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Speaking of Silence

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BOOK REVIEW

Speaking of Silence


Reviewed by Martha Minow**

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“We thought we could wear them down with our ability to suffer.”
—Bernard Lafayette¹

I. INTRODUCTION

Maybe you experienced it as a new kid in school. If other kids picked on you, you were in a bind. You could complain to the teacher, thereby marking yourself as an outsider who didn’t play along, or you could suffer in silence, preserving your self-sacrificing dignity, but also your powerlessness. This dilemma still confronts some adults who face discrimination by employers and landlords. There are real costs of complaining. There may also be a kind of survival strategy in swallowing the injury, or “lumping it.”² To respond to hurt with silence, however, leaves the source of hurt unchallenged.

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** Martha Minow is a Professor of Law at Harvard University. Many thanks to Joe Singer, Mary Ann Glendon, Elizabeth Schneider, Vicky Spelman, and the participants in the Harvard Law School 1988 Summer Research Program for their help.

¹ Quoted in We Shall Overcome (PBS television documentary broadcast, Aug. 27, 1988) (describing moments in the civil rights movement of the 1950s and 1960s).
² See Felstiner, Abel & Sarat, The Emergence and Transformation of Disputes: Naming, blaming, claiming . . . , 15 LAW & SOC’Y REV. 631 (1980-81) [hereinafter Naming, Blaming, Claiming . . .].
This is the insight behind the satirist’s invocation: “Will all those who feel powerless to influence events please signify by maintaining their usual silence.”

In *The Civil Rights Society*, Kristin Bumiller explores the conundrum of the discrimination victim by evoking the perspective of the victims themselves. The author reports that a survey conducted in 1980 shows that many individuals who acknowledged that they had experienced discrimination did not protest—either to the offender or to anyone else. Although people fail to pursue grievances of all sorts, the survey suggests that individuals who experience discrimination are less inclined to pursue their grievances than are other potential claimants. When asked why they fail to complain, many of these individuals blame themselves for not pursuing the problem, or explain that they accept the situation as inevitable.

To find deeper explanations, Bumiller interviewed eighteen people who experienced discrimination but did not object. She reports her findings in a subtle narrative, weaving what she learned from the interviews into a thoughtful synthesis of historical, anthropological, and psychological assessments of antidiscrimination law. She concludes that, although antidiscrimination law promises to benefit victims, their own efforts to challenge discrimination through law “usually end in defeat . . . because the bonds of victimhood inhibit

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5. The Survey was conducted as part of the Civil Litigation Research project. See D. Trubek, J. Grossman, W. Felstiner, H. Kritzer, & A. Sarat, *Civil Litigation Research Project: Final Report* (1983); Kritzer, *Studying Disputes: Learning from the CLRP Experience*, 15 LAW & SOC’Y REV. 503 (1980-81). The survey asked if respondents “had experienced ‘illegal or unfair treatment’ because of their ‘race, age, sex, handicaps, union membership, or other things.’” Id. at 26. Some 5,000 households were sampled and yielded 560 discrimination claims. “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.” Id. See Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525 (1980-81).
6. See K. Bumiller, *supra* note 4, at 27. Bumiller relies in part on Alan Freeman’s landmark work on antidiscrimination law, which identified the reliance of antidiscrimination law on the perspective of the perpetrator rather than the victim. Freeman argues that it is the actor’s intention, rather than the consequences for others, that critically determines whether a violation occurred. *Id.* at 64-66 (citing ALAN FREEMAN, *Anti-Discrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 101 (D. Kairys ed. 1982)). Implicitly accepting Freeman’s criticism of antidiscrimination law, Bumiller uses the perception of the ostensible “victim” to establish the benchmark of an experience with discrimination—against which she assesses the decision to complain or not to complain. For problems with this assumption, see infra Section II.
challenges against the perpetrators.” Legal tools impose divisions between the powerful and the powerless, despite the rhetoric of equality. The law assigns claimants to the role of the victim, scripted by antidiscrimination doctrine. In the role of victim, the claimant must assume a stance of powerlessness and defeat, deny the complexity of her own experience, seek visibility, give control of the situation to others, and disrupt and destabilize daily life and relationships. The victim must also reconstruct and relive the incident of discrimination. The victim then runs the risks that others will not confirm the story, or that the legal system in the end will grant not relief but further humiliation. Those who choose to “lump it” and refrain from seeking legal relief may exercise a sense of dignity, strength, and autonomy in the very choice not to complain. Because victims who complain are often left with their own anger and confusion, victims who decide not to complain have good reasons to adopt instead an ethic of survival and sacrifice. Thus, Bumiller portrays a system of legal redress that affords more opportunity for dignity and autonomy when individuals who have claims decide not to pursue them than when individuals who have claims choose to pursue them.

If this portrayal is plausible, it is a serious condemnation. The problem with antidiscrimination laws then is not simply the usual difficulties with implementing public policies through courts and agencies, nor even the obstacles posed by election returns that produce administrative or judicial foot-dragging or interference with stated policies. Rather, Bumiller suggests that the specific problem with antidiscrimination laws is that they manifest and recreate some of the harms they were supposed to redress. Such laws operate within a world so hostile to the mission of redressing discrimination that they assign the degrading role of victim to anyone who asserts the rights that the laws set forth.

Some may challenge this thesis as empirically unsupported or as a defeatist and pessimistic assessment. I ask, instead, what happens if we locate this thesis within a broader array of reasons why people with potential discrimination claims do not assert them? I suggest that the decision not to complain looks both less exceptional and more exceptional in this light. People generally complain less than they could, given the incidence of infringements of legal rights. The

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7. K. Bumiller, supra note 4, at 83.
8. Id. at 2.
9. Id. at 60-65.
10. Id. at 104-05.
11. Id. at 69-71.
12. Id. at 83-84.
special reasons for silence after discrimination incidents highlight the limits of antidiscrimination law, and the pervasive patterns of power within which discrimination may arise. I develop Bumiller's inquiry into the strengths expressed by those who choose not to pursue discrimination complaints and then consider whether, and how, antidiscrimination laws should be changed, in light of potential claimants' reasons for avoiding their use. My analysis is urged ahead by Bumiller's reminder that social scientists and lawyers should try to understand the perspective of those they study. I will also consider, however, how the laws do, and will, reflect other perspectives and purposes, and the importance, then, of bearing witness.

II. REASONS FOR SILENCE

Law is not defined only by those who use it. Those who do not come to the legal system with complaints are as critical to an understanding of law as those who do complain. Those who could complain but do not mark the gateway between societal ideals and practice. Sometimes the law is designed to make its actual use unlikely: It may require proof that is hard to retrieve, or attorneys' fees that exceed the amount of damages provided for by the legal claim. Similarly, a legislature that provides an environmental protection program but also declines to fund it has, in effect, adopted the policy of nonenforcement, despite the ostensibly espoused goals of the legislation. When the unenforceability of a norm stems from the burdens it places on those supposed to enforce it, a problem in implementation—or a problem in the feature of the design itself—emerges. Either way, enforcement difficulties modify the norm and point toward the real meaning of the law.

A. The Rights Society: Stages of Complaining

The shortfall between espoused norms and their enforcement may occur at many stages on the way to pursuing a grievance through litigation. A review of these stages helps to locate the particular

13. Id. at 30. In general, Bumiller's commitment to tell the stories from the vantage point of those who experience discrimination leads to a sensitive synthesis of theories, but she underplays the actual voices of the people interviewed for her study. They remain brief and somewhat elusive sketches, rather than fully-developed narratives. In addition, Bumiller uses the term "victim" which may impose an identity on people that they resist or find problematic as descriptions of themselves. I will avoid using the word here except to describe how others name them.

14. See generally Naming, Blaming, Claiming..., supra note 2.

15. These stages elaborate what Bumiller may mean when she notes that legal rights are not self-enforcing, but instead, require action by those who would assert them. K. BUMILLER, supra note 4, at 111. Of course, the enforcement of some legal rights is entrusted exclusively,
reasons for silence discovered in Bumiller's study of people who experienced discrimination and demonstrates that there are many more reasons for refraining from litigation besides avoiding the pain of the victim role.

First, the individual must perceive an injury to himself, and perceive it as something beyond his own fault or his inevitable fate. Many psychological, religious, and political world views lead people to conclude, in contrast, that whatever happens to them is their own responsibility, or else the dictates of a political or divine authority beyond their control. For example, one study showed how women in a predominantly Baptist community tended not to seek divorces, even when they found their marriages in trouble, because their religious community urged them to come to terms with negative feelings by redefining their own role, internalizing the conflict, preferring self-sacrifice, and addressing obligations to the whole group. Even an expert in litigation, Louis Nizer, noted that "[w]hen a man points a finger at someone else, he should remember that four of his fingers are pointing at himself." Complaining about another's conduct, therefore, becomes entangled with self-blame, and some may find this reason enough to avoid accusing another. Moreover, the danger of
working up hope and then losing may seem more painful than the process of giving up before hoping. Thus, perceiving an injury as objectionable and actionable is actually a difficult hurdle for many people.

Even for those who perceive a harm as something to challenge, the second stage requires recognizing that harm as a legal violation, and as something worth discussing with a lawyer or some other guide through the legal system. This stage is especially difficult where the injury represents a harm newly recognized by law, or where the injury occurs within the pattern of ongoing daily relationships that may seem removed from both legal commands and legal redress. There also may be practical and economic barriers, for the individual must find a lawyer or an advocate to discuss and assess the complaint. Most people do not have a lawyer on call, and further, most individuals cannot afford one.

Even if the individual can find a legal advocate, he may well drop out during the third stage. At this stage, the lawyer evaluates the claim in light of prior case law, assesses the potential financial and emotional costs of a lawsuit, and assesses the strength and credibility of the plaintiff. Here, cold, hard facts, rather than the more subtle difficulty of the victim role, may dissuade the individual from suing. The brutality of litigation, and the rational judgment that it is not worth pursuing, were well-communicated long ago when Voltaire announced, "I was never ruined but twice: once when I lost a lawsuit, and once when I won one." The burdens of litigation to both plaintiffs and defendants have been a topic of much discussion throughout this century. When it comes to antidiscrimination law, the costs of litigating have become quite severe. In fact, most lawyers knowledgeable about Title VII claims are likely to advise an individual against bringing a discrimination suit because the sheer costs of discovery in such suits often swamp the value of the claim in its undeveloped


21. These obstacles to perceiving injury exist independently of the reluctance to assume the role of the victim that is central to Bumiller's analysis. See, e.g., K. BUMILLER, supra note 4, at 98-103.

22. See infra note 25 and accompanying text.


At any of these stages, the individual may conclude that the time and emotional energy that litigation demands will unduly interfere with ongoing life, and place too great a burden on not just that individual, but also on his family and friends. Thus, people may “lump” their discrimination claims, due to a sense that the injury cannot be redressed. They may fail to connect an insult at work to a legal right. They may lack an ability to locate a willing lawyer, or a lawyer’s assessment may dissuade them from pursuing their claim. These reasons may well apply to any legal claim, not just to discrimination claims. At the same time, these reasons, which lead people to “lump it” should be understood as part of society’s legal norms concerning when discrimination is, and is not, countenanced. In addition, the lawyer’s probable assessment that most individual discrimination claims are not worth pursuing is a direct translation of the legal system’s past results in the area. The actual societal norm about discrimination, in practice, provides a less stringent ban than the statutes facially seem to proscribe.

B. The Uncivil Society: Complaining and Stigma

Any complainer risks being labeled, or even shunned, as a troublemaker. As much as our cultural myths celebrate the rugged individual and the courageous iconoclast, we simultaneously warn against rocking the boat and making a fuss. Indeed, the very values of individualism and courage devalue sensitivity to the slings and arrows of chance or bad manners.

There are special additional problems accompanying some complaints where the very act of recounting what happened can be newly painful. Survivors of rape may feel so humiliated by the experience that they would prefer not to talk about it. Others correctly fear renewed humiliation if they have to discuss the experience with strangers, and especially if they must face an adversary process that puts their own credibility and reputation into question. Here, complaining may promise less than silence for the person who wants to retain control, privacy, and a sense of self-respect.

Similarly, people who have faced discrimination may view complaining about it as more risky than silence. They, too, may find that discussing the incident is likely to reopen the wounds, cede control to others, or expose them to painful scrutiny and skepticism by others. The person who complains of discrimination on the basis of race, sex,

or another significant personal trait may encounter spoken or implied disapproval from peers and coworkers. It may be difficult to bear disapproving judgments that in effect tell the complaining party: you are a troublemaker, you are disloyal, you are different from us, just as we always suspected. Moreover, complaining about discrimination means you are weak, you are dependent upon others to protect you, and you are a victim. This is in part what Bumiller means when she identifies how antidiscrimination rules provide for a social construction of the complainant as a victim, a role that can be confining and even humiliating. In addition to all the other stages at which a potential litigant may fail to pursue a complaint, the discrimination complainant faces the additional question: Do I want to risk the forced visibility, the label of a troublemaker?

The survivor of discrimination who contemplates complaining about it faces still further problems of stigma. If I claim that I was discriminated against on the basis of a trait that has in the past carried a stigma, I wave the flag that I am a different or deviant person. I may be stigmatized not only for being a complainer, but also for being a person with traits that give rise to discrimination, traits that have been despised or devalued by powerful people in the past.

The problem of risking stigma by complaining extends beyond the context of antidiscrimination litigation. When a particular trait or status carries stigmatizing consequences, people understandably do not want to identify themselves by that trait or status, even to claim a benefit supposedly designed to relieve the burdens of the past. For example, some members of minority groups object to questions on application forms for college or for employment that ask about minority status because they want neither positive nor negative consideration on this basis. They understandably fear that any continued distinction drawn on the basis of their race or ethnicity will perpetuate the use of a trait that, in the past, has deprecated or degraded them, or people like them. Similarly, some female employees refuse to accept maternity leave or part-time work options following childbirth on the grounds that such special benefits will stigmatize them at work,

27. Bumiller suggests that complaining means accepting the constraints of the victim role, which also “transforms the conflict into an internal contest to reconcile a positive self-image with the image of oneself as a powerless and defeated victim.” K. Bumiller, supra note 4, at 52. See also id. at 83-84, where Bumiller observed that:

The promise of antidiscrimination law is that it will benefit the victim against the more powerful perpetrator of discrimination. These struggles usually end in defeat, however, because the bonds of victimhood inhibit challenges against the perpetrators. The result is that victims internalize the power struggle by submitting to ruthlessness and their own anger and confusion.
and identify them as second-class or less than top-notch employees. A woman who receives special media attention because she holds a job only men have previously held may object to that attention, especially if the reporters focus on her appearance or other aspects of a gender stereotype. Objecting on any of these grounds, however, continues to identify the individual with the trait she prefers to make unimportant.

All of these people face what I call the "dilemma of difference." They face a dilemma because the negative social meaning of a particular trait of difference lies so much beyond their control that their very efforts to object to negative treatment on that basis may confront them with further undesirable consequences. I emphasize here the "social meaning" of difference because the trait may be real, but its negative consequences in people's lives derive from cultural attitudes and practices. We tend to talk as though the difference sits inside the person who diverges from the majority or an unstated norm. The difference, however, is really a comparison, a comparison drawn by some to degrade others. Where a particular pattern of differences between people signals deviance and inferiority for some, efforts both to deny and to recognize their difference may reexpose them to stigma. Ignoring the differences between a child who speaks English and one who speaks Spanish may disable the Spanish speaker in a class conducted in English. On the other hand, identifying the difference and providing specialized instruction may segregate that student from others, while implying or assuring delayed achievement in the lessons taught to the other students. So long as a norm is embedded within the major institutions that make certain traits abnormal, both identifying and denying those traits may harm the person who seems different.

In the face of such adverse situations, it should not be surprising when people who have been called "different" by others prefer to remain silent about harms related to that "difference." Bringing attention to their difference could create new injury. In addition to all the other reasons for refraining from litigation—the failure to perceive the injury, or the lawyers' or clients' judgment that the suit is too costly financially and emotionally—people who have experienced discrimination face a special risk in complaining. They risk encountering further humiliation in the victim role designed for the complainer.

Bumiller’s special contribution is to show how silence and submission may seem a better alternative to such people, even though silence leaves their past and future injuries unaddressed. Even if silence may register complicity or submission to continuing patterns of deprecation and discrimination, deciding not to complain may save the costs of the victim role. Moreover, as Bumiller explores,29 such a decision may grant a moment of autonomy, control, self-sacrifice, and even transcendence in a world that has dealt out few opportunities for such expressions of character. While Bumiller’s argument should be tempered in light of the range of reasons why people generally decline to pursue claims, I find a powerful insight in her inquiry into self-sacrifice and transcendence. Here, the depth of dilemmas of difference is matched only by the resourceful strengths of the human spirit.

C. Beyond Society: Silence, Self-Sacrifice and Transcendence

Sometimes silence, submission, and self-sacrifice can be expressions of strength, self-respect, and autonomy. Sometimes decisions not to complain reflect a moral universe where these qualities of character count more than redressing a particular injury. Sometimes decisions not to complain reflect a position of such exclusion from the community that only the act of choosing to affirm such exclusion affords a sense of dignity. A real contribution of Bumiller’s study is her effort to describe these times. She draws, for example, on Barrington Moore’s study of ascetics, untouchables, and concentration camp prisoners who accepted pain with a kind of moral authority in the face of hugely degrading circumstances.30 Moore concludes that such people demonstrated a “capacity to resist powerful and frightening social pressures to obey oppressive or destructive rules or commands.”31 Bumiller comments that “[w]hat appear to be acts of total submission may in fact preserve the remnants of human autonomy.”32 For some, choosing not to complain may preserve a sense of autonomy otherwise threatened with suppression.

Moments of individual transcendence through silence or self-sacrifice in some ways are more glorious and ennobling than anything offered through the tedious process of litigation. In both history and fiction, stories of silence in the face of degradation, and self-sacrifice in the face of oppression, enlarge our sense of the human spirit. Such

29. See K. BUMILLER, supra note 4, at 69-95.
30. Id. at 70 (discussing B. MOORE, INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT (1978)).
32. K. BUMILLER, supra note 4, at 70.
moments also expose how specific social structures make silence or self-sacrifice noble alternatives. Silence in the face of oppressive harm seems transcendent when other routes of expression are futile. When people could, instead, register legal complaints, their silence marks points of perceived futility within the law.

Silence under these circumstances may be a form of self-sacrifice or submission to insult. Yet self-sacrifice is inspiring when done to avoid worse consequences for oneself or for others. Self-sacrifice is uplifting when it alone allows a chance for self-control and dignity. Self-sacrifice is dignifying when it redraws seemingly immutable lines of difference, and it is transcendent when it discloses the hidden power of the powerless.

Some examples of self-sacrifice in fiction help to highlight the remarkable discovery of human freedom and strength in situations that seem to offer no chance for dignity or autonomy. It is as if giving away what seems one's own last shred of self breaks open the prison of external oppression. Thus, in Andre Malraux's *Man's Fate*, a novel about the Chinese revolution, a group of war revolutionaries await their deaths in prison. One has managed to smuggle along a cyanide capsule, which, in this desperate context, represents the last chance for self-control and for freedom: its possessor could at least choose the moment and the means of his own death. In what can only be understood as an act of enormous generosity and self-sacrifice, its owner gives the capsule to two prisoners to share; there was only enough for two. It is a sign of both his noble spirit and the extreme desperation of their circumstance, that giving an instrument for self-destruction could be a moment of self-denial and human connection.

In *The Color Purple*, Alice Walker creates a moment of dramatic tension when Adam, a young American black man, falls in love with Tashi, a young African woman, during his stay in Africa with his missionary mother. The African woman decides that she must undergo her tribal ceremony which will permanently scar her face. She tells the young man that she cannot join him in America because her scars would be too stigmatizing. He responds by returning with scars identical to hers and assures her that whatever happens to her in America will also happen to him. Here, he finds a power, even while powerless in the face of her obligations. It is a power to sacrifice

34. Id. at 326-28.
36. Id. at 213-14.
37. Id. at 243.
38. Id. at 243-44.
himself, to use his own choice to embrace the difficulty others will place upon her; it is a power to redraw the lines of difference so that they will not divide him from the one he loves.

Marge Piercy's *Woman on the Edge of Time* introduces a distant world that is either a Utopia or the deluded fantasy of a mentally ill woman. In this world, all human reproduction is managed through test tubes; women may not conceive or deliver children, although they biologically could. When asked why women are willing to give up these joys, a spokeswoman replies that the power over conception and childbirth is the only power women have, and as long as the biological difference gives women a power that men do not have, then men and women can never be equal. Sacrificing this one power of their own, then, is a first step toward achieving the world of mutual respect that they seek.

In a chillingly gradual revelation, Toni Morrison's *Beloved* turns out to be the ghost of the daughter killed decades before by her mother Sethe, an escaped slave. Sethe preferred to destroy her beloved child with her own hands, rather than expose her to the white men coming to return them both to slavery. She had faith that the child would be safe in heaven, and in that faith, she sacrificed what she loved.

These moments of self-sacrifice represent desperate efforts to avoid something that seems worse. They reveal surprising and courageous preferences for companionship over autonomy, equality over power, love over equality, and dignity over life. In these moments, the characters seized latitude for choice and control, when none seemed to exist. They redressed power imbalances when they themselves seemed powerless. They redrew a line of difference by putting themselves on the side of deviance, stigma, or powerlessness, and by giving up the small advantage they had, in order to help another, or to deny anyone beyond themselves the authority to arrest their own values.

The realm of the human spirit evoked in these stories soars above the mundane cruelties of employment or housing discrimination but hints at the dignity of those who withstand those injuries. For them,

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40. Id. at 98.
42. Ironically, the murder propelled the child's ghost into clinging to, delighting with, and nearly destroying the mother in her later years.
43. This is fair only when given a definition of autonomy that presumes independence and solitude. For a contrasting conception, see J. Nedelsky, *Reconceiving Autonomy* (forthcoming, Yale J. Law & Feminism).
too, silence and self-sacrifice in search of dignity help to explain decisions not to complain or decisions to submit to injuries. If people who experience discrimination do not sue because silence and self-sacrifice are the only alternatives that preserve their autonomy and dignity, then there is a serious defect in the antidiscrimination rules themselves. Perhaps some people do not sue because they want to avoid something that seems worse. Perhaps they seek to obtain control or preserve their dignity, or redress an imbalance of power by choosing their own powerlessness. Perhaps they sacrifice themselves to redraw a dividing line of difference, refusing the power of others to assign difference by choosing their own meanings. Perhaps decisions not to complain reflect such powerlessness that only the act of choosing to affirm such powerlessness affords a sense of dignity.

We should not forget the other reasons why people decline to complain—because they fail to perceive the injury or its legal dimensions, because they cannot obtain legal counsel, or because they find the financial and emotional costs excessive. If, however, people decline to complain because that choice offers a small chance to avoid something worse, to protect their dignity, or to exercise the bare autonomy of affirming the fate otherwise assigned to them, then we have in the practice of antidiscrimination law stories like searing fiction. Like the fascist enemy, the intolerant majority, the jealous men, and the slave-catchers in the works of fiction, the legal rules create situations in which submission offers a paradoxical chance for dignity; and like those fictional enemies, the antidiscrimination laws and the society producing them stand condemned.

III. BEYOND SILENCE

Like Kristin Bumiller, I have tried to consider the problems of antidiscrimination law from the perspective of those it was supposed to, but does not, benefit. From this perspective, antidiscrimination laws, in practice, may reiterate stigmas they were supposed to redress by constructing an undesirable victim role for anyone who complains under the laws, and by exposing the complainant to risks of humilia-

44. Sometimes, objecting to a label assigned by others only gives more power to those others and to the stigma attached to that label. In those circumstances, accepting the label may be a form of resistance. The courage to resist in this way can be very costly, as some writers and actors discovered when they refused to cooperate with the House Un-American Activities Committee during the Hollywood black-listing days. See also Frug, McCarthyism and Critical Legal Studies (Book Review), 22 Harv. C.R.-C.L. L. Rev. 665 (1987) (reviewing E. Schrecker, No Ivory Tower: McCarthyism and the Universities (1986), and discussing parallels between McCarthyism and current issues in law school hiring and promotion practices).
tion and additional failure. Furthermore, from this perspective, it is important to view decisions not to bring discrimination complaints as acts of strength and dignity by the individuals and as condemnations of the laws supposedly designed to help them. On a very practical level, those who internalize the conflicts by "lumping it" are susceptible to health risks, evidenced by the higher blood pressure and heart attack rates of members of minority groups in this country. When individuals fail to complain about the discrimination that they experience the entire nation misses opportunities to correct and deter patterns of discrimination that may injure others in the future. Yet, there are other perspectives relevant to antidiscrimination laws and patterns of complaining and silence.

A. Other Perspectives

When considering the perspectives of those lacking enough power to complain through official channels, it would be wrong to ignore other perspectives that in the past have been at least as significant in defining the shape of the law. One contrasting perspective is the "potential perpetrator" perspective—the perspective of the employers, landlords, and other potential defendants in discrimination suits. Such people may reject some perceptions of discrimination expressed by people like those studied in Bumiller's book. Such incidents, they may argue, arise from undue sensitivities, or unjustified efforts to use civil rights laws in order to harass others or to gain an unfair advantage in the economic competition of the job or housing markets. From this perspective, the fact that many people who perceive discrimination do not complain may help to correct these risks of erroneous perceptions by offsetting legitimate claims against misguided ones.

Another perspective can be called the "legal administration" perspective. From this perspective, the law should be carefully crafted to avoid false incentives for lawsuits that are not warranted, or that should be resolved through less costly means. Thus, cases at the margin should be discouraged, and disputes in general should be channeled away from full-fledged litigation. In addition, the "legal administration" perspective opposes the distortion that can occur when a claimant changes the facts in order to fit the legal requisites and to increase chances of prevailing in court. For a good example of this problem, consider prisoners applying for parole from prison who learn about a factor—such as marital status—that the administrators use in granting applications for parole. Because married prisoners, as a statistical matter, have performed better on parole than single pris-
oners, the administrators have viewed marriage as a helpful factor. If inmates learn about this, and get married in order to improve their chances of parole, however, they have manipulated a factor and undermined its factual usefulness to the administrators. Similar administrative concerns argue against designing antidiscrimination laws in ways that would give parties, on either side, greater control over the conduct that becomes germane to an ultimate lawsuit. Obviously, this administrative concern cuts in the opposite direction of the parties' own interests in enhancing their own autonomy and control, both in and beyond litigation.

The confluence and conflict among these perspectives may help to explain the problems with antidiscrimination laws described by Bumiller. As written, and as implemented, laws do—and will continue to—reflect other perspectives and purposes besides the viewpoint of those injured by the discriminatory acts of others. Silence, sacrifice, and resistance will remain important responses because the system is not designed with only victims in mind. I agree with Bumiller that the problem is not merely simple "flaws in the system," meaning the system of legal rules and procedures. Bumiller argues that the problem lies in the law's distance from people's daily lives and social roles, and people's perceptions of law as hostile and disruptive.

For me, there is something even more significant than people's perceptions that the law may not serve them to redress discrimination. The problem is not perception, but fact. Often, in fact, law is not a fruitful mechanism for objecting. The system serves many contrasting and conflicting purposes. The complainant becomes subjected to a kind of scrutiny and doubt that can be brutal, given the system's commitment to the perspectives of legal administrators and potential defendants that operate alongside its commitment to provide remedies for discrimination. Moreover, in the specific context of racial and gender discrimination, the legal system historically reflects and reinforces the biases of the larger society. Judges, prosecutors,

45. See generally Underwood, Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment, 88 YALE L.J. 1408, 1437-42 (1979) (analyzing the use of predictive factors that induce, reward, or punish).
46. K. BUMILLER, supra note 4, at 110.
47. Id. at 110-11.
48. In fact, most cases are settled rather than taken to trial, so the chances of full vindication in a courtroom are very small, even for those who do pursue legal relief. See Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983) (considering courts as arenas for compulsory bargaining, rather than avenues for pursuing justice).
clerks, juries, police officers, and lawyers often share the negative attitudes that trap members of minorities in dilemmas of difference. Even glimpses of reform have too often fallen prey to the larger patterns that herald one kind of person as the norm in society, and subordinate others as inferior.49 Potential claimants, therefore, are not often wrong to perceive that pursuing a lawsuit could be disruptive and abrasive without much probability of success.

The accuracy of these perceptions may reflect a failure of antidiscrimination law to register one more perspective. At least some people who are neither subjected to discrimination, nor actively engaged in it, actually want to live in a society where discrimination on the basis race and gender does not occur. Perhaps some of these people believe in this ideal society strongly enough to be willing to participate in the changes in our society that might make their own lives less comfortable or familiar. I fear that this perspective has been shortchanged by political leaders who say that we have done enough already, and by the practice of antidiscrimination law that effectively communicates that it is unwise, and even humiliating, to complain.

The present balance of perspectives in society reinforces neither the perspectives of this group nor the perspectives of those subjected to racial or gender discrimination. Until the balance of perspectives shifts and produces greater commitments of public resources and communal authority in this direction, tinkering with the laws against discrimination will make little difference.50 The ability of some to suffer,51 however, will not, by itself, wear down the patterns of discrimination. Efforts to reform antidiscrimination law are not unimportant. Minimally, preserving the current balance against forces of reaction remains important. Furthermore, although I do not believe that legal changes alone can change the larger patterns behind the "dilemma of difference,"52 the arena of law reform is no less viable than other places for pursuing a larger strategy of changing social attitudes and sensitizing more people to the experiences and injuries of discrimination. Those who sue as discrimination plaintiffs, however, should be understood as foot soldiers in an often brutal struggle for change. They are not merely individual claimants seeking their due, even if the format of an individual lawsuit makes it seem that way. This may

50. See Freeman, supra, note 6.
51. See We Shall Overcome, supra note 1.
52. See supra note 28.
be the most telling sign of Bumiller's claim that the victim role harmfully constrains discrimination complainants. By treating the plaintiff as an isolated person, the form of individual lawsuits underplays the conflict of group-based perspectives at work in each societal consideration of allegations of discrimination.

B. What to Do?

The analysis of the legal system that we adopt surely affects the changes we may recommend. From Bumiller's analysis, there is little that can be done. Her condemnation of antidiscrimination law exposes as unrealistic the hope that law could empower those whom it treats as victims. Bumiller suggests that when white women and minorities bring discrimination complaints, "they assume a role more like the accused defendant in a criminal trial than like the ally of government prosecutors." Like criminal defendants, the discrimination plaintiffs may face an assumption that they are to blame. Further, like criminal defendants, discrimination plaintiffs face pressure to settle or to cede their claims because the costs of pursuing them are simply too high. Bumiller argues that "[t]he worthiness of the discrimination claim is never evaluated when persons who experience discrimination do not transcend the burdens of their victimhood."

I suggest a different analogy. It is not perfect but it highlights another dimension: The discrimination complainant is like the victim of a violent, shattering crime—one that most nonvictims who can do so proceed to ignore, despite its pervasiveness. The direct target of discrimination has less luxury. If there is to be any societal response, she, like a victim of a violent crime, must help prosecute the defendant, but she may herself be brutalized by the adversarial process of litigation. The emotional rigors of litigation can be destructive even to those it is supposed to help. The adversary system subjects even the victim-witness of a crime to the ravages of cross-examination and the humiliations of an assigned role in someone else's play. Eloquent accounts by rape victims depicting the trial as an additional rape are a vivid example of this fact. Litigation is not a pleasant way to solve problems, and its processes are not guidelines for settling disputes, but are instead the rules for the worst-case scenario. Those rules provide the relentless opportunity to scrutinize all perspectives, while placing the burden of proof on those who would change what has happened, given the otherwise prevailing pattern of circumstances. The litiga-

53. K. Bumiller, supra note 4, at 111.
54. See Galanter, supra note 49.
55. K. Bumiller, supra note 4, at 111.
tion process is committed to expressing and protecting not only the complainant's perspective, but also the perspectives of the alleged perpetrator and the legal administrator. This commitment makes the courtroom, and its attendant machinations, a crucible in which all parties and witnesses face heat and friction.

Prosecutors, and society in general, need the help of crime victims in order to pursue criminals and bring them to justice. If the burdens are too great, victims will not participate, or will not participate effectively. Victims of crime who have been through the system, and their advocates, have effectively persuaded governments around the country to organize and finance victim-witness assistance programs. These programs do not alter the system, but instead try to help these people through it. Like the victims of crimes, people who have experienced discrimination are themselves innocent, but they risk emotional degradation and exhaustion if they participate in enforcing the law. Of course, unlike victims of crime, the discrimination victims must often serve as the "prosecutor" by initiating a civil, rather than a criminal, action, and by acting as the party seeking legal redress. Furthermore, in the role of the party pursuing the action, the plaintiff must finance the case and provide the momentum to push it through the system.

In the role as the injured witness to the violation of a societal norm—like the victim-witness to a crime—the discrimination plaintiff may need something equivalent to the victim-witness advocates programs developed in many jurisdictions. Access to support groups composed of others in similar situations, and access to an experienced guide who can explain the system and help the individual negotiate a pathway through its emotional rigors, would be two important features of an admittedly limited program. This suggestion, like victim-witness programs for survivors of rape and other violent crimes, does not change the essential features of the litigation system, nor does it alter the balance of the system's competing goals. Victim-witness programs may, indeed, help to legitimate the brutality of systems that instead need to be changed. In addition, an assistance program for discrimination complainants may acknowledge the reasons why many

57. There may be a criminal prosecution in some instances of discrimination, and there may be a civil action initiated by the victim for damages against someone who committed a crime. The dual criminal and civil systems serve overlapping functions, and redundancy itself may promote more accurate results and more reliable checks on centers of power. See Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, 22 WM. & MARY L. REV. 639 (1981).
people, quite rationally, decide in favor of self-sacrifice, rather than pursue legal redress. An assistance program may, nonetheless, encourage some to rethink that choice, and may afford a greater chance of dignity and transcendence within the legal process. And it may, like memorable fiction, and like Bumiller's memorable book, provide witness to the extraordinary capacities of human beings faced with no good choices.