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# Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation

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A substantial body of sociolegal scholarship suggests that the legitimacy of the law crucially depends on the public's perception that legal processes are fair. The bulk of this research relies on an underdeveloped account of the material and institutional contexts of litigants' perceptions of fairness. We introduce an analysis of situated justice to capture a contextualized conception of how litigants narrate fairness in their actual legal encounters. Our analysis draws on 100 in-depth interviews with defendant's representatives, plaintiffs, and lawyers involved in employment discrimination lawsuits, selected as part of a multimethod study of 1,788 discrimination cases filed in U.S. district courts between 1988 and 2003. This article offers two key empirical findings, the first at the level of individual perceptions and the second at the level of legal institutions. First, we find that neither defendants' representatives nor plaintiffs believe discrimination law is fair. Rather than sharing a complaint, however, each side sees unfairness only in those aspects of the process that work to their disadvantage. Second, we demonstrate that the very notion of fairness can belie structural asymmetries that, overall, profoundly benefit employers in employment discrimination lawsuits. We conclude by discussing how a situated justice analysis calls for a rethinking of empirical research on fairness. Audio recordings of respondents quoted in this article are available online.\*

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\* Readers can hear the data in respondents' own voices by listening to online audio recordings of the lengthy quotations. There are a few ways to listen to the 22 audio clips while reading the article. Those who are reading the digital version of the article will see that the name of each person quoted is hyperlinked. After clicking on a hyperlink, readers will be directed to a Web page containing just the audio recording for the appropriate

You know what? If you want to sue me, sue me. Lots of people have sued me. You won't be the first, and you probably won't be the last. But there's some things you need to understand. You need to understand that I have a job and I get paid every day. And your lawsuit is just a job to me. Do I want to win? I want to win everything I do. I am a type A, competitive person. But if I don't win, my world doesn't stop. And I still get paid.

—[Harold Ward](#), company representative, recounting his advice to fired employees who say they might file a discrimination lawsuit.

Fairness is central to American law. Considerable empirical research has shown that law's legitimacy crucially depends on the perception that its processes are fair (Lind & Tyler 1988; Tyler 1990). Fairness is the stated goal of civil rights enforcement agencies. It is recognized as the primary governing principle in litigation (Newman 1985). It underlies political theorists' ideas about the institutionalization of justice in a constitutional democracy (Rawls 1999 [1971]). Yet, the bulk of the research on legal justice has left us with an insufficient account of fairness.

Sociolegal studies of fairness currently are dominated by the social psychology of *procedural justice*, or the perceived fairness of the legal process (e.g., Greenberg 1987; Lind & Tyler 1988; Naumann & Bennett 2000). This approach has produced elegant causal arguments, such as the proposition that legal process is more important to litigants' sense of justice than is substantive outcome. However, these studies typically rely on a strikingly narrow conception of fairness. As Max Weber (1949: 80) notes, explanations that formulate causal laws about cultural phenomena should not be the end of analysis, but the beginning:

An "objective" analysis of cultural events . . . is meaningless. . . . Firstly, because the knowledge of social laws is not knowledge of social reality but is rather one of the various aids used by our minds for attaining this end; secondly, because knowledge of *cultural events* is inconceivable except on a basis of the significance which the concrete constellations of reality have for us in certain *individual* concrete situations. . . . All knowledge of cultural reality, as may be seen, is always knowledge from *particular points of view* [*italics in original*].

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quotation. The other option is for readers to open the article on their computer or to print it out and open the article web page simultaneously ([www.americanbarfoundation.org/research/Civil\\_Rights\\_in\\_their\\_Own\\_Voices0.html](http://www.americanbarfoundation.org/research/Civil_Rights_in_their_Own_Voices0.html)). When these readers reach a lengthy quotation in the article, they can play the recording on the Web page that corresponds to the speaker's name. The recordings are listed on the Web page in the order in which they appear in the article.

Weber called on social scientists to produce interpretive understandings of cultural phenomena in context in order to counter the “overreaching tendency of a formal-juristic outlook” (1949: 82). Our study is inspired by Weber’s insights and follows a long-standing tradition of sociolegal research that has shown how perceptions of legality are rooted in concrete situations.

There are two key limitations to the design of a typical procedural justice study, in which researchers ask respondents to respond to brief or hypothetical encounters with the law. First, this approach may oversimplify or, worse, sanitize the conditions in which legal disputes occur. Second, by focusing on only one side of a legal encounter, these studies miss how actual litigation involves sense making within an adversarial context. These limitations leave important questions unanswered: How do people assess fairness after they have had sustained encounters with legal institutions? What is the relationship between these assessments and power, domination, and structural bias within the legal system?

To address these questions, we introduce an analysis of *situated justice*, which focuses on how people’s accounts of fairness are bound up in the institutions and structural advantages and disadvantages they encounter in actual legal disputes. This approach emphasizes how litigants’ construction of fairness is relational, particularly in terms of an adversarial orientation to the opposing party but also in terms of the resources and accumulated experiences that litigants bring with them. Rather than using experiments to abstract respondents’ ideals of fairness from their lived experience, a situated justice analysis reconnects litigants’ narrative accounts of fairness to the material and symbolic struggles and structural inequalities that characterize litigation. This approach also turns a critical eye toward the very notion of fairness.

The purpose of this article is to introduce, develop, and apply a situated justice analysis that builds on the insights of procedural justice yet remains sensitive to institutional inequalities within real legal cases. Our analysis draws on 100 in-depth interviews with defendant’s representatives, plaintiffs, and their lawyers involved in employment discrimination lawsuits, selected as part of a multi-method study of 1,788 discrimination cases filed in U.S. federal courts between 1988 and 2003 (Nielsen, Nelson, & Lancaster 2010). We treat both defendants’ representatives’ and plaintiffs’ accounts of fairness in litigation as multilayered narratives formed through multiple encounters with the law (even if just in the course of a single case) and situated within their respective social locations and resources for navigating the legal system.

In addition to developing a situated justice analysis, this article emphasizes two key empirical findings. The first relates to the level of individual perceptions of fairness. We show that one of the few

topics that defendants' representatives and plaintiffs agree upon is that discrimination litigation is exceedingly unfair. Neither side leaves the litigation process confident in the ability of law to serve justice. However, rather than possessing a shared complaint about the unfairness of employment discrimination litigation, each side sees unfairness in those aspects of the process that are to their own disadvantage. Defendants' representatives tend to focus on the process of entering litigation. They claim that employers are "held hostage" to meritless cases, and they blame plaintiffs' problematic personalities and lack of legal expertise for preventing efficient resolutions. Plaintiffs, in contrast, focus on the processes related to staying in litigation and resolving cases. They see unfairness in the institutional barriers they faced in securing competent legal assistance, the devastating toll of litigation on their financial and emotional well-being, and the lack of a clear resolution to their original workplace grievance.

Our point here is that the perception of fairness is relational when litigants discuss the actual contexts of legal encounters. Although both sides claim to value the abstract ideal of fairness for all, they only talk about the fairness of the parts of the process that advantage their opposition and disadvantage themselves. To follow Weber, "cultural reality . . . is always knowledge from *particular points of view*" (1949: 80) [italics in original]. From a situated perspective, what each side wants in a fair legal system is not an unbiased process (as the procedural justice literature suggests) but one that benefits their own side.

Our second key finding concerns legal fairness at an institutional level. We find that the very concept of fairness, by implying an equivalency across the adversarial dispute, can exacerbate fundamental inequalities within the litigation system. Each side selectively frames the notion of fairness in ways that reinforce its goals in litigation, with different implications. Defendants' representatives' interpretation of fairness points to unreasonable individual claimants as the problem. This interpretation obscures the employers' disproportionate resources, power, and control in litigation, such as the inherent job security of defendants' representatives, as described by Harold Ward in the opening quotation. Even plaintiffs' understanding of fairness can play a pernicious role. Plaintiffs tend to recognize their structural disadvantages relative to defendants. However, their hope that the legal system will deliver fairness can prime them to enter and stay in litigation even when most have a slim chance of achieving what they would consider a victory.

In this way, the ideal of fairness can reinforce the myth that lawsuits are a real dispute concerning the substantive claims of two roughly equivalent parties. It suggests that a level playing field somehow is possible. However, in an adversarial legal system in

which employers enjoy tremendous structural advantages, the cultural ideal of fairness can mask those advantages while reinforcing the disproportionate burden borne by plaintiffs.

A situated justice analysis provides a more empirically accurate account of litigants' views of fairness. It questions several assumptions of procedural justice research, such as the assumption that fairness can be treated uncritically as an ideological construct. Situated justice analysis also contributes to a more robust theoretical understanding of inequality in litigation by demonstrating the role of cultural ideas in constituting and reproducing structural advantage (Bourdieu 1984). We follow Galanter (1974), who shows that seemingly neutral legal rules have structural features that result in inequality. Likewise, the seemingly neutral cultural frame of "fairness" can perpetuate the inequities of litigation by rendering those inequities invisible. The often-evoked notion of fairness implies that each side's grievances are played out on a level playing field, yet the playing field of employment discrimination litigation imposes significantly different burdens upon each side. For defendants' representatives in our study, these burdens are managerialized and made into routine operating costs. For the individual plaintiffs, these burdens often are personally and professionally crushing.

### **How People Assess Legal Fairness: Toward an Analysis of Situated Justice**

The study of procedural justice has produced valuable insights into the importance of the perception of fairness. Scholars find that subjects often express greater concern for a fair process than for the substantive outcome of a legal encounter (e.g., Lind et al. 1993). Absent a fair process, respondents view legal outcomes as suspect (Lind & Tyler 1988; Tyler 1990) and lose confidence in the ability of legal institutions to resolve future grievances (Tyler 1984, 1990). These findings have serious implications for the legitimacy of the law and future legal behavior. Without trust in legal institutions, citizens may be less likely to abide by the law in the future.

The problem is that these findings commonly rest on an analytically thin conceptualization of fairness. This shortcoming is a consequence of researchers' analytic and methodological choices. Despite Lind and Tyler's recognition that there are "situationally based differences in the meaning of procedural justice" (1988: 110), much of the research that has followed their lead is based on discrete and hypothetical encounters with law and legal authorities like the police (for notable exceptions, see Lind et al. 1990; Tyler 1989). Results capture research participants' feelings about fairness abstractly and are elicited through either forced-choice surveys and

interview protocols (Tyler 1990) or social psychological experiments that use vignettes and simulated conflict (e.g., Collie et al. 2002; see also MacCoun 2005).

The limitations of these empirical strategies are well documented elsewhere (Festinger & Carlsmith 1959; Prasad et al. 2009). Suffice it to say, much of the procedural justice research assumes that it is the analyst's job to distill the "objective" from the "subjective," "thought" from "action," and "process" from "outcome," regardless of whether these distinctions have any relationship to how actual litigants describe their legal experiences. This has resulted in formulaic psychological models largely divorced from the real-world social contexts of legal encounters.<sup>1</sup> Although early procedural justice research called for attention to the interaction between expectation and experience (Folger 1984; Thibaut & Walker 1978), we still know strikingly little about how people evaluate fairness after more sustained involvements with the legal system.

Ewick and Silbey (1998) observed that social psychological conceptions of fairness, when presented this way, can appear timeless and universal. This conceptualization not only tends to ignore social and cultural variation, but also is strikingly one-dimensional. That is, a timeless and universalistic view of fairness is merely one dimension within which citizens discuss justice. They also talk about justice within the specificities of their varying, often divergent experiences. To say this a bit differently, we should not rely on a thin operationalization of fairness if we believe that this key concept is culturally thick (e.g., Walzer 1983).

### **Situated Justice**

A situated justice approach directs attention to how people's sense of fairness is formed through their particular experiences within the legal system and in relation to the litigants' embeddedness in institutional contexts. Situated justice researchers take structural constraints seriously while also recognizing that individuals navigate structures based on their legal consciousness (even as structures shape legal consciousness). These constraints can include the opportunities and normative categories that the law establishes; the roles of professionals like judges and lawyers; and material, social, and cultural resources such as well-worn organizational rou-

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<sup>1</sup> Other critics argue that procedural justice research can lend itself to "Machiavellian" manipulation (Sarat 1993) or is at least a "double-edged sword" (MacCoun 2005). The concern is that sophisticated parties and the state could direct legal processes in ways that satisfy participants' procedural preferences without concern for substantive justice (Sarat 1993).

tines for managing disputes. To develop a situated justice framework, then, we draw from legal consciousness and cultural sociology to analyze internal schema in their social contexts and from dispute processing to analyze the constraints of legal structures.

As both the literature on legal consciousness and cultural sociology demonstrate, the ways in which people construct cultural categories are inseparable from the conditions of possibility within their legal, social, economic, and institutional environments. Law is not just a formulaic code of conduct. It also is an ever-evolving set of schemata that exists in the minds of individuals. Legal consciousness is influenced by perception, sensation, memory, and other psychological processes that scholars of procedural justice and other social psychologists of law have attended to (e.g., Fiske 1998). Legal consciousness is shaped by people's social locations; life stages; and the knowledge, interpretative frameworks, and resources at their disposal (Ewick & Silbey 1998; Marshall 2008; Nielsen 2000). Importantly, a person's legal schema is contingent on the specific contexts in which he or she engages law (or avoids it)—which includes the legal environment as well as the structure of markets (Larson 2004), the workplace (Hirsch & Lyons 2010), and the government's legal categories and classifications (Abrego 2011)—with consequences for everyday behavior (Gonzales 2011). Likewise, people's interpretations of law become closely tied to feelings and emotions and are imbricated in relations of power, domination, and legal hegemony (*ibid*; Silbey 2005).

People's understandings of law and expectations of fairness profoundly shape their legal engagement. For example, potential plaintiffs' decisions to turn to the law (or not) and to continue to pursue justice (or not) require that they know they have been, or could be, harmed (Felstiner et al. 1980; Major et al. 2002). Even when they lack this knowledge, people are reluctant to make a claim because they have insufficient access to lawyers (Curran 1977), do not want to be classified as a victim (Bumiller 1987), or doubt whether they deserve legal protections (Kirkland 2008). Thus, the basic decision to make a claim turns on whether someone even recognizes the law as a viable option. Furthermore, after individuals turn to the law they often find their disputes transformed by lawyers (Sarat & Felstiner 1995) and the courts in ways they find unsatisfying (Merry 1990).

These insights into legal consciousness point to the necessity that we examine people's perceptions of fairness within the institutional constraints and power dynamics that form and re-form them. Fairness is never immutable, universal, or transcendent. Thus, our approach begins with the interpretive assumption that people "build up" the meanings of their legal encounters through both mundane and extraordinary interactions (Blumer 1962). This



sense making typically occurs between litigants and formal legal authorities, legal procedures, the mass media, and other key institutions, such as law school for lawyers.

We also draw upon dispute processing research, which has placed an even greater emphasis on structural context. As Galanter (1974) argues, institutional features of the legal system may appear neutral but actually favor parties with more resources and experience. Empirical research in this area has shown how these structural features produce tangible material advantages for affluent defendants and corporate litigants (Grossman et al. 1999; Hirsh 2008). For example, courts commonly treat employers' diversity policies as indicators of employers' legal compliance, regardless of the policies' efficacy (Edelman 2005).

Similarly, our situated justice approach suggests that legal categories, frameworks, and cultural constructs are not impartial. Despite law's ideological promise of neutrality, legal concepts communicate the worldviews of people in positions of power and facilitate those groups' interests (Berrey 2011). At a more general level, key cultural constructs like fairness should not be easily dismissed as epiphenomenal window dressing atop the more causal material underpinnings of legal institutions. Rather, cultural constructs are both reflective and constitutive of these institutions. The very existence of the justice system is constituted, in part, through the commonly held perception that law should be fair. As cultural theorists argue (Alexander 2004; Sewell 1992), any serious contemporary analysis of how power and inequality are produced and reproduced within institutions such as courts must consider the enactment of cultural concepts.

In sum, legal institutions and constructs establish the very "conditions of possibility" that an individual claimant encounters (Bourdieu 1984: 418) by setting up the arena, the rules, and the ideological parameters within which participants understand and play the game. Our situated justice approach begins with these premises. Applied to the study of employment discrimination, it reveals litigants' conceptions of fairness in the context of their real-life institutional encounters with law and the role of these conceptions in reproducing an unequal legal system.

### **Why Employment Civil Rights?**

Employment civil rights litigation is one of the largest fields of civil litigation and is emblematic of legal intervention to achieve workplace justice. It is an excellent location for analyzing situated justice because most parties have multiple, ongoing interactions with various instantiations of the legal system. In the cases we studied, individual employees (by inclusion in the sample) faced what they



perceived as unfair treatment at work and an unfair or unsatisfactory process of workplace dispute resolution. Defendant-employers responded by challenging the employees' claims of unfair treatment and by defending the fairness of their workplaces. For both parties in cases like these, a single lawsuit usually involves repeated encounters with legal authorities. As the defendants' representatives and plaintiffs recall, a case also requires them to think and talk about law on numerous occasions. They have these experiences within the context of the American legal system, which is predicated on the right to a fair process rather than the achievement of justice (Stuntz 2011). All these attributes make perceptions of fairness—especially those of plaintiffs, who are relatively more concerned with fairness—salient and easily accessed for study (Stinchcombe 2005).

Employment discrimination lawsuits are nationally significant because they are the largest single type of case filed in U.S. district courts: they constitute up to 10 percent of the cases filed between 1988 and 2003 (our period of study). As such, these cases are an important arena in which a considerable portion of Americans who engage in litigation develops ideas about the law's fairness.

Employment civil rights law shares important similarities with other laws, such as torts and environmental protections, because lawsuits—rather than mandates or some other system of regulation—are the primary mechanism for arbitrating claims and enforcing compliance (Burke 2002, 2003). That is, the laws are “litigious” policies (*ibid*).

Employment discrimination lawsuits themselves embody inequality. They function as an individualized system of justice in which nearly all plaintiffs (93 percent) pursue individual rather than collective claims, which puts them at a tremendous disadvantage relative to employer-defendants (Nielsen, Nelson, & Lancaster 2010). Unlike other kinds of cases in district courts, they show a consistent, exaggerated pattern of case resolution in which plaintiffs fare poorly in many ways (Clermont & Schwab 2009: 122). Most cases end not in a big plaintiff win, as media coverage suggests (Nielsen & Beim 2004), but in a small settlement. These cases are more likely to be pursued *pro se*, to be dismissed or thrown out on summary judgment, to result in plaintiff losses at trial, to be appealed by defendant-employers, and to result in plaintiff loss on appeal (Clermont & Eisenberg 1992, 2002; Clermont & Schwab 2004, 2009; Nielsen, Nelson, & Lancaster 2010).

## Methods

This qualitative study is designed to reveal the distinct perspectives of multiple parties engaged in litigation. It is a subset of a

mixed-methods study of employment discrimination litigation consisting of a random sample of 1,788 cases filed in federal court in seven districts between 1988 and 2003 (Nielsen, Nelson, & Lancaster 2010). That study is an expanded replication of Donohue and Siegelman's well-known study of employment civil rights litigation between 1972 and 1987 (e.g., Donohue & Siegelman 1991).

Using the quantitative findings of the most common types of employment discrimination (race, sex, age, disability) and the most theoretically meaningful case resolutions (dismissal, early settlement, late settlement, trial), we created a 16-cell grid to capture the possible combinations. From each cell, we drew a random subsample of cases from two of the districts for in-depth study. By sampling for range (Small 2009), we increased the likelihood of capturing relevant dynamics in the cases.

We interviewed 100 individuals across these cells: 41 plaintiffs, 20 plaintiff lawyers, 20 individuals representing defendant-employers, and 19 lawyers serving as outside counsel to employers. Plaintiffs were interviewed first, and then, when feasible, defendants' representatives and lawyers in the same case were interviewed subsequently. When this was not feasible, we selected defendants' representatives and lawyers from other cases in the random subsample. This article focuses on defendants' representatives and plaintiffs, although the analysis is enhanced by our lawyer interviews. Defendants' representatives were employed by a company, nonprofit organization, or government entity as human resources (HR) professionals or in-house counsel with responsibility for employment law (see Table 1).<sup>2</sup> Plaintiff-employees filed cases against the private companies, nonprofit organizations, or government entities that employed them, although at the time of our interviews, only one plaintiff still worked for the employer. Names used here are pseudonyms.

Our interview protocols consisted of open-ended, semistructured questions about closed legal cases involving the interviewee. Defendants' representatives discussed a specific closed case and their organizations' general strategies for managing discrimination complaints and lawsuits. The plaintiffs' interview covered their personal experiences of job discrimination, workplace dispute resolution, legal authorities, and case resolution. Each interview lasted about one hour and ended with forced-choice demographic and attitudinal questions. Interview transcripts and notes were coded with NVivo qualitative analysis software. The coding scheme was developed inductively, with codes identified through data analysis,

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<sup>2</sup> Title VII exempts employers with fewer than 15 employees.

**Table 1.** Interviewee Demographics

Plaintiffs (41 Total)		Defendants' Representatives (20 Total)	
Selected for claims based on		Position	
Race	12	Inside counsel	16
Sex	15	HR manager	4
Age	12		
Disability	15		
Type of employer		Type of employer	
Private company	28	Private company	12
Government	12	Government	5
Nonprofit	1	Nonprofit	3
Race		Race	
White	25	White	17
African American	16	African American	2
		Other	1
Gender		Gender	
Female	18	Female	11
Male	23	Male	9
Legal representation		Legal representation	
Pro se all of the case	7	At least one attorney was involved in all reported cases	
Pro se part of the case	5		
At least one attorney for all or some portion of the case	34		

and deductively, with several codes based on secondary literature (Miles & Huberman 1994).

Following standard practices for qualitative research, the analysis uses rich, textured data to identify social mechanisms and general processes (Lofland & Lofland 1995). Because interviewees were asked to “tell us their story,” the resulting data can be viewed as narrative. Our data provide a personal account, a “plot” (Polletta 2006), which, with a beginning, middle, and end, resonates as persuasive with many readers. To temper the individualistic tendency common in narrative studies (Berrey & Nielsen 2007; Fleury-Steiner 2004), we follow sociolegal research that ties narrative accounts to social structure, the life course, social situations, and membership in identity groups (Engel & Munger 2003; Ewick & Silbey 1998; Nielsen 2000; see also McCann 2006). Our study combines the persuasive richness of narrative interviews with rigorous qualitative analysis of our respondents’ stories.

Our interviewees’ “plots” are necessarily retrospective, particularly for the plaintiffs, as very few were still involved in litigation when interviewed. Nonetheless, interviewees’ reconstructions of their cases are as important, arguably more important, than their *in situ* experiences. It is through memories of salient events that legal actors continually reconstruct their faith, or lack thereof, in the fairness and legitimacy of the law.

Our unique inclusion of both defendants’ representatives and plaintiffs, along with our data on parties’ interpretations of real lawsuits, reveals the subjective and relational experiences that matter for each sides’ assessments of fairness.

## **Perceptions of Fairness in the Context of Employment Discrimination Litigation**

Defendants' representatives' and plaintiffs' encounters with litigation are organized by the three basic stages of a lawsuit: entering litigation, staying in litigation, and resolving cases. In each of the following three sections, we briefly elaborate the stage of litigation and then analyze the litigants' relevant narratives of fairness, first for defendants' representatives because they have so much influence over litigation, and then for plaintiffs.

We highlight two overarching findings throughout our analysis. First, defendants' representatives and plaintiffs alike believe that discrimination law is rife with unfairness, but each party points to unfairness in those aspects of the legal system that most disadvantage that party. Second, both parties' interpretations of fairness rely, in some measure, on the ideological fiction that discrimination lawsuits are disputes between somehow equivalent parties and are decided on the substantive merits of the arguments. This reliance on the cultural trope of fairness can cloak the many ways in which employers actually shape the terms and outcomes of disputes.

### **Entering Litigation**

Most people who believe they have experienced discrimination do not pursue a lawsuit (Felstiner, Abel, & Sarat 1980; Nielsen & Nelson 2005). For those who do, the first step is to register a charge with the Equal Employment Opportunity Commission (EEOC) or Fair Employment Practices Agency (FEPA) at the state or local level. In the vast majority of cases, the agency issues a Notice of Right to Sue letter without investigating the workplace or representing the plaintiff legally. This letter enables complainants to file a claim in federal court. Plaintiffs may handle the agency process with or without an attorney. Defendant-employers, by definition, enter into lawsuits on defense. Both defendants' representatives' and plaintiffs' perceptions of legal fairness are informed by the experiences of this plaintiff-initiated process for entering litigation.

### ***Defendants' Representatives' View of a System Hijacked by Meritless Cases***

"The system isn't fair. . . . [T]he employee has no skin in the game."

In their narratives, defendants' representatives—who were HR managers or in-house counsel—commonly refer to the egregious

unfairness of the process of entering litigation. They report that the ease with which plaintiffs can “drag” their companies into court with little evidence is the most unfair and out-of-control aspect of litigation. The system is unfair, they say, because the plaintiff has all the power to file a lawsuit. This assessment derives from defendants’ representatives’ allegiance to their employers’ interests and from repeated encounters with discrimination claims. Their subjective experience of law is evident, for example, in their point of reference for their assessments of fairness: they assess the harm done to the employer-organization as an organization, not to themselves as individuals.

From this vantage point, all the defendants’ representatives interviewed speak of “meritless cases” and “problem employees.” [Don Gale](#), a white in-house counsel for a research organization, says, “Most cases, I don’t say they’re totally frivolous. . . . I really don’t believe *any* of our cases [were cases] where the other side had sufficient merit.” According to defendants’ representatives, these meritless discrimination cases are pursued by poorly performing employees who do not understand the differences among illegal behavior, misbehavior, and unpopular business decisions. [Nicole Price](#), a white general counsel for a health care nonprofit, describes these cases:

Oftentimes it’s somebody may have made a remark to somebody that that person took offense to. . . . We have tended to be very successful on those because a lot of people don’t understand. They take it to extremes, you know. They hear one remark and . . . get very upset or they feel like they can’t tell their supervisor, so they’ll actually file a complaint, but those typically aren’t going to be found to be discriminatory. . . . Yelling at an employee is not discrimination, but, you know, some people believe that it should be.

Price, like other defendants’ representatives, blames plaintiffs (and occasionally their lawyers) for failing to understand discrimination law.

Defendant’s representatives point to various personal attributes that make plaintiffs problematic employees.<sup>3</sup> As they describe it, plaintiffs tend to be poor performers with overinflated self-images. Some plaintiffs have “difficult” personalities, so they themselves are the impediment—not the manager, the coworker, or the workplace conditions cited in the lawsuit. Plaintiffs may be emotionally unsound or even mentally ill, so they cannot see the situation

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<sup>3</sup> These characterizations, like the popular rhetoric on frivolous lawsuits promoted by tort reform lobbyists and the mass media (Haltom & McCann 2004), suggest that lawsuits are motivated by the greed and opportunism of plaintiffs and their attorneys.

clearly. On top of this incompetence, as defendants' representatives describe it, is plaintiffs' basic ignorance of law. On his desk one HR executive has a jar that captures this pervasive negative sentiment. Designed to look like an urn, the jar is engraved with these words: ASHES OF PROBLEM EMPLOYEES.

Defendants' representatives also blame the law and legal authorities for unfairly empowering incompetent workers to make unsubstantiated claims. They frequently characterize the EEOC as inadequate because it makes litigation too open to plaintiffs. With this system, they say, practically anyone can drag them into court and shake them down (see also Abel 1998). [Marilyn Cole](#), a white in-house counsel and corporate officer for a finance corporation, says,

Here's what I hear from our managers, who've been involved in these situations, is that they complain to me that the system isn't fair. That we have to hire these attorneys and we have to pay this money and . . . go through this process and the employee has no skin in the game. And if, you know, if they lose, then it doesn't seem fair that they shouldn't have to pay.

While no defendant's representative goes so far as to question the very existence of discrimination law, they see the system as deeply unfair, primarily because unreasonable plaintiffs can hijack it. Their construction of fairness rests on the underlying assumption, communicated in the ideal of legal fairness itself, that there should be a baseline equivalence between the opposing parties and that the current system perverts this. Given that exceedingly few cases ever reach a point at which a judge or jury definitively rules against the defendant-employer, the discrimination litigation system rarely confronts defendants' representatives with cause to question this assumption.

Defendants' representatives' rhetoric about meritless cases is typically accompanied by the insistence that discrimination is rare and their workplace is fair. [David Lever](#), a white in-house counsel for a transportation company, expresses this sentiment:

I've never seen overt discrimination. I think it is something that does still happen, but I think it's pretty unusual, pretty rare. I've questioned managers at times . . . "Are you sure [that discrimination did not occur]?" . . . I think that 98, 99 percent of the time, [discrimination did not occur].

Defendants' representatives express confidence that managers properly address inappropriate behavior in those rare cases when it does occur. [Don Gale](#) says, "The management's position is if the misconduct or the bad performance is established, whatever

disciplinary action is appropriate will be taken.” He and others depict their managers’ proactive problem solving as evidence of a lack of discrimination (see also, e.g., Edelman 1992). They view the workplace itself, not the courts, as the fairest arbiter of a resolution.

In litigation, defendant-employers react defensively to accusations. Their primary goal is to reduce the cost of dealing with disgruntled employees, ideally by avoiding lawsuits. Their in-house counsel and HR managers characterize discrimination litigation as most unfair precisely at the point where plaintiffs have, arguably, the most control: the point of filing a claim. In short, law is “unfair” because it does not treat the parties equally at the moment when employees first have an opportunity to exercise greater control over the employment dispute.

These interpretations of fairness belie the many mechanisms by which employers actually shape and limit employees’ entry into litigation. Defendant-employers have tremendous organizational leverage over the plaintiff as an employee. National data show that 40 percent of all U.S. employment discrimination claims include a charge of retaliation (Nielsen et al. 2008), which may include the very consequential act of firing the employee. Whether or not employers retaliate against an employee’s claim, the threat of doing so is always present. Furthermore, employers may require new employees to sign binding arbitration clauses that prohibit workers from filing discrimination lawsuits.

In the second data section, we revisit employers’ techniques for preventing workplace problems from turning into litigation. But first we turn to plaintiffs’ accounts of fairness in the process of entering litigation.

### *Plaintiffs’ Dashed Hopes for Fairness*

“I’m thinking the law exists for everybody.”

Like defendants’ representatives, plaintiffs’ lived experience of law influences their assessments of its fairness. A major difference, however, is that most plaintiffs engage only in a single case. Plaintiffs typically have little experience with litigation and far fewer resources to draw upon. Also, a plaintiff’s point of reference is the harm done directly to him or herself as an individual. Plaintiffs frequently narrate their experiences of the law as financially devastating, emotionally wrenching, and personally damaging.

Whatever devastation plaintiffs ultimately experience, their narratives nearly universally reference an optimistic assumption they held early in the legal process: that the law would provide an unbiased means to justice and fairness. Plaintiffs’ recollections of how they first turned to the law were usually descriptive and



emphasized their need for independent recourse. Consider [Kristin Hamilton](#), an African-American woman, who believed that a younger white male with far less experience was promoted over her:

I went [to the company's internal EEO office], and of course they said they were going to investigate, but how do you investigate yourself? . . . There's not an outside [agency] doing it. [The employer is] doing it. So then I did go to EEOC and filed a complaint, and then that's when they gave me the letter to sue.

The dispassionate language that plaintiffs like Hamilton use to describe their initial turn to law contrasts with their characterizations of intense feelings about the workplace problems they experienced: "It was a terribly abusive environment," one plaintiff remembers. "I was just so appalled and mad," says another. "It got stupid; it got real stupid. It got ridiculous," says yet another. These individuals and many others recall their first effort to contact a lawyer or their own act of filing a complaint as a pragmatic next step. As evident in their narrative accounts, their initial, often-unspoken expectation is that law will be fair. This expectation seems to prime them to enter litigation.

As plaintiffs reconstruct their litigation experiences, however, most note that their optimism that law could deliver fairness rapidly faded. Many remember their first encounters with EEOC and FEPA employees or lawyers as sources of frustration and dashed hopes. [Marjorie Turner](#), an African-American secretary, is a typical example:

I mean, I really did go [to the state department of human rights] naively thinking that they were going to do what I thought was their mission, and that was to protect the rights, your civil rights. And what I found is that consistently they don't do that. . . . In fact, I just wrote a letter to ACLU [American Civil Liberties Union] about the department of human rights and the fact that they don't accept evidence that the victim wants to present to them. . . . They don't return calls. I had an investigator who was really rude to me on the phone [and] did not interview me at all before having the fact-finding conference.

Turner is among the nine plaintiffs interviewed who say they expected the EEOC or FEPA to deliver far more than it did; 10 others report disappointment with the agency.

Some plaintiffs, like Turner, recall that when they approached these offices they expected to find something like a plaintiff advocacy group but instead found an opaque bureaucracy (Hirsh & Kornrich 2008). For some, their disappointment stems from their expectation that the EEOC or FEPA would issue a legally binding

decision. These plaintiffs' interpretations of fairness rest, in some part, on the assumption that law would treat them as more of an equal than did their employer.

The disappointment that most plaintiffs describe is part of their general sense that law is unfair. By the time we interviewed them, over 75 percent of plaintiffs thought that either the whole legal system or specific aspects of it were biased against them. All of these plaintiffs describe how they expected the law to provide a means of vindication but found their expectations deflated. [Gerry Handley](#), an African-American computer operator who made little headway with his case, suggests that the legal process was tainted by racism:

They thought that I was just, like, this black man that was stupid and that they could just do whatever they wanted. . . . I had a good case. And I knew that. I would write stuff down and I'd keep it and I would confirm it by telling the people that this happened. . . . And they kept it a secret for me. It's a good case, but the legal system didn't work. It didn't help me. I fell through the cracks.

The 12 plaintiff interviewees who pursued all or part of their case without a lawyer report especially acute feelings of bias. [Jimmy Williams](#), an African-American laborer who filed his case *pro se* against a railroad company, recounts, "I lost everything, you know, and given the fact that, like I said, I've never been arrested for anything, I'm thinking the law exists for everybody. You know how they say it's 'justice'? It's 'Just us.' Not justice for all . . . 'Just us.'" Handley and Williams's initial optimism reveals their initial expectation that discrimination litigation would be responsive and fair. As with defendants' representatives, the plaintiffs' conception of fairness rests on an assumption that law will treat the adversarial parties as equals.

Plaintiffs' ideals of fairness are especially apparent in the sense of vindication that some express when they speak of "fighting" for justice. Almost half of the plaintiffs (19) stress that, even if they lost their cases, they are glad they pursued the case. [Sam DeLuca](#), a white policy analyst who lost at trial, explains.

I did what I could do to fight what I thought was an action that was sort of improper. . . . I don't want to say that it's, that cliché, you had your day in court or whatever. But it's like, okay, you know this wasn't right and I was able to do something.

A smaller number of the plaintiffs we interviewed (seven) feel they had the opportunity to tell their full story to a lawyer, a FEPA representative, the EEOC, a judge, or a jury (see also Adler et al. 1983), thus bolstering their sense that law could be fair by giving

them voice. This finding is consistent with studies of procedural justice.

Most plaintiffs report feeling optimistic, especially early in their cases, that the law could be a fair arbiter of their workplace disputes. Indeed, this optimism seems to help buoy them through degrading treatment at work or unresponsive internal workplace channels. Even if their optimism is merely a product of the narrative method—a retrospective explanation that valorizes the tremendous burdens they have endured—it indicates that most plaintiffs need an explanation for why they have pursued litigation despite what they view as its profound unfairness. The precise sources of plaintiffs' optimistic expectations were unclear from our interviews. Employees' expectations may be influenced by media coverage (Haltom & McCann 2004; Nielsen & Beim 2004) or employer and insurance industry analysts (Bisom-Rapp 1999), all of which depict antidiscrimination law as a boon to plaintiffs and their lawyers. The relative ease of filing a claim, compared to later stages of litigation, may heighten plaintiffs' expectations by providing a false sense that law is manageable.

What is clear is that plaintiffs' expectations follow from the ideological promise that law provides a fair means of resolution by leveling the playing field. Hopes of impartial resolution or telling one's story in court are constitutive parts of the ideological apparatus of legal systems. Plaintiffs' typical sentiment that law generally is (or should be) fair serves to legitimize the law's symbolic authority, despite the law-in-practice's inability to deliver on this promise regularly.

This idealized sentiment can exacerbate the structural inequalities of litigation. Take, for example, how an abstract ideal of fairness undergirds the notion of having fought the good fight. While this ideal provides symbolic nourishment to continue pursuing a lawsuit against the odds, it also has the effect of reinforcing the myth that lawsuits are typically won and lost over the substantive claims of adversarial parties. For the plaintiffs in this sample—all of whom had the tenacity to continue their claim beyond the EEOC—their early optimism that the legal system could deliver such fairness seems to prime their decision to enter a litigation dispute. But if they do so alone, without collective claims or perhaps a lawyer, as is typically the case, they have little chance of winning.

### **Staying in Litigation**

For both parties, staying in litigation presents challenges, particularly because it requires them to expend resources, financial and otherwise. Parties evaluate law's fairness within this context. Although the obstacles to pursuing a case are many, the outcome

is indeterminate. Thus, there are considerable incentives for defendant-employers to prevent claims from progressing to a decision and for plaintiffs to try to overcome challenges and pursue their claims.

### *Defendants' Representatives' Strategies for Minimizing the Burdens of Litigation*

"Your lawsuit is just a job to me."

Compared to their strong sentiments about bias toward plaintiffs at the filing stage, defendants' representatives had far fewer complaints about the unfairness of defending a case. The process of staying in litigation poses costs to their employer-organizations, but they are armed with organizational supports and past experience that enable them to routinize litigation and minimize its burdens.

Defendants' representatives told us of their efforts to respond strategically once a claim was filed. [Krista Hewick](#), a white in-house counsel and HR officer for a product manufacturer, details these efforts:

In nearly 100 percent of the cases, the employee who has got this problem has no idea that I'm involved at all. Because when you add lawyers to a mix, it's like putting gas on the flame. So what we do is I will talk to the HR person and I'll say, "Okay, tell me what happened. . . . What do you need to accomplish here to make a resolution that everybody can work with? And here are the rules." . . . My job is to establish . . . the boundaries of the playing field. "Now your job as the HR person is to figure out where you want to start the play . . . where you want to put the ball."

Defendants' representatives like Hewick talk and act in savvy, purposeful ways to manage the potential damage of a lawsuit. Through organizational strategies of concealment and laying out strategic options, employer-organizations can assert some control over litigation. Most of the defendant-organizations have HR personnel trained in law, a lawyer, and even a legal office, so they have budgeted for some of the costs of litigation. If a case becomes too difficult to handle in-house, they refer it to outside counsel. As revealed in Hewick's comments, such efforts bring enormous advantage to employers but often are hidden from employees.

What is left *unsaid* is striking. Defendants' representatives do not see unfairness in those actions that clearly advantage them over plaintiffs (who possess little to none of the experiences and strategic savvy of defendant-employers once the lawsuit is underway). No defendants' representative, despite their calls for a level playing field in the abstract, called for greater equality between the parties at this stage.

In addition, defendants' representatives, as individuals, enjoy numerous protections. They are not named in the suits. Not one discusses personal hardships stemming from involvement in a discrimination lawsuit. Overall, the monetary and reputational costs of a lawsuit are socialized across the organizational hierarchy in ways that protect the attorneys and managers as long as they competently perform their duties. [Harold Ward](#), the white in-house counsel and HR officer with whom we began this article, says that his job description insulates him. He goes on to explain what he tells workers who threaten to sue:

"If I don't win, my world doesn't stop. And I still get paid. It's going to become your single focus in life and it's going to keep you from getting a job because future employers are going to see this seething pot and they're not going to want to have anything to do with you. So before you sue me, you ought to think about that."

As Ward articulates so forcefully, his involvement is just a job. His explicit acknowledgment of the emotional and financial asymmetry is fairly unique among the defendants' representatives we interviewed. However, his use of that knowledge to "inform" (and probably frighten) the employee into a settlement and waiver of liability is even more striking.

Defendants' representatives did characterize some of the work of defending an employment discrimination case as unfair to the employer. They complained of randomness in the assignment to a district judge or jury, inconsistent quality of judges—and, therefore, of settlements—and juries' stereotype of corporations as nothing more than deep pockets. Still, these complaints were fewer and less charged than defendants' representatives' complaints about entering litigation. These interviewees saw far less unfairness in the process of staying in litigation, precisely when the employer has greater advantage relative to plaintiffs.

### *Plaintiffs Confront Obstacles to Justice, Especially High Costs*

"If you don't have an extra \$100,000, \$200,000 to throw away, you don't belong in the legal system."

In contrast, plaintiffs, especially those without lawyers, experience the challenges of staying in litigation as extremely unfair. Many recall feeling overwhelmed and powerless to influence the course of their cases. Their sense of unfairness is often rooted in the myriad obstacles imposed by the litigation system that prevent the truth of their workplace dispute from coming out. The most salient of these obstacles are incompetent lawyers, steep financial costs, the

maze of litigation faced by pro se plaintiffs, a variety of personal burdens imposed by the case, and a perception of defendant favoritism.

### *Incompetent Lawyers*

The private market for legal services matters in plaintiffs' experiences of litigation and perceptions of fairness because the fates of their cases largely rest on getting a lawyer (e.g., Seron et al. 2001). Most plaintiff attorneys work for private firms and, among those we interviewed, usually insist on billing by the hour rather than taking cases on contingency. Plaintiffs who secure a lawyer usually pay a high price but, as evidence suggests, are far more likely to win than are those without legal representation.

Many of the plaintiffs who had a lawyer saw unfairness in their legal representation. Twenty-seven of the 41 plaintiff interviewees report that the lawyers they worked with were incompetent or seemed to work against them. [Floyd Kelly](#), an African-American market analyst, recounts how he pulled his attorney aside during settlement negotiations because he believed the attorney was making decisions without consulting him:

I said, "If you're my attorney and you're working for me and with me supposedly. The reason I hired you in the first place is because I don't know legal things. I expect for you to tell me the legal things and true legal things because you and I are supposed to be partners. Even though you work for me, we're still partners."

Kelly is among the one-quarter of plaintiffs who feel their attorneys were corrupt. Numerous plaintiffs (11) recount serious mistakes their lawyers made and other forms of incompetence. There are some exceptions; 13 plaintiffs describe their attorneys as either possessing integrity or being skilled. Yet nearly half (5) of these 13 mention ways in which their lawyers disappointed them by giving bad advice, making mistakes, or colluding with the defense. Kelly and other plaintiffs report unfairness not only in the ways that lawyers pursued their cases but also in lawyers' failure to make the plaintiffs feel like equal players in what turned out to be an unequal contest.

### *Steep Financial Costs*

The monetary costs of lawsuits rank high among plaintiffs' concerns. As the plaintiffs remember their cases, they report being shocked to discover how expensive pursuing litigation can be. Their financial burdens come primarily from attorneys' fees, often precisely when plaintiffs' employment is often most precarious. Those with disabilities or health problems face additional expenses.

A white plaintiff with a disability, Debra Leonard, laughs nervously as she describes her attorney's fees—on top of her health expenses—as “this giant rock rolling down the hill.” Plaintiffs report mortgaging homes, declaring bankruptcy, and taking on second or third jobs to pay for litigation.

Plaintiffs see these costs as profoundly unfair because they create obstacles to the pursuit of justice without regard for the substance of the employees' claims about their treatment at work. [Peter Nicholson](#), a white police lieutenant, expresses this point:

If you want to know how I feel about the legal system right now, [the system] has nothing to do with a regular guy like me. . . . I have no business being there. . . . [I]f you don't have an extra \$100,000, \$200,000 to throw away, you don't belong in the legal system. That's the way I feel now.

Nicholson sums up a common theme: the legal system serves only those who are able to pay for it. This pecuniary bias seems to most plaintiffs an utter perversion of their ideas about what the law *should* do: fairly determine the facts of a case for each side and offer reasonable redress. Plaintiffs experience monetary costs as profoundly unfair because money has the effect of transforming their situated experience of moral wrongdoing into an abstract economic calculation (Giddens 1990), often at a considerable cost and without regard to their substantive claims.

### *The Maze of Pro Se Litigation*

Without a lawyer, plaintiffs in employment discrimination cases are extremely unlikely to win. While the plaintiffs interviewed were uniformly aware of this fact from the beginning, many still pursued their cases alone. Pro se plaintiffs report unsuccessful searches for lawyers who charged rates that they could afford. Similarly, plaintiff attorneys report that, on average, they took only one of every ten clients who approached them, even though they believed that many of the cases they rejected involved discrimination.

Although most plaintiffs find themselves confused by legal codes and procedures, those who pursued all or part of their case pro se have a particularly acute feeling that the law was unfairly stacked against them. Most pro se plaintiffs could not make complete sense of the legal system while they were pursuing their cases and, years after their cases closed, are still baffled by it. For example, these plaintiffs frequently misunderstand court documents. Chris Burns, an African-American machinist for the military who was injured on the job, provides an illustrative example. After he received a letter from the court of his “failure to exhaust administrative remedies” and “failure to answer a motion for dismissal,”



he thought the case was over. He actually had 30 days to revise his original complaint. His case was dismissed for want of prosecution.

Pro se plaintiffs describe litigation as an overwhelming maze of technical complications and legalese. “I got so, you know, depressed,” [Burns](#) says. “They send you through all this red-tape gobbledy-goo, and they say these big 25-cents words. And you *know* without a lawyer degree that you don’t understand a thing that they are telling you.” Pro se plaintiffs’ insufficient institutional resources and sense of powerlessness clash with their enduring belief that they indeed were discriminated against in the workplace. Experiences such as Burns’s violate plaintiffs’ underlying assumptions of legal fairness—that the courts could or should treat them equally by assessing the actual details of their discrimination claims. “Red-tape gobbledy-goo” should not determine a case’s outcome. This dissonance adds fuel to plaintiffs’ perception that the law is profoundly biased against them.

#### *Personal Burdens and Defendant Favoritism*

Plaintiffs’ narratives highlight two other factors that inform their sense that the process of pursuing a lawsuit is unfair: the toll on their personal lives and the defendant team’s ability to bias the course of litigation.

For about half of the plaintiffs interviewed (21), the personal burdens of pursuing a legal case are numerous. Plaintiffs repeatedly tell emotional stories of depression, addiction, bankruptcy, and divorce, and some attribute these ailments to the stress of their lawsuits.<sup>4</sup> A number of plaintiffs cried during their interviews. For many, these personal problems began prior to the lawsuit, with the indignity and helplessness of losing their jobs. As they remember, the case itself created new problems.

[Gerry Handley](#) describes his lawsuit as the cause of monumental personal devastation: “I lost my wife and my family and my home. I had a million-dollar home at that time. . . . My wife left me . . . because I became unbearable to be around. And I lost my kids.” Handley’s wife sued him and received half his settlement. Although his losses are extreme, the personal stresses that he attributes to the lawsuit—family tension, economic uncertainty, and transformation of his personality—are commonly reported. While plaintiffs do not use a vocabulary of fairness, *per se*, to frame the personal toll on their intimate relationships, they do see this toll as a consequence of a legal system that places undue burdens on plaintiffs. Their assessments of fairness are grounded in their orientation to and

<sup>4</sup> While we cannot assess the accuracy of these claims, there is ample scholarly evidence that pursuing a lawsuit can cause such problems (e.g., Blanchard et al. 1998).

investment in their cases and filtered through charged emotions. This is not a dispassionate process for plaintiffs as it is for defendants' representatives.

Plaintiffs recognize some of the advantages that defendant-employers enjoy in litigation. Several plaintiffs report that defendants and their attorneys actively gamed the system and maliciously misled judges and juries without being held accountable. [Lois Smith](#), a white foreman of engineers, tells us that she suffered six or seven "horrible" days of depositions during her trial. "They kept trying to turn it around to me, me, me," she says. "It's unbelievable what they do to you." Later in the interview, she recalls, "This stuff was allowed to come out that was so ludicrously untrue."

Plaintiffs, especially pro se plaintiffs, frequently find themselves disappointed by judges and juries, and the report that these authorities favor defendants. Plaintiffs recollect these experiences as they describe their perception that the litigation process is merely a contest to manipulate instead of a mechanism for vindication. [Smith](#) says, "Honestly there is no such thing as a fair lawsuit. I mean, it's who plays a better game."

Plaintiffs' accounts of an unfair personal toll arise from an individualized system of litigation. Individual plaintiffs must provide the resources, both financial and psychological, to propel discrimination cases along. Their accounts of staying in litigation reveal the real-life burdens of believing in, and fighting for, fairness. Their ideals of fairness help them make sense of employers' structural advantages. Plaintiffs invoke this ideal to call out the instances where they observe the undue power exercised by employers and the complicity of the courts. Yet Smith and other plaintiffs also assume that they would have been on equal footing if they had just had the opportunity to air their substantive arguments fully. If only they could tell a judge or jury exactly what happened to them, the reasoning goes, the process would be fair—and they would win. As it turns out, there is little evidence that this would be so. However, the very belief that an idealized legal system would function as a truth machine can legitimize an actualized system that is inherently—and, for plaintiffs, painfully—unequal.

## **Resolving Cases**

As we have noted, employment civil rights plaintiffs who pursue individual claims constitute the vast majority of cases, but they generally do not fare well in court. In addition, such cases rarely end with a court decision based on an assessment of the legal claim. Few cases have an unequivocal winner and loser. Approximately 50 percent of cases end in settlement; most of the rest are decided on procedural grounds (Nielsen et al. 2008). In this section, we

analyze how each side of a discrimination lawsuit perceives fairness during the stage of case resolution.

### *Defendants' Representatives' Perceptions of Strategic (but Unfair) Nuisance Settlements*

“We’re here to make a profit. . . . Some cases you’ll settle out early.”

Defendants’ representatives uniformly told us that if a case survives a motion for summary judgment, they usually aim to negotiate a small settlement as early as possible. This serves to minimize damage to the organization. David Lever explains, “[T]he majority of our cases will either settle early for nuisance value or lower values where we can at least make the business case that it’s going to cost us less to enter into the settlement than it would be to proceed.” When pressed about nuisance value, Lever says, “Maybe \$1,000 or \$1,500 or something.” When he and other defendants’ representatives make such statements, they are presenting themselves as efficient, effective lawyers and managers. Yet, given the large portion of settlements nationally, there is good reason to believe that defendant-employers actively orchestrate this pattern of case resolution and that courts depend on them to do so.

Defendants’ representatives describe how they, together with outside counsel, appraise the short-term benefits of inexpensive early settlements and the long-term costs of fighting plaintiffs’ claims. [Troy Pedlow](#) articulates this simple cost-benefit analysis:

We’re here to make a profit. . . . The sooner you can get rid of a case, the better. Obviously, the cheaper you can get rid of a case, the better. . . . I mean, this isn’t rocket science.

Pedlow and others characterize these nuisance settlements as sound strategy, if somewhat unfair, since these cases presumably lacked merit. They consider nuisance settlements as especially useful—but especially unfair—when plaintiffs file claims after their employment has been terminated. Don Gale, discounts the many obstacles facing plaintiffs, as detailed in the previous data section, when he describes cases that allege discrimination in termination as “highway robbery . . . [The plaintiffs] have nothing to lose.” Such assessments about law’s fairness follow from national trends in these lawsuits: 60 percent of employment discrimination cases involve complaints about termination (Nielsen et al. 2008).

Very occasionally, a corporate executive might fight a case based on a longer-term calculation. After remarking that his

company is in business to make profits, [Pedlow](#) says that, as a matter of principle, his company does not want to be held hostage. He described the company's reaction to a plaintiff who was "holding us up":

Certain cases that are absolutely meritless, even though it's not the right cost-benefit analysis, you'll fight. Whatever it takes, you'll fight, because sometimes you just need to send the message.

Being "held up" is another example of a defendant's representative appealing to fairness to explain settlement decisions. This appeal rests on the notion that a truly fair legal process treats the parties as equals rather than allowing one to rob the other.

Such claims obscure the power dynamics at play. In addition to questioning the sincerity of plaintiffs' accusations, and thus minimizing the possibility of the defendant-employers' culpability, this framing hides the fact that nuisance settlements essentially buy employers out of trouble. In the aggregate, the majority of cases end in settlement, which serves to absolve employers of any kind of wide-scale effort to guarantee workplace equality. Employers' assertions of unfair settlements maintain the myth that discrimination lawsuits are typically meritless, while these settlements close the legal investigation and restrict public knowledge of the substance of the cases.

### *Plaintiffs' Perceptions of Unfair Resolutions*

"I wanted my job back."

Whether they won or lost, whether they got a large or small settlement, plaintiffs largely feel disappointed by the final resolutions of their cases. Only three plaintiffs note that they are very satisfied with their outcome. Twenty-three say that they are not at all satisfied. Another 15 express ambivalence about both the process that led to the resolution and the substance of the resolution. Many feel that their original complaint was never addressed, much less resolved.

Slightly over 40 percent of plaintiffs interviewed report that they once hoped to get their jobs back or, if they were still employed when they filed, keep their jobs. This almost never happens. [Sam Grayson](#), a white police officer, describes his \$100,000 settlement—which was one of the largest among our plaintiffs, and considerably larger than the average \$30,000 settlement in our national sample—as "not anything big." He notes that a large portion went to his attorney. Regarding whether he thinks \$100,000 was a fair outcome, he says,

R: I didn't want any money. I wanted my job back. . . . [T]o be completely honest with you, [I] cried and . . . felt like I lost because it wasn't about the money.

I: So even at that point you were still hoping to get your job back?

R: Yeah.

People only fight this hard over a job that they consider to be a good one. For many of our plaintiffs, the employer they sued was the last employer they ever had. Plaintiffs' disappointment about not being reinstated—expressed by those whom observers might identify as big winners *and* big losers—confirms prior findings that workers drastically misjudge the degree of job protection that the law provides (Kim 1997).

Nationally, plaintiffs in employment discrimination cases are far more likely to receive some financial compensation than they are to get their jobs back. That said, very few of our interviewees who received such compensation consider it adequate. Catherine Harris, a white manager for a city government, describes her \$160,000 early settlement as a "victory" but also recounts her disappointment in the case resolution—most notably the city's failure to fire the person who discriminated against her, because it was an affront to Harris's pride as a public servant. She is among the 22 plaintiff interviewees who we know won some kind of financial compensation. Half of these individuals report feeling somewhat satisfied with their case outcome—a far greater rate of satisfaction compared to those who won no financial compensation. Yet most of these plaintiffs describe the resolution as inadequate and unjust. Numerous plaintiffs echo Harris's sentiment that it was "not about the money."

Most plaintiffs believe they lost their cases for reasons entirely unrelated to the validity of their claims. Their losses violated their basic understanding of legal fairness as the impartial consideration and resolution of two parties' substantive claims. These plaintiffs report that they did not get a real hearing or that their lawyers pressured them to accept offers they disliked. A number—most vocally, the pro se plaintiffs—complain that their case was decided on technical procedures, not merit. [Chris Burns](#), the injured machinist who misunderstood his dismissal, recalls the explanation the court gave him for dismissing his pro se case:

[The court] say my doctor was late getting them the letter. For 12 years, I been fighting! . . . For me to fight for 12 years, and you going to tell me [I lost] because I was late with a letter? . . . I don't care if it was late or early. [My doctor is] still saying the same thing.

Burns thinks the court should have resolved his case based on its content, not on what he considers a ridiculous technical requirement. Such sentiments inform his profound disillusionment with law.

Plaintiffs see unfairness in the resolutions of their cases, a point in litigation at which they are typically at a disadvantage relative to their employers. Plaintiffs' disadvantages should be understood not just in terms of small settlements and other unfavorable case outcomes, as traditionally defined in sociolegal scholarship. These disadvantages also include plaintiffs' failure to recoup a job and other material losses and their emotional disappointment, most notably with the huge gulf between hope and reality.

While some plaintiffs recognize ways that employer-defendants control litigation, this recognition does not shield them from the dominant pattern of small settlements or provide them with the decisive resolutions they expect. Nor does it buffer them from the inequalities of an individualized system of legal arbitration that systematically benefits the party with greater experience, resources, and legal savvy.

These cases, in the aggregate, are not the outcome of "battles" or "fights" between roughly equal adversaries.<sup>5</sup> From a situated justice perspective, these cases are something different entirely. They are routinized cooling-off periods. Defendants' representatives experience case resolutions as a professional nuisance, but for so many plaintiffs the same resolutions are horribly disappointing—even personally and professionally ruinous.

## **Conclusion: Toward Understanding Situated Justice**

Legal fairness is not something that people consider merely as an idealized or philosophical principle (although it is this too, as we have shown). For people who actually have been through a lawsuit, concrete and particular experiences profoundly inform their assessments of what is fair and unfair in the legal system. A situated justice approach takes this context as the starting point for the study of legal fairness. Our approach treats people's considerations of fairness as dynamically situated in their personal and organizational positions within the unequal institutional contexts of law.

We have demonstrated that defendants' representatives in employment discrimination cases—aided by greater organizational resources and personal distance from the dispute itself—view the legal system as unfair because it provides problem employees

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<sup>5</sup> For a parallel analysis of the rhetoric of warfare, see Baudrillard (1995).

with the power to pursue meritless cases. Plaintiffs, who typically lack legal experience, understand the law as a potentially powerful tool that fails them by unfairly inflicting personal burdens while protecting employers. Both sides see unfairness in the aspects of law that disadvantage them most. Yet, the very notion of fairness can belie the pernicious power dynamics that advantage employer-defendants.

These perceptions, power dynamics, institutional contexts, and consequences remain underexamined in studies that capture only a transcendent view of fairness by documenting people's perceptions of fairness in discrete or hypothetical encounters with the law. In real legal cases, fairness is central to both parties' understanding of justice. Each party bases its view of fairness on what it sees as the relative advantages of its opposition. Our findings are therefore consistent with procedural justice research insofar as we find that perception of the fairness of legal processes is a key factor in the evaluation of the law's efficacy. However, our findings point to five important insights that are downplayed or altogether ignored in this literature and that push the study of fairness toward broader law and social science areas.

First, people's assessments of fairness, both abstract and concrete, are part of their dynamic, subjective legal consciousness. The parties' narratives suggest that litigants evaluate fairness throughout the months or years of their legal entanglements, rather than at a single point in time. As our data analysis reveals, litigants' sense of unfairness seems to accumulate, piling on through a series of experiences characteristic of different stages of a lawsuit. This is especially true for plaintiffs, who generally approach their cases with little or no litigation background and are thus interpreting their experiences *de novo*. Future research can continue to document this fluidity of legal perceptions, keyed to the duration of legal encounters and to changing circumstances (for one example, see Gonzales 2011).

Second, it is apparent in our findings that perceptions of fairness are filtered through varied emotional valences. Furthermore, a situated justice analysis highlights the social and organizational structuring of emotions. For example, our attention to defendants' representatives—a study “up” of people in positions of power (Nader 1972)—demonstrates that their organizational roles insulate them from the material, personal, professional, and emotional costs of a lawsuit that plaintiffs typically face.

Third, the meaning of fairness is relational in actual legal cases. Each side assesses fairness through relative comparisons between their experiences and (what they witness of) the opposing side, whom they see as gaming and benefiting from the legal system. Through these comparisons, the parties together construct the idea



of justice. These findings lend support to a “relational model” of conflict resolution (Tyler 1989; Tyler & Lind 1992)—which posits that people’s assessments of a “resolution” are crucially shaped by their evaluation of the competence, interests, and power of the other actors involved—although we call for greater sensitivity to cultural constructs in people’s relational assessments of law.

Fourth, and of particular importance, is that legal processes and legal outcomes are often blurred in actual litigation cases. The parties’ stories about resolving legal cases complicate the distinction between process and outcome that is a mainstay of the procedural justice literature. For defendant-employers, the work of shaping legal outcomes, most evidently through nuisance settlements, is part and parcel of the legal process. Defendants’ representatives are less concerned with the outcome of any individual case unless it exposes their organization to massive liability. They are more concerned with shaping the typical outcomes (and managing the overall costs) of the multiple cases filed against the organization. Hence, defendants’ representatives characterize the fairness of case resolutions—even the fairness of an individual case—in reference to this larger set of cases, not in terms of a single and static legal encounter or court decision. This insight is completely lost to designs that employ hypothetical scenarios.

Plaintiffs’ accounts of case resolutions raise additional questions about the scholarly cleavage between legal process and outcome. The plaintiffs consider the outcome as something broader than a court decision on their case. Sam Grayson, the police officer, sees the most important outcome as whether or not he got his job back, not what scholars would record as his \$100,000 “settlement.” Chris Burns, the injured machinist who lost on a technicality, does not differentiate between the process (the application of procedural rules) and the outcome (dismissal); he does not believe his case had a real outcome because the court never made a substantive decision. These observations are not easily explained in terms of either procedural or substantive justice. It is impossible for the analyst to decide whether a plaintiff’s dissatisfaction with a case resolved on legal technicalities is a “procedural” or “substantive” problem. Although some litigants make conceptual distinctions between process and outcome, they do not necessarily do so, and they may not consider these distinctions particularly salient or important compared to other aspects of their legal encounters. They draw such distinctions when the situation calls for it. Legal scholars can follow their lead here.

Fifth, and finally, our situated justice analysis illustrates the ways in which shared cultural concepts such as fairness relate to the substantial material and psychological asymmetries between the powerful employer and the less powerful employee. The real-life

institutional conditions of litigation, such as private market for lawyers, are largely inequitable. This context shapes the particular issues upon which people base their evaluations of fairness. Those most disadvantaged in this system—plaintiffs without lawyers and plaintiffs who experience their lawyers as incompetent or corrupt—are most confused about law and see it as most unfair. Their confusion further exacerbates their sense that law is entirely biased against the proverbial little person. In light of this structural context, we should *expect* plaintiffs to feel betrayed. Their sense of law's unfairness is a reflection of the non-neutrality of the playing field.

Cultural constructs such as fairness can contribute to the masking and exacerbation of inequality. As their narratives suggest, most plaintiffs eventually recognize the advantages enjoyed by defendant-employers in court, but plaintiffs often bring to their cases perfectly reasonable assumptions about how the law *should* work. These assumptions are quite different from how the law does, in fact, work. This discrepancy can strongly influence how plaintiffs assess the fairness of the legal system as they pursue their cases, as evident in their reported disappointment about their unrealized hopes for vindication. Somewhat paradoxically, these assumptions can serve to further legitimize the law in the abstract even when litigants come to believe that the law is unfair in the particular.

How well does the employment discrimination system eliminate workplace inequality and produce a sense of legitimacy for the courts? Our data allow us only speculation. It seems that litigation, as currently structured, is problematic in that so many cases become cooling-off periods in which employers wait out unrepresented plaintiffs whose cases, in all likelihood, will be dismissed. For the plaintiffs who survive this process, it often leads to small settlements that are not significant enough to induce an employer-organization to change its internal practices. Asymmetries in parties' experiences with litigation, resources, and degree of emotional distance put plaintiffs at a significant disadvantage in employment discrimination cases, thus further contributing to their strong sense of disillusionment with legal remedy. None of this transpires in the abstract, but always within the situated experience of flesh-and-blood litigants and weaved into the memories they carry with them.

Even when litigation makes defendants' representatives and their bosses feel powerless, it is a system they are largely able to manage and manipulate. The unfairness that they describe is mitigated by their organizational position. Whether they are sued or not, "they still go to work every day and still get paid." For plaintiffs who declare bankruptcy, turn to drugs and alcohol, or lose their marriages, the costs are significantly higher and often tragic.

The high-minded idealism of political theorists, such as Rawls's simple yet radical notion of justice as fairness, is essential to projects that rely on abstract criteria for a good society. Yet, our analysis reveals how easily idealism can become ideology in social practice. Our findings show how cultural constructs can contribute to the unequal conditions that enable the haves to come out ahead of the have-nots. Even though plaintiffs and defendants' representatives agree that discrimination litigation is unfair, the ideal of fairness remains a centerpiece of the popular fiction that litigation is a real dispute between equivalent adversaries. When scholars adopt a similarly uncritical view of fairness, we are complicit in this game of masquerade.

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