Limitations on the Business Case for Diversity

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Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, **Wash. L. Rev.** (forthcoming 2017), available on SSRN.

Those working in antidiscrimination law are well-versed in the central role that the business case for diversity plays in shaping policy. Even as enthusiasm for legal interventions in business or education has waned, the business case for diversity has remained persuasive. Courts have even relied on it to find practices that disparately impact certain groups discriminatory, affirmative action plans legal, and accommodations required. In fact, I would submit that the business case for diversity has eclipsed arguments about justice, inequality, or morality as reasons to support such measures.

That is why Jamillah Bowman Williams' article, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, **Wash. L. Rev.** (forthcoming 2017), is so important. Williams asks the foundational question of whether the business case for diversity actually accomplishes the goal of antidiscrimination law – reducing bias and promoting racial inclusion – and reports on experimental research that tests the relative efficacy of the business case rationale versus a legal case for equity and inclusion. Williams finds not only that the legal case for diversity is more effective for reducing bias and promoting inclusion, but also that it exerts a stronger normative influence on actors than the business case.

Williams starts from the premise that we should work toward reduced bias, and her analysis focuses on the workplace. From that starting point, she traces the shift of strategies from antidiscrimination law to arguments that underrepresented groups should be integrated into organizations because their involvement makes those organizations work better or be more profitable. In this section, Williams describes the literature on why antidiscrimination law works to change behavior and why the focus shifted to diversity and inclusion in the 1990s and then became so entrenched.

Three main theories have developed to explain why antidiscrimination law is thought to reduce bias. The first assumes employers are rational actors who fear sanctions. The second posits that decision makers act based on moral beliefs about the right thing to do, which are in turn shaped in part by law. The third holds that decision makers act without thinking, based on roles and scripts, so that law is effective if it prompts the creation of new roles and scripts. While there is some experimental evidence supporting both the first and second theories, the history of antidiscrimination enforcement as recounted by Williams suggests that the third has a role as well.

Lack of enforcement in Title VII's early days gave way to expansion and serious enforcement by the Equal Employment Opportunity Commission after the Equal Employment Opportunity Act of 1972. Heightened standards led to adoption of affirmative action policies, which, in turn, led to demand for EEO and management specialists to better shield companies from litigation. Then, in the 1980s, President Reagan cut the EEOC's budget, opposed affirmative action, and appointed judges hostile to regulation and especially to affirmative action. But, the new cadre of EEO and management specialists remained popular. Employers simply reframed the purposes and goals of their affirmative action practices to focus on diversity management as a way to increase business effectiveness and profitability.

Williams explains the attractiveness of the business case for diversity:

> a business case for diversity may be perceived as more legitimate than antidiscrimination law because it offers a connection between increased diversity and inclusion and positive performance outcomes. It may also be favored because it frames the efforts as proactive, to reap financial rewards, rather than reactive, to stop

discrimination and avoid punishment.

There is some empirical evidence to suggest that diversity imposed as a result of an externally driven legal reason and not an internally motivated organizational value may result in resistance. Yet, Williams notes that "[t]he business case for diversity may persuade Supreme Court justices and America's top business leaders, but the question remains whether this rationale is persuasive to the remainder of America's workforce."

To help answer that question, Williams conducted a laboratory experiment to look at whether the business case for diversity decreased bias and increased inclusion of racial minorities. Her results showed that white participants exposed to the business case actually reacted more harshly toward minority teammates than white participants who were not. She then conducted a survey-based experiment to look at whether the traditional legal case for inclusion might be more effective. That study showed that emphasizing civil rights law evoked more positive responses than the business case or no rationale at all.

Williams wraps up the paper by discussing some important implications of her results. First, she notes that conventional wisdom emphasizing the business case for diversity might actually undermine efforts toward greater inclusion. She uses social psychology to explain why. Essentially, the business case challenges deeply ingrained stereotypes and hierarchies without countering them overtly. Making people think about race may activate negative stereotypes, which can lead to negative treatment of minorities. The business focus on diversity may paint minorities as competitors for economic and social resources and may thus cause resistance because that competition poses a threat to scarce resources and privileges of the dominant group. Additionally, by emphasizing the benefit of diversity, organizations may send a message that the dominant group is less valuable. Finally, diversity values may generate resistance because they conflict with color-blind "meritocratic" ideology that is becoming more and more pervasive.

Williams stresses that not only may the business case backfire, but civil rights law has greater potential to promote positive beliefs and behaviors about inclusion. Although she does not frame the issues this way, as lawyers, we may be trained to be skeptical of the moral force of law; non-lawyers, though, find the law to be an expression of what is good and morally right. Williams is careful to say that she does not intend to cast doubt on the accuracy of the business case for diversity, which has a reasonable empirical basis, but instead to provide guidance on how organizations might communicate that goal to their members. Her findings offer compelling reasons to heed that recommendation.

One issue left unaddressed by this paper and open for future work is what to do with this information when it comes to the courts. As Williams notes, many legal scholars are concerned about the lack of antidiscrimination enforcement. She suggests that even with this lack of enforcement, the legal case for diversity is more effective than the business case at achieving diversity within organizations. Yet at some point, non-enforcement by courts might lead to the law's erasure as a practical matter. So what then? If judges and lawyers are not persuaded by the moral foundations of the law apart from the law's existence, then how can we stop them from undermining it?

I think that Williams' work offers food for thought there, as well. Perhaps greater focus by advocates and scholars on those moral underpinnings of the law and on the current lived experiences of people of color can help persuade judges that the law should be enforced vigorously. Lawyering is often at least partially storytelling. We would do well to be sure we are telling the stories of the disempowered and focusing on the moral force of robust equality norms.

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