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RIGHTS ON TRIAL: A GROUND-BREAKING STUDY ON THE LEGAL REINSCRIPTION OF HIERARCHY IN THE AMERICAN WORKPLACE THROUGH THE EMPLOYMENT DISCRIMINATION PROCESS

Erin Mayo-Adam*

ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAWS PERPETUATE INEQUALITY* (UNIVERSITY OF CHICAGO PRESS 2017). Pp. 320. PAPERBACK \$30.00.

In *Rights on Trial: How Workplace Discrimination Laws Perpetuate Inequality*, Ellen Berrey, Robert Nelson, and Laura Beth Nielsen provide the first comprehensive study on employment discrimination civil rights claims in the United States. Breathtaking in its scope and analysis, this ground-breaking book should be a staple in any undergraduate or graduate course that addresses law and inequality in America. *Rights on Trial* both documents the processes used by plaintiffs in employment civil rights cases and analyzes how this system works (or does not work) for those who experience discrimination. It is organized around a broad theoretical question: are rights useful for dismantling hierarchies of unearned privilege in the US?¹ Through a multi-method study that includes nearly 1,800 employment discrimination court filings from 1988 to 2003 and 100 in-depth interviews with plaintiffs, defendants, and their attorneys, the book thoroughly demonstrates how, in practice, employment civil rights fail to undo social hierarchies and, instead, reinscribe and legitimate these hierarchies in the workplace.

Rights on Trial is divided into three sections and ten chapters that align with the book's broad theoretical and practical aims. Part one, which includes the introduction and first two chapters, provides the legal context for the book and presents key findings from the quantitative dataset of case filings that the authors have amassed. This part sets-up the remainder of the book through an accessible survey of major legislative, regulatory, and judicial trends in employment civil rights and quantitative data analysis that lend support to the book's main argument: the system for addressing employment discrimination in

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1. ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAWS PERPETUATE INEQUALITY* 11 (2017).

American courts perpetuates bias by minimizing and deflecting rights claims.² Part two is an analysis of the author's rich qualitative data, which is refreshing and unique in its inclusion of both parties in employment discrimination lawsuits and their attorneys. Chapters four through eight present a narrative analysis that traces the employment discrimination process from grievance through outcome. Part three, which encompasses chapter nine and the conclusion, presents the book's theoretical and policy conclusions. In this part, the authors lay out a compelling argument that the employment civil rights process that exists in the US involves the legal reinscription of hierarchy due to structural asymmetries between employers and courts, the adversarial nature of discrimination claims, and the individualization of discrimination disputes.

Berrey, Nelson, and Nielson's study is especially notable for its impressive data collection and narrative analysis of employment civil rights litigation. The data presented lends support to scholars of critical race and feminist theory who have long criticized antidiscrimination processes for their failure to address inequalities perpetuated by race, gender, class, and ability hierarchies in the United States. However, *Rights on Trial* goes even further by showing that, not only does the current employment civil rights system fail to address social hierarchies, it works to maintain and strengthen them by minimizing and denigrating complainants while uplifting narratives crafted by managerial authority.³ The book's theory of legal reinscription of hierarchy is evocatively woven through the narrative chapters, which trace power asymmetries between the courts and employers that are built into the employment discrimination legal process. Building off of Marc Galantar's seminal "Why the 'Haves' Come Out Ahead," Berrey, Nelson, and Nielson's narrative analysis demonstrates how the employment discrimination claims process favors employers,⁴ is biased against racial and ethnic minorities,⁵ and subjects plaintiffs to harmful stereotypes in a process where even rare "wins" allow employers to escape culpability.⁶ The book shows how, in unusual cases where plaintiffs are granted small monetary awards, they are usually encouraged to sign settlement agreements with employers that include clauses denying that employment discrimination occurred.⁷ Furthermore, the process of pursuing employment discrimination claims generally has disastrous consequences for employees who complain, including a damaged professional reputation, job loss, bankruptcy, and depression.

Given the stunning breadth of the authors' empirical evidence, there is very little room for criticism. After reading the narrative sections, the reader is left wanting to hear more from the interviewees, especially the plaintiffs, about their experiences with employment discrimination process. Berrey, Nelson, and Nielson adeptly meet this demand by providing audio transcriptions of the interviews at the heart of their book in an easily accessible online platform.⁸ The platform would serve as a particularly useful tool in the classroom setting where instructors can use it to engage in discussions with students

2. *Id.* at 18–19.

3. *Id.* at 18–19, 267.

4. *Id.* at 51.

5. *Id.* at 229–36

6. BERREY, NELSON & NIELSON, *supra* note 1, at 63, 207.

7. *Id.* at 268.

8. RIGHTS ON TRIAL, <https://rightsontrial.com/audio/> (last visited Nov. 30, 2019).

that center the lived experiences of the parties in employment discrimination cases and their attorneys. In its conclusion, the book provides a series of policy proposals that address many of the inequities recounted by the interviewees. Although these proposals might benefit from the inclusion of more suggested best practice policies for employers, those proposals included rightly focus on the need for greater public intervention in employment discrimination lawsuits such as increased access to legal aid,⁹ more resources for the Equal Employment Opportunity Commission,¹⁰ and better transparency about employment demographics and employee earnings in both the private and public sectors.¹¹

Rights on Trial is a vital and significant intervention in the interdisciplinary study of law and society that makes a compelling case for the need to reform contemporary employment discrimination law. The book will be of great interest to the wide range of social scientists in the fields of public law and legal studies who focus on race, gender, and disability politics; the relationship between law and social movements; and the implementation of policies meant to address inequality in formal and complex organizations. Because the book is so accessible, minimizes the use of academic jargon, concisely summarizes antidiscrimination law to provide context, and centers employment discrimination narratives, *Rights at Work* will also appeal to those in the classroom and beyond who are interested in how law-in-action often fails to match law-on-the-books.

9. BERREY, NELSON & NIELSON, *supra* note 1, at 272.

10. *Id.*

11. *Id.*