Book Review

Rights on Trial; How Workplace Discrimination Law Perpetuates Inequality

By Ellen Berrey, Robert L. Nelson, and Laura Beth Nielson
Chicago and London: University of Chicago Press, 2017. Pp. xiv+351.

Reviewer: Robin Stryker, *University of Arizona*

Rights on Trial, authored by Ellen Berrey, Robert Nelson, and Laura Beth Nielson, skillfully combines both quantitative and qualitative methods to illuminate federal employment civil rights litigation processes and their consequences. The cumulative result of extensive research conducted over a period of 10-plus years, the book relies on a quantitative sample of about 1,800 employment discrimination litigations pertaining to race, sex, age, and disability across the United States from 1988 to 2003, combined with 100 in-depth interviews of participating actors. The authors randomly selected interviewees from legal cases within all 16 cells of a four-by-four sample-selection grid. The grid cross-classified the most common bases of discrimination (race, sex, age, and disability) with four key points in the sequence of potential litigation outcomes. These include case dismissed, early settlement (that is, settlement prior to the filing of a motion for summary judgment), late settlement (that is, settlement after court disposition of a motion for summary judgment but before a judicial decision or jury verdict in a trial), and trial.

In collecting and analyzing their data, the authors put rights on trial in two interrelated ways. First, they explore the experience of employment civil rights litigation through the eyes—and voices—of plaintiffs, employer-representatives, plaintiffs' lawyers, and defense lawyers. Second, they subject the full employment civil rights litigation system to "empirical scrutiny" (10) and evaluate its implications. In essence, they argue that both these types of "trials" provide plenty of evidence to convict.

According to the authors, notwithstanding that employment civil rights provide a source of empowerment for some disadvantaged or marginalized persons, the employment civil rights litigation system generally is of very limited use in "dismantling barriers to equal employment opportunity for traditionally disadvantaged groups" (10). In fact, this system "re-inscribes hierarchy by challenging and containing discrimination claims" (13). As well, this system—devised in the first instance to redress employment discrimination against African Americans—serves this particular group of plaintiffs especially poorly. Where quantitative analyses show that legal representation is the single most important factor enhancing plaintiffs' legal

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doi: 10.1093/sf/sox097

outcomes, African Americans are substantially less likely to have such representation in employment civil rights litigations than are other plaintiffs.

Failed plaintiff attempts to get legal representation is one mechanism among many diminishing the capacity of employment civil rights litigation to redress employment discrimination effectively. Other mechanisms include an adversary system substantially shaped and controlled by management, in which the dispute typically is individualized, and in which plaintiffs experience the bulk of material and psychological costs; and the prevalence in litigation of labeling plaintiffs with the same sorts of stereotypes that contribute to discrimination in the first place. Yet additional mechanisms are the myriad ways employers prevent disputes at work from becoming legal disputes, that employers have more control over and support from their attorneys than do plaintiffs who do manage to secure legal representation, and that employers are advantaged tactically in settling cases at a modest cost to them and without any determination of rights violations. While collective legal mobilization, including multiple plaintiffs, class actions, and representation by the Equal Employment Opportunity Commission or a public interest law firm, improves plaintiffs' litigation outcomes, 93 percent of cases are brought by single plaintiffs, thus individualizing an experience that sociologists understand as systemic.

Rights on Trial should be read by all socio-legal scholars and scholars of inequality and social policy, as well as by practicing lawyers, policymakers, and ordinary citizens. Chapters discussing interview-based findings will be accessible to and compelling for undergraduate readers. The book's systematic and careful data collection and analyses undercut prevailing myths, including that discrimination is very rare, that American workers are highly litigious, and that employers are saddled with huge, unwarranted financial penalties. Without invoking Weber, the authors showcase the power of a Weber-like interpretive sociology conveying subjects' voices—including literally on audio recordings available online—while also offering their own expert interpretations based on analyzing their qualitative data in light of—and to help explain—their quantitative findings.

The book is not perfect. For example, the authors do not provide an online thematic coding scheme for their qualitative analyses, nor do they provide systematically the criteria for identifying the material they take to exemplify particular kinds of meanings and conclusions. Measures of some explanatory variables in their quantitative analyses could usefully be refined to examine directly the group-centered effects (GCE) theoretical hypothesis pertaining to variability in civil rights law effectiveness, proposed recently by Nicholas Pedriana and Robin Stryker ("From Legal Doctrine to Social Transformation?," *American Journal of Sociology*, 2017). The authors also could have used their research to revisit and reflect upon classic debates about law's autonomy and limits within capitalist political economies. This would have been especially apt, given that the contemporary United States does little to restrain the economic and political power of capital and countenances wealth and income inequalities far higher than those existing when the 1964 Civil Rights Act was enacted.

However, such quibbles pale against the accomplishments of *Rights on Trial*. The book is very effective in bringing its readers in, not just to see, but also *to*

feel, what it is like to be in the place of diverse actors in employment civil rights litigation. It also combines this positive attribute of interpretative sociology with representative quantitative data enabling sound empirical generalization. In so doing, it shows very clearly the limits of a strategy of providing legal rights to disadvantaged classes and groups instead of marshalling direct redistributive strategies, including those that curtail managerial power and prerogative.

I recommend reading *Rights on Trial* in tandem with Lauren Edelman's (2016) recent book, *Working Law: Courts, Corporations and Symbolic Civil Rights* (University of Chicago Press). Together the two books persuade that there are different, but complementary, social mechanisms through which legislative provision of the right to be free of employment discrimination in the contemporary United States accomplishes far less than its promoters hoped, especially for racial minorities. Indeed, just as the authors of *Rights on Trial* argue, the US civil rights litigation system, at least in its current version, may reinscribe and solidify class, race, gender, and other hierarchies.