

Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System

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I. Introduction

Forty years after the passage of the Civil Rights Act of 1964, the foundation of contemporary employment discrimination law--the enforcement of legal rights through litigation in federal or state court--is subject to unprecedented attack. On the one hand, critics of the current system from the employer perspective argue that the system is *overexpansive*, fostering frivolous claims in a context of steadily improving rights protections. On the other hand, critics of the current system from the employee perspective argue that litigation is not the answer, either because more litigation will not deliver gains in the workplace or because other techniques, such as mediation or problem-solving approaches, are more likely to achieve the goals of anti-discrimination policy. These critics thus support *nonlitigation-alternatives*.

There are three problems with the overexpansive and non-litigation alternatives positions. First, the assertions from both camps are made largely without empirical data about what actually happens in the employment discrimination claiming process. Without a thorough understanding of the dynamics of each phase of the claiming system as it currently exists, proposals to restrict certain forms of claiming or to develop alternative

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models may be misguided. Any new system will involve some sort of claiming process (be it to a lawyer, a business representative, or some third-party). As such, new systems may replicate the problems of over- and under-claiming that prove vexing in the current system.

Second, both critiques suffer from a common difficulty in legal policy analyses that rest on empirical claims. Legal scholars and attorneys lack the ability to critically appraise relevant social science; social scientists with relevant expertise do not have an adequate understanding of law to translate what the social science teaches us into realistic policy recommendations for the law.

Third, both critical camps assume that the problems they see in the current system are specific to civil litigation and not to other factors like the power relationships embedded in the workplace, the social-psychological factors that shape the claiming process itself, or to the inherently contested character of charges of invidious discrimination. These problems may persist in any anti-discrimination law regime.

In this article we offer an empirical analysis of employment discrimination litigation as a claiming system, which we hope will form the basis for a new realism about the prospects for achieving rights under the anti-discrimination laws. The unifying framework for this examination is the sociolegal concept of the pyramid of disputes.¹ The pyramid concept raises fundamental questions about the system of claiming under anti-discrimination laws: Who has potential legal grievances? Do they do anything about it? And, with what likely result? We embed this analysis in a review of doctrinal and

¹ Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525 (1981).
Galanter 1983. See also, Marc S. 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, 6-11 (1983).

statutory developments in employment discrimination law, a summary of social scientific literature on discrimination in the workplace, and an analysis of the most comprehensive data available about employment discrimination litigation in the federal courts from 1990 to 2001.

This framework helps to explain the divergent accounts of employment discrimination law. As suggested in the overexpansive account, in many ways the symbolic and actual reach of employment discrimination law has grown in the last decade. Statutory rights and remedies have expanded. There has been a significant rise in the amount of litigation and the emergence of large awards in a small number of highly publicized cases. Yet, we also find that the expansion of rights and remedies has been undercut in more subtle ways by countervailing judicial developments. Moreover, the empirical data indicate that anti-discrimination law is seldom used by people who perceive themselves to be the target of workplace discrimination. Thus the dramatic rise of employment discrimination claiming that occurred in the 1990s can be attributed to a relatively small increase in the rate of claiming by aggrieved individuals.

This analysis suggests the need for a fundamental reconsideration of anti-discrimination law in action. The present system may police against egregious forms of discrimination, but for many who perceive themselves to be victims of discrimination, their rights remain unrealized. Instead of asking why there are so many claims of workplace discrimination made to the EEOC and in federal courts, perhaps we should be asking why there are so few. The dramatic amount of underclaiming we find in the current system suggests a need to increase resources for the enforcement of anti-discrimination law, either through litigation or through other means.

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We proceed in seven parts. In the next section, we summarize current debates about the relationship between inequality, discrimination, and rights. The third section briefly reviews major developments over the last two decades in federal law on employment discrimination. These developments create the appearance of significant expansion in anti-discrimination law, but also entail less visible shifts that may limit plaintiffs' ability to litigate successfully. These trends in formal law lead to conflicting expectations about trends in discrimination litigation. The fourth section examines the “claiming system” of anti-discrimination law—reviewing social scientific data on the incidence of perceived discrimination, the likelihood that targets of discrimination will seek redress, and the likely outcome of these efforts. The fifth section summarizes research that indicates that the threat of liability from employment discrimination may well be inflated due to bias in media reports about highly publicized cases and by the tendencies of defense lawyers and human resources professionals to emphasize a few rare cases. In the sixth section of the article, we perform an analytic exercise that estimates the incidence of discrimination against one particular group (full time African-American workers), the likelihood that they will file a complaint with the EEOC or in court, and the likely size of their recovery. Finally, we conclude with a discussion of the theoretical and policy implications of our analysis.

II. The Current Debate: Inequality, Discrimination, and Rights

Current debates revolve around claims that there is too much discrimination litigation, that there is not enough litigation, or that litigation is ineffective in curing discrimination. The contention that there is too much litigation, the conception of anti-

discrimination law as overexpansive, is premised on some uncontested observations and some problematic assertions. It is clear that federal, state, and municipal laws now formally offer broad legal protections from workplace discrimination for minorities, women, the disabled, working parents, and the aged, among others. It also is clear that charges of discrimination made to the Equal Employment Opportunity Commission increased 14% between 1992 and 2002,² and that federal employment discrimination lawsuits rose 161% between 1990 and 2001.³ As the number of claims has grown, the variety of types of discrimination alleged also has increased. Whereas charges of racial and gender discrimination in hiring and promotion predominated in the early years of the Civil Rights Act, the current set of claims include large numbers of allegations of discriminatory firing, sexual harassment, age discrimination, and disability discrimination.⁴

The expanding scale and diversity of employment discrimination claims has produced a backlash of criticism against employment discrimination laws by some members of the employment defense bar⁵ and conservative commentators⁶ that contains more debatable assertions. Often focusing on media reports of major awards, critics

² EEOC Charge Statistics FY1992 through FY2002 at <http://www.eeoc.gov/stats/charges/html>.

³ Administrative Office of the U.S. Courts, Civil Master File, annual. Federal Court Cases: Integrated Data Base, 1970-2001 [Computer File]. 2nd ICPSR version. vol. 2002: Washington, D.C.: Federal Judicial Center [producer], 2002. Ann Arbor, MI: Interuniversity Consortium for Political and Social Research [distributor].

⁴ See John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991); John J. Donohue & Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: An Empirical Investigation*, (2002) in LAURA BETH NIELSEN AND ROBERT L. NELSON, EDS. HANDBOOK ON EMPLOYMENT DISCRIMINATION: RIGHTS AND REALITIES, forthcoming, 2005.

⁵ See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law and Practice*, 26 FLA. ST. U. L. REV. 959, 960-961 n4 (1999).

⁶ See PHILIP K. HOWARD, *DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994); PHILIP K. HOWARD, *THE LOST ART OF DRAWING THE LINE: HOW FAIRNESS WENT TOO FAR* (2001); WALTER K. OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* (1997); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

assert that antidiscrimination law has become a “windfall for plaintiffs.”⁷ The insurance industry attempts to capitalize on perceptions of a growing risk of employment discrimination litigation by offering insurance against such claims.⁸ In the marketing of the new products, insurance companies have repeated the most dramatic stories of employer liability in discrimination suits.⁹ An increasingly critical tone about these trends also appears in academic discussions. In a recent paper, Donohue and Siegelman¹⁰ assert that the Civil Rights Act of 1991, which gave plaintiffs additional remedies and more frequent access to jury trials, combined with an increasingly entrepreneurial plaintiffs’ bar, has generated more lawsuits and larger awards, even though the underlying phenomena of workplace discrimination may actually be declining.¹¹

Those who argue that there is not enough litigation, the conception of anti-discrimination law as weak, is rooted in research by social scientists that demonstrates a relative lack of progress in recent decades by women and minorities in closing the wage gap with white men in overcoming patterns of occupational segregation by sex and race,¹² and in overcoming patterns of occupational segregation by sex and race.¹³

⁷ See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); OLSON 1997, *supra* note X. For a concise account of the American litigation explosion generally, see Marc S. 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, 6-11 (1983). There are also many empirical examinations of its origins. See generally JETHRO K LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981); OLSON 1991, *supra* note X; John Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977); Maurice Rosenberg, *Let’s Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972).

⁸ See William T. Bielby & Michael Bourgeois, *Insuring Discrimination: Making a Market for Employment Practice Liability Insurance*. Paper presented at the Annual Meetings of the American Sociological Association, Chicago, August 2002.

⁹ See Bielby & Bourgeois, *supra* note X; Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, forthcoming STAN. L. & POL. REV. (2004).

¹⁰ See Donohue & Siegelman, 2002, *supra* note X.

¹¹ See Bisom-Rapp, *supra* note X, at 960-61, n4; Donohue & Siegelman 2002, *supra* note X, at 15, n27.

¹² See ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA* (1999).

Research on the prevalence of discrimination in the workplace shows a striking disjuncture between the perceptions of white women and people of color in the workplace, and their white male colleagues and supervisors.¹⁴ Moreover, other research finds that significant barriers confront plaintiffs. Potential plaintiffs are reluctant to complain.¹⁵ Those who do complain seldom succeed within their own organization,¹⁶ before the EEOC,¹⁷ or in the courts.¹⁸

Other scholars share the conviction that discrimination persists in the workplace, but favor non-litigation alternatives for dealing with the problem. They argue that legal definitions of discrimination do not adequately capture modern forms of discrimination, which are built on unconscious bias.¹⁹ Moreover, they see litigation as out of step with

¹³ See Jerry A. Jacobs, *Evolving Patterns of Sex Segregation*, in SOURCEBOOK OF LABOR MARKETS: EVOLVING STRUCTURES AND PROCESSES 535 (I. Berg & A.L. Kallerberg eds., 2001); Barbara F. Reskin, *Employment Discrimination and Its Remedies*, in SOURCEBOOK OF LABOR MARKETS: EVOLVING STRUCTURES AND PROCESSES 567 (I. Berg & A.L. Kallerberg eds., 2001).

¹⁴ See K.A. Dixon, Duke Storen & Carl E. Van Hom. *A Workplace Divided: How Americans View Discrimination and Race on the Job*, John J. Heldrich Center for Workplace Development (2002).

¹⁵ See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988). See also, F. Crosby, A. Pufall, R.C. Snyder, M. O'Connell, & P. Whalen, *The Denial of Personal Disadvantage Among You, Me, and All the Other Ostriches*, in GENDER'S THOUGHT: PSYCHOLOGICAL PERSPECTIVES 79 (M. Crawford & M. Gentry, Eds., 1989); Cheryl R. Kaiser & C.T. Miller, *Stop Complaining!: The Social Costs of Making Attributions to Discrimination*, 27 PERS. & SOC. PSYCH. BULL. 254 (2001); CHERYL R. Kaiser & C.T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP RELAT. 227 (2003); Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, in LAURA BETH NIELSEN AND ROBERT L. NELSON, EDS. *HANDBOOK ON EMPLOYMENT DISCRIMINATION: RIGHTS AND REALITIES*, forthcoming, 2005.

¹⁶ See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law* 97 AM. J. SOC. 1531 (1992); Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993); Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 AM. J. SOC. 479 (1997).

¹⁷ See EEOC, *supra* note X.

¹⁸ See Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendant's Advantage*, 3 AM. L. ECON. REV. 125 (2000); Colker, *supra* note X; Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989); Marika F.X. Litras, *Civil Rights Complaints in U.S. District Courts 2000*, 1 (Dep't of Justice, Bureau of Justice Statistics Special Report NCJ-193979, 2002); Marika F.X. Litras, *Civil Rights Complaints in U.S. District Courts, 1990-98* (Dep't of Justice, Bureau of Justice Statistics Special Report NCJ-173427, 2000); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67 (1999).

¹⁹ Krieger and others

more promising approaches in which lawyers act as problem-solvers in employment contexts, rather than as advocates for one side against another.²⁰

The debates among these scholars only are significant with respect to assumptions about the practice, nature, frequency, and harm of discrimination itself. It is widely recognized that racial minorities, women, and other groups protected by antidiscrimination laws are significantly disadvantaged in outcomes relating to education, employment, health, wealth accumulation, criminal justice, and housing.²¹ For example, in 2000 the median full-time earnings of African-American males were 77% of white male workers. Women full-time workers made 74% as much as full-time male workers²² and 71% of white male workers.²³ But how much of this inequality is the result of illegal discrimination?

A large and respectable body of academic opinion is skeptical about the significance of discrimination as a source of differential labor market outcomes. These skeptics point to the historical decline in measures such as the wage gap, cite public opinion data that show a decline in racist and sexist attitudes,²⁴ assert that blatant barriers for the hiring and promotion of women and minorities no longer exist, and argue that non-discriminatory factors, such as differences in amount and quality of schooling (and

²⁰ Sturm, Simon, Nielsen and Nelson

²¹ See DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* (1999); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1997); BRIAN D. SMEDLEY ET AL., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (2002); GREGORY D. SQUIRES & SALLY O'CONNOR, *COLOR AND MONEY: POLITICS AND PROSPECTS FOR THE COMMUNITY REINVESTMENT MOVEMENT IN URBAN AMERICA* (2001); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in *ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES* 311-374 (M.H. Tonry, ed., 1997).

²² Calculated from the 2000 census data, available at www.census.gov/hhes/income00. White men's median income in this category is \$40,350 and African-American men's is \$30,893.

²³ Calculated from the 2000 census data, available at www.census.gov/hhes/income00. Women's income in this category (without regard to race) is \$28,823 and African-American women's income is \$25,745.

²⁴ See, e.g., Donohue & Siegelman 1991, *supra* note X, at 1001, n69-70.

other human capital variables) and different worker preferences²⁵ explain differential outcomes. They argue that policy tools other than antidiscrimination efforts will be more useful in closing differential outcomes. Moreover, if one assumes that there is now less labor market discrimination than in the past, at the same time there is significantly more litigation, it suggests that the rise in litigation might be due to frivolous claims.

The skeptical view can be seen in judicial opinions that shape current discrimination litigation. In a district court opinion denying class certification to African-American employees at Lockheed Martin Aeronautics, the court observed:

In the initial days after the enactment of Title VII, class action law in the employment discrimination context developed in a culture where many employers completely excluded members of minority groups from positions and job benefits at all but the lowest levels of the company. . . . In contrast to the early days of Title VII, it is now more uncommon to find an employer that overtly encourages wholesale discrimination on the basis of race; race discrimination today usually comes in more subtle forms.²⁶

As a result of this changed “culture,” the court said the law now demanded more proof of company-wide discrimination before it would allow plaintiffs to proceed as a class. After reviewing statistics concerning racial disparities from different departments, jobs, and locations of the defendant employer, the court left the plaintiffs to pursue claims as individuals.²⁷

The other side in this debate sees discrimination as pervasive in labor markets, employing organizations, and other contexts that shape differential outcomes. The “discrimination-as-pervasive” camp points out that trends in the decline of the wage gap

²⁵ See NELSON & BRIDGES, *supra* note X; James J. Heckman, *Detecting Discrimination*, 12 J. OF ECON. PERSP. 10 (1998); Jacob Mincer & H. Ofek, *Interrupted Work Careers*, 17 J. OF HUM. RESOURCES 3 (1982).

²⁶ *Reid v. Lockheed Martin Aeronautics*, 205 F.R.D. 655, 660 (N.D. Ga. 2001).

²⁷ *Id.*

have slowed in the contemporary period and therefore no guarantee that differential outcomes will continue to decline.²⁸ It suggests that much of the movement in public opinion measures of racism and sexism are superficial, and do not fully reflect deeper, more complex attitudes that tend to support the hierarchical position of traditionally dominant groups.²⁹ It asserts that blatant forms of discrimination have been replaced by subtle forms of bias and stereotyping that have negative effects on outcomes for traditionally disadvantaged groups,³⁰ and cites studies that find racial and gender-based differentials remain unexplained even after introducing extensive controls for non-discriminatory factors.³¹

²⁸ See NELSON & BRIDGES, *supra* note X; Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC'Y REV. 542 (2001); Jacobs, *supra* note X.

²⁹ See Lawrence Bobo, *Race and Beliefs About Affirmative Action: Assessing the Effects of Interests, Group Threat, Ideology, and Racism*, in RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA 137-64 (D.O. Sears, J. Sidanius, & L. Bobo, eds., 2000); Jim Sidanius, Pam Singh, John J. Hetts, & Chris Federico, *It's Not Affirmative Action, It's the Blacks: The Continuing Relevance of Race in American Politics*, in RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA 191-235 (D.O. Sears et al., eds., 2000).

³⁰ Several kinds of evidence are cited, including audits of employers. See Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers: An Investigation of Employers' Hiring Decisions*, 38 SOC. PROB. 433 (1991); David Neumark, *Sex Discrimination in the Restaurant Industry: An Audit Study*, 111 QUART. J. OF ECON. 915 (1996), self-reports of being the target of discrimination, Dixon, Storen, & Van Horn, *supra* note X, and considerable psychological research on implicit bias of various kinds, M.R. Banaji & C.D. Hardin, *Automatic Stereotyping*, 7 PSYCH. SCI. 136-141 (1996); M.R. Banaji, C. Hardin, & A.J. Rothman, *Implicit Stereotyping in Person Judgment*, 65 J. OR PERSONAL. & SOC. PSYCH. 272 (1993); Kay Deaux, *How Basic Can You Get? The Evolution of Research on Gender Stereotypes*, 51 J. OF SOC. ISSUES 11 (1995); Kay Deaux & M.E. Kile, *Gender Stereotypes*, in HANDBOOK ON THE PSYCHOLOGY OF WOMEN (F. Denmark & M. Palud, eds., 1991); J.F. Dovidio, J.C. Brigham, B.T. Johnson, & S.L. Gaertner, *Stereotyping, Prejudice, and Discrimination: Another Look*, in STEREOTYPES AND STEREOTYPING 276 (N. Macrae, C. Stangor, & M. Hewstone, eds., 1996); J.F. Dovidio & S.L. Gaertner, *Affirmative Action, Unintentional Racial Biases, and Intergroup Relations*, 52 J. OF SOC. REL. 51 (1996); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in HANDBOOK OF SOCIAL PSYCHOLOGY 357 (D. T. Gilbert, S. T. Fiske, & G. Lindzey, eds., 1998); Susan T. Fiske, D.N. Bersoff, E. Borgida, K. Deaux, & M.E. Heilman, *Social Research on Trial: The Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCH. 1049 (1991); Susan T. Fiske, A. J. Cuddy, P. Glick, & J. Xu, *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. OF PERSONAL. & SOC. PSYCH. 878 (2002); Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. OF SOC. ISSUES 41 (1987).

³¹ See Reskin 2001, *supra* note X.

Our approach to the debate about the centrality of discrimination to inequality is not so much to choose sides as to recognize the complexity of the issue, suggest that no one can definitively state the extent to which discrimination is implicated in unequal outcomes, and move beyond the debate to explore alternative empirical and theoretical approaches to understanding antidiscrimination law as a social system. We acknowledge that discrimination (as defined by law) is only one source of differential outcomes among groups. Many aspects of inequality by race, gender, and other protected characteristics are structural in nature, rooted in historical disadvantage and hierarchical relationships among groups. Because many forces contribute to differential outcomes, it is difficult in the aggregate to neatly decompose inequality into that which is attributable to ongoing discrimination and other sources. If we could flip a switch tomorrow and end all employment discrimination, it would not immediately eliminate labor market inequality.

Nonetheless, it also is not clear that the elimination of all forms of employment discrimination would have only a trivial effect. While the skeptics assert much of the wage gap between races and genders can be explained by non-discriminatory factors, there is no simple formula to determine what we would expect to find in terms of relative pay for different groups in the absence of workplace discrimination. For example, in their review of the literature on the gender gap in wages, Nelson and Bridges concluded that efforts to decompose the wage gap based on aggregate data into such basic categories as within-job vs. between-job wage differences proved highly speculative.³² As a result they questioned the conclusion of some analysts that pay discrimination litigation could do little to close the wage gap. “Rather than characterizing the gains from eliminating unjustified between-job wage gains as being small or nearly insignificant, we think that

³² See NELSON & BRIDGES, *supra* note X, at p.59-65.

the evidence could just as easily be used to describe the effects as positive but indeterminate in size.”³³

Necessary as the debate about discrimination and inequality is, much can be gained by moving beyond it. Whether or not workplace discrimination is one of, or even the primary source of unequal outcomes may be important to understand, but we begin our analysis from the position that the right to be free from discrimination in one’s place of work is a fundamental right enjoyed by all workers.³⁴ From this perspective, it is important to assess how many workers may be the target of discrimination and what happens to their potential claims.

III. Expansion and Retrenchment in Employment Discrimination Law: Legislative and Judicial Decisions

In the forty years following the passage of the Civil Rights Act of 1964,³⁵ employment discrimination law has been a dynamic and conflictual field, both in legislative and judicial arenas. The outcomes of legislative and judicial contests have a direct bearing on the claiming process, as these, shape what constitutes an actionable claim, whether actionable claims are worth pursuing for lawyers and their clients, and what burden of proof must be met to prevail. In this section, we provide a brief synopsis of recent legislative and judicial changes that affect the substance of employment discrimination law.

³³ *Id.*

³⁴ This is not to say that all people who think they have been discriminated against or treated unfairly in the workplace have been. Detailed discussion of how individuals understand being the target of discrimination and of attribution error (when a person believes they have been targeted on the basis of race or gender but in fact, they have not), follows in section X, *infra*.

³⁵ Civil Rights Act of 1964 (Pub. L. No. 88-352, July 2, 1964, 78 Stat. 241).

We argue that there has been a recurring pattern of expansion and retrenchment in legislative and judicial mandates on employment discrimination. A series of Supreme Court decisions in the 1970s and 80s, as well as new legislation in the 1990s, significantly expanded rights and protections for employees. But as the federal judiciary became more politically conservative from the 1980s onward, there has been significant retrenchment in what constitutes an actionable employment discrimination claim. The expansion of rights through legislation and landmark judicial innovations is perhaps the more visible kind of change in the system while the elements of retrenchment by the courts are more technical and less visible in character.

A. *Expansion: Major Statutory and Judicial Developments Encouraging Employment Discrimination Litigation*

In the late 1980s and 1990s, Congress appeared to be the champion of the underrepresented. When the Supreme Court issued a number of pro-employer/defendant decisions that restricted protections for employee/plaintiffs,³⁶ Congress responded with the Civil Rights Act of 1991,³⁷ which overrode the increasingly conservative jurisprudence on a variety of issues. President Bush signed the Americans with Disabilities Act (ADA) into law in 1990³⁸ and the first bill that President Clinton signed into law was the Family and Medical Leave Act (FMLA) in 1993.³⁹ Each of these legislative actions represented a significant expansion of employee rights in the workplace.

³⁶ *Martin v. Wilkes*, 490 U.S. 755 (1989); *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Ward's Cove* 490 U.S. 642.

³⁷ 42 U.S.C.A. 1981.

³⁸ Americans With Disabilities Act of 1990, 42 U.S.C. 12101- 12213 (1994).

³⁹ Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq.

The Civil Rights Act of 1991 in some respects was the most sweeping legislative change in the period.⁴⁰ For plaintiff/employees alleging discrimination on grounds other than race prior to the Civil Rights Act of 1991, Title VII provided only equitable remedies and primarily was limited to back pay.⁴¹ Plaintiffs alleging racial discrimination could obtain additional remedies only if they were eligible to and were successful in a jointly-filed §1981 claim. The Civil Rights Act of 1991 allowed those not previously eligible under §1981 to also make claims for compensatory damages (for psychological distress), although the amount of the potential award is capped according to the size of the organization/defendant.⁴² Statutory provision for compensatory damages not only allowed plaintiffs greater potential awards, but also triggered the 7th Amendment⁴³ right to a jury trial in a civil action, meaning that plaintiff/employees can now insist that their cases be heard by a jury.⁴⁴

The 1990s also saw passage of the Americans with Disabilities Act (ADA), which protects employees from discrimination based on disability (with damages similar to those provided under the Civil Rights Act of 1991) and requires employers of people with disabilities to make “reasonable accommodations” for their employees with disabilities.⁴⁵ The FMLA⁴⁶ provides that employees with up to twelve weeks of unpaid leave due to their own illness, a close family member’s medical need, and/or birth or adoption of a

⁴⁰ Barnes, *supra* note X; Comment, *Developments in the Law: Employment Discrimination*, 109 Harv. L. Rev. 1568 (1996)

⁴¹ PAUL N. COX, *THE LAW OF EMPLOYMENT DISCRIMINATION* (1987).

⁴² 42 U.S.C.A. 1981.

⁴³ U.S. CONST. amend. VII.

⁴⁴ SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* (2000).

⁴⁵ Tom Burke, *How do Rights Work?: The Case of Americans with Disabilities Act*, paper presented at “Rights and Realities: Legal and Social Scientific Approaches to Employment Discrimination” (Stanford Law School, 2003).

⁴⁶ 29 U.S.C. 2601

child. FMLA prohibits mistreatment, including firing or demotion, of an employee who uses family leave.

The most significant judicially constructed theory of discrimination in the period was the emergence of sexual harassment as a cause of action in Title VII⁴⁷ jurisprudence. In *Meritor Savings Bank v. Vinson*,⁴⁸ the Supreme Court acknowledged that quid pro quo sexual harassment constitutes discrimination “on the basis of sex” and therefore is prohibited by Title VII. Since *Meritor*, sexual harassment claims have become an important category of sex discrimination cases.⁴⁹

B. *Retrenchment: The Jurisprudence of Antidiscrimination Law*

During the same period that we see the expansion of statutory rights against discrimination, the Supreme Court and other appellate court decisions began to limit the scope of antidiscrimination law in a variety of ways. Compared to the newsworthiness of legislation, judicial changes are less publicly visible, but no less important in the determination of whether an employment discrimination claim is viable or not. In what follows, we trace how the courts have limited the scope of antidiscrimination law by making it more difficult to prove discrimination, by interpreting the 11th Amendment⁵⁰ as a limit on Congressional power to pass antidiscrimination statutes, by ratcheting up the requirements for what an organization or state must prove before it may lawfully engage in affirmative action, by providing increasingly minimalist burdens on employer/defendants facing sexual harassment claims, and by limiting the scope of disparate impact theories of discrimination.

⁴⁷ Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1 to 2000e-16.

⁴⁸ *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986).

⁴⁹ See EEOC, *supra* note X; EEOC, Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992-2002. <http://www.eeoc.gov/stats/harass> (2003).

⁵⁰ U.S. CONST. amend. XI.

1. *Making employment discrimination more difficult to prove in court*

As the courts have moved in the direction of requiring direct proof of discriminatory intent, of limiting the scope of disparate impact theories of discrimination, and of finding voluntary efforts at affirmative action to be illegal and unconstitutional, the jurisprudence of employment discrimination law is characterized by what Freeman referred to as the “perpetrator model” of discrimination.⁵¹ In the perpetrator model, antidiscrimination law has the more limited purpose of remedying specific intentional wrongs, rather than redressing systemic aspects of discrimination and inequality that are not so clearly linked to intentional decisions.

In *Griggs v. Duke Power Co.*⁵² the Supreme Court, with Chief Justice Burger writing for the majority, allowed plaintiffs to prevail in a showing of discrimination without proof of discriminatory intent. The high court recognized that “practices that are fair in form, but discriminatory in operation,” should be illegal. *Griggs* represented the Court’s willingness to accept disparate impact theories of discrimination. *Wards Cove*⁵³ significantly eroded the *Griggs*⁵⁴ standard and represents the perpetrator model in the extreme. In *Wards Cove*, the Court emphasized that employers should not be held liable for their actions unless the employee/plaintiffs could demonstrate individual animus on the part of the employer.⁵⁵ *Wards Cove* was partially overturned by the Civil Rights Act of 1991 discussed above.⁵⁶

⁵¹ See Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 285 (D. Kairys, ed., 3d ed., 1998); Alan Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW* (D. Kairys ed., 1982).

⁵² *Griggs v. Duke Power Co.*, 401 U.S. 604 (1995).

⁵³ *Wards Cove*, 490 U.S., at 667-68.

⁵⁴ *Griggs*, 40 U.S. 424 (1971).

⁵⁵ *Id.*, at 672-73.

⁵⁶ 42 U.S.C.A. 1981.

Similarly, difficult cases in the early period of the ADA have led to jurisprudence which rejects protection for people with a number of disabilities.⁵⁷ As a result, courts have accepted narrow definitions of the crucial statutory term “reasonable accommodation.”

2. *11th Amendment bars to Congressional authority to pass antidiscrimination legislation*

Perhaps the most significant doctrinal development in recent years is the U.S. Supreme Court’s decisions limiting Congressional authority to pass laws designed to remedy discrimination. This resurgence of federalism began with decisions that did not affect employment discrimination at all as the Supreme Court began eroding Congressional authority by narrowing the scope of constitutionally regulable activities under the commerce clause.⁵⁸

Despite nearly 100 years of Supreme Court deference to Congressional power via the Commerce Clause,⁵⁹ this new theory of federalism was brought to bear on employment discrimination in *Kimel v. Florida Board of Regents*,⁶⁰ in which the Supreme Court struck down Congress’ extension of Age Discrimination in Employment Act (ADEA)⁶¹ protections to State and Federal employees as not permissible under

⁵⁷ See Nora Bellinger, *The ADA: A Practitioner’s Guide in the Aftermath of Sutton: Sutton v. United Air Lines*, 21 PACE L. REV. 271 (2000); Linda Hamilton Krieger, *Forward: Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

⁵⁸ For a more comprehensive discussion of this trend, see Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison & Kimel*, 110 YALE L. J. 441 (2000). See also *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Federal Gun Free School Zone Act because it exceeded Congressional authority to regulate interstate commerce) and *U.S. v. Morrison*, 120 S.Ct. 1740 (2000) (striking down the Violence Against Women’s Act because Congress did not have the authority to create a federal civil remedy for victims of gender based violence under either the Commerce Clause or Section 5 of the Fourteenth Amendment).

⁵⁹ U.S. CONST. art. I, § 8, cl. 3.

⁶⁰ *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

⁶¹ 29 U.S.C. 621-634 (1994 & Supp. I 1995).

section 5 of the 14th Amendment.⁶² Finally, in *Alabama v. Garrett*, the Supreme Court invoked its increasingly expansive vision of the Eleventh Amendment⁶³ to strike down the application of the Americans with Disabilities Act to the states.⁶⁴

3. *Affirmative action more difficult to legally justify*

Affirmative action in employment became nearly impossible to practice in the period. In order for a government employer (or government contractor) to practice affirmative action, they must meet the constitutional standard for making a race-based distinction including a formal finding of past discrimination by the body.⁶⁵ Any racial distinction, whether or not designed to favor a traditionally underrepresented group, has been judicially determined to amount to a racial classification, triggering strict scrutiny, and may not be used to remedy general or societal discrimination or inequality.⁶⁶

The Title VII standard for race or gender classifications (for private employers) is only slightly less burdensome. It requires that the employer make a showing of past discrimination, propose a plan to remedy a “manifest imbalance” along race or gender lines in a “traditionally segregated job category,” and not employ quotas or otherwise unnecessarily “trammel the rights” of the majority group.⁶⁷

In the most recent case regarding affirmative action in education,⁶⁸ the majority was careful to make clear that the reasoning allowing limited affirmative action plans in law school admission is particular to the education context and differentiated the employment context. At the same time, the court struck down (a different type of)

⁶² U.S. CONST. amend. XIV, §5.

⁶³ U.S. CONST. amend. IX.

⁶⁴ *Alabama v. Garrett*, 531 U.S. 356, 360 (2001).

⁶⁵ See *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

⁶⁶ See *City of Richmond v. Croson*, 488 U.S. 469 (1989).

⁶⁷ See *Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Santa Clara County* 480 U.S. 616 (1987).

⁶⁸ *Grutter v Bollinger*, 124 S.Ct. 35 (2003), 2003 U.S. Lexis 4800.

affirmative action in undergraduate admissions.⁶⁹ Despite limited success for affirmative action in some education contexts, these cases do not change the restrictive policies the court previously enacted regarding lawful affirmative action plans in employment.

4. *Minimalist burdens on employer/defendants facing sexual harassment claims*

Sexual harassment under Title VII,⁷⁰ which increasingly had become a source of discrimination claims since 1986, has become easier to defend against as a result of recent decisions. In *Faragher v. City of Boca Raton*,⁷¹ the Supreme Court announced that while employers can be held vicariously liable for the actions of employees who create a hostile work environment, the employer may offer an affirmative defense that they, the employer, had a reasonable policy on sexual harassment, and that the target of the harassment failed to act reasonably to end the harassment. And, lower courts have begun to interpret nearly any policy as a “reasonable” one.⁷²

5. *Limiting the scope of disparate impact theories of discrimination*

The Civil Rights Act of 1991 restored disparate impact to its pre-*Wards Cove* status, but recent Supreme Court and appellate court opinions limit the scope of disparate impact theories, albeit not in Title VII cases. In *Adams v. Florida Power*,⁷³ the Eleventh circuit joined other circuits in denying disparate impact theories for ADEA claims. And, in *Alexander v. Sandoval*,⁷⁴ the Supreme Court held that Title VI of the Civil Rights Act⁷⁵ does not allow a private right of action to enforce disparate impact regulations under.

⁶⁹ *Gratz v Bollinger*, 539 U.S. 224 (2003).

⁷⁰ 42 U.S.C. 2000e-1 to 2000e-16.

⁷¹ *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998).

⁷² John H. Marks, *Smoke, Mirrors and the Disappearance of ‘Vicarious’ Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401 (2002).

⁷³ *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2002).

⁷⁴ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁷⁵ Civil Rights Act of 1964, § 602, 42 U.S.C.A. § 2000d-1.

Age discrimination in employment is prohibited by the ADEA.⁷⁶ Although the ADEA does not specifically allow for disparate impact theories, federal courts disagree as to whether an ADEA claim can be brought using a disparate impact theory. In the 1990s, the Supreme Court decided *Hazen Paper v. Biggins*,⁷⁷ which did not specifically address the disparate impact theory. Nevertheless, a number of Appellate Courts took the language in *Hazen* to mean that disparate impact would not be permissible under the ADEA. There is a circuit court split on the issue, with the First, Third, Sixth, Seventh, Tenth, and Eleventh circuits denying claims of disparate impact under the ADEA.⁷⁸

IV. The Pyramid of Employment Discrimination Disputes

These statutory and judicial developments lead to conflicting expectations about trends in complaints and lawsuits. On the one hand, the addition of new rights for the aged, the disabled, and for women who are sexually harassed, as well as expanded remedies and rights to jury trial under the Civil Rights Act of 1991,⁷⁹ would lead one to expect a rise in claiming behavior. But judicial retrenchment on the allowable scope of antidiscrimination law might offset this rise. Moreover, changes in law are not the only factors that might affect claiming behavior. Donohue and Siegelman argued that discrimination claims throughout the 70's and 80's responded to the economic cycle. When the economy was strong, few lawsuits were filed; when the economy was bad, more employees sued.⁸⁰ After a recession in the early 1990's, the economy experienced

⁷⁶ 29 U.S.C. 621-634.

⁷⁷ *Hazen Paper v. Biggins*, 507 U.S. 604 (1993).

⁷⁸ *Adams*, 255 F.3d 1322; *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996).

⁷⁹ 42 U.S.C.A. 1981.

⁸⁰ John J. Donohue & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Over the Business Cycle*, 66 S. CAL. L. REV. 709, 711 (1993).

steady growth until 2000. If the economic account holds, we would expect less claiming behavior, *ceteris paribus*.

But what do we observe about trends in claiming? While we already have alluded to general statistics about the rise in employment discrimination lawsuits, and how this rise has been interpreted as evidence of antidiscrimination law exceeding its legitimate function, statistics on lawsuits and media reports of big cases may be misleading indicators on the claiming process as a whole.⁸¹ It is necessary to investigate trends in claiming behavior from the bottom-up, so to speak. Starting from the bottom means beginning with what we know about the number of potential grievances in the workplace and moving to a critical examination of the best empirical data available on litigation filings and outcomes.

In this section, we apply the concept of the “pyramid of disputes” to the claiming systems of employment discrimination law.⁸² After summarizing the concept, we review the existing literature on the stages of the system, summarize data from the EEOC on trends in discrimination complaints from 1992-2002, and present an analysis of data obtained from the Administrative Office of the Federal Courts on filings and dispositions of employment discrimination lawsuits in federal district courts from 1990-2001. The literature and data allow us to portray the broad contours of change in discrimination claims, but also reveal critical gaps in our knowledge about the claiming system.

⁸¹ Nielsen & Beim, *supra* note X.

⁸² Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525 (1981). *See also*, Galanter 1983, *supra* note X and, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631 - 654 (1981).

A. The Pyramid of Disputes

Three classic articles develop the concept of dispute formation and the dispute pyramid; they provide an overview of the processes that lead from perceived injuries to formal claiming behavior.⁸³ The concept can be readily applied to claims arising from antidiscrimination law. At the base of the dispute pyramid are perceived injurious experiences⁸⁴—the broad mass of injuries that people recognize. Some proportion of these experiences becomes grievances:⁸⁵ injuries that involve a violation of right or entitlement. Grievances can be thought of as 100% of potential claims, for without a violation of right or entitlement individuals will not seek redress. Only some grievances become claims:⁸⁶ when an individual contacts the party responsible for the grievance. Fewer still are disputes:⁸⁷ when the party allegedly responsible for an individual's claim initially denies their responsibility. Some number of disputes results in filings: a formal complaint (in a litigation model, a court filing) and the smallest category of all is made up of trials: cases that are adjudicated.

Drawing on data from Miller and Sarat's study⁸⁸ of middle range claims by individuals (over \$1,000 by individuals in the late 70's), Galanter demonstrates that cases drop out of the dispute pyramid at a rapid rate.⁸⁹ Only 70% of people with grievances press them to a claim, only 46% pursue a grievance to the level of dispute, only 5% of

⁸³ *Id.*

⁸⁴ William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 L. & SOC'Y REV. 631, 633 (1981); Galanter 1983, *supra* note X, at 13.

⁸⁵ Felstiner et al., *supra* note X, at 635; Galanter 1983, *supra* note X, at 13.

⁸⁶ *Id.*

⁸⁷ Felstiner et al., *supra* note X, at 636; Galanter 1983, *supra* note X, at 13.

⁸⁸ Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525 (1981).

⁸⁹ Galanter 1983, *supra* note X, at 14-16.

grievances lead to filing a lawsuit, and only .06% of grievances end up in trial.⁹⁰

Galanter summarizes other literature about the variables that affect this pyramid of probabilities: the wealthier and better educated are more likely to make claims and pursue them to court, as are those individuals who have terminated their relationship with the party with which they have a grievance.

A comprehensive understanding of trends in employment discrimination litigation requires comprehensive data on all the stages of the dispute pyramid. That is, what is the likelihood that individuals will have grievances stemming from perceived employment discrimination, complain about discrimination, engage in disputes with employers, file formal complaints outside the organization (with the EEOC, an equivalent state agency, or a federal or state court), and adjudicate their claim?

B. Personal Experiences of Discrimination in the Workplace

The base of the dispute pyramid—whether one perceives oneself as injured and thus as someone who might have a legal claim—is the most difficult to analyze and the least understood aspect of disputing systems. In some respects, these problems are especially vexing in efforts to define the baseline of personal experiences with discrimination. As Smith notes in his critical review of the literature prepared for the National Academy of Sciences panel on measuring racial discrimination,⁹¹ a target of discrimination may not even know they have been discriminated against for a variety of reasons.

⁹⁰ It is important to note that these data are drawn from all civil cases and are not specific to antidiscrimination claims.

⁹¹ Tom W. Smith, *Measuring Racial Discrimination*, National Opinion Research Center (Chicago, 2002).

Individuals may be uncertain as to what qualifies as employment discrimination (e.g., epithets, jokes, verbal assaults, etc.).⁹² They may have different propensities to report that they feel discriminated against, with some “over-reporting” discrimination because they attribute their frustrations to racial disadvantage,⁹³ while others “under-report” perceived discrimination due to a sense of shame or their rejection of victimhood,⁹⁴ because friends, family, and coworkers discourage them from thinking they were victims of discrimination,⁹⁵ or due to the interpersonal costs associated with making a discrimination claim.⁹⁶ Responses about experience with discrimination vary with question formats (e.g., explicitly race-focused vs. open-ended, venue-specific vs. general, time-specific vs. ever, etc.).

Despite these problems establishing a baseline frequency of discrimination, a considerable body of empirical research on experiences with discrimination exists.⁹⁷ Many researchers find self-reports meaningful measures of experience with discrimination.⁹⁸ And there are several clear patterns in the survey data that inspire confidence about the validity and reliability of the data. Smith’s study of self-reported

⁹² See Marshall, *supra* note X.

⁹³ See Shelly P. Harrell, *A Multidimensional Conceptualization of Racism-related Stress: Implications for Well-Being of People of Color*, 70 AM. J. OF ORTHOPSYCH. 57 (2000); Samuel R. Lucas, *Effects of Race and Gender Discrimination in the United States, 1940-1980* (1994) (unpublished Ph.D. dissertation, University of Wisconsin, Madison) (on file with authors).

⁹⁴ See Lawrence Bobo & Susan A. Suh, *Surveying Racial Discrimination: Analyses from a Multiethnic Labor Market*, in PRISMATIC METROPOLIS: INEQUALITY IN LOS ANGELES (M.L. Oliver, L.D. Bobo, J.J. Johnson, & A. Valenzuela, eds., 2000); Joseph R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101 (1991); Susan A. Suh, *Women’s Perceptions of Workplace Discrimination: Impacts of Racial Group, Gender, and Class*, in PRISMATIC METROPOLIS: INEQUALITY IN LOS ANGELES (M.L. Oliver, L.D. Bobo, J.J. Johnson, & A. Valenzuela, eds., 2000).

⁹⁵ See Suh, *supra* note X.

⁹⁶ See Kaiser & Miller 2001, *supra* note X; Kaiser & Miller 2003, *supra* note X.

⁹⁷ See Smith, *supra* note X.

⁹⁸ See Bobo & Suh, *supra* note X; Hope Landrine & Elizabeth A. Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of Its Negative Physical and Mental Health Consequences*, 22 J. OF BLACK PSYCH. 144 (1996).

discrimination found that some 95% of respondents reporting discrimination could provide highly specific descriptions of the circumstances in follow-up questions.⁹⁹

With these comments as methodological background, what do the survey data on personal experiences with employment discrimination indicate? African-Americans consistently report the highest levels of discrimination; whites report the least; and Asians and Hispanics fall in between.¹⁰⁰ The percentage of African-Americans reporting that they were discriminated against “at [their] place of work” within “the last 30 days” varied between 21% and 18% for years 1997 through 2001 in national Gallup polls.¹⁰¹ The percentage rises with longer time horizons. Some 33% of Blacks and Hispanics reported that they “ever” were “not offered a job that went to a white” because of racial discrimination; 31% reported being “passed over for a promotion which went to a white” because of racial discrimination.¹⁰² The data also show that better educated and more race conscious respondents report higher levels of experience with discrimination than other respondents.¹⁰³

These data on self-reports of discrimination are consistent with other studies that focus specifically on claiming behavior. Using data from a national survey of over 2,000 adults conducted in 1972, Curran found that 9% of respondents said they had experienced job discrimination at least once in the last year.¹⁰⁴ Similarly, based on data from the Civil Litigation Research Project (CLRP), Kristin Bumiller reported that about 11% of those surveyed had experienced illegal or unfair treatment because of their race, age, sex,

⁹⁹ Tom W. Smith, Taking America’s Pulse: NCCJ’s 2000 Survey of Intergroup Relations in the United States, Paper presented at the National Conference for Community and Justice (New York, 2000).

¹⁰⁰ See Smith 2002, *supra* note X, at 16.

¹⁰¹ *Id.*, at 26.

¹⁰² *Id.*, at 28.

¹⁰³ See Bobo & Suh, *supra* note X.

¹⁰⁴ Barbara A. Curran, The Legal Needs of the Public: The Final Report of a National Survey, at 103 (1977)

handicap, union membership, or other things”¹⁰⁵ These percentages are for the entire sample of respondents. When the samples are broken down by race, the results are quite similar to the studies cited above.

A recent study of discrimination in the workplace conducted by researchers at Rutgers University deserves special consideration, given its focus on employees, the detailed nature of the questions it employed about the experience of workplace discrimination, and its nationwide sample.¹⁰⁶ The Rutgers study found that 10% of respondents said they had been “treated unfairly at [their] workplace because of their race or ethnicity.”¹⁰⁷ Over half of the African-Americans surveyed “knew of” discrimination in the workplace in the last year and more than one-quarter (28%) had themselves experienced discrimination due to race in the last year.¹⁰⁸ In contrast, only 6% of whites had themselves been treated unfairly due to their race in the previous year.¹⁰⁹ More generally, when asked if the practice of determining promotions is unfair, only 6% of whites said yes, while almost half (46%) of African-Americans answered yes, and 12% of workers of other races said yes.¹¹⁰ When asked what type of discrimination they face in the workplace, those who report being treated unfairly most commonly report being passed over for promotion (28%), being assigned undesirable tasks (21%), and hearing racist comments (16%).

¹⁰⁵ This question is not limited to the workplace – the “illegal” or “unfair” treatment could be racial profiling by police, discrimination in housing, or some other form of unfair treatment than in the workplace. See Bumiller, *supra* note X, at 424.

¹⁰⁶ The Rutgers study is based on a nationwide sample of 1000 employed workers weighted to match the presence of selected groups in census data. The sample is 12% African-American, 72% white, 5% Hispanic, 2% Asian, 1% Native American, 1% Bi-racial, and 3% other. The response rate for the survey is not reported in the research report.

¹⁰⁷ Dixon, Storen, & Van Horn, *supra* note X, at 11.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, at 14.

C. Making Complaints

Deciding whether or not one should make a complaint internally within the organization, to a Federal Agency, to a lawyer, or even to one's friends and family involves complicated processes. In this section of the article, we review the literature on whether people who think they have been the target of discrimination do something about it.

1. Extra Legal and Informal Complaints

In the Rutgers study described in the previous section, more than a third (34%) of those who reported unfair treatment in the workplace did not do anything.¹¹¹ Although they also may complain to friends, family members, or even co-workers, some 29% said they "reported the incident to a supervisor;" 19% "filed a complaint according to company procedures;" 10% "avoided certain areas or people in the office;" 4% "quit" and 2% "confronted the person." Only 3% said they "sued" the company or their co-worker.¹¹²

2. Internal Organization Complaint Handling

Case law mandates that prior to filing a formal complaint with the EEOC, a worker exhaust her internal remedies within the employing organizations. Most large employers have policies and departments in place to handle such complaints. But what is the nature of the internal complaint process?

¹¹¹ *Id.*, at 15.

¹¹² As we demonstrate in what follows, if 3% of African-Americans who thought they were treated unfairly on the basis of race or ethnicity in the past year in fact sued their employer, we would see vastly more lawsuits than are filed. The 3% figure in the Rutgers report may include EEOC complaints as well as state and federal lawsuits. It also may also be rounded up from a smaller fraction.

The passage and enforcement of the Civil Rights Act of 1964¹¹³ resulted in corporate actions regarding antidiscrimination law. Organizations instituted formal internal procedures and departments to track developments and resolve disputes,¹¹⁴ although these offices may be more a symbolic signal that the corporation is complying with the law than an internal structure that actually produces good results for complaining employees.¹¹⁵ In response to their inaccurate perceptions about the actual risks of being on the losing end of an antidiscrimination lawsuit,¹¹⁶ employing organizations operate to “managerialize” the process of complaining. Edelman and her colleagues have shown that internal processes seek to deemphasize and depoliticize incidents of workplace discrimination. While the courts have encouraged these processes by citing the presence of internal complaint structures as evidence against the inference of discrimination,¹¹⁷ by redefining possible incidents of discrimination as “misunderstandings,” internal processes may operate to deflect employees from pursuing their claims as matters of rights.¹¹⁸

These data demonstrate that even those employees who take formal actions inside their company are likely to confront a corporate culture with a vested interest in transforming their claim from discrimination to something else.

3. Trends in Formal Complaints: Federal Agency and Court Statistics

The components of the disputing system of antidiscrimination law about which we have some direct measures are those for which the government collects and reports

¹¹³ 78 Stat. 241.

¹¹⁴ See Edelman 1992, *supra* note X.

¹¹⁵ *Id.*

¹¹⁶ See Lauren B. Edelman, Howard S. Erlanger, & Steven E. Abraham, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC’Y REV. 47 (1992).

¹¹⁷ See Edelman 2002, *supra* note X.

¹¹⁸ See Edelman, Erlanger, & Lande, *supra* note X.

statistics: discrimination charges filed with the EEOC and federal district court filings of employment related civil rights cases. Data on state agencies and courts are more fragmentary and for purposes of this paper, we focus on the federal case.¹¹⁹

The broad contours of formal complaints over time are straightforward. Employment related civil rights cases filed in federal district court grew from 336 in 1970 to 7,613 in 1989;¹²⁰ by 1994 the number reached 15,965; by 1998 filings reached 23,735.¹²¹ By 2001, the number of filings had declined slightly to 21,157.¹²² One limitation of the Administrative Office (hereafter AO) data is that they do not categorize cases by type of discrimination alleged. For some insight into changes in the nature of allegations, we must consult data from the EEOC.

Table 1 reports EEOC charge statistics for the years 1992-2002.¹²³ The total number of individual charge filings (which may include multiple types of discrimination) rose sharply in the first four years of this period, 1992-95, largely in response to the addition of disability cases starting in 1993. Hence, in 1992, 77,302 individual charges of discrimination were filed with the EEOC; in 1993, 87,942 complaints were filed; in 1994 the total number of complaints reached the high watermark for the EEOC, with 91,189 complaints; but then began to recede, with 87,529 in 1995, and then dropped dramatically to 77,990 in 1996, before rebounding to 80,680 in 1997 and staying in the range of 77,000-81,000 between 1998-2001. They rose above 84,000 in 2002.

[Insert Table 1 and Figure 1 about Here]

¹¹⁹ For more information on state court verdicts, See David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS. L. REV. 511 (2003).

¹²⁰ Donohue & Siegelman 1991, *supra* note X, at 989.

¹²¹ Administrative Office of the U.S. Courts, Civil Master File, annual.

¹²² *Id.*; See also Litras 2000, *supra* note X; Litras 2002, *supra* note X.

¹²³ EEOC, *supra* note X.

Figure 1 presents the same data graphically. Two types of discrimination clearly rise in prominence over the period: retaliation—which grows from 15.3% of individual complaints to 27.5% of individual complaints—and disability—which the EEOC began to enforce in July 1992 and immediately jumps to 17.4% of complaints in the 1993. Thereafter, disability claims vary between 20-23% of complaints. Complaints about other types of discrimination are quite stable over the time period. Race remains the most frequent type of discrimination charge (although it declines from 41% to 36% of charges in the period), followed closely by sex (which rises from 30% to 31%), age (which declines from 27% to 22%), national origin (which begins and ends the period at 10%), religion (1-3%), and equal pay act claims (1-2%).

The rise in disability claims appears to be a simple reflection of the impact of the ADA. The reason for the rising number of retaliation charges is less obvious. It may reflect the rising proportion of charges that involve dismissal, a finding documented by Donohue and Siegelman for the period 1965-1989.¹²⁴ It may also reflect an increasing tendency for plaintiffs (and their lawyers) to add retaliation as a claim in discrimination disputes. It may reflect more retaliatory behavior by employers. Without in-depth analysis of claims over time and the employment contexts that produce them, we are left to speculate about the reasons for this shift.

We also know from EEOC data that the character of sex discrimination charges has changed significantly in the last 15 years. Sexual harassment was first recognized as actionable under Title VII in 1986. By 1992, the EEOC and state Fair Employment agencies received 10,532 sexual harassment claims.¹²⁵ This number rose to 15,549 in

¹²⁴ Donohue & Siegelman 1991, *supra* note X.

¹²⁵ EEOC, *supra* note X.

1995, where it remained relatively stable through 2001. In 2002, there was a decline in sexual harassment charges and an increase in the number of male workers making harassment charges.¹²⁶ Thus sexual harassment charges equal 56% of the total sex discrimination charges filed with the EEOC in 2002.¹²⁷

Data on the rate at which plaintiffs succeed in discrimination cases after they make formal complaints is less comprehensive than data on formal complaints themselves. The EEOC reports “resolutions” by type of discrimination claim each year. In 2001, 8% were resolved by “settlements,” 4% were “withdrawn with benefits” (presumably also favorable to the complaining individual), and in 10% the EEOC made a finding of “reasonable cause” that discrimination occurred, which is followed by efforts at conciliation. Most cases end in a finding of “no reasonable cause” (57%), which means the agency does not find the case meritorious and the individual may pursue a private cause of action, or are closed administratively (21%), which means the case is closed without any remedy or finding for the charging party. In 2001, the EEOC reported obtaining \$247.8 million in monetary benefits for charging parties, a figure which does not include monetary benefits won through litigation. The EEOC itself directly litigates a relatively small number of cases per year. It filed between 193 and 481 cases per year between 1992 and 2001. Hence, if we look only at the EEOC, we see that most complainants (78% in 2001) obtain no relief from the EEOC and very few are directly represented by the agency in court. If we divide the monetary benefits procured by the number of complaints that survive administrative closures and no reasonable cause findings, complainants obtain an average of less than \$14,000 per complaint.

¹²⁶ *Id.*

¹²⁷ *Id.*

The Administrative Office of the U.S. Courts reports annual data on filings and dispositions in federal district courts, including the category "employment discrimination claims."¹²⁸ These data have not been extensively analyzed before, with the exception of some government reports¹²⁹ and the paper by Donohue and Siegelman¹³⁰ referred to above. The data are based on forms that plaintiffs' attorneys are required to fill out at the time of filing and disposition of a lawsuit. As we discuss below, some aspects of the data are subject to error. Nonetheless, they offer a reasonably comprehensive view of aggregate trends in federal discrimination litigation.

Figure 2 displays the number of lawsuits filed and disposed of from 1990-2001. Here is graphic evidence of the rise in employment discrimination litigation, as filings rise dramatically from 1990 to 1997, roughly tripling in the time period, before leveling off and declining slightly from 1998 to 2001. Dispositions follow a similar pattern lagged by about one year. Indeed, the median number of months between filing and disposition of these cases hovers between 11 and 12 months. The government is a plaintiff in a declining proportion of filings over this period. In 1990 the government was a plaintiff in 7% of cases; by 2001 the government acts as plaintiff in 2% of cases, albeit roughly the same absolute number of cases. As other commentators have noted, class actions make up a small fraction of filings. Only 20 cases were filed as class actions in 1990, 0.25% of filings; in 2001, some 73 cases were filed as class actions, or 0.35% of filings.

[Insert Figure 2 about here]

¹²⁸ Administrative Office of the U.S. Courts, Civil Master File, annual.

¹²⁹ See Litras 2000, *supra* note X; Litras 2002, *supra* note X.

¹³⁰ Donohue & Siegelman 2002, *supra* note X.

Table 2 reports data on case dispositions by year. Consistent with Galanter's depiction of civil litigation, a small and declining proportion of cases are resolved through a trial. At the beginning of the period, in 1990, two thirds of cases are dismissed without judgments, and only 8.7% go to trial. By 2001 almost three-quarters of cases are dismissed without judgments, and only 3.8% go to trial. The largest single category of dismissal is through settlement. Because we have virtually no information on how favorable settlements are for plaintiffs, this represents an enormous gap in our knowledge about discrimination litigation. The significance of settlements is underscored in Figures 3 and 4, which respectively graph the number and percentage of different types of dispositions over the decade. From 1998 on more than 8,000 cases per year are settled. As Figure 4 shows, settlements are a slowly rising percentage of dispositions, from 35% in 1990 to 43% in 2001. The next most frequent outcomes are dismissals without judgments, which makes up about 30% of dispositions throughout the period, and other judgments (such as judgments by default, consent, motion before trial, etc.), which make up just under a quarter of dispositions in most years. The latter two types of dispositions more clearly benefit defendants.

[Insert Figures 3 and 4 about here]

Trials make up a relatively small percentage of case dispositions, but are especially interesting because they are coded for plaintiff wins and award amounts. These data are presented in Table 3 and 4.

Table 3 reveals that the number of cases terminated by trial varies within a limited range by year: in 1990 there were 709 employment discrimination trials terminated by verdict, a number which rises as high as 1,167 in 1997, but then recedes to 780 in 2001.

The plaintiff win rate rises from 24% in 1990 to 38% by 2001, but the percentage of winners who obtain monetary awards declines slightly from 1990 to 2001.

[Insert Table 3 about Here]

The reported amounts of plaintiff awards must be interpreted cautiously. As Donohue and Siegelman (1993) explained in detail, some award amounts are inflated because the attorneys filling out the case disposition forms did not follow the instruction to report the award "in thousands." If a plaintiff was awarded \$9,000 after a trial, the attorney should have written "9" in the award amount field. However, if the attorney wrote \$9,000, the award amount would be set at 9,000 one thousands or \$9 million. If anything, then, there is an upward bias in reported awards.

With this danger in mind, Table 3 suggests that most plaintiffs win modest awards at trial. The median award in all but 1990 falls between \$62,000 and \$156,000. While there appear to be relatively large percentages of plaintiff winners getting more than \$1 million in 1990-1992, between 8% and 15% of plaintiff winners obtain awards of more than \$1M from 1993 to 2001. However, if the numbers in Table 3 are to be believed, between 5% and 10% of plaintiff winners, or 15-30 plaintiffs, obtain awards of \$10 million dollars or more per year.

Table 4 divides cases decided at trial by jury and bench trials which may be important because the Civil Rights Act of 1991 had the effect of extending the right to jury trial for plaintiffs who claimed compensatory damages or who claimed to be victims of intentional discrimination. The percentage of trials before juries rather than judges rises significantly from 1992 on. Jury trials increase from 254 in 1990 to 633 in 2001, while bench trials decline from 410 in 1990 to 111 in 2001. Plaintiffs enjoy higher rates

of success before juries than before a judge. In every year, the plaintiff success rate before juries is higher (ranging from 36% to 44%) than the success rate before judges (which ranges from 14% to 33%). Median awards also typically are modestly higher for cases tried to a jury than those tried to a judge. The median awards for jury cases hover around \$150,000; median awards in bench trials fall below \$100,000 for 8 of 12 years.

[Insert Table 4 about Here]

After trial, plaintiffs fair poorly. Eisenberg demonstrates that defendants are extremely likely to have their trial successes preserved after appeal, while more than one-third of plaintiff trial victories are reversed on appeal.¹³¹ The plaintiff success rate after appeal is 11% in bench trial cases, 25.2% in jury trial cases, or 16.9% overall. Colker's analysis of disability cases from 1992 to 1998, in which she examined both published and unpublished opinions, found that defendants prevailed 93% of the time at the trial level and 84% of the time upon appeal.¹³²

V. *The Inflated Risk of Employment Discrimination Litigation*

These data indicate that most discrimination lawsuits have very different outcomes from the image of major plaintiff victories in highly publicized settlements or trial victories, such as those involving Texaco, Mitsubishi or Home Depot. Most plaintiffs who file federal suit never reach trial. If they do go to trial, they lose more than 60% of the time. If they win, they get relatively modest awards. Perhaps what we know the least about are settlement figures in the large number of lawsuits settled each year.

¹³¹ See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L. J. 1567 (1989).

¹³² See Colker, *supra* note X, at 109.

Yet the number of cases and the size of some awards have generated considerable fear among employers and spawned a new line of insurance against employment liability.¹³³ A presentation by the executive of an insurance company that sells employment practice liability insurance warned of “Escalating Exposures.”¹³⁴ Citing many of the same EEOC statistics we cited above, this insurance representative reported that discrimination claims are becoming more frequent and more severe. Without disclosing the source, he reported that in 1999 there were 12 settlements or verdicts of \$100 million or more, 135 settlements or verdicts over \$15 million, and 101 settlements or verdicts below \$15 million. These figures represented more than a doubling of cases in each category of award size from 1997. The presentation goes on to report that there are more than 22,000 labor and employment lawyers in the ABA, that employment issues now make up 30% of all civil litigation in the United States, and that the average verdict in employment liability cases now exceeds \$450,000.

Many of these insurance industry assertions seem dubious. Yet they are interesting because they invoke the expansive model of antidiscrimination law, that is, as a system that poses the risk of more numerous and expansive lawsuits. Employers, their lawyers, and their insurers may indeed see discrimination law as more costly than in earlier years. Nielsen and Beim demonstrate that the information that employers, lawyers and insurers may glean from the media about employment discrimination litigation overstate the risks posed by litigation.¹³⁵ Using national and local media coverage of employment cases, Nielsen and Beim demonstrate that newspapers report a plaintiff win-rate nearly three times the actual win-rate of 32%. Moreover, this analysis shows that

¹³³ See Bielby & Bourgeois, *supra* note X.

¹³⁴ Presentation given June 19, 2001 (on file with authors).

¹³⁵ Nielsen & Beim, *supra* note X.

newspaper accounts of awards in such cases have a median value well over \$1M, a figure nearly six times greater than the actual median award of \$150,000 in such cases. The popular image of a plaintiff-oriented system stands in marked contrast to how most victims of discrimination and most plaintiffs' lawyers view the system. They think the system heavily favors employers. Bisom-Rapp's analysis of employer and defense attorney responses to employment discrimination law, especially in the area of dismissals, finds that employer defendants have very considerable advantages in contests over discrimination claims.¹³⁶ Employers, human resource professionals, and defense lawyers have developed effective techniques for minimizing the legal threat posed by discrimination lawsuits in the dismissal context, even though it is not clear that their techniques in fact reduce the amount of discriminatory behavior taking place in the workplace. Her survey of plaintiffs' lawyers finds that they too recognize the distinct advantages that employer-defendants possess, and hence are reluctant to take cases unless they contain particularly powerful evidence of discrimination. Even then, plaintiffs apparently do not have a strong chance of success.

The findings of Nielsen and Beim coupled with other evidence of the difficulty for plaintiffs of mounting a successful lawsuit, echo the research of Edelman and her colleagues concerning the inflated threat of wrongful discharge.¹³⁷ Employment lawyers and human resources professionals exaggerate the threat of such litigation in professional journals, which prompts many employers to revise their employee manuals and

¹³⁶ Bisom-Rapp, *supra* note X.

¹³⁷ Lauren Edelman, Steven E. Abraham, and Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC'Y REV. 47 - 83 (1992).

management practices to prevent any suggestion in the employment-at-will contracts.¹³⁸

In employment litigation, as in other areas of litigation, the biased character of media reports has led to hardening of business attitudes towards rights of injured parties and to political and public relations campaigns to define litigation as a problem in its own right.

VI. Scaling the Pyramid of Employment Discrimination Claims: An Analytic Exercise

The empirical data examined thus far present no easy answer regarding the competing images of employment discrimination law. One could say that plaintiffs are winning more often than they used to and that large awards are more frequent than they used to be. On the other hand, fewer plaintiffs get to trial, the percent of plaintiff winners who receive any monetary award is down, and the median monetary award is lower than it was 10 years ago. But these data represent only the middle and top of the dispute pyramid. If we travel to the base of the pyramid and examine what percentage of possible claims of discrimination are entering the system, perhaps we would arrive at a different perspective. In this section, we attempt just that through an empirical exercise that puts the data on formal complaints together with data on the reported prevalence of discrimination among protected groups.

Consider just one category of protected employees for whom we have such data: African-American workers. The survey research cited above contained several different estimates of how many African-Americans had experienced discrimination at work in the last year. The high estimate was 46%, the average was 33%, and the low figure, in the

¹³⁸ See, e.g., Lindsay E. Harris and James E. Boddy, *Sex Discrimination Class Actions and Merit-Based Compensation: Is Your System at Risk?* Employment Law Commentary, Morrison and Forester, available at <http://www.mofo.com/news/bulletin.cfm?MCatID=8968&concentrationID=&ID=1174&Type=7>

Rutgers study, was 28%.¹³⁹ To be conservative, we will use the Rutgers finding as the basis for our estimate. According to U.S. census reports, the number of African-Americans working full-time, year-round in the United States in the year 2000 was 12,197,000.¹⁴⁰ Although the Rutgers study found that most African-Americans reported two incidents of discrimination in the last year, we, again conservatively, assume that individuals will file only one discrimination claim. Using the 28% figure from the Rutgers study, we would estimate that 3,415,160 African-American workers perceived that they were the targets of workplace race discrimination in 2000. To be sure, this number of perceived discriminatory incidents must include misperceptions (when the target attributes a decision to discrimination when that is not the motivation of the decision-maker) and unfair treatment that does not meet the legal standard for employment discrimination. But it also excludes discrimination that goes on unnoticed by its targets. Nonetheless, this estimate is a rough approximation for the pool of individuals who feel they have been a target of discrimination. This group approximates the bottom of the dispute pyramid for African-Americans with a claim of racial discrimination.

What percentage of this group starts a claiming process? The EEOC reports that 28,912 individuals filed complaints of racial discrimination in the year 2001. An EEOC charge is only one avenue of formal complaint, yet it probably is the most common nationally. Using this estimate, less than 1% (0.85%) of African-Americans who felt they were discriminated against filed an EEOC complaint.

[Insert Figure 5 about here]

¹³⁹ Recall the caveats about measuring perceived discrimination discussed in section IV, *infra*.

¹⁴⁰ United States Census, Selected Characteristics of People 15 Years and Over by Total Money Income in 2000, Work Experience in 2000, Race, Hispanic Origin, and Sex. http://ferret.bls.census.gov/macro/032001/perinc/new01_018.htm.

As we already have seen, this remaining 1% faced further attrition before receiving any remedy. In 2001, the EEOC obtained settlements in 7.9% of the cases it resolved, another 3.8% of complainants withdrew their complaints “with benefits,” and 7.5% of cases were determined to have “reasonable cause” and were sent to conciliation. Of the cases sent to conciliation, less than one-third (or 2.2% of resolved cases) ended in “successful conciliations,” the remainder were “unsuccessful.” If we divide the monetary benefits the EEOC reports for race-based cases among the some 4,443 who obtain relief, they each received on average \$19,469. Some 63.3% of cases resulted in a finding of “no reasonable cause,” which left the charging party with the right to pursue a private remedy. (The number of “disputes” in Figure 5 is the percentage of EEOC complainants given a disposition of “no reasonable cause” or 18,215.) “Administrative closures,” which appear largely to provide no relief for the complaining party, made up 17.5% of resolutions. Thus, about 4 in 5 EEOC complainants receive no relief from the EEOC, while at least 63% can sue in federal court.

Here we reach a disjuncture in official statistics. We cannot directly determine from federal court or EEOC statistics how many federal lawsuits allege racial discrimination in employment. The best estimate we can make of the number of race-based claims is to assume that the proportion of race cases filed in federal court is the same as the proportion of race charges in the EEOC charge statistics.

By this estimate, 35.8% of the 21,151 employment discrimination cases filed in federal court in 2001 are race cases, or 7,572 lawsuits filed. To estimate what happens to these 7, 572 cases, we rely on what we saw in Table 2 above about the dispositions of all employment discrimination cases. In 2001, 74% of dispositions were dismissals without

a judgment. Of these, we expect 42.5% (or 3,218) to settle, while the others are dismissed without relief. Of the 26% of cases that proceed to judgment (or 1,969 cases), 3.8% (or 289) go to trial. Then as we would project from Table 3, of the cases that go to trial, plaintiffs win 38.1% (or 110), and obtain monetary relief in 80.8% of the winning cases (or 89 cases). If the race case awards mirror the overall pool of awards, the median monetary award is \$130,500.

To summarize, of 3.4 million potential race claimants, only 28,912 file an EEOC complaint and only about 7,500 file a federal lawsuit. Of these charging parties and plaintiffs, about 7,771 receive some kind of conciliation or award: 4,443 through EEOC action; 3,218 through litigated settlement; and 110 through litigated victories at trial. That amounts to 28% of those who complain starting with the EEOC or 0.23% or 23 in 10,000 of the potential pool of 3.4 million self-identified targets of racial discrimination in employment.¹⁴¹

This analytic exercise is admittedly somewhat crude. To gain better estimates about the prevalence of discrimination and the propensity to do something about it, it would be necessary to collect survey data from larger samples, as well as data from state agencies and courts. We have treated the cases as though only one individual plaintiff were involved. While this is largely correct, we do know that at least some cases (73 overall in 2001, not just in race-based cases) include classes of plaintiffs. Yet this simple exercise reveals that a very small percentage of African-Americans who feel they are discriminated against in the workplace take a grievance to the EEOC or the courts. If larger percentages of workers took action it could have a dramatic impact on caseloads.

¹⁴¹ A replication of this exercise conducted for the population of disabled workers can be found in Burke, *supra* note X.

After looking at these numbers, we are inclined to ask not why there are so many discrimination claims, but why there are so few?

The answer to that question may lie in studies conducted about rights claiming by sociolegal scholars. In addition to the standard cost/benefit calculations that economists typically consider, sociolegal scholars have begun to identify a number of factors that influence decisions about disputing, including the material resources required to pursue a claim,¹⁴² the relationship of the parties to one another,¹⁴³ resistance to being classified as “victim”,¹⁴⁴ conceptions about other powerful social institutions such as work and family,¹⁴⁵ and resistance to law on ideological grounds,¹⁴⁶ to name just a few.

The answer to that question may also be suggested in the statistics we have gathered here. The exercise suggests that only little more than one quarter of cases will yield awards for plaintiffs. Most complainants will receive an average of a little more than \$19,000; the median awards in cases that go to trial and win are \$130,000. When these awards are weighed against the difficulties of bringing a complaint, and the social opprobrium such an action typically provokes,¹⁴⁷ it is hardly surprising that so few targets of discrimination take formal action to obtain redress.

¹⁴² See Curran, *supra* note X.

¹⁴³ See Barbara Yngvesson, *Law, Private Governance, and Continuing Relationships*, 1985 WISC. L. REV. 623 (1985); Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 L. & SOC'Y REV. 409 (1988).

¹⁴⁴ See Bumiller, *supra* note X.

¹⁴⁵ See Catherine R. Albiston, *The Struggle to Care: Negotiating Family and Medical Leave in the Workplace* (Center For Working Families, Working Paper No. 26, 2001); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 L. & SOC'Y REV. 67 (1999); Catherine R. Albiston, *Legal Consciousness and the Mobilization of Civil Rights: Negotiating Family and Medical Leave Rights in the Workplace*, Paper presented at the Annual Meeting of the Law and Society Association (Miami 2000).

¹⁴⁶ See Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of ordinary Citizens about Law and Street Harassment*, 34 L. & SOC'Y REV. 201 (2000).

¹⁴⁷ See Kaiser & Miller 2001, *supra* note X; Kaiser & Miller 2003, *supra* note X; Major & Kaiser, *supra* note X.

VII. Conclusion

When we begin to conceive of employment discrimination litigation as a pyramid of disputes, it leads to a more realistic conception of the capacity of law to vindicate rights in the workplace. Contemporary anti-discrimination law appears from a distance as an imposing edifice of rights. It is only up close in the observation of how these rights are translated into the practices of courts, regulatory agencies, employing organizations, and aggrieved workers that we see the formidable obstacles to using these rights. And it is only by investigating the mechanisms that make rights work or frustrate their exercise that we can forge a regime of anti-discrimination law that leads to the realization of rights envisioned in our civil rights laws.

This analysis of antidiscrimination law as a claiming system suggests that it is a system whose symbolic presence is more powerful and pervasive than its practical effect. True to the overexpansive view, people of color, white women, those living with disabilities, and people with other protected characteristics have more statutorily protected rights to equal treatment in the workplace than was the case 15 years ago. Changes in the economy and cultural norms about work and the social status of protected groups have wrought significant changes in patterns of employment, so that members of protected groups are employed in jobs today that they could not have held before the beginning the contemporary civil rights era. As a result of changes in education and the dissemination of information about employment rights, protected groups no doubt are more aware of their rights than in the past. As a result, there are many more claims of discrimination than in the early 1970's and 1980's. Yet, as the conception of discrimination law as weak asserts, it appears to remain the case that workers who feel

subjected to discrimination seldom take formal actions within their organization or in court to achieve redress. If they do, they face a daunting array of challenges, are unlikely to obtain a remedy, and, if they do, they are unlikely to obtain a substantial recovery.

Recognition of the substantial gap between rights and realities is, however, only the first step in designing practices that achieve greater workplace equity. One reading of these data leads to a clear policy prescription -- strategies should be developed to increase the amount of litigation in order to remedy the dramatic under-claiming in the employment discrimination system. As one participant in a seminar in which this paper was presented asked, "should we turn the pyramid into a cube?" Of course not -- it would be impossible and impractical to do so. In the current political climate of antagonism to lawyers and litigation, it is pragmatic as well as prudent to consider less adversarial alternatives to help achieve workplace equality.

There are several less adversarial strategies that could be pursued. 1) New governance mechanisms in the workplace that empower teams of workers and managers to devise employment policies that reduce possibility for operation of discrimination.¹⁴⁸ 2) Enhanced regulation of employment decisions, such as additional reporting requirements concerning pay and promotion. Some of these measures have been proposed in Congress, but have not progressed. 3) As a corollary, increasing the regulatory resources of the EEOC to screen cases and employers for potential violations. EEOC budget has grown incrementally despite dramatic changes in jurisdiction, # of potential claims. 4) Granting some form of immunity to employers who take proactive steps to evaluate whether discrimination exists in their organization and take steps to

¹⁴⁸ Sturm, Simon

redress them. This approach has been advocated by some scholars of inequality¹⁴⁹ and is the current policy in other countries including Canada.¹⁵⁰

More adversarial, but still non-litigation strategies also should be considered. Strategies for addressing workplace discrimination that do not include litigation and that might well be pursued include increasing enforcement resources for the EEOC and its state-level equivalents that individuals may use that regulatory structure as a mediation-like alternative to filing lawsuits. Over the period in which the EEOC has been asked to investigate and resolve easing burdens on employers who wish to engage in affirmative action, and encouraging organizational policies that promote equal opportunity.¹⁵¹

But it is also the case that litigation-based strategies can be effective, especially if they are strengthened. An important paper by Kalev, Dobbin, and Kelly, analyzes the impact of the experiences and organizational structures of employers on the extent to which women and minorities gain managerial positions within the organization, including organization size, whether the employer is unionized, the presence or absence of EEO offices and affirmative action programs, and whether the employer has been sued for discrimination.¹⁵² Being exposed to litigation was among the significant predictors to increasing diversity in the managerial ranks of employers.

Given the effectiveness of litigation strategies, it is important to consider the ways that law itself could be transformed to better address employment discrimination. Implementing state-level antidiscrimination laws to overcome new theories of federalism that block the application of federal law to state employers, would provide protection for

¹⁴⁹ Nelson and Bridges

¹⁵⁰ Nielsen, *Paying Workers or Paying Lawyers*

¹⁵¹ See, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 461-62 (2000).

¹⁵²

millions of currently unprotected workers. In addition, expanding the application of disparate impact theories of discrimination and making affirmative action easier to practice in the workplace could make important headway in reducing employment inequality.

These general suggestions should not be seen as an exhaustive list of avenues to pursue. We present them as illustrations of what might be considered. In the present political and judicial climate the prospects that these measures might be adopted seem remote. Indeed, our more fundamental purpose is to alter the terms of the present debate and argue for more sophisticated empirical inquiry into discrimination claiming.¹⁵³ Until we know why the vast majority of people who believe they have been discriminated against fail to make a claim, as well as what happens to those who make claims but never appear in published cases, we cannot make sensible policy recommendations.

Nonetheless, we remain aware that while there are many people who believe they have been discriminated against in the workplace who do not claim, we recognize that there are those who claim but do not have a legitimate complaint. These claimants may truly believe they have a claim, but are in error either because they attribute negative outcomes to discrimination when they actually are due to other factors. Or, these claimants may know they have no legitimate complaint but are retaliating for something else the employer has done to them. While we believe there is strong evidence that

¹⁵³ Indeed, even members of the Supreme Court are looking to empirical data for answers about discrimination. In her dissent in *Gratz v. Bollinger*, Justice Ruth Bader Ginsburg cited social science evidence about disparities in housing, health care, income, and education as proof that racial inequality persists and constitutes evidence of past (if not on-going) discrimination that can and should be rectified.

lawsuits are one of the most effective mechanisms for achieving workplace diversity,¹⁵⁴ the answer to these quandaries is not simply more lawsuits. Neither, however, is the answer that law should get out of the business of employment discrimination altogether. Law occupies the space of remedying this problem. Ordinary people understand that discrimination on the basis of race or sex is morally wrong and, illegal. The law provides powerful tools that can affect bargaining position in informal negotiations in the workplace, achieving positive results for workers who do not ever show up in the regulatory agencies or the civil litigation system as plaintiffs.¹⁵⁵

¹⁵⁴ Kalev, Dobbin, and Kelly

¹⁵⁵ Albsiton, McCann

Table 1:
EEOC Charge Statistics, Fiscal Year 1992 to 2002¹⁵⁶

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Total Charges	72,302	87,942	91,189	87,529	77,990	80,680	79,591	77,444	79,896	80,840	84,442
Race	29,548 40.90%	31,695 36.00%	31,656 34.80%	29,986 34.30%	26,287 33.80%	29,199 36.20%	28,820 36.20%	28,819 37.30%	28,945 36.20%	28,912 35.80%	29,910 35.40%
Sex	21,796 30.10%	23,919 27.20%	25,860 28.40%	26,181 29.90%	23,813 30.60%	24,728 30.70%	24,454 30.70%	23,907 30.90%	25,194 31.50%	25,140 31.10%	25,536 30.20%
National Origin	7,434 10.30%	7,454 8.50%	7,414 8.10%	7,035 8.00%	6,687 8.60%	6,712 8.30%	6,778 8.50%	7,108 9.20%	7,792 9.80%	8,025 9.90%	9,046 10.70%
Religion	1,388 1.90%	1,449 1.60%	1,546 1.70%	1,581 1.80%	1,564 2.00%	1,709 2.10%	1,786 2.20%	1,811 2.30%	1,939 2.40%	2,127 2.60%	2,572 3.00%
Retaliation											
All Statutes	11,096 15.30%	13,814 15.70%	15,853 17.40%	17,070 19.50%	16,080 20.60%	18,198 22.60%	19,114 24.00%	19,694 25.40%	21,613 27.10%	22,257 27.50%	22,768 27.00%
Title VII	10,499 14.50%	12,644 14.40%	14,415 15.80%	15,342 17.50%	14,412 18.50%	16,394 20.30%	17,246 21.70%	17,883 23.10%	19,753 24.70%	20,407 25.20%	20,814 24.60%
Age	19,573 27.10%	19,809 22.50%	19,618 21.50%	17,416 19.90%	15,719 20.20%	15,785 19.60%	15,191 19.10%	14,141 18.30%	16,008 20.00%	17,405 21.50%	19,921 23.60%
Disability	1,048* 1.40%	15,274 17.40%	18,859 20.70%	19,798 22.60%	18,046 23.10%	18,108 22.40%	17,806 22.40%	17,007 22.00%	15,864 19.90%	16,470 20.40%	15,964 18.90%
Equal Pay Act	1,294 1.80%	1,328 1.50%	1,381 1.50%	1,275 1.50%	969 1.20%	1,134 1.40%	1,071 1.30%	1,044 1.30%	1,270 1.60%	1,251 1.50%	1,256 1.50%

* EEOC began enforcing the Americans with Disabilities Act on July 26, 1992
 Source: U.S. Equal Employment Opportunity Commission

¹⁵⁶ The number for total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the eight types of discrimination listed. The data are compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System - quarterly reconciled Data Summary Reports, and the national data base.

Table 2:

Disposition of Employment Civil Rights Complaints in U.S. District Courts, 1990-2001

Year	Number of employment civil rights complaints disposed ^a	Percent of cases disposed								
		Dismissed						Judgment		
		Total	Settled	Voluntary	Lack of jurisdiction	Want of prosecution	Other	Total	Trial ^b	Other ^c
1990	8,205	67.2%	35.0%	8.8%	7.0%	5.1%	11.3%	32.8%	8.7%	24.2%
1991	7,911	67.3	36.4	9.2	2.9	5.2	13.6	32.7	9.2	23.5
1992	8,924	67.2	35.1	11.1	1.4	5.1	14.5	32.8	8.4	24.3
1993	10,305	69.6	37.0	11.5	1.2	4.4	15.5	30.4	7.8	22.6
1994	12,232	70.9	39.4	12.6	1.0	3.3	14.5	29.1	7.5	21.6
1995	14,967	72.1	39.9	13.4	1.0	3.5	14.3	27.9	6.8	21.1
1996	18,456	72.0	39.0	13.2	0.8	3.4	15.6	28.0	6.0	22.0
1997	20,564	72.6	39.0	13.8	0.8	3.8	15.2	27.4	5.7	21.7
1998	22,570	72.4	39.3	13.9	0.9	3.8	14.7	27.6	4.8	22.8
1999	22,701	73.1	40.5	13.2	0.9	3.3	15.1	26.9	4.5	22.4
2000	21,524	73.1	41.5	12.6	1.0	3.6	14.4	26.9	4.3	22.6
2001	20,345	74.0	42.5	13.2	0.9	3.6	13.8	26.0	3.8	22.2

Note: Percentages may not sum to total due to rounding.

^aExcludes transfers, remands, and statistical closers.

^bTrial includes cases disposed of by jury verdict, directed verdict, or bench trial. In some cases, the parties may have settled before the completion of the trial.

^cIncludes judgments by default, consent, a motion before trial, judgment of arbitrator, or by some other final judgment method.

Source: Administrative Office of the U.S. Courts, Civil Master File, annual.

**Table 3:
 Plaintiff Winners and Awards in Employment Civil Rights Complaints Terminated by
 Trial in U.S. District Courts, 1990-2001**

Year	Number of cases terminated by trial verdict*	Percent Plaintiff Winners	Number Plaintiff Winners	Award Amount					
				Monetary Awards		Median	Less than \$500,000	\$1 million or more	\$10 million or more
				Percent	Number				
1990	709	24.4%	173	84.4%	146	\$248,500	54.1%	40.4%	1.4%
1991	728	26.9	196	82.7	162	127,000	65.4	32.1	1.2
1992	752	27.8	209	80.9	169	151,000	66.9	26.0	5.3
1993	803	25.7	206	82.0	169	62,000	85.8	8.3	2.4
1994	916	30.9	283	88.3	250	89,500	87.6	7.6	3.6
1995	1,015	26.5	269	85.1	229	116,000	80.8	13.5	8.7
1996	1,106	32.6	361	82.8	299	125,000	78.6	14.7	8.4
1997	1,167	34.4	401	81.0	325	125,000	78.8	13.5	10.2
1998	1,083	35.5	384	78.6	302	137,000	77.8	14.2	10.6
1999	1,029	34.9	359	83.6	300	150,000	82.0	12.3	6.0
2000	921	35.4	326	80.7	263	156,000	81.4	10.6	5.3
2001	780	38.1	297	80.8	240	130,500	77.9	13.8	7.5

*Number of trial cases disposed for which a judgment was known.
 Includes jury trials, bench trials, and directed verdicts.
 Source: Administrative Office of the U.S. Courts, Civil Master File.

**Table 4:
 Plaintiff Winners and Awards in Employment Civil Rights Cases Terminated in U.S.
 District Courts by Type of Trial, 1990-2001**

Plaintiff winners in jury trials									
Year	Number of cases terminated by jury trial ^a	Percent Plaintiff Winners	Number Plaintiff Winners	Monetary Awards		Award Amount			\$10 million or more
				Percent	Number	Median	Less than \$500,000	\$1 million or more	
1990	254	40.9%	104	95.2%	99	\$440,000	51.5%	42.4%	2.0%
1991	241	42.3	102	92.2	94	198,500	61.7	35.1	—
1992	257	43.6	112	92.9	104	319,000	58.7	31.7	7.7%
1993	316	36.7	116	89.7	104	92,500	80.8	10.6	2.9%
1994	464	43.1	200	90.0	180	110,000	85.0	8.3	3.9%
1995	598	35.8	214	86.4	185	150,000	81.1	13.0	9.2%
1996	758	38.5	292	83.9	245	146,000	77.1	15.5	9.4%
1997	877	40.9	359	82.5	296	128,000	78.4	13.5	9.8%
1998	845	40.4	341	79.5	271	139,000	77.9	13.7	10.0%
1999	810	39.3	318	83.6	266	168,500	81.2	12.8	6.4%
2000	748	38.0	284	83.5	237	150,000	82.3	10.5	4.6%
2001	633	40.6	257	81.7	210	141,500	77.6	14.3	7.1%

Plaintiff winners in bench trials									
Year	Number of cases terminated by bench trial ^b	Percent Plaintiff Winners	Number Plaintiff Winners	Monetary Awards		Award Amount			\$10 million or more
				Percent	Number	Median	Less than \$500,000	\$1 million or more	
1990	410	16.3%	67	68.7%	46	\$114,000	58.7%	37.0%	—
1991	440	19.1	84	75.0	63	69,000	69.8	28.6	3.2%
1992	449	21.4	96	66.7	64	43,000	79.7	17.2	1.6
1993	444	19.6	87	74.7	65	35,000	93.8	4.6	1.5
1994	408	19.9	81	84.0	68	43,500	94.1	5.9	2.9

1995	364	14.0	51	82.4	42	45,000	81.0	14.3	4.8
1996	285	22.8	65	78.5	51	71,000	86.3	9.8	2.0
1997	219	18.7	41	68.3	28	84,500	85.7	10.7	10.7
1998	168	24.4	41	73.2	30	141,000	76.7	20.0	16.7
1999	170	22.9	39	82.1	32	54,000	87.5	9.4	3.1
2000	138	26.8	37	64.9	24	183,500	70.8	12.5	12.5
2001	111	33.3	37	75.7	28	112,500	78.6	10.7	10.7

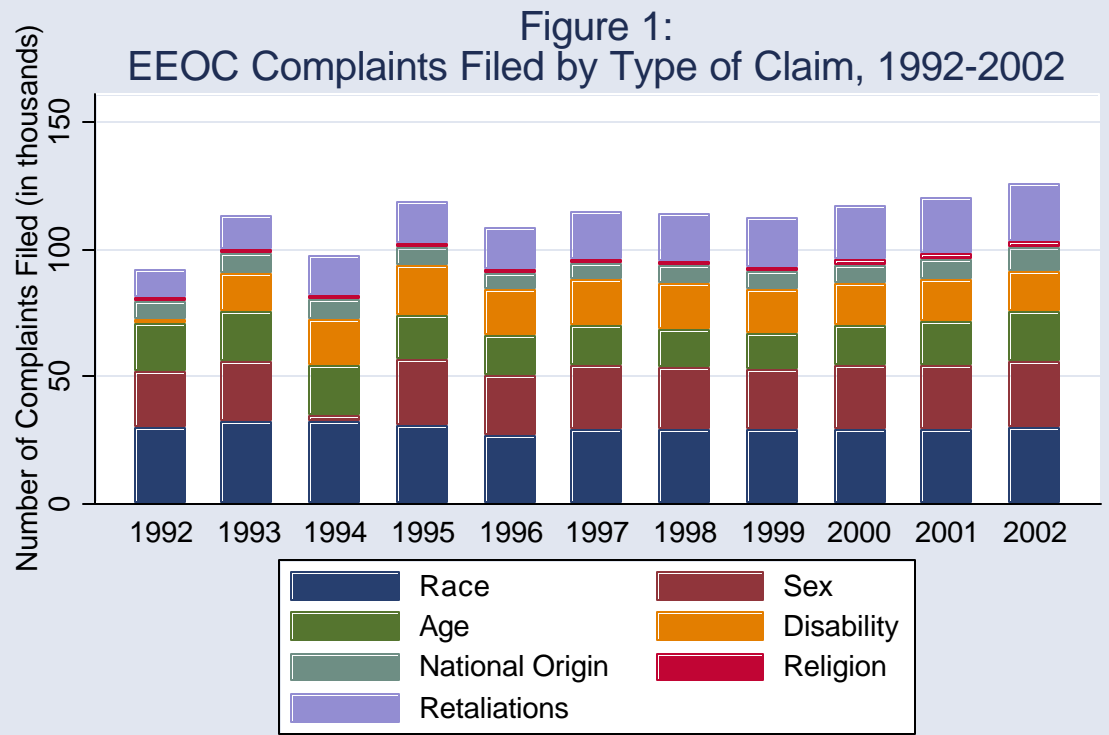
^aNumber of jury trial cases disposed for which a judgment was known.

^bNumber of bench trial cases disposed for which a judgment was known.

Directed verdicts not included.

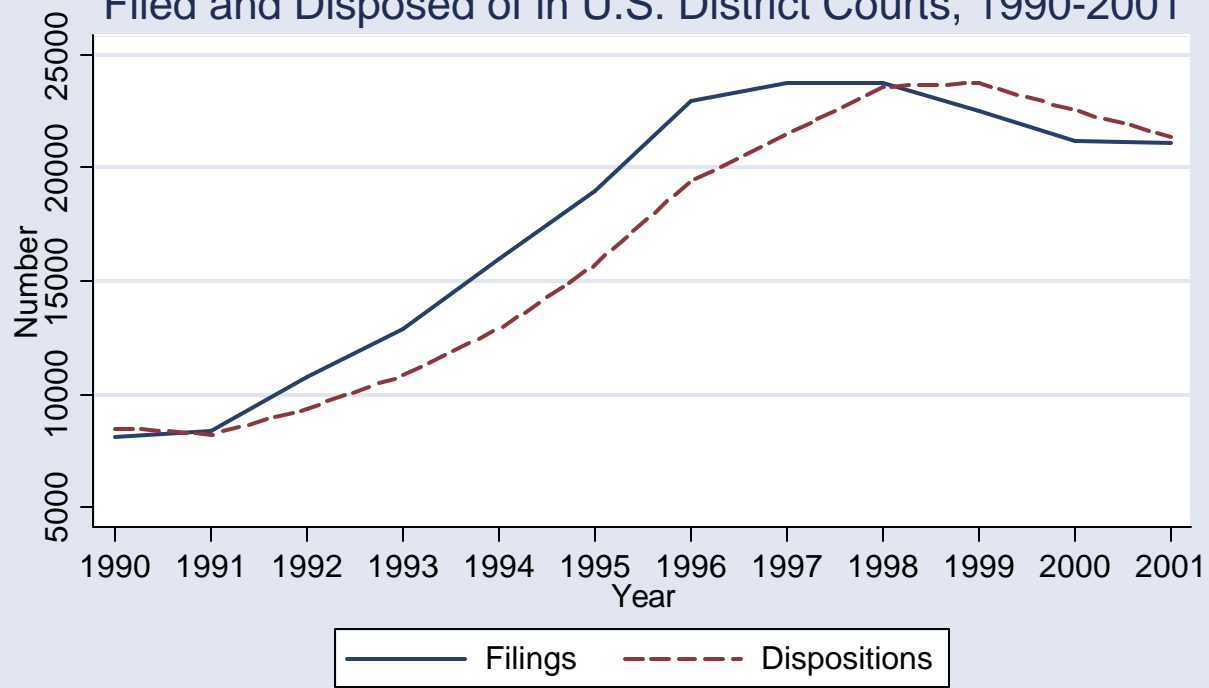
-- No cases recorded.

Source: Administrative Office of the U.S. Courts, Civil Master File.



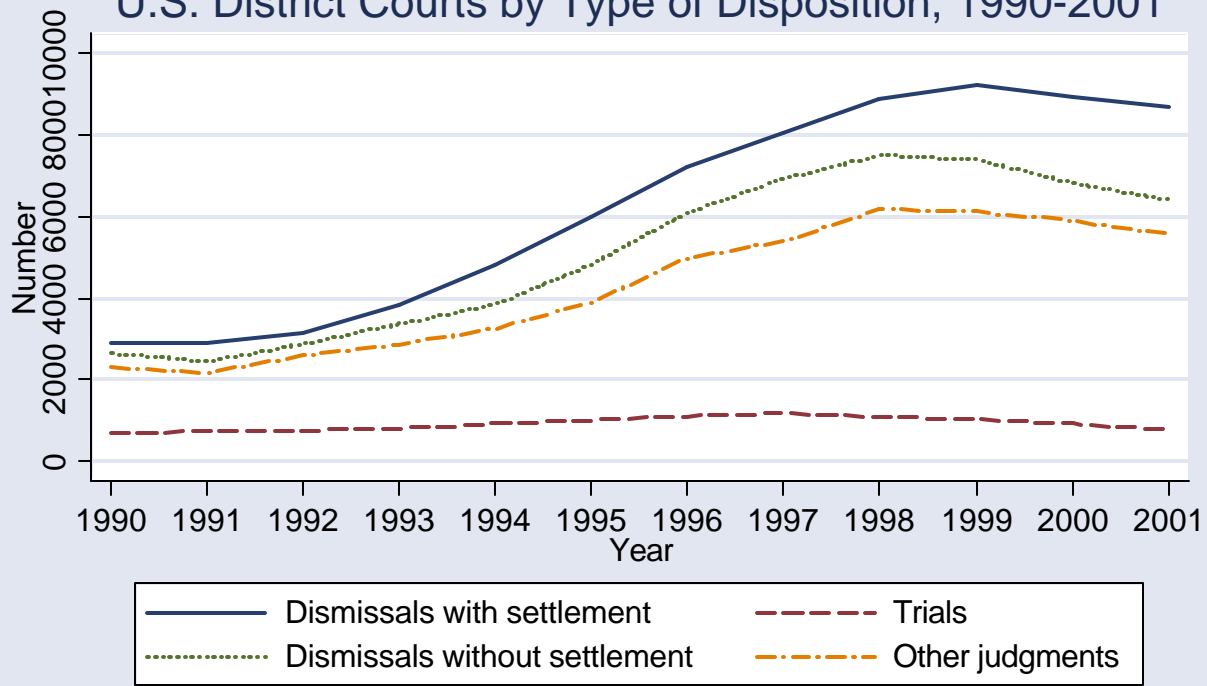
Source: Equal Employment Opportunity Commission, www.eeoc.gov/stats/

Figure 2:
Number of Employment Discrimination Lawsuits
Filed and Disposed of in U.S. District Courts, 1990-2001



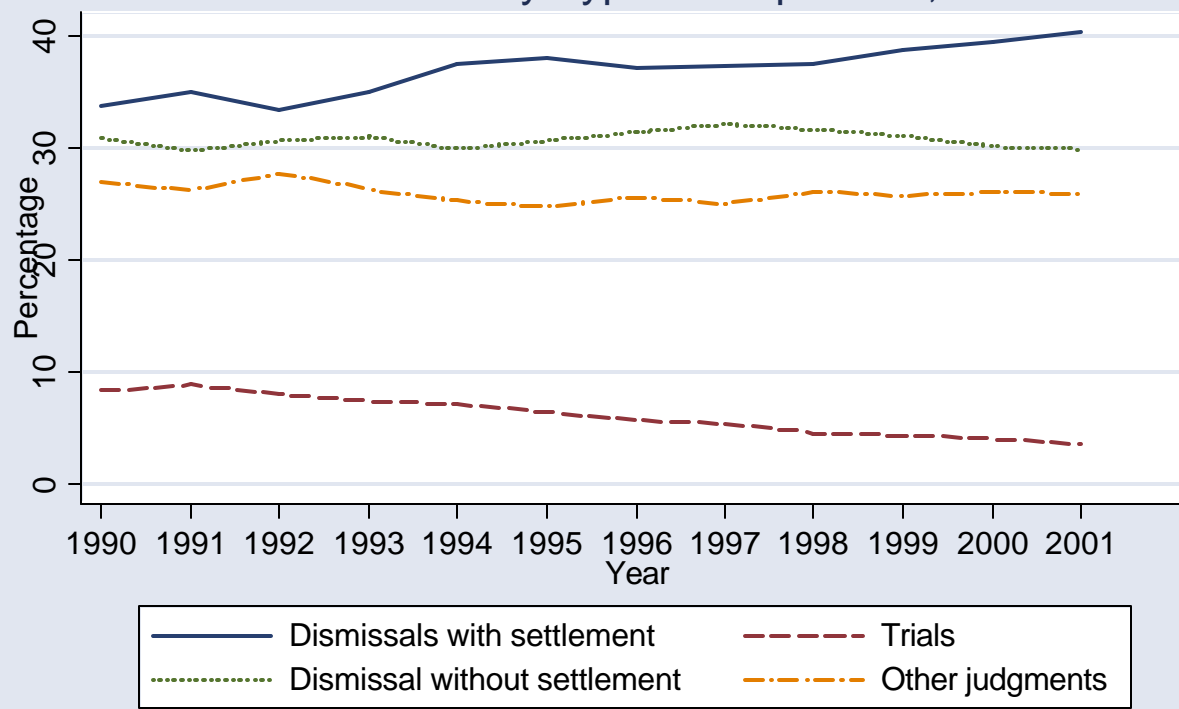
Source: Administrative Office of the U.S. District Courts, Civil Master File

Figure 3:
Dispositions of Employment Discrimination Complaints in
U.S. District Courts by Type of Disposition, 1990-2001



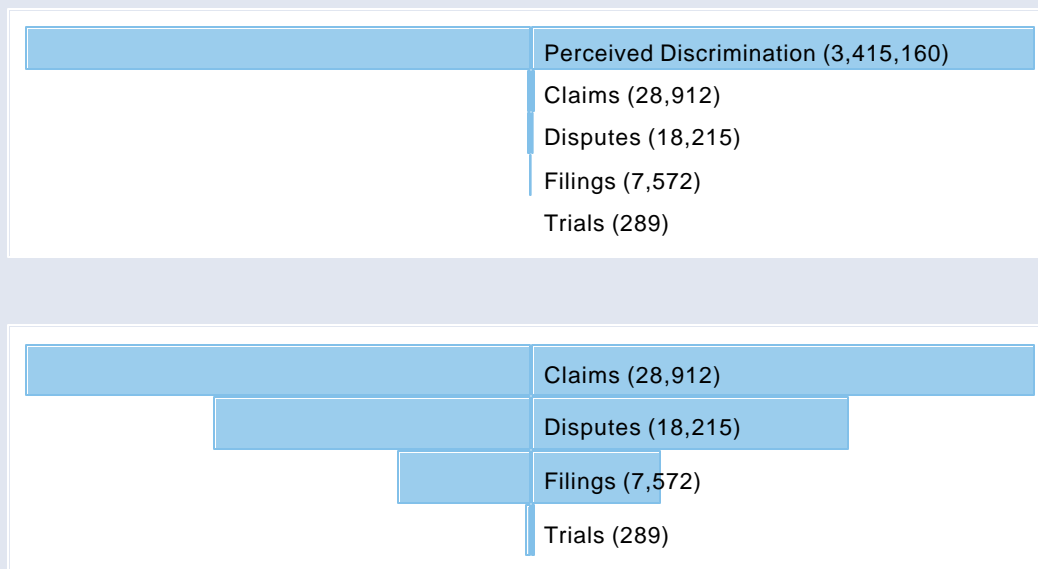
Source: Administrative Office of the U.S. Courts, Civil Master File

Figure 4. Dispositions of Employment Discrimination Complaints
U.S. District Courts by Type of Disposition, 1990-2001



Source: Administrative Office of the U.S. Courts, Civil Master File

Figure 5:
Dispute Pyramid of Employment Discrimination for
African-Americans, 2001



Numbers are estimates from the analytic exercise, pp.40-43 infra.

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