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VICTIMS IN THE SHADOW OF THE LAW: A CRITIQUE OF THE MODEL OF LEGAL PROTECTION

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The twentieth anniversary of the 1964 Civil Rights Act marked the end of an era of uncertain progress. Despite dramatic victories in constitutional litigation and the visibility of group-based struggles, civil rights strategies had limited success in initiating major economic and social change.[1] The limited progress has prompted a new sense of realism among groups who experience discrimination—a sense of how little the situation has changed even though overt prejudice may be less prevalent. The modest progress of the civil rights movement has not made "rights-focused" struggles unattractive, however; in fact, there is a proliferation of civil rights strategies

[1] For a longitudinal study of the effects of civil rights reforms on black and white incomes, see Donald J. McCrone and Richard J. Hardy, "Civil Rights and the Achievement of Racial Economic Equality, 1948–1975," *American Journal of Political Science* 22, no. 1 (February 1978): 1–17. These sentiments have been expressed by Coretta Scott King on the twentieth anniversary of the 1964 Civil Rights Act: "'Segregationist' politicians don't stand at the school house door anymore. But segregated housing patterns and more subtle forms of racism prevent equal access to a quality education. . . . All too often 'last hired, first fired' is still the rule for minorities. . . . Recent Supreme Court decisions have shown us how vulnerable affirmative action policies can be when the Court's longstanding commitment to equality is undermined. It also shows how susceptible the . . . [C]ourt is to the winds of political change" (Robert Peer, "Civil Rights Act Is Accessed as a Modest Step," *New York Times* [July 1, 1984]).

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for reform. Organized groups are striving to extend the same legal protections won for blacks in order to prohibit discrimination on the basis of sex, age, and sexual preference and to control sexual harassment and pornography.[2] These groups see such legal guarantees as symbolic victories and as initial steps toward improved social status.

Contemporary antidiscrimination policies are based on a model of legal protection.[3] From this perspective, the law is a powerful and effective instrument. The law provides victims with a tool by which they can force perpetrators of unlawful conduct to comply with socially established norms. The model of legal protection assumes that those who have suffered harms will recognize their injuries and invoke the protective measures of law. Since most antidiscrimination laws rely primarily on victims to identify violations, report them to public authorities, and participate in enforcement proceedings, these laws tacitly assume that such behavior is reasonably unproblematic. In other words, because protective laws place responsibility on the victim to perceive and report violations, they assume that those in the protected class can and will accept these burdens.[4]

[2] For an example of how the antidiscrimination strategy is translated into legal protection for sexual harassment, see Catharine MacKinnon, *Sexual Harassment of Working Women* (New Haven, Conn.: Yale University Press, 1979).

[3] The constitutional revolution arising from the civil war established a method of federal intervention that forms the "seeds of failure" within present-day antidiscrimination strategies. See C. Vann Woodward, "Seeds of Failure in Radical Race Policy," in *New Frontiers of the American Reconstruction*, ed. Harold Hyman (Urbana: University of Illinois Press, 1966); Harold Hyman and William M. Wiecek, *Equal Justice under Law: Constitutional Development, 1835–1875* (New York: Harper & Row, 1982); Stanley Kutler, *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1968); Arthur Bestor, "The American Civil War as a Constitutional Crisis," *American Historical Review* 69 (1964): 327–52. As the grand design of reconstruction policies was met with increasing obstructions and violence, the protection of the black citizen was delegated to enforcement by the courts. This marked the end of the duty of reconstruction politicians to scrutinize civil rights' protection and the beginning of the reliance on legal procedures that were viewed as effective remedies. The moral purpose of the reconstruction was lost to faith in legal effectiveness. The black citizen, the "initial and primary beneficiary" of civil rights law "became all but invisible" (Hyman and Wiecek, 509).

[4] This is an idealization of the model of legal protection as it reflects the historical purposes of antidiscrimination policies. This model and its critique have been applied to other areas of law: Anthony Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1977); Joseph Gusfield, *The Culture of Public Problems* (Chicago: University of Chicago Press, 1981); Martha Fineman, "Implementing Equality: Ideology, Contradiction, and Social Change," *Wisconsin Law Review*, no. 4 (1983), 789–886. Legal protection also reflects assumptions in dominant research paradigms in law and society. See, for proactive law, Donald Black, "The Mobilization of Law," *Journal of Legal Studies* 2 (1972): 125–49; dispute processing, e.g., Richard Abel, "A Comparative Theory of Dispute Institutions in Society," *Law and Society Review* 8 (Winter 1973): 217–315. It also has broader significance in legal theory, e.g., the work of the nineteenth-century German jurist Jhering, and instrumental strains of legal realism; see Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930).

Research on antidiscrimination policies has often relied on the model of legal protection, and, as a consequence, it has been uninformed by the social-situational viewpoint of women and men of color. Strategies of equal protection may inadequately address the burdens imposed on women and men of color because they accept the authoritative discourse of law rather than question the compatibility of legal rules with everyday life. From a feminist perspective, legal discourses are problem-solving approaches that reflect the ideology of the powerful and ignore the realities of the powerless.[5] The acceptance of a situation of sexual or racial discrimination as a legal problem (a bipolar, rights-oriented, isolated dispute) structures the interpretation for both the participants and outsiders. In such a system interaction with the law is alienating for social victims just as the language of legality is alienated from everyday discourse.

The voices of the excluded classes of blacks and women within Western cultures have been quieted in academic work influenced by doctrinal analysis and the methodological framework of the dispute processing paradigm.[6] This project takes on as its central focus the struggles of women, and in particular the life situations of women of color, because these struggles bear more relevance to the implementation of antidiscrimination policies than the abstract world of legal enactments. The image of the victim[7] portrayed by this study is a product of contemporary conditions of sexual and racial oppression: many respond in an ineffectual and defensive manner to a complex network of victimizations and a few (who are exceptionally prepared for struggle) stage dramatic battles against discrimination. The study examines the choices discrimination victims make in light of the perceived social constraints and the vision of protective law. Unlike conventional legal analysis that magnifies the authority of legal rules vis-à-vis other social constructions, these in-depth portrayals of responses to discrimination illustrate how the link between economic, social, psycho-

[5] For example, Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982).

[6] There are exceptions, including studies focusing on disputing outside of the contemporary American context; see, e.g., Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada," *Law and Society Review* 12 (Fall 1977): 5–126. For a study within the U.S. context, see Sally Merry, "Going to Court: Strategies of Dispute Management in an Urban Neighborhood," *Law and Society Review* 13 (Summer 1979): 891–924. Both articles attempt to examine attitudes toward law without imposing the model of legal protection.

[7] "Victim" is used in this context to refer to the diminished role created and characterized by the law, government bureaucrats, and social services directed at serving the needs of the disadvantaged. The word "victim" is used with hesitation, since the word evokes and reinforces its own social reality. The portrayal of victims within the study attempts to appreciate their strength under extreme conditions of oppression. The powerful and the powerless cannot be talked about in isolation of each other: the political psychology of the victim is constituted from exchanges between victims and those who impose their authority.

logical, sexual, and legal roles creates an ethic of survival that precludes the protective role of law.

The research project

The initial source of data for this study was a household survey designed to measure the incidence of civil disputes. In the survey, conducted by the Civil Litigation Research Project (CLRP) in 1980, a sample of 560 discrimination claims was obtained from approximately 5,000 households. Respondents were asked if they had experienced "illegal or unfair treatment" because of their "race, age, sex, handicaps, union membership, or other things."[8] In this way, it was possible to obtain a sample of discrimination grievances that had not reached courts or public agencies. Preliminary analysis indicated that approximately half of the aggrieved individuals did not make a claim to the other party, nearly two-thirds did nothing further to rectify their perceived mistreatment, and only a very small percentage had achieved successful resolution of their claims.[9] Discrimination grievances had a significantly lower rate of escalation into court cases than civil matters such as contract disputes or landlord-tenant problems. The size of the gap is indicative of the more problematic relationship between victims and the law in discrimination cases compared to other civil cases. This study began with the anticipation that to bring the complaint into the realm of public action forced victims to encounter deeper and more encompassing conflicts of racial, gender, and social identity than complaints arising from relationships defined by legal roles (i.e., landlord/tenant). What accounts for the apparent acceptance of defeat among those who experience discriminatory treatment? Why is it unlikely that those who experience discrimination will take their claims to courts or other legal channels?

Although the survey probed for open-ended responses to the question

[8] The initial survey was conducted by the CLRP by telephone in five federal judicial districts: South Carolina, Eastern Pennsylvania, Eastern Wisconsin, New Mexico, and Central California. The districts were chosen to maximize geographical and demographic diversity. The respondents were asked whether anyone in their household had experienced one or more of a list of problems in the past three years. If the respondents indicated they experienced a discrimination problem they were administered an additional "problem" questionnaire with forty-four closed-ended and open-ended questions. The data reported in table 1 are derived from open-ended questions included in the survey that were previously uncoded. The methodology is described in Herbert M. Kritzer, "Studying Disputes: Learning from the CLRP Experience," *Law and Society Review* 15, no. 3/4 (1980–81): 503–24.

[9] Richard E. Miller and Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," *Law and Society Review* 15, no. 3/4 (1980–81): 525–66. The aggrieved party makes a "claim" when she communicates her entitlement to the party responsible for the perceived harm.

"Why didn't you complain?" it could not provide the depth necessary to present a view of discrimination from the victim's perspective. A subsample of eighteen persons in Milwaukee and Los Angeles were selected for in-depth interviewing.[10] The format of the interviews was unstructured but directed at probing for interpretations of the discrimination incident, people's attitudes about themselves and their social status, and their justifications for their beliefs and actions.[11] The interviews were conducted from April to October 1982. Each face-to-face interview was two to four hours long. The participants in the interviews are representative of those affected by the social inequalities and the pattern of discrimination in American society: six black and Hispanic women, nine white women, and three black and American Indian men.[12]

The response to discrimination

In the civil litigation research project survey on incidence of civil disputes, each individual who perceived they experienced discrimination and made no protest was asked to explain their decision with the question "Why didn't you complain?" In response to this question, participants denied the worthiness of their own interests in comparison to their opponents' (table 1). Some respondents accounted for their inaction in terms of the harm their opponent could impose on them (e.g., responses 5, 8, and 9 in table 1). Others acknowledged they should have done something, yet either blamed themselves for not pursuing the dispute or accepted the inevitability of the situation (e.g., responses 1, 2, 3, 4, and 11 in table 1). The explanations focus on an interpretation of immediate circumstances rather than norms or rights; for example, the expense of legal action and the

[10] The intensive interviewing was conducted in two judicial districts: Eastern Wisconsin (Milwaukee metropolitan area) and Central California (Los Angeles County). Interviews were attempted with all respondents experiencing discrimination problems in the two districts. Cases were eliminated if an individual had refused to provide their name, address, and phone number and if their description of the problem was inappropriate.

[11] The prototype of this method of research in political science is Robert Lane, *Political Ideology* (New York: Free Press, 1962). A recent study of similar design is Jennifer Hochschild, *What's Fair? American Beliefs about Distributive Justice* (Cambridge, Mass.: Harvard University Press, 1981).

[12] The characteristics of the interviewees were as follows: race, nine white, five black, four Hispanic and American Indian; sex, fifteen women, three men; type of problem, eleven employment, two employment and housing, two housing, three other; type of discrimination, nine sex, seven race, one age. These characteristics correspond to the overall CLRP sample in which the responses were distributed as follows: type of problem, 56 percent employment, 12 percent education, 18 percent housing, 14 percent other; type of discrimination, 13 percent age, 22 percent sex, 31 percent race, and 34 percent other. There was a disproportionate number of women in the intensive interview sample because they had a higher response rate.

TABLE 1 **RESPONSES TO THE QUESTION: "WHY DIDN'T YOU COMPLAIN?"**

Coded Responses*	**Responses**	
1. It would do no good/end results the same/a way of life	35	(19.9)
2. Not worth it/not a major problem	18	(10.2)
3. Need to solve the problem immediately/situation easily replaceable	17	(9.7)
4. Gave up/I don't know why I didn't complain/I'm easy going	17	(9.7)
5. Fear of retaliation or being known as a troublemaker	16	(9.1)
6. Don't know who to complain to	14	(8.0)
7. Could not prove/no evidence	13	(7.4)
8. Avoid dealing with them in the future	12	(6.8)
9. Don't want to cause trouble	9	(5.1)
10. Excessive time or cost	9	(5.1)
11. Rules cannot be changed	8	(4.6)
12. Other	8	(4.6)

NOTE.—Numbers in parentheses are percentages.
*Open-ended responses were coded into these twelve categories.

inability to prove discriminatory motives (e.g., responses 6, 7, and 10 in table 1).[13]

The model of legal protection would suggest that the failure of persons to use the law stems from the victims' inability to serve their own needs: lack of information and knowledge about their rights and their limited resources for utilizing legal channels. These persons were not rejected by unresponsive agencies, deterred by the unavailability of lawyers, or barred from pursuing legal claims by technicalities. Although the anticipation of these factors played a role in their decision making, they did not take action primarily because they legitimized their own defeat. For the most part, the problem is never conceptualized in terms of public action. In this universe of discrimination problems far removed from legal fora, the labeling of acts as discriminatory and the eventual deflation of the conflict by apology or self-blame serve as coping mechanisms for suppressing burgeoning discontent.[14]

These data reveal a general pattern of response but provide limited insight into the social-psychological situation. More adequate explanations

[13] Attribution theory attempts to explain why individuals blame themselves for the dispute (i.e., the need to maintain perceived control); this provides a limited psychological explanation for behavior, but it does not raise questions about the consequences of self-defeat. See Dan Coates and Steven Penrod, "Social Psychology and the Emergence of Disputes," *Law and Society Review* 15, no. 3/4 (1980–81): 655–80. For an interpretation similar to my own, see Sally Merry and Susan S. Silbey, "What Do Plaintiffs Want? Re-examining the Concept of Dispute," *Justice System Journal* 9, no. 2 (1984): 151–78.

[14] Simone de Beauvoir has described this as a "rite of justice," which manifests society's respect for each citizen's individuality. When procedural justice does not allow for a meaningful expression of individual rights, this rite of justice becomes a ritual of degradation (Simone de Beauvoir, *The Ethics of Ambiguity* [Secaucus, N.J.: Citadel Press, 1980]). See also the framing of the problem as the stultification of individual action in Murray Edelman, "Art as Liberating Political Communication," *Institut für Höhere Studien Journal* 6 (1982): 1–15.

for legal action or inaction can be found in participants' responses examined within the context of their lives: the social exchange between authorities and those who experience discrimination, the social and psychological mechanisms that stifle conflict, and the role of legal ideology in influencing individual choice. In combination with the general survey data examined above, intensive interviews can elaborate the victim's view of social reality and their perception of alternative courses of action.[15]

Rather than treating participants' socially constructed viewpoints as mere reflections of elite ideology, the interpretations of the interviews in this study were focused on strategies taken by individuals engaged in legal conflict.[16] The specific objectives of interpretation were: (1) to develop a meaningful understanding of the conflict in the context of individual lives; (2) to analyze the structure of their rationalizations for action or inaction; (3) to discover when and how law enters personal spheres; and (4) to understand power at the extreme points of its exercise.[17]

[15] The interviews were guided by forty questions on the following topics: (1) the circumstances of the discrimination incident; (2) the relationship of the incident to other acts of discrimination or other forms of perceived mistreatment; (3) justifications for the respondents' actions in response to the incident; (4) their feelings about fairness, competition, merit, and status inequalities; (5) their attitudes about their own self-worth and competence; (6) their political mind: degree of trust in government, political alienation and cynicism, extent of political participation, and attitudes toward leaders and authority; (7) their knowledge of the political and legal process and their interpretation of antidiscrimination law; (8) the consequences of the actions they took in response to the discrimination problem and their evaluations, in retrospect, about how their strategies in the conflict situation were modified over time; (9) their beliefs about the effectiveness of political and legal action.

[16] This issue is especially problematic given that this study does not rely on an objective definition of discriminatory treatment. To what extent are these individuals' perceptions a reflection of ideology or "unmasked" personal knowledge? In terms of dispute processing methodology, see David M. Trubek, "The Construction and Deconstruction of a Disputes-focused Approach: An Afterword," *Law and Society Review* 15, no. 3/4 (1980–81): 738–40; also see Karl Mannheim, *Ideology and Utopia* (New York: Harcourt, Brace, Jovanovich, 1936); Georg Lukács, *History and Class Consciousness* (Cambridge, Mass.: MIT Press, 1968); Herbert Marcuse, *One-Dimensional Man* (Boston: Beacon Press, 1964). These issues have also been addressed within the dispute processing framework. See, e.g., William Felstiner et al., "The Emergence and Transformation of Disputes," *Law and Society Review* 15, no. 3/4 (1980–81): 631–54; and Lynn Mather and Barbara Yngvesson, "Language, Audience, and the Transformation of Disputes," *Law and Society Review* 15, no. 3/4 (1980–81): 773–821.

[17] This is a brief summary of the methodological framework for the interviews. These objectives draw eclectically from theoretical writings: Ralf Dahrendorf's concept of "life chances," *Life Chances* (Chicago: University of Chicago Press, 1979); Bruno Bettelheim's social-psychological understanding of the structure of rationalizations in "extreme situations," *Surviving* (New York: Vintage, 1980); Niklas Luhmann's analysis of law in interactional systems, "Communication about Law in Interactional Systems," in *Advances in Social Theory and Methodology*, ed. K. Knorr-Cetina and A. V. Cicourel (Boston: Routledge & Kegan Paul, 1981); and Michel Foucault's microphysics of power, *Power/Knowledge* (New York: Pantheon Books, 1980).

The creation of illegitimate bonds

Discrimination conflicts usually occur in situations where there are asymmetrical power relations. In most instances of discrimination the perpetrator acts in an authoritative role (employer, landlord, or teacher, e.g.). In these roles people wield power by virtue of their expertise, their ability to enforce orders, the permanence of their positions, or their mystique.[18]

The participants in this study who experienced discrimination often portrayed perpetrators as tyrants. Several individuals referred to the "regal" qualities of those who discriminate against them. Mrs. Perkins, when denied a job in a department store, reacted toward her employer in these words: "She is very attractive. She'd wear clothes like she stepped out of a spring garden. She'd walk like a model; she was something else. You'd have to see her. She had an office in the back of the store. She sits like she's the *Queen*, Queen Elizabeth. Like you'd have to bow down to her. That's the feeling I get when I see her." Mrs. Perkins was intimidated by the personnel officer's regal appearance. She was particularly sensitive to how the environment surrounding the woman was designed to impress her "subjects" and protect her authority. Mrs. Perkins was, in fact, afraid to begin a disagreement because she felt she lacked the language skills and the social presence to confront her opponent.

Carmen also described her supervisor on the job in regal terms: "He was a bit of a *tyrant*—screamed a lot and yelled a lot. The type of person who would make you cry, then apologize instantly. Like, heck, I am the boss and the ruler, and I do things my way, always." Carmen considered her employer's demand for total control immature, like the actions of a brutal ruler. Even though she responded more cynically to the regal manner than did Mrs. Perkins, she felt caught in an explosive and abusive exchange.

Other tyrant-like employers achieved total control through verbal abuse. Nora believes that she never received an explanation for her pay differential because "to be quite honest with you we were terrified with the owner of the company. He ran a very tight ship and if you disagreed with him you were sure to cause nothing but trouble." The tactic of a less effective tyrant (a military dictator), Virginia's supervisor, was to impose a chain of command that allowed the top ranks to reserve credit for accomplishments. To Virginia he was the "chicken colonel" (he was a former army colonel) because he could exercise authority only behind closed doors (but

[18] For a similar analysis, see Richard Sennett, *Authority* (New York: Vintage, 1980); for application to other forms of victimization see Bettelheim; Stanley Elkins, *Slavery* (Chicago: University of Chicago Press, 1959); Susan Griffin, *Woman and Nature* (New York: Harper & Row, 1978); Eugene Genovese, *Roll, Jordan, Roll* (New York: Vintage, 1976); Malcolm X, *The Autobiography of Malcolm X* (New York: Ballantine Books, 1965).

paper-thin walls); Virginia was his "secretary," and so he claimed credit for her work.

The authority figures described by these participants behave according to Machiavelli's instructions to *The Prince*: they control by fear and simplification of reality. As tyrants the perpetrators are brutal simplifiers of the situation through appearances that disguise realities. The effectiveness of their rule according to Machiavelli rests on the subject's willingness to be "always taken by what a thing seems to be and by what comes of it."[19] The employee believes "what seems to be"—that her supervisor exercises royal supremacy—and "what comes of it"—the finality of the authority's total control. All conflicting interests and demands are subdued by the employee's retraction in fear. The bonds of the tyrant image are powerful because the disrespect for royalty is self-deceptive; it allows the subjects to regard their superiors as immature and arrogant and yet justifies their own impotence. Tyrants are not legitimate rulers; yet within these demoralized bonds the illegitimacy of the rulers sustains rather than defeats them. The image of the tyrant transforms the exchange between the perpetrator and victim into a situation where the perpetrator controls and the victim transgresses.

The potential for explosion reinforces the inviolable bonds of the victim/oppressor relationship. Since the expression of anger is unacceptable in bureaucratic settings, there are no minor infractions within normal ranges of behavior: there is only rebellion and submission.[20] The victims of discrimination, therefore, perceive their own reactions to injustice as explosive and extreme. Most of the individuals admitted to extreme anger (often violent in intent), which persisted for long periods of time. A seventy-two-year-old woman involved in an age discrimination dispute said in reference to her employer: "I wanted to punch her. I was angry for a couple of weeks. I would like to take a good swing at her and teach her a couple of things. . . . I'd still [two years later] like to punch her." Another woman, after being fired, claimed: "I felt like bombing the place." John indicated that he was so angry that he could not deal with it verbally; if he expressed his rage, he would have to "take it out on the street." Debbie, in a sexual harassment dispute with a fellow employee, felt: "There are times I would love to punch him out—to get out the frustration." Patricia, after being fired from a newly acquired job because they were "looking for a white person" to fill the position, was angry for months. Two to three years afterward it would make her angry whenever she thought about it. In only

[19] Niccolo Machiavelli, *The Prince*, in *Masterworks of Government*, ed. L. D. Abbott (New York: McGraw-Hill Book Co., 1947), 162.

[20] See Genovese; and Franz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963).

one case did anger lead to physical violence: when a black woman slapped a white, fellow employee who had made a racist comment.

These people seem to respond to the violation of their dignity within these power relations with intense anger, expressed in the very terms that had been prohibited—immediate physical retaliation—but the result was that anger silenced the victims.[21] They were intimidated by the social unacceptability of their anger; therefore, they confronted their emotions by exercising control. As Patricia explains, she can only remain angry if it is "vital," otherwise if she let herself get angry, "then I'd be angry all the time." Others admit they "don't know how to fight," they "stay quiet," "calm down," or "absorb a lot of anger before [they] let go." These rationalizations about the desirability of control may stifle the expression of injustice in any form.

An ethic of survival

The attitude about their successes and failures of those individuals who confronted discrimination is best described in Virginia's words: "The main measurement of success [was] basically survival." The ethic of survival means different things to different people, depending on how they define their responsibilities and their bases for self-respect and how they view their struggles and needs.[22]

Carmen, for example, considers her encounter with discriminatory treatment an inevitable event in the life of a woman of color. Carmen, who worked as a clerk in a discount department store for almost ten years, discovered that after a promotion to a more responsible position as an area supervisor her salary was lower than those of men in the same position. Carmen chose not to make a formal complaint. She made this decision because of a complex set of constraints that reveals that her powerlessness in obtaining equal pay is linked to her powerlessness in other domains. She needs the job because she has responsibilities as a single parent for four children. She also recognizes that in any dispute it would be "me against a

[21] When victims, consumed by anger, avoid face-to-face confrontations, they lose the opportunity to exercise their authority. When Patricia returns to pick up her final paycheck, she finds her employer "embarrassed" like "someone who made a decision they are not proud of." Patricia felt that if she started a confrontation the employer "would get very upset." This confirmed Patricia's suspicions about the discriminatory nature of the firing, yet she did not pursue the matter with the employer. John describes a similar incident with his district supervisor: "All of a sudden he gets loud and tells me he is not prejudiced, I didn't ask for that. I just looked at him, walked out, and I let it go at that . . . that let the cat out of the bag."

[22] For an interesting analysis of how an individual's ethic of survival is defined in oppressive situations, see Barrington Moore, *Injustice* (New York: M. E. Sharpe, 1978); Robert Coles, *Children of Crisis* (Boston: Little, Brown & Co., 1964); and Robert Coles and Jane H. Coles, *Women of Crisis* (Boston: Little, Brown & Co., 1978).

large corporation," and then it becomes "your word against [a more powerful] somebody else's." There are risks involved in "not knowing what the outcome will be," and she has reason to suspect the chances for successful resolution are low, having seen "too many people let go for the things that make you wonder." Carmen justifies her acquiescence by explaining that she is like many people who, when something bad happens, "get it out of the way and don't make waves."

She avoids the full impact of accepting the definition of the problem as discrimination, and thus identifying herself as the victim, with careful distinctions about the nature of her mistreatment. Her employer may have discriminated against her "without even realizing it." It is only when she hears certain insinuations that women are incompetent at their jobs that it gains conscious importance. Carmen attempts to avoid the label of victim by denying her group origins. While it is impossible for her to deny her womanhood, she can disavow her ethnic identity because of her coloring and married name. Therefore, she is not vulnerable to others who would say, "She is Puerto Rican, so we treat her *this* way." Discrimination is to Carmen something "they are constantly *pushing at you.*" Avoiding acts of discrimination given its ever-present nature is impossible; what is dreaded is the status of "being a victim of discrimination," a role that seizes and marks its possessor.

Despite her deliberate efforts to see her mistreatment as something other than discrimination, she confronts the reality of her circumstances, that she was doing a good job and yet not receiving just rewards. For her to acknowledge an undeniable injustice she must come first to believe that she has failed to live up to some preconceived standard of self-protection, that she was by her own estimation "not that brave of a person." Confronting discrimination under these circumstances is a no-win situation that "depends upon you as an individual and how much you can take" (whether you are enduring precomplaint unjust treatment or postcomplaint retaliation). When Carmen feels depressed about what has happened to her, she has to remind herself that she "has nothing to be ashamed of."

Ironically, at the heart of the trap of victimhood is the strong and positive dimension to Carmen's self-evaluation of her experiences. Carmen prides herself on her ability to downplay the problem and act realistically. She is proud of her independence and her success in the personal domain of her family life. The pride in her own strength is linked to her identity as a woman. For example, in reference to her accomplishment of maintaining a house on her own for five years she proclaims, "I keep it going myself, I did it myself, a *woman.*" She finds it necessary to remind herself that a part of her identity, her womanhood, is capable of surviving. Thus Carmen draws strength from her ability to endure, yet her energies are drained into the act of survival.

John's ethic of survival is "making it through the rain." Like Carmen,

his primary sense of responsibility is to his child, though one of his complaints about the ordeal of discrimination on the job is that it made him more irritable around his young daughter. John believes that each person has the responsibility to do the job their employers assign because "they are the ones that give me my paycheck, you should do them right." When the employer is discriminatory it does not change the basic requirements of the relationship: "What right does someone have to hassle me like that when I am doing my job? I took it from them, but I don't take it from very many individuals—they give me my paycheck; [with] individuals my boiling point is a little lower."

This sense of responsibility is revealed in the two ways in which he demonstrates his loyalty. First, despite opportunities to "steal from the company," John has "a little wishy-washy" code of honesty that prevents him. Second, he feels more loyalty to the employer than to the union, not because he believes the company serves his best interests but "because the union can only help so much." He expects that if he filed a complaint with the union the company would investigate him and they would find a reason to fire him whether they had grounds or not. Even though he does not expect fair treatment from his employer, he has even less faith in his co-workers' support.

His overall philosophy is "I don't need a lot." John does not attribute his ability to endure the strain of a discriminatory situation on the job to strength of character but, rather, to the ability to "weather the storm." By his own estimation, in his weakness he endures: "My personality is what kept my job, my color created the problem. If it came to a point where I felt less than a man for taking the abuse, I would have quit; [as things were] if I had quit I would have felt less of myself."

These two portrayals illustrate how victims of discrimination protect themselves from the hardships imposed by relying on an illusive and private honor. Their sense of honor or pride, seen in the context of how they create opportunities and constraints within an ethic of survival, is a justification to submit personal needs to the demands of powerful institutions. Thus the discrimination victim upholds the appearance of justice even within a system that denies her equality. The victim's ethics are maintained within an individual, self-defined realm. Institutional and bureaucratic grievance procedures invade this personal ethic and strengthen the illusion that institutions are fair and that discrimination is not prevalent as long as the victims of discrimination believe their individual misfortune stems from the acts of aberrant individuals and from business practices.[23] Honor subdues aggression—as in John's commitment to

[23] Lukács, speaking of the bureaucrat's conscientiousness, saw that it is "precisely his 'honor' and his 'sense of responsibility' that exact his total submission. . . . It points to the fact that the division of labor . . . invades the realm of ethics. . . . This strengthens the reified

honest dealings with a firm that institutes racially discriminatory business practices. Pride subdues powerlessness—as in Carmen's need to "like herself" when she is powerless to combat pay differentials she acknowledges as unfair. When neither institutional practices nor the law of equal opportunity affirm a moral commitment to standards, the victims of discrimination cannot find purpose beyond their individual fate.[24]

The discrimination victim's view of the law

Claiming discrimination

In order for an individual to press a claim that unfavorable treatment stems from discriminatory practices she must assume the role of the victim. This transforms a social conflict into a psychological contest to reconcile a positive self-image with the image of the victim as powerless and defeated. Deciding whether or not to make a public claim of discrimination thus becomes intertwined with the process of reconciling these self-images.[25]

In this study, those interviewed discussed the discrimination they experience in qualified terms. Some approached it by denying self-involvement: "Sometimes I don't even feel like I was personally being discriminated against, as if they did not know who I was or saw who I was." Another approach characterized acts of discrimination as the result of personal likes and dislikes: "You come across it so often it is really ridiculous."

To experience discrimination, by these accounts, is to sense one's own invisibility and to grasp the reality of differential treatment. The women perceived that neither the mistreatment nor their response to it focused on a deliberate attack against them, but injustices resulted from being discounted or ignored.[26]

The legal concept of discrimination has a historical and analytical basis in the identification with a group cause.[27] To put this concept into opera-

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structure of consciousness . . . as long as the fate of the worker still appears to be an individual fate" ([n. 16 above], 99–100).

[24] Max Weber, *Economy and Society*, 2 vols., ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1968), 2:884–85.

[25] The law creates a juridical person in its image. See Joseph Vining, *Legal Identity* (New Haven, Conn.: Yale University Press, 1978); John Noonan, *Persons and Masks of the Law* (New York: Farrar, Strauss, & Giroux, 1976).

[26] Ralph Ellison, *Invisible Man* (New York: Vintage Books, 1957); Gordon Allport, *The Nature of Prejudice* (Boston: Beacon Press, 1954).

[27] Owen Fiss, "Groups and the Equal Protection Clause," in *Equality and Preferential Treatment*, ed. Marshall Cohen et al. (Princeton, N.J.: Princeton University Press, 1977), argues that the norms of the judicial craft accentuate antidiscrimination laws' narrow focus on objectivity and individualism. Fiss describes, on the doctrinal level, the highly individualistic

tion, so to speak, involves finding a basis for the claim in terms of the individual's group identity.[28] Yet, these respondents resist perceiving their situation as the result of their group identity. In some cases, they depersonalize their mistreatment rather than identify with the group fate: "[Discrimination] depends upon who you are working for, changes in supervisors [solve the problem]"; "[discrimination] occurred because he has a problem and I was sort of a scapegoat." Or "I expected [discrimination]; that's the way men treat women." These statements disassociate the experience of discrimination from group identity, causes, or concerns, either by emphasizing the idiosyncratic nature of the perpetrator's actions or by universalizing the presence of discrimination. Several respondents supported these rationalizations by pointing out that everyone is vulnerable to some type of discrimination. A black man explained: "I don't walk around with my head buried in the sand. People discriminate against anything and anybody." Two respondents referred to discrimination directed at their "fat relatives" as examples of the prevalence of discrimination. A few men even attempt to defend discrimination as unavoidable: "I even discriminate against Mexicans." In sum, the respondents felt that it was self-defeating to associate an illogical and irrational process of mistreatment with a real cause. When someone did state their claim in terms of group concerns, they met resistance: "Most of the people I talked to thought I overreacted [when I complained of discrimination] . . . [I think it was] because I was labeled a feminist."

Even though these individuals express ambivalence about claiming discrimination publicly, they believe they have been seriously harmed. Their ambivalence places them in a self-imposed trap. They struggle with an image of themselves and their actions that produces an uncomfortable sense of exceptionality.[29] While antidiscrimination law ostensibly promotes

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nature of antidiscrimination law given the designers' deliberate protection of persons rather than classes and the court's rejection of natural classes. In the Supreme Court's interpretations, references to groups are continually scrutinized to assure they do not offend the value of individuality.

[28] Realizing discriminatory treatment is like recognizing a group-identified mask that partly reflects the identity of the wearer, racial or sexual stereotypes, and the image of the victim found in antidiscrimination doctrine. Sylvia, who encountered discrimination in school, felt that without discrimination "I would have thought more of me, myself." She was uncomfortable about being labeled as "Latin" or "Mexican" by other students. She explained, "Sometimes it would hurt, sometimes it would make me feel funny, *and well, I am Mexican.*" The all-inclusiveness of the label demeans her, and at the same time, the label deeply reflects her social and personal self. What seems alien at the same moment is essential to her being. See Franz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1967).

[29] Hannah Arendt describes the need to escape from the group identity in her biography of Rachel Varnhagen (1771–1833), a woman caught in the dilemmas of a period of German-Jewish assimilation. Arendt assesses the mood: "A political struggle for equal rights might have taken the place of a personal struggle . . . [but] Jews did not even want to be emancipated

dignity and universal human rights, in practice individuals may prefer the dignity found in their anonymity to an attempt to exercise their rights under such law.[30]

The reluctance to move beyond the perception of discrimination to claim formally the protection of antidiscrimination law is partly due to a resistance to the negative image of the victim. Moreover, this ambivalence deflects potential conflict because they choose not to categorize their mistreatment within narrow boundaries of discriminatory activity, thereby accepting the power of the law but restricting its domain.[31] Their reluctance to cross the boundary between normalcy and victimhood forces them to justify the perpetrators' actions. Those who transgress the social boundaries of discrimination experience sanctions—the label of the victim (the powerless outsider) or the label of a group stereotype (the potential zealot).

The intruding presence in everyday life

Despite the fact that victims are reluctant to use the law, they cling to the belief that it benefits them. Mrs. Perkins, when asked to report her age on an employment application, explained, "I told her I thought you weren't asking that anymore." She also indicated that she was sure she could "report her . . . right then and there." She knew that "they weren't supposed to consider your religion, age, your color, or whatever the heck it was and she sure did." All the respondents, when asked if they felt the law was on their side in the dispute, suggested that, at least in principle, the law would have supported their position. For example, one respondent involved in a housing dispute explained: "I knew I had the right. It made me feel good, that I knew if I wanted to [I could make a claim]."

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as a whole; all they wanted was to escape from Jewishness, as individuals if possible. Their urge was secretly and silently to settle what seemed to them a personal problem, a personal misfortune"(Hannah Arendt, *Rachel Varnhagen: The Life of a Jewish Woman* [New York: Harcourt, Brace, Jovanovich, 1974], 7).

[30] Tocqueville warns that democratic freedom can silence the proclamation of right: "The body is left free and the soul is enslaved." The "master" says: "You are free to think differently from me, and to retain your life, your property, and all that you possess; but you are henceforth a stranger among your people. You will retain your civil rights, but they will be useless to you . . . for you will never be chosen by your fellow citizens. . . . You will remain among men, but you will be deprived of the rights of mankind." The claim of right, Tocqueville explains, brings with it the severest sanction in a democratic society (Alexis de Tocqueville, *Democracy in America*, ed. Richard D. Heffner [New York: Mentor, 1956], 118).

[31] For example, their reluctance to pursue claims is fostered by the perception that in the legal realm their accounts are worthless without "objective proof." They believe the law will not recognize their claim because "everything is verbal," "there is no formal bookkeeping or job descriptions," and "everything went on behind closed doors, nobody heard what I asked him." These statements devalue their self-knowledge in relation to the opponents' administrative procedures and the legally imposed standards of burden of proof.

Their assumption that there are absolute guarantees in the law seems to contradict their attitudes toward the law once it is employed.[32] After they engaged the apparatus of law or even considered invoking it, the respondents saw legal resolution as a risky course of action. They feared legal intervention would worsen their situation.

The prospect of legal intervention heightened a sense of powerlessness and produced a fear of loss of control. Nora believed that the decision to go to court was like opening up a "Pandora's box." Delma described her feelings: "I might have taken it to court; I might have done that. I went to the [unemployment office], and she confronted me and I felt so helpless. It was just his word against mine, and I am dumb . . . and there is nothing I can do." The unemployment office was a preview of the confrontation in court, where she would feel exposed, forced to defend herself with nothing other than her own words and intelligence.

Victims of discrimination also fear that their powerlessness will be accentuated in the legal forum because the legal disposition will address only a part of the problem.[33] As one respondent reasoned, the law will "not represent personality: it is cut and dry—there [is] not room for emotion." Behavior and loyalties may change when allies are asked to participate in legal proceedings: "[Going to court] would mean that people would have to speak up. In the lounge they might say you are really getting screwed. To say that in a court of law is different. When your neck is on the chopping block, you ain't going to start talking."

Legal intervention also had the effect of restructuring conflict, according to respondents, by provoking extreme hostility.[34] The respondents claimed that they avoided legal action in order to maintain civilities or remain employed: "If I didn't want to work there anymore, then I think I

[32] Antidiscrimination law is potentially broad in its application. For example, in Title VII discrimination is defined broadly, including situations where employers fail to hire, to discharge, or otherwise discriminate with respect to compensation, terms, conditions, and privileges of employment and practices that "limit, segregate, or classify . . . in any way that would deprive or tend to otherwise adversely affect his [*sic*] status." The wording of the statute suggests the law was designed to prohibit subtle forms of discrimination. The statute, however, has been narrowly applied by the courts because the burden of proof rests with the plaintiff. A prima facie case is established when the plaintiff shows "(i) that he [*sic*] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications" (McDonnell Douglas Corp. v. Green, 411 U.S. 792 [1973]). Factors that may invalidate a claim include failure to bring a claim within specified time limits, failure to pursue proper administrative channels, inability to prove discriminatory impact of tests or other procedures, and the employer's priority to maintain practices that are "business necessities."

[33] See W. Lance Bennett and Martha S. Feldman, *Restructuring Reality in the Courtroom* (New Brunswick, N.J.: Rutgers University Press, 1981).

[34] Luhmann (n. 17 above).

would take legal action." When law is effective, it is at best a stopgap measure, to use when defeat is already certain to salvage a situation after one is resigned to defeat. The respondents felt that the law can only delay what they perceive as the inevitable revenge.[35]

Several respondents revealed that when they were confronted with the prospect of initiating a legal action they worried about their own guilt, as if they were charged with criminal offenses. Delma, while considering whether to file a complaint, mused, "Maybe it is me, maybe I am doing something wrong." Another woman, one who precipitated an act of violence after which she lost her job, reflected, "What I had done was against the rules, but what she had done was also against the rules. I didn't take legal action against it because I knew I had done a wrong part, I didn't try to take away from what I had done." John also reveals his feeling of guilt once he discovers himself singled out for discriminatory treatment. He felt as if his whole life was on trial; he was always on the defensive and compelled to prove he was doing his best possible work.

More generally, these discrimination victims felt it was necessary to prevent law from aggravating their situations. Often this meant blocking the law from taking over the relative normalcy of day-to-day life.[36] As Carmen said, "What was important to me at the time was trying to erase the situation. I was split between the idea of pursuing it in court and just letting it die. I couldn't stand the stress." Another woman explained, "The situation is really blocked out, because I don't want them to take action against me."

Conclusion

These descriptions of the social reality of victims explain why only an exceptional few who perceive they have experienced discrimination

[35] Luhmann has developed a model of the communicative process that accounts for the transformation of a conflict once a legal theme has been introduced. Once a dispute has been thematized as a legal conflict, the participants require social support. In some cases, law can be advantageous to the weaker party because it removes law to a rule-oriented context. But Luhmann explains, "not all interaction systems can handle this kind of alienation" (244–45). The legal thematization may rudely displace the power relations and move the communication interaction into the sphere of the legal system that is incompatible with the subsystems of interaction (meaning everyday life).

[36] The view of the law held by victims of discrimination is in stark contrast to the anticipated response to protective law. The collection of statements by individuals who feel they have experienced discrimination creates a composite picture analogous to the themes about law presented in Kafka's *The Trial*. "If I had behaved sensibly, nothing further would have happened, all this would have been nipped in the bud. But one is so unprepared." The solution seems to be to reestablish boundaries that push legality away from the victim's life (Franz Kafka, *The Trial* [New York: Schocken Books, 1968], 20).

achieve successful resolution of their problems.[37] This study offers three explanations for victims' reluctance to assert the worthiness of their interests and their acceptance of defeat as inevitable. First, the bonds between the perpetrator and the discrimination victim drive the conflict to self-destructive or explosive reactions. Second, these individuals are guided by an ethic of survival that encourages self-sacrifice rather than action. And third, the potential for legal remedies is diminished by a view of the law that engenders fear of legal intervention. Injured persons reluctantly employ the label of discrimination because they shun the role of the victim, and they fear legal intervention will disrupt the delicate balance of power between themselves and their opponents.

The hostile image of the law held by respondents considering legal recourse is a harsh reality compared to the spirit of protective law that promises to give purpose and justice to its beneficiaries' lives. In contemporary American society it is typically assumed that the "rule of law" is strengthened by the increase in enforcement powers, the clarification of goals, or the removal of discretion, so that the right-bearer is protected. Yet when people contemplate invoking the right of "equal treatment under law," they find themselves in a position with only undesirable alternatives. The invocation of antidiscrimination law does not enable the victim to overcome power differentials in situations where she or he is pitted against the more powerful opponent. The bonds of victimhood are reinforced rather than broken by the intervention of legal discourse.

The civil rights movement has produced numerous lessons about the limits of the law. Evaluations of doctrinal development and policy implementation have demonstrated the limited role of courts in restructuring social and economic relations.[38] Champions of litigation may misrepresent the problem by ignoring the complexity of systematic processes of discrimination that operate throughout society and then misrepresent the solution by creating the impression that the elimination of legal barriers is sufficient to achieve racial equality. Litigation thus becomes the focal point of activism at the cost of possibly more dynamic attacks on the root causes of

[37] Other studies have attempted to account for unsuccessful resolution of claims when they are brought to legal agencies. See Leon Mayhew, *Law and Equal Opportunity* (Cambridge, Mass.: Harvard University Press, 1968); Patricia Ward Crowe, "Complainant Reactions to the Massachusetts Commission against Discrimination," *Law and Society Review* 12, no. 2 (Winter 1978): 217–36; Joel Handler, *Social Movements and the Legal System* (New York: Academic Press, 1978). These studies found that complaints were systematically "dismissed for lack of probable cause," there were frequent "double-victimizations" due to the degradation imposed by the hearing process, and many routine cases were abandoned due to a preference for class actions and agency co-optation.

[38] For example, see Stuart Scheingold, *The Politics of Rights* (New Haven, Conn.: Yale University Press, 1974); Charles A. Bullock and Charles M. Lamb, *The Implementation of Civil Rights Policy* (Monterey, Calif.: Brooks/Cole, 1984); Donald Horowitz, *The Courts and Social Policy* (Washington, D.C.: Brookings Institution, 1977).

racial and sexual subordination.[39] Moreover, legal ideologies can constrain the social vision of the victim and promote self-blame. The mythologies which perpetuate racism and sexism are reflected in both the benevolent policies of legal reformers and the self-image of those who experience discrimination.

The inaction of discrimination victims is problematic from the vantage point of the ideology of legal protection. From the social reality of the victim, however, we find that "survival is a form of resistance."[40] In this study, the majority of these individuals view protest as contrary to their well-being and livelihood. The situation creates a paradox of irrationality, in which people engaged in discrimination conflicts believe they are better off if they decide not to pursue their interests.[41] To act aggressively and battle for a principle requires "irrational" sacrifices and defeats the individual's ethic of survival.

Though antidiscrimination law may have produced positive social change, legal strategies put unacceptable burdens on disadvantaged groups with little promise of success. The gap between the symbolic life of the law and the ineffectiveness of the law in action imposes a cost borne by the intended beneficiaries of civil rights policies. The inability of civil rights strategies to fulfill their promise appears to have left many who experience discrimination on uncertain ground between public and private action where they are without faith in themselves or the law.

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[39] Derrick Bell, "Foreword: The Civil Rights Chronicles," *Harvard Law Review* 99, no. 1 (November 1985): 4–83.

[40] For example, see the use of the phrase in Gerda Lerner, *Black Women in White America* (New York: Vintage, 1972), 287.

[41] The paradox of irrationality is employed in the study of police behavior to account for why rational negotiations are impossible with a suspect who has nothing to lose. See William Ker Muir, *Police: Street Corner Politicians* (Chicago: University of Chicago Press, 1977). For an analogy to criminal defendants, see Malcolm Feeley, *The Process Is the Punishment* (New York: Russell Sage, 1979). He observes that for defendants the cost of invoking one's rights frequently is greater than the loss of the rights themselves.