

# RACE AND REPRESENTATION: RACIAL DISPARITIES IN LEGAL REPRESENTATION FOR EMPLOYMENT CIVIL RIGHTS PLAINTIFFS†

*Amy Myrick\**  
*Robert L. Nelson\*\**  
*Laura Beth Nielsen\*\*\**

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\* J.D.-Ph.D. Candidate, Northwestern University Sociology Department and School of Law. J.D. program completed 2009; M.A. Northwestern University, 2010; B.A. Brown University, 2003.

\*\* Director and MacCrate Chair, American Bar Foundation and Professor of Sociology and Law, Northwestern University. Ph.D., Northwestern University, 1983; J.D. Northwestern University School of Law, 1979; M.A. Northwestern University, 1977; B.A. Northwestern University, 1974.

\*\*\* Research Professor, American Bar Foundation and Associate Professor of Sociology and Law, Northwestern University. Ph.D., University of California, Berkeley, 1999; J.D. Boalt Hall School of Law, University of California, Berkeley, 1996; B.A. University of California, Santa Cruz, 1992.

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## INTRODUCTION

Philip Jacobson was a thirty-four-year-old African American man working as an administrator at a government printing plant. After a series of incidents with managers and several denied promotion requests, he became convinced that he was the victim of discrimination. Mr. Jacobson decided to file a complaint with the Equal Employment Opportunity Commission (EEOC) and later filed a Title VII discrimination claim in federal court. But like a surprisingly high percentage of plaintiffs in employment discrimination cases, he went to court without a lawyer.<sup>1</sup> Long after his case had terminated, Mr. Jacobson believed that it was still pending and that he was merely waiting for a response from the court. In reality, a judge dismissed the claim for want of prosecution after Mr. Jacobson missed a hearing and a deadline to file a response. For Mr. Jacobson, going to court was just another confusing episode in a series of failures to have his concerns about workplace discrimination addressed. Without a lawyer, he lacked basic knowledge of how to advance his claim and came away feeling that the legal system had no interest in serving the goals of people like himself. As he recalled<sup>2</sup> the experience of filing a suit in federal court, he lamented:

I think it was just out of desperation. I didn't even pursue it. I thought maybe I would get a call from somebody and get some help because EEO didn't help me at all. So I filed after I got that erroneous decision saying I hadn't been discriminated against; that management had a right. And then after they sent me a decision saying . . . 'the decision we rendered was erroneous. You can go into federal court.' I'm going okay and that's when I went. So I'm like if you made the wrong decision, why don't you make the right one? So even then it was like they were discriminating against me saying we judged it wrong so we won't judge it right.<sup>3</sup>

Mr. Jacobson's experience is not unique. This article uses statistical analysis to show that minority plaintiffs in employment discrimination lawsuits—in particular African Americans—are much more likely than white plaintiffs to file without a lawyer. This difference is salient because pro se plaintiffs have significantly worse litigation out-

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1. See *infra* Part I.

2. This article relies in part on a series of 100 interviews conducted with employment discrimination litigants, defendants, and lawyers from 2005 to 2007. Interviews were conducted in two major American cities and by telephone. In order to preserve the privacy of the participants, all interview subjects are identified by pseudonyms, and the exact dates and locations of interviews have been withheld.

3. Telephone Interview with Philip Jacobson (Feb. 2006) [hereinafter Jacobson Interview].

comes than those with representation.<sup>4</sup> Furthermore, we show that pro se plaintiffs tend to misunderstand their legal issues and, like Mr. Jacobson, feel that the courts have failed them. While past access to justice initiatives have addressed these negative consequences of lacking a lawyer, they have not systematically examined racial differences in representation rates, or tried to explain why these differences exist. Remarkably, access to justice approaches have largely overlooked race, instead focusing primarily on poverty as a barrier to finding a lawyer.<sup>5</sup> This article fills that gap. It shows that race matters in representation rates. It then examines possible reasons for this ignored but troubling disparity. We show that race operates in complex ways, both for minority plaintiffs seeking lawyers, and for the lawyers who decide whether to accept them as clients. In sum, minority plaintiffs face many of the same barriers to obtaining legal resources as minority groups do in other social domains.<sup>6</sup>

Part I of the article presents our methods and reviews a growing body of work showing that pro se plaintiffs are disadvantaged relative to those who have lawyers. Part II statistically demonstrates that minority plaintiffs, in particular African Americans, are much more likely than white plaintiffs to file pro se, even when controlling for a variety of legal and non-legal factors. We review social science research on access to justice that speaks to these findings. Part III draws on qualitative interviews with African American pro se plaintiffs to propose reasons for this pattern, and to expand on consequences from the plaintiffs' viewpoint, contrasting pro se plaintiffs with represented plaintiffs. Part IV turns to interviews with lawyers, demonstrating that employment discrimination practitioners screen clients in ways that may work to the disadvantage of minorities. Part V explores the implications of racial disparities in pro se filings and suggests policy solutions.

## I.

### PRO SE LITIGATION: DATA AND PAST FINDINGS

The data used throughout this article come from our large-scale, multi-method study of employment discrimination litigation in U.S.

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4. See *infra* Part I.

5. See *infra* note 26.

6. See generally Devah Pager & Hannah Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181 (2008) (reviewing data on racial inequality in multiple social areas and the causes of inequalities).

federal courts.<sup>7</sup> Replicating and expanding on John Donohue and Peter Siegelman's important study of employment civil rights litigation between 1972 and 1987,<sup>8</sup> we drew a random sample of 2,100 cases filed in seven U.S. federal district courts between 1988 and 2003.<sup>9</sup> To build our statistical dataset we coded these cases for a wide variety of attributes that included the type of claim, case history, progression, and outcome, as well as characteristics of the plaintiff, employer, and legal representation on both sides.<sup>10</sup> Then, to gain insight beyond case attributes, we systematically sampled from the case filings to conduct in-depth interviews in 2006 and 2007 with a total of 100 individuals across the range of case types: 41 plaintiffs; 20 plaintiff lawyers; 20 individuals representing defendant-employers; and 19 lawyers serving as outside counsel to employers.<sup>11</sup> Our intent with this mixed-methods design was to allow statistical modeling of the legal and social factors that influence case progression and outcomes. We also wanted to provide a complex, multi-perspective qualitative view on how parties to discrimination cases experience them in human terms.<sup>12</sup> In this article we use both the statistical and interview datasets to understand the dynamics of pro se litigation.

One of our prior articles dealing quantitatively with how and why plaintiffs' claims progress or fail concluded that a main determinant of

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7. All quantitative and qualitative data are on file with the authors.

8. John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709 (1993); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) (analyzing employment discrimination litigation on a large scale); Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427 (1995).

9. We developed an extensive coding form and trained teams of coders for each site under the supervision of a single data collection manager. Ten percent of the cases were coded independently by different coders to test for intercoder reliability. For a more detailed technical description of methods, see Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010). Of the 2,100, 1,672 were closed cases that contained enough information to be used in our analyses.

10. For a full list of variables coded, see *id.* at 200.

11. For a more detailed description of qualitative methods, see Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1 (2012).

12. For a published paper using the qualitative interviews, see *id.* (comparing narratives of plaintiffs, plaintiffs' lawyers, and defendants' lawyers and representatives on what constitutes "fairness").

a plaintiff's case outcome is whether she has a lawyer.<sup>13</sup> Compared to represented plaintiffs, pro se plaintiffs were significantly more likely to have their cases dismissed or lose on summary judgment, and were less likely to reach early settlement.<sup>14</sup> This empirical evidence proving the serious disadvantage that pro se status entails is consistent with other access to justice research on various types of legal action.<sup>15</sup> Although we know of no other studies that look specifically at the outcomes for pro se employment discrimination plaintiffs, a growing body of work shows that employment discrimination litigation in general disfavors plaintiffs.<sup>16</sup> In addition, research on pro se plaintiffs

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13. Nielsen et al., *supra* note 9, at 188. We used a discrete-time event-history model to estimate whether a case would end at a particular litigation stage (dismissal, early settlement, summary judgment loss, or late settlement), controlling for a wide range of legal and extra-legal factors. This type of statistical model estimates how included predictors—for example, the type of discrimination alleged, or the race of the plaintiff—affect the likelihood that a case will obtain a given outcome at each stage of the litigation. The model presents the effect of each predictor independent of the others. For example, pro se status decreased the chances of successful outcomes independent of whether pro se plaintiffs were more likely to file certain types of claims, or hold non-managerial positions. In other words, the observed effect of each predictor on the outcome is not determined by its overlapping relationship with other predictors, but instead exists “net of” those relationships.

14. *Id.* at 188.

15. See Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 51–52 (2010) (combining the results of multiple studies to conclude that “when people are represented by attorneys, they are, on average, more likely to win in adjudication than are people who are unrepresented”); Carroll Seron, Gregg Van Ryzin, & Martin Frankel, *The Impact of Legal Counsel on Procedural Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419 (2001) (showing benefit of counsel through unique experimental design). But see James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. (forthcoming 2013) (explaining that experimental treatment of eviction cases in state district court shows that with random assignment, fully-represented defendants fared better than those receiving only “limited” assistance), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1948286](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948286); James Greiner, et al., How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court (Sept. 1, 2012) (unpublished manuscript) (explaining that a similar experimental design found no measurable benefits for fully-represented defendants in housing court eviction proceedings), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1880078](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078).

16. Compared to other kinds of cases in district courts, employment discrimination plaintiffs fare poorly in many ways. See generally Charles A. Brown, *Employment Discrimination Plaintiffs in the District of Maryland*, 96 CORNELL L. REV. 1247 (2011); see also Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 54–55 (2006); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 104–05 (2009) (showing how recent decline in employment discrimination claims may reflect plaintiffs’ consistently poor outcomes over time); Kevin M. Clermont & Stewart J. Schwab, *How Employment Dis-*

suggests that they suffer most when they file claims involving complex or document-intensive areas of law,<sup>17</sup> and that such issues may compel plaintiffs to seek an attorney instead of attempting to self-represent.<sup>18</sup> Because employment discrimination law meets these criteria, we would expect pro se rates to be low. However, twenty percent of employment discrimination plaintiffs in our sample filed their claims unrepresented,<sup>19</sup> and other studies have shown pro se rates to be similarly high.<sup>20</sup> Employment discrimination is thus an area of law in which plaintiffs face serious hurdles to success, especially if unrepresented. And yet they often lack lawyers.

To date, we know of no research that has examined which employment discrimination plaintiffs are likely to file pro se. Even in other areas of law, systematic studies of what plaintiff characteristics explain their decisions to use or forgo lawyers are relatively scant. The limited work on this question has tended to look at what legal factors explain representation rates—for example, by comparing rates across

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*crimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003) (asserting employment discrimination plaintiffs are disadvantaged on appeal); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1966 (2009) (“We showed that in federal court the plaintiff win rate for jobs cases (15%) was lower than that for nonjobs cases (51%).”); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) (citing statistics that show at the trial level, defendants won in 94% of ADA cases); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556–57 (2001) (suggesting that judicial perceptions of the law disfavor plaintiffs). *But see* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 112 (2007) (claiming that despite low win rates, “plaintiffs are achieving a reasonable degree of success through settlements, measured against their lost wages”).

17. Sandefur, *supra* note 15, at 52 (combining the results of multiple studies to conclude that “[o]ne factor that seems to shape variation in the magnitude of lawyers’ impact is procedural complexity—the complexity of the documents and procedures necessary to pursue a justice problem as a court case appears to account for some of lawyers’ effect on case outcomes.”).

18. Lynn Mather, *Changing Patterns of Legal Representation in Divorce: From Lawyers to Pro Se*, 30 J.L. & SOC’Y 137 (2003); Bruce Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 598 (1993) (“Complexity of one’s case is significant in determining one’s decision; the more complex the case, the less likely is self-representation.”).

19. Nielsen et al., *supra* note 9, at 188.

20. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 434 (2004); John Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117, 343 (1997) [hereinafter *Report to the Second Circuit Task Force*] (reporting that “plaintiffs in [employment discrimination cases] often appear pro se, and do not understand the law or the court’s procedures.”).

claim types ranging from family law to personal injury,<sup>21</sup> issue complexity, and the nature of requested relief,<sup>22</sup> or legal provision systems that compensate lawyers in different ways. An exception to this law-focused approach is the body of research that focuses on the specific plaintiff characteristic of socioeconomic class. These studies compare rates of lawyer use across income levels, paying special attention to the poor. Concern about unmet legal needs of low-income groups drives this research as well as other access to justice scholarship.<sup>23</sup> While studies generally find that low income plaintiffs are less likely to have lawyers, some also find that income alone does not explain all variation.<sup>24</sup> Plaintiffs' perceptions of the law, and their beliefs about lawyers, may also influence their decision to self-represent.<sup>25</sup>

Apart from socioeconomic class, little research has systematically analyzed group characteristics such as sex or race as they relate to representation rates, nor have scholars asked how such characteristics might operate.<sup>26</sup> In the following section we use statistical tech-

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21. E.g., Herbert Kritzer, *To Lawyer or Not to Lawyer: Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875 (2008); Sandefur, *supra* note 15, at 59–60 (2010).

22. See e.g., Mather, *supra* note 18, at 137; Sales, *supra* note 18, at 553.

23. See AM. BAR. ASS'N. CONSORTIUM ON LEGAL SERVS. & THE PUB., TWO NATIONAL SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY 37–38 (1989).

24. Kritzer, *supra* note 21, at 887, 900 (finding that claim type is a better predictor of lawyer use than income, and that lower income plaintiffs were more likely than middle income plaintiffs to use lawyers for personal and economic injury claims); Sales, *supra* note 18, at 563, 567 (finding that irrespective of income, people with “some college” were more likely to self-represent in divorce cases and noting that 22% of pro se filers said they had money available but chose not to spend it on a lawyer); Jeffrey W. Stempel, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 140 (1980) (showing that income was only weakly predictive of lawyer use).

25. See *infra* Part III.G.

26. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 350 (2008) (“No work from the contemporary national surveys has yet focused on measuring and explaining race differences in the incidence of problems, in disputing behavior, in how problems are handled, or with what results . . . [and] [n]o major qualitative study has focused expressly on race and disputing, justiciable problems, or with civil courts or staff.”). Anecdotal reports have suggested that women and minorities are more likely to lack lawyers. See, e.g., *Report to the Second Circuit Task Force*, *supra* note 20, at 343; see also Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, 529–32 (1991) (including race and gender variables in a model predicting lawyer use in Ontario, Canada, with mixed results and little discussion by the authors). But systematic studies are few, as some legal scholars have noted. See Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 236 n.65 (2002) (“I have been unable to find any empirical study on either quantity or quality of utilization of lawyers' services among minorities.”).

niques to test whether a wide range of plaintiff characteristics and legal features affect whether employment discrimination plaintiffs have lawyers. To preview, we find that racial and ethnic minorities, in particular African Americans, are much less likely to have lawyers than white plaintiffs.

## II.

### WHO HAS A LAWYER? RACIAL DISPARITIES IN REPRESENTATION

#### A. *Statistical Analysis*

This Part first describes the representation status of plaintiffs in our dataset as it relates to plaintiff characteristics. Plaintiffs fell into three categories: (1) those who had a lawyer for the duration of their case; (2) those who filed alone but later obtained a lawyer (sometimes through court appointment);<sup>27</sup> (3) and those who never had a lawyer. Table 1 shows that African Americans, Asian Americans, and Hispanics; men; and those employed in non-managerial or professional positions were more likely than their counterparts in the respective categories of race, sex, and occupation to lack a lawyer throughout their cases. Conversely, white plaintiffs and those identified as “other” were more likely to be represented throughout, as were women, and people with high-level jobs. In the intermediate category, African Americans, Hispanics, and especially Asian Americans appear more likely than whites to file pro se but gain a lawyer, as do men relative to women, and people who are not managers or professionals.

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27. See *infra* Part V.C.3 for a discussion of the court appointment process.

TABLE 1: SELECT PLAINTIFF CHARACTERISTICS BY  
LEGAL REPRESENTATION

|  | Pro Se Throughout | Filed Pro Se,<br>Gained<br>Counsel | Lawyer Throughout | Total        |
|--|-------------------|------------------------------------|-------------------|--------------|
| <b>Race***28</b>   |                   |                                    |                   |              |
| African American   | 20.79%            | 12.13%                             | 67.09%            | 100% (635)   |
| White  | 8.37%             | 3.35%                              | 88.28%            | 100% (478)   |
| Hispanic   | 21.38%            | 6.38%                              | 72.34%            | 100% (94)    |
| Asian American   | 25.58%            | 19.95%                             | 60.47%            | 100% (43)    |
| Other  | 6.52%             | 5.98%                              | 87.50%            | 100% (184)   |
| Missing  | 13.35%            | 5.46%                              | 81.09%            | 100% (238)   |
| Total  | 14.77%            | 7.72%                              | 77.51%            | 100% (1672)  |
| <b>Sex **29</b>  |                   |                                    |                   |              |
| Male   | 18.24%            | 8.08%                              | 73.68%            | 100% (817)   |
| Female   | 11.47%            | 7.45%                              | 81.09%            | 100% (846)   |
| Missing  | 11.11%            | 0                                  | 88.89%            | 100% (9)     |
| Total  | 14.77%            | 7.72%                              | 77.51%            | 100% (1,672) |
| <b>Occupation***30</b>   |                   |                                    |                   |              |
| Management, Business,<br>or Professional   | 8.64%             | 5.50%                              | 85.85%            | 100% (509)   |
| Service, Sales, and<br>Office or Administrative<br>Support                           | 16.20%            | 9.37%                              | 74.43%            | 100% (747)   |
| Natural Resources,<br>Maintenance,<br>Construction,<br>Production,<br>Transportation | 16.39%            | 8.03%                              | 75.59%            | 100% (299)   |
| Other  | 15.38%            | 15.38%                             | 69.23%            | 100% (13)    |
| Missing  | 29.81%            | 4.81%                              | 65.38%            | 100% (104)   |
| Total  | 14.77%            | 7.72%                              | 77.51%            | 100% (1,672) |

\*\*\* Chi Square Probability = 0.0001 \*\* Chi Square Probability = .01

These patterns are intriguing. While we might expect plaintiffs with higher occupational status to be more likely than others to obtain lawyers given their greater resources and potential for greater damages as higher paid employees, it is surprising to find significant differences by race and sex. It is necessary to determine whether the effects of some characteristics are explained by other variables. For example, it could be the case that managers are more likely to have lawyers, regardless of race, but that whites are more likely to be managers.

28. Chi square < 0.0001, meaning that the probability the observed relationship between race and representation status could occur by chance alone is less than 1 in 10,000. In other words, there is a statistically significant relationship between race and representation status.

29. Chi square  $\leq$  .01, meaning that the probability the observed relationship between sex and representation status could occur by chance alone is less than 1 in 100, and thus is statistically significant.

30. Chi square  $\leq$  .00001, meaning that the probability the observed relationship between occupation and representation status could occur by chance alone is less than 1 in 100,000, and thus is statistically significant.

Such a pattern would imply a different kind of access problem than one showing that all whites, regardless of occupation, are advantaged.

Table 2 reports the results of a logistic regression, a statistical model that addresses such possibilities by presenting the effect of each variable on representation status controlling for the effects of other variables.<sup>31</sup>

TABLE 2: LOGISTIC REGRESSION MODELS PREDICTING PRO SE FILING AND GAINING COUNSEL

|                         | (1)                | (2)                             |
|-------------------------|--------------------|---------------------------------|
|                         | Filed Pro Se       | Filed Pro Se but Gained counsel |
| <b>Plaintiff's Race</b> |                    |                                 |
| African American        | 2.540***<br>(3.86) | 1.332<br>(0.64)                 |
| White                   | Reference Group    |                                 |
| All other <sup>32</sup> | 1.948***<br>(3.29) | 1.359<br>(0.70)                 |

*Table continues on next page.*

31. In brief, a logistic model reports the relationship between a predictor—for example, race or gender—and a categorical outcome, in this case either “filed pro se” or “filed pro se but gained counsel.” This relationship appears as a numeric “odds ratio.” An odds ratio of 2.5 (for “African American” in column one) means that African Americans are 2.5 times more likely to file pro se than whites (the reference group), controlling for the effects of all other variables in the model (see explanation of “control” below). An odds ratio of less than 1—for example, .47 for occupational managers and professions—means that the group is .47 times as likely to file pro se as the reference group (here a combined category of blue collar, other, and missing). For predictors that are shown without a reference group, the odds ratio reflects the odds compared to plaintiffs who lack that characteristic (for example, plaintiffs who file a Title VII race claim are 1.8 times as likely to file pro se as plaintiffs who do not file a Title VII race claim). Each odds ratio is independent of the others—for example, the race effect for African Americans does not exist because African Americans are less likely to be managers (although that may be the case). The regression “controls” for the effects of such relationships, and statistically removes them to present the odds for each predictor “net of” other predictors. In addition, it identifies the relationships that are least likely to appear by chance in a randomly selected sample of this size. Such relationships are deemed “significant,” meaning that there is less than a 5% chance that they appear randomly in our sample, but not in the larger population of all employment discrimination cases. In our model, significant coefficients appear with “\*” notations.

32. This category includes Asian American, Hispanic, Other, and missing. For analytical purposes, we combined these groups to facilitate a African American-White comparison. We acknowledge that if we had more complete information on race it might affect the African American-White difference. We decided it was better to treat “missing” as a valid value and include it in the analysis rather than omit it.

|                                       | (1)                 | (2)                             |
|---------------------------------------|---------------------|---------------------------------|
|                                       | Filed Pro Se        | Filed Pro Se but Gained counsel |
| <b>Plaintiff's Sex</b>                |                     |                                 |
| Male                                  | 1.327<br>(1.70)     | 0.718<br>(-1.28)                |
| Female <sup>33</sup>                  | Reference Group     |                                 |
| <b>Plaintiff's Occupation</b>         |                     |                                 |
| Managerial or Professional            | 0.474***<br>(-3.50) | 2.059<br>(1.89)                 |
| Service, Sales, Office Administrative | 1.005<br>(0.03)     | 2.037*<br>(2.24)                |
| Blue Collar and Other <sup>34</sup>   | Reference Group     |                                 |
| <b>Other Plaintiff Features</b>       |                     |                                 |
| Age                                   | 1.012<br>(0.77)     | 0.997<br>(-0.11)                |
| Job Tenure                            | 0.969**<br>(-2.68)  | 1.040*<br>(2.20)                |
| Union Member                          | 1.905**<br>(2.58)   | 0.956<br>(-0.12)                |
| <b>Legal Claim</b>                    |                     |                                 |
| Title VII – Race                      | 1.833**<br>(2.87)   | 0.926<br>(-0.25)                |
| Title VII – Sex                       | 1.080<br>(0.40)     | 1.089<br>(0.26)                 |
| Title VII – Retaliation               | 0.933<br>(-0.38)    | 0.571<br>(-1.78)                |
| Title VII – Other                     | 0.865<br>(-0.40)    | 0.381<br>(-1.04)                |
| ADEA – Age                            | 0.992<br>(-0.03)    | 0.742<br>(-0.57)                |
| ADEA – Retaliation                    | 1.324<br>(0.82)     | 1.471<br>(0.56)                 |
| ADA – Disability                      | 1.434<br>(1.47)     | 0.664<br>(-0.91)                |
| ADA – Retaliation                     | 0.825<br>(-0.50)    | 0.919<br>(-0.11)                |
| 42 USC 1981                           | 0.425***<br>(-4.12) | 3.381***<br>(3.30)              |
| 42 USC 1983                           | 0.633<br>(-1.27)    | 1.145<br>(0.17)                 |
| Constitutional Claim                  | 0.853<br>(-0.32)    | 1.128<br>(0.12)                 |
| Other Statutory Claim                 | 0.325***<br>(-6.04) | 0.774<br>(-0.70)                |

*Table continues on next page.*

33. The female category includes the observations that were missing a sex specification.

34. This category includes natural resources, maintenance, construction, production, transportation, other, and missing.

|  | (1)                  | (2)                             |
|--|----------------------|---------------------------------|
|  | Filed Pro Se         | Filed Pro Se but Gained counsel |
| <b>Type of Discrimination</b>            |                      |                                 |
| Hiring                                   | 1.282<br>(0.93)      | 0.385<br>(-1.66)                |
| Firing                                   | 0.891<br>(-0.71)     | 0.872<br>(-0.50)                |
| Sexual Harassment                        | 0.457**<br>(-2.66)   | 0.655<br>(-0.81)                |
| Conditions of Employment                 | 1.057<br>(0.32)      | 1.957*<br>(2.29)                |
| Pay                                      | 0.851<br>(-0.66)     | 1.204<br>(0.48)                 |
| <b>Other Legal Features</b>              |                      |                                 |
| Discrimination by a Specific Perpetrator | 1.352<br>(1.86)      | 0.677<br>(-1.47)                |
| Disparate Impact                         | 0.734<br>(-0.81)     | 1.307<br>(0.40)                 |
| <b>EEOC</b>                              |                      |                                 |
| Negative Finding on the Merits           | 6.624***<br>(10.57)  | 0.661<br>(-1.54)                |
| No Finding Returned                      | Reference Group      |                                 |
| Positive Finding on the Merits           | 0.647<br>(-0.98)     | 1.024<br>(0.03)                 |
| Constant                                 | 0.0863***<br>(-3.47) | 0.388<br>(-0.79)                |
| <i>N</i>                                 | 1672                 | 376                             |
| pseudo <i>R</i> <sup>2</sup>             | 0.244                | 0.110                           |

Exponentiated coefficients; *t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

Table 2 presents logistic regression models for two categories of representation status: whether a plaintiff filed their case pro se and whether a plaintiff who filed pro se gained counsel later in the litigation process. The first model (Column 1) analyzes our full sample of 1,672 cases to show which plaintiff and case characteristics are linked to pro se status at filing. The second model (Column 2) only analyzes the 376 cases that were filed pro se, showing which characteristics are related to gaining a lawyer after filing. The first model is our main focus, given that conventional process theories assume plaintiffs will have a lawyer from the beginning to assist with case preparation and the filing itself. The second model tests whether plaintiffs who lack a lawyer at filing may fix the problem by getting one later, perhaps through court appointment or a legal system intervention. In both models, we look for systematic patterns that might show disadvantage to particular groups.<sup>35</sup>

35. See *infra* Parts II.B, III.G.

The results in Column 1 of Table 2 demonstrate the strong influence of race in the employment discrimination litigation system. Compared to white plaintiffs (the reference group), African Americans are 2.5 times as likely to file pro se. This gap is greater than the difference between our “Other” category (which includes Hispanic and Asian American minorities) and whites. Still disadvantaged, the “Other” group is 1.9 times more likely than whites to lack counsel at filing. Moreover, in addition to the race of the plaintiff, race claims filed under Title VII<sup>36</sup> are about 1.8 times more likely to be filed without the benefit of counsel. This effect controls for the race of plaintiffs—in other words, it is not explained by the fact that more minorities than whites file Title VII race claims. Instead, these filers of Title VII race claims are disadvantaged apart from the plaintiff’s race, perhaps suggesting other reasons that these cases do not find lawyers.

For occupation, plaintiffs in managerial jobs are less than half as likely to file pro se as the “blue collar” group (odds ratio = .47), and the effect is statistically significant. Plaintiffs with longer job tenure are also less likely to file pro se. On average, each year on the job reduces the odds of pro se filing by about ten percent (odds ratio = .9). Complicating the pattern in Table 1, the sex variable shows that men are more likely than women to file pro se, but the effect is not statistically significant, meaning that it might be explained by random variation. Finally, union members were almost twice as likely as non-union members to lack a lawyer (odds ratio = 1.9), and this difference is statistically significant. This unexpected pattern may suggest that union members believed they had other resources to draw upon, making formal representation (perhaps at cost) unnecessary. This could also reflect a concentration of union members in low-income jobs. While our controls for occupation partly address this, we do not have an income measure to fully test the possibility.<sup>37</sup>

Moving on to legal attributes, the statute under which a claim is filed is significantly related to the presence of a lawyer at filing. As noted already, Title VII race claims are more likely to be filed pro se, net of other factors, and at the EEOC level are the most frequent type of filing in this system.<sup>38</sup> The individuals filing race claims under Title VII may be more willing to file a claim on their own, or lawyers may

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36. 42 U.S.C. § 2000e-2 (2012).

37. See *infra* note 47 (discussing the lack of an income control).

38. Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 687, 690 (noting that because federal court statistics do not track the type of discrimination claimed, EEOC data is the best available).

dislike these cases. We consider these possibilities in more detail below. In contrast, claims filed under 42 U.S.C. § 1981<sup>39</sup> are less than half as likely to be filed pro se (odds ratio = .43), and all “other statutory” claims are only a third as likely (odds ratio = .33). This may suggest that only lawyers have the legal knowledge to select these statutes over something more common like Title VII. Or, it could mean that plaintiffs who have fact patterns that fit the elements for these statutes<sup>40</sup> are more likely to attract lawyers. Our model cannot differentiate between these causal mechanisms. Among types of alleged discrimination, sexual harassment claimants are less likely to file pro se, and this effect does not appear because these claimants are more likely to be women. Sexual harassment may thus be a type of grievance that attracts lawyers, or people who experience sexual harassment may be unwilling to self-represent.

Finally, there is a very strong association between filing pro se and an adverse finding by the EEOC.<sup>41</sup> Plaintiffs who have received adverse findings are 6.6 times more likely to file pro se compared to plaintiffs who receive no finding. Interestingly, a supportive EEOC finding does not significantly increase the chances of getting a lawyer relative to no finding. Again, this is an instance in which the direction of the effect is ambiguous. It may be that when the EEOC finds against a charging party, it discourages lawyers from taking that case. It may also be that complainants represented by counsel are more likely to shape the EEOC outcome to avoid such a negative finding.

Our second analysis (Column 2) tests whether some of these disparities are mitigated by pro se plaintiffs who add lawyers after initial filing, possibly through a court appointment.<sup>42</sup> With a few exceptions, we do not see this pattern in the model for the probability of gaining

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39. 42 U.S.C. § 1981 (2012).

40. In other words, clients who have lawyers may end up filing under 42 U.S.C. § 1981 because lawyers choose that strategy in preference to others. Alternatively, lawyers may decide to accept clients specifically because their case facts enable a Section 1981 claim. While both sequences would appear in our model as higher representation rates for people filing under Section 1981, only the latter implies that the statutory basis is the *cause* of representation.

41. Employment discrimination is a unique area of law because before filing a federal claim all plaintiffs must exhaust their remedies with the Equal Employment Opportunity Commission, the federal agency charged with enforcing Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and select other civil rights statutes. The EEOC investigates the grievance, issues a finding of supported, unsupported, or neither, and mails the complainant a letter authorizing federal suit. See MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 1078–80 (4th ed. 1997) (describing administrative procedures for enforcing antidiscrimination law).

42. See *infra* Part V.C.3 for a discussion of the court appointment process.

counsel after filing pro se. Employees in service, sales, and administrative positions are significantly more likely to gain counsel, as are employees with longer tenure. But while African Americans and “Other” minorities are slightly more likely than whites to add counsel, these effects are neither large nor significant. For legal features, Title VII race claims are not more likely to gain lawyers; the only significant legal predictors are claims under Section 1981, which attract lawyers at more than three times the rate of other statutes, and claims of discrimination in employment conditions, which are about twice as likely to gain lawyers. Thus, the lack of representation for African Americans, other minorities, and persons making Title VII race claims is not redressed after a pro se filing.

Table 2 demonstrates that both the social characteristics of plaintiffs and the nature of their legal claims are associated with whether they have a lawyer at filing and over the course of litigation. Most striking is the continuing significance of race—as a plaintiff characteristic and as a characteristic of the legal claim—to patterns of legal representation. These analyses compare all groups to whites, showing that whites are by far the most represented group. Between African Americans and other minorities, African Americans remain at a disadvantage; they are 2.5 times more likely to file pro se than whites, while other minorities are 1.9 times more likely. This disparity is larger than any other plaintiff characteristics we tested, including sex and occupation. This pattern holds even controlling for the effects of occupation, other plaintiff characteristics such as age and union membership, and for a variety of legal factors including the basis for the claim and the nature of alleged discrimination. But what explains this racial disparity?

### *B. Social Science Explanations for Racial Disparities in Lawyer Use*

Access to justice research typically differentiates “bottom-up” reasons for legal action (or inaction) from “top-down” determinants.<sup>43</sup> The former relate to potential litigants, including how they view the law and the costs and benefits of each step in the legal process as compared to other dispute resolution options.<sup>44</sup> In contrast, “top-down” factors reside in the legal system—for example, the cost and accessibility of lawyers, or the complexity of the claims process.<sup>45</sup>

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43. Sandefur, *supra* note 26, at 341–45.

44. *Id.*

45. *Id.*

While these approaches are not completely distinct—for example, systemic complexity is related to litigants' perception of it—they provide a rough framework to understand when and why people use legal processes. Before moving on to our interviews, we discuss both possibilities as they relate to race and disparate representation rates. We focus primarily on African Americans, the group with the highest pro se rates.

We noted in Part I that most research on which plaintiffs lack a lawyer has focused on socioeconomic status, finding generally that people with low income are less likely to have representation.<sup>46</sup> Because our data does not include measures of financial resources, such as salary or net worth, we could not control for these effects in our model; occupation, and managerial status, are our closest proxies.<sup>47</sup> It is possible that minority plaintiffs lack lawyers because, at the group level, minorities have lower wealth and incomes.<sup>48</sup> We will discuss this possibility in more detail below. However, we first review recent “bottom-up” access to justice research that cautions against treating income, or financial constraint, as the only determinant of representation. Instead, how plaintiffs view the legal system influences their decision-making, starting from when they identify a problem as legal, and extending through each step of the dispute escalation pyramid, from hiring a lawyer, to filing a claim, to settling or seeking trial. In other words, researchers cannot assume that a given level of representation is optimal, or that all people take legal action (or use or forgo lawyers) for the same purposes and reasons.<sup>49</sup>

These insights about the role of consciousness in legal behavior could suggest reasons that minority plaintiffs obtain lawyers at lower rates than white plaintiffs. Research in other areas has shown that African Americans may be less trusting of psychological counselors than

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46. *See supra* Part I.

47. We did control for occupation. Controlling for other factors, managers and professionals were more likely to be represented than “blue-collar” employees. But, the rough job categories that we coded may not fully correspond to income. For example, within “blue-collar,” the “maintenance” category may include highly paid plumbers and trade workers, and “managers” may include low-level, hourly wage retail or food service managers. Thus, we cannot rule out an income effect that appears as a race effect.

48. *See infra* Part III.G.

49. *See* Charles Epp, *Connecting Litigation Levels and Legal Mobilization—Explaining Interstate Variation in Employment Civil-Rights Litigation*, 24 *LAW & SOC'Y REV.* 145, 149–50 (1990) (noting that litigation decisions “take place within a broader social and legal context” and that “[p]eople and organizations may have a variety of reasons for mobilizing the law, from securing favorable economic outcomes to developing favorable precedents for future litigation.”).

whites, less willing to discuss issues that they feel are sensitive, and more likely to terminate counseling.<sup>50</sup> In the legal field, at least one study has found African American defendants to be among the groups least satisfied with their public defenders.<sup>51</sup> More broadly, African Americans have been shown to view some legal issues differently from whites, with a greater tendency to perceive discrimination,<sup>52</sup> coupled with more reluctance to raise a grievance and thereby appear as a “victim.”<sup>53</sup> Practitioners have noted that trust is essential to the lawyer-client relationship, and lawyers may misjudge the veracity of cli-

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50. See, e.g., Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 363–64 (1997); Jay Pomales et al., *Effects of Black Students’ Racial Identity on Perceptions of White Counselors Varying in Cultural Sensitivity*, 33 J. COUNS. PSYCHOL. 57 (1986) (demonstrating that African American students showed negative responses to white counselors who were not culturally sensitive); Silver, *supra* note 26, at 235–37 (reviewing studies in which African American patients terminated counseling after a single visit at higher rates than whites).

51. Robert J. Alberts et al., *Do Race/Ethnicity and Gender Influence Criminal Defendants’ Satisfaction with Their Lawyers’ Services? An Empirical Study of Nevada Inmates*, 2 NEV. L.J. 72, 73–74 (2002) (showing racial and ethnic differences in criminal defendants’ satisfaction with their lawyers, noting that those “who are female and Hispanic are relatively more satisfied with their legal representation . . . [And] defendants who are male, and African American, Caucasian, or Native American, are the least satisfied.”); see also Kenneth P. Troccoli, *“I Want a Black Lawyer to Represent Me”: Addressing a Black Defendant’s Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 21–22 (2002).

52. See Elizabeth Hirsh & Christopher J. Lyons, *Perceiving Discrimination on the Job: Legal Consciousness, Workplace Context, and the Construction of Race Discrimination*, 44 LAW & SOC’Y REV. 269, 284–85 (2010); see also Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 668 (2005) (“Research on the prevalence of discrimination in the workplace shows a striking disjuncture between the perceptions of white women and people of color, and their white male colleagues and supervisors.”) (citing K.A. DIXON ET AL., JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 7–10 (2002)).

53. KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 109 (1988) (“Injured persons reluctantly employ the label of discrimination because they shun the role of the victim.”); Joe R. Feagin et al., *The Many Costs of Discrimination: The Case of Middle-Class African Americans*, 34 IND. L. REV. 1313, 1335–36 (2001) (using focus groups with African American professionals to show reluctance to complain about perceived discrimination). For an anecdotal example, see Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1370 (1992) (recounting a lawyer’s experience in a case in which the defendant felt he had been a victim of racial profiling, and “[y]et at no point during the entire 50 minute initial interview, nor later during our representation, did [the defendant] tell us that he thought the trooper stopped him because he was black or otherwise claim that their actions were motivated by racism.”).

ents' accounts because of the latter's reticence.<sup>54</sup> These findings frame questions about how African American employment discrimination plaintiffs view attorneys, how they express their grievances when contacting lawyers, and whether or not they secure representation.<sup>55</sup> Racial differences in legal consciousness could translate into lower representation rates for African Americans.

Other access to justice work on pro se litigants, while not explicitly focused on race, provides possible grounds for a racial link. Studies have demonstrated that plaintiffs with certain views of the law and legal goals are more likely to file pro se.<sup>56</sup> For example, those who believe that their legal issues are straightforward forgo lawyers at higher rates.<sup>57</sup> One study found that people chose to self-represent on appeal because they wanted to focus on aspects of their cases that their trial lawyers saw as legally irrelevant; self-representation thus allowed clients to turn litigation to their own goals, even while limiting legal efficacy.<sup>58</sup> Groups with a cultural preference to defer to authority figures may be more likely to use lawyers.<sup>59</sup> Although no systematic research has shown that demographic groups differ in legal understandings and goals of this nature, existing work on racial differences

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54. See Jacobs, *supra* note 50, at 355–61; Silver, *supra* note 26, at 220–29. Domestic violence and immigration practitioners provide many examples of cultural barriers to communication and sometimes mutual distrust between clients and lawyers. See Jessica H. Stein, *Coalition, Cross-Cultural Lawyering, and Intersectionality: Immigrant Identity as a Barrier to Effective Legal Counseling for Domestic Violence Victims*, 11 CONN. PUB. INT. L.J. 133, 134–36 (2011).

55. The social-psychological literature provides possible mechanisms; people who feel they are under scrutiny, or disfavored from the outset, may make errors of presentation or otherwise “confirm” the negative opinions that they sense. See, e.g., Laura Kray et al., *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY AND SOC. PSYCHOL. 942 (2001) (finding that women performed worse in negotiations when they believed that the test measured negotiation ability or required gender-specific traits); Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY AND SOC. PSYCHOL. 797 (1995) (finding that African American students performed worse on tests when they believed them to be diagnostic of verbal abilities that African Americans were stereotyped as lacking).

56. See, e.g., Stempel, *supra* note 24, at 142–43 (testing a variety of predictors of lawyer use, among them “legal awareness” and “attitude toward lawyers,” with mixed results).

57. Sales, *supra* note 18, at 598.

58. See, e.g., Scott Barclay, *The Decision to Self-Represent*, 77 SOC. SCI. Q. 912 (1996).

59. See Kritzer, *supra* note 26, at 533–36 (finding that Canadians use lawyers more than Americans, and speculating that “Canadian culture, with its greater deference to authority, leads people to want to use an intermediary if they are going to confront an institution.”).

in the perception of the law and workplace fairness, as cited above,<sup>60</sup> suggests the possibility.<sup>61</sup>

Another set of explanations looks to “top-down” features of the legal system and whether African Americans can access lawyers when they so desire. A voluminous body of social science research shows that African Americans have smaller professional networks that might connect them to jobs or other benefits.<sup>62</sup> This holds true both at the workplace, where minorities are often tracked into low-level jobs with limited mobility potential, and in communities where residential segregation restricts opportunity.<sup>63</sup> Studies have shown that litigants may find attorneys through their elite networks.<sup>64</sup> Given the complex structure of the Bar, personal connections can be crucial in the referral process. African Americans as a group tend to have more limited professional networks,<sup>65</sup> so they may face barriers to identifying and reaching employment discrimination lawyers, and choose to file pro se instead.

Finally, “top-down” theories suggest that the racial disparity might reflect how lawyers screen and select clients. This explanation locates the disparity in the legal system, where fee structures, lawyer preferences, or other systemic features might work against African

60. For additional differences in how African Americans and whites view discrimination, see generally Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 550–51 (2003) (reviewing racial differences in surveys about discrimination prevalence and workplace fairness).

61. Sandefur, *supra* note 26, at 346 (“Little research has explored whether some groups are more likely than others to accept expression as a substitute for enforcement—for example, are men more likely to do so than women, or professionals more so than working-class persons—and under what conditions.”).

62. See, e.g., PETER EDELMAN ET AL., RECONNECTING DISADVANTAGED YOUNG MEN 19–23 (2005) (identifying limited networks as a barrier to minority mobility); DEIRDRE A. ROYSTER, RACE AND THE INVISIBLE HAND 102 (2003) (same); see also Vincent Roscigno, Lisa Williams & Reginald Byron, *Workplace Racial Discrimination and Middle Class Vulnerability*, 56 AM. BEHAV. SCIENTIST 696, 697 (2012) (“The minority vulnerability thesis, in particular, suggests that segregation, job networks, and ostensibly race neutral employer decision making continue to put minority workers in situations of vulnerability when it comes to hiring, mobility, and firing.”).

63. Chris Tilly et al., *Space as a Signal: How Employers Perceive Neighborhoods in Four Metropolitan Labor Markets*, in URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES (Alice O’Connor, Chris Tilly & Lawrence D. Bobo eds., 2001); see also John Beggs et al., *Black Population Concentration and Black-White Inequality: Expanding the Consideration of Place and Space Effects*, 76 SOC. FORCES 65 (1997).

64. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 167–206 (1982); see also Stempel, *supra* note 24, at 145 (showing that people with lawyer contacts used lawyers more frequently).

65. EDELMAN, *supra* note 62, at 11 (demonstrating how poverty, residential segregation, unemployment, and incarceration “disconnect” some African American youth from resource networks, especially those that lead to jobs).

Americans.<sup>66</sup> These barriers might exclude even those African American plaintiffs who want a lawyer and are able to gain a consultation. Much of the work in this area has focused on the effects of contingency fee tort practice, sometimes concluding that it prompts lawyers to reject clients with labor-intensive cases or low prospects of recovery.<sup>67</sup> No studies have looked specifically at employment discrimination lawyers and their selection criteria.

In sum, both “bottom-up” and “top-down” factors could explain the racial disparity in representation rates that our statistical results revealed. Our unique research design allows us to move beyond the formal models into the realm of first-person explanation. In Part III and Part IV we explore these options from the perspectives of African American pro se plaintiffs, and of employment discrimination lawyers, respectively, thereby evaluating both “bottom-up” and “top-down” explanations.

### III.

#### THE PRO SE PLAINTIFFS

We interviewed a total of 100 individuals who were parties or lawyers in a systematically selected subsample of cases, which was drawn from the larger set of 2,100 federal employment civil rights case filings in our statistical dataset. These included 41 plaintiffs, of whom 8 filed pro se. Six of the 8 were African American: 5 men and 1 woman.<sup>68</sup> The qualitative data thus broadly mirror the large dataset used in the model above: about 20% of respondents were pro se, and

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66. Sandefur, *supra* note 26, at 343–45.

67. See *infra* Part IV; see also, e.g., Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice*, 80 TEX. L. REV. 1781, 1817 (2002) (showing empirically that lawyers responded to tort reform by accepting far fewer cases on contingency and changing their selection criteria to exclude plaintiffs with more difficult cases, including those with a prior history of filing lawsuits, those who moved frequently, and those with criminal records); Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 655 (2005) (showing how tort reform changed lawyers' consideration of damages in the client screening process, prompting many to reject those with limited recovery prospects, including low wage earners, clients with limited physical injuries, and other “meritorious but less profitable cases”); Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1267 (2004) (finding that women, the elderly, and children receive a greater share of malpractice awards as non-economic damages than men, and would disproportionately suffer from reforms to limit these awards in favor of economic damages).

68. Of the other two plaintiffs, one was a white man and one was a white woman.

of these 75% were black and 25% were white.<sup>69</sup> The pro se African American plaintiffs that were interviewed spoke at length about their reasons for not having a lawyer. This Part presents and analyzes their views. Given the relatively small number of interviewees, we cannot claim that these examples are representative of all pro se African Americans.<sup>70</sup> Indeed, the six had a variety of reasons for lacking a lawyer. The interviews do, however, illustrate how some of the factors described above in Part II operate for African American plaintiffs in ways that statistical results cannot. These interviews also provide a “bottom-up” picture of this group that is missing from access to justice research. Because the racial breakdown of the randomly selected interviews matches the breakdown of the larger dataset, no evidence suggests that these narratives are unrepresentative of the larger group.

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69. To select interviewees, we drew systematically from each cell of a sixteen cell table that included all combinations of four claim types (race, sex, age, and disability) and four case resolutions (dismissal, early settlement, late settlement, and trial). By chance, we drew only African American and white plaintiffs. Our qualitative data thus does not include interviews with other minority plaintiffs.

70. While the subsample of in-depth interviews is relatively modest in size, it merits serious consideration for several reasons. First, it is a systematic, random subsample of a larger random sample. The response rate to interview requests was high (57%). Thus, while small, the sample is truly random within our sixteen-cell table of important case types. Second, most qualitative research that relies on in-depth interviewing employs a similar size or smaller sample. This reflects an inherent trade-off between depth and breadth in social research. In-depth interviews are uniquely able to identify social mechanisms and processes. See generally JOHN LOFLAND & LYN H. LOFLAND, *ANALYZING SOCIAL SETTINGS: A GUIDE TO QUALITATIVE RESEARCH AND ANALYSIS* (1995). Although narratives and interviews do not always allow researchers to generalize beyond their sample, they do show how individuals relate to social structure and social situations. Methodologically, they illustrate mechanisms that link large-scale statistical patterns to individuals who experience them. See DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998); BENJAMIN FLEURY-STEINER, *JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY* (2004); Michael McCann, *On Legal Rights Consciousness: A Challenging Analytical Tradition*, in *THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* (Ben Fleury-Steiner & Laura Beth Nielsen eds., 2006); Ellen Berrey & Laura Beth Nielsen, *Rights of Inclusion: Integrating Identity at the Bottom of the Dispute Pyramid*, 32 *LAW & SOC. INQUIRY* 233 (2007).

TABLE 3: RACE, GENDER, AND REPRESENTATION STATUS OF INTERVIEWED PLAINTIFFS

|                               | <b>Pro Se Entirely</b> | <b>Represented for at least part of case</b> | <b>Total</b> |
|-------------------------------|------------------------|--|--------------|
| <b>African American men</b>   | 5 (50%)                | 5 (50%)                                      | 10 (100%)    |
| <b>African American women</b> | 1 (14%)                | 6 (86%)                                      | 7 (100%)     |
| <b>White men</b>              | 1 (8%)                 | 12 (92%)                                     | 13 (100%)    |
| <b>White women</b>            | 1 (8%)                 | 10 (91%)                                     | 11 (100%)    |
| <b>Total</b>                  | N = 8                  | N = 33                                       | N = 41       |

A. *Billy Dee Did Not See His Case as a Legal Issue*<sup>71</sup>

Billy Dee, a forty-nine-year-old<sup>72</sup> African American man working in an auto manufacturing plant, was fired in 1988 after he entered a mental hospital for drug treatment. Shortly afterwards he went to the EEOC (the required pre-step to filing federal suit),<sup>73</sup> which returned a negative discrimination finding six years later in 1994. Mr. Dee then filed a Title VII claim in federal court on race, disability, and religious grounds. He requested permission to file without fees, and also requested a court-appointed lawyer. The judge dismissed his claim because the fee waiver was incomplete, but allowed him to re-file. Mr. Dee re-filed, but did not serve notice on his former employer and missed the first hearing. His case was then dismissed for want of prosecution.<sup>74</sup>

Mr. Dee had a high school education and attended trade school to learn manufacturing skills. Although he did not provide income details, he felt his salary and bonuses while working were generous, and he contributed to a 401k that he cashed out for \$4,700 when he was fired. He described his parents as a housewife and a maintenance electrician who served as the bedrock of his large family, giving him housing and helping him find mental health care, and assisting other relatives financially. His brother worked at the corporate headquarters

71. Interview with Billy Dee (Oct. 2005) [hereinafter Dee Interview].

72. All ages are at time of case filing.

73. See ZIMMER ET AL., *supra* note 41; see also *infra* Part V.

74. See FED. R. CIV. P. 41(b). This is a form of involuntary dismissal in which the court finds a plaintiff has not moved her case forward in accord with court expectations; particulars can vary and include requests for delays, failure to file documents, etc. See *Sandee Mfg. Co. v. Rohm & Haas Co.*, 298 F.2d 41, 43 (7th Cir. 1962) (“No exact rule can be laid down as to when a court is justified in dismissing a case for failure to prosecute. Each case must be looked at with regard to its own peculiar procedural history and the situation at the time of dismissal.”).

of his former employer, helped Mr. Dee get his job, and had ties to personnel managers. Mr. Dee recalled that he had dealt with lawyers in the past, retaining private defense attorneys (through his parents) for marijuana and assault arrests and to sue for recovery in an auto accident.

In his recollection, Mr. Dee had not planned to sue at the time of his firing, but only wanted to fight for unemployment benefits, which required a visit to the EEOC. He was nonplussed when EEOC staffers told him his rights had been violated and that he should sue for discrimination. This was not entirely appealing because, as he reported, "I was a humble person. The most humble state that I ever been in my whole life. I didn't feel like suing nobody. I didn't feel like court litigations, dealing with [the employer]. I had a nervous breakdown more or less than anything."<sup>75</sup> In his memory, EEOC staffers suggested that he had experienced racial discrimination as well as disability discrimination. He adamantly denied this, stating that the people responsible for his firing were black. But he came to agree with their suggestion that his "human right" to seek mental health care had been violated.

At this point, Mr. Dee asked the EEOC if he needed a lawyer. He remembered they responded: "not of a case of this magnitude, this type of a case. This is a human rights case. The State or Federal Government represents you."<sup>76</sup> They suggested that such cases could go to the Supreme Court, but it might take years. Mr. Dee accepted this and called to check on his case every few months, but eventually forgot about it. After several years of no contact with the EEOC, Mr. Dee filed his case in federal court and asked for an appointed lawyer along with a waiver of filing fees. However, Mr. Dee did not remember filing the case at the time of his interview, nor did he recall wanting or seeking a lawyer at any time in the process. When asked about his decisions he recalled that he "was going through, I was in a humble, no, I more or less got pushed into the lawsuit, you understand what I'm saying?"<sup>77</sup> Although his Title VII claim included racial discrimination, he repeatedly denied that racial discrimination was at play, and found the suggestion bizarre because in his view, his antagonists were black.

Mr. Dee did not seek a lawyer primarily because he did not see his case as a legal issue, but rather as a simple matter involving benefits that he wanted to resolve without fanfare. His visit to the EEOC sparked a legal process. He neither closely monitored it nor under-

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75. Dee Interview, *supra* note 71, at 16.

76. *Id.* at 21.

77. *Id.* at 37.

stood the details. Although cost might have been an issue if he sought an attorney, he did not recall obtaining quotes from lawyers to confirm that they were unaffordable, apparently because he left the matter up to the EEOC. He recalled that his mental illness shaped his actions at the time. Although he had a supportive family who helped him obtain other services, and sought lawyers for other reasons, this episode did not lead him to pursue representation. In sum, Mr. Dee's understanding of the legal system and his own legal issue—and his belief that a lawyer was not crucial—explain his pro se status.

*B. Chris Burns Could Not Afford a Lawyer, Misunderstood His Legal Issues, and Did Not Trust Lawyers' Assessments*<sup>78</sup>

Chris Burns was a sixty-year-old shipbuilder thirty years into his career working as a civilian for the Navy when he filed his complaint. He permanently injured his back at work in the late 1980s and in 1990 stopped working because of a reduction in force, receiving workman's compensation for his back injury until the Department of Labor terminated payments in 1993. Mr. Burns then unsuccessfully attempted legal action to restore his disability payments. Several years later, in 1999, he sued the Navy for disability, age, and racial discrimination under Title VII. His case was dismissed for failure to exhaust administrative claims and want of prosecution.

Mr. Burns had a high school education. He was married with an employed wife. He had an adult daughter and was a member of a church with a pastor in whom he confided. He had access to doctors, some of whom he considered to be supporters. He did not provide details on his income.

Chris Burns took pains to find a lawyer. In his recollection, he tried to obtain a lawyer in 1993, when his disability payments were terminated. His doctor at the time referred him to some attorneys, but the one he called wanted \$2,700 up front, and in his words, “[t]he fee was so, you know, tremendous that we could not afford it.”<sup>79</sup> He looked for a lawyer who would take the case on contingency but could not find one. For several years he wrote letters to various agencies and government officials, including the President of the United States, none of whom offered help. Later, in 1999, Mr. Burns' uncle, who worked for the EEOC, told him to try the alternative strategy of suing his employer for eliminating his position nine years earlier, although at that time he had not objected because his disability payments

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78. Interview with Chris Burns (Nov. 2005) [hereinafter Burns Interview].

79. *Id.* at 5.

seemed secure. Mr. Burns recalled exhaustively contacting law school clinics and other public interest aid agencies in 1999, but all turned him down. Finally, he filed pro se with his uncle's assistance. Mr. Burns summarized that "I couldn't [talk to a lawyer]! I been searching for a lawyer to fight the Navy, the government, for twelve years and there's no point."<sup>80</sup>

Mr. Burns' failure to obtain a lawyer seems related to the prospects of his nine-year-old claim, which was past its statute of limitations. In addition, although he filed for racial discrimination, he was uncertain whether this was the real problem. For Mr. Burns, the denied disability claim was the foremost concern. Although cost may have been a barrier, as it had been in 1993 when Mr. Burns first sought representation for his claim when it was still fresh, the problematic timing likely made Mr. Burns' extensive outreach to clinics and agencies futile. However, Mr. Burns' view of the legal system led him to believe that lawyers were rejecting him out of unwillingness to challenge the government, something he felt eager and willing to do.

*C. Franklin Williams Wanted to Control His Own Strategy, and Had Confidence in His Ability to Self-Represent*<sup>81</sup>

Frank Williams, a thirty-eight-year-old railway laborer, was fired on disciplinary grounds that he felt were a pretext for racial and disability discrimination. He filed in federal court under Title VII in 1992. With the help of his wife, a paralegal, he progressed to trial where a jury found against him. Mr. Williams was the only pro se plaintiff in the sample to survive summary judgment, and, remarkably, make it to jury trial.

Mr. Williams completed high school and some college. He described his parents as a housewife and a machine operator. Before he was fired he made about twelve or thirteen dollars an hour. He and his wife owned their home. His wife was a college-educated paralegal at the time of his case, and later became a state legal investigator.

When asked about his pro se status, Mr. Williams recalled that he did not seek representation because "we didn't have the money to get an attorney."<sup>82</sup> The judge refused his request to appoint counsel later in the case,<sup>83</sup> saying that Mr. Williams and his wife were "doing a good job [on their own]."<sup>84</sup> Mr. Williams said in retrospect he would

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80. *Id.*

81. Interview with Franklin Williams (Nov. 2005) [hereinafter Williams Interview].

82. *Id.* at 36.

83. See *infra* Part V.C.3 for a discussion of the court appointment process.

84. Williams Interview, *supra* note 81, at 18.

have taken an equity mortgage on his house in order to hire a lawyer because he felt the court was insurmountably biased in favor of attorneys. Still, Mr. Williams recalled being somewhat flattered by the judge's comment, and thus accepted the denial of appointed counsel without argument; he later felt he had been "manipulated" into agreement by the judge's flattery.

Mr. Williams did not discuss whether he had tried and failed to find a lawyer who would take his case on contingency (at lower initial cost), nor whether he actually consulted lawyers about their fees before assuming them to be unaffordable. He also did not talk about whether he received referrals to lawyers from people in his network. However, he did note that he and his wife visited law libraries to do their research, and that his wife mentioned discussing complex legal issues with other employees and friends, some of whom sought her professional expertise, and some of whom had retained attorneys for their own discrimination cases against the railroad. It thus appears that Mr. Williams had some level of preliminary access to lawyers, but cost was an issue. His confidence in his wife's expertise, and his own desire to control the litigation, influenced his decision to move forward without a lawyer.

*D. For Philip Jacobson, Cost Was Prohibitive, and He Could Not Invest in an Extensive Search*<sup>85</sup>

Philip Jacobson was a thirty-four-year-old production administrator in a government printing plant. After several failures to gain a promotion, and friction with managers, he went to human resources, internal EEO officers, his union, the Fair Labor Relations Board, then finally to the EEOC. He filed a Title VII race claim in federal court in 1991 after receiving a negative finding from the EEOC. His case was dismissed for want of prosecution.

Mr. Jacobson described his parents' occupations as church pianist and longshoreman. He completed high school and some college, getting an associates degree in paralegal studies. At the time of his case, he was making about \$30,000 a year. He was married to a woman who suffered disabilities from multiple sclerosis. He had five children. Before his case he had previously met with a lawyer to deal with his mother's probate, and later saw lawyers for probate matters, workman's compensation, and his home loan.

Mr. Jacobson initially tried to find a lawyer. He recalled that he used the phonebook to locate a person he thought was the only lawyer

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85. Jacobson Interview, *supra* note 3.

in the area handling federal cases of his type. He made an appointment, but that attorney “wanted \$500.00 and I didn’t have any money. I had five children and a disabled wife.”<sup>86</sup> The lawyer suggested that there was little to do unless Mr. Jacobson got fired, at which point he could claim lost wages. In addition, Mr. Jacobson was paying another attorney to deal with a separate matter involving his home loan. These circumstances deterred Mr. Jacobson from retaining counsel. When asked if he had looked for pro bono options, he said “I didn’t. I was looking. I tried. I thought maybe the union but there’s was just so many things going on my life. I had to work.”<sup>87</sup> Financially strapped and without time to investigate more attorneys, Mr. Jacobson decided to file pro se. His case was terminated when he missed a hearing, and at the time of his interview he was not aware of the outcome, instead recalling that: “I never heard anything from them. I don’t think I ever heard anything from the federal court either. It was like I just filed and that was it. No, they didn’t even acknowledge it. It was like, okay fine.”<sup>88</sup>

The main barriers separating Mr. Jacobson from a lawyer were cost, and lack of time and emotional resources to search extensively for representation. He used his work contacts—among them the union and staff from the “Fair Labor Relations Board”—to file grievances and contest individual incidents over several years. Afterward, Mr. Jacobson was exhausted and tired of bureaucratic processes. But he was convinced that he was experiencing continuing discriminatory treatment. Balancing his desire for redress with his work and family obligations, he turned to the yellow pages, but the lawyer he found there quoted an unaffordable fee and low expectations. Mr. Jacobson declined to hire him. Instead he filed without representation. His decision reflects a belief that the benefits of a lawyer would not justify the cost of obtaining one, with his understanding of the law and the importance of counsel underscoring that belief. It is also clear that while Mr. Jacobson had avenues for redress within his work place, they did not place lawyers within his personal network, prompting him to use the yellow pages for reference.

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86. *Id.* at 10.

87. *Id.*

88. *Id.* at 11.

*E. Travis Winters Misunderstood His Legal Issue*<sup>89</sup>

Travis Winters, a fifty-one-year-old African American custodian at an elementary school, filed a race discrimination claim under Title VII in 1988 after being fired for allegedly making harassing comments to an African American teacher. Although he recalled in his interview that he had a lawyer who negotiated a settlement of \$30,000, his court docket states that he appeared pro se and his case was dismissed for want of prosecution.<sup>90</sup>

Mr. Winters had a high school education and took some college courses. He was a veteran with twenty years of active duty. He was married to a teacher who taught in the school district where he worked, and he and his wife had two children. His parents were farmers. He did not recall his income at the time he was fired.

Mr. Winters' story defies classification because, contrary to court records, he recalled being represented by a lawyer who was also an old personal friend and occasional breakfast companion. He said he relied on this lawyer for all negotiations, and was pleased with his services, though he was later disbarred and became a paralegal.

The discrepancy between Mr. Winters' recollection and the court file make it impossible to know why he did not retain a lawyer. Some insight comes from a letter in Mr. Winters' file from the EEOC informing him that he had waived his right to sue, possibly by accepting a prior settlement of \$23,000. Thus, a competent lawyer would have declined to take the case if approached. Although there is no way to determine how, or if, Mr. Winters sought representation, the merits of his case seem to explain his pro se status, even if he searched widely and was able to afford fees. The fact that he filed the case seems to reflect his misunderstanding of the law and/or the legal system.

*F. Marjorie Turner Was Possibly Preempted  
by a Simultaneous Case*<sup>91</sup>

Marjorie Turner, a forty-six-year-old African American woman working as a secretary for a public school district, experienced several years of conflict with supervisors over matters that included sexual harassment, religion, and race. She complained to the Illinois Human Rights Commission on two occasions and proceeded separately with

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89. Telephone Interview with Travis Winters (June 2006) [hereinafter Winters Interview].

90. See *supra* note 74.

91. Telephone Interview with Marjorie Turner (May 2006) [hereinafter Turner Interview].

different matters in federal and later state court.<sup>92</sup> Her federal Title VII discrimination suit, filed in 1998, included sex, race, and religion claims. She voluntarily dismissed her case.

Ms. Turner had a bachelor's degree. Her mother was a domestic worker, and her father was a barber. She was married with two children. She recalled her salary was about \$20,000 to \$22,000. She belonged to a union and had used its grievance process for an unrelated matter. She had substantial knowledge about advocacy organizations and sometimes suggested that other employees contact them. In general, Ms. Turner described a longstanding commitment to workplace rights.

Why didn't Ms. Turner have a lawyer? Like Travis Winters, Ms. Turner recalled her case in a way that diverged from official documentation, making the reasons hard to determine. Ms. Turner remembered filing her first claim with the Illinois Commission of Human Rights after speaking with a lawyer who told her how to proceed, and that the claim was dismissed. She then recalled filing her claim in federal court prior to consulting with several more lawyers. When all the lawyers told her she had a weak case and refused to take it, she voluntarily withdrew the claim. In her words, "I went down and talked with [lawyers], and they told me that . . . lawyers can be fined or something for bringing in frivolous suits. And so I couldn't really find anyone that wanted to take the case."<sup>93</sup> This recollection contradicts information in her case file, which shows a rare positive finding from the Commission of Human Rights on parts of her claim dealing with retaliation and unequal treatment, which is a strong indication that they were not frivolous.<sup>94</sup> Her case file also indicates that the Commission of Human Rights ended up representing her in a simultaneous case in state administrative court, which may have prompted her to withdraw her federal claim, but Ms. Turner did not recall this.

In spite of her own account, Ms. Turner's pro se status does not seem directly related to the merits of her case. Nor does it reflect a lack of searching: she consulted with many lawyers at various stages of the process, and was very knowledgeable about a range of advocacy and rights organizations dealing with various types of discrimination. Surprisingly, Ms. Turner did not mention cost as a reason; she ended up retaining a lawyer for a later, similar claim that started at the

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92. This agency enforces the Illinois Human Rights Act, 775 ILL. COMP. STAT. 5 (2012). For more on the relationship between state and federal claims, see *infra* Part V.

93. Turner Interview, *supra* note 91, at 5.

94. The EEOC, however, found against her.

Commission of Human Rights, and went on to state court, where her lawyer did a “strange thing” by moving for withdrawal without consulting her and, she recalled, working against her interests. Ultimately, our data cannot explain Ms. Turner’s pro se status in federal court, but pre-emption by a state court case remains possible, as does the possibility that Ms. Turner’s lawyer withdrew from her case for reasons such as Ms. Turner’s litigation goals, or low damage prospects.

*G. The Problem of Finding a Lawyer:  
The Plaintiffs’ View, Synthesized*

These interview summaries demonstrate many reasons plaintiffs fail to obtain lawyers from the “bottom-up.” Some of these reasons are likely to have a greater impact on African American litigants. Prominently, lack of information about the legal process creates a barrier to representation. Billy Dee, for example, did not see his claim as a legal issue, and then mistakenly believed that the EEOC would represent him. Because plaintiffs must first file with the EEOC, which typically produces a right to sue letter but no discrimination finding, uninformed plaintiffs may decide to simply file their federal claims as the next step in the process. Absent information and knowledge, they may not understand the importance of finding a lawyer for their claim to survive in federal court. Other pro se African American plaintiffs, like Chris Burns, Travis Winters, and Marjorie Turner clearly lacked information about aspects of the legal process.

While existing research shows that the question of whether plaintiffs perceive legal complexity predicts whether they obtain a lawyer,<sup>95</sup> there are no recent surveys of how legal knowledge differs across demographic groups. However, social science research shows definitively that African Americans receive less education than whites at every level from high school graduation to graduate degrees.<sup>96</sup> In addition, African Americans tend to be segregated in low-status jobs,

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95. See *supra* Part II.B.

96. See James Heckman & Paul LaFontaine, *The American High School Graduation Rate: Trends and Levels*, 92 REV. ECON. & STAT. 244, 245 (2010) (reviewing methods for assessing graduation rates, and concluding that excluding GEDs, the African American and Hispanic graduation rate is about 65%, much lower than the non-Hispanic white rate). For comprehensive federal statistics on higher education, see *Postsecondary Education: Completions*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/programs/coe/tables/table-dcd-2.asp> (last visited Sept. 22, 2012). In 2009 and 2010, 72.9% of Bachelor’s degrees were awarded to whites, while 10.3% were awarded to blacks. *Id.* We note that the share awarded to blacks has increased over the past decades since the time that many of our subjects filed their claims.

without access to training or advancement opportunities,<sup>97</sup> and do not receive equivalent positive socialization or opportunities to build “human capital” even in better jobs.<sup>98</sup> If, on average, African American plaintiffs have lower levels of knowledge and information about the law because of these systemic disparities in education and personal development opportunities, they may be more likely to file cases on their own. Our interviews do not allow us to generalize at this level, but do support the mechanism.

Trust in lawyers and their motives also emerged as an issue in the interviews. Chris Burns, for example, felt that lawyers were rejecting his case because they did not want to take on the government, not because his claim lacked merit. Marjorie Turner had mixed feelings about lawyers, although she reported believing them when they said her case was frivolous, and said she withdrew it as a result. At the same time, she believed that lawyers were likely to work against her interests. Philip Jacobson was not convinced when a lawyer told him that filing while he was still employed would accomplish little, so he proceeded on his own. As we noted above, studies have shown racial differences in trust of counseling professionals and criminal defense lawyers.<sup>99</sup> At the group level, if African American plaintiffs are less trusting of civil lawyers and their advice, they may be more likely to forgo representation. While we do not make this claim definitively from our limited data, it is in line with substantial research on how race shapes the way people view legal actors and institutions as supportive or opposed to their interests.<sup>100</sup>

Searching for a lawyer is a complicated and time consuming process. Plaintiffs who have jobs and family obligations, like Philip Jacobson, may lack the material and emotional resources to invest in calling multiple lawyers and organizations while fulfilling their other obligations. This is especially true for plaintiffs who do not have law-

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97. See Matt Huffman & Philip Cohen, *Racial Wage Inequality: Job Segregation and Devaluation Across U.S. Labor Markets*, 109 AM. J. SOC. 902 (2004) (documenting persistent African American job segregation in low status positions and linking it to the black-white wage gap).

98. Sharon Collins, *Black Mobility in White Corporations: Up the Corporate Ladder but Out on a Limb*, 44 SOC. PROBS. 55 (1997) (finding that black managers are not given opportunities to build human capital); Roscigno et al., *supra* note 62, at 697; Donald Tomaskovic-Devey et al., *Race and the Accumulation of Human Capital Across the Career: A Theoretical Model and Fixed-Effects Application*, 111 AM. J. SOC. 58 (2005) (showing same at multiple career stages).

99. See *supra* notes 50–53.

100. Criminal justice research provides additional support. See John Hagan, Carla Shedd & Monique Payne, *Race, Ethnicity, and Youth Perceptions of Criminal Injustice*, 70 AM. SOC. REV. 381 (2005).

yers, or ties to them, in their personal networks, and thus must turn to directories or legal aid providers. Because African Americans generally have smaller professional networks, they may be less likely to find a lawyer.<sup>101</sup> Additionally, racial differences in care obligations and household organization, all well documented in the social science literature, may impede the search at the group level in the way that Philip Jacobson described.<sup>102</sup> Even transportation is less accessible to urban minority populations because of suburbanization and its effects on public transit policy.<sup>103</sup> Given the resource-intensive nature of the search, which we demonstrate in more detail below when interviewing represented plaintiffs, racial disparities in access to social and material resources could contribute to the disparity.

Several plaintiffs mentioned the cost of a lawyer as a problem, although not always in a straightforward way. Franklin Williams recalled that at the time of his case, he preferred to self-represent rather than pay an attorney. Mortgaging his house had been an option that he dismissed based on confidence in his and his wife's abilities. Chris Burns and Philip Jacobson felt they could not afford lawyers' fees of \$2,700 and \$500 respectively. They made cost-benefit assessments based on their knowledge of the legal process and the perceived value of representation. Additionally, Mr. Jacobson was already paying a lawyer for an unrelated matter. The racial wage and wealth gap between African Americans and whites is a persistent problem in the United States.<sup>104</sup> At the group level, African Americans have far fewer financial resources than whites, and face barriers to obtaining credit.<sup>105</sup> The average income for a full-time African American worker in 2010 was \$28,964.<sup>106</sup> White, non-Hispanic full-time work-

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101. For a discussion of smaller personal networks as a constraint on African American employment, see ROYSTER, *supra* note 62, at 102.

102. See Sandra Hofferth, *Kin Networks, Race and Family-Structure*, 46 J. OF MARRIAGE & FAM. 791 (1984); Julie E. Miller-Cribbs & Naomi B. Farber, *Kin Networks and Poverty Among African Americans: Past and Present*, 53 SOC. WORK 43, 43 (2008) ("Many current public policies and programs that affect poor African Americans place increasing responsibility on families to provide their members with child care, kinship foster care, financial resources, and other types of vital support.").

103. See Matthew A. Dombroski, *Securing Access to Transportation for the Urban Poor*, 105 COLUM. L. REV. 503, 508–11 (2005).

104. For a comprehensive overview of racial wealth disparity, see MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH* (2d ed. 2006). For income disparity, see Huffman & Cohen, *supra* note 97, at 902 (documenting persistent African American job segregation in low status positions and linking it to the back-white wage gap).

105. Pager & Shepherd, *supra* note 6, at 189–91.

106. *Selected Characteristics of People 15 Years Old and Over by Total Money Income in 2010, Work Experience in 2010*, U.S. CENSUS BUREAU, <http://>

ers, in contrast, averaged an annual salary of \$41,656 in 2010.<sup>107</sup> As we discussed above, our data do not include an income or wealth measure, so part of the race effect we observe may be caused by the extent to which African Americans are, on average, poorer than whites. But our interviews suggest that cost is not a straightforward barrier to obtaining a lawyer. Instead, plaintiffs' decisions about how to spend their resources depend on how plaintiffs view the law, the legal profession, and their chances of success. A low-income plaintiff might decide to pay for a lawyer, at serious hardship, if she thought it crucial, while a plaintiff who could afford a lawyer might forgo one based on a different cost-benefit assessment. Our findings are in line with other access to justice research that complicates the role finances play in use of legal services—plaintiffs' views of those services are part of the equation.<sup>108</sup> Racial differences in such perceptions might then interact with income disparities to explain why African American plaintiffs are less likely to have lawyers.

What about the merits? Is it possible that, as a group, African American plaintiffs have weaker cases that lawyers reject, forcing them to file *pro se*? If this were the case, lawyers would be performing a "gate-keeping" function in an effort to keep weak claims out of court. We acknowledge that our data do not allow an objective assessment of case merits, either statistically or through interviews. We note cautiously that two of the interviewees—Chris Burns and Travis Winters—seemed to have problematic claims, which would deter lawyers from accepting them as clients. Chris Burns said he contacted multiple lawyers but none would take his case nine years after the fact, so his decision to file alone may have bypassed their "gate-keeping." His earlier efforts to find a lawyer seem to have failed because of his perception of the cost. Travis Winters believed that he was represented, and did not recall getting advice from a lawyer that he should not file, so there is no evidence of gate-keeping. Two others—Frank Williams, who advanced to trial despite substantial efforts from defense attorneys, and Marjorie Turner, who obtained a positive finding from a

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[www.census.gov/hhes/www/cpstables/032011/perinc/new01\\_005.htm](http://www.census.gov/hhes/www/cpstables/032011/perinc/new01_005.htm) (last visited Oct. 26, 2012).

107. *Id.* Note that the black figure is for respondents who checked the black box alone or in combination with other race and/or ethnicity boxes on the census survey. The white figure is for respondents who checked the white box alone.

108. Sales, *supra* note 18, at 576. When asked directly about their reasons for filing *pro se*, 45% of respondents said their case was simple enough to handle alone; 22% said they had money available but chose not to spend it on a lawyer; 31% said they couldn't afford a lawyer, and 36% said they had contacted lawyers before deciding to appear alone, with an average of 2.3 consultations. *Id.*

state review commission—appear to have had viable cases, and lacked lawyers for other reasons. Acknowledging the limits of our data, unmeritorious cases do not seem to be the main reason that African American plaintiffs are less likely to have lawyers. Instead, the resources required to find and retain a lawyer are unequally distributed. Resources include forms of human and social capital, among them legal knowledge, trust in lawyers, and personal connections to lawyers. Resources also include time and money to invest in searching for a lawyer. Social science research shows clearly that inequitable social structures in the United States offer minorities less education, wealth, and income, and limit their professional networks in ways that exacerbate disparities.<sup>109</sup> Because the lawyer search process draws on all these resources, minorities are likely disadvantaged relative to whites.

Interviews with lawyers, which are presented in Part V, strengthen the position that systemic forces apart from the merits of individual cases drive the disparity in representation. First, however, we offer a brief summary of how represented plaintiffs found their lawyers, as contrasted with the pro se plaintiffs who did not.

#### *H. What Worked? Insight from Represented Plaintiffs*

Although this article focuses mainly on the experiences of pro se African American plaintiffs, some additional insights can be gained by considering the accounts of represented plaintiffs. This dataset includes thirty-three interviews with members of this group, including eleven African Americans. A few salient themes emerged to show what the process of securing a lawyer entails.

First, many represented plaintiffs talked about the time consuming process of seeking a lawyer. Many plaintiffs who successfully secured attorneys reported consulting with several before finding the right one. They described the right lawyer as one with whom they felt comfortable, one who was willing to work out an acceptable payment arrangement, or in some cases, one who was willing to take their case at all. Some said they were initially rejected by lawyers who told them to seek second opinions, forcing them to decide whether to persist. Peter Nichol森, a fifty-six-year-old white police officer filing a race discrimination case, received a referral from his police union.<sup>110</sup> Instead of following it, he contacted the Pacific Legal Foundation, a conservative advocacy group that he thought might sympathize with his reverse discrimination claim. When they rejected his case he talked

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109. See *supra* notes 62–65, 97–108 and accompanying text.

110. Interview with Peter Nichol森 (Sept. 2005) [hereinafter Nichol森 Interview].

to a friend who had used a lawyer for his own employment case and ultimately selected this attorney. Rob Narrot, a sixty-four-year-old white warehouse manager filing an age and disability discrimination case, similarly started by going to Equip For Equality, an advocacy group.<sup>111</sup> He did not pursue becoming a client there, but instead obtained three referrals from the American Bar Association (ABA). Because of the referrals, he was able to meet with several lawyers and choose the one with the most desirable fee plan. These plaintiffs shrugged off rejection and used additional resources to pursue different paths to representation.

Plaintiffs who secured lawyers generally seemed to have access to more resources of the kind that the pro se plaintiffs in our sample lacked. Several knew lawyers personally, or had them in their social networks. Kristin Baker, for example, a thirty-three-year-old white sex discrimination plaintiff, had a friend in the insurance business who convinced a lawyer at a large law firm to take her case at a discount even though he did not normally represent individuals.<sup>112</sup> In this case, personal social capital was clearly instrumental. John Palmer, a forty-five-year-old African American manager filing a race claim, chose a law firm that his father had worked with professionally,<sup>113</sup> while Jack Stern, a twenty-six-year-old white police officer filing for disability discrimination, chose the law firm where a fellow officer cum law student was interning.<sup>114</sup>

Some represented plaintiffs found their lawyers through directories or publicly available sources instead of personal connections, but they often had additional resources with which to approach the search. Floyd Kelley, a fifty-seven-year-old African American professional filing a race claim, took advantage of a group plan through his American Express account that offered him access to a list of participating lawyers at reduced rates, and ultimately selected one who charged an up-front fee that he could afford.<sup>115</sup> Robert Lester, a forty-nine-year-old white professional claiming age discrimination, obtained a list from the ABA and “just went down the list and, you know, for no other reasons, just selected four of them, and basically then I went out and I interviewed them and discussed my case to see if there was

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111. Interview with Rob Narrot (Oct. 2005) [hereinafter Narrot Interview].

112. Telephone Interview with Kristin Baker (Aug. 2006) [hereinafter Baker Interview].

113. Telephone Interview with John Palmer (Jan. 2006) [hereinafter Palmer Interview].

114. Telephone Interview with Jack Stern (June 2006) [hereinafter Stern Interview].

115. Interview with Floyd Kelley (Nov. 2005) [hereinafter Kelley Interview].

something there.”<sup>116</sup> Both these plaintiffs had resources—financial, but also intangible stores of knowledge and confidence that make up human capital—that secured them lawyers through impersonal processes.

As a group, the represented plaintiffs were not very specific about how they paid for the lawyers they retained. Several talked about shopping around for an option that they could afford, but knew that they had a budget to work with, in contrast to a pro se plaintiff like Philip Jacobson who obtained a single quote of \$500 and felt it was unaffordable.<sup>117</sup> Rob Narrot, who contacted legal clinics and then followed up on referrals from the ABA, said that his financial resources allowed him to persist.<sup>118</sup> The more flexible tone with which represented plaintiffs talked about money is itself a difference from some of our pro se plaintiffs, who felt immediately that they could not afford a lawyer and did not seriously consider shopping around.

At least two plaintiffs said they used their ability to acquire and demonstrate legal knowledge to compensate for a lack of financial resources. Matthew Brown, a forty-seven-year-old African American manager filing for race discrimination, consulted with many attorneys, but realized early in the process that none would take his case without immediate payment. Mr. Brown persisted because “every time I met with one of these lawyers, I’d try to squeeze a question in,” thereby learning more about his case.<sup>119</sup> Ultimately, Brown learned that if he filed pro se he could request a court-appointed lawyer, which he did successfully. Kristin Hamilton, a forty-two-year-old African American supervisor working on her master’s degree, filed a race claim pro se, then kept showing up at hearings and asking questions about her case until the judge appointed an attorney who happened to be in the courtroom.<sup>120</sup> Unlike some of our pro se plaintiffs, Ms. Hamilton did not feel hesitant to assert herself to members of the legal profession. Both these plaintiffs were well-educated professionals who had the skills to build and use a stock of legal knowledge that made them good candidates for court-appointed lawyers.<sup>121</sup>

These brief insights from represented plaintiffs support that getting a lawyer requires resources of the kind that some African Ameri-

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116. Telephone Interview with Robert Lester (June 2006) [hereinafter Lester Interview].

117. Jacobson Interview, *supra* note 3.

118. Narrot Interview, *supra* note 111.

119. Interview with Matthew Brown (Nov. 2005) [hereinafter Brown Interview].

120. Interview with Kristin Hamilton (Dec. 2005) [hereinafter Hamilton Interview].

121. See *infra* Part V.C.3 for a discussion of the court appointment process.

cans may be less likely to possess because of the systemic disparities that we discuss and support above in Parts II.B and III.G. The taxing process of meeting with multiple lawyers, some of whom are discouraging or unaffordable, requires time and a tolerance for rejection of one's views. Personal connections to lawyers are helpful. Even public directories and court appointment programs can be more effectively used by plaintiffs with resources, both financial and those related to human capital. The search process seems to favor confident professional negotiators (including managers, as our regression indicates) and people with background knowledge about the law and legal profession. At the same time, it requires a belief that a prolonged search is preferable to filing alone.

#### IV.

##### THE LAWYERS

The pro se plaintiffs attributed their lack of representation to a range of factors, some of which centered on how lawyers made their decisions about which clients to accept. Likewise, represented plaintiffs thought they knew what worked to find a lawyer. But what can we learn from the lawyers' perspectives, and are their thoughts consistent with plaintiffs' beliefs? Twenty plaintiffs' attorneys representing a range of practice specialties, sizes, and prestige levels—from solo practice generalists to lawyers engaged in pro bono work through large firms to an elite national class action specialist—explained how they select clients.<sup>122</sup> These interviews provide a “top-down” view of access to legal services that highlights the role of the system, as opposed to the litigants who approach it from the “bottom-up.” The themes that emerged bear on the racial disparity in representation.

##### A. Screening

Every plaintiffs' attorney interviewed stressed that he or she accepted a very small fraction of potential discrimination clients, with several estimating a ten percent or smaller acceptance rate. This high selectivity drove their client selection process.<sup>123</sup>

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122. As we noted above, work on how lawyers select clients is surprisingly limited, and mostly focuses on torts. Generally, it finds that contingency lawyers are very selective and favor clients with high recovery prospects. See sources cited *supra* note 67 (showing how low recovery plaintiffs are disadvantaged).

123. This is generally consistent with studies finding that plaintiffs' lawyers are highly selective. But, many show systematic variation in selectivity. See Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 24–25 (1997) (showing how firms that receive a high call volume accept fewer clients than low or medium volume firms); Mary Nell Trautner, *How*

Lawyers prepared to reject a majority of cases reported using screening processes to make rejection faster and easier. Most described screening that took place before they would agree to meet a potential client or discuss their case details.<sup>124</sup> Joseph Shapiro, for example, an experienced plaintiff's attorney, said his office conducted in-depth phone screenings by an on-call intake attorney who weeded out most would-be clients.<sup>125</sup> If a client was referred directly to him or his partner, however, one of them would personally perform the initial assessment. Dan Franco, a specialist who connected with clients through referrals from lawyers, former clients, and professionals such as accountants, as well as through mass advertising and the yellow pages, said all potential clients were screened over the phone.<sup>126</sup> One out of ten calls resulted in an invitation to meet, at which clients were required to fill out an extensive questionnaire and pay a consultation fee starting at \$75 that was meant to deter casual inquiries. Karen Green utilized phone screenings in which she looked for specific details that suggested discrimination, rejecting clients if they did not mention key points.<sup>127</sup> She also charged a consultation fee for a meeting if the client survived the phone call.

Many lawyers also said they were intentionally pessimistic in their assessment, aiming to weed out clients who were not serious. As one stated, "I will say to people 'from what you tell me, I don't think I can help you. If you really want a consultation, I'll give it to you,' and so sometimes people say 'well, you mean I don't have a case?' Then I say, 'I'm not telling you that because you're not my client' . . . ."<sup>128</sup> Others described similar tactics of discouragement.

While lawyers claimed to have an ability to assess the merits of a case almost instantly, their initial screening methods seem to favor some clients for reasons unrelated to case merits. They favor clients who know how to quickly and compellingly "sell" their case, or who

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*Social Hierarchies Within the Personal Injury Bar Affect Case Screening Decisions*, 51 N.Y.L. SCH. L. REV. 215, 225–40 (2007) (finding variation among individual lawyers in an elite tort practice); Jerry Van Hoy, *Markets and Contingency: How Client Markets Influence the Work of Plaintiffs' Personal Injury Lawyers*, 6 INT'L J. OF LEGAL PROF. 345 (1999) (contrasting high selectivity of small-town tort lawyers with that of lawyers practicing in urban hubs on the basis of financial reserves).

124. One study found that depending on call volume, contingency firms rejected 59% to 83% of clients after the first phone call, with an average of 65% across all firms surveyed. Kritzer, *supra* note 123, at 27.

125. Interview with Joseph Shapiro (May 2006) [hereinafter Shapiro Interview].

126. Interview with Dan Franco (Mar. 2006) [hereinafter Franco Interview].

127. Telephone Interview with Karen Green (Nov. 2006) [hereinafter Green Interview].

128. *Id.* at 12.

have a personal vouching connection that takes them past the first call. They also select for clients who know to read discouraging assessments for what they are: a test of commitment, and a professional disclaimer, instead of a clear rejection. Because many lawyers charged fees for these early assessments, poor clients are disadvantaged at screening. These patterns would likely work against some African American plaintiffs, who statistically are poorer and—as a correlate of educational disparities and segregation in low level jobs<sup>129</sup>—might be less experienced at making compelling phone presentations to strangers expressing disbelief.<sup>130</sup>

### B. Demeanor

After the initial phone call, most plaintiffs' attorneys said a large part of their decision whether to accept a client was based on her mannerisms or demeanor at the initial meeting.<sup>131</sup> Attorneys looked for a variety of things. Some assessed clients specifically for how they were likely to interact with their attorney. Harry Morgan, a prominent African American civil rights lawyer, said he had a "sixth sense" for "difficult" clients, meaning that they would become "accusatory" or "whin[y]" in the course of the lawyer-client relationship. In his view, "a personal relationship with a client means a lot."<sup>132</sup> Mark Lewis, another experienced specialist, agreed. "[F]irst of all a piece of

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129. See *supra* Part III.G.

130. Although many lawyers said they preferred clients who came to their meetings prepared with documents and having done background work, or those who framed their cases to include salient facts, some also cautioned that they often turned down clients who appeared to have visited several attorneys already and "ma[de] the case more interesting [through embellishment]" after being rejected. Kovac Interview, *infra* note 146, at 14. One said explicitly that he preferred clients who were *not* savvy about the legal process, noting that "what I feel more of an affinity for are people who really don't know what their rights are and they're generally lower in the food chain, lower in the corporate food chain." Barry Interview, *infra* note 135, at 17. Thus, attorneys seem to have perceived a line between clients who used knowledge to build a valid case and those who used knowledge to manipulate the system and its evaluative criteria. Lawyers referenced demeanor as a way to negotiate this line; clients who could articulate their rights and/or had assembled documentary evidence were preferred, but only if lawyers "believed" them based on their demeanor, and furthermore saw them as "reasonable" collaborators in the attorney-client relationship. For a mechanism linking listener beliefs to reduced facility, see sources cited *supra* note 55 (citing social-psychological research on how communicative performance suffers when people believe they are being evaluated for "stereotypical" group attributes).

131. We are aware of no major studies that consider cultural or social interactive practices that influence U.S. lawyers' client selection. For an interesting international analysis, see Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 LAW & SOC'Y REV. 1 (2006).

132. Interview with Harry Morgan (Apr. 2006) [hereinafter Morgan Interview].

whatever you do if you have any sense as a lawyer is you know is there chemistry? Is this somebody that you feel like you can work with? Are you able to communicate effectively with that person?"<sup>133</sup>

Attorneys also said that demeanor related to client credibility, or simply whether their claims of discrimination were true.<sup>134</sup> Ellis Barry, who represented a woman in the sample whom he felt was a "quality person," said that "whatever the case is, if I don't have a sense of the, if I personally don't get a sense of the honesty of the person or if I don't feel like what I'm hearing is what's really there, I generally don't get involved."<sup>135</sup> Margaret Cottle referred more directly to the "smell test" that, prior to discovery, she necessarily depended on to determine whether a client was "trying to work the system," instead of having a "morally right" conviction that he or she had been discriminated against.<sup>136</sup> This attorney rejected clients whom she felt had the former motive.

Finally, some attorneys assessed demeanor in terms of whether a client would interact favorably with a judge or jury. A few explicitly distinguished this type of demeanor from that required to persuade the attorney to accept the case. Joseph Shapiro explained that "we assess both the plaintiff in terms of our hit on her and kind of perception of how she might be perceived [by the court],"<sup>137</sup> while Timothy George said that after deciding whether he himself "believed" a client, he focused on their "confidence in their ability to communicate their story and to be believed, to be likable, be sympathetic figures, and so forth, because so many times even people with good stories to tell, if they can't tell it well, just are not going to survive the process."<sup>138</sup>

These observations might help explain the underlying pattern of underrepresented African American plaintiffs in Title VII race discrimination plaintiffs if lawyers tend to unfavorably assess the demeanor of minority plaintiffs, viewing them either as "difficult" to work with, not credible, or unlikely to present well to a judge or jury.

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133. Telephone Interview with Mark Lewis (Nov. 2006) [hereinafter Lewis Interview].

134. See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 1032 (1999) (surveying plaintiffs' lawyers and practice literature, finding that they evaluate clients for credibility, appearance, articulateness, and cooperativeness).

135. Interview with Ellis Barry (Apr. 2006) [hereinafter Barry Interview].

136. Interview with Margaret Cottle (May 2006) [hereinafter Cottle Interview].

137. Shapiro Interview, *supra* note 125, at 2.

138. Telephone Interview with Timothy George (Aug. 2006) [hereinafter George Interview]. Such criteria is perhaps surprising given that all the interviewed attorneys agreed that trials—bench or jury—were rare, and most cases were expected to settle based on an agreement between the parties.

Predictably, none of the attorneys made such a connection explicit. Still, all except one of the attorneys in our sample were white, and a large literature exists on unconscious biases in interracial assessments.<sup>139</sup> More importantly, given that many of the plaintiffs' attorneys believed that race cases were among the most ambiguous and dependent on "he said, she said" accounts, it is possible that some disfavor African American clients because of their presentation styles.

### C. Plaintiffs' Preparation

Apart from demeanor, several attorneys said they were more likely to accept clients who came to their initial meetings with documents or background work, or who seemed likely to be willing and able to assist with their case preparation going forward. Joseph Shapiro said that a good client "was someone who's responsible and follows instructions, whether it's depo[sition] prep[aration] or getting the documents and responding to the document requests," and that he typically instructed potential clients to obtain documents prior to the first meeting.<sup>140</sup> A few lawyers recalled cases that they would have rejected had it not been for background work a client had already done to develop his claim. Doug Schwartz, a specialist who said he only represented plaintiffs, recalled a client for whom "the facts of the case were, as he told them . . . pretty outrageous but he had some documents [obtained from his work] which made it all make sense so I agreed to take his case."<sup>141</sup> An attorney at a public interest firm said she accepted a case largely because the client had already organized other employees at her workplace to request medical files, thereby showing that discrimination was widespread, and laying the groundwork for a class action claim.<sup>142</sup>

These lawyers responded positively to clients' foresight in requesting and assembling documentary evidence. The preference some lawyers showed for prepared clients might be expected to work to the disadvantage of African American plaintiffs who, statistically, are

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139. John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002) (showing that implicit bias operates in interracial interactions); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005) (reviewing "persuasive evidence" that implicit bias against a particular social category predicts disparate behavior toward people in that category); see also Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

140. Shapiro Interview, *supra* note 125, at 15.

141. Interview with Doug Schwartz (July 2006) [hereinafter Schwartz Interview].

142. Interview with Valerie Lane (Nov. 2006) [hereinafter Lane Interview].

likely to have less education, more likely to work in jobs with less access to documents or opportunities to request them, and perhaps more likely to have less general legal knowledge about the litigation process as a consequence.<sup>143</sup> At the aggregate level, these factors might make it difficult for African American clients to create the succinct, supported presentations that lawyers favored.

#### D. Payment

There was wide variation in the sample as to how lawyers negotiated payment. Some operated on contingency, expecting the bulk of payment only when and if a client prevailed. Contingency lawyers might or might not charge a retainer fee or require a reduced hourly rate in addition to a portion of recovery. Other lawyers shunned contingency arrangements and billed entirely by hourly rate. Some took pro bono cases. Many reported using a variety of plans, or having shifted between payment modes over the course of a career. Notably, the payment scheme an attorney followed influenced how he or she evaluated potential clients.<sup>144</sup>

##### 1. Contingency

Attorneys who worked on contingency based client-acceptance decisions on projected recovery. For these lawyers, liability was separate from, and *less* relevant than, potential damages. Factors that lawyers considered in assessing recovery included the plaintiff's salary, which would serve to calculate back pay, so higher salaries were favored, and whether the plaintiff found a new job immediately after being fired, which could mitigate lost wages, and thus limit damages. One lawyer said that he was generally unwilling to "invoke the heavy machinery of the law," even for "somebody who kind of seems to have the facts to support a case," if the client found a new job "two weeks" after being fired.<sup>145</sup> Another lawyer said he used a formula to determine whether one-third of anticipated recovery would equal his goal hourly billing rate, and would only take cases in this ballpark because they made "economic sense." Given that recovery depended largely on a clients' salary, this lawyer said that regardless of merits,

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143. See discussion *supra* Part III.G.

144. Other studies have found similarly. See sources cited *supra* note 67; see also Herbert M. Kritzer, *Lawyers Fees and the Holy Grail—Where Should Clients Search for Value*, 77 JUDICATURE 187, 187–90 (1993) (describing various billing mechanisms and analyzing the interaction between billing schemes and the attorney-client relationship).

145. Lewis Interview, *supra* note 133, at 2.

“if they were like low wage earners, like \$3,000 a month, I would not be interested in filing a lawsuit or anything like that.”<sup>146</sup>

This cutoff, equivalent to \$36,000 per year, would exclude many African American workers, given that the average income for an African American full-time worker in 2010 was \$28,964.<sup>147</sup> White, non-Hispanic full-time workers, by contrast, averaged \$41,656 in annual salary in 2010.<sup>148</sup> Our data suggest that lawyers ask about salary as part of the client screening process, sometimes in an initial phone call. Because African American workers are likely to have lower salaries and fewer benefits, lawyers may screen them out based on profit incentives. In addition, contingency lawyers in our sample reported conducting a cost-benefit analysis to assess the amount of work and immediate financial investment required to obtain a given award. Several also said that race cases were “difficult” and lengthy to litigate because of savvy employers and the frequent absence of “smoking gun” evidence.<sup>149</sup> Race cases, to the extent that they promised low damages, substantial work, and delayed recovery, would thus be disfavored by contingency lawyers.

## 2. *Hourly*

Lawyers who followed hourly billing schemes were less directly concerned with how much a claim might recover. Because they were guaranteed payment regardless of outcome, damages were less significant to their decisionmaking. These lawyers saw hourly billing arrangements as a way to represent clients who wanted to pursue cases that might not prevail or that promised to be extremely labor intensive in relation to recovery.<sup>150</sup> Aaron Erlington, for example, said he used an up-front retainer fee to force clients “to decide whether it’s worth it or not [to proceed with a case]” and to give them an “awakening” to the risk of losing.<sup>151</sup> This lawyer then continued at an hourly rate, avoiding contingency in almost all cases because he found recovery to be unpredictable. Other lawyers agreed that they avoided taking cases

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146. Telephone Interview with Jeff Kovac (Nov. 2006) [hereinafter Kovac Interview].

147. *See supra* notes 106–107.

148. *See supra* note 107.

149. Interview with Leonard Phillips (May 2006) [hereinafter Phillips Interview]; Morgan Interview, *supra* note 132; Barry Interview *supra* note 135; Lewis Interview, *supra* note 133.

150. Still, most said they discouraged clients from proceeding when their cases appeared legally weak or their potential recovery was limited.

151. Interview with Aaron Erlington (Sept. 2006) [hereinafter Erlington Interview].

for an hourly fee unless they had at least some merit and the client both understood the risks and could afford the expense.

Hourly fee payment plans with up-front retainers would be out of reach for plaintiffs lacking substantial financial assets. Again, because African American plaintiffs as a group are likely to have lower income and wealth than other groups, their ability to secure an hourly-fee lawyer is probably diminished.<sup>152</sup> Most lawyers described hourly-fee arrangements as an option for plaintiffs who could not convince contingency lawyers to accept their cases. In other words, they expanded the representation prospects for only those plaintiffs who could afford it. Financial constraints probably limit some African American plaintiffs' access to these "auxiliary" lawyers, forcing many of them to find a contingency lawyer or go without representation.

### 3. *Pro Bono or Informal*

While most lawyers said payment prospects were important to client evaluation, this was not the case for all lawyers in the sample. Lawyers who claimed to have personal or ideological commitments to the plaintiffs' side sometimes described indifference to financial gain. Valerie Lane, who worked for a public interest organization and then transitioned to a firm, said she preferred clients who had "kind of public interest goals" and were not "money driven."<sup>153</sup> This lawyer reduced her fees considerably in order to help sympathetic plaintiffs and repeated that she "wasn't willing to do a case to make money," rejecting clients who appeared motivated only by financial gain.<sup>154</sup> One experienced lawyer said that he felt it was typical to count on "mak[ing] up . . . for the weak cases by the strong cases,"<sup>155</sup> while another said his firm took about one-third of their cases pro bono based on interest and commitment to helping plaintiffs, writing off these costs and "hopefully at the end of the year have some money left over after we pay everybody."<sup>156</sup> Lawyers who reported taking cases without regard for payment generally said they selected them based on legal interest or sympathy for a client.

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152. For more on the racial wealth and income disparity, see discussion *supra* Part III.G, especially note 104.

153. Lane Interview, *supra* note 142, at 3.

154. *Id.* at 15.

155. Lewis Interview, *supra* note 133, at 18.

156. Schwartz Interview, *supra* note 141, at 15.

E. *The Problem of Finding a Lawyer:  
The Lawyers' Side, Synthesized*

To summarize, factors intrinsic to how lawyers evaluate clients likely contribute to the racial disparity in representation rates. Lawyers reported favoring clients who could quickly and compellingly present their cases to get past a screening, or who came with a personal referral. They evaluated clients for demeanor, which included perceived affability, credibility, and jury appeal. Lawyers liked prepared clients who kept a paper trail of discriminatory incidents even while working. All of these criteria may weigh against some African Americans, who at the group level have less education, are occupationally segregated in lower-status positions, and may express themselves in ways that reflect this background.<sup>157</sup> “Top-down” lawyer preferences might also interact with “bottom-up” client beliefs, with some African Americans having been shown to trust counselors and lawyers less in other contexts,<sup>158</sup> and also to be less willing to describe themselves as “victims” of discrimination for fear of confirming stereotypes.<sup>159</sup> Because discussing sensitive events requires trust in a relationship, instant screening processes may deter clients.

In addition, the contingency fee structure disadvantages lower income clients. Because African Americans, as a group, have lower incomes than whites,<sup>160</sup> the growing use of contingency plans likely impacts African American representation rates. Some lawyers said they would not even consider clients who had low damages, regardless of the merits of their cases. These patterns imply that a low-income African American plaintiff who was fired for racist reasons but found a new job immediately and lost little in wages would have difficulty retaining a lawyer.

Pro bono and ideologically sympathetic practitioners offer some prospects for such clients, but because many operated quietly and without advertising for “business,” plaintiffs might have difficulty in reaching them. Hourly-fee lawyers also likely contributed to the racial disparity if white clients used them to advance questionable cases, even after having been advised of the risks.<sup>161</sup> Thus, from the lawyers’ side, the disparity may stem from a combination of black plaintiffs

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157. See discussion *supra* Part III.G.

158. Jacobs, *supra* note 50, at 363–64; see also Alberts et al, *supra* note 51, at 73.

159. See sources cited *supra* note 53.

160. See discussion *supra* Part III.G.

161. Other studies have found that elite lawyers feel increased pressure to take cases from friends and peers who are highly invested in the issues, even when the cases appear weak. HEINZ & LAUMANN, *supra* note 64, ch. 6.

with legally viable cases failing to secure lawyers *and* white plaintiffs of sufficient means electing to pursue cases with lawyers whom they hire out-of-pocket.

## V.

### IMPLICATIONS AND POLICY RECOMMENDATIONS

This Part highlights some implications from these findings and evaluates policy recommendations.

#### A. *Systemic Implications:*

##### *A Problem with the Individual Litigant Model*

First, racial disparities in representation signal an additional problem with a system that relies on individual employees to bring their own resource-intensive cases against employers. A growing body of research shows that plaintiffs fare poorly in this area of law, while defendant employers most often prevail.<sup>162</sup> Contrary to popular belief, plaintiffs tend to have their cases dismissed before resolution, and rarely win large verdicts when they progress to trial.<sup>163</sup> Employers tend to be repeat players who become experts in self-protection. Prospects for systemic change in the workplace seem limited, given these features of the individual litigant model. All of this holds true even without considering race or the role of lawyers. Lawyers are almost certainly necessary to improving outcomes against experienced employers, even if they are not sufficient to do so. Since minority plaintiffs do not obtain lawyers as readily as whites, their ability to influence the system may be further curtailed. Thus, at the systemic level, racial disparities in representation mean that the groups most impacted by discrimination lack the resources to mount effective challenges through the courts. This is an additional strike against the individual litigant model. Beyond that, it poses a paradox in which the Civil Rights Act—enacted largely to help minorities—ends up better serving non-minority groups who have more legal help to effectively enforce it.

#### B. *Implications for Litigants: Legal Confusion and Disillusionment*

Second, disparities in representation suggest that minorities, more than whites, may have a negative litigation experience that leaves

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162. See *supra* note 15 and accompanying text.

163. Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y. REV. 237, 262 (2004).

them disillusioned with the courts. Several of the pro se plaintiffs interviewed sensed that the legal system was operating over their heads, and viewed them as irrelevant or incompetent while denying them respect.<sup>164</sup> These plaintiffs felt disparaged when they asked questions in court.<sup>165</sup> They sometimes believed that court personnel and judges were secretly favoring employers' attorneys because they knew them personally.<sup>166</sup> For them, the experience of going to court was confusing and degrading, on top of the unhappy workplace situations that led them to sue. Afterwards, their accounts show major, persistent misunderstandings about their cases.<sup>167</sup> This pattern is problematic regardless of whether plaintiffs have "good cases" that might prevail on the merits with the help of a lawyer. Even if plaintiffs are in court pro se because they misunderstand the law, the appropriate redress is for them to learn more about the legal system and its limitations, not for them to be disparaged and made to feel that their subjective experiences of discrimination are not valid. Because minorities are more likely than whites to be unrepresented, these negative experiences have troubling implications for equality in the courtroom.

### C. Policy Suggestions

This article has demonstrated an unrecognized racial disparity in employment discrimination representation rates, and highlighted both systemic and litigant-level implications. It has argued that part of the disparity stems from "bottom-up" differences in how plaintiffs view lawyers, their legal issues, and the workings of the court. Another part relates to how lawyers function from the "top-down," including their screening practices and payment requirements. How, then, can the legal system address the disparity? We focus on the pros and cons of each approach.

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164. As Chris Burns recalled, "I got so, you know, depressed with the whole bunch of, you know, they send you through all this red tape gobbledy goo, and they say these big twenty five cents words and you know without a lawyer degree that you don't understand a thing that they are telling you." Burns Interview, *supra* note 78, at 12.

165. For example, Franklin Williams believed that when he tried to file motions or question the employer counsel's legal tactics, that lawyer treated him as if he was overstepping his bounds and acting "too smart from his own good." Williams Interview, *supra* note 81, at 18.

166. Franklin Williams: "[T]o make a long story short, I took it as though they were telling me straight up, and let me be candid, 'nigger, I'm not going to destroy his career for you. Okay, he doesn't follow civil rules of civil procedure, I'm not going to do it for you. I'm not going to sanction him, I'm not going to do one damn thing.' And they didn't. I said 'okay.'" *Id.* at 19.

167. For example, Travis Winters, who thought he won his case; Billy Dee, who thought the EEOC was his lawyer; and Philip Jacobson, who thought his case got swallowed by the court. See *supra* Part III.

### 1. EEOC Reforms

Employment discrimination litigation is complicated by the requirement that plaintiffs exhaust their remedies through the EEOC, the federal agency charged with enforcing Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and select other civil rights statutes. Only after the EEOC has issued a finding (which may include “reasonable cause,” “no reasonable cause,” or administrative closure), and a right to sue letter, can a federal suit be filed.<sup>168</sup> The interviewed plaintiffs, both pro se and represented, tended to misunderstand this process, or otherwise felt that it was a waste of time. Some reported confusion when visiting the EEOC office to file the claim.<sup>169</sup> Others thought that the right to sue letter they received at the end of the EEOC review was a positive finding of discrimination, or meant that the EEOC would act as their lawyer. While lawyers helped explain the process to their clients, the pro se plaintiffs were left in a state of confusion.

Adding to the confusion, most states maintain separate offices or commissions to deal with workplace rights under state law.<sup>170</sup> There is wide variation across states in how these bodies function. Some offices have their own review processes that are similar to the EEOC. Some have dedicated attorneys that may agree to represent clients. One of our pro se interviewees, Marjorie Turner, appears to have simultaneously pursued a state and federal case. She obtained review through the Illinois Human Rights Commission but was confused about that institution’s role.<sup>171</sup> Our data on these bodies and processes is limited, except to note that they exist in parallel with the EEOC and are another source of potential problems and solutions.

Both the EEOC and state equivalents could take steps to assist pro se claimants. An obvious option is to increase levels of direct representation, where agency attorneys accept clients. Budget constraints at the federal level and in many states seem to preclude this at present, and such a reform would require a major agency overhaul. Some have argued that transforming the EEOC into a direct services agency would detract from systemic change activities.<sup>172</sup> Alternatively, the

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168. The EEOC outlines its requirements on its website. *Filing a Charge*, EEOC, <http://www.eeoc.gov/employees/charge.cfm> (last visited Sept. 7, 2012).

169. See *supra* Part III.A.

170. See Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 127 (2010).

171. See *supra* Part III.F.

172. Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 468 (arguing that focusing on charges wastes EEOC resources).

EEOC could enhance its collective regulatory role, bringing suit against employers when there is evidence of widespread discrimination practices or policies instead of focusing on specific incidents. This would entail a shift away from the individual litigant model in favor of a government oversight and enforcement approach. The EEOC now has authority to act as a party in litigation, and does so on occasion. While this solution might speak to the systemic problem of employment discrimination, it moves away from our focus on individuals who cannot obtain lawyers and have personal grievances, and is not specific to the problems that minority plaintiffs face.

Short of individual or collective representation, EEOC policy could focus on better education of clients. This could happen both in person, when claims are filed, and through the mail over the course of the review processes. Based on our interviews, the terminal “permission to sue” letter seems especially important in directing claimants’ next steps. It should convey information clearly in accessible language, explain that the claimant is not represented, and outline options for finding a lawyer prior to filing. While the agency now disseminates published information and runs a website, its educational efforts could be enhanced.

These minor steps, however, might not change deep-seated beliefs that could cause minority claimants to interpret advice and instructions in different ways. For example, a letter explaining the benefits of counsel would likely be read differently by groups with divergent social backgrounds.

## 2. *Inform Plaintiffs About the Law and Legal Process*

Because legal beliefs have complex social determinants, there is no easy way to change how people view lawyers and the legal system. For example, trust in attorneys cannot easily be encouraged. Education efforts that try to explain the complexity of the legal system (and related benefits of counsel) seem dubious, and might deter people from pursuing claims; this is true even though perceived case complexity seems to promote lawyer use.<sup>173</sup> Instead, the process itself seems to best educate plaintiffs about how lawyers operate. Thus, assuming that some pro se plaintiffs file unrepresented because they do not feel the benefits of counsel justify the cost, the court should provide subsequent opportunities to add a lawyer when litigation realities emerge. Ideally, courts could facilitate that process through an appointment model.

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173. See *supra* Part II.B.

Because minority plaintiffs may be likely to know fewer lawyers personally, outreach through specialized directories and clinics could also have benefits. While these methods cannot substitute for personal connections, at least they provide options beyond random searches of lawyer listings. For general education purposes, clinics that run information sessions describing the legal process might be useful; currently, phone calls to lawyers who also serve as high volume screeners seem to be a primary source of plaintiff information, and these calls do not serve to educate as much as evaluate.

### 3. *Court Appointments*

Federal law authorizes courts to appoint lawyers in civil cases.<sup>174</sup> There is wide variation across federal courts in how appointments function; local court rules usually outline the steps. Example criteria include case merits as set forth in the pleadings, issue complexity, the presence of conflicting evidence, the litigant's capability to self-represent, and the litigant's access to other lawyers.<sup>175</sup> The availability of panel lawyers is a constraint that varies widely by district.<sup>176</sup> A task force assessing courts in the Second Circuit concluded that compensating lawyers for litigation costs would allow for greater participation.<sup>177</sup> Better recruitment and possible compensation of a reserve panel might improve these programs.

Because the appointment process requires judges to evaluate plaintiffs, cultural and social awareness is crucial to avoiding racial disparities. For example, denying a plaintiff counsel because her pleadings were not compelling might disadvantage plaintiffs who lacked educational attainment, or who were unfamiliar with the legal system. Our interviews included three plaintiffs who successfully requested court appointed lawyers; all were well-educated, legally knowledgeable people who felt comfortable in the courtroom.<sup>178</sup> Judges should self-examine the basis of their decisions, and courts should keep statistics with racial breakdowns to guard against disparities.

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174. 28 U.S.C. § 1915(e) (2012) (“The court may request an attorney to represent any person unable to afford counsel.”).

175. See, e.g., N.D. ILL. LOCAL R. 83.36, available at <http://www.ilnd.uscourts.gov/legal/newrules/New00092.htm>.

176. *Report to the Second Circuit Task Force*, supra note 20, at 310–11 (citing the proximity of large firms with pro bono programs as a factor explaining variation).

177. *Id.*

178. See supra Part III.H.

#### 4. *Solutions Within the Bar*

Our interviews suggest that lawyer screening practices may be vulnerable to racial bias. Legal practitioners should be attentive to this possibility. In particular, they should question what underlies their “smell tests” and other quick assessments about clients that they make at the screening stage, and express pessimism about outcomes in a way that is sensitive to different levels of legal knowledge and trust in legal advice. These solutions are amenable to training. Some practitioners call for law schools to teach students how to listen to diverse clients both in clinical settings and through professional conduct curriculums.<sup>179</sup> More attention has been paid to groups seen as non-mainstream, such as transgender clients<sup>180</sup> or immigrant domestic violence victims.<sup>181</sup> Minority employees who have experienced discrimination, however, may also require reflective listening by lawyers who fail to grasp the social and cultural context from which they speak.

In addition, the fee structures that disadvantage groups with low recovery prospects likely also disadvantage minorities. Interviewed pro bono lawyers did not use the same profit-driven criteria.<sup>182</sup> Thus, more pro bono services might ease the racial disparity. Currently, employment discrimination does not seem to have been identified as an area of pro bono need. This may reflect beliefs that frivolous cases predominate or the high work demands of this complex area. The racial disparity in representation should urge pro bono volunteers to take on these cases; otherwise, the reality is that white employment plaintiffs are better able to use the court system to redress employment discrimination complaints than minorities are.

#### 5. *Help for Plaintiffs Who Proceed Pro Se*

Even with reforms that strive to match plaintiffs with lawyers, a subset will continue pro se. We have argued that beliefs about the law, lawyers, and personal litigation goals prompt some plaintiffs to choose this option. While more available and affordable legal services might shift the cost-benefit calculus, some plaintiffs will still file pro se. Regardless of their reasons, the legal system should treat them with re-

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179. See Jacobs, *supra* note 50, at 405–07; Silver, *supra* note 26, at 221–29.

180. Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLINICAL L. REV. 329, 357–68 (2006) (urging lawyers to examine how their world views and prior assumptions affect how they “hear” transgender clients’ accounts).

181. Stein, *supra* note 54, at 134–36.

182. See *supra* Part IV.3.

spect instead of disparaging them as courtroom irritants.<sup>183</sup> Judges should make efforts to explain requirements, invite questions, and give plaintiffs leeway where appropriate, especially when setting and enforcing deadlines.<sup>184</sup> Recognizing the racial disparity in pro se filing makes this especially imperative; otherwise, courts may function to reinforce substandard treatment that minority groups experience in other social domains.

Also to this end, courthouse resources including help desks might assist pro se plaintiffs with standard tasks such as filing motions. Help desk staffers could also help translate legal jargon and offer a neutral perspective to plaintiffs who feel all players, from judges to defense attorneys, are against them. Some federal districts have extensive help desk programs while others lack them.<sup>185</sup> Future research might evaluate whether help desks actually benefit plaintiffs and in what ways.

#### CONCLUSION

Access to justice research has not looked systematically at racial patterns of lawyer use. Our mixed-methods study of employment discrimination litigation revealed a troubling disparity. Minority plaintiffs, especially African Americans, are much less likely than white plaintiffs to have lawyers. Since employment discrimination law is intended to assist marginalized groups in the workplace, including minorities, this finding suggests a flaw in the redress system. Reasons for the disparity may come from “bottom-up” plaintiff views and behaviors, or “top-down” features of the legal system. We argue that both contribute, with the former shaped by wider social inequities in education, income, and access to social capital, and the latter shaped by legal market dynamics and how lawyers view plaintiffs.

Because social inequities are entrenched and slow to change, the onus for improvement may lie with the legal community. Substantial research has shown that access to civil justice is restricted at multiple

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183. See *Report to the Second Circuit Task Force*, *supra* note 20, at 343 (surveying judges, lawyers, law clerks, and courtroom deputy clerks and revealing that “some judges who agree that their colleagues are unhappy with [employment discrimination] cases attribute the discontent to the fact that plaintiffs in them often appear pro se, and do not understand the law or the court’s procedures. Many federal judges also appear to believe that the proliferation of small cases involving individual claimants clog up the federal courts and divert judges’ attention from larger, purportedly more significant, civil cases.”).

184. For a report arriving at similar suggestions, see *id.* at 310–11.

185. The Northern District of California maintains one. *VLSP Legal Help Center*, U.S. DIST. COURT, N. DIST. CAL., <http://www.cand.uscourts.gov/helpcentersf> (last visited Aug. 30, 2012).

steps of the process, with poor litigants often excluded, albeit in complicated ways. Legal reformers have taken steps to equalize access. Adding race to the picture makes such efforts even more imperative. Otherwise, legal services function to reinforce system-wide disparities aligned with race.