complexities because significant effects were found with the first batch.

B. Results

Figure 2 presents the difference in average response rates for individuals that received the black and white name signals. The response rate for emails from "black" potential clients is 19%, while for "white" potential clients is 40%. The difference is statistically significant using a two-tailed Fisher exact test (p-value=0.038). For whites to receive callbacks at twice the rate of blacks is shocking, although similar to what has been observed in other audit studies.[141]

While the primary factor of interest in this experiment was race, analysis of the other factors introduces other interesting observations. In particular, men appear to obtain 50% more responses than women (37.5% versus 23%) (Figure 3). Clients signaling high income did worse than those signaling low income, although the difference was very small and not statistically significant (Figure 4). While the male versus female response rates are fairly expected if preferences drive selection, the small and backward income effect is perplexing from the standpoint of statistical discrimination. If lawyers are trying to figure out whether a client can actually pay, one would tend to expect such a direct and clear signal to prove relevant.[142]
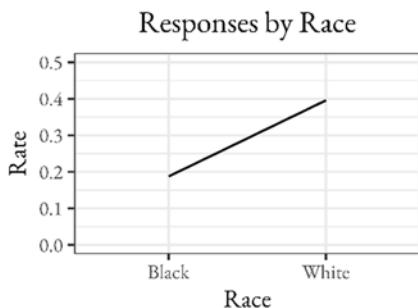
Figure 2: Response rates of lawyers by client race.
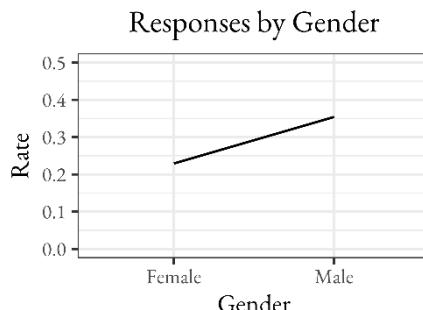
Figure 3: Response rates of lawyers by client gender.

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[140] Donald B. Rubin, *Causal Inference Using Potential Outcomes: Design, Modeling, Decisions*, 100 J. AM. STAT. ASS'N 322, 327–28 (2005).

[141] Lincoln Quillian et al., *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 PROC. NAT'L ACAD. SCI. 10,870, 10,871 (2017).

[142] A committed believer might say the income signal is cheap talk. Yet the strong interaction effects, discussed in more detail below, are more consistent with the signal being credible.

Responses by Income
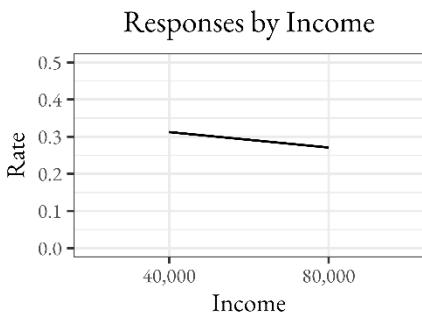
Figure 4: Response rates of lawyers by
client income.

Responses by Race and Gender
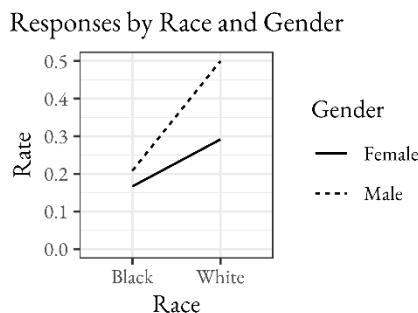
Figure 5: Interaction of client race and
gender in lawyers' response rates.

Responses by Race and Income
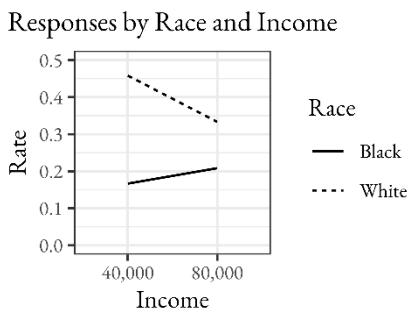
Figure 6: Interaction of client race and
income in lawyers' response rates.

Responses by Gender and Income
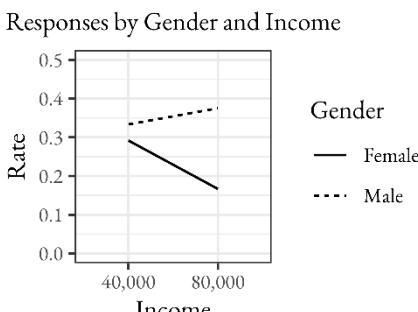
Figure 7: Interaction of client gender and
income in lawyers' response rates.

C. Discussion

The experiment shows that black clients face higher search costs in the market for legal services than do whites, at least in some circumstances. By design, the experiment has limited power to explain why different racial signals produce different outcomes. In particular, the study does not identify whether lawyers prefer clients of one race over another or are engaging in some form of economic "racial profiling." Even so, the result does appear more consistent with one explanation than another. If one started with the presupposition, as some no doubt would,[143] that a mostly

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[143] *See, e.g.*, Ashly H. Pinnington & Jörgen Sandberg, *Lawyers' Professional Careers: Increasing Women's Inclusion in the Partnership of Law Firms*, 20 GENDER WORK & ORG. 616, 616–17 (2013) (discussing disparate experiences in the legal profession along lines of gender); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1755 (2005) (analyzing the failures of the legal profession to access racial diversity, as well as potential explanations); Kevin Woodson, *Human Capital Discrimination, Law Firm Inequality, and the Limits of Title VII*, 38 CARDOZO L. REV. 183, 193–94 (2016) (summary of challenges faced by black attorneys).

white and male profession is prejudiced against blacks and successful women, one would predict the outcomes that the study found. If one started from the assumption that lawyers act like profit-maximizing algorithms, one would not expect these experimental outcomes. The fact that the income signal works differently for men than for women is particularly confusing from the statistical discrimination perspective.

A more qualitative analysis of the responses suggests the possibility of other, more pernicious disparities in the market for legal services. Take, for example, the difference between emails that were sent to Brad McCarthy and to Darnell Jackson as shown in Figure 8. In response to identical requests, Brad received a description of the implied consent law in California, how it related to his case, and what legal strategies remain available in light of it. The email gives Brad context for interpreting events that might take place at the DMV. Although the lawyer admits that "it is very unlikely the suspension can be lifted," he nevertheless appears to have some serious interest in providing Brad with legal services, as evidenced by sharing his cell phone number with Brad. By contrast, Darnell receives a fairly ominous "who referred you?" from one lawyer, and a melodramatic warning that he has "JUST TEN DAYS TO CHALLENGE HIS SUSPENSION!!" While it is hard to rigorously define quality of email response or legal service more generally, in this instance Brad's email response was clearly the more useful. It was more detailed, validated Brad's concerns about getting to work without a car, imparted knowledge that Brad could take with him regardless of whether a lawyer-client relationship was ever formed, and probably took more than a few minutes to compose.

TO: {Brad.McCarthy@comcast.net}
BODY: Dear Brad, I could certainly take your case, but you need to know that I have been handling DUI cases successfully for 30+ years, yet it is very unlikely the suspension can be lifted. The Vehicle Code requires that, in return for a driver's license, anyone stopped by a peace officer provide a blood or breath sample on demand. It's called the "implied consent" law. You consent to provide blood or breath or you don't get a driver's license. Now, what CAN be done is to fight the DUI charge and, if that can be won, you might be able to get the suspension changed to a restriction that allows you to go to and from work without having to rely on public transportation! In my experience, that's the only option available to you if you want to fight the suspension. Fighting that fight at the DMV is virtually a waste of time. If the DMV finds you refused to comply with the request for blood or breath, they suspend your license, period. Listen, if you want to talk directly about this, please feel free to call me, OK? You can catch me best at my cell: XXX-XXX-XXXX.

(a) High Quality Response

TO: {Darnell.Jackson@comcast.net}
BODY: who referred you?

TO: {Darnell.Jackson@comcast.net}
BODY: Call our office at XXX-XXX-4DUI for an appointment. YOU HAVE JUST TEN DAYS FROM YOUR ARREST TO CHALLENGE THE SUPSENSION WITH DMV!!
Sent from my iPhone

(b) Low Quality Responses

Figure 8: Examples of lawyer responses.

III. SECOND STUDY: WHY IS IT HARDER TO GET A LAWYER WHILE BLACK?

The first experiment showed that lawyers discriminate on the basis of race when choosing to respond to solicitations from potential clients. Yet audit experiments typically provide little evidence as to why such discrimination occurs.[144] Admittedly, certain experimental findings are inconsistent with economic profiling, at least of the simple and intuitive variety. Of particular note in this regard are the observations that signaling higher income (1) had no overall effect and (2) was harmful for women but helpful for men. Even if the income and gender interactions are particularly hard to view as a rational response to incentives, it is possible that economic profiling could explain a substantial fraction of the discrimination faced by blacks, since discrimination targeting the two groups may have different pathologies. The importance of better understanding the mechanisms of racial discrimination in legal markets is that it can help with identifying policy changes that might ameliorate these problems or will at least spare us the costs associated with interventions that do not work.

To explore more deeply the causes of racial disparities in lawyers' responses to clients, I devised a larger follow-up experiment. The goal of this experiment was to modulate factors that, according to economic models of discrimination, one might reasonably expect to have a causal impact on response rates. That is, if changing these factors leads to the exacerbation or diminution of racial disparities. This Section proceeds by describing the causal factors that were incorporated into the design of the experiment and how one might expect them to influence a lawyer's propensity to respond to a potential client's request for representation.

A. Causal Factors

1. Lawyer Race

Formal models of preferential discrimination in economics sometimes suppose that service providers are of two types: those that experience aversion from interaction with a minority group and those that do not.[145] Depending on the model, these differences among service providers can translate into observable implications. Kenneth Arrow found, for example, racist employers hired fewer black workers than non-racist employers.[146] What makes these observable implications hard to test is that similar looking patterns of discrimination can emerge from slightly different assumptions. Suppose that the two types of employers differ not according to their

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[144] Pager & Karafin, *supra* note 105, at 72.

[145] Arrow II, *supra* note 106, at 6; Fang & Moro, *supra* note 101, at 134–35.

[146] Arrow II, *supra* note 106, at 9.

preferences over employee race but rather for some latent trait such as their employees having graduated high school. The prevalence of such latent traits may differ by group. For example, in the contemporary United States, approximately 86% of white students graduate high school, while only 69% of blacks do.[147] Under fairly simple assumptions that are similar to Arrow's baseline model, one may find that some employers will hire fewer blacks than whites, even though they have no preferences over race as such. Looking purely at the data on hiring rates by race, one could not know for sure whether some of the service providers are racist or whether some of the service providers prefer some latent trait whose prevalence differs by groups. To some extent, the high school degree example is inapt because educational credentials are hard, observable information. Presumably, researchers could control for such observable factors. If there are latent traits that are important to employers but are softer and more difficult to detect, that is where the really difficult inferential issues would come in.[148] Without the ability to observe or make strong assumptions about the nature of homogeneity among service providers, there appears no way out of this observational equivalency.

While there is no perfect solution to this issue, I offer one plausible idea as to how to proxy for the racial preferences of service providers: using the provider's own race. In some sense, it is ironic that this idea has not received greater exploration. A veritable ocean of ink has been spilled over the idea that decision makers use race to proxy for unobservable traits such as productivity. But for a researcher to use race to proxy for latent racial preferences, which are also unobservable? Few, if any, researchers have done this in the audit-study context.[149]

Here, using race to proxy for latent racial preferences would mean contrasting the behavior of black lawyers with respect to potential clients with that of white lawyers. It is well-known and quite unsurprising that on a population level blacks have always expressed more favorable attitudes towards blacks than have whites.[150] Therefore, if racial preferences alone drive client selection, then one might expect to see black service providers engage in "reverse" discrimination. If economic profiling alone drives the disparities observed in the first experiment, then black service providers should engage in it about equally to whites. Other experimental outcomes

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[147] Mary Stetser & Robert Stillwell, *Public High School Four-Year On-Time Graduation Rates and Event Dropout Rates: School Years 2010-11 and 2011-12*, NAT'L CTR. EDUC. STAT. 9 (Apr. 2014), https://nces.ed.gov/pubs2014/2014391.pdf.

[148] James J. Heckman, *supra* note 100, at 109.

[149] One important reason for this is probably that it is often not easy to actually observe the service provider's race. In some contexts, it may not even make sense to think of a service provider as having a race, for example if the service provider is a company such as McDonald's or Home Depot. Because lawyers so frequently have photographs on websites, bar directory listings, or media coverage, however, it is usually not difficult to observe a particular lawyer's race.

[150] Maria Krysan & Sarah P. Moberg, *Trends in Racial Attitudes*, U. ILL. INST. GOV'T & PUB. AFF. (Aug. 25, 2016), https://igpa.uillinois.edu/programs/racial-attitudes.

would prove more ambiguous and harder to interpret. If black lawyers discriminate against blacks less than whites, but still somewhat, that might indicate that favorable racial preferences compensate for statistical discrimination in client selection. Alternatively, it could be consistent with a pure preferential story in which black and white lawyers both prefer white clients, but that black lawyers' preferences are weaker. Any of these experimental outcomes would provide more evidence as to the mechanism than exists in the status quo.

The preceding discussion of the proper inferences to make from the resolution of the experiment relies on a number of assumptions. Importantly, it seems to assume that black lawyers and white lawyers are otherwise homogenous economic actors. In the absence of information to the contrary, this assumption is *ex ante* reasonable, however there is some contrary evidence. African-American lawyers report lower earnings than white lawyers,[151] for example. This significant difference in reported earnings could be a consequence of various forms of market discrimination on the client or large-firm hiring side. It could also be the result of black lawyers self-selecting into less lucrative but not necessarily less prestigious professional tracks—for example, government service. Future work can and should explore the extent to which black lawyers and white lawyers tend to have similar or different legal practices, and why. Given the limited information about such difference in the literature, however, the most sensible thing to do is to focus on making comparisons only within experimental sub-populations where homogeneity assumptions are less risky. For example, one can focus only on differences within small law practices practicing in particular areas such as criminal law or personal injury. To the extent that one only compares within these blocks, one should compare lawyers whose economic incentives are more similar.

More complex models of how legal markets work could also raise problems for the interpretation of response rates by lawyer race. One particularly worrying possibility is that there are differential transaction costs associated with matching across racial groups.[152] If such transaction costs existed, they would tend to produce data that, for many purposes, appeared like in-group racial affinity or out-group racial aversion, but the ultimate reason for their existence would not really have anything to do with racial preferences per se. To give a specific story of how such transaction costs arise, suppose that there is wide-spread sorting of black clients to black lawyers and white clients to white lawyers in the status quo. Such sorting could occur for many reasons. For example, if lawyers like to work close to home and there is residential segregation,[153] then black lawyers will work in black neighborhoods and

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[151]   FLA. B., *supra* note 30, at 75.

[152]   Petur O. Jonsson, *Networks, Culture, Transaction Costs and Discrimination*, 28 INT'L J. SOC. ECON. 942, 943–44 (2001).

[153]   JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 144 (2018).

white lawyers will work in white neighborhoods. Differential response rates could therefore have nothing to do with expected profitability of resolving client matters or underlying racial preferences, but rather because cross racial attorney-client relationships are more costly to form. Hence, lawyers are dubious that anything will actually come from a solicitation by a client of another race.

While these and other stories complicate inference, they should not prevent the accumulation of more evidence that pushes the literature forward. Clearly, racial attitudes of lawyers should depend on their race; therefore looking at the behavior of black and white lawyers separately and comparatively can produce important descriptive evidence that is relevant to the underlying mechanisms for lawyerly discrimination.

2. Heterogeneous Practice Area Effects

Besides distinguishing actors that may or may not have racial preferences, many economic models also raise issues about *which* actors' preferences are responsible for discriminatory outcomes. For example, in Becker and Arrow's classic models,[154] it is shown that racism by employees of a firm or consumers of a firm can create similar market outcomes as if the firm itself were directly racist. While the economics of the law firm and the legal services industry are in some ways different from the firm economics described by Becker and Arrow,[155] the underlying question remains whether discrimination is due to the lawyer's own preferences, statistical discrimination, or its expectations about the preferences of third-parties whose judgment matters for the lawyer's own payoff.

In this context, it is useful to note that the legal market uses a variety of funding models. By exploiting this variation, one should expect to obtain insights into whose preferences, and over what, racial disparities drive client selection. Lawyers may receive payment in the form of a flat-fee, billing based on an hourly rate, or as a percentage of the verdict that is contingent on a successful outcome. Combinations of these arrangements are also possible. Indeed, it is common for a lawyer to ask for a retainer to begin providing services and then bill at a certain rate after spending some hours on the matter. Yet the context of a given practice area can make certain fee arrangements more or less sensible and therefore prevalent. A contingent fee makes little sense in the criminal context, for example, because a successful outcome does not give the client new assets. By contrast, in the personal injury context, new assets *are* made available to the client. Risk-averse litigants may also find it attractive to avoid downside risk associated with losing their case and also know that the lawyer has a strong personal incentive to win the case. As a result, it is not surprising that the majority of personal injury plaintiffs appear to pay for service in this fashion.

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[154] BECKER, *supra* note 91, at 56; Arrow II, *supra* note 106, at 6–10.

[155] For example, a sole proprietorship may not have any employees.

For a lawyer, a personal injury matter and a criminal client create fundamentally different economic risks.[156] The criminal lawyer has to consider the economic resources of the client because it affects whether and when the lawyer will be paid. The client's outcome has no immediate effect on what the lawyer is due. If client outcomes do matter for the lawyer's payoff, it is indirectly and over the longer-term, for example, because they define the lawyer's reputation.[157] By contrast, the personal injury lawyer does not have to worry nearly so much about whether the client can actually afford a lawyer. The reason is that contingent fee arrangements are available, so that a personal injury client can receive payment through a winning verdict or a settlement. Economically speaking, the personal injury lawyer's concern is the size and probability of these respective outcomes, so the characteristics of the client's matter are much more important than the economic resources the client currently has.[158] As in the criminal context, client outcomes also influence reputations for the personal injury lawyer, but the effect is indirect, cumulative, and longer term.

Because the criminal and personal injury contexts create fundamentally different incentive problems, different theories of how race interacts with economics lead to different expectations about the degree of racial disparities in the two segments of the legal market. Recall that the first experiment related to a criminal DUI. If profiling of the client's economic resources is the overwhelming driver of racial disparities in lawyer response, then an experiment in the personal injury context should reveal little to no discrimination. By contrast, if there is concern about the racial preferences of judges or juries, one should see *greater* disparities in the personal injury context than in the criminal one, given the greater relevance for the decision-making of these third parties for the lawyer's bottom line.

Level of Non-Payment Risk		Case Outcome	
		Low	High
Client Resources	Low	Divorce	Personal Injury
	High	Criminal	-

Table 1: Non-payment risk and practice area on lawyer payoffs.

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[156] James D. Dana, Jr. & Kathryn E. Speir, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349, 351 (1993).

[157] HERBERT M. KRITZER, RISKS, REPUTATIONS & REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 233 (2004).

[158] Admittedly, one problem with the personal injury context as a counter-party is that the size of a personal injury claim is related to the client's income if the injury causes loss of wages. Yet some part of the client's claim is usually independent of their income, so personal injury claims can have substantial value even if the client is not particularly affluent. Reimbursements for the costs of medical treatment and pain and suffering are at times substantial. Indeed, looking ahead, it turns out that doubling the signaled income produced no significant increase in the propensity of a personal injury lawyer to respond.

Additional explanatory power for this kind of analysis can arise from examining lawyer behavior in a third practice context. An ideal counterpoint would be a practice area where lawyer payoffs depended as much on racial preferences of judges and juries as personal injury law and as much on client affluence as criminal law. Alternatively, an equally good counterpoint would be a practice context where the lawyer payoff depended as little on racial preferences of judges and juries as in the criminal legal context, and as little on client affluence as with the context of personal injury law. Table 1 is a helpful illustration.

Exact matching of the quality and degree of risks by practice area is, clearly, impossible. In selecting this third comparison context, one has to settle for an approximation. Based on interviews with practicing lawyers and prior qualitative research, I argue that divorce or "family" law is a practice area in which judgment risks and client affluence risks are both relatively low. Indeed, divorce is a special context because it is exceedingly rare for a spouse to emerge from the proceedings without any part of the communal assets, so an outcome that results in a client receiving something is usually assured.[159] Moreover, the risk of a client being unable to pay is also low according to the attorneys I interviewed. While a divorce lawyer does prefer a rich client to a poor one, divorce cases are somewhat like personal injury cases insofar as the resolution of the legal problem makes assets available that were previously not. In particular, divorce may force the dissolution of common assets such as a house, condo, or car. During this period of heightened liquidity, the divorce lawyer is able to get paid, even from clients who are not particularly affluent. Given these unique characteristics of the divorce context, one might expect neither third-party racial preferences nor economic profiling to play much of a role. An added attractive feature of this context is that racial preferences of third parties are particularly unlikely to influence outcomes, for two reasons. First, six out of seven marriages are between people of the same race,[160] so racial preferences usually have no referent to adhere to. Second, in most jurisdictions, judges rather than juries preside over divorce cases.[161] Hopefully, judges are better than juries at avoiding conflating racial preferences from the appropriate outcome.[162]

While this description of the incentive problems facing lawyers in these practice areas leads to expected different degrees of racial disparities, as before, the identifi-

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[159]   For a classic discussion, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950–97 (1979).

[160]   Mary Kent, *Most Americans Marry Within Their Race*, POPULATION REFERENCE BUREAU (Aug. 5, 2010), https://www.prb.org/usintermarriage/#.

[161]   Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 13 (2006).

[162]   Mary R. Rose et al., *Preferences for Juries Over Judges Across Racial and Ethnic Groups*, 89 SOC. SCI. Q. 372, 374 (2008).

cation of mechanisms is imperfect. There are other differences between these practice areas that I have not described but which could matter. To describe a particularly severe issue related to selection, suppose that lawyers practicing in some area are found to discriminate but lawyers practicing in a different area are not. Is that because the practice areas have different incentive problems, as I seem to suppose, or because the areas have practitioners that are different? Some interesting work in social psychology, for example, shows that social dominance orientation—which is connected to both racist and sexist attitudes—also influences choice of professions.[163] Purely on the basis of an observed difference between practice areas, it is impossible to know if the practitioners or the client problems are what drives the difference.

As is the pattern for normal science, theories are only as strong as the last piece of evidence.[164] Differences in patterns of discrimination by practice area might have many explanations, but considering how to adjudicate between them is fairly pointless without knowing there is a difference in the first instance. For example, to explore the practitioners versus practice incentives question, one might collect data on the aggregate characteristics of two professions to see if there is any evidence that lawyers are selecting into practice areas because of traits that might matter for these outcomes. Even stronger, one could compare the responses of lawyers that only practice in each area with ones that crossover between the two areas. Alternatively, one might focus on the population of lawyers that practice in the two areas and see if they discriminate differently when presented with clients coming to them with different problems. There are many strategies for better identifying the mechanism in the event that some mediating factors are found. The important point is not that looking across practice areas can perfectly identify the reasons for discrimination, but rather that under some plausible theories one should expect variation in the degree of discrimination to emerge across practice areas. Only if and when these differences are found should additional work be considered that might probe more deeply into the question of whether differences in lawyer discrimination are due to differences in practitioners or practice area.

3. Subtyping and Effect Prevalence

A final set of causal questions relates to the prevalence and severity of the problem identified in the first experiment. Put differently, what is the external validity of these findings about Brad, Laurie, Latoya, and Darnell? While individuals in the United States typically have names that provide suggestive evidence of race, they are not nearly so suggestive as those that are the subject of most audit studies. As Ronald Fryer and Steven Levitt report, about 40% of whites are given first names that are

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[163] Jim Sidanius et al., *Consensual Racism and Career Track: Some Implications of Social Dominance Theory*, 12 POL. PSYCHOL. 691, 697 (1991).

[164] KARL R. POPPER, CONJECTURES AND REFUTATIONS 34–37 (4th ed. 1972).

four times or more as likely to belong to a white person as a black person.[165] Alternatively, one could say that about 60% of whites have a name where the odds of someone with that name being white are less than 4 to 1. In email audit studies, researchers usually use names such as Brad and Laurie where the odds of a correct guess are more like 30 to 1.[166] More troubling from an interpretive validity standpoint, the more distinctive the name, the stronger the indication about socioeconomic status at birth. Distinctively black names are associated with lower levels of parental education, being born in a low-income zip code, and one's parents not having private insurance at the time of birth.[167] Given limited upward mobility in contemporary American society,[168] these are also strong signals of present-day socioeconomic status. Some might worry that these studies exaggerate the extent of true racial disparities between blacks and whites, because they focus on a narrow segment of the population that is more likely to face both racial animus and economic profiling than the typical African-American.

Of course, it should go without saying that there really are a lot of people with names like Darnell and Latoya. Justice demands that they have equivalent access to representation as Brad and Laurie. It is absurd and unconscionable that their name would substantially affect their ability to do so. The point of asking questions about effect prevalence is not to suggest that the differences found by prior research are smaller or less important than one might think. Rather, it is to suggest that developing policy interventions and mobilizing politically is hard without a clear understanding of the scope of the problem. Do the discrepancies found in audit studies typically relate to a small fraction of the black and white populations in the United States with names that are highly predictive of race and socioeconomic status? Or are these discrepancies broad-based and emerge even from weak signals of race? How disparities emerge in response to racial signals is also potentially informative as to why such discrimination occurs. For example, if response rates for an individual with a name that weakly or probably signals blackness are about the same as response rates for someone who is almost certainly white, that suggests disparities are driven more by hostility toward a certain segment of the Africans-American population than towards African-Americans per se.[169] By contrast, if response rates are about

[165] Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. ECON. 767, 774–75 (2004).

[166] Bertrand & Mullainathan, *supra* note 129, at 995; Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463, 466 (2011); Andrew Hanson et al., *Discrimination in Mortgage Lending: Evidence from a Correspondence Experiment*, 92 J. URBAN ECON. 48, 48 (2016).

[167] Fryer & Levitt, *supra* note 165, at 786.

[168] Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCI. MAG. 398, 405 (2017).

[169] SAMUEL L. GAERTNER ET AL., HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 378, 379, 392–93 (Laura Beth Nielsen & Robert L. Nelson eds., 2005).

the same for Darnell as they are for someone who is probably but not certainly white, then that suggests the disparities observed are mostly driven by affirmative preference for some segment of the white population than for whites per se.[170] A linear trend is what one would expect to observe if there were simple and direct preferences over race.

B.   Experimental Design

1.   Treatment Instruments

a.   Email Templates

In order to field the second experiment, it was necessary to develop a new email template. Different goals motivated the design process in the second experiment than in the first. Here, the overriding imperative was ensuring comparability of instrumental effects across practice areas. Obtaining high-response rates did not cease to be an object of concern, but experience had revealed the risks were less than feared. The first experiment had an overall response rate of 30%, which is very high by survey research standards. Moreover, given the urgency of the social problem identified by the first experiment, it would prove easier to justify scaling up the size of the experiment if necessary.

Given the desire for comparisons across practice area contexts to prove as clean as possible and the now diminished concerns about response rates, it was decided to create one template for each practice area. None of these templates would include any significant details about the client's case. The templates would only describe the type of matter the client had without giving any information about how it had come about.

In light of the difference in funding models between the practice areas, it was also decided to send less direct signals about income in the criminal and divorce context. The primary reason for sending a less direct signal in the divorce context was because discussions with practitioners had suggested that assets or wealth were more important than income. Explicitly signaling wealth raised concerns, however informal and hard to evaluate, about detection bias. Indeed, fears about detection bias also led to the decision to make the income signal less explicit in the criminal context. What is meant by detection bias? If suspicions about email legitimacy are more likely to arise from clients with black names than those with white names, that could explain some or all of the differences between blacks and whites identified in the first experiment. In particular, one might fear that interactions between explicit income signals and race might prove confounding. Fortunately, an instrument validity experiment, described in more detail below, allays such concern. Indeed, the test ironically shows that a template with an explicit affluence signal is *less* likely to

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[170]   C. Bram Cadsby et al., *In-Group Favoritism and Moral Decision Making*, 128 J. ECON. BEHAV. & ORG. 59, 60 (2016).

ring alarm bells than one with a more subtle affluence signal, or even real emails that carry no income signal whatsoever. Nevertheless, because the experimental context and the validation exercise are not identical, it was decided to experiment with a less direct approach to signaling income in the criminal context, exploiting the fact that the criminal context was repeated in the second and first experiments. The personal injury context would preserve the direct and explicit signal as a more interpretable experimental contrast.

In order to establish the validity of emails with minimal case information, a small experiment was conducted. Emails were collected from a set of real clients. Three emails were found that contained relatively minimal identifying information in the body of the message. These would constitute part of a "lineup," in which various potential templates would also be included. Over the course of several days, an undergraduate research assistant challenged as many law students as he could to attempt to detect the fake email from the real ones. Figure 9 provides an illustration of the prompt, which law students could fill out on their phone or an iPad by going to a certain URL. The position of letters in the lineup was varied at random, as was the name and email of the sender. Importantly, as experimental subjects moved between letters, the "from" field was kept the same. As an additional data point, we also asked the participants to state how confident they were that they had correctly identified the fake one. While law students are not as good as lawyers at knowing what client emails look like, their task was considerably easier than the one facing lawyers in the real experiment. Here the subjects were *told* that one of the emails was a fake. By contrast, actual lawyers in the experiment have no reason to suspect the emails that they were receiving are not legitimate.

Figure 9: Prompt given to law student subjects in experiment conducted to assess email validity.

Figure 10 shows the results of the validity check. Fifty-four individuals took the challenge, of which only 10 correctly identified the fake. In other words, law

students would have on average done better at picking the fake if they had guessed at random. The figure shows separately the results for the subtle and the obvious affluence signal. Interestingly, when individuals did identify the "fake" email cor-
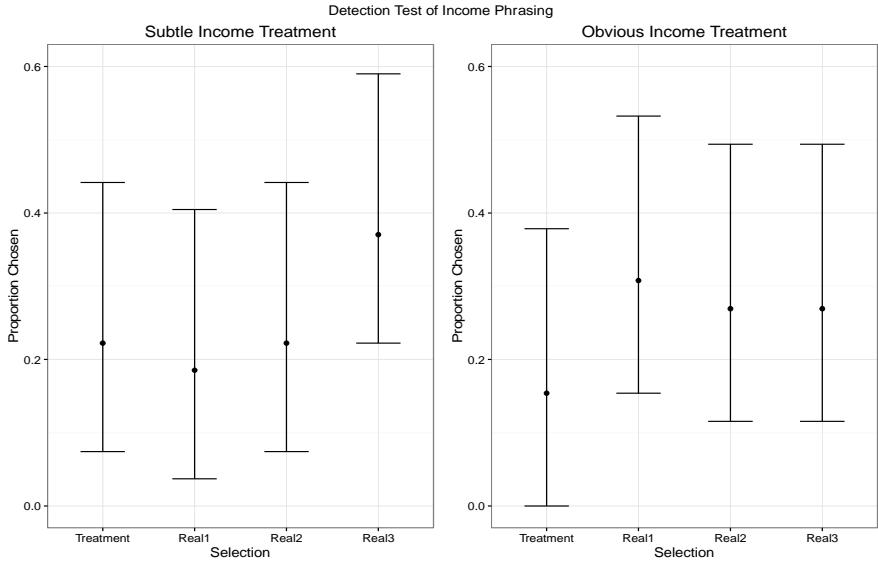

Figure 10: Results of email validity experiment by income treatment.

rectly, they were less sure of their guesses than when they incorrectly identified the other real emails as fakes. In other words, the instrumental validity check produced absolutely no evidence that the phrasing of the income signal mattered for detection. It also did not appear that omitting case details would make the template more detectable.

b.   Name Design

As explained above, a key idea motivating the design of the second experiment was to explore how the probability of lawyer response changes in response to differing odds of a black versus white sender. Figure 11 provides a few examples of how
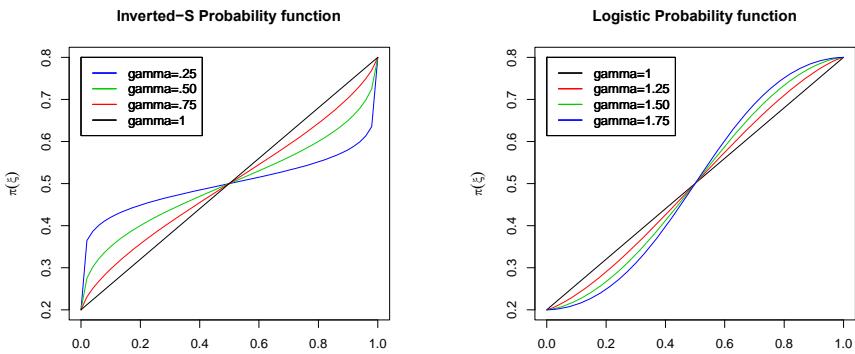

Figure 11: Functions describing how the probability of lawyer response changes in response to racial identifiability of a name.

these functions could look. For example, the left-hand figure suggests that the disparities identified in the email experiment are very narrowly confined to those individuals with highly-identified names. On the right-hand figure, disparities emerge quickly when it becomes more than even-money that an individual is black. Two key statistical questions are (1) how to estimate the shape of this curve and (2) how to optimally design an experiment for purposes of analysis. Answers to both questions are the subject of another paper aimed at applied statisticians.[171] However, the conclusions of that article may be briefly summarized. I used a Bayesian hierarchical model to estimate a four-parameter link function which admits the curves shown in Figure 11 as special cases. The four parameters control the inflection points, midpoint, and "gamma." When "gamma" is less than one, the curve is "sinusoidal" and the difference in response rates is larger at the extremes. The closer that gamma is to zero, the more similar outcomes are for those with intermediate names. When "gamma" is greater than one, marginally identifiable names result in more differentiable response rates. The larger "gamma" is, the more the results for names that are highly identifiable speak to the entire distribution of names. Analysis shows that six names, equally spaced along the interval between zero and one and a sample size of about 1,000, have substantial power to detect whether "gamma" is greater than one or less than one under a variety of assumptions about the true shape of the response curve. As a result, it was decided to include information about 1,000 lawyers total and to use six names.

c.   Name Loading

Having made the decision to use six names that were racially identified to varying degrees, it was necessary to obtain names that had the intended odds. While in the first experiment it was possible to rely on prior studies to identify plausible names for signaling, to my knowledge no prior study has looked at less extreme names. Following the approach of Bertrand and Mullainathan,[172] I relied on a combination of administrative data and individual surveys, searching for names where objective truth and subjective beliefs would lead one to believe the same subjective odds of that name being black versus white.

In order to conduct this search, I began by using a large administrative dataset containing racially-identified name information. In particular, I used the Florida voter file, which contains the first and last names of 8.2 million self-described whites and 1.7 million self-described African-Americans. While voters are not a random draw from the general Florida population, so the names might be susceptible to some sort of bias, the degree of bias must be small because the dataset is close to a complete enumeration of the entire Florida population, since over 80% of voting-

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[171]   Curious readers are encouraged to examine the statistical research note published with Tirthankar Dasgupta.

[172]   Bertrand & Mullainathan, *supra* note 129.

age Floridians are registered to vote.[173] For simplicity of explanation, let us suppose that the population in the voter file is identical with the entire population of Florida and, further, that Florida only contained self-identified blacks and whites. Obviously, neither assumption is literally true, however, for understanding the experimental design they are close enough.

Studies that rely only on highly identified names can afford to be a bit loose about whether the first, last, or entire name is carrying the racial signal. In the context of names that are weakly racially identified, however, one has to consider how the first and last name act together as a complete signal of a person's name. In particular, I used a "naïve Bayesian" approach for setting the odds of identifying a person's race from their name, which is similar to the approach used by Fryer and Levitt (2004).[174] To illustrate the method, consider a name such as Terence Austin. According to the Florida voter file, 998 white Floridians have the given name Terence and 3,416 have the surname Austin.[175] The probability of a white Floridian having first name Terence is 998/8,227,929, while the probability of having a last name Austin is 3416/8,227,929.[176] If one assumes first names and last names are assigned independently, then the probability that a white Floridian is named Terence Austin is approximately 4.16×10^{-8}.[177] By contrast, 454 black Floridians have the given name Terence and 1,554 have the surname Austin.[178] The probability of a black Floridian being named Terence Austin is therefore 4.09×10^{-8}. While the likelihood of a black person being named Terence Austin is somewhat higher than that of a white person, an adjustment must be made for the fact that there are more whites than blacks in Florida. Multiplying the probability of a Floridian being white $(8,227,929/(8,227,929+1,733,249))$ by the probability that a white Floridian has the name Terence Austin gives the relative probability that Terence Austin is white, while a similar calculation gives the relative probability that Terence Austin is black. Dividing the one relative probability by the other gives the odds that Terence Austin is black. Using this method, Terence Austin turns out to be just barely more likely white than not. The main advantage of using the independence assumption, rather

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[173] ANNA CHU ET AL., CTR. FOR AM. PROGRESS ACTION FUND, *Florida's Worst Election Offenders*, (Dec. 2013), https://americanprogress.org/wp-content/uploads/2013/12/FlVoting Report.pdf.

[174] Ion Androutsopoulos et al., *An Experimental Comparison of Naive Bayesian and Keyword-Based Anti-Spam Filtering with Personal E-mail Messages*, PROC. 23RD ANN. INT'L ACM SIGIR CON. 160, 160 (2000), https://arxiv.org/pdf/cs/0008019.pdf; Fryer & Levitt, *supra* note 165, at 774.

[175] The data can be found in the November 30, 2015 voter file at flvoters.com/downloads.html.

[176] *Id.*

[177] The numerical calculation is $(998/8,227,929)(3416/8,227,929)(8,227,929)/(8,227,929+1,733,249)$. *Id.*

[178] *Id.*

than seeing how many white people versus black people in Florida are actually named Terence Austin, is that the method would give reasonable odds even if few people in Florida actually had the name Terence Austin.[179]

The method described gives a method of generating names that plausibly should signal a certain probability that a name belongs to a white person as opposed to a black person. Yet it is not immediately obvious that this objective estimate corresponds to subjective beliefs. In order to assess this, I conducted two large sample surveys on m-Turk, one for each gender. I selected eight names which were intended to signal a less than 1 in 6 chance an individual with that name is white, eight names intended to signal between 1/6 and 1/3 probability an individual has a name is white, and so forth. For each of these names, I asked m-Turkers to guess whether the individual with this name is more likely white or more likely black. In this way, I hoped to find names where the subjective probability and objective probability are close. For each name, there were at least 715 m-Turkers that provided a guess,[180] so the subjective probability is very precisely estimated, at least within this population. The least precisely estimated name was Ericka Samuels. Three-hundred fifty-eight m-Turkers thought she was more likely black than white, while 359 said more likely white than black. The probability of an m-Turker saying she was more likely white is therefore estimated as 50%, with a 95% confidence interval of that subjective probability being between 46.4% and 53.7%.

Figure 12 illustrates the correlation between objective and subjective measures for male and female names separately. Overall, the correlation is strong. The grey
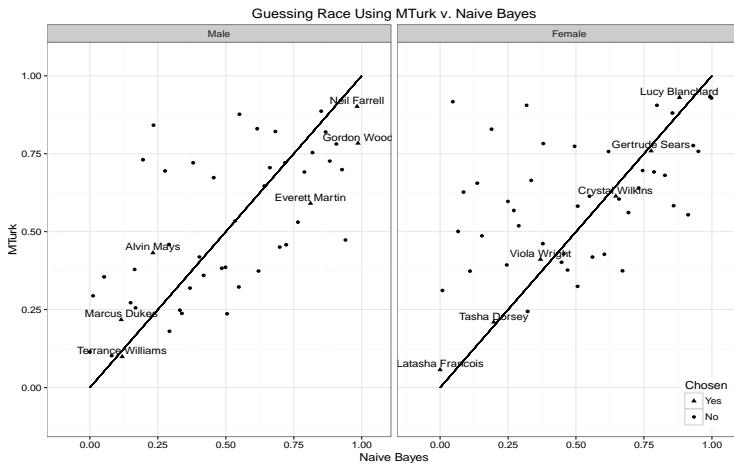
Figure 12: M-Turk and naïve Bayes survey of levels of race signals in names, by gender.

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[179] Indeed, there is in fact only one Floridian named Terence Austin, at least according to the voter file. *Id.*

[180] M-Turkers were allowed to complete the survey without responding to all names, mostly to decrease administrative overhead associated with individuals inadvertently realizing they had missed a name. The order of the names in the survey was randomized so as to minimize the risk of certain names getting more non-responses.

boxes illustrate names where both the objective and subjective probabilities were within the intended range. For the female names, it was always possible to find names where the coincidence was strong. For the male names, it was not possible to get coinciding measures simultaneously for all signal strengths, so I picked names that fell in the middle of the intended interval according to m-Turkers.

2.   Spam Tests

As an additional validity check, I conducted a robust examination of the behavior of default spam filters from several internet service providers. One potential concern of confounding in email experiments are these filters. If these filters screen emails from black clients more than white ones, it could explain some of the differences in apparent lawyer behavior.[181]

While it seems unlikely that spam filters might produce the gendered-income dynamics found in the first study, racially disparate treatment has been known to occur among computer algorithms.[182] The results of this experiment found that the letters from unfamiliar senders did sometimes get marked as spam. Importantly, however, the effect was entirely determined by the email service provider. No matter the treatment loading in the template, the result was the same. Since the spam effect was purely a function of the recipient and did not depend on assignment, one would expect treatment and control are equally likely to be marked as spam. In other words, the spam filter used is exactly the kind of unobservable background covariate that randomized trials are designed to handle.

3.   Treatment Populations and Blocking

The final and most costly aspect of study preparation was to find lawyers for inclusion in the study and to identify their race, firm size, and practice area. Only solo and small firm practitioners, understood as lawyers working in firms with fewer than six attorneys, were considered eligible for inclusion. While a complete enumeration of the Florida bar is available through the bar association's website, only occasionally will the listing indicate the necessary information. Therefore, a team of Harvard undergraduate research assistants were employed to skim through the bar directory in random order and instructed to identify about 1,000 eligible lawyers equally distributed into one of 12 blocks (three practice areas, two races, and two genders). The primary way they did so was through photos in the bar directory and in lawyer websites, although occasionally they may have identified a lawyer's race through news coverage. In some cases, lawyers advertised themselves as practicing in several areas such as criminal defense and personal injury. In these cases, a lawyer was considered eligible to fall into any block.

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[181] Jerry Kaplan, *Why Your AI Might Be Racist*, WASH. POST (Dec. 17, 2018), www.washingtonpost.com/opinions/2018/12/17/why-your-ai-might-be-racist/.

[182] *Id.*

As the data collection proceeded, it became clear that hitting the desired number of white lawyers was relatively easy to do by random sorting; however, finding black lawyers in the directory by random search proved difficult. Given that about four percent of lawyers in Florida are black,[183] this is unsurprising. As the costs of this data collection effort mounted, I decided to speed up the process of finding eligible lawyers by applying the naïve Bayesian method described above to the Florida bar directory. The undergraduates were instructed to evaluate for inclusion lawyers who the algorithm expected to be black. Sorting the lawyer population in this way greatly sped up the process of finding black lawyers whose practice areas fit the needs of the study, although the research process was still time-consuming. Since lawyers in the pool of participants were assigned to blocks at random, this approach to subject inclusion did not create any particular internal validity problems. Nevertheless, since black lawyers had a higher probability of inclusion in the study than the baseline if their name indicated a high probability of being black, the findings are subject to certain external validity issues. In particular, it is possible that black lawyers with distinctively black names differ systematically from black lawyers whose names are not distinctively black.[184]

Overall, 899 individuals were found for inclusion in the study. Table 2 shows the number of individuals ultimately assigned to each block. The process of assigning individuals to blocks was complicated by the fact that some lawyers could practice in multiple areas and so were eligible for inclusion in one of several experimental strata. The pool of 899 lawyers was imbalanced with respect to race, gender, or practice area. Unfortunately, the power of statistical comparisons between blocks is limited by the sample size of the smaller block.[185] As a result, it was desirable to distribute lawyers to blocks as evenly as possible. In order to deal with this complex allocation problem, the following procedure was used. First, individuals that only practice one kind of law subject to the study were immediately assigned to the appropriate substrata. Next, individuals who could be assigned to two blocks were assigned in such a way as to ensure a complete set of treatments from the six possible race signals, two possible gender signals, and two possible income signals. This is to say that blocks were topped up to the nearest multiple of 24 starting with the blocks that had the fewest members assigned thus far. Next, individuals who could practice in all three areas were assigned in a similar fashion. Finally, any leftover individuals were assigned to suitable blocks at random.

		Female	Male
Criminal	Black	48	74
	White	49	97

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[183] *Results of the 2018 Economics and Law Office Management Survey*, FLA. B. (Mar. 2019), https://www-media.floridabar.org/uploads/2017/08/2016-Florida-Bar-Sections-and-Divisions-Membership-Growth.pdf.

[184] Fryer & Levitt, *supra* note 165, at 783.

[185] DAVID M. DIEZ ET AL., OPENINTRO STATISTICS 242–44 (3d ed.) (2017).

Divorce	Black	73	49
	White	72	72
Personal Injury	Black	72	77
	White	72	144

Table 2: Number of lawyers assigned to each stratum, by race and gender.

C. Results

Figure 13 presents the most comprehensive view of the experimental effects regarding race. The overall experimental response rate was 29.3%, very similar to the 29.2% rate of the first experiment. The response rate by practice areas ranged from 31% for divorce lawyers to 27% for personal injury lawyers, but the largest difference in response rate (between divorce and personal injury) is not statistically
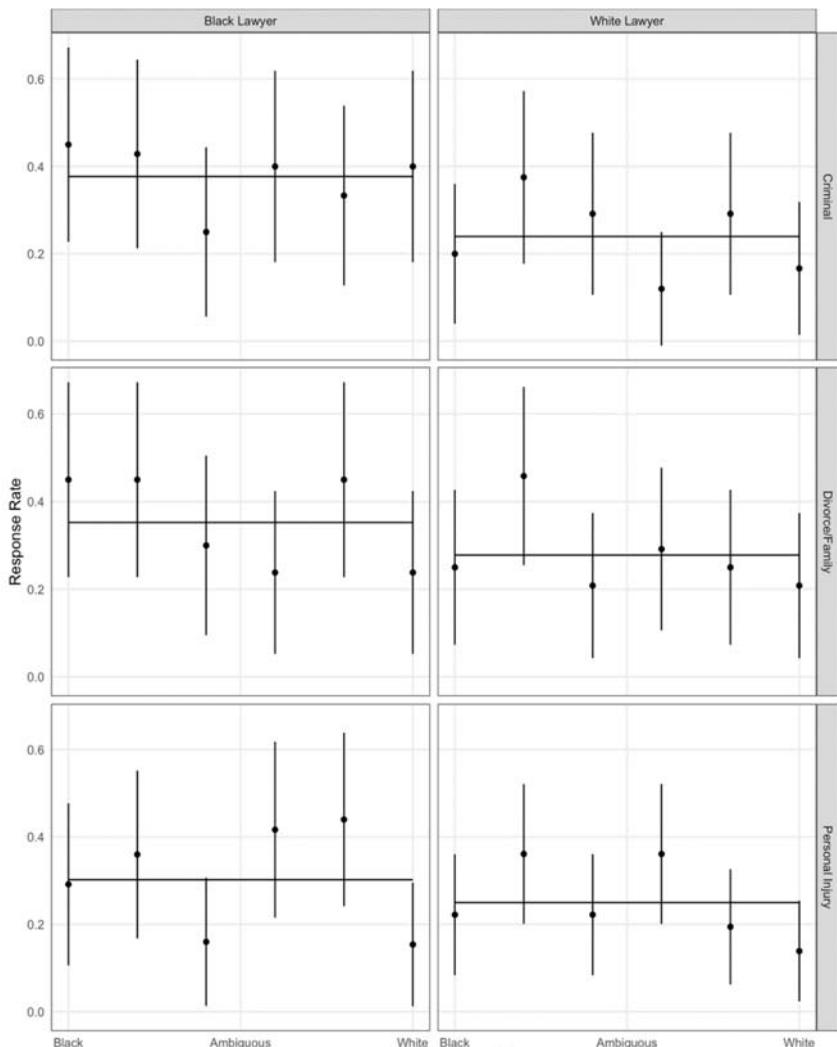

Figure 13: Response rates and client racial signals by lawyer race and practice area.

significant (p-value 0.263). Black lawyers overall had a significantly higher tendency to respond to client emails, regardless of racial signal. The white lawyer response rate was 25.4%, while the black lawyer response rate was 34.1%, a statistically significant difference (p-value <0.01).

After considering the difference in black versus white lawyer response propensities and the smaller differences in tendency to respond by practice area, it appears that there is no evidence that lawyers are responding to clients at different rates based on the strength of the racial signal embodied in their name. Figure 13 displays 95% confidence intervals around the estimated response rate for each race signal by lawyer race and practice area. In only one out of 36 cases does the confidence interval fail to intersect the lawyer race and practice area mean response rate. In other words, there is no evidence that signaling client race to any degree of certainty mattered to these lawyers in choosing whether to respond to an inquiry. If anything, it seems that signaling that one was black was helpful. Increasing the probability that the client is black by about 20% was associated with about a 1.8% increase in the response rate on average (p-value <0.039). Yet the significance of this regression disappears after controlling for the differences in white versus black lawyer response rates. Because there is no evidence that racial signals have an effect at a more disaggregated level, I view this significant relationship as an example of Simpson's paradox, which is to say: a statistical artifact.

In order to highlight the extent to which the findings of the Florida experiment differed from the California experiment, it makes sense to focus on the following sub-strata of the Florida experiment: white criminal lawyers receiving strong racial signals.[186] In total, 49 emails were sent by Latasha Francois, Tasha Dorsey, Terrance Williams, and Maurice Henry to white lawyers in Florida asking for representation in a driving-related misdemeanor. Similarly, 48 lawyers were sent identical emails from Anthony Holley, Sam Nash, Nicole Horton, and Tabitha Morgan. The overall response rate for those with names indicating they were very likely black was 28.6%. The overall response rate for those with names indicating they were very likely white was 22.9%. While the fact that clients with black-sounding names got a higher response rate than did white clients is a notable contrast with the first experiment, one should not read too much into this finding. The p-value on a two-sample t-test just within the white criminal lawyer population is 0.529, indicating that these differences are not all that surprising given the small number of individuals within this experimental substratum. The more interesting point is that the stratum was about the same size as the first experiment and was applied to a population ex ante con-

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[186]   Of the following names, the weakest signal is Maurice Henry. Three in four m-Turkers would expect Maurice Henry to be black, so it is still a fairly strong signal of client race. Interestingly, there are nine voters in Florida with the name Maurice Henry, seven of whom describe themselves as black and two whom describe themselves as white.

sidered similar. The first experiment found a substantively large and statistically significant discriminatory impact, but the same effect was not observed in the second experiment.

While the main purpose of the second experiment was to focus on the role of race, it is worth considering the gender and income dynamics that were identified in the first experiment. Female clients received a response rate (31.2%) that was higher, but not significantly higher, than the response rate for male clients (26.5%). The failure of the main effect regarding gender from the first experiment to carry over to the second experiment is also noteworthy.

Interestingly, however, the gender-income interactions are again counterintuitive from the standpoint of the statistical discrimination theory. Figure 14 provides the analogues to Figure 13 for the main experiment. Overall, signaling higher affluence marginally increased response rates by about 0.03% (p-value 0.33). The higher income signal caused an increase in the response rate by about 1.3% for men (p-value 0.76), while it lowered the response rate by about 8% for women (p-value 0.16). The magnitude of this gender-income interaction is about half as large as in the first experiment. In both cases, it is lower than conventional social scientific significance levels, although in the case of female clients it is not well below conventional significance level. Given the theoretical significance of this effect and its existence in the prior experiment, it is worth parsing the effect more finely. In particular, if one looks at the response rate by lawyer gender, it seems that the entirety of the interaction effect passes through the female lawyer population. In other words, the female lawyers are the ones treating affluent men more favorably and affluent women less favorably. As Figure 14 shows, the slopes for signaling higher income are both downward to an equivalent degree for the male subpopulation of lawyers. Signaling higher income for male lawyers decreases response rates by about 6.7% (p-value 0.09). By contrast, if one looks only at female lawyers, then signaling higher income is beneficial for male-named clients but harmful for clients with female names. Looking just within the female lawyer population, there is a 16% decrease in the response rate for signaling one is a high-income female relative to signaling
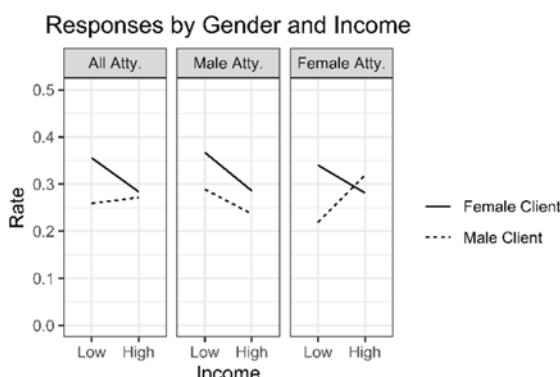
Figure 14: Response rates and client income by client gender and lawyer gender.

that one is a low-income female, and the effect is significant at conventional levels (p-value 0.08). Given the small sample size of the first experiment, it is hard to say to what extent this last finding differs or comports with the first experiment. Nevertheless, the interactions between client gender, client indications of affluence, and lawyer gender are both remarkable and inconsistent with the simplest stories of economic rationality.

IV. INTERPRETATION, REPLICATION, AND SYNTHESIS

There is an old saying that while man plans, God laughs.[187] Very few of the effects anticipated during the design phase of the second experiment materialized. Race did not matter more or less in some practice areas. Client race did not matter more or less to black lawyers than to white lawyers. The certainty with which client race was signaled did not matter. Even to white criminal lawyers receiving inquiry related to "driving-related misdemeanors," the most directly comparable sub-population of experiment two to experiment one, race did not matter. The only aspect of race that mattered was the lawyer race, but not for the expected reasons. It was not that black lawyers discriminated less or engaged in "reverse" discrimination. Rather, black lawyers responded to every kind of client more than white lawyers did.

The disagreement between these two sets of experimental results provides motivation for an additional experimental replication. Absent some replication exercise, it would be very hard to know what to make of the different sets of experimental findings. These differences might be because the context of the first experiment unexpectedly differed from the second experiment. Alternatively, the difference might be due to subtle internal validity problems such as inadvertent errors in design relating to the emails or names. Given the fact multiple names and emails were used, this explanation is somewhat implausible, but it nevertheless would be hard to rule out without some attempt at replication. A similarly implausible but possible explanation is that the first experiment was simply a "lucky" fluke. The odds of observing a race effect so large were 26 to 1 against. Still, the second experiment had a sample size of 899, almost ten times as large, so much less susceptible to statistical chance.

In this case, I decided to conduct a "cross-over" replication exercise. I used the exact same email instrument applied to the criminal subpopulation of lawyers in the Florida experiment to the criminal lawyers in the California experiment while applying the same instrument from the California experiment to Florida's criminal lawyers. For the replication experiment in California, I used the names Latasha Francois, Terrance Williams, Sam Nash, and Tabitha Morgan, which were the strongest intended racial signals in the second experiment. In Florida, Brad, Laurie, Darnell, and Latoya had their reprise. Importantly, whatever intended racial, in-

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187   FRED KOGOS, 1001 YIDDISH PROVERBS 71 (1974).

come, and gender signal the lawyer received in the earlier experiment, they also received in the crossover exercise. In other words, the same individual received the same intended treatment but with a different treatment instrument.

As it turned out, the results of *both* experiments replicated through this crossover exercise, so neither the names, the emails, nor statistical chance seem likely explanations. Using the first study design on 146 white criminal lawyers from Florida, the response rate was 21.9% for black-named clients and 15.1% for white-named clients. The difference was not statistically significant (p-value 0.40). Using the second study design on the criminal lawyers from the first experiment, the response rate for black-named clients was 27.1% while for white-named clients it was 56.2%. Given that the magnitude of the effect in the replication exercise was even larger than the first experiment, it is unsurprising that the result was even more unusual from a statistical standpoint. Indeed, the odds against observing such a large effect due to chance was 291:1. Combining the data on the two experiments in California and, for simplicity, treating each response as independent, the odds of seeing something so large are in excess of 2000:1. It appears that, for whatever reason, the criminal lawyers from the California population really are different from the lawyers in the Florida population in ways that matter for producing the sorts of disparities in response.

I also wish to mention two other branches of the replication exercise. Besides focusing on what happened if the first experiment's design was applied to the white Florida criminal lawyer population, I also applied the same design to 122 black criminal lawyers in Florida. With these lawyers, black-named clients did 13.5% better than white clients (p-value 0.094). While theoretically this effect was expected by the racial preferences theory, it is not what was expected from the standpoint of economic profiling, and it also differs from the weak preference for white clients found in the earlier Florida experiment. Pooling the experimental data from the black criminal lawyers in Florida, black lawyers are marginally (5.7%) more likely to respond to black clients than to white clients, but the difference is not significant (p-value 0.337).

Secondly, I proceeded to use the first experiment treatment on the second block of 96 lawyers that I would have sampled in the initial California study had the effect been shy of statistical significance. Focusing only on this group, white client response rates were 6.25% higher than those of blacks. While not a statistically significant finding on its own, this result is also best understood as strengthening the overall finding of the replication exercise. Why? First, there is no statistical evidence that the disparities differ between the two blocks (p=0.349). Therefore, it makes sense to combine the data from this branch with some of the other California data. No matter how one does this pooling or meta-analysis step, one will find important effects of comparable statistical and substantive magnitude as reported in the initial pilot study. Combining the initial study and this replication wave, for example, I have a sense of what I would have observed if the initial study protocol had required

contacting 192 lawyers rather than 96. The estimated effect would have been 12.5% and the p-value would have been 0.0622, significant enough to demonstrate the probable existence of an effect. I would have concluded that whites were receiving 50% more replies than were blacks purely on account of their name, rather than twice as many. Alternatively, suppose I treated all data collected during the replication phase in California as a single experiment and ignored the difference in treatment instruments: n=192 and the overall disparity is 17.7% (p=0.01). The difference is also smaller than what was found initially, but it is actually more statistically significant. Pooling all the California data and naively ignoring the fact that some lawyers were included in the sample twice and that there were different treatment instruments used, n=288 and the black-white disparity is 18% (p=0.00122). Taken together, the California data clearly indicates substantial disparities in treatment of black- and white-named clients by this lawyer population.

The major lingering puzzle, then, is why the Florida and California sample populations are different in such a way that the former disregards race while the latter discriminates. There are two sorts of explanations one might offer. One possibility is that the California and Florida lawyer populations have different latent traits that lead to discrimination. The bluntest version of this hypothesis is that California lawyers are racist, but Florida lawyers are not. Another possibility is that their environments differ in ways that encourage them to act differently. In other words, California and Florida lawyers are fundamentally similar in their racial preferences, but something about the Florida environment inhibits expression of these preferences, or the California environment encourages it. Ideally, a parsimonious explanation would explain not just why there is discrimination against black clients in California but not in Florida, but also the stronger findings of discrimination against females signaling high income in California. The evidence of such behavior was also notably weaker in Florida.

The basic problem in the people-centric story is that it struggles against prior beliefs about who discriminates on the basis of race or gender. While not all informed observers might expect Californians to be better than Floridians in this regard, many might. Some might cite the differing election outcomes in California and Florida in recent presidential elections, where black and female candidates did significantly better in the former state than in the latter.[188] Others might point to the fact that Florida was part of the Confederacy and later the Jim Crowe South. Still others might point to a policy such as felon disenfranchisement, which stripped voting rights from almost half of black men in the state of Florida up until this year.[189]

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[188] Ben Christopher, *Record Number of Women Candidates Won in California's Midterm Election*, TIMES SAN DIEGO (Nov. 23, 2018), https://timesofsandiego.com/politics/2018/11/23/record-number-of-women-candidates-won-in-californias-midterm-election/.

[189] Taylor, *supra* note 13.

Yet all these observations are anecdotal, and contrary points could easily be amassed to make the opposite case. More systematic evidence tends to support the intuitive priors. Survey researchers have developed a number of tools for eliciting racial preferences from the public.[190] Probably the simplest method involves asking individuals a set of direct questions about what they think about individuals of other races and scaling the responses to create a single number summarizing the respondent's "racial hostility." According to recent versions of these measures, white Floridians are somewhat more averse to blacks than are white Californians, although the variation within each state is larger than the difference between each state.[191] One weakness of this measurement strategy, of course, is that it is strongly susceptible to whatever differences there might be in the strengths of anti-racist norms.[192] If Californians are more scared to say what they "really" think, for example, then they could also simultaneously have stronger racial preferences and still look less racist according to self-reports.

One clever way around this problem is so-called "list" experiments.[193] In such an experiment, individuals are divided into two groups at random and asked to state the number of propositions they agree with from some list. One of the groups will see, say, three propositions. Another group will see the same three propositions, but also an additional one that is perhaps a socially undesirable opinion to express. The respondents will be asked to say how many propositions they agree with. Because the respondent does not need to say which statements they agree with, it is thought that they will be less inhibited in responding. Yet the clever part of the design is that the difference in the average number of statements agreed with is equal to the proportion of people in the population that agrees with the controversial statement. While these experiments are conducted less frequently than the prior sorts of surveys, data from a 1991 experiment also suggests that Californians have much weaker racial preferences than Floridians on average.[194] The list experiment shows that 49% of white Floridians in 1991 would be upset by a "black family moving in next door" and 100% would be upset by "black leaders asking the government for affirmative action." A statistically negligible number of white individuals in California would be upset by either event.

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[190]   *See, e.g.*, Graeme Blair & Kosuke Imai, *Statistical Analysis of List Experiments*, 20 POL. ANALYSIS 47 (2012); Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414 (1981).

[191]   *See* Ansolabehere & Schaffner, *supra* note 14.

[192]   *See* Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2022 (2014) (discussing the dominance of "PC" culture on California college campuses).

[193]   *See* Blair & Imai, *supra* note 190.

[194]   *See* Sniderman & Tedlock, *supra* note 14.

This more systematic evidence tends to rebut the notion that the white California population might be more racist than one would think and the Florida population less. Indeed, our conventional priors seem correct. A similar but better version of the different preferences story is that somehow the 96 individuals from California happen to be an unusual set of Californians.[195] Indeed, given that variation in strength of racial attitudes within a state is larger than the variation across states, the explanation is reasonable. Given the limited information available on each lawyer and the ethical problems with engaging in even more individualized data collection on these people, it is hard to assess how unusual a draw these individuals are in terms of their likely attitudes toward race and gender.

Without mining the data on the 96 individuals in the experiment too finely, it does not seem that the California lawyers in the first experiment live in more rural areas than the Florida lawyers in the second experiment. Based on bar admission date, the California lawyers are somewhat older on average than the criminal lawyers in Florida. The median admission date among the first 96 California lawyers is 1986, and 75% were admitted to the bar after 1977. In Florida, the median year of admission is 2000, and 75% were admitted after 1984. Likely, this difference in admission age is explained by the fact that the California lawyers were identified as criminal lawyers because they had a certification from the state of California, which naturally skews them to be older and more experienced than the entire bar. Since age correlates with conservative social attitudes,[196] this explanation for the difference is not unreasonable. It is, however, unconvincing. The age difference is not big enough to compellingly suggest this story. Almost the entirety of the California sample would have attended college and law school after the social revolutions of the 1960s and 1970s changed generational attitudes toward race and gender.[197] In fact, the California lawyers admitted to the bar before 1986 were slightly more equitable in their treatment of black and white clients than those admitted after 1986. Within the experimental data, age does not do the work it should in explaining outcomes. A similar analysis in Florida shows that the interaction of client race and bar admission year provides no evidence in favor of this theory.

While the explanation that these people are different from those people struggles against our priors and some data, there is a much stronger case that the markets are substantially different. According to the Bureau of Economic Analysis, there are about 20% more lawyers per capita in Florida than in California.[198] While there is little hard data to verify it, one could very reasonably suspect that the proportion of

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[195] *See* Kari Lock Morgan & Donald B. Rubin, *Rerandomization to Improve Covariate Balance in Experiments*, 40 ANNALS STAT. 1263, 1263 (2012).

[196] K.R. Truett, *Age Differences in Conservatism*, 14 PERSONALITY & INDIVIDUAL DIFFERENCES 405–11 (1993).

[197] *See* Bobo et al., *supra* note 122, at 43.

[198] BUREAU LAB. STAT., *supra* note 42.

lawyers working in government or for large law firms is also larger in California than in Florida.[199] The oversupply of retail lawyers is probably even greater than that 20% figure suggests. Unsurprisingly, Florida lawyers earn substantially less on average.[200] As a result, it is very easy to believe that competition among lawyers for clients is greater in Florida than it is in California.

Theoretically, it is easy to understand why lawyers in a more crowded market will decline to express their racial or gender preferences through client selection. There are few opportunity costs to expressing racial preference if one is working at or near one's capacity. By contrast, refusing clients one would rather not consort with has real costs if one is less than fully occupied. Indeed, California lawyers, by virtue of the fact that they all have state certifications in criminal law, are likely more skilled and in higher demand than the typical Florida lawyer in the study. As a result, they might be especially likely to have the luxury of expressing their idiosyncratic personal preferences through client selection.

Using data from the Florida experiment, it is possible to adduce some additional observational evidence in favor of this theory. In particular, Table 3 shows the racial disparities in response by county and shows how these disparities change in response to local labor conditions for lawyers, especially lawyer earnings and employment. Although the sample size for this regression is small, because it is tied to the number of counties where there were enough lawyers sampled, the coefficients consistently point in the right direction and are often significant, especially the ones related to wages. At the same time, as this mechanism for the contradictory experimental findings seems plausible, the evidence in favor of the mechanism is ultimately observational. While experimentally manipulating quantities such as local lawyer labor supply is generally impossible, future work can explore quasi-experimental methods such as instrumental variables or regression discontinuity designs to causally identify the role of this explanatory mechanism.

x	(1)	(2)	(3)	(4)
Hourly mean wage	0.017* (0.008)			
Hourly 25th percentile wage		0.037 (0.023)		
Hourly 75th percentile wage			0.011* (0.005)	
Employment per 1,000 jobs				0.005 (0.029)
Constant	-1.059** (0.464)	-1.240* (0.704)	-0.849** (0.374)	-0.142 (0.168)
Obs.	16	16	16	19

$*p < .1; **p < .05; ***p < .01$

Table 3: Racial disparity in response rate (county level, white lawyers only).

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[199] TORA K. BIKSON ET AL., THE LABOR MARKET FOR ATTORNEYS IN THE STATE OF CALIFORNIA: PAST, PRESENT, AND FUTURE 1–78 (2003).

[200] BUREAU LAB. STAT., *supra* note 42.

V. FIXING RACIAL DISCRIMINATION IN LEGAL MARKETS

Given the vast amount of ground covered by the experiments described above, it is worth taking a step back and thinking about the experimental results and what they suggest that the legal profession should do to ameliorate racial disparities in the market for legal services. In particular, the complex body of experimental evidence described above has three clear findings. First, at least in *some* geographically defined legal markets, blacks on average have a substantially harder time getting lawyers to respond to their requests for representation than whites. The word "some" is important. Not every sub-population of lawyers appears to discriminate against black-named clients. Even so, there is a replicated experimental finding within one well-defined population where a substantial disparate impact was found, and it is unlikely that this lawyer population is particularly unusual. Second, black lawyers respond to all clients at a higher rate than white lawyers do. Third, there is no evidence that economic profiling drives the selection of black versus white clients. Variation in the kind of risks to the lawyer's payoff did not lead to any differences in lawyer behavior toward black and white clients; if anything, black lawyers treated black clients more favorably than white clients. There is some evidence that retail lawyers particularly dislike affluent female clients, which is a counterintuitive form of economic profiling to say the least.

While the first finding establishes that the legal profession has a substantial problem in serving black clients, the latter two findings are informative about the set of solutions. On the one hand, the null findings in response to tests of many possible forms of economic profiling tend to strengthen the case that latent preferences are the primary driver for these differences. Of course, some more complicated form of economic rationality might be at work, but exactly which remains unclear. The social psychology literature suggests that eradicating latent social preferences and attitudes is exceptionally difficult,[201] but if one could somehow do it then that should ameliorate these problems.

Alternatively, and in the absence of thinking that we can actually change lawyer's preferences about individuals of another race, the experiments suggest that increasing the supply of lawyers would help improve racial balance in access to justice. The argument that artificial constraints on the supply of lawyers leads to inequality in access to justice is nothing new in the literature.[202] The literature also anticipates

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[201] *See, e.g.*, Bernadette Park & Charles M. Judd, *Rethinking the Link Between Categorization and Prejudice Within the Social Cognition Perspective*, 9 PERSONALITY & SOC. PSYCHOL. REV. 108, 108–09 (2005); Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCHOL. 1, 31–32 (1982).

[202] Clifford Winston, *Deregulate the Lawyers*, BROOKINGS (Apr. 30, 2012), https://www.brookings.edu/opinions/deregulate-the-lawyers/.

that whatever inequality in access to justice exists in America will tend to affect African-Americans more profoundly than whites, for the simple reason that blacks as a group are poorer on average than whites.[203]

Yet the notion that lawyers' racial preferences would represent another important barrier for blacks has not received much attention, nor the even deeper point that inadequate supply of lawyers is a crucial mediating variable permitting these preferences to express themselves. If the market does not apply sufficient pressure, lawyers can afford to be choosy and select clients on the basis of personality traits irrelevant to market outcomes. If the market is tough, then lawyers who want to serve only some kinds of clients will not have that luxury.

Naturally, these recommendations are unlikely to prove politically popular with lawyers. California lawyers make a lot more money on average than do Florida lawyers, and the relative tightness of the labor supply must have a great deal to do with this. A more politically expedient alternative might well be to focus on changing the racial composition of the legal profession rather than increasing its size. There are two main reasons to think that admitting more African-Americans to the bar would help close the gap in access to justice by race. First, there was consistent evidence in the experiments that black lawyers respond at a higher rate to all clients, which should particularly benefit those for whom access is currently the worst. Second, there was evidence in the replication wave that black lawyers responded to black clients at a higher rate than they do to white clients, so that more black lawyers in the population might close the aggregate representation gap faster.

At least since the 1980s, the American Bar Association has promoted various initiatives to increase the diversity of the profession.[204] These policies include the adoption of statements of principles affirming a commitment to diversity,[205] the creation and financial support of minority affinity groups within firms or law schools,[206] special recruiting events targeting underrepresented demographics,[207] the creation of new bar sections focused on problems of diversity and inclusion,[208] the establishment of diversity committees within firms,[209] the development of voluntary

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[203] Myrick et al., *supra* note 60, at 738.

[204] A.B.A., DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 9 (Apr. 2010), https://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.

[205] N.Y.C. B., EMPLOYER DIVERSITY INITIATIVES: LEGAL CONSIDERATIONS FOR EMPLOYERS AND POLICYMAKERS 18 (Apr. 2012), https://www2.nycbar.org/pdf/report/uploads/20072272-EmploymentDiversityInitiatives.pdf.

[206] *Id.* at 12.

[207] *Id.* at 17.

[208] *See, e.g.*, *GPSLD Diversity Plan*, A.B.A. (Aug. 2013), https://www.americanbar.org/groups/government_public/about_us/diversity_plan/.

[209] Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015), https://www.washingtonpost.

reporting requirements and data collection procedures aimed at assessing the state of inclusion in the profession, and still others. These initiatives have had mixed success. Representation of minorities and women at junior levels has improved substantially, relative to past decades.[210] Yet as a whole, the profession remains disproportionately white and male as compared with the national population, particularly at the profession's highest earnings and most prestigious echelons.[211]

One of the most effective tools for increasing the representation of black lawyers in the legal profession is, and remains, affirmative action in law school admissions. The maximum representation of minority lawyers is capped by the number of minority students entering law school. Logically, it is impossible to make progress in balancing the profession without first balancing law schools. Of course, affirmative action is a controversial subject that may be explored from many perspectives. There are vast sub-literatures on the lawfulness of various admissions policies in different Court eras,[212] the efficacy of these policies in regard to their students,[213] the ethical and moral quandaries they create,[214] and other topics. There is insufficient space here to do these sub-literatures much, if any, justice.

At the same time, it is worth noting that the experimental results presented here can give something new to this debate: an evidence-based rationale for affirmative action policies in law schools that focus on redressing a contemporary market failure in the provision of essential services. As Feldman notes, the contemporary debate about the constitutional legitimacy of state affirmative action plans has failed to move past the badly fractured *Bakke* opinion.[215] Four justices in that case would have upheld University of California's quota-based admissions program on the grounds that it was an appropriate remedy for past discrimination, while four justices considered this program a violation of the Equal Protection Clause.[216] Powell,

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com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.eb84f9247c6d.

[210] *See* Aviva Cuyler, *Diversity in the Practice of Law: How Far Have We Come?*, GPSOLO, Sept.–Oct. 2012, at 15.

[211] Rhode, *supra* note 209.

[212] *See, e.g.*, Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 B.Y.U. EDUC. & L.J. 1, 38 (2006).

[213] *See* Heather Rose, *The Effects of Affirmative Action Programs: Evidence from the University of California at San Diego*, 27 AM. EDUC. RES. ASS'N 263, 263 (2005); Thomas E. Weisskopf, *Consequences of Affirmative Action in US Higher Education: A Review of Recent Empirical Studies*, 36 ECON. & POL. WKLY. 4719, 4719 (2001).

[214] *See* Prue Burns & Jan Schapper, *The Ethical Case for Affirmative Action*, 83 J. BUS. ETHICS 369, 369 (2008); Alan H. Goldman, *Affirmative Action*, 5 PHIL. & PUB. AFF. 178, 194 (1976); Bill Shaw, *Affirmative Action: An Ethical Evaluation*, 7 J. BUS. ETHICS 763, 764 (1988).

[215] Noah Feldman, *Justifying Diversity*, N.Y. REV. BOOKS (Dec. 6, 2018), https://www.pressreader.com/usa/the-new-york-review-of-books/20181206/281629601288569.

[216] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 376–78 (1978).

the swing Justice, argued that while promoting diversity was a compelling interest for the state to advance in selection, reserving seats for minority students represented an overly broad approach to securing these benefits.[217]

The problems of the diversity rationale are well known. The Justices struggle to provide a consistent story of what diversity does or why it matters. For Powell, diversity promotes the acquisition of educational goods that cannot readily be obtained in homogenous student bodies.[218] For O'Connor, diversity in education is important as a precursor to democratic legitimacy.[219] Kennedy's *Fisher v. Texas* opinion appears to treat diversity as a good in and of itself. Without any clear theory of *why* diversity is an important educational or societal goal, it is also impossible to know whether the policy is succeeding.[220] The combination of unclear goals and obvious winners and losers naturally breeds suspicion and hostility. The legitimacy of affirmative action as a policy regime suffers.[221] Unsurprisingly, as the courts have continued to trend in a more conservative direction, the existing constitutional justifications for these policies appear shaky at best.[222] As Feldman remarked, "we are going to need new approaches to ensure continued representation of African-Americans and Latinos without violating the law."[223]

While attention of the legal community is likely to return to the logically stronger rationale of redressing past discrimination that commanded support from four justices in *Bakke*, this justification also has certain weaknesses. In particular, it seems to suggest no clear limiting principle: when has redress sufficed? How does one decide the appropriate level of compensation for past wrongs?[224] From a more practical standpoint, it is doubtful that the Roberts Court, after the addition of Kavanaugh and Gorsuch, is remotely likely to accept it any time soon. Rather, I would argue that proponents of affirmative action must confront themselves to considering the *other* compelling interest that Powell identified in *Bakke*: correcting market failures with racial dimensions in the provision of essential services. As Powell wrote:

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[217] *Id.* at 320.

[218] *Id.* at 311–20; Richard A. Posner, *The* Bakke *Case and the Future of "Affirmative Action,"* 67 CALIF. L. REV. 171, 180 (1979).

[219] Grutter v. Bollinger, 539 U.S. 306, 332 (2003); Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 628 (2006).

[220] Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J. POL'Y. ANALYSIS & MGMT. 463, 477–79 (2006) (discussing the need for further research on the effectiveness of affirmative action programs).

[221] *See* Lawrence Bobo, *Race, Interests, and Beliefs About Affirmative Action: Unanswered Questions and New Directions*, 41 AM. BEHAV. SCIENTIST 985, 985–86 (1998) (describing the perceived illegitimacy of affirmative action programs).

[222] Gayle, *supra* note 24.

[223] Feldman, *supra* note 215.

[224] Joel Thomas Tierno, *On the Justification of Affirmative Action*, 21 PUB. AFF. Q. 295, 296 (2007).

It may be assumed that, in some situations, a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.[225]

Presumably, ensuring that African-Americans and other minority groups obtain equal access to lawyers is as compelling a justification as ensuring they have access to doctors. The main inadequacy that Powell found with this justification is the lack of evidence supporting it. Given the relatively primitive state of social science research in 1979, it is unsurprising that the evidence was lacking. Forty years later, however, the techniques of policy analysis have advanced significantly. Experiments such as those presented here can provide the evidentiary record necessary to show that affirmative action policies would help bring about equality in access to lawyers and realize our commitment to the fundamental normative ideals behind our system of government.

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[225] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978).