Summary and Keywords

The labor market is governed by a panoply of laws, regulating virtually all aspects of the employment relation, including hiring, firing, information exchange, privacy, workplace safety, work hours, minimum wages, and access to courts for redress. Antidiscrimination laws, especially Title VII, notably prohibit employment discrimination on the basis of race, color, religion, sex, and national origin. Court decisions and legislation have led to the extension of protection to a far wider range of classes and types of workplace behavior than Title VII originally covered.

The workplace of the early 21st century is very different from the workplace when the major employment discrimination statutes were enacted, as these laws were conceived as regulating an employer–employee relationship in a predominantly white male labor market. Prior emphasis on employment discrimination on the basis of race and sex has been superseded by enhanced attention to sexual harassment and discrimination on the basis of disability, sexual orientation, gender identity, and religion. Concerns over the equity or efficiency of the employment-at-will doctrine recede in a workforce in which workers are increasingly categorized as independent contractors who are not covered by most equal employment laws. As the workplace has changed, the scholarship on the law and economics of employment law has been slow to follow.

Keywords: law and economics, employment law, employment discrimination, regulation, antidiscrimination laws, Title VII

Introduction

The labor market is governed by a panoply of laws, regulating virtually all aspects of the employment relation, including hiring, firing, information exchange, privacy, workplace safety, work hours, wages, and access to courts for redress. Antidiscrimination laws, especially Title VII of the Civil Rights Act of 1964, notably prohibit employment discrimination on the basis of race, color, religion, sex, and national origin. Court decisions and legislation have led to the extension of protection to a far wider range of classes and types of workplace behavior than Title VII originally covered.
discrimination against certain protected classes. Court decisions and legislation have expanded the definition of “discrimination” and extended protection to a far wider range of classes than the original five classes of race, color, religion, sex, and national origin covered under Title VII.

There are three distinct fields of research with respect to the role of employment law in the labor market. Legal scholars who study employment law typically focus on individual rights and interpret employment law as a mechanism to enforce those rights and protect workers against harm and exploitation by employers. In contrast, legal scholars in the law and economics tradition often question the value of extensive regulation of the labor market, anticipating that competitive market pressures would largely lead to efficient outcomes. Lastly, labor economists have focused on theoretical and empirical analyses of the labor market and have identified market failures that support an important role for regulation in many employment contexts.

Many think of Richard Posner’s influential work when they think of the law and economics approach to law: essentially, markets work, and government regulation is harmful (e.g., Posner, 1999). Theoretical models in this framework often predict that regulation will lead to lower wages or to lower employment. In the law and economics paradigm, parties will bargain around inefficient legal rules, shifting resources to their highest valued use, and obviating the benefit of regulation.

When assessing the impact of antidiscrimination laws, there is also concern that laws designed to prohibit discrimination can themselves result in unintended consequences, leading to worse outcomes for protected employees. This theoretical prediction is supported by a substantial empirical literature that often, although certainly not universally, identifies unintended effects of the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and other equal opportunity laws. Papers with titles such as “Who Hires When It’s Hard to Fire” (Oyer & Schaefer, 2002) signal concerns about hiring workers who, by their membership in a protected class, would be eligible to sue for causes unavailable to those not in the protected class.

How, then, can economists recognize a positive role for legal rules? First of all, it is important to recognize that laws protect the rights of individual and groups of workers and provide recourse to address violations of civil rights. Furthermore, recognition of transactions costs as well as market failures, arising from, for instance, strategic behavior, asymmetric information, and unequal bargaining power, suggest a role for legal regulation that protects workers as groups. There may also be positive spillover effects from laws. Positive spillover benefits can come from two sources. One source is termed “the expressive value of law,” which posits that the existence of laws signals the behavior expected of a society and can serve to influence preferences (see, e.g., Sunstein (1986) for a discussion of how sexual harassment prohibitions can change preferences). Related is that such laws can thereby provide “cover” to employers who would prefer to not discriminate, allowing them to hire in a nondiscriminatory manner by claiming that the law gives them no choice. Secondly, like other forms of regulation, such laws place firms
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on a level playing field. For example, the ADA requires employers to make reasonable accommodation for workers with disabilities. Reasonable does not mean zero cost, however. If discrimination against workers with disabilities is illegal, then all firms face the same potential costs of accommodation, and no firm would have an advantage by refusing to hire workers with disabilities.

Drawing on both the economics and legal literature, this article analyzes the role of employment discrimination law in the United States and empirical evidence on its efficacy through the lenses of these three research fields.

Economists Discover Employment Discrimination

Taste-Based Discrimination

Gary Becker’s (1957) book, *The Economics of Discrimination*, laid the groundwork for analyzing employment discrimination as an economic phenomenon, and it remains foundational to the vast influential literature. However, the initial reaction to this seminal work was lackluster. As Becker notes in his introduction to the second edition, “some readers asserted that economics is not relevant in analyzing racial discrimination against minorities.” Becker further notes that the 1957 book was reviewed in few of the major economics journals and that almost no studies of discrimination by economists were published in the five years after the publication of his book.

In this book, Becker introduced the key concepts that continue to provide the basis for economic analysis of employment discrimination. He distinguished among three sources of discrimination: employer, co-worker, and customer. All forms are illegal under Title VII, and these distinctions have direct relevance to incentives to eliminate discrimination and to how the judiciary interprets the laws governing employment discrimination.

Becker also provided a framework for the persistence of discriminatory pay differentials by monetizing the “taste for discrimination.” In this framework, parties are willing to pay a premium, either directly or indirectly in reduced income, to avoid associating with certain groups. Recognition of tastes for discrimination provides a rationale for the existence of discriminatory pay differentials between apparently equally productive groups of workers, even when labor and product markets are competitive. However, it fails to explain how discriminatory pay differentials could persist over time, as competition should lead to the least discriminatory employers hiring minority workers at lower pay, ultimately resulting in discriminatory employers’ exits from the market.

Although competitive markets would seem to provide incentive to eliminate discrimination, employers in noncompetitive markets, such as monopolists, government, or regulated industries, would seem to be situated to exercise their tastes for discrimination. It has long been understood that firms operating in noncompetitive
environments may tolerate activities that are not profit maximizing. Indeed, Becker (1957) posited that discriminatory preferences may be given freer rein in noncompetitive markets, and this possibility was further developed in more technical form by Arrow (1971, 1985).

Markets differ in their degree of competitiveness based on product market competition and the labor market structure. Evidence of whether market structure is an important determinant of discriminatory wages or employment is mixed (e.g., Heywood, 1998; Shackett & Trapani, 1987). Studies have examined the consequences of deregulation of formerly regulated industries. Heywood and Peoples (1994) found that deregulation of the trucking industry resulted in an increase in black truck drivers. In contrast, Agesa (2001) found no improvement in racial composition of employment in the airline industry following deregulation.

**Statistical Discrimination**

An alternative explanation that seemingly rationalized the existence of pay disparities between groups is statistical discrimination (Aigner & Cain, 1977; Phelps, 1972). Under statistical discrimination, a worker’s productivity is not known with certainty. In contrast to Becker’s model, there is no assumption of a taste for discrimination. In addition, the theory does not rely on mistaken beliefs. Instead, it is based on beliefs that some groups are on average less productive, or, even if productivity is on average the same between groups, characteristics of the minority group are less predictive of productivity. For example, it is thought that employers rely on stereotypes—such as that older workers are less knowledgeable about technology or more likely to miss work (Lahey, 2008A)—and apply these stereotypes to the entire group of workers.

Without observing individual productivity, under statistical discrimination, all members of the disfavored group are paid less because employers cannot identify who in that group is more productive. And, if workers’ investment decisions are hard to observe, statistical discrimination can induce actual productivity differences between groups by discouraging investments by minority workers, even if workers in each group would be otherwise equally productive (Coate & Loury, 1993). Antidiscrimination law will not be protective against pay disparities that arise from such believed productivity differences, even if the productivity differences arise from illegal discriminatory treatment.

Despite the prominence in the literature of statistical discrimination as an explanation for pay disparities, it too runs into theoretical problems as to how discrimination can be sustained. If groups are equally productive on average, then some members of each group will be paid below the group average and some above, but there will be no pay disparity on average. If groups are not equally productive on average, then different average pay per group may be justifiable. Furthermore, statistical discrimination too is hard to sustain, as there would be incentives to establish better testing mechanisms. On the other hand, testing can itself be applied in a way to support discrimination (“disparate impact”) against members of a group. The 1971 Supreme Court decision
Griggs v. Duke Power, 401 U.S. 424 (1971), mandates that any employment tests must be relevant to performance of the job. To the extent that there is underutilization of employment tests to avoid running afoul of employment law, there is greater leeway for statistical discrimination on the basis of group membership.

Field experiments have been frequently used to test for statistical discrimination. The two main types are correspondence studies and audit studies. Correspondence studies analyze the likelihood that an employer invites an applicant to interview based on fictitious resumes that are equivalent other than having indicators associated with the characteristics of a certain group, such as race or parenthood status. In audit studies, pairs of fake job candidates, differing only in the characteristic under consideration, are sent to apply or interview for jobs. These studies often find evidence of discrimination. Baert (2018); Bertrand and Duflo (2017); Fix and Struyk (1993); and Neumark (2018), and provide thorough overviews of this literature.

**Employment Discrimination and the Role of Employment Law in the United States**

The United States is characterized by the myth of competitive labor markets and access to opportunities that create economic mobility. Yet there is strong evidence that certain groups, notably women, as well as racial and ethnic minorities, earn substantially less than otherwise comparable white men, giving rise to the possibility that employment discrimination plays a role in creating labor market disparities. This is so despite the prevalence of many laws that prohibit discrimination in the workplace.

Understanding large and persistent disparities in employment outcomes in a labor market that is at least presumptively competitive, and in which most forms of explicit discrimination on the basis of personal traits are illegal, remains an ongoing theoretical challenge for economists. As discussed in the section “ECONOMISTS DISCOVER EMPLOYMENT DISCRIMINATION,” evidence that market pressures serve to eliminate unprofitable employment discrimination is mixed. The failure of market pressures to eliminate discrimination is further evidenced by empirical evidence of persistent unexplained disparities and by ongoing court decisions and legislation that have extended protection to a far wider range of classes and types of workplace behavior.

However, the reality behind the legislature’s choice to adopt equal opportunity laws was likely an ideological desire to recognize the need to protect individual rights. In fact, the first shift from at-will employment to protecting the rights of minorities in the workplace took place in the wake of the Civil Rights movement. The federal government was the first to develop clear exceptions to the at-will employment doctrine. In 1941, President Roosevelt issued an executive order prohibiting discrimination “in defense industries or government because of race, creed, color, or national origin.” Soon after, several states passed fair employment laws that expanded protections for the same classes of individuals in the private sector. These laws also created state agencies responsible for
enforcement. These agencies could receive complaints, investigate the complaints, and issue cease-and-desist orders. Then, in 1963, the federal legislature adopted the Equal Pay Act and in 1964 adopted Title VII of the Civil Rights Act. These would be the first of many state and federal laws aimed at protecting the individual rights of the workforce.

Title VII of the Civil Rights Act of 1964

The most sweeping and comprehensive law prohibiting employment discrimination is Title VII of the Civil Rights Act of 1964. Title VII prohibits employment discrimination broadly, making it illegal to discriminate in hiring, in firing, and with respect to compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. As recognized by the Act, and courts interpreting it, discrimination includes disparate treatment—one class is treated differently than another—and disparate impact—a facially neutral policy that has a disproportionate effect on one class. The three categories of taste-based discrimination identified by Gary Becker—employer, co-worker, and customer discrimination—are all prohibited, and the employer is generally liable for all violations.1

Title VII applies to all employers with more than 15 employees, including private employers, federal, state, and local governments, unions, and employment agencies. In addition, the Pregnancy Discrimination Act of 1978 amended Title VII to make it illegal to discriminate against a woman on the basis of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

As created by the Act, the Equal Employment Opportunity Commission (EEOC) is tasked with enforcing Title VII by receiving and investigating complaints. An individual claiming discrimination must first file a claim with the EEOC before filing a complaint in federal court. The EEOC will then investigate the claim and attempt to resolve the claim before issuing a right to sue letter to the employee, which allows the employee to file a claim in federal court. Even if the EEOC believes the claim lacks merit, the employee can file a claim in federal court after the investigation is complete. With the Equal Employment Opportunity Act of 1972, the EEOC also received the ability to sue employers on behalf of complaining agencies. The EEOC was also tasked with enforcing other equal employment opportunity laws with the passage of those Acts (such as the Age Discrimination in Employment Act).

Is Title VII Structured Efficiently?

Conditional on having laws prohibiting employment discrimination, it is desirable that the form any law takes is efficient. Title VII has two important features. Firstly, employers are often liable for the discriminatory acts of their employees or for responding to the discriminatory demands of their customers.
Secondly, although the EEOC can file lawsuits, the main legal mechanism of enforcement is via private litigation initiated by victims of discrimination. And, the statistics show that private litigation is the main enforcement mechanism. From FY 1997 through FY 2016, the EEOC received an average of around 87,000 charges a year. Contrastingly, in FY 2016, the EEOC only exercised its right to sue employers in 114 cases (less than 0.2% of the charges filed in that year).\(^2\)

It is easy to see that there is a wide range of alternatives to these two features of employment law. For example, supervisors or co-workers can themselves be personally liable; or discrimination suits could exclusively be brought by a government entity on behalf of the public in a manner similar to criminal suits. Unfortunately, there is little empirical evidence about whether Title VII’s structure provides optimal incentives.

Despite a lack of empirical or theoretical evidence, many legal scholars have criticized the effectiveness of the EEOC. For example, Selmi (1996) suggests that the agency serves little function except as an administrative obstacle that prevents potentially meritorious cases from being filed in court and that the agency takes cases that would otherwise be handled by private attorneys. In addition, Donohue and Siegelman (1991) recognize that the agency has served little purpose but to filter out more than 90% of charges filed. And many scholars attribute this failure to the EEOC’s ever-growing backlog of cases and lack of any true power to enforce the laws (Green, 2001).

**Theoretical Predictions About the Impact of Title VII**

Title VII requires nondiscriminatory treatment in both pay and hiring. These two objectives may be in opposition to each other, as firms that would hire workers in the protected class only at a pay discount may instead hire fewer such workers, even though the employed workers will be paid higher nondiscriminatory wages. Furthermore, coverage under Title VII is incomplete, with firms with fewer than 15 employees (and fewer than 25 employees until Title VII was amended in 1972) not covered. If minority workers spill over from the covered sector, then wages in the uncovered sector would be further depressed, showing that Title VII caused a greater pay gap by minority status. Or, if minorities who would have low earnings exit the labor market altogether, then earnings relative to white males will rise, showing a misleading improvement from Title VII.

In addition, as explored by Bloch (1994), the increased risk of potentially costly litigation from firing a member of a protected class could lead to a decrease in hiring that is often difficult for potential employees to detect, making lawsuits over hiring less likely to be pursued.

Thus, although the intended effect of Title VII would be to increase both employment and pay for those in protected classes relative to white males, because both the demand for labor and the supply of labor may shift in response to changes in employment law, theoretical models can predict any possible outcome in terms of employment and pay,
making it frustrating to identify whether Title VII (as well as many other employment laws) was effective.

**Empirical Evidence on the Efficacy of Title VII**

There has been a large body of research, conducted primarily in the 1970s and 1980s, that examines whether Title VII was successful in its intended goal of improving employment outcomes for minorities. Most of this research examines outcomes for racial minorities, with some research examining outcomes for women. There is little empirical evidence on the efficacy of Title VII on outcomes for those protected on the basis of color, religion, or national origin.

In addition to the lack of clear theoretical predictions, there were both data limitations and the confounding effects of other societal trends (specifically, the Civil Rights movement, the War on Poverty, and affirmative action programs) through the 1960s and 1970s, which severely constrained the ability to draw definitive conclusions about the specific influence of Title VII. Furthermore, because Title VII is a federal law with broad coverage, there is less of an opportunity to compare a treated group to a control group. Studies conducted in the 1970s and 1980s examined time series trends in relative employment or earnings of black males to white males over time, where improvement following Title VII implementation is taken as evidence that the law had the desired effect of improving labor market outcomes for workers in the protected classes. As summarized by Donohue and Heckman (1991) and Hersch and Shinall (2015), although there is some evidence of improvement for black males, overall the evidence based on trend data is mixed and not clearly causally related to the implementation of antidiscrimination law instead of other changes in the same period.

As micro-level data became available in the 1970s, studies turned to making comparisons of outcomes for groups based on differences in coverage. The Equal Employment Opportunity Act of 1972 expanded the scope of Title VII in several dimensions, making comparisons over time possible. For Title VII, the main dimension on which coverage varied is by number of employees. Although this approach likewise ran into challenges due to data limitations matching number of employees of a firm to individual outcomes, evidence by Chay (1998) and Carrington, McCue, and Pierce (2000) finds that Title VII was effective in improving employment outcomes for African American workers.

Other studies took advantage of the state equal employment laws adopted before Title VII. These studies were able to isolate the effect of laws substantially the same as Title VII because these states adopted the laws over time and before the national law was adopted (Collins, 2003; Neumark & Stock, 2006). Both studies find some support for an improvement in earnings of black workers that can be causally attributed to state-level equal employment laws. Bullock (2015) examined variation in EEOC enforcement and found that greater enforcement narrowed the black-white wage gap among men.
Empirical Evidence of Race Discrimination

Race discrimination is the most frequent charge filed with the EEOC. In FY 2016, race charges represented 35.3% of the 91,503 charges filed with the EEOC, followed by sex with 29.4% of the charges. Although the federal government recognizes five racial categories (American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White), discrimination against black workers has been far more frequently studied. In part this is because it is the largest racial minority, but an important reason is that the history of slavery and pervasive racism in the United States has left a long legacy of disadvantage to African Americans. Becker’s (1957) original model of discrimination focused on racial discrimination against black workers, and most of the literature seeking to identify whether antidiscrimination laws such as Title VII were effective analyzed whether labor market outcomes of male black workers improved relative to male white workers (e.g., Donohue & Heckman, 1991). For example, Collins (2003) found that state fair employment laws improved employment outcomes for black men and women, with larger effects for black women and larger effects in the 1940s.

Regardless of the primary research question, it is standard in the empirical labor literature to include controls for race in wage equations. Wage regressions virtually always find a substantial pay penalty for black workers on the order of about 8% to 10% relative to otherwise comparable white workers, even after the enactment of Title VII (Altonji & Blank, 1999; Lang & Lehmann, 2012). Because any regression, no matter how comprehensive, is subject to the criticism that unexplained disparities are due to unmeasured characteristics or characteristics measured with error, experimental data has been valuable in providing evidence on race discrimination. Notable research, such as the correspondence study by Bertrand and Mullainathan (2004), identifies substantially lower probability of being called back for a job interview if the applicant’s name signaled that the applicant was black. However, choice of name in this context may be related to socioeconomic status, and the lower callback rate may instead reflect socioeconomic status bias rather than racial bias. Fryer and Levitt (2004) find no lifetime penalty to having a distinctly black name. Darolia, Koedel, Martorell, Wilson, and Perez-Arce (2016) likewise did not find any significant differences in callbacks based on having a surname that strongly predicted the applicant was African American. They interpret their difference with Bertrand and Mullainathan (2004) as due to their use of names that may have been less distinctively African American or less indicative of socioeconomic status. In combination, and despite substantial evidence of racial discrimination in pay, these studies suggest caution in inferring employment discrimination in hiring based on correspondence studies for entry-level jobs on the basis of race.

Empirical Evidence of Sex Discrimination

Wage regressions invariably find that women earn less than comparable men, with wage regressions showing a gap of around 8% to 10%, similar in magnitude to the gap between white and black men (Altonji & Blank, 1999; Blau & Kahn, 2017). Although the pay gap
narrowed from the 1960s through the late 1990s, progress in attaining pay equity has since stalled, despite women comprising nearly half of the labor force and dominating men in educational attainment. The portion of the wage disparity that is unexplained by observable characteristics is large, with typically far less than half of the pay gap explained by human capital characteristics (Altonji & Blank, 1999; Blau & Kahn, 2017). Whether the unexplained disparity is due to discrimination is debated, and economists have been reluctant to interpret the unexplained disparity as due to discrimination instead of to factors such as choices over work–family balance and job characteristics, and to gender differences in risk-taking behavior or willingness to compete or bargain. It is undisputed that women have traditionally and continue to bear the bulk of household responsibilities, and a line of literature shows a negative relation between time spent on home production and wages (Hersch, 1991B, 2009). However, as Hersch (2006A) summarizes, even the accumulation of these many choices does not explain the pay gap, and Hersch argues that discrimination is by far the most likely explanation. Experimental studies support a direct role of discrimination. Goldin and Rouse (2000) showed an increase in hiring of female musicians after orchestras adopted a policy of conducting blind auditions, with musicians concealed behind a curtain; Carlsson (2011) found that males in Sweden are slightly more likely to be called for an interview in male-dominated industries; and Neumark, Bank, and Van Nort (1996) found evidence of discrimination against women in employment as waitstaff in high-priced restaurants.

Again, due to conflating social trends and the lack of a control group, studies accurately examining the effect of Title VII on gender discrimination are limited, and the evidence is mixed. Time series studies that analyze employment outcomes for women before and after the Civil Rights Act found weak evidence of an improvement (Beller, 1983; Eberts & Stone, 1985). However, Neumark and Stock (2006) analyze the effect of state fair employment laws and find that the laws—which only targeted pay—actually decreased the employment of women.

**Empirical Evidence of Color Discrimination**

Color is one of the original five protected classes under Title VII. Although the color-based charges are a small share of the charges filed with the EEOC, the number of color-based charges has increased substantially. In FY 1992, there were 374 charges filed, but in FY 2016, there were 3,102 charges filed.

Color is often conflated with race, but charges of color discrimination can be made separately from, or in addition to, charges of race discrimination. Using data on EEOC charges filed between 1999 and 2010, Hersch (2012) provides a statistical profile of color discrimination charges and the combinations of charges (e.g., whether color plus race). Of all claims charging color discrimination, 84% also included race as a basis, and 22% also included national origin as a basis.

A substantial empirical literature provides strong evidence of labor market discrimination against those with darker skin color. African American workers with darker skin color
earn less than their counterparts with lighter color (Hersch, 2006B; Goldsmith, Hamilton, & Darity, 2006, 2007; Kreisman & Rangel, 2015). Notably, legal immigrants to the United States with darker color earn less than their counterparts with lighter skin color even after taking into account national origin and race (Hersch, 2008, 2011B).

Color discrimination is likely to become an increasingly important source of discrimination for three reasons. One is that there has been an increase in the number of children born to parents who are themselves of different races, which is associated with an increase in the range of skin colors among the population. The increased diversity in racial background has been recognized by the U.S. Census, which for the first time in 2000 provided the option of reporting more than one racial identity. The greater variation in skin color increases the potential for discrimination on the basis of color. Secondly, legal immigrants to the United States are on average darker than native U.S. citizens (Hersch, 2011B), and although it is illegal to profile for possible unauthorized status based on skin color, there is evidence that individuals have been targeted by police because of their skin color, as reported by the Stanford Open Policing Project. Thirdly, many immigrants to the United States originate in countries with well-established color hierarchies, and discriminatory treatment of those with darker color may follow. Of legal relevance is that many of the claims charging color discrimination that have been litigated involve people of the same identified race or national origin but of different skin tone (Banks, 2000; Jones, 2000, 2010; Nance, 2005).

Empirical Evidence of National Origin Discrimination

A substantial literature in economics documents that immigrants have lower pay initially, but have rapid wage growth and eventually catch up, or surpass, the earnings of native-born individuals (Chiswick, 1978; Borjas, 1985, 1994). This trend seems to have stalled, however, and various explanations, particularly lower human capital of recent immigrants, have been offered as a reason for earnings disparities on the basis of national origin (Borjas, 2015). Correspondence studies, as summarized in Baert (2018), almost uniformly show discrimination in hiring based on national origin as indicated by a non-native name presented on the fictitious resume. An exception is Darolia et al. (2016), which did not find any significant differences in callbacks based on having a name indicative of Hispanic ethnicity.

However, whether any disparities in labor outcomes are due to discrimination on the basis of national origin will be hard to detect, because of differences in education, cultural background, and often language. In FY 2016, there were 9,840 charges of national-origin-based discrimination filed with the EEOC, representing 11% of charges filed. One potential form of discrimination that has been recognized by the EEOC but largely unexplored by economists is English-only policies, which employers must show are justified by business necessity (Peebles & Solberg, 2005). Zavodny (2000) finds that male workers with limited English proficiency suffer a 12% penalty in states with English-only laws, a result that is supported by work by Drory (2018).
Empirical Evidence of Religion Discrimination

Title VII protects individuals from employment discrimination on the basis of religion, where religion refers to any sincerely held religious, ethical, or moral beliefs. Employers are required to make reasonable accommodation of an employee’s religious practices unless doing so would impose more than a minimal burden on operations. Many potential accommodations would likely pose more than a minimal burden on the employer, leaving a narrow scope for religious accommodation.

Although relatively few claims of religious discrimination are filed with the EEOC—only 4.2% of the 91,503 charges in FY 2016 included religion as a basis—the acts that lead to discrimination claims often receive substantial public attention. Since the 9/11 terrorist attack in 2001, Muslims have particularly been targets of discrimination, and charges by Muslims account for a far greater share of religious discrimination charges filed with the EEOC relative to the Muslim population share. The EEOC has filed several prominent lawsuits on behalf of Muslim workers, including against the meatpacking plant JBS Swift and Abercrombie & Fitch.

Successful litigation by the EEOC supports the presence of religious discrimination, but there have been few empirical studies examining the existence or magnitude of religious bias in the workforce. Ghumman and Ryan (2013) find substantial discrimination against Muslims in a field experiment in which female students who volunteered to act as job applicants applied for jobs in restaurants and retail stores, varying whether she wore a hijab or not when applying. In addition, Wright, Wallace, Bailey, and Hyde’s (2013) correspondence study finds that the mention of any religious affiliation on a resume decreases the likelihood of getting called for an interview and that Muslim applicants face the most discrimination.

Empirical Evidence of Pregnancy Discrimination

The Pregnancy Discrimination Act (PDA) of 1978 amended Title VII to prohibit discrimination on the basis of pregnancy or childbirth, and on average since 2010, 3,500 women have filed charges of pregnancy discrimination with the EEOC each year. This is a strikingly high number, considering that only women can file such charges and they must be of childbearing age for the legal protection against discrimination to be relevant. Also striking, that number is an increase of about 35% from the previous decade.

Of course, that pregnancy discrimination exists is not too surprising, given increased healthcare costs and time away from work. As noted by Hebl, Glick, King, Singletary, and Kazama (2007), many psychological studies have confirmed that pregnant women who work outside the home experience hostility in the workplace, and some have found that the hostility increases due to the protections that women receive. Further, Slonaker and Wendt (1991) analyzed a subset of gender discrimination claims and found that pregnant women lost their jobs at a rate ten times higher than non-pregnant employees following a
period of leave, and Cunningham’s (2007) correspondence study found that pregnant applicants were less likely to be recommended for hiring.

Although there is a massive literature in economics addressing the relation between employment or earnings and child-related factors such as availability and length of paid or unpaid parental leave (e.g., FMLA) and time out of the labor market, there is little direct evidence addressing the labor market consequences of the PDA. Mukhopadhyay (2012) shows a substantial positive effect on employment after passage of the PDA. Gruber (1994) finds that there was evidence that employers passed on the increased cost of health insurance associated with the Act to their employees without affecting employment. Future studies may take advantage of recent expansions of disability protection that have occurred on a state-by-state level to discern the impact of such legislation—as of August 2017, 22 states and the District of Columbia had passed legislation going beyond Title VII and requiring employers to make accommodations for pregnant women (National Women’s Law Center, 2017). Title VII simply requires employers to treat pregnant women the same as other employees.

Additional Federal and State Antidiscrimination Laws

Shortly after the passage of Title VII, in 1967 Congress passed the Age Discrimination in Employment Act (ADEA), which prohibits private and public employers from discriminating against individuals over the age of 40. Surprisingly, as America’s workforce has aged, the age of the individuals receiving protection has not changed. The next group to receive legal protection and an exemption from at-will employment was individuals with disabilities. Section 504 of the Rehabilitation Act of 1974 prohibits discrimination on the basis of disability for those employers receiving federal funding. Employers cannot discriminate against an otherwise qualified individual who has a disability if that individual could perform the job duties with a reasonable accommodation. This same language became the basis of the Americans with Disabilities Act passed in 1990. The ADA extended protection for those with disabilities to the private sector. As with race, sex, and national origin discrimination, many proactive states passed legislation to protect individuals with disabilities and to prohibit age discrimination before national legislation was adopted.

Other national legislative protections include the Family and Medical Leave Act of 1993, which prohibits employers from retaliating against employees for taking medical leave to care for themselves or family members; Section 1981 of Chapter 42 of the United States Code, which also prohibits discrimination on the basis of race in private employment; and the Genetic Information Nondiscrimination Act of 2008 (GINA), which makes it illegal to discriminate against employees or applicants because of genetic information.
The second way that employment protection has been extended is by judicial interpretation of protected classes. A notable example is the 1986 Supreme Court decision *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), which interpreted sexual harassment as a form of illegal sex discrimination under Title VII. A new and important possible extension is whether sexual orientation and transgender discrimination is prohibited as a form of illegal sex discrimination under Title VII. As of August 2018, this has not been resolved at the national level through legislation or by the Supreme Court.

In addition, many states continue to adopt more expansive legislation to protect certain classes of individuals. As of 2015, more than 20 states have adopted legislation prohibiting private employers from discriminating on the basis of sexual orientation (Burn, 2015). In addition, a similar number of states prohibit discrimination on the basis of gender identity. Localities and municipalities have also adopted similar legislation even when their state has not acted. Interestingly, the earliest of the sexual orientation discrimination laws was adopted in 1973 by the District of Columbia.

### Evidence Regarding Sexual Harassment in the Workplace

Annually, more than 10,000 sexual harassment charges are filed with the EEOC, and approximately 16% of those charges are filed by men. Although media attention became pronounced with the #MeToo movement launched in Fall 2017, and the media included numerous reports of settlements paid to victims of sexual harassment, there is little evidence concerning the effect of these movements or federal court decisions recognizing sexual harassment as actionable sex discrimination under Title VII on the prevalence of workplace sexual harassment.

There is also little evidence on the frequency of workplace sexual harassment based on national data. Hersch (2015) describes the methodologies used to elicit information on rates of sexual harassment and provides a survey of international evidence. The most reliable data in the United States is based on surveys conducted by the federal government of those in the military or of federal employees. The Workplace and Gender Relations Survey of Active Duty Members is conducted every two years, and the U.S. Merit Systems Protection Board (MSPB) conducted a survey of federal government employees in 1987, 1990, 1994, and 2016. These surveys show high rates of sexual harassment. For example, the 1994 MSPB survey shows that 44% of women and 19% of men had experienced unwanted sexual attention on the job in the preceding two years, although there was a substantial reduction by the 2016 survey, with 18% of women and 6% of men reporting that they had been sexually harassed in the past two years (U.S. Merit Systems Protection Board, 1995, 2017).

Most evidence outside of the military or federal employees comes from smaller and non-representative samples. Many studies focus on the negative effects of workplace sexual harassment. Chan, Lam, Chow and Cheung (2008) conducted a meta-analysis of 49 sexual harassment studies, finding in general that sexual harassment leads to a decrease in health, self-reported well-being, job satisfaction, and productivity. Hébert (1994) and
Raver and Gelfand (2005) found similar negative consequences. In addition, the MSPB found that sexual harassment in the federal government cost the government approximately $327 million over a two-year period based on the 1994 survey (U.S. Merit Systems Protection Board, 1995). McLaughlin, Uggen and Blackstone (2017) found that women who experience sexual harassment early in their career often experience stagnant wages, likely due to changing careers. And Hersch (2011A) found that employees working in industries with higher rates of sexual harassment receive a compensating differential for working in that environment, similar to the hazard pay premium that workers receive for exposure to workplace risk of fatality or injury.

Other studies have focused on an employee’s perception of what constitutes sexual harassment. Several studies have found that individuals are more likely to believe an action is harassment if conducted by a supervisor than a friend or co-worker (Druhan, 2013; Katz, Hannon, & Whitten, 1996). Interestingly, Wienberg and Nielsen (2017) found that judges had the opposite perception and were more likely to view conduct as harassment when a co-worker was the harasser. Others have found that sexual harassment training leads to more sensitive perceptions of what conduct constitutes harassment (Antecol & Cobb-Clark, 2003). Druhan (2013) also found that women are significantly more likely than men to believe certain actions constitute sexual harassment. In addition, Pickerill, Jackson, and Newman (2006) found that employees believed a larger range of conduct constituted harassment in 1994 compared with 1987, likely due to a growing focus on the subject.

Additional studies seek to learn what characteristics of the workplace increase the likelihood of experiencing sexual harassment. Newman, Jackson, and Baker (2003) found that an employee’s personal characteristics are the biggest predictor of whether he or she will experience harassment, and Jackson and Newman (2004) found that women are more likely to experience harassment in workplaces that contain higher percentages of men.

Finally, and importantly, many studies focus on a victim’s decision not to report harassment. Only 6% of the MSPB respondents that experienced harassment reported the harassment (Hébert, 2007). Knapp, Faley, Ekeberg, and DuBois (1997) theoretically predict that a company’s policy and the severity of harassment will influence this decision. Perry, Kulik, and Schmidtke (1997) experimentally found that the role of the employee and the company’s previous response to harassment were the greatest predictors of whether a victim reports the harassment, and in a survey, Espinoza, and Cunningham (2010) found that more liberal employees were more likely to report harassment. Bullock (2015) found that individuals who report harassment are statistically more likely to experience retaliation following harassment than their counterparts who do not, especially if the harasser is the supervisor, suggesting an additional reason for low reporting.

The authors know of no studies analyzing the effect of Title VII court decisions on the prevalence of sexual harassment or of retaliation following sexual harassment, although
Hersch (1991A) shows using stock market data that the value of firms drops following employment discrimination litigation. The role of sexual harassment specifically is certainly an area that in this climate needs to be explored.

**Empirical Evidence of Age Discrimination**

On average, around 20,000 EEOC charges are filed under the ADEA annually. Despite easy access to data sets that report age, little empirical evidence of such discrimination exists. As Tinkham (2010) and Grossman, Cane, and Saad (2007) explain, true detection of age discrimination may be difficult because of the natural progression of wages and raises in the workplace, which almost always show earnings increase with age at a decreasing rate. These studies also note that abilities, mobility, and production often naturally decline with age, although many cognitive and movement abilities do not show early decline, and the rate of any decline varies considerably by individual health status (Belbase, Sanzenbacher, & Gillis, 2015). As a solution, Grossman et al. (2007) recommend that computer modeling and controlling for performance evaluations should be used to detect discrimination instead of traditional methods.

Empirical evidence on whether the ADEA had an effect on employment outcomes of protected workers is mixed. Schuster and Miller (1984) analyzed a sample of cases filed under the ADEA, finding that most of the complaints were filed by men between 50 and 59 in professional settings. They also found that an employee was more likely to succeed in ADEA litigation if the action in question was involuntary retirement and that, all things considered, women were more successful.

Adams (2004) analyzed the effect of the national law on states that did not have a fair employment law prior to the Act under the assumption that the Act should not have much of an effect in the states that already prohibited age discrimination. Adams (2004) found a small but significant increase in employment for those individuals newly protected by the law caused by a decrease in retirement. Neumark and Stock (1999) using a similar methodology found that the law boosted the relative employment of older workers and led to steeper age-earnings profiles. McLaughlin (2017) used the same analysis to show that these beneficial effects were stronger for men than women, and Neumark, Burn, and Button (2015) used a correspondence study to show that same disparity—that age discrimination is more prevalent for women than men. On the other hand, Lahey (2008B) finds that the states that already had a fair employment law in place saw a decrease in the employment of older workers following the passage of the ADEA. Lahey’s analysis assumes that due to the EEOC’s backlog, states that already had fair employment are more affected by the passage of a federal antidiscrimination law.

**Empirical Evidence of Disability Discrimination**

Studies surrounding individuals with disabilities frequently look to whether the laws have advanced the employment of that group, and although not universally, many find that the ADA decreased employment or workforce participation for individuals with disabilities
(Acemoglu & Angrist, 2001; DeLeire, 2000). However, these studies have been criticized because of limitations of the measures of disability available in the data. Problems with the definitions of disability include that identifying a disability based on whether it limits work is determined endogenously and creates a negative bias on the probability of employment, does not reflect the legal definition of disability under the ADA, and is too broad to accurately capture the heterogeneity of conditions (Hotchkiss, 2004; Kruse & Schur, 2003). Further, additional scholars have found no effect of the ADA, arguing that because of trends individuals with disabilities were experiencing at the time, including access to social security benefits, individuals without disabilities are not an adequate control group (Houtenville & Burkhauser, 2004; Bound & Waidmann, 2002). Nevertheless, even the studies that question the decline generally do not find an improvement in employment for those with disabilities due to the passage of the ADA (Bound & Waidmann, 2002; Hotchkiss, 2004; Kruse & Schur, 2003). Further, Beegle and Stock (2003) analyzed state laws that prohibited disability discrimination and also found a decrease in earnings and labor force participation of individuals with disabilities and no effect on employment following the passage of those acts. Jolls and Prescott (2004) also utilized state variation and found that the immediate negative effects on employment are likely due to the requirement that employers make reasonable accommodations (not the prohibition against termination), and that the negative effect was only present in the few years following the passage of the Act. Relatedly, Shinall (2017) studies the intersectionality between sex and disability discrimination, finding that women are statistically significantly more likely to file charges of disability discrimination. As discussed by Shinall, earlier studies, including Acemoglu and Angrist (2001) and Beegle and Stock (2003), found a larger negative effect for female workers with disabilities than for male workers with disabilities.

One study (Button, 2018) suggests that the ADA did not go far enough—finding that California’s 2001 law, which lowered the burden of proof required to establish a protected disability, increased employment for individuals with disabilities. Alternatively, Shinall (2016) finds no improvement for obese individuals following Congress’s expansion of the definition of disability when it amended the Act in 2008, and Thompkins (2015) found that the amendments slightly decreased the labor force participation of individuals with disabilities. Interestingly, Armour, Button, and Hollands (2018) found that the amendments increased the hiring of individuals with non-salient conditions but had no effect for those with salient conditions.

Empirical Evidence of Sexual Orientation and Transgender Discrimination

Sexual orientation discrimination is well documented—studies generally find a disparity between employment outcomes of gay men and straight men, but not women. Outside of analyses of small samples through surveys, there have been several studies of national data sets that document a substantial disparity in wages for male homosexual workers. Badgett (1995) analyzed the 1989-1991 General Social Survey and found that gay men earned up to 27% less than heterosexual men. Using the same data set but slightly
different definitions of homosexual, Black, Makar, Sanders, and Taylor (2003) found that lesbian women actually earned more than comparable heterosexual women and that gay men earned less than their counterparts. Allegretto and Arthur (2001), Clain and Leppel (2001), and Berg and Lien (2002) all found a wage disparity between homosexual and heterosexual men that could not be explained by other differences. Many studies also confirmed Black et al.’s (2003) finding of a premium for lesbian workers (Clain & Leppel, 2001; Ozeren, 2014). As Ozeren (2014) summarizes, several researchers suggest that one explanation for this premium is that lesbian women are more likely to equally allocate household responsibilities.

There is less evidence on whether there is discrimination in hiring based on sexual orientation. A correspondence study conducted to examine whether there was hiring discrimination against gay men found lower callback response to resumes that signaled that the applicant was an officer in a gay campus organization relative to the control group that signaled the applicant was an officer in a left-wing campus political organization. The disparity in callback rates varied by region, with little to no disparity in the West or Northeast (Tilcsik, 2011). In contrast, the correspondence study by Bailey, Wallace, and Wright (2013) did not find evidence of discrimination on the basis of sexual orientation.

Studies analyzing the impact of state laws prohibiting sexual orientation discrimination utilized Census data that identified individuals who cohabitated with a same sex partner and found improvements for homosexual men in weeks worked and wages in states that had adopted those laws (Klawitter, 2011; Baumle & Poston, 2011; Gates, 2017). Martell (2013) expanded that analysis to include single men who identified as behaviorally homosexual and found similar results. Further, Burn (2015) finds varying results based on the type of law—for example, the study only found an improvement in earnings for cohabitating homosexual men if the state law allows plaintiffs to recover damages.

Transgender discrimination is also documented through survey evidence as summarized by Badgett, Lau, Sears, and Ho, (2007). Several states have adopted legislation protecting transgendered workers, and several courts have interpreted Title VII’s prohibition against sex discrimination to include gender identity. The authors are only aware of one study attempting to analyze the empirical effect of these laws or court decisions. Bardales’s (2013) correspondence study finds no difference in transgender discrimination in a city with an antidiscrimination law compared with a city without.

**Expansion of the Reach of Title VII Through Disparate Impact Analysis**

Courts have also expanded the reach of Title VII by determining which seemingly neutral policies have a “disparate impact” on protected classes. For example, employers may ask candidates to agree to a background check, which may disproportionately keep young black and Hispanic/Latino men from being hired. The policies that courts have held to
violate Title VII (or the relevant employment law) are those that have been found to have a detrimental effect on the hiring, compensation, or promotion of minority employees. Similarly, some states and localities have banned policies that may have such a disparate impact.

**Ban the Box Laws**

“Ban the box” refers to limiting questions about a job candidate’s criminal background until near the end of the hiring process. Because black and Hispanic/Latino men have far greater rates of involvement in the criminal justice system, questions about criminal backgrounds at the application stage would serve to disproportionately screen out black and Hispanic/Latino candidates. The EEOC takes the position that requiring employees to report criminal background at the application stage violates Title VII because it has a disparate impact on the basis of race and national origin (U.S. Equal Employment Opportunity Commission, 2012). By deferring such questions until a post-interview stage, the expectation is that employers would make individual assessments about the ability of the individual to perform the job. Several states, cities, and counties have passed such laws, and some companies have voluntarily adopted ban the box policies. These acts are often referred to as “Fair Chance Acts.”

As with many other laws, much of the limited evidence suggests that ban the box laws had the unintended consequence of leading to lower hiring of minority workers. Agan and Starr (2018) conducted a correspondence experiment and confirmed that criminal records are a barrier to employment but also found that the race gap in callbacks increases when ban the box policies are in effect. Doleac and Hansen (2016) find that ban the box legislation decreases the likelihood of employment for young black and Hispanic/Latino men. However, not all studies find these negative consequences. Doleac and Hansen (2017) find that ban the box legislation does not affect migration into or out of these states. Craigie (2017) does not find negative effects, and only finds an increase in public employment for those with criminal backgrounds. Further, Gubernick (2017) analyzed a small sample of public studies conducted by cities including Minneapolis, San Francisco, Durham, and New York—most finding a positive effect. However, as the author acknowledges, these studies are limited, in part by the sample and technique, as all suffer from omitted variables bias.

**Pay Secrecy Laws**

According to a 2001 HRNext survey, more than one-third of private employers had pay secrecy rules—preventing employees from discussing their wages with co-workers. Recognizing that these rules are a limit on employee speech and likely hinder employees from uncovering discrimination, many states and municipalities have passed pay secrecy laws preventing employers from regulating such nondisclosure. Interestingly though, these policies had already been held to violate the National Labor Relations Act—which
prohibits employers from regulating concerted activity in the workplace (Gely & Bierman, 2003).

Although there is little empirical evidence for how these specific laws affect the gender and minority pay gap, there is empirical evidence suggesting it may be a factor. Ramachandran (2012), citing studies such as Hegewisch, Williams, and Drago (2011), summarizes this research, which is generally limited to finding that the pay gap is smaller in unionized industries and in the federal government where pay transparency is instituted. Kim (2015) uses a difference-in-differences approach, finding smaller gender pay gaps for women with high education in states that have outlawed pay secrecy. These studies should be expanded by analyzing the effect of recent legislation and potentially by examining policies adopted by private corporations.

Identifying Discrimination in Litigation—Connecting the Human Capital Model to Identifying Discriminatory Pay Differentials

The economics literature that seeks to identify the sources of pay disparities between groups typically controls for a wide array of characteristics that have been identified, either from theory or empirical evidence, as influences on earnings. The data used in economics publications is selected to be representative of a population of interest and drawn by sampling techniques; in contrast, regressions estimated for litigation purposes will be based on the universe of employees of (or applicants to) a single employer. Many personal characteristics, such as marital status and number of children, will be included in academic studies of earnings as proxies for unavailable productivity variables such as market commitment, investment in on-the-job training, hours restrictions, location restrictions, and time not in labor force when actual work experience is not available. However, such family variables will be specifically excluded from earnings regressions in litigation because these personal characteristics are not legally relevant.

Courts have long accepted that regression analyses can serve an important role in establishing discrimination, and parties often introduce regression analyses in Title VII employment discrimination cases. In contrast to studies done for economics research and to test hypotheses, how extensively to control for variables is typically a subject of heated controversy in the litigation context. Unsurprisingly, plaintiffs will push for inclusion of few variables, whereas defendants will argue for the inclusion of the broadest possible set of variables, no matter how relevant to the job, in the hope that even small correlations of included variables with the indicator for the protected class will result in a coefficient on the protected class that is not statistically significant. A common critique of a plaintiff’s regression analysis—as seen in Wal-Mart Stores, Inc. v. Dukes, 546 U.S. 338 (2011)—is that it did not include every possible variable that may have been related to the outcome (e.g., pay, promotion, or hiring). The Supreme Court recognized in Bazemore v. Friday, 478 U.S. 385 (1986) that it is not required that every variable that could be claimed by
the defendant be included for a regression to play a legitimate role in establishing discrimination. Hersch and Bullock (2014) describe the use and misuse of econometric evidence in employment discrimination litigation and document empirically that invalid critiques of regression models favor defendants, but it is unlikely that courts will adopt a uniform solution to the problems that plague the use of statistics in employment litigation.

**Issues Outside of the Law**

### Independent Contractors

Title VII is structured around the employer–employee relationship. Notably, because independent contractors are not protected under Title VII, there is no legal recourse available to independent contractors who face discrimination from customers or potential customers. What may have once been a minor concern has become a far more consequential problem given the rapid rise in independent contractors. Furthermore, while some independent contractors are genuinely independently employed, misclassification by firms to dodge employment discrimination law is likewise on the rise (Alexander, 2017).

A particular concern in this context is customer discrimination (Bartlett & Gulati, 2016). Under Title VII, firms are generally prohibited from discrimination in hiring based on discriminatory preferences of their customers. The traditional view of customer discrimination is that it would be an unimportant determinant of pay disparities. Under the view of a largely competitive market, the expectation would be that workers in protected classes who would face customer discrimination could sort into producing goods or services that did not involve customer contact. White workers would then also be moved into jobs with customer contact, until wages are equalized between sectors.

But no such market mobility is available to independent contractors. Empirical work documents the existence of customer discrimination in a number of markets. Most of the empirical work on customer discrimination has considered the market for professional athletes, examining the relation between factors such as pay of individual athletes, the athlete’s race, and the racial composition of the locale from which spectators are drawn, and finds evidence of customer discrimination (Kahn, 2000). Evidence in other contexts is more mixed. Using longitudinal data on employees for a retail store with multiple locations matched to Census data on local demographics, Leonard, Levine, and Giuliano (2010) found a small drop in sales in stores located in black communities when the share of black employees increased, which is contrary to the predictions of customer discrimination. Overall, however, they found little evidence that customer discrimination is either pervasive or quantitatively important. Nonetheless, there is evidence of customer discrimination in a number of markets, including hiring of servers at
restaurants (Neumark et al., 1996), tipping of taxi drivers (Ayres, Vars, & Zakariya, 2005), and in online markets (e.g., Ayres, Banaji, & Jolls, 2015; Doleac & Stein, 2013).

The Role of the Private Employer

Given the persistence of the gender and race pay disparities and the inconsistent empirical evidence regarding the effectiveness of the equal employment laws, attention has turned to the role of private employers in addressing this problem. Although no law requires employers to take these steps, almost every large corporation has adopted a diversity program seeking to remedy those disparities. In many cases, these policies involve some form of affirmative action. More recently, private employers have begun putting pressure on other employers that they hire to take significant measures to improve diversity in the workplace. For example, large corporations have started requiring law firms that represent their companies to submit diversity reports and to have a certain number of minorities on the representative legal team.

Little empirical evidence exists examining the effectiveness of diversity programs and affirmative action in private workplaces. However, these same policies have been in effect in the federal government for decades. For example, federal contractors are required to adopt affirmative action programs and to submit reports on the diversity of their employees to the Department of Labor. Leonard (1984, 1989) and Rodgers and Spriggs (1996) all studied federal contractors and found general effectiveness for the employment of blacks, but ineffectiveness for the employment of women. Outside of the federal government and federal contractors, Holzer and Neumark (2000B) found that employers that do use affirmative action to hire or recruit cast a wider net and thus attract more diverse candidates. Holzer and Neumark (2000B) also found that employers with affirmative action policies obtain more information about candidates, leading these employers to be less likely to practice statistical discrimination. Holzer and Neumark (2000A) provide a thorough overview of the affirmative action literature.

Because the adoption of these programs may decrease minority pay and hiring disparities, another important empirical question is how these programs affect the productivity of the firm. An affirmative answer to this question is imperative to incentivize workplaces to adopt such programs. Many studies analyze the performance of workers subject to an affirmative action program compared with others. For example, Penn et al. (1986) and Davidson and Lewis (1997) studied affirmative action in the medical field and found that programs led to weaker credentials on paper but no difference in performance. Holzer and Neumark (2000B) also found no difference in performance.

Though production may not decline, an employer may be more interested in whether such policies boost a corporation’s overall bottom line. Johnston and Malina (2008) found no effect—positive or negative—on a firm’s stock performance by implementing LGBT-friendly policies. The McKinsey consulting firm studied the connection between profitability and gender, racial, and ethnic diversity and found a positive relationship (Hunt, Layton, & Prince, 2015). And as Dobbin and Jung (2011) acknowledge, empirical
studies of the effect of gender diversity on corporate boards on profitability is mixed. As access to data on diversity improves, such studies could add value to identifying whether the market could be influential in reducing discriminatory outcomes even when formal law has shown limited efficacy.

Conclusion

Whether discrimination is the explanation for the persistent differences in compensation and employment between white men and minority workers is a question that labor economists have sought to answer for decades. Further, scholars in the law, law and economics, and economics fields have continually explored the role that regulation has in decreasing those differences. Because theoretical models can predict any possible outcome of whether those differences can be decreased through workplace regulation, including Title VII, and because the empirical literature finds mixed evidence, the efficacy of regulation as it is currently implemented and enforced remains empirically debatable. And although answering these questions remains difficult due to data limitations and confounding variables, scholars should continue to explore these unanswered questions. Further, as state and local regulation becomes more widely adopted, more and more classes of individuals become protected by antidiscrimination laws, and private employers start instituting their own policies to decrease the unexplained differences, scholars have a plethora of new data and opportunities that should be explored.

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Further Reading


The Law and Economics of Employment Discrimination Law


References


The Law and Economics of Employment Discrimination Law


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**Notes:**

(1.) More precisely, employers are only responsible for customer discrimination if they succumb to it or promote it.

(2.) EEOC statistics cited throughout this article can be found.

(3.) The Stanford Open Policing.
(4.) As of 2018, the Second and Seventh Circuits had held that sexual orientation discrimination was sex discrimination under Title VII (Zarda v. Altitude Express, Inc., No. 15–3775 (2d Cir. 2018); Hively v. Ivy Tech Community College, 853 F.2d 339 (7th Cir. 2017)), but the Eleventh Circuit had disagreed (Evans v. Georgia Regional Hospital, 850 F.2d 1248 (11th Cir. 2017), cert. denied, 138 S. Ct. 556 (2017)).

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