Abstracts for the Law and Economics of Race Symposium

Evidence of Discrimination
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This paper develops a simple decision-theoretic model of evidence production in the context of a discrimination trial. Producing evidence is assumed to be costly, and the cost can vary depending on what type of defendant behavior (and plaintiff characteristics) the evidence bears upon. We assume that the goal of the trial is to uncover a possible behavioral bias in the defendant (intent to discriminate), rather than achieving more equitable outcomes across protected categories. We then ask how a "social planner" would structure the production of evidence in a trial in order to best achieve this objective, taking into account the cost of evidence production. We show that it is sometimes efficient to sequence the production of different kinds of evidence (burden-shifting), or even to allow a decision based on limited evidence (e.g., disparate impact alone, as a proxy for intent to discriminate). The analysis suggests that a key variable is the availability of evidence concerning the "productivity" of the plaintiff. We use this insight to classify the different ways in which a generic antidiscrimination principle is implemented via administrative regulations and judicial rules in several areas of the law.

The Evolution of Gender Employment Differentials within Racial Groups in the United States
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This paper analyzes the causes and consequences of changes in the gender employment differentials for non-Hispanic whites and non-Hispanic blacks in the United States over the period from 1950 to 2008. We begin by documenting the evolution of the gender employment rate gap. The gender employment differentials narrows considerably within both racial groups and turns slightly negative for African-Americans. We document the changing employment levels by gender that drive these patterns as well as compositional shifts in each gender-race population that drive changes in employment levels (e.g., changes in education, marriage, fertility and incarceration). Among whites, nearly all of the narrowing is attributable to increasing employment among white women, which is in turn explained by declining marriage and fertility, increasing education, and increasing employment within groups defined by these characteristics. While we observe similar changes for African-American women, a large component of the narrowing of the black gender differential is explained by declining employment among black men. Black employment rates decline precipitously for the least educated and post-1980 are driven down further by increased institutionalization and declining marriage. Finally, we explore whether the correlates of employment among women are themselves responsive to changes in the employment prospects of men. In an analysis of state-level inter-decade changes in female outcomes, we find that a worsening of black male employment prospects is associated with an increase in the proportion of women with education beyond high school, a decline in marriage, and a decline in fertility among African-American women. For white women, we observe similar results for marriage and fertility. We also find that the employment differential between white women with very young children and white women without children declines with declining white male employment.
The Compromised Worker and the Limits of Employment Discrimination Law

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We have long known that close to 2/3 of all federal employment discrimination suits are filed by workers alleging discriminatory firing. I document and attempt to explain an additional significant fact: virtually all of these suits (and some others as well) are brought by "compromised" workers—those who have done something that would arguably justify their adverse treatment. This fact is especially true for race discrimination claims, probably both because minority compromised workers are especially likely to be victims of discrimination and because firings (whether justified or not) are especially likely to be framed as discriminatory by racial minorities. The centrality of compromised workers among plaintiffs claiming racial discrimination in employment makes it difficult to use civil rights laws to achieve significant progress in this area, because plaintiffs' compromised status often obscures the possibility of discrimination and diminishes their "attractiveness" to judges and juries. Compromised workers pose other difficult problems for the law as well.

Subjective and Objective Indicators of Racial Progress

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Our typical measures of racial progress focus on objectively measurable changes in economic conditions—employment opportunities, income, consumption, or on measures of racial discrimination and segregation in markets. These indicators tell a story of ongoing, albeit frustratingly slow, progress. In this paper, we focus instead on measures of subjective wellbeing—life satisfaction, happiness, and measures of both affect and attitudes. These data suggest a far greater degree of progress, largely because the racial gap that existed back in the 1970s was astonishingly large. We attempt to account for the extent to the closing racial happiness gap can be accounted for changes in the usual economic indicators, and the extent to which it reflects broader hard-to-measure influences.

Do Judges Vary in Their Treatment of Race?

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Are minorities treated differently by the legal system? Systematic racial differences in case characteristics, many unobservable, make this a difficult question to answer directly. In this paper, we estimate whether judges differ from each other in how they sentence minorities, avoiding potential bias from unobservable case characteristics by exploiting the random assignment of cases to judges. We measure the between-judge variation in the difference in incarceration rates and sentence lengths between African-American and White defendants. We perform a Monte Carlo simulation in order to explicitly construct the appropriate counterfactual, where race does not influence judicial sentencing. In

[1] University of Chicago. The authors would like to thank Josh Fischman, Chris Hansen, Max Schanzenbach, and seminar participants at Chicago, Harvard, MIT, and the NBER Summer Institute. Many thanks to Chief Judge Timothy C. Evans, Presiding Judge Paul P. Biebel, Jr. and Karen Landon for providing the data and invaluable background information on the Cook County Courts. Excellent research assistance was provided by Rohit Gupta, Dhruba Kothari, Jessica Pan, Tommy Wong, and especially James Wang.
our data set, which includes felony cases from Cook County, Illinois, we find statistically significant between-judge variation in incarceration rates, although not in sentence lengths.

Racial Disparities, Judicial Discretion, and the United States Sentencing Guidelines
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Over two decades ago, the United States Sentencing Guidelines imposed a highly structured sentencing regime on district courts. Reducing racial disparities in sentencing was one of the primary goals of the Guidelines’ adoption, which won wide Congressional support. Nonetheless, studies of the Guidelines sentencing have uniformly concluded that significant racial disparities in sentencing persist; indeed it remains unclear whether the Guidelines increased or decreased racial disparities. Commentators have argued that the Guidelines created structural biases that disfavored minorities. The most telling example in this case is the crack cocaine disparity, in which the Guidelines counted crack and powdered cocaine at a ratio of 100 to 1 when calculating sentencing levels.

We examine the extent to which structured rules and judicial discretion can enhance or mitigate racial bias in the U.S. justice system. To do so, we exploit changes in sentencing doctrine over the last twelve years to examine the interplay of judicial discretion and racial disparities. To enforce its strictures, the Guidelines created a framework of appellate court review of sentences, which were virtually unreviewable prior to the Guidelines. Over the past fourteen years, the Supreme Court and Congress have altered review standards for district court “departures” from the Sentencing Guidelines. At the Guidelines inception, most circuits reviewed departures de novo (as a mixed question of fact and law). In 1996, the Supreme Court held that departures should be reviewed under a more deferential abuse of discretion standard, but this was reversed by Congress in the PROTECT Act of 2003, which reinstated the de novo standard. Then, in United States v. Booker (2005), the Court declared the Guidelines to be “advisory” only and encouraged appellate courts to allow sentencing judges more discretion in departures. This effectively created an “abuse of discretion” standard under advisory Guidelines.

We examine the size of unexplained racial disparities under these alternating standards of review. Our initial findings suggest that unexplained racial disparities are lowest when an abuse of discretion standard for departures is applied to mandatory Guidelines. When review is de novo, judges adhere more to the Guidelines but racial disparities increase. This is consistent with the notion that the Guidelines created structural racial biases, against which judges can mitigate when they have greater discretion to depart. By contrast, racial disparities actually increased when the Guidelines were made advisory under Booker. This suggests that the disparity-minimizing sentencing regime was one of intermediate judicial discretion.