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Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States

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This article analyzes the outcomes of employment discrimination lawsuits filed in federal court from 1988 to 2003. It goes beyond previous research by examining case filings rather than published opinions and by treating case outcome as a sequential variable. Our analysis is informed by four theoretical models: formal legal, rational action/economic, legal mobilization, and critical realist. We employ a discrete-time event-history model with random effects to estimate whether a case will end at a particular stage. We find that employment discrimination litigation consists overwhelmingly of individual cases, a majority of which end in a small settlement. The outcomes of cases are difficult to predict at the outset of litigation. Legal representation and collective legal mobilization have powerful effects on outcome, but collective legal mobilization is rare. These results are most consistent with the critical realist perspective. Our analysis suggests that employment discrimination litigation maintains law's jurisdiction over claims of workplace discrimination while not providing a significant remedy or an authoritative resolution in most cases.

I. Introduction

A focal point of theoretical and policy considerations of the law's capacity to effect social change has been the enforcement of anti-discrimination law in the courts. Given the frequency of employment discrimination litigation (EDL) in the contemporary United

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States, and its prominence in sociological theories of law, inequality, and social change (Burstein 1991a; Edelman 2005; Edelman & Suchman 1999; Hirsh 2008; Kalev & Dobbin 2006; McCann 1994; Nelson & Bridges 1999; Pedriana & Stryker 2004; Skaggs 2008; Stryker 2007), it is surprising that sociologists have not more systematically examined the processes and outcomes of discrimination lawsuits themselves. The need for such research is all the greater in what some scholars refer to as the post civil rights era in the United States, a time in which anti-discrimination law has shifted from attacking the blatant exclusion of minorities and women from market opportunities to addressing a broader set of protected classes (including the aged and the disabled) from more "subtle" or unconscious forms of discrimination (Bumiller 1988; Donohue & Siegelman 2005; Skrentny 1996, 2002). Discrimination litigation has been a dynamic field in the last two decades, with case filings more than doubling from 1992 to 1997, before declining significantly from 1998 to 2007 (Nielsen et al. 2008). In this period of more numerous and diverse allegations of discrimination, in which there may be greater uncertainty about what the law demands and more uncertainty about how cases will be resolved, it is theoretically and practically important to understand the composition and outcome of discrimination lawsuits. How such cases fare in the courts, and the determinants of case outcomes, are critical to assessing the relationship between law and workplace discrimination, and may implicate the legitimacy of law itself.

Unlike much other empirical scholarship about employment discrimination litigation, which studies the relatively small proportion of cases that lead to published judicial opinions or that otherwise become visible through media coverage, we analyze a large random sample of case filings in federal court in the period 1988–2003. By examining a representative sample of discrimination complaints, from the least visible and most routine cases to the blockbuster trials and settlements that dominate media coverage (Nielsen & Beim 2004), we attempt to more comprehensively assess law's role in processing claims of discrimination. We supplement case file data with in-depth interviews with parties and lawyers from a systematically selected subsample of cases. Rather than analyze litigation outcomes in binary terms (did the plaintiff win or lose?), we analyze case outcomes as a sequential variable. This approach better captures the dynamic character of the litigation process and the dilemmas that parties and courts face in adjudicating claims. By including distinct categories of outcomes that are largely unmeasured and therefore invisible in other research, our analysis more clearly reveals the social organization of discrimination litigation.

We consider four theoretical perspectives on the litigation process that offer explanations of case outcomes, each with different theoretical implications about the relationship between law, workplace discrimination, and social inequality. These are a formal legal perspective, a rational action/economic perspective, a legal mobilization perspective, and a critical realist perspective. Although all four perspectives provide insights into the results, the weight of the evidence supports a critical realist model. A critical realist perspective recognizes that employment discrimination litigation operates as a system of individualized justice, in which the overwhelming proportion of cases raise individual rather than collective claims. As a result, most plaintiffs receive cursory attention in legal process and a limited remedy. While law occupies an apparently central position as the arbiter of claims

about workplace discrimination, it seldom offers an authoritative resolution of whether discrimination occurred.

II. Theoretical Perspectives on Employment Discrimination Litigation

Employment discrimination lawsuits are distinctive from civil litigation more generally in many respects. First, anti-discrimination law is a welfare-oriented law that explicitly seeks to redress wrongs against certain protected categories of individuals, rather than a status-neutral law that "do[es] not on [its] face . . . give special benefits to [a particular] class" (Lempert & Sanders 1986:431–36). While anti-discrimination law protects everyone, it largely is employed by members of traditionally disadvantaged groups and may be seen as a redistributive policy engendering more opposition than other areas of law. It is not surprising, therefore, that legal claims of discrimination are bitterly contested and involve sharply opposing, often subjective, characterizations of what led to a negative personnel decision.

In addition, employment disputes take place in the context of a racially polarized U.S. workplace. Almost one-third of African Americans report that they experienced discriminatory treatment in the last year at least once, compared to a much smaller percentage of white workers (Dixon et al. 2002). White men significantly underestimate how often people of color and women experience offensive treatment at work and in public places (Dixon et al. 2002; Nielsen 2004).

Unlike many civil actions, which focus primarily on economic damages, discrimination claims allege moral *and* legal wrongs. Both parties (plaintiff-employees and defendant-organizations) in employment discrimination litigation seek to have the moral issues dispositively decided. Targets of discrimination typically experience considerable stress (Feagin 1991) and struggle with the decision about whether to complain of discriminatory treatment and take on the mantle of victimhood (Bumiller 1987). These concerns are well-founded because managers and co-workers react with considerable hostility to claims of discrimination; they denigrate workers who allege discrimination even when there is experimentally provided evidence that discrimination played a role in a negative employment outcome (Major & Kaiser 2005).

Requiring plaintiffs to file a charge with the Equal Employment Opportunity Commission (EEOC) before suing in court is also unique to discrimination. The EEOC charging structure is designed to provide an early opportunity for administrative investigation and conciliation and to allow the state to bring certain cases with significant impact, but it also is a hurdle for plaintiffs. The EEOC charge resolution process is itself ambiguous and organizationally constructed by the repeat players in the system (Hirsh 2008) so that most cases end with no agency decision beyond the provision of a right-to-sue letter. Fewer than one in five charging parties obtain any kind of favorable outcome from the EEOC itself. Although the EEOC occasionally provides a remedy and, according to plaintiffs' lawyers, occasionally provides investigative material that may be useful at a later stage of litigation, most often the EEOC process results in considerable delay without producing meaningful investigation or conciliation.

As with any lawsuit, employment discrimination lawsuits can resolve at different stages. In discrimination cases, what begins as a moral contest over whether discrimination occurred progressively becomes redefined as a shifting set of cost-benefit analyses about how to dispose of a dispute before proceeding to the next, more costly stage. EDL cases are treated more harshly by the courts, with lower levels of settlement rates, higher rates of summary judgment motions against plaintiffs, higher plaintiff loss rates, and higher appellate reversal rates of plaintiff awards than is the case for other kinds of civil litigation (Cecil et al. 2007; Clermont & Schwab 2009; Eisenberg 2004).

The literatures on courts, dispute processing, and legal mobilization suggest four theories that might explain the outcomes of discrimination lawsuits. These perspectives do not produce mutually exclusive predictions but, rather, emphasize different axes of explanation. Therefore, they all contribute to an understanding of how EDL operates. Yet the theories are not equally capable of explaining our results.

A. Formal Legal Model

A formal legal model of EDL holds that legal outcomes should reflect the law on the books. The outcome of a case should be determined by how well a plaintiff meets the formal requirements for making and proving a claim of discrimination. Because different theories of discrimination require different elements of proof, ceteris paribus, a formal legal model suggests that there will be variation in plaintiff success across different legal claims. Because new laws were introduced during the period we are studying, a formal model would predict that we would see changes in outcomes over time. The formal legal model does not consider the social processes that may shape what claims are made or how the contending parties pursue their representation. The formal legal model would assume that the behavior of lawyers in accepting, defending, and settling cases will reflect their knowledge of the law and their prediction of how a judge or jury would decide a case.

B. Rational Action/Economic Model

The field of law and economics has developed models that predict the behavior of parties in litigation based on their calculations of cost and legal uncertainty. The classic model by Priest and Klein (1984) suggests that those cases that are most likely to go to trial are those in which the uncertainty of the outcome is greatest, resulting in a predicted 50 percent success rate at trial. In economists' terms, the uncertainty of outcome in a particular case is an information problem that can be reduced by acquiring additional information about the facts or law of a case, but at the cost of acquiring that information. Priest and Klein recognize that if the parties have different stakes in the outcome, and thus different incentives for the level at which they would invest in a case, the odds might shift. As such, if employers have more to lose in an employment discrimination case, and are willing to invest greater resources to bring cases to successful conclusion at trial, they would enjoy higher trial success rates. Other economists have noted that asymmetries in information about the validity of claims among the parties can also lead to varying levels of plaintiff success rates at trial (Shavell 1996).

General economic conditions affect litigation as well. Donohue and Siegelman (1991) show that plaintiffs are more likely to sue for discrimination when the unemployment rate is high and they have fewer options in the labor market. While this model worked well for the 1972 to 1987 period, they found that the model did not hold during the 1990s after the passage of the Civil Rights Act of 1991. The 1991 Act provided the possibility of compensatory damages in addition to back-pay damages, and thus loosened the connection between litigation incentives and labor market conditions (Donohue & Siegelman 2005). Donohue and Siegelman also suggest that as the number of lawsuits filed increases, the average quality of cases will decline, because the growth reflects a greater proportion of plaintiffs with weaker cases making the decision to litigate.

Rational action/economic models move beyond formal law in making predictions about litigation outcomes, but are limited to considerations of cost. This model would predict that we would see a high proportion of small settlements because it reflects the true value of claims discounted by the uncertainty of winning and the cost of litigating. Economic models would not predict variations in outcome across theories of discrimination, across social groups, or over time, except as these correlate with differences in cost considerations.

C. Legal Mobilization

Theories of legal mobilization examine the conditions under which ordinary citizens turn to law (Bumiller 1988; Merry 1990; Sarat & Kearns 1995; Zemans 1983), the different ways in which law operates to achieve social change, and the likely impact of law (Stryker et al. 1999; Zemans 1983). Some scholars explicitly link social movement theory with theories of legal mobilization, characterizing discrimination lawsuits as social movement tactics "within proper channels" (Burstein 1991a) and arguing that law can be effectively mobilized on behalf of disadvantaged groups (Albiston 2005a; Burstein 1991a; McCann 1994). These scholars emphasize the importance of resources (including federal government intervention), the synergy with other social movement activity (Pedriana & Stryker 2004), and the efficacy of litigation generally (Kalev & Dobbin 2006), and class actions in particular (Skaggs 2008), for remedying race-gender inequality in organizations and industries.

The driving force in the legal mobilization model is *collective action*, typified in litigation by the class action or the test case that seeks to alter an industry practice that limits the employment opportunities of protected groups. The legal mobilization model suggests (1) that collective legal mobilization makes up a substantial segment of the docket of employment discrimination cases and (2) that cases that incorporate collective mobilization will be more successful. It follows that groups who are more effective at legal mobilization will enjoy greater success in litigation. The legal mobilization framework also recognizes the significance of organized resistance to change, whether in the form of efforts by conservative groups to employ anti-discrimination law (Burstein 1991b) or to appoint federal judges who would narrow the scope of anti-discrimination law or to the effect of conservative political environments on the decisions of judges and juries in discrimination cases.

D. Critical Realist

Whereas the legal mobilization framework may be thought of as being "optimistic" on the prospect of social change through litigation, what we call the critical realist framework is more "pessimistic." Drawing from legal realism, which suggests that judicial decision making is indeterminate (Gulati & Nielsen 2006; Kalman 1986; Llewellyn 1931, 1950), the critical realist perspective on EDL asserts that the indeterminacy of discrimination claims is inherent in the nature of the claim. Thus, while there may be some clear instances of "frivolous" cases or "smoking gun" cases, most cases fall in between. Costly investigation and adjudication are the only way to determine the strengths of a case. Although the critical realist agrees with the economist that the stakes in most cases are not large enough to persuade the parties to proceed, with the result that many cases will settle, the critical realist sees the social organization of litigation systematically working against certain parties and social groups. Plaintiffs, as one-shot litigants, are at a serious disadvantage compared to defendants, who more often are repeat players (Galanter 1974). Socially privileged groups, in better-paying jobs, with more education, with more influence within the work organization, will convert these social resources into legal resources. As a result, they should enjoy greater success in litigation. More fundamentally, critical realism recognizes the constructed nature of the "stakes" in a discrimination case, which are determined not by the intellectual complexity of the issues raised but by the social status of the parties involved (Katz 1977). The "critical" aspect of this approach recognizes the authority of law to claim jurisdiction over these disputes even as the empirical evidence demonstrates that these apparatuses simply process claims rather than authoritatively resolve them.

The "realist" aspect of this theoretical approach recognizes the broader social context in which the EDL framework exists. Even though the litigation system embodies unequal systems of power and privilege, it is unlikely that it will soon be replaced with something else. Although there may be possibilities within the existing framework to use law to more successfully advance workplace justice, the mere existence of this apparatus may displace other possible strategies of reform.

The four theories have implications for the relationship between law and workplace discrimination. The formal legal model suggests that law is doing what the legislature intended it to do it in combating employment discrimination. The rational action/economic model suggests that law is doing what is economically rational to combat discrimination. From this perspective, there may be inefficiencies in the system that allow some weak cases to proceed, while some strong cases do not, but the rational action perspective largely sees courts and lawyers as acting rationally to screen and prosecute cases appropriately. Legal mobilization theorists suggest that litigation may be effective in ameliorating discrimination if EDL incorporates mobilization tactics. Critical realists connect the outcomes of cases to law's role in preserving existing hierarchies in the workplace. If EDL is the focal point for contesting workplace discrimination, but the law typically does not provide a meaningful adjudication of a case or remedy for harm, then law may function primarily to legitimate current workplace practices.

III. Research Design and Data

A. Methodology and Data

Our project draws on three data sets. The first is an expanded replication of Donohue and Siegelman's earlier research on employment discrimination case filings. We collected a random sample of employment civil rights cases filed in federal courts between 1988 and 2003 in seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco (see Donohue & Siegelman 1991, 1993, 1995). These districts contain about 20 percent of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. Three-hundred cases were drawn from the list of all civil employment discrimination cases (classified as nature of suit code "442") in these districts from 1988 to 2003 compiled by the Administrative Office of the U.S. Courts (AOUSC) in each city, yielding a sample of 2,100 total cases. We derived sampling weights by district based on the total number of employment discrimination case filings in each district. This article examines only closed cases ($N = 1{,}805$) with all required key variables for this analysis, producing a final sample for analysis of 1,672 cases.

We developed an extensive coding form and trained teams of coders for each site. The same data-collection manager supervised and trained coders in each location. Ten percent of the cases were coded independently by different coders to allow tests of intercoder reliability. In 94 percent of cases there was agreement between coders on case outcome, the dependent variable in this analysis. Manually coding a random sample of case filings provides far more valid and representative data, but the approach faces some limitations because publicly available files can be incomplete due to misfiling or poor record keeping.

A second data set consists of more than 100 in-depth interviews with plaintiffs, defendants, and their lawyers. We randomly drew a subsample of cases from our filings sample in two districts.[1] Where possible, we interviewed opposing parties and lawyers in the same case. The interviews were taped, transcribed, and coded.

A third set of data we make limited use of here is the confidential charge data file obtained from the EEOC for the years 1991–2002, which contains the universe of complaints submitted to the EEOC or state fair employment agencies (Lancaster et al. 2006). In some 85 percent of cases in the court filings data set we were able to obtain a match to the EEOC charge file. For cases from 1995 on, we are able to use the EEOC priority handling code, described below, contained in the EEOC charge file as a predictor of the outcome of lawsuits.

B. Independent Variables

The case filings data, combined with data from matching EEOC charges, provide us with several independent variables that the theoretical models suggest will be important determinants of case outcomes or that are logically necessary control variables. The means and

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[1]We constructed a 4×4 table with basis of discrimination (race, sex, age, and disability) cross-tabulated with outcomes (dismissed, early settlement, late settlement, and trial) and then randomly drew within each of the 16 cells for willing participants.

standard deviations for all independent variables are shown in the Appendix. These include: (1) plaintiff characteristics, including race, gender, occupational status, and age; the industry and public or private status of the employing organization; the tenure of plaintiffs in their position and their union status; (2) the legal theories invoked in a case as measured in a variable that combined statute and type of discrimination involved; (3) case characteristics, including the issue raised in the case (hiring, firing, etc.); an index of legal effort that ranged from 0 to 3 (one point each was awarded if a file contained depositions, expert testimony, and/or statistical evidence; the variable was only computed for cases that proceeded to motions for summary judgment); whether the case alleged discriminatory actions by specific individuals; and whether the case alleged a disparate impact theory of discrimination; (4) the treatment of the charge that preceded the lawsuit by the EEOC, as well as the EEOC priority code for cases filed after 1995; (5) legal representation, including whether plaintiffs were represented by a lawyer throughout the litigation, were pro se (i.e., they represented themselves) throughout, or filed pro se and obtained counsel during the course of litigation; (6) measures of collective legal mobilization, including whether a case was a certified class action, whether there were multiple plaintiffs, whether the EEOC joined the lawsuit as a party, and whether the plaintiff was represented by a public-interest law firm; (7) jurisdiction: the seven federal districts in which we coded case filings; (8) year: 1988–2003; and (9) the political party of the presiding judge, as measured by the party of the appointing president.

It is important to note that we attempted in the coding of case files to construct valid measures of what can be conceived of as a latent or unmeasured variable of the "quality" of a case. Several of our measures might capture aspects of this variable, including the index of legal effort, the outcome of a case in the EEOC, and the EEOC priority code, but none is definitive. We attempted, without success, to have coders provide a subjective rating of the strength of a case, but we learned that there are inherent limitations to case files as a source of indicators about the "merits" of a case. Unlike some medical malpractice research in which medical records can be sent to medical professionals to assess, the merits of the case in employment discrimination depend on subjective assessments of job performance and the meaning of employer actions. Even where such records were included in the file, there is no standard for keeping employment records that would allow us to evaluate personnel files like a medical professional can do using agreed upon standards of care. We coded sets of documents constructed by the adversarial process of which they are a part. The relationship between those documents and a "good" or "bad" case are difficult to discern.

C. Dependent Variable

We sought to systematically analyze the dynamic character of EDL by constructing a set of sequential outcome variables that we identified through our interviews with lawyers and their clients. We coded six mutually exclusive outcomes: (1) dismissed, (2) early settlement, (3) summary judgment loss for plaintiff, (4) late settlement, (5) trial win for plaintiff, and (6) trial loss for plaintiff. Here, we describe the legal process that leads up to these outcomes and our methodology for analyzing outcomes.

Individuals filing a claim of employment discrimination in federal court must first file a charge with the EEOC or state fair employment practice administration (FEPA) and obtain a right-to-sue letter (see Hirsh 2008; Lancaster et al. 2006). Once in federal court, a plaintiff's case is classified as "dismissed" if it is involuntarily disposed of without trial of the issues (Rules 12 and 41, Federal Rules of Civil Procedure). Such cases typically are dismissed for the plaintiff's failure to state a claim, failure to serve the defendant, or for want of prosecution. These fundamental legal flaws often result from plaintiff misunderstanding. If the plaintiff has counsel and the case is dismissed, the plaintiff recovers nothing and may bear attorney fees and court costs.[2]

The next three outcomes—"early settlement," "plaintiff loss on all counts of summary judgment," and "late settlement"—are defined in reference to the motion for summary judgment (Rule 56, Federal Rules of Civil Procedure). During the discovery period (when the parties request, acquire, and analyze the opposing party's evidence), the defendant-organization makes a decision about whether to file a motion for summary judgment. In such a motion, the defendant argues that there is no material issue of fact to be adjudicated and that the judge should rule in favor of the defendant as a matter of law. If a case resolves through settlement prior to the motion for summary judgment, we code it as an "early settlement." If the defendant-organization files and wins on all counts of the motion for summary judgment, the plaintiff loses and bears attorney fees and court costs and is coded as "plaintiff loses all counts on motion for summary judgment." Plaintiffs may appeal the summary judgment ruling, but seldom prevail on appeal (Clermont & Eisenberg 2001; Clermont & Schwab 2004, 2009). If even one part of the plaintiff's complaint survives motion for summary judgment, the case continues forward for trial. If some portion of the case survives the motion for summary judgment and then settles, we code the case a "late settlement."

Surviving a motion for summary judgment may seem like a proxy for the quality of the case because it means a federal judge has looked into the case and made a determination that the case should continue. But we know parties sometimes engage in strategic settlement to dispose of strong cases early in the process (Albiston 1999; Albiston & Nielsen 2007), and surviving a motion for summary judgment is not a review on the merits of a case. How far a case proceeds may also affect litigants' perceptions of "procedural justice" (whether they feel they had an opportunity to be heard in court) (Tyler 1990), which is a theme we explore in other work. For this article, we simply note that plaintiffs are not necessarily uniformly better off if their case is prolonged. Finally, cases may proceed to trial before a judge or a jury. We code these cases as a plaintiff trial win if the plaintiff wins any part of a verdict.

After analyzing the distribution of case outcomes, we use discrete-time event-history models with a random-effects term to estimate the probability that a case will end at a particular stage as a function of the effects of independent variables, *net of the odds that a case has survived to that point.* The use of an event-history model captures the sequential nature of the litigation process and allows us to vary the coefficients for each stage of the litigation

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[2]In a small fraction of these cases, the cases were dismissed "without prejudice," meaning the plaintiff could file again if he or she wished, typically when the plaintiff failed to first pursue administrative remedies with the EEOC or a FEPA.

process. In this sense, it is an improvement over simple logistic or probit models that do not allow for multiple litigation outcomes.[3] Because we are concerned with the likelihood that a case will end at each given stage, we use each stage as the time period. This implies that we model the hazard rate that a case will end at each stage or continue on to the next stage. The event-history model also allows us to introduce a random-effects term, which controls for case-specific variation in the error term. Given the small number of cases that survive to trial, it was necessary to limit our analysis to the first four sequences of litigation: dismissal, early settlement, plaintiff loss on summary judgment, and late settlement.

Thus, the model summarized in Table 1 and analyzed in greater depth in the section that follows contains 3,778 observations, which equals the total number of cases at risk of concluding in the first four sequences. That is, all 1,672 cases were at risk of ending in dismissal; plus the 1,355 that survived dismissal and were at risk of ending in early settlement; plus the 522 cases that progressed past early settlement that might have ended in a loss on summary judgment; plus the 229 cases that survived past the motion for summary judgment and might have ended in late settlement. For the final stage, we model those cases that ended in a late settlement against the 100 cases that continued to trial. While discrete-time event-history models are appropriate for estimating the probability of sequenced events, levels of significance for coefficients will be affected by how many cases survive to a given stage.[4] The coefficients presented in Table 1 estimate the effect of each variable on the hazard rate of a case ending at each specific stage, given that it has already reached that stage.

IV. Results

A. The Distribution of Case Outcomes

Figure 1 diagrams the sequence of case outcomes from our sample. A significant proportion of cases (some 19 percent) are dismissed. By far the most frequent outcome is early settlement, which makes up one-half the entire sample of closed filings (50 percent). Most parties seek to avoid the risks associated with investing in a motion for summary judgment and resolve their claims prior to the filing of a motion. Of the cases that do not settle early, plaintiffs lose the motion for summary judgment in more than one-half the cases (57 percent of remaining cases, or 18 percent of filings overall). In the 14 percent of cases that remain active after the disposition of the motion for summary judgment, more than one-half (57 percent of remaining cases, or 8 percent of filings overall) settle before a trial

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[3]A limitation of discrete-time models is that they treat the occurrence of events as sequentially instantaneous without accounting for the real elapsed time and temporal dependence between events. The analysis could be further refined in future analyses by employing a competing risks model that accounts for the passage of real time.

[4]We ended up using the discrete-time event-history model because it allowed us to control for case-specific variation, as well as simultaneously estimating the likelihood of a case ending at each stage. However, to test the robustness of our results, we also ran models that were specified as sequential logits, sequential probits, multinomial logits, multinomial probits, and conditional logits. In each of these specifications, we observed the same patterns in direction and significance in our coefficients, indicating that our results are not due to the specific model.

Table 1: Discrete-Time Random-Effects Event-History Model of Litigation Outcomes

	Dismissal		*Early Settlement*		*Summary Judgment Loss*		*Late Settlement*	
	β	*Robust Z Score*	*β*	*Robust Z Score*	*β*	*Robust Z Score*	*β*	*Robust Z Score*
Plaintiff Characteristics								
Other nonwhite	0.0440†	(1.91)	0.172	(0.99)	0.402	(1.29)	−0.528	(0.96)
Black	0.335	(1.27)	−0.056	(0.24)	0.901*	(2.42)	−0.772	(1.17)
Male	0.303†	(1.66)	−0.087	(0.53)	0.38	(1.34)	−0.322	(0.67)
Manager/professional	0.018	(0.08)	−0.593**	(3.15)	−0.176	(0.50)	−0.509	(0.71)
Sales, services, office	−0.212	(1.08)	−0.137	(0.76)	−0.095	(0.28)	−0.564	(0.83)
Age	−0.023*	(2.14)	−0.023**	(2.65)	−0.005	(0.31)	−0.022	(0.83)
Job tenure	−0.018	(1.57)	−0.029**	(3.43)	0.031*	(2.14)	−0.073*	(2.53)
Member of union	−0.459	(1.46)	−1.126**	(4.61)	0.298	(0.85)	0.111	(0.16)
Private defendant	−0.452*	(2.29)	0.250	(1.41)	0.600+	(1.95)	1.894**	(3.17)
Statutory Basis/Type of Discrimination Alleged								
Title VII—Race	0.351†	(1.63)	−0.045	(0.21)	−0.753*	(2.23)	−0.089	(0.15)
Title VII—Sex	0.502*	(2.29)	−0.405*	(2.08)	0.488	(1.51)	−0.844	(1.38)
Title VII—Retaliation	−0.303	(1.55)	−0.053	(0.31)	−0.635*	(2.17)	−0.322	(0.65)
Title VII—Other	−0.114	(0.51)	−0.461*	(2.25)	−0.121	(0.40)	−0.288	(0.40)
ADEA—Age	0.045	(0.16)	0.267	(1.13)	0.209	(0.53)	−0.255	(0.36)
ADEA—Retaliation	0.501	(1.30)	−0.119	(0.38)	0.576	(1.31)	2.149*	(2.25)
ADA—Disability	−0.191	(0.78)	−0.511*	(2.43)	−0.287	(0.78)	0.869	(1.21)
ADA—Retaliation	−1.070*	(2.32)	0.161	(0.48)	−0.881	(1.51)	−1.385	(1.31)
42 U.S.C. § 1981	−0.076	(0.35)	−0.287	(1.56)	0.400	(1.27)	−0.121	(0.20)
42 U.S.C. § 1983	0.286	(0.80)	−0.601†	(1.88)	−0.315	(0.67)	1.235	(1.52)
Constitutional case	−0.006	(0.01)	−0.136	(0.37)	0.269	(0.52)	−1.394	(1.31)
Other statute	0.244	(1.22)	−0.040	(0.24)	−0.320	(1.02)	−0.478	(0.98)
Alleged Discriminatory Practice								
Hiring	−0.244	(0.77)	0.230	(0.90)	−0.630	(1.35)	1.232	(1.39)
Firing	0.040	(0.23)	0.040	(0.26)	−0.291	(1.08)	−0.541	(1.13)
Sexual harassment	−0.354	(1.19)	0.300	(1.17)	−0.238	(0.49)	0.393	(0.49)

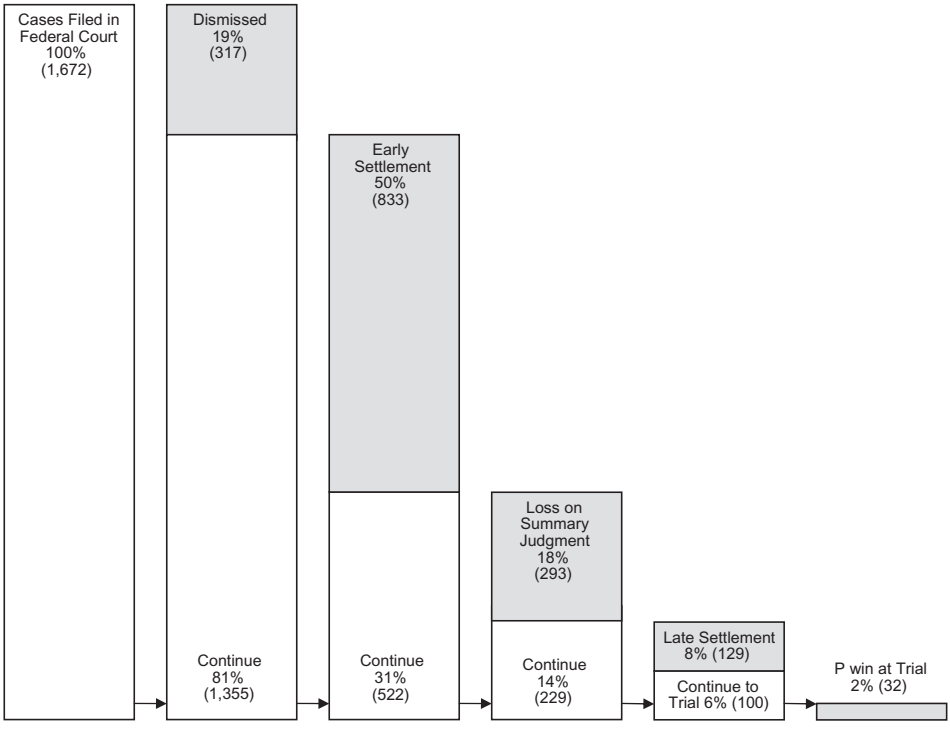
Table 1: *Continued*

	Dismissal		*Early Settlement*		*Summary Judgment Loss*		*Late Settlement*	
	β	*Robust Z Score*	*β*	*Robust Z Score*	*β*	*Robust Z Score*	*β*	*Robust Z Score*
Conditions of employment	0.129	(0.66)	0.344*	(2.10)	0.013	(0.05)	1.041†	(1.76)
Pay	0.113	(0.46)	0.422†	(1.88)	−0.865*	(2.50)	1.119†	(1.92)
Other Case Characteristics								
Index of legal effort					0.066	(0.34)	−0.409	(1.02)
Specific individual perpetrator	−0.138	(0.78)	−0.155	(1.00)	−0.128	(0.48)	0.117	(0.22)
Disparate impact theory	−0.701†	(1.71)	−0.510	(1.31)	0.053	(0.10)	0.426	(0.48)
EEOC Treatment								
EEOC A categorization	−0.167	(0.49)	0.331	(1.19)	0.414	(0.94)	0.020	(0.02)
EEOC B categorization	0.137	(0.55)	0.428*	(2.03)	0.250	(0.66)	0.416	(0.47)
EEOC C categorization	−0.077	(0.29)	0.254	(1.08)	0.176	(0.42)	0.875	(0.97)
EEOC supported	−0.088	(0.21)	−0.215	(0.62)	−0.365	(0.69)	0.435	(0.44)
EEOC not supported	−0.172	(0.76)	−0.398†	(1.86)	0.161	(0.48)	−0.936	(1.17)
Legal Representation								
Only pro se	2.632**	(11.60)	−0.889**	(3.44)	2.116**	(4.65)	−0.660	(0.48)
Gained counsel	0.081	(0.25)	−0.755**	(3.04)	0.488	(1.20)	−0.265	(0.33)
Collective legal mobilization	−1.045*	(2.40)	−0.038	(0.16)	−1.167**	(3.14)	0.132	(0.22)
Constant	−0.889	(1.37)	2.32**	(4.00)	−0.194	(0.21)	1.362	(0.77)
Observations	3,778							
Chi^2	1193.77**							
Pseudo R^2	0.300							

†$p < 0.10$; *$p < 0.05$; **$p < 0.01$.

NOTE: Effects for city and year were estimated, but not reported. Reference categories for categorical variables with multiple categories are: for race, white; for occupational status, blue collar and other; for EEOC outcome, no findings; for EEOC categorization, no categorization; for legal representation, lawyer throughout. All cases were weighted by the sampling weight.

Figure 1: The paths of federal employment discrimination cases: A sequential model of outcomes, 1988–2003.



NOTE: Percentages may add to more than 100 percent because each case may allege more than one type of discrimination.
SOURCE: American Bar Foundation Employment Discrimination Litigation Dataset (for 1972–1987, see Donohue and Siegelman (1991); for 1988–2003, see current study).

outcome. In the 6 percent of filings that result in trial outcomes, plaintiffs win 33 percent of the time, or in 2 percent of filings overall.

Because settlement is the modal outcome, it is important on both theoretical and policy grounds to know the size of settlements, yet such data typically are unavailable because of confidentiality agreements that often accompany settlement. Of the 945 cases in our sample that settled, we obtained settlement amounts for only 75 cases from court records. The median settlement was $30,000, the 25th percentile was $11,500, and the 75th percentile was $92,458. Although the number of cases is very small ($N = 14$), if a plaintiff survived a motion for summary judgment, coded as a "late settlement," the median award rises to $40,000 and the 75th percentile to $110,000. Our sample contained three very large settlements: one for $110M, one for $29M, and one for $8.1M.[5]

[5]Our findings are consistent with research that examined a confidential data set of nearly 500 employment discrimination cases settled by federal magistrates in Chicago between 1999 and 2005. It revealed a median settlement award

Cases that proceed to trial produce larger awards for plaintiffs than those reached in settlement. The data on trial verdicts in our data set are more complete, given the recording of the amount in case files, but the number of plaintiff trial victories is small ($N = 32$). The median award amount at trial is $110,000, with a 25th percentile of $23,000, and a 75th percentile of $403,098. The largest trial award in our data is almost $3M.

The sequential model of case outcomes provides a more realistic assessment of the prospects for plaintiffs in EDL than previous research suggests. If the measure of plaintiff success were winning "something," the plaintiff win rate would be approximately 60 percent. Yet many of those "wins" come in the form of small settlements with a median value of $30,000, of which a portion goes for legal fees. Some 40 percent of plaintiffs win nothing. This pattern by itself has significant implications for understanding the role that EDL might play in redressing workplace discrimination. The fact that most plaintiffs gain modest settlements or nothing at all suggests that EDL may be a relatively weak engine for social change, both because potential plaintiffs and their attorneys will lack the incentives to pursue their claims and because defendants typically face limited exposure from litigation.

B. Explaining Outcomes

What explains how a case will end? This section examines the explanatory variables that have no effect on case outcome (year filed, jurisdiction, political party of the presiding judge, legal effort, and issue raised); those that have an effect at some stage of the process (certain plaintiff characteristics, including race, gender, tenure on the job, unionization of the workforce, public/private sector, and statutory claim); and the variables that explain the most variation in case outcomes (legal representation and collective legal mobilization).

1. Independent Variables that Strongly Affect Outcomes

By far the most significant effects on outcome are legal representation and collective legal mobilization. One in five plaintiffs acts as his or her own lawyer, operating pro se over the course of the lawsuit, and they are almost three times more likely to have their cases dismissed, are less likely to gain early settlement, and are twice as likely to lose on summary judgment. If pro se plaintiffs survive beyond summary judgment, they are not significantly different from other plaintiffs in terms of their odds of obtaining a late settlement. Another 8 percent of plaintiffs file pro se, but obtain counsel during their case. Table 1 reveals that, controlling other variables, these plaintiffs are still less likely to settle early than plaintiffs who had counsel throughout.

These dramatic effects of legal representation were demonstrated when we ran a logit model predicting dismissals. The pseudo R^2 for the model before adding the legal representation variables is 0.09 (model not shown). The pseudo R^2 more than doubles to 0.22

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in employment discrimination lawsuits of $30,000. At the extremes, 7 percent of the settled cases ended with the plaintiff receiving less than $5,000, and 2 percent of cases ended with the plaintiff receiving settlements over $300,000 (Kotkin 2007).

just with the addition of legal representation variables. At the first, perhaps least visible, aspect of the litigation process, legal representation is crucial to continuing and representation remains critical for plaintiffs to obtain early settlement and avoid loss on summary judgment.

Why would plaintiffs who have the benefit of counsel be more likely to exit at the early settlement stage? Why do they choose not to pursue their cases? The statistical results are consistent with what our interviews with plaintiff and defense lawyers suggested. Settlement offers at this stage typically include attorney fees, which offer a direct incentive to plaintiffs and their attorneys to settle. This is a stage when sophisticated parties come to recognize that they can minimize cost and risk, even if the settlement amounts involved are modest. Plaintiffs' lawyers obviously are pivotal in persuading their clients to accept early settlement, as one-half of filings are resolved at this stage.

The powerful effect of legal representation might be explained as a selection effect. That is, obtaining legal representation reveals an otherwise unmeasured variable of quality of case. A considerable amount of research, some involving random assignment of counsel, finds an independent effect for legal representation for a range of problems facing individuals (Kritzer 1990, 1998; Sandefur 2008; Seron et al. 2001) regardless of the strength of the case. As we discussed above, included in our model are several measures that should tap the strength of a case. Yet the presence of counsel had a significant effect on outcome net of those variables. Thus we are not persuaded that the effect of counsel can be attributed to unmeasured aspects of the strength of a case.

In addition to legal representation, collective legal mobilization (cases involving multiple plaintiffs, certified class actions, and representation by a public-interest law firm or the EEOC) is the most important predictor of case outcomes. Of the 152 cases in which collective legal mobilization was employed, 108 involved a lawsuit by multiple plaintiffs, which may consist only of two plaintiffs; 46 were cases in which the EEOC intervened as a party; 18 were certified class actions (a similar number of cases sought class action status but did not obtain it); and in only nine cases were plaintiffs represented by a public-interest law firm. At the outset, then, we should note that collective legal mobilization is rare in the system of EDL (less than 10 percent of all cases). Most cases are brought by individual plaintiffs, without the support of other plaintiffs, the EEOC, a class, or a public-interest law firm.

Yet Table 1 shows that plaintiffs in cases with collective legal mobilization are far more successful. They are less likely to be dismissed and less likely to lose on motion for summary judgment. In simplified analyses of trial outcomes (not shown), we found that plaintiffs in collective cases had an even chance of winning at trial, compared to only 3 in 10 chances for plaintiffs overall.

2. Independent Variables that Affect Outcomes at Some Stages of the Litigation Process

Various plaintiff characteristics, legal theories, and different kinds of dispositions by the EEOC have effects at some points in the litigation process.

Early in the litigation process, plaintiff race and gender matter significantly. Plaintiffs are more likely to survive the dismissal phase if they are white than if they are a person of

color and they are more likely to survive dismissal if they are a woman versus a man (see Table 1). After surviving the dismissal phase, whites have similar experiences to people of color in later stages and women's outcomes are similar to men's. The race effect is not explained by reverse discrimination cases (i.e., when whites file a race discrimination claim).[6] The gender effect, in contrast, *is* attributable in part to the lack of success enjoyed by men filing gender claims.[7]

One concern raised by our data is multicollinearity between some of our independent variables, particularly between demographic characteristics and statutory claims, such as race of plaintiff and Title VII race claims, sex of plaintiff and Title VII sex claims, and age and ADEA claims. To ensure that our results are not affected by this multicollinearity, we conducted a number of post hoc analyses to determine whether or not our results were robust to the inclusion or exclusion of particular variables. We assessed this through comparing the results to models that included only one of each of these pairs of variables and those that contained both, as well as directly testing the interaction between them. In all cases we found that the sign and significance of the results presented here were not substantively different in these alternate specifications, and found that the interactions did not affect the pattern of results even when they were significant. This indicates that our results are not affected by the multicollinearity of our independent variables.

Other plaintiff characteristics that are associated with outcomes suggest more "staying power" and may reflect greater resources or a different kind of attachment to the employer. Managerial and professional employees, older plaintiffs, employees with more tenure on the job, and plaintiffs working at unionized establishments are less likely to be dismissed or to settle early. Not only are these plaintiffs more likely to have lawyers, they may be more persistent in seeking redress. Tenure may also strengthen a plaintiff's claim that a negative employment action results from discrimination.

Cases involving private-sector companies look quite different from public-sector cases. We might expect some important differences between private-sector and public-sector cases, given that private-sector EEOC cases overwhelmingly involve firing, whereas public-sector cases include much higher percentages of hiring and promotion claims (Roscigno 2007:89–101). Private-sector cases are less likely to be dismissed than public-sector claims. However, private-sector plaintiffs then face a greater risk of losing on a motion for summary judgment. If they survive that motion, they are far more likely to obtain a late settlement than their public-sector counterparts, perhaps reflecting the greater willingness of public defendants to proceed to trial. Despite the importance of sectoral differences, industry variables did not produce significant effects and were dropped from further models.

The statutory claims plaintiffs raise have relatively few significant effects on outcome, with the exception of retaliation cases. Title VII retaliation cases are less likely to lose on

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[6]Adding an interaction term for whites filing race claims did not change the significance level of the main race effects.

[7]An analysis that included an interaction term for men claiming gender discrimination under Title VII found that male gender claims were significantly more likely to be dismissed. When that term was added to the model, the coefficient for Title VII gender claims was no longer statistically significant.

summary judgment. ADEA retaliation is more likely to gain late settlement. ADA retaliation is less likely to be dismissed. Retaliation claims appear to raise difficult issues for defendants. Title VII race claims are somewhat less likely to lose on summary judgment; Title VII gender claims are more likely to be dismissed and less likely to settle early.

Finally, we explore the effect of EEOC action, short of intervening as a plaintiff, on case outcomes. As we observed in our discussion of collective action, when the EEOC becomes a plaintiff in a case it has a significant effect. However, EEOC priority codes and merit determinations have little explanatory effect.

In an effort to reduce case backlog by dedicating resources to the strongest cases, the EEOC established a priority case handling process (PCHP) in 1995 that requires an EEOC complaint processing specialist (who is not a lawyer) to assign each case an A, B, or C priority code. The specialist decides if further investigation will "probably" result in a cause finding (an A case), will "likely" result in a cause finding (a B case), or has "uncertain merit" (a C case). The parties are not allowed to know the priority code their case receives. Some 20 percent of EEOC charges are classified as A cases, 58 percent as Bs, and 22 percent as Cs (Hirsh 2008; Lancaster et al. 2006). We matched the EEOC data to case filings in 815 of our cases. There is a filtering effect by priority code on cases with A, B, and C priority codes because they receive different treatment and outcomes in the EEOC. Nonetheless, the matched cases in the filings data set roughly matched the proportion of A, B, and C cases in the EEOC. Of the matched cases, 20.4 percent (179) were As, 47.3 percent (416) were Bs, and 32.3 percent (384) were Cs. Thus, despite the EEOC's differential efforts in A, B, and C cases, the proportion of each type of case that makes it to federal court is similar to the proportion at EEOC intake, leaving a credible subset of cases with which to evaluate the effect of priority code on case outcome.

Table 1 shows that the only statistically significant effect that EEOC priority codes have is that B cases are more likely to obtain early settlement than other cases. The absence of significant effects holds both in models that included legal representation variables and those that did not. Moreover, the explanatory value of the model (R^2) does not change when the variables for EEOC priority codes are included.

In addition to the PCHP code, we analyzed information on the disposition of the EEOC (or FEPA) charge in the case. In 80 percent of the lawsuits in our sample, the EEOC made no finding and provided the plaintiff with a right-to-sue letter. In the 20 percent of cases in which there was an EEOC finding, the EEOC supported the plaintiff's charge 21 percent of the time and did not support on the merits 79 percent of the time. These EEOC administrative decisions also have relatively little effect on litigation outcomes. Table 1 reports that when the EEOC supports a plaintiff's charge, there are no significant differences from cases with no EEOC finding. When the EEOC issues a finding that does not support the plaintiff, cases are less likely to settle early. Employers apparently take the EEOC ruling in these cases as an indication they should continue to litigate rather than settle.

3. Independent Variables that Have No Effect on Outcomes

Finally, it is important to note which independent variables had no effect. Jurisdiction of case filing, year filed, and the political party of the president who appointed the presiding

district court judge (Democrat or Republican) had no effect on the outcome.[8] Jurisdiction and year filed were included in the model in Table 1, but the effects are not shown. Party of presiding judge was dropped from the model after we found it had no effect. The index of legal effort also had no effect on outcome.

With the exception of conditions of employment and pay discrimination, the issues raised in a case filing (hiring, firing, promotion, sexual harassment, etc.) also have no strong relationship with outcome when controlling other variables. Conditions of employment and pay discrimination claims have slightly higher levels of settlement, both early and late, than other cases, and pay discrimination plaintiffs are less likely to lose on summary judgment. These differences may be because complaints about working conditions are more easily resolved, resulting in a higher settlement rate. Pay cases may be more likely to survive motion for summary judgment given the specific nature of evidence required in such cases, that is, comparisons between similarly situated employees.

Disparate impact cases—those in which a plaintiff complains about a firm-wide, facially-neutral policy such as a height/weight requirement or an employment test—have largely the same outcomes as other cases. The fate of disparate impact theories has been a focus of much legal and policy debate. Indeed, part of the 1991 Civil Rights Act was a legislative override of jurisprudential barriers for plaintiffs alleging disparate impact theories of discrimination. Yet, as the Appendix shows, disparate impact cases represent only 4 percent of the EDL docket. They are slightly less likely to be dismissed ($p < 0.1$), but otherwise do not differ significantly from other cases.

Finally, given the increasing emphasis by courts on intentional acts of discrimination, we thought it was possible that cases in which a specific individual or group of individuals was identified as the perpetrator of discriminatory acts might enjoy greater success, but there are no significant effects.

C. Discussion

These results provide the most support for legal mobilization and critical realist theories of EDL, but much less support for the formal legal model and the rational action/economic model. Formal legal categories, with a few exceptions, do not explain outcomes. Nor did changes in formal law—the passage of the ADA and the Civil Rights Act of 1991—have an effect on outcomes. (It is apparent that there has been an increase in the proportion of jury vs. judge trials, which can be attributed to the 1991 Act. Yet trials are rare and have become less frequent during the period we analyze.) A formal legal model predicts that characteristics of plaintiffs unrelated to the substance of a case should have no effect on outcome, but we find that sometimes they do. A formal legal model implies that outcomes should be relatively predictable, but neither EEOC disposition nor EEOC priority codes are predictive of outcome. The two variables that have the largest impact on outcome, legal representation and collective legal mobilization, do not fit comfortably in a formal legal model.

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[8]Cases filed in Chicago were somewhat more likely to be dismissed and less likely to settle late than the reference jurisdiction, Dallas. True to its reputation as a center for dispute resolution, San Francisco cases were more likely than others to settle early and Philadelphia cases were less likely to lose on motion for summary judgment.

One interesting null finding is consistent with a formalist view: the fact that party of the deciding judge bears no relation to outcome. There appears to be a dichotomy between results in data sets that are limited to available opinions versus those that look at the mass of cases (or a random sample of them as in our study). Cases with published opinions are a highly filtered subset of cases. Most studies by political scientists find judge effects in data sets based on available opinions but studies that look at all cases in an area do not find such effects (Ashenfelter et al. 1995; Sisk et al. 1998). Keele et al. (2009) provide some explanation for this difference, explaining that federal judges are more likely to write opinions in cases when discernable ideological issues are at stake.

Some of the broad patterns of results are consistent with the rational action/economic perspective. This perspective would predict a high rate of settlements at modest cost as reflecting the rational behavior of parties and the courts in a large number of modest claims, which potentially are costly to prosecute at trial. Rational action models would explain the effects of legal representation and legal mobilization as reflecting a greater investment in a case, which pays off in better outcomes. In this perspective, the greater investment is rational in light of the greater stakes of the case for the parties or the stronger merits of the case. However, this is a disciplinary assumption rather than an empirically demonstrated relationship. The rational action perspective would hold that the lack of representation and collective action must reflect low stakes or weak merits, rather than an absence of resources. The rational action perspective also cannot readily explain why certain racial, gender, and occupational status groups might fare better than others, unless it again returns to the assertion that these groups have higher stakes or stronger cases than other plaintiffs.

Nor does the rational action/economic perspective easily accommodate the lack of predictive force from EEOC dispositions and priority codes. Presumably, these measures indicate the strength of a plaintiff's case, which should affect case outcome in a world of rational actors. An economist might respond that EEOC classifications simply are not a good measure of the strength of a case, which explains why we find only a weak relationship.

Just as the rational action model interprets these results through the lens of costs, the legal mobilization perspective interprets the results in terms of political mobilization. The most direct support for this model is the clear benefit enjoyed by cases that entail legal mobilization. The biggest difficulty for the model is that 9 of 10 cases do not reflect collective mobilization of any sort. A mobilization theorist could argue that if plaintiffs adopted collective tactics in a larger proportion of cases, they would obtain better results. Similarly, a mobilization framework would interpret the effects of plaintiff's characteristics and legal representation as related to the greater capacity of certain groups or the legally represented to mobilize within litigation. The mobilization perspective is relatively silent on what we should expect when the EEOC gives a favorable disposition or assigns a case a high priority code, except that favorable EEOC treatment might itself be seen as a form of mobilization within law, which should benefit a plaintiff.

The results fit squarely within a critical realist interpretation, without needing to rely on unmeasured variables. The relative prevalence of individual cases within a system that also includes a small number of class actions is consistent with the classic literature on the social organization of litigation (Galanter 1974). That literature explains that one-shot

litigants are typically outgunned, with the result that many lose or obtain small settlements, without ever obtaining a day in court in which they present their grievance and bring evidence to support it. The critical realist and the economist both expect this pattern of case resolutions, but whereas the economist is likely to view these outcomes as appropriate given the stakes and uncertainties involved, the critical realist sees the results as the product of institutional forces that treat the cases as though they involve small stakes. The critical realist expects that social advantages will play a role in case processing and thus would not be surprised that more privileged social groups obtain better results, even though it may be ironic in a subfield of law intended to protect traditionally disadvantaged groups. The critical realist expects that more resourceful parties, those who have legal representation or are supported through collective mobilization, will obtain superior results in law. And while these more resourceful plaintiffs may have stronger cases, the critical realist is skeptical about the ability of lawyers, courts, and regulators to draw neat lines between weak and strong cases. Realists are prepared to explain the results in terms of resources without making assumptions about the strength of the case. Realism expects legal decision making to be arbitrary and indeterminate as an inherent aspect of legal process. The inability of the EEOC to predict case outcomes is consistent with that perspective.

V. Conclusion: Individualized Justice

When we shift to studying a random sample of cases, and include what typically is excluded in research that looks only at published opinions, an image of discrimination litigation emerges that is very different than media representations of highly successful and consequential outcomes (Nielsen & Beim 2004). The image also is different from many social scientific accounts that emphasize high-impact class action litigation (e.g., Skaggs 2008). Employment discrimination litigation is a system dominated by individual cases bringing claims of disparate treatment, rather than by cases that attack policies that have a disparate impact on protected groups. In this system of individualized justice, plaintiffs and defendants come to court seeking a vindication of their respective positions, but typically they leave with a settlement they feel they must accept, even if it is not "just." Plaintiffs who come to the process with legal representation or the strength of collective legal mobilization fare significantly better than other plaintiffs. It is a system characterized by considerable indeterminacy about the outcome of a particular case, even though the overall distribution of outcomes is remarkably stable over the time we analyzed.

We considered four overlapping theoretical perspectives in developing a multivariate analysis of the sequential outcome of cases. Although we were not engaged in a theory-testing approach, and the four theories do not offer mutually exclusive interpretations of the results, we found only limited support for a formal legal model, mixed support for the rational action/economic and legal mobilization models, and considerable support for a critical realist framework.

The failure of the formal legal model to describe the outcomes of litigation, while hardly surprising to law and society scholars, underscores the need for legal scholars, jurists, and policymakers to examine how the law actually functions in a given arena. The provision

of formal rights does not lead automatically to their realization; rather, the effect of rights depends on the social organization of the enforcement system. And here, the system largely is premised on the private market for legal services. The rational action framework helps explain the pattern of case outcomes based on the stakes involved and legal costs. Yet it must fall back on an assumption that the observable determinants of outcome—legal representation and collective legal mobilization—somehow reflect the unobserved "worth" of a case.

The legal mobilization framework sees continued prospects for significant social change through the current system of employment discrimination litigation. This optimism is validated in a broad sense by the growth of EDL in the 1990s and the inclusion of newly protected groups of workers, such as the disabled, older workers, and sexually harassed workers. It also is validated by the relative success of cases that incorporate collective legal action. When collective action occurs, plaintiffs are far more successful in court. The largest award in our data set by many orders of magnitude was the result of collective action. As Skaggs (2008) reported, class action litigation significantly improved the economic status of women in the supermarket industry.

While arguably successful in promoting social change, the success of a small number of major class actions also creates an illusion of the effectiveness of law. Less than 1 case in 10 has any element of collective action. This is dramatically lower than the 45 percent rate of class actions among the appellate cases reported by Burstein (1991a). The predominance of individual claims does not in itself mean that employment civil rights do not play a role in the workplace. To the extent that individual workers feel empowered to make demands that result in improved working conditions, these rights have important, if difficult to measure, effects (Albiston 2005b; McCann 1994). The workers we studied who could not resolve their problems in the workplace informally and chose to resort to the formal legal system typically received cursory review of their claims by the EEOC and, if they avoided dismissal or loss on summary judgment, settled for a small sum. Many of the plaintiffs we interviewed began litigation hoping to get their jobs back, but most do not. Given the emotional and financial risks that plaintiffs must bear, this is not a regime that encourages the pursuit of rights. Still, there is little question that if a plaintiff can inject collective mobilization into his or her lawsuit, even by adding one other plaintiff, it dramatically increases the odds for success.

The critical realist perspective raises profound questions about the relationship between employment discrimination litigation and patterns of workplace discrimination. The large number of individuals who pursue claims in court and, indeed, the widespread criticism of employment discrimination litigation from conservative political quarters, suggests that litigation is seen as a central arbiter of disputes over workplace discrimination. In a literal sense, law takes jurisdiction over claims of workplace discrimination: it offers a promise of an authoritative resolution of a morally freighted conflict. Yet the law promises more than it delivers for the vast majority of litigants. If a plaintiff does not have the benefit of counsel, he or she is likely to fail. When the plaintiff does have a lawyer, he or she is typically persuaded to settle for a modest amount. While the system largely favors defendant-employers, who face only modest costs in any individual case, defendants also feel abused by discrimination litigation. The defendants and defense lawyers we interviewed

made clear that no one is happy with settlements. Defendants consistently maintain that if they see discrimination in their organization they redress it. Defendants arrive at settlements on pragmatic grounds. They reject the notion that they discriminated, but do not trust the legal system to vindicate their position. They prefer to settle at modest cost rather than incur additional legal expenses or risk a negative trial outcome. If defendant-employers do not view the legal result as substantively and procedurally fair, it is dubious, given the small costs imposed, that they will critically examine the organizational conditions that led to the discrimination claim.

The critical realist perspective on employment discrimination litigation is in part consistent with the observations of several critical sociolegal scholars, but also extends those theoretical arguments. Employment discrimination law ostensibly provides relief for individual targets of discrimination and incentives for change in employing organization. When these rights are activated in the formal legal system, however, plaintiffs seldom achieve satisfactory relief. The law fails to seriously address discrimination, not because it excuses discriminatory behavior, but because of how it organizes the enforcement of legal rights. Like scholars who have studied the relationship between law and inequality in other dimensions (Nelson & Bridges 1999; Nielsen 2004; Scheingold 1974), these data demonstrate that employment law takes jurisdiction over a set of potential rights claims. But unlike comparable worth or hate speech, in which the courts authoritatively rejected a species of rights claims, in EDL the process of marginalizing rights claims is less formal and less visible. In EDL, the courts largely deflect rights claims without authoritative resolution: they dismiss, they orchestrate settlement, they reject on summary judgment. In a small portion of cases—the collective legal mobilization cases and a small number of individual cases—plaintiffs are able to deviate from the normal pattern of case processing. Those relatively rare cases sustain the myth of a responsive system of employment civil rights.

Our results call for a rethinking of law and social change. Because employment discrimination litigation seldom yields a substantial award for plaintiffs and seldom provides systemic results, it largely does not deliver an impetus for the elimination of workplace discrimination. Employment discrimination litigation is not so much an engine for social change, or even a forum for carefully judging the merits of claims of discrimination, as it is a mechanism for channeling and deflecting individual claims of workplace injustice.

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Appendix: Descriptive Statistics, Independent Variables

Variable	*Mean*	SD	*Min*	*Max*
White	0.286	0.452	0	1
Black	0.380	0.486	0	1
Other nonwhite	0.334	0.472	0	1
Male	0.489	0.500	0	1
Manager, professional	0.304	0.460	0	1
Sales, service, office	0.447	0.497	0	1
Blue collar and other	0.249	0.432	0	1
Age	38.48	10.874	18	76
Job tenure	6.46	8.330	0	48
Member of union	0.091	0.288	0	1
Private defendant	0.755	0.430	0	1
Title VII—Race	0.401	0.490	0	1
Title VII—Sex	0.364	0.481	0	1
Title VII—Retaliation	0.336	0.473	0	1
Title VII—Other	0.166	0.372	0	1
ADEA—Age	0.224	0.418	0	1
ADEA—Retaliation	0.061	0.241	0	1
ADA—Disability	0.191	0.394	0	1
ADA—Retaliation	0.050	0.219	0	1
42 U.S.C. § 1981	0.188	0.391	0	1
42 U.S.C. § 1983	0.074	0.263	0	1
Constitutional case	0.050	0.220	0	1
Other statute	0.352	0.478	0	1
Hiring	0.086	0.282	0	1
Firing	0.605	0.489	0	1
Sexual harassment	0.171	0.377	0	1
Conditions of employment	0.599	0.490	0	1
Pay	0.136	0.343	0	1
Index of legal effort	1.436	0.671	0	2
Specific individual perpetrator	0.566	0.496	0	1
Disparate impact theory	0.040	0.196	0	1
EEOC A categorization	0.097	0.400	0	1
EEOC B categorization	0.233	0.500	0	1
EEOC C categorization	0.156	0.467	0	1
EEOC no categorization	0.513	0.500	0	1
EEOC supported	0.043	0.204	0	1
EEOC not supported	0.162	0.369	0	1
EEOC no finding	0.795	0.404	0	1
Only pro se	0.148	0.355	0	1
Gained counsel	0.077	0.267	0	1
Lawyer throughout	0.775	0.418	0	1
Collective actor	0.090	0.288	0	1
Republican judge	0.521	0.500	0	1
y1989	0.025	0.158	0	1
y1990	0.038	0.192	0	1
y1991	0.034	0.182	0	1
y1992	0.050	0.220	0	1
y1993	0.050	0.220	0	1

Appendix *Continued*

Variable	*Mean*	SD	*Min*	*Max*
y1994	0.061	0.240	0	1
y1995	0.091	0.288	0	1
y1996	0.092	0.290	0	1
y1997	0.087	0.283	0	1
y1998	0.082	0.275	0	1
y1999	0.083	0.276	0	1
y2000	0.067	0.251	0	1
y2001	0.077	0.268	0	1
y2002	0.062	0.243	0	1
y2003	0.034	0.182	0	1

Note: $N = 1{,}672$; index of legal effort only computed for summary judgment loss and late settlement.