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Brian Libgober, Getting a Lawyer While Black: A Field Experiment, 24 Lewis & Clark L. Rev. 53 (2020).

Elizabeth Chambliss

Do lawyers engage in racial discrimination in client selection? This is the primary question Brian Libgober asks in his article, *Getting a Lawyer While Black: A Field Experiment*. The article presents a series of field experiments testing private practitioners' responses to emails from potential clients with Black- and white-sounding names. In the first experiment, based on a sample of 96 criminal lawyers in California, the response rate to emails from Black-sounding clients seeking DUI representation was 19%, compared to 40% for white-sounding clients. (P. 76.) The quality of lawyers' responses also varied in response to the client race signal. For instance, in response to otherwise identical requests, "Brad McCarthy" received an email describing California law, how it applied to his case, and possible legal strategies, whereas "Darnell Jackson" received one that said only "who referred you?" and another that said "Call our office at XXX-XXX-4DUI for an appointment. YOU HAVE JUST TEN DAYS TO CHALLENGE YOUR SUSPENSION." (P. 78.)

Though race was the primary factor of interest, the first experiment also found significant differences in lawyers' responses to client gender, with men receiving 50% more responses than women (37.5% versus 23%) and white men receiving the highest percentage of responses (50%). (PP. 76-77.) Interestingly, signals about client income (around $40,000 versus $80,000) were not significant in the overall sample; however, signaling higher income was significantly *harmful* for women. The response rate for higher-income women was only 16%, tied for lowest with Black women and Black, lower-income clients. (P. 77.) These income effects are "hard to view as a rational response to incentives." (P. 79.) The lawyers in the first sample were "mostly white and male." (Pp. 77-78.)

The second experiment was based on a sample of 899 lawyers in Florida, selected to vary by race, gender, and practice area (criminal, divorce, and personal injury). The second experiment was designed to test whether the racial disparities observed in the first experiment were the result of economic profiling rather than lawyers' own racial preferences. For instance, perhaps lawyers use race as a proxy for income and are concerned about clients' ability to pay. Or perhaps lawyers are concerned about third-party racial preferences, such as the preferences of

judges and juries. (Pp. 55-56.) Variations among practice areas with different economic risks and incentives might clarify the "mechanisms of racial discrimination in legal markets." (P. 79.)

Strikingly, however, in the second experiment, client race had no significant effect on lawyers' responses overall or by practice area. Client race also did not matter significantly more or less to Black lawyers than to white lawyers. (P. 96.) The effect of client gender also was "notably weaker" in the second study. (P. 100.) The race of the lawyer, however, had a significant effect on lawyers' overall responsiveness. "Black lawyers overall had a significantly higher tendency to respond to client emails, regardless of racial signal. The white lawyer response rate was 25.4%, while the [B]lack lawyer response rate was 34.1%." (P. 96.)

What should we make of the seemingly inconsistent findings regarding lawyers' responses to client race?

One possibility is that the findings reflect differences in experimental design. To maximize comparability across practice areas, the second experiment used different email templates and different income signals than the first study (P. 87), as well as different names "that were racially identified to varying degrees" (P. 90.)[1] To investigate the possibility that these design changes affected the results, Professor Libgober conducted a "cross-over" replication exercise among the criminal lawyers, using the California names and template on the Florida criminal lawyers, and the Florida names and criminal template on the California lawyers (both the original sample and a second, fresh sample of 96 criminal lawyers). (P. 99.) The result was the replication of findings from *both* experiments: that is, significant differences in California lawyers' responses to Black- versus white-sounding clients (27.1% versus 56.2% in the original sample) but no significant differences in Florida lawyers' responses. (P. 99.)

What should we make of *these* findings showing consistent differences between states? Surely California lawyers are not more racist than Florida lawyers? Professor Libgober investigates this possibility using various sources of evidence about racial attitudes in California and Florida, such as voting patterns, attitude surveys, and "list" experiments (arguably a more rigorous form of attitude assessment than surveys). (Pp. 100-101.) He concludes that the evidence "tends to rebut the notion that the white California population might be more racist than one would think and the Florida population less," and that "our conventional priors seem correct." (P. 102.) More plausibly, he argues, it may be that the original sample of California lawyers was somehow unusual. The original sample showed the largest race effects under both experimental designs, whereas the results from the second sample of California lawyers were weaker. (P. 99.) Yet there is no statistical evidence of disparities between the two California samples and no reason to treat them separately rather than pool them for analysis. (Pp. 99-100.) (Recall, too, that gender effects also differed between the two states.)

Instead, he argues, a better interpretation of the differences between states is that the market for lawyers is more competitive in Florida, making it more costly for Florida lawyers to discriminate in client selection. He notes that there are "about 20% more lawyers per capita in Florida than California," and "[t]he oversupply of retail lawyers is probably even greater." Florida lawyers also earn substantially less on average. (P. 103.) Moreover, the criminal lawyers in California had a specialty certification and were selected for study on that basis, to ensure that a request for DUI representation would be relevant, whereas Florida does not offer specialty certification. In Florida, lawyers were selected through a more labor-intensive process of combing through the state bar directory and lawyer websites to identify lawyer practice areas. (P. 93.) The state-certified California lawyers "are likely more skilled and in

higher demand than the typical Florida lawyer in the study" and more likely "to have the luxury of expressing their … personal preferences through client selection." (P. 103.) (And though he does not discuss it, Black lawyers may be less likely to have this "luxury," because Black lawyers may be more likely to face discrimination from clients.)

Professor Libgrober tests the market explanation by looking at the Florida data by county to see whether lawyers' responses to client race vary according to local market conditions and finds that they do. "Although the sample size for this regression is small, because it is tied to the number of counties where there were enough lawyers sampled, the coefficients consistently point in the right direction and are often significant, especially the ones related to wages." (P. 103.) Thus, he argues that "[w]hile the explanation that [the lawyers in the two states] are different … struggles against our priors and some data, there is a much stronger case that the markets are substantially different." (P. 102.)

In conclusion, he states that the experimental evidence has "three clear findings":

> First, at least in *some* geographically defined legal markets, blacks on average have a substantially harder time getting lawyers to respond to their requests for representation than whites. The word "some" is important. Not every sub-population of lawyers appears to discriminate against black-named clients. Even so, there is a replicated experimental finding within one well-defined population where a substantial disparate impact was found, and it is unlikely that this lawyer population is particularly unusual. Second, black lawyers respond to all clients at a higher rate than white lawyers do. Third, there is no evidence that economic profiling drives the selection of black versus white clients. Variation in the kind of risks to the lawyer's payoff did not lead to any differences in lawyer behavior toward black and white clients; if anything, black lawyers treated black clients more favorably than white clients. There is some evidence that retail lawyers particularly dislike affluent female clients, which is a counterintuitive form of economic profiling to say the least. (P. 104.)

Professor Libgober argues that the main policy implication of his findings is the need to increase market competition by increasing the supply of lawyers. Or, if increasing the overall supply of lawyers proves too "politically unpopular with lawyers," he suggests focusing on increasing the supply of Black lawyers. (P. 105). He argues that his research provides "an evidence-based rationale" for race-based affirmative action in law school admissions and spends the last part of the article discussing the diversity rationale in affirmative action case law. (P. 106.)

Whatever its merits, this doctrinal punchline does not do justice to the myriad implications of Professor Libgober's rich experimental research. For starters, his findings have direct implications for current debates about professional regulation, such as the regulation of racial discrimination by lawyers under Model Rule 8.4(g). Model Rule 8.4(g), as recently amended, prohibits lawyers from engaging in "discrimination … in conduct related to the practice of law," but does not regulate discrimination in client selection.[2] Some argue that it should;[3] and Professor Libgober's findings could be read to support this view.

His findings also will be of interest to those seeking to expand access to legal assistance in eviction and debt collection matters by providing a civil right to counsel,[4] or empowering trained nonlawyers to offer basic legal advice.[5] The vast majority of defendants in eviction and debt collection matters currently are unrepresented and, in many markets, are disproportionately Black.[6]

To the extent that racial discrimination by private practitioners is a factor, calls for a civil right to counsel and reforming prohibitions against non-lawyer assistance take on an additional urgency with racial justice implications.

More research is needed to assess the prevalence of discrimination by private practitioners in different legal markets, as well as variations among private practitioners by race and gender. This article deserves close attention from researchers and policymakers alike.

1. The names used in the first experiment were Darnell Jackson, Latoya Jackson, Brad McCarthy, and Laurie McCarthy. (P. 73.) The names used in the second experiment were Latasha Francois, Tasha Dorsey, Terrance Williams, Maurice Henry, Anthony Holley, Sam Nash, Nicole Horton, and Tabitha Morgan. (P. 96.) In the replication of the second experiment in California, the names used were Latasha Francois, Terrance Williams, Sam Nash, and Tabitha Morgan, which were the names intended to send the strongest racial signal. (P. 98.) For the second experiment, Professor Libgrober used administrative data and a "naïve Bayesian" approach to select racially-identified names. (Pp. 90-93.) ⮌

2. Model Rules of Prof. Conduct r. 8.4(g) (Am. Bar Ass'n 2016). ⮌

3. See, *e.g.,* Jessie Allen, *Lawyers for White People?* 69 **U. Kan. L. Rev.** 349 (2021) (arguing that Rule 8.4(g) should not exempt client selection). ⮌

4. See, e.g., Tonya L. Brito, *The Right to Civil Counsel*, 148 **Daedalus** 56 (2019); National Coalition for a Civil Right to Counsel. ⮌

5. See, *e.g.*, *Upsolve & Rev. John Udo-Okon v. New York*, Case No. 1:22-cv-00627-PAC (S.D.N.Y. Jan. 25, 2022); Robbie Sequeira, *Landmark First Amendment lawsuit against NY AG's office over free legal advice gains support from NAACP, justice groups*, **Bronx Times**, Mar. 5, 2022. ⮌

6. Brief for Upsolve, Inc. and Rev. John Udo-Okon, as Amicus Curiae Supporting Plaintiffs, *Upsolve & Rev. John Udo-Okon v. New York*, No. 1:22-cv-00627-PAC (S.D.N.Y. Jan. 25, 2022). ⮌

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