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DO THE SOCIAL SCIENCES SHAPE CORPORATE ANTI-DISCRIMINATION PRACTICE?: THE UNITED STATES AND FRANCE

Frank Dobbin†

I. STATE STRUCTURE, SOCIAL SCIENCE, AND ANTI-DISCRIMINATION PRACTICE

Since the passage of the Civil Rights Act in 1964, U.S. anti-discrimination law and workplace practice have undergone major revolutions. At first both law and practice were oriented to preventing *prima facie* discrimination—to putting an end to Jim Crow in employment. Employment practice and case law changed dramatically in the 1970s, to recognize new structural theories of discrimination that placed the blame on employment practices that were not, *prima facie*, discriminatory, but that had the effect of disadvantaging women and minorities. In the 1990s, employment practice and case law changed again, building on the cognitive revolution in the social sciences to recognize cognitive categorizing, or stereotyping, and its effects on both worker aspirations and managerial promotion decisions.

France also outlawed employment discrimination, in July of 1972, in legislation that took much the same form as the Civil Rights Act. But in France, employer practice and anti-discrimination law have changed little over time. France has not seen the incorporation of two waves of social scientific thinking in workplace practices. Until new legislation expanded the definition of workplace discrimination in 2001, France saw little change indeed. Why have the United States and France seen such different patterns of anti-discrimination practice and law?

I argue that state structure has produced two very different outcomes in these two cases. In the American case, state

† Professor, Department of Sociology, Harvard University.

fragmentation and porousness encouraged activists and human resources specialists to expand upon the narrow definition of discrimination set out in 1964, generating an industry of human resources specialists who promoted new anti-discrimination measures based on speculation about how judicial and administrative interpretation of the law might evolve.¹ Social-scientific revolutions, then, shaped employer practice not by shaping the law directly, but by giving new ammunition to entrepreneurial human resources specialists. In the French case, state centralization and insulation discouraged those who would have built upon the foundation of the law of July 1, 1972. Activists and human resources specialists had no realistic chance of expanding the meaning of discrimination brick-by-brick. The structure of French policymaking ensured that the law would not develop significantly outside of the legislature. Hence, French law did not produce an industry of experts eager to translate new insights from the social sciences into new employment practices. In the French case, then, the initial legislation did not open the way for the evolution of the meaning of discrimination. The legislature would redefine discrimination if they saw fit, as they did in 2001, but employment specialists would not invent new definitions of discrimination themselves in anticipation of changes in the law.

While anti-discrimination activities among French employers were few and far between, American employers adopted a wide range of measures over time. In the 1960s, firms complied with Civil Rights law by eliminating rules that excluded women and minorities from certain jobs. In the early 1970s, they briefly experimented with hiring by quota before the courts struck that strategy down. By the 1980s, employers and the courts had jumped on the institutional bandwagon in the social sciences, and compliance came to include new bureaucratic personnel systems designed to counter unintentional institutional discrimination. Internal labor market mechanisms were expected to bureaucratize hiring and promotion, ensuring that decisions were based on qualifications and performance rather than cronyism. These systems had the added advantage of creating a paper trail that would help employers to justify their hiring and promotion decisions in the courts.

By the 1990s, employers had added a new layer of anti-discrimination measures to match emerging social-scientific thinking about cognition. The cognitive revolution suggested that mental

1. Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396 (1993).

categories shape the behavior of managers and workers alike. For managers, the idea was that these categories shape hiring and promotion decisions. The remedy was diversity training programs designed to alter managerial cognition. For workers from disadvantaged groups, the idea was that stereotyping can impede ambition and lead to self-handicapping. The remedy was mentoring and networking programs that would impart the skills and insider knowledge necessary to succeed, and at the same time offer positive role models.

Anti-discrimination law had dramatically different effects on the workplace in the United States and France. American law caused new social scientific ideas to be incorporated into workplace anti-discrimination practices. French law had no such effect, despite the fact that the legislation took a similar form. To understand these differences, I sketch an argument about state fragmentation versus centralization. Then I discuss the original intent of lawmakers in each country, before turning to a survey of the evolution of corporate anti-discrimination practice, and anti-discrimination law, in each country.

II. STATE FRAGMENTATION AND POROUSNESS VERSUS CENTRALIZATION AND IMPERMEABILITY

Why has the legal meaning of discrimination changed so radically over the last three decades in the United States but not in France? Why have the social sciences had such an impact on that meaning in the former case but not the latter? The answer lies in part in the character of the American state. The Civil Rights Act takes its power from the guarantee of equal protection, and the meaning of that guarantee, like the meaning of the guarantee of privacy, has been interpreted variously by the courts and by administrative agencies. From very early in the life of the Civil Rights Act, it was clear that the meaning of discrimination would change with the winds of time.

John Meyer and W. Richard Scott (1983) argue that state fragmentation in the United States has led public and private organizations alike to take active roles in scanning the environment for relevant regulatory changes and in interpreting those changes. The U.S. Constitution deliberately fragments public authority across levels and branches of government. In the case of employment regulation, city, state, and federal governments have authority to make law. The Constitution also divided federal powers among the legislative, judicial, and administrative branches and gave the latter branches authority to interpret the legislature's intent and the

judiciary ultimate authority to decide whether legislation contravenes the constitution. Because state and municipal governments copied the federal government's separated powers, in most locales three levels of government, and three branches at each level, have authority over the law. In the case of discrimination law, states and cities have their own laws that go further than federal law, and at each level the interpretation of the law may vary by branch—legislative, administrative, and judicial.

The French legal system, by contrast, is based in civil law rather than in common law and this means, first and foremost, that the courts do not have the authority to interpret and overturn legislation on the basis of precedent and tradition. Laws are not open to constant reinterpretation in the way that they are in the United States. France has nothing like the American separation of powers and system of checks and balances. Moreover, French state authority is centralized in the Parisian bureaucracy, rather than dispersed to the provinces and towns. Authority to make employment law is closely guarded by the central state; cities and provinces cannot adopt their own standards.

Studies tracing the evolution of American anti-discrimination law have charted the remarkable expansion of the law through changes in how employers understand it.² Those studies emphasized the initial ambiguity of the law, and the way in which the separation of powers gave the courts an opening for expanding the definition of discrimination.³ Erin Kelly has recently argued that it is the separation of powers that appears to permit interest groups of different sorts to contribute new ideas to the evolving understanding of the law—that the separation of powers allows even clearly defined laws to be changed by the judicial and executive branches.⁴ Robert Lieberman has similarly argued that state structure is key, for America's fragmented state saw much greater expansion of anti-discrimination law than did France's centralized state—despite the

2. Lauren Edelman, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999); JOHN D. SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1996); Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Employment Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441 (1998).

3. Lauren Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401 (1990); Lauren Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992); Dobbin et al., *supra* note 1.

4. ERIN KELLY, *THE STRANGE HISTORY OF EMPLOYER-SPONSORED CHILDCARE: AMBIGUITY AND THE TRANSFORMATION OF LAW IN ORGANIZATIONAL FIELDS* (Dept. of Sociology, University of Minnesota, Working Paper, 2002).

fact that the initial statutes were clear and were similar in form.⁵ American state fragmentation created multiple openings for citizen input, allowing for changes in the law over time, whereas French state centralization prevented the gradual elaboration of the law.

Lieberman contends that the signal change in American anti-discrimination law was the replacement of the color-blind approach found in the Civil Rights Act of 1964 with a race-conscious policy, and that this was a consequence of state fragmentation, which allowed proponents of race-conscious policies to influence administrative and judicial interpretation of the law. By contrast, France's more centralized political structure allowed the race-blind and individualistic approach envisioned by legislators to stand. Lieberman argues that rather than emasculating anti-discrimination law, the fragmentation of the American state has led to more activist anti-discrimination policies in the field of employment as groups advocated in different branches of government, and at different levels, for redress. The state's fragmentation created an opening for advocates of race-conscious policies, whereas French state centralization created a buffer.

I build on these ideas, arguing that, in the American case, the fragmentation of the state fostered the rise of a corps of professionals who would expand the meaning of discrimination by introducing a series of equal opportunity measures based on new social-scientific paradigms. This happened principally because employers were uncertain of what the law meant and of where it was going. To inoculate themselves against employment discrimination suits, which could prove costly and embarrassing, they engaged experts who followed social-scientific understandings of discrimination and who institutionalized equal opportunity practices in anticipation of where the courts would go. By contrast, French anti-discrimination policy elicited no such professional development movement on the part of human resources experts. French law seemed clear in its intent, although it was in fact no clearer than American law. French law seemed to target individuals rather than firms as perpetrators of discrimination, but so at first did American law. The salient difference between French and American law was that French law could not be expanded by courts and administrative agencies.

5. Robert C. Lieberman, *Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France* (2002) (unpublished paper presented at the 13th Biennial Conference of Europeanists, Council of European Studies, Chicago, Aug. 28, 2002).

I proceed in several steps. First, I explore two common explanations of the difference between the United States and France and find that neither is adequate. Second, I compare the founding moments of anti-discrimination policies in the United States and France to show that the initial laws were very similar on important dimensions. Perhaps most important, the language of both laws seemed to cover only blatant cases of personal discrimination. This would remain unchanged in France, but it would change dramatically in the United States. Third, I review the history of French anti-discrimination law and practice, exploring how the character of the French state discouraged those who would have liked to see the definition of the law expand. Fourth, I review the history of American anti-discrimination practice and law to show how state fragmentation led employers to establish new staff positions whose incumbents would make guesses about how the law would change via judicial interpretation and establish new anti-discrimination measures accordingly. Both those staffers and the courts followed social scientific thinking on discrimination and, hence, so did anti-discrimination measures and case law. I focus on the issue of racial discrimination throughout, because French and American law alike outlawed racial discrimination, whereas only the United States included sex discrimination in the initial statute.

III. COMPETING EXPLANATIONS

Before proceeding to the core of the analysis, I consider two common explanations for the differences between U.S. and French anti-discrimination policy. Both address the blossoming of anti-discrimination law in the United States and its stagnation, until 2001, in France.

The first concerns the form that the initial legislation took in each country. Some suggest that France's early decision to make anti-discrimination law part of the criminal, rather than civil, code limited employer liability and thereby limited employer interest in expansionary anti-discrimination programs. But this begs the question: How would France's anti-discrimination law have played out in the American context? At first American employers believed that discriminatory managers would be disciplined under the law but that the firms they worked for would not be disciplined. Soon the courts held firms accountable for the behavior of discriminatory managers. It seems likely that a criminal law against discrimination, such as that in France, would have been expanded by the American

courts to cover not only individual managers but the firm at large. Thus, it seems unlikely that the criminal versus civil form that the initial legislation took in these two countries explains the resulting trajectory of law and corporate practice.

The second explanation concerns national traditions that affirm, or deny, race as a social category. Some argue that while the American system has a long tradition of defining race quite explicitly, dating back to the era of slavery, the French system has a tradition of denying racial differences. In the years after the Civil War, the Supreme Court's *Plessy v. Ferguson* ruling defined as black anyone with any traceable African heritage—the one-drop rule. Accordingly, while the Civil Rights Act of 1964 ruled out remedies to discrimination that were based on differential treatment, creating a race-blind legal framework, the administration and the courts soon defined compliance in terms of treatment of clearly defined racial and ethnic groups.⁶ France, it is argued, has defined national membership in terms of citizenship and not race; even in the colonial period, inhabitants of French territory, black and white alike, were defined as French.⁷ The pattern dates back to the consolidation of France under absolutist rule and the integration of disparate French regions with unique cultures and languages under a single flag and a single sword.⁸ Students of race relations argue that this tradition has led to lower levels of racism in France and that it accounts for France's race-blind laws.

In fact, as Erik Bleich argues, both countries have dual traditions that could have supported either race-conscious or race-blind policies.⁹ Slavery was outlawed in metropolitan France by the time of the revolution, but it was not outlawed in the French Caribbean. The Declaration of the Rights of Man and the Citizen in 1789 was followed, in 1794, with the abolition of slavery there. But this was short-lived, for Napoleon reestablished slavery until 1848, when the Second Republic abolished it for once and for all. France's division between a metropolis characterized by freedom and a periphery characterized by racial slavery was in fact not so different from America's division between north and south. Slavery was not found

6. SKRENTNY, *supra* note 2.

7. YASEMIN SOYSAL, *LIMITS OF CITIZENSHIP: POST-NATIONAL MEMBERSHIP IN THE CONTEMPORARY NATION-STATE SYSTEM* (1994); MICHELE LAMONT, *THE DIGNITY OF WORKING MEN: MORALITY AND THE BOUNDARIES OF CLASS, RACE, AND IMMIGRATION* (2000).

8. PERRY ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE* (1974).

9. Erik Bleich, *Antiracism without Races: Politics and Policy in a "Color-blind" State*, 18 *FRENCH POL. & SOC'Y* 48 (2000).

in the African colonies, but civil and political rights were tied to race and religion. In Algeria, neither Muslims nor Jews had the same rights as native Christian Frenchmen for most of the nineteenth century.¹⁰

Just as race-conscious and race-blind traditions were known in France, both were known in the United States. The great paradox of Gunnar Myrdal's *An American Dilemma* is the tension between America's strong ideological commitment to equality and her discrimination against blacks.¹¹ John Skrentny, in *The Ironies of Affirmative Action*, argues that race-blind anti-discrimination laws were the norm for much of the twentieth century, but rather than becoming less salient under the Civil Rights Act, racial categories became more salient.¹² As race-conscious and race-blind policies alike were known in both countries, it is difficult to support the argument that the history of race policies alone explains the very different trajectories of discrimination law.

IV. TWO COUNTRIES ADOPT RACE-BLIND POLICIES

Both the United States and France adopted anti-discrimination laws based on the principle of racial blindness—of treating workers without regard to race. In the United States, Title VII of the Civil Rights Act of 1964 made it illegal for employers with 25 or more employees to discriminate on the basis of race, color, religion, sex, or national origin. The architects of the Act went to some trouble to ensure that the legislation would not become a broad sword, but would require employers to eliminate explicitly discriminatory policies and to become race-blind themselves. Thus the Act stated explicitly that its intent was not “to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer.”¹³ The stated intent was not to encourage employers to balance racial groups, but to make them ignore race in hiring and promotion decisions.

10. *Id.* at 54.

11. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

12. SKRENTNY, *supra* note 2.

13. Lieberman, *supra* note 5, at 9.

France's law against racism of July 1, 1972, took a different form and established a different enforcement mechanism. France's law also extended to different realms—the American law covered education, housing, and public accommodations; the French law covered racist speech and groups that promote racism. But the core principle—that employers should be color-blind rather than race-conscious—was very much the same.¹⁴ French and American law also took very similar forms in terms of who could bring complaints, who bore the responsibility for discrimination, and what kinds of discrimination were covered. French policy recognized individual claims, but not group claims; it recognized individual perpetrators, but not corporate responsibility; it recognized direct discrimination, but not unintentional and indirect discrimination. American policy looked much like French policy at the start, but it expanded to recognize group claims, corporate liability, and indirect discrimination. How did laws that took such similar initial forms evolve in such different ways?

A. *French Employers Respond to Anti-Discrimination Law*

In chronicling the history of French anti-discrimination law, I rely on the comparative studies of French and American discrimination law of Erik Bleich, Robert Lieberman, and Abigail Saguy.¹⁵ Unlike the Civil Rights Act of 1964, France's law of July 1, 1972 was not a bill that had been substantially watered down in the legislative process. The American compromise fully satisfied no one, but its language was clear as to its intent. The law was not to be used to address past discrimination with broad-based remedies for large classes of Americans. It was designed to allow individuals who had faced discrimination to seek redress, and more generally to make employers behave as if they were blind to race.

The French law was debated little, and was scarcely changed from the initial proposal of some thirteen years earlier.¹⁶ It was passed in 1972 because racist incidents in recent years had led President

14. *Id.* at 26.

15. Bleich, *supra* note 9; Erik Bleich, *Re-imagined Communities?: Education Policies and National Belonging in Britain and France*, in *THE POLITICS OF BELONGING: MIGRANTS AND MINORITIES IN CONTEMPORARY EUROPE* 60 (Andrew Geddes & Adrian Favell eds., 1999); Lieberman, *supra* note 5; Robert C. Lieberman, *Race and State in the United States, Great Britain, and France: Employment Discrimination Policy in Comparative Perspective* (1998) (unpublished paper presented at the annual meeting of the American Political Science Association, Boston, Sept. 6, 1998); Abigail Saguy, *Defining Sexual Harassment in France and the United States, 1975-1998* (2000) (unpublished Ph.D. dissertation, Department of Sociology, Princeton University).

16. Lieberman, *supra* note 5.

Georges Pompidou to favor some kind of action. The French law made it illegal to hire or fire on "account of race," defined as including religion, ethnicity, and national origin.¹⁷ It categorized employment discrimination as a criminal offense punishable by incarceration and fines. It did not establish an enforcement mechanism akin to the American Equal Employment Opportunity Commission, but instead permitted individuals, who could be backed by organizations that opposed racism, to file criminal complaints. Complainants could go to the local police commissioner (an appointee of the central state) or to the Ministry of Labor's Labor Inspectors. As discrimination was a criminal offense, the state was responsible for prosecuting cases.

The main reason the scope of the law remained largely unchanged between 1972 and 2001, when new legislation was passed, is that the French judiciary is rooted in the civil law tradition and hence the courts do not interpret the law.¹⁸ The legal code, as written, is the ultimate arbiter of judicial decisions. Under America's common-law Constitution, administrative agencies are free to interpret the law as they please and the courts ultimately decide what a law means in practice. In France, efforts to refine or elaborate the meaning of a statute are discouraged by the fact that neither administrative agencies nor the courts hold authority over the meaning of the law.¹⁹ The law also stagnated because provincial and local governments are not empowered to create their own, more expansive, protections.²⁰

In consequence, the original and narrow interpretation of the law against racism of July 1, 1972, held firm until 2001. The law gave potential complainants narrow grounds for claiming they had been discriminated against, and discrimination was taken to mean direct, unambiguous, racism.

The legislature did pass two important laws to combat racism between 1972 and 1990, but these focused on issues other than employment. The first, in 1978, made the collection of statistics based

17. Bleich, *supra* note 9, at 58.

18. ANDERSON, *supra* note 8.

19. JOHN MERRYMAN, *THE CIVIL LAW TRADITION* (1969); Pierre Birnbaum, *State, Centre, and Bureaucracy* (1979) (unpublished paper presented at the International Political Science Association Meetings, Moscow, July 12, 1979).

20. Wolfram Fischer & Peter Lundgreen, *The Recruitment and Training of Administrative Personnel*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 456 (Charles Tilly ed., 1975); ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* (1955 (reprint)).

on race illegal in most instances.²¹ The second, the Gayssot law of 1990, banned revisionist treatments that denied the Holocaust; mandated an annual report on racism and xenophobia (presumably free of statistics); and denied those convicted of racist behavior the right to run for public office—to thwart Le Pen’s racist party, the Front Nationale.²² These laws did nothing to alter the scope of the law of July 1, 1972.

1. Few Complaints Mean Little Incentive for Employer Action

French anti-discrimination law produced few successful complaints. One reason is that the standards of evidence were stringent. Over time, American courts came to accept evidence of a pattern of disparate treatment of protected groups as sufficient for a finding of discrimination. French law stipulated that the complainant must prove deliberate discrimination of a criminal nature, and the courts had no authority to alter the rules of evidence. In both countries it has been quite difficult to prove individual acts of discrimination with direct evidence, but in France this remained the only legal avenue.

The law against racism of July 1, 1972, resulted in a moderate number of convictions overall, ranging from an annual mean of fewer than 20 between 1975 and 1984 to a mean of over 70 between 1985 and 1997, but the vast majority involved racist speech rather than employment discrimination.²³ Between 1990 and 1994, France averaged fewer than 9 convictions of employment discrimination per year.²⁴ By another count, between 1993 and 1997, there were only 7 convictions.²⁵ Compare this with the situation in the United States. Between 1966 and 1995, the EEOC reports receiving 1,440,103 complaints of discrimination based solely on the categories protected under French law: race, national origin, and religion (EEOC 1966-1997). Since 1977 over a quarter of a million private discrimination suits have been filed in the federal courts.²⁶

21. Bleich, *supra* note 15; Joshua R. Goldstein & Ann Morning, Back in the Box: The Dilemma of Using Multiple-Race Data for Single-Race Laws (2001) (paper presented at the “Multiraciality: How Will the New Census Data Be Used?” Conference at the Jerome Levy Economic Institute, Bard College, Apr. 6, 2001).

22. Bleich, *supra* note 9, at 61.

23. Lieberman, *supra* note 5, at 30.

24. Bleich, *supra* note 9, at 286.

25. Lieberman, *supra* note 5, at 30.

26. *Id.*

Moreover, French criminal fines are modest. In the United States, complainants can sue for lost wages and in some cases for punitive damages. Between 1993 and 1997, the highest penalty imposed by the French courts was 10,000 francs, or about \$1700.²⁷ Compare this with the United States, where Texaco Inc. settled a class-action racial discrimination suit in 1996 for \$176 million and where Coca-Cola Corporation settled a similar suit three years later for \$192.5 million.

The paucity of complaints in the French system, and meager fines that are imposed, meant that French employers had little incentive to develop anti-discrimination measures on their own. In the United States, some of the most popular anti-discrimination measures, such as internal grievance mechanisms and bureaucratic promotion systems, were race-blind in form and French employers might well have adopted them. But they did not. In the United States, the frequency of complaints was a function of the extension of the law to include more types of discrimination. The ballooning of judgments was a consequence of judicial autonomy. French employers were not free to ignore the law because of its initial form, but because it was not amended by the various branches of government and in the process turned into a genuine threat.

2. The Legislature's Further Efforts to Combat Discrimination

France's approach to racial discrimination was paralleled in legislation outlawing sex discrimination. The law is not only race-blind, it is nearly sex-blind. Labor and employment laws have done little to protect French women against discrimination or to promote affirmative action. The Socialist government of 1981 established a Ministry of the Rights of Women that created modest training programs designed to help women move into high technology industries, but these programs were short-lived and had meager effects.²⁸ The law against sexual harassment of 1992 made harassment a criminal offense, as part of a wider ban on sexual violence.²⁹ The law applied to cases in which a superior harasses an inferior with the goal of obtaining sexual favors and specifies punishment of "[a maximum of] one year of imprisonment and [a maximum of] fine of [\$20,000]."³⁰ In the United States, by contrast, it was the courts that

27. *Id.* at 31.

28. Bleich, *supra* note 9, at 276.

29. Saguy, *supra* note 15.

30. *Id.* at 99.

defined sexual harassment as sex discrimination, under the Civil Rights Act, and that adopted an expansive definition that included “hostile work environment” harassment.

In the late 1980s and 1990s, French authorities moved in two directions in the pursuit of greater racial equality in employment. On the one hand, they created regional assistance programs that would benefit areas dominated by North African immigrants and other minorities. From 1986, France identified a series of “enterprise zones” in which it promotes development, and in which it practices employment discrimination in favor of local youth.³¹ These policies aim to create employment opportunities for racial and ethnic minorities in poor areas, but they do not carry the language of race. At about the same time, the National Agency for the Insertion and Promotion of Overseas Workers (ANT) began to offer aid to citizens from the four overseas departments—virtually all of them persons of color—designed to improve their employment situations.³² What is striking is that between 1972 and 2001, the French government did virtually nothing to expand employment discrimination law *per se*, and this was largely the case because only the legislature held the authority to expand the definition of discrimination.

3. The Legislature Expands the Scope of the Law

By the late 1990s, a series of academic reports brought to light widespread employment discrimination against North African immigrants and other minorities. A survey reported by Michele Tribalat in 1996 showed that unemployment among children of Algerian immigrants ran at 40%—double that of similarly skilled children of Portuguese immigrants. Three other studies found widespread employment discrimination. Government officials called for the creation of a central public authority charged with fighting discrimination, on the British model. Early proposals for reform built on insights from the cognitive revolution. The Haut Conseil à l’Intégration (HCI), appointed in 1990 to address problems of integration, found widespread employment discrimination and called for consciousness-raising activities among employers.³³ In 1998, the Minister for Employment and Solidarity, Martine Aubry, proposed to

31. Gwenaële Calves, *Les Politiques Françaises de Lutte Contre le Racisme, des Politiques en Mutation*, 18 FRENCH POL. & SOC’Y 75, 77 (2000).

32. Bleich, *supra* note 15, at 276.

33. Alec G. Hargreaves, *Half-Measures: Antidiscrimination Policy in France*, 18 FRENCH POL. & SOC’Y 83, 87 (2000).

fight workplace racism with a range of initiatives directed at consciousness-raising³⁴ that resemble the diversity management programs that American employers were adopting in large numbers during the 1990s.

In the context of studies finding widespread discrimination, the administration and legislature sought to make complaints easier to prosecute. In 1999, the Interior Ministry required Prefects to set up agencies to take charge of discrimination complaints. The establishment of a telephone helpline in 2000 led to a thirty-fold increase in the number of discrimination complaints.³⁵

Following thirteen months of debate, on November 6, 2001, the French legislature adopted a new anti-discrimination law (FR0011198N) that expanded the definition of discrimination and shifted the burden of proof toward the employer. Under the new law, discrimination was still a criminal matter, but the law extended coverage from sex, family situation, ethnicity, national origin, and race to age, surname, physical appearance (height, weight, attractiveness), and sexual orientation.³⁶ The latter two protections go considerably beyond federal law in the United States. Perhaps the most important change is a shift in the burden of proof, so that the complainant and employer are on equal footing. Under the new law, employers must present evidence that they did not discriminate once complainants show prima facie evidence of discrimination. As the new law does not require a smoking gun, it is expected to elicit more complaints and more successful prosecutions.

This new law underscores the impermeability of the French state, for until 2001, courts, bureaucrats, provincial governments, and local governments had done nothing to expand the scope of anti-discrimination law. Because cases were difficult to prosecute under the original formulation of the law, employers had little incentive to develop anti-discrimination measures on their own, and they did not jump on the institutional and cognitive bandwagons that swept through the social sciences.

B. American Employers Respond to Anti-discrimination Law

In American social science, the behaviorist revolution of the 1950s shaped thinking in sociology, economics, and psychology alike.

34. *Id.* at 85.

35. *Id.* at 97.

36. Mouna Viprey, *New Anti-Discrimination Law Adopted* (Apr. 1, 2002), available at <http://www.eurofound.ie>.

Individual behavior became the focus of analysis across the social sciences. In the literature on inequality, this approach led to the “status attainment” paradigm, in which occupational and income attainment were modeled with a series of individual-level variables. Race, and later gender, were introduced in these models to capture discrimination on the part of employers, but otherwise factors such as previous work experience and education were thought to explain social location. In economics, Gary Becker’s work on human capital and his book on the inefficiencies of discrimination, *The Economics of Discrimination*, explained stratification first and foremost with individual qualities—the human forms of capital that are rewarded in the labor market.³⁷ Human capital theorists recognized discrimination as an individual-level phenomenon occurring among managers, and thereby explained the lion’s share of racial and gender differences in occupational attainment as a consequence of individual choices, whether those of managers or those of workers. This model suggested that discrimination was a personal matter, and that because it was inefficient it would eventually be stamped out. The principal remedy, in organizations and at the new Equal Employment Opportunity Commission, was an in-house grievance mechanism that would permit employees to complain of incidents of discrimination on the part of particular managers and to win redress.

The institutional revolution changed all of this, as employers brought new insights from labor economics and structural sociology to bear on the problem of unequal opportunity in employment. From the mid-1970s onward, employers adopted formal internal labor market mechanisms to undermine institutional discrimination. The underlying understanding of discrimination had changed, to one in which organizational structures had unanticipated discriminatory effects. The courts did not do much to endorse these new solutions, but neither did they strike them down as they did in the case of employment tests and quotas. Then by the late 1980s, social science’s cognitive revolution shaped new diversity management programs, designed to make managers aware of their own cognitive schemas and in particular of their implicit stereotyping. The cognitive revolution also spurred mentoring and networking programs for women and for minority groups, designed to undermine self-handicapping by members of disadvantaged groups.

37. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

1. How the Institutional and Cognitive Revolutions Invaded the U.S. Workplace

President Dwight Eisenhower did little to satisfy Civil Rights protesters during the 1950s, but when the Democrats were returned to the White House by the 1960 election, federal policy took a left turn. In the first year of his presidency, John F. Kennedy decreed that if companies wanted to do business with the federal government, they must take "affirmative action" to reverse the effects of past discrimination. Lyndon Johnson renewed that decree in 1965 and established an agency to oversee compliance. In 1964, Johnson signed the Civil Rights Act, outlawing discrimination in education, housing, public accommodations, and employment. No one could have anticipated the effects these actions would have on the workplace. Not a single sentence remains from the corporate personnel manuals of the time. Employers now recruit, hire, discipline, evaluate, compensate, and fire employees differently than they did in 1960.

Congress outlawed discrimination in much the same terms that France's legislature would later use, and conservatives went to considerable lengths to ensure that the courts would be circumspect. Congressional debates and amendments led to language that explicitly ruled out efforts to improve employment opportunities for racial and ethnic groups. But this effort largely failed. American state fragmentation and porousness meant that the law would be a moving target, because state and local governments, administrative agencies, and state and federal courts could redefine discrimination. Within a decade, large employers were on constant alert, scanning the environment for new definitions of discrimination and attendant prescriptions for how to fight it. As social scientists identified new sources of discrimination, personnel specialists devised measures to prevent discrimination arising from those sources. What employers did became the foundation for new judicial interpretations of the Civil Rights Act, rather than vice versa.

New anti-discrimination practices were built on two foundations. One was social-scientific thinking, and in particular the institutional and cognitive revolutions of the 1970s through the 1990s. The other was corporations' longstanding arsenal of personnel practices, for personnel managers fashioned anti-discrimination measures from the raw material of those arsenals.

2. Before Civil Rights

In the early 1960s organizations used several different employment systems. Those systems depended to different degrees on the principle of merit, but even the best of them used merit only to allocate jobs within groups of workers—among white men or black women. Entire industries were segregated, and in industries that were integrated, jobs were typically segregated. Where the best machinist job went to the best worker, only white males were in the pool.³⁸ In 1960, many industries and firms still used the rudimentary system of allocating and managing labor that labor economist Sumner Slichter termed the “drive system.”³⁹ In clothing factories, in gravel pits, and on farms, foremen who did the hiring and firing depended on the immediate threat of punishment and dismissal to motivate workers. They hired by sex and race, choosing women to operate sewing machines, men to work in stone quarries, and minority men and women to pick fruit.

Frederick Taylor’s system of scientific management had spread across mass manufacturing, wherever work could be routinized.⁴⁰ Taylor encouraged employers to test new workers, so as to identify the jobs in which they could be most productive. By the 1950s, employers were depending on job tests to sort workers into suitable jobs: “the worker came to be viewed as an embodiment of aptitudes.”⁴¹ Firms sought to match workers with the jobs they were best equipped for, but they first sorted workers by sex, race, and ethnicity.

In the early 1960s, nearly one third of Americans belonged to unions, and came under personnel systems that were negotiated between union and management. Promotion rules negotiated by unions guaranteed that managers would not discriminate against union leaders, but the hiring process was not rule-governed. Most unions recruited through personal networks, which meant that they chose people who were on most counts identical to existing workers, reproducing job segregation by gender, race, and ethnicity.⁴² By 1960,

38. DAVID M. GORDON, RICHARD EDWARDS & MICHAEL REICH, *SEGMENTED WORK, DIVIDED WORKERS* (1982).

39. SUMNER SLICHTER, *THE TURNOVER OF FACTORY LABOR* (1919).

40. FREDERICK TAYLOR, *SCIENTIFIC MANAGEMENT* (1911).

41. REINHARD BENDIX, *WORK AND AUTHORITY IN INDUSTRY* (1956); SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945* (1985).

42. RICHARD EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* (1979); James N. Baron, Frank R. Dobbin & P. Devereaux Jennings, *War and Peace: The Evolution of Modern Personnel Administration in U.S.*

a range of employment systems was in operation, but all of these systems served to sustain segregation of workplaces and of jobs.

3. Civil Rights Law

Title VII of the Civil Rights Act of 1964 made it illegal for employers with 25 or more employees to discriminate on the basis of race, color, religion, sex, or national origin. These protections were extended to persons between the ages of 40 and 65 in 1967, and to the physically and mentally impaired in 1973.⁴³ The new Equal Employment Opportunity Commission was charged with overseeing Title VII of the Act. But neither the Commission nor employers knew what the law required. While all parties could agree that in the absence of a compelling business reason, Title VII made the practice of excluding women and minorities from certain jobs illegal, no one had a good idea of whether the law implied anything beyond this. Lyndon Johnson's affirmative action program for federal contractors, under Executive Order (EO) 11246 in September of 1965, was equally vague about nuts and bolts.

The courts would voice their opinions about what constituted discrimination, but only in response to charges against employers. Most employers thought, correctly, that Congress had intended to outlaw blatant discrimination. Because few thought that they practiced such discrimination, few thought that they would have to make any changes to comply. Those who openly refused to hire women and minorities for certain jobs changed their ways, for the most part.

The scope of Title VII was expanded in 1971, when the Supreme Court, in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), redefined discrimination, ruling against employment tests that had a "disparate impact" on black applicants absent evidence of intentional discrimination. Now employment practices that had the effect of excluding blacks appeared to be illegal, even if, *prima facie*, they were racially neutral. The *Griggs* case was pursued by attorneys who believed that firms had created systems of *de facto* discrimination to replace their systems of *de jure* discrimination. *Griggs* put employers on notice that they could not comply with the law simply by moving discrimination underground. For the courts, whether such practices

Industry, 92 AM. J. SOC. 350 (1986); MICHAEL BURAWOY, *THE POLITICS OF PRODUCTION* (1985).

43. JENNIE FARLEY, *AFFIRMATIVE ACTION AND THE WOMAN WORKER* 12 (1979); RUTH G. SCHAEFFER, *NONDISCRIMINATION IN EMPLOYMENT AND BEYOND* (1980).

were a ruse for practicing discrimination or whether they represented good-faith efforts to select and allocate workers was immaterial.

In 1972 Congress, dissatisfied with progress in the eight years since passage of the Civil Rights Act, bolstered Title VII with the Equal Employment Opportunity Act, which extended coverage to small employers and gave the EEOC power, for the first time, to bring lawsuits itself. The number of Title VII suits skyrocketed, from several hundred a year at the beginning of the decade to over 5000 a year by the end of the decade.⁴⁴ This expanded the purview of the agency, but it did not give it radically different powers from those of France's Labor Inspectors, who could investigate cases and whose prosecutions could be backed by civil groups.

In response to these changes, which labeled covert forms of discrimination illegal and which gave the EEOC authority to pursue some changes on its own, personnel specialists opened their bags of tricks and brought out quasi-judicial grievance and disciplinary mechanisms to intercept discrimination complaints before they reached the courts.⁴⁵ Grievance mechanisms had been pioneered in union firms, and spread to non-union firms that built on the foundation of welfare capitalism to forestall unionism.⁴⁶

V. THE INSTITUTIONAL REVOLUTION AND EMPLOYMENT DISCRIMINATION

The behavioral revolution that swept through the social sciences in the 1950s was followed by an institutional revolution that began in the early 1970s. The revolution was widespread, affecting sociology, economics, and political science.⁴⁷ In the fields of labor economics and the sociology of stratification, this revolution reshaped thinking in fundamental ways. In place of the common-sense notion that discrimination is an outcome of managerial prejudice, there rose the idea that social structures can have discriminatory effects, whether by

44. Paul Burstein & Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 16 L. & SOC'Y REV. 355 (1986).

45. Edelman, *supra* note 3; John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794 (1996).

46. SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* (1997).

47. John L. Campbell, *Institutional Analysis and the Role of Ideas in Political Economy*, 27 THEORY & SOC'Y 377 (1998); Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUDIES 936 (1996); Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, in *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE POLITICS 1* (Sven Steinmo, Kathleen Thelen & Frank Longstreth eds., 1992).

design or not. Institutional inertia sustains structures—hiring and promotion practices, in particular—that may be discriminatory, even when those structures have become inefficient, as Gary Becker had argued.⁴⁸ Personnel specialists and the courts quickly picked up these ideas and fashioned a set of bureaucratic mechanisms designed to fight discrimination. It was thus that the institutional revolution reshaped corporate practice and popular thought.

Economists were first to explore the effects of organizational structures on employment outcomes, and labor economics was one of the first beachheads of institutionalism. In 1971, Peter Doeringer and Michael Piore published *Internal Labor Markets and Manpower Analysis*, analyzing the circumstances under which firms create formal internal promotion schemes. In 1975, Oliver Williamson's influential *Markets and Hierarchies* sketched a program for institutional economics and developed a range of hypotheses about the conditions under which employers would create formal structures for managing internal promotion. Neo-Marxist economists would develop broadly similar insights in their efforts to understand how employment structures shape opportunity in the labor market.⁴⁹

Sociologists interested in stratification were coming to similar, and similarly institutional, conclusions.⁵⁰ James Baron and William Bielby's "Bringing the Firms Back In: Stratification, Segmentation, and the Organization of Work" marked the entry into the mainstream of stratification research of the idea that institutions within organizations affect social stratification profoundly.⁵¹

These two camps developed analyses of how firm-level employment practices shape the careers of men and women, blacks and whites. They focused on the mechanisms that firms used to organize careers within the firm; the bureaucratic and informal systems for deciding whom to promote. Studies confirmed that much of the inequality in employment outcomes by gender and race could be traced to how firms treated employees after they first walked through the door. Economists tended to focus on the efficiencies that could be realized with well-designed "internal labor market" (ILM)

48. BECKER, *supra* note 37.

49. David Gordon, *Taxation of the Poor and the Normative Theory of Tax Incidence*, 62 THE AM. ECON. REV. 319 (1972); Katherine Stone, *The Origins of Job Structures in the Steel Industry*, 6 REV. OF RADICAL POL. & ECON. 113 (1974); EDWARDS, *supra* note 42.

50. Michael Aiken & Jerald Hage, *Organizational Interdependence and Inter-Organizational Structure*, 14 AM. SOCIOLOGICAL REV. 366 (1968); Seymour Spilerman, *Careers, Labor Market Structure, and Socioeconomic Achievement*, 83 AM. J. SOC. 551 (1977).

51. James N. Baron & William T. Bielby, *Bringing the Firm Back In: Stratification, Segmentation, and the Organization of Work*, 45 AM. SOC. REV. 174 (1980).

practices, whereas sociologists tended to focus on the inequities that hiring and promotion practices could produce.

This concern with how the promotion rules and procedures of firms affected individuals and groups was soon reflected in the personnel journals and in employer practice. Employers came to see unfair promotion systems as an Achilles' heel vis-à-vis Civil Rights law, and well in advance of any court or administrative decisions, they revised their promotion programs, making them more bureaucratic and objective and eliminating elements that could result in discrimination.

It was not the direct actions of the courts that spurred this activity, but rather the fact that the courts and administrative agencies had signaled, in the Griggs decision in 1971 and in a series of other decisions and edicts, that the government would not adhere to a narrow interpretation of the Civil Rights Act. In particular, the Griggs decision made it clear that the Supreme Court would sanction firms that practiced de facto discrimination through selection procedures that had the unintended effect of discriminating. In the early 1970s, several high-profile firms were slapped with huge fines on the basis not of knowing discrimination, but of complacency in the face of employment practices that had the effect of disadvantaging minorities and women. These decisions, and ultimately the state's fragmentation—the tradition of judicial interpretation of legislative edicts, led employers and personnel experts to devise anti-discrimination measures based on their guesses about how the courts might interpret the law in the future. Employers embraced the emerging social scientific understanding of discrimination even before the courts issued any judgments on the matter.

A. *The Personnel Arsenal: Internal Labor Market Mechanisms*

Internal labor market mechanisms were pioneered in banking and in other sectors where long-term employment was vital to the continuing success of the firm.⁵² Certain components, such as seniority, were first used in unionized blue-collar firms.⁵³ The core bureaucratic practices were designed to reward long-term employment by basing promotions, and job security, on objective criteria rather than on cronyism. The classificatory logic of these procedures, in which certain categories of employees (e.g., unionists)

52. JACOBY, *supra* note 41; HELEN BAKER, CURRENT POLICIES IN PERSONNEL RELATIONS IN BANKS (1940); Baron, Dobbin & Jennings, *supra* note 42.

53. Baron, Dobbin & Jennings, *supra* note 42.

are afforded specific protections against dismissal and rights to be considered for promotion⁵⁴ was particularly well suited to the task of protecting the rights of new categories—women and members of minority groups.

1. Job Descriptions, Performance Evaluations, and Salary Classification.

Not long after the publication of Doeringer and Piore's book on the logic of internal promotion systems, personnel specialists began to describe formal internal labor market mechanisms as anti-discrimination devices. For instance, in 1974 the *Harvard Business Review* published an article titled "Make Your Equal Opportunity Program Court-Proof" which emphasized "the need for positive action against the risk of prolonged and serious litigation or crippling financial judgments," and specifically encouraged firms to establish non-discriminatory job descriptions and salary classification systems and to "ensure that prescribed qualifications and pay scales can be justified on business grounds and that inadvertent barriers have not been erected against women and minorities."⁵⁵ In the same year the journal *Personnel* published an article titled "A Total Approach to EEO Compliance"⁵⁶ encouraging employers to implement formal performance evaluations for all employees. This would give firms a basis for considering women and minorities for promotion, and the resulting records of performance were thought to be essential to the successful defense of discrimination suits involving promotions. The personnel journals also counseled employers to establish job descriptions, setting out the prerequisites for each job, and salary classification systems, ranking all jobs to determine which job changes constitute promotions.

Articles promoting internal labor market mechanisms as a civil rights solution often touted a secondary benefit; they increase efficiency by encouraging managers to match employees with jobs on the basis of ability rather than race or gender.⁵⁷ Executives came to

54. David Stark, *Rethinking International Labor Markets: New Insights from a Comparative Perspective*, 51 AM. SOC. REV. 194 (1985).

55. Antonia Chayes, *Make Your EEO Program Court-Proof*, 52 HARV. BUS. REV. 81 (1974); Thomas A. Kochan & Peter Capelli, *The Transformation of the Industrial Relations and Personnel Function*, in INTERNATIONAL LABOR MARKETS 133, 147 (Paul Osterman ed., 1984).

56. Edward Giblin & Oscar Ornati, *Beyond Compliance: EEO and the Dynamics of Organizational Change*, 52 PERSONNEL 38 (1974).

57. Shelly J. Lundberg, *The Enforcement of Equal Opportunity Laws Under Imperfect Information: Affirmative Action and Alternatives*, 106 Q.J. ECON. 309 (1991); John J. Donohue III, *Is Title VII Efficient?*, 134 U. PENN. L. REV. 1411 (1986).

see that formal promotion systems could undermine middle-manager cronyism, curtailing discrimination and thereby reducing the firm's exposure to litigation. As Glazer argued in 1988, "Many firms have overhauled personnel policies. . . . Promotions are less informal. When positions become open, they are posted so anyone (not just the boss's favorite) can apply. Formal evaluations have been strengthened so that, when a manager selects one candidate over another . . . there are objective criteria" (quoted in *Harvard Law Review* 1989, p. 668). Meanwhile, in 1974 the EEOC issued a guidebook for employers, titled *Affirmative Action and Equal Employment*, which suggested that employers could avoid litigation by formalizing hiring and promotion procedures, and expanding personnel record-keeping so that they would be able to prove that they did not discriminate.⁵⁸ Surveys have shown that the popularity of three traditional internal labor market practices—salary classification, job descriptions, and performance evaluations—rose sharply from the mid-1970s through the late 1980s.

2. Job Ladders and Employment Testing

Formal job ladders and employment testing had traditionally been important components of internal labor market systems. Job ladders specified which entry-level jobs were in line for promotion to which higher-level jobs. Tests for new employees, and for those seeking promotions, allowed personnel managers to make assignments based on aptitude. Some personnel managers heralded testing and job ladders as part of the new bureaucratic response to Civil Rights law, but both practices were challenged as potentially discriminatory. In consequence, while some traditional internal labor market practices spread widely, job ladders and employment tests stagnated.

In the case of job ladders, private-sector personnel consultants and federal civil service administrators worried that formal job ladders could discriminate by defining only certain jobs as promotable. Giblin and Ornati counseled that firms should examine whether their promotion ladders "create unwarranted restrictions to minority mobility," and in particular whether "women or minorities are concentrated in certain jobs outside any line of progression or in jobs that dead-end."⁵⁹ The problem was that most employers had lower-

58. NIJOLE BENOKRAITIS & JOE FEAGIN, *AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY* (1977).

59. Giblin & Ornati, *supra* note 56, at 40.

tier job ladders for clerical and production workers, who were often members of groups covered by Civil Rights law, and upper-tier ladders for executives—but no bridges in between.⁶⁰ Employees in the lower tier were typically not eligible for promotion to upper-tier jobs, even if they were otherwise qualified. Federal agencies responded to EEO legislation by creating bridges between job ladders in different tiers,⁶¹ but the personnel journals urged private employers to switch to open bidding systems, modeled on those that some sectors had developed, that allowed any employee to bid for a vacant job.⁶² A 1973 article on improving opportunities for women, in *Human Resource Management*, advocated the “institution of a method of job posting so that all employees are aware of vacancies as they occur and that promotion into these vacancies is based on qualifications, not sex” or prior position.⁶³ Many employers did away with job ladders, and few built them into new equal employment opportunity programs.

Some personnel experts saw testing as a way to fight discrimination on the part of managers. Since the time of Frederick Taylor, testing had been viewed as a way to ensure that workers would be allocated to “the highest class of jobs” that they were capable of performing.⁶⁴ When the Court ruled in *Griggs* that tests had unfairly excluded blacks from employment, it suggested that tests must be demonstrably related to job performance. Some personnel managers reacted by developing more sophisticated tests that would predict job performance and stand up to EEOC guidelines;⁶⁵ but most advocated the abandonment of testing. A 1973 survey, reported in *Personnel*, found that 15.1% of employers had abandoned employment tests in reaction to the *Griggs* decision.⁶⁶

During the 1970s, institutionalists in economics and sociology identified hiring and promotion practices as a source of employment discrimination. The principal Civil Rights measures that most employers adopted during the 1970s and 1980s were formal internal labor market systems, based in traditional employment practices and

60. THOMAS DiPRETE, *THE BUREAUCRATIC LABOR MARKET: THE CASE OF THE FEDERAL CIVIL SERVICE* 197 (1989); DAVID HALLE, *AMERICA'S WORKING MAN* (1984).

61. DiPRETE, *supra* note 60.

62. BURAWOY, *supra* note 42.

63. Dennis Slevin, *Full Utilization of Women in Employment: The Problem and an Action Program*, 12 HUM. RESOURCE MGMT. 25, 30 (1973).

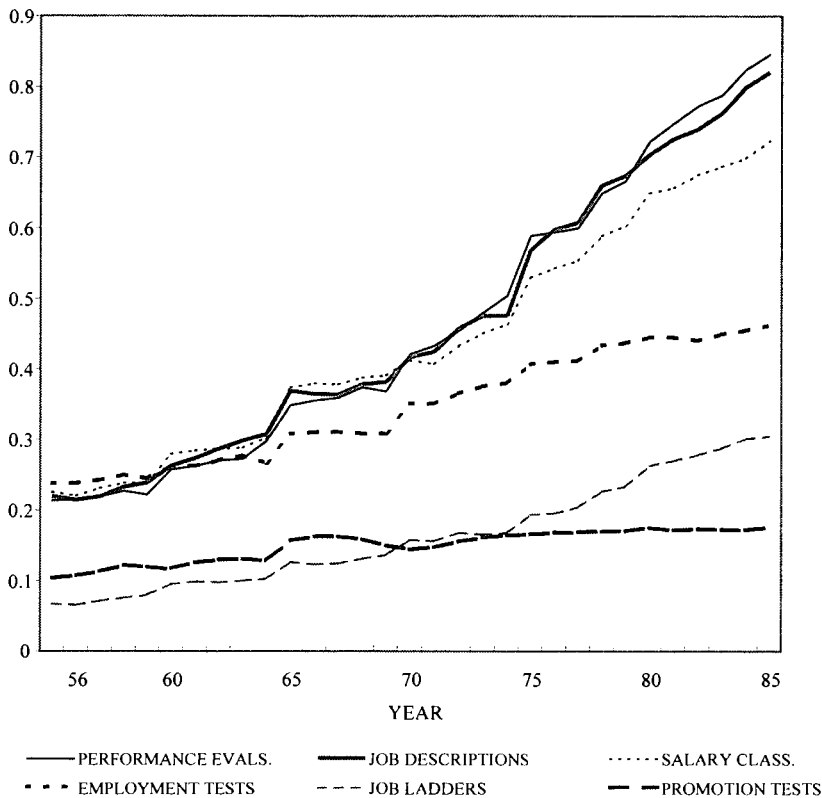
64. BENDIX, *supra* note 41, at 279; TAYLOR, *supra* note 40.

65. Joel T. Campbell, *Tests are Valid for Minority Groups Too*, 2 PUB. PERSONNEL MGMT. 70 (1973); Slevin, *supra* note 63; James F. Gavin & David L. Toole, *Validity of Aptitude Tests for the Hardcore Unemployed*, 26 PERSONNEL PSYCH. 139 (1973); William A. Gorham, *New Answers on Employment Tests*, 13 CIV. SERVICE J. 8 (1972).

66. Donald Peterson, *The Impact of Duke Power on Testing*, 51 PERSONNEL 30 (1974).

designed specifically to counter institutional discrimination. Some employers had experimented with hiring quotas mirroring those that the courts had imposed on recalcitrant firms, but several well-publicized reverse-discrimination suits in the early 1970s put an end to that remedy.⁶⁷ This left formal internal labor market practices as the principal remedy to discrimination in promotion.

Figure 1
The Rise of Institutional Remedies: Internal Labor Market Practices



The best evidence that it was Civil Rights law that prompted employers to install internal labor market mechanisms—and not simply the inclination to bureaucratize the firm—is that employers

67. Burstein & Monaghan, *supra* note 44; PAUL BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL (1985); Jonathan S. Leonard, *What Promises are Worth: The Impact of Affirmative Action Goals*, 20 J. HUM. RESOURCES 3 (1985).

embraced those favored as Civil Rights remedies but not those that seemed to pose problems. Performance evaluations, job descriptions, and salary classification spread rapidly, but employment tests and job ladders did not. A survey I conducted in collaboration with John W. Meyer, W. Richard Scott, and John Sutton in 1986 provides striking evidence.⁶⁸ In our sample of 279 U.S. workplaces, the prevalence of performance evaluations, job descriptions, and salary classification systems roughly doubled between 1970, when about 40% of employers had each these mechanisms, and 1985, when about 80% had each (*see* Figure 1). By contrast, job ladders and job testing, which courts and personnel experts defined as potentially discriminatory, grew incrementally. Employment tests were about as popular as performance evaluations, job descriptions, and salary classification in 1964, but they lagged far behind by 1985. Job ladders and promotion tests lagged considerably behind the other practices. Abandonment of these practices also became common. In our sample, 15% of organizations using employment tests abandoned them during the period under study, and 11% of organizations using promotion tests abandoned them. By contrast, no more than 2% of the organizations using any other practice abandoned it.

Figure 1 suggests that employers popularized ILM practices in response to the institutional revolution in economics and sociology, which focused attention on hiring and promotion institutions rather than on individual-level prejudice. It also suggests that employers adopted not the traditional ILM arsenal, but those practices that personnel experts and the courts had approved as anti-discrimination measures.

VI. THE COGNITIVE REVOLUTION: DIVERSITY MANAGEMENT, MENTORING, AND NETWORKING

During the 1980s, executive-branch support for anti-discrimination measures waned, as Ronald Reagan cut back enforcement activities and staffing at the EEOC, which administered Civil Rights law, and the OFCCP, which administered affirmative action law for federal contractors. Yet the courts continued to hear discrimination suits and to apply the broad definition of discrimination that was implied by the institutional paradigms that had taken hold in the social sciences.

68. Dobbin et al., *supra* note 1.

By the mid-1980s, the cognitive revolution in the social sciences molded new anti-discrimination practices under the mantle of “diversity management.” The change came about in part because Reagan’s efforts to curtail Civil Rights enforcement led human resources managers to look for a new rationale for their anti-discrimination programs. They embraced the idea that demographic trends were going to make workplace diversity an increasingly pressing issue—an idea that was popularized by a federally commissioned Reagan-era report on the future of work, *Workforce 2000*. On the one hand, they talked less and less of “equal opportunity” and “affirmative action” and more and more of “the business case for diversity management.” On the other hand, they conceptualized the problem of diversity management with tools from the cognitive revolution in the social sciences.

The diversity management movement was a spin-off of equal employment law. While many saw diversity management as equal opportunity management in new packaging, in name, and to some extent in practice, diversity management was distinct. Diversity management practices brought together a new stream of theorizing about discrimination with an older stream of management practices. The theorizing came from the cognitive revolution in the social sciences, which emphasized the role of cognition in shaping behavior. The management practices included the training component of the Organizational Development programs of the late 1960s, and the traditional, informal career system—the “old-boy” network.

On the one hand, the cognitive revolution suggested that cognitive categorizing produces stereotyping even among people who do not think of themselves as prejudiced. Managers of all stripes may make hiring and promotion decisions based on race and gender without realizing it. They may fail, for instance, to consider for promotion people who do not fit into their cognitive category of “manager.” One proposed solution was diversity training and management programs that built directly on the Organizational Development and sensitivity training models that had been popularized in management in the early 1970s. On the other hand, the cognitive revolution suggested that cognitive categorizing shapes the ambitions and behavior of people from disadvantaged groups. Members of disadvantaged groups may underperform relative to their abilities and may not see themselves as potential managers. Here, the solution was a new set of mentoring and networking programs for women and minorities modeled on the “old boy network.”

A. *The Cognitive Revolution in the Social Sciences*

Whereas the institutional revolution was championed by economists, sociologists, and political scientists, the subsequent cognitive revolution was championed by psychologists, anthropologists, and sociologists.⁶⁹ Its core insight is that people behave according to mental maps—to representations and procedures they experience in the world.⁷⁰ In psychology this was an old insight, but the behaviorism of the 1950s and 1960s tended to overshadow it. In anthropology, the idea that mental maps of the world shape behavior was popularized by Clifford Geertz⁷¹ and Mary Douglas.⁷² In sociology, the importance of cognition had been recognized by constructionists such as Berger and Luckmann (1967) and symbolic anthropologists such as Garfinkle (1987), but the approach became central to the discipline with the rise of the sociology of culture in the 1980s.⁷³

The cognitive revolution had two key implications for processes of workplace inequality. One was that managers might discriminate not due to prejudice or malice but due to unconscious categorization. Rosabeth Moss Kanter used the term “homosocial reproduction” to describe the tendency of managers to choose others like themselves for promotion—for white men to choose white men.⁷⁴ The other was that members of traditionally disadvantaged groups might handicap themselves. Studies of “expectancy effects” had focused on teachers’ classroom expectations for students, finding that students do better when teachers are led to believe those students will do well.⁷⁵ In the late 1980s, social psychologist Claude Steele⁷⁶ found that blacks fare worse on standardized tests under conditions of stereotype “vulnerability” or “threat”—when they were sensitized to issues of

69. PAUL THAGARD, *MIND: INTRODUCTION TO COGNITIVE SCIENCE* (1996).

70. NOAM CHOMSKY, *SYNTACTIC STRUCTURES* (1957); JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (1958); JOANNE MILLER, *CORPORATE RESPONSES TO DIVERSITY* (1994).

71. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983).

72. MARY DOUGLAS, *HOW INSTITUTIONS THINK* (1986).

73. ROBERT WUTHROW, *MEANING AND MORAL ORDER: EXPLORATIONS IN CULTURAL ANALYSIS* (1987); ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* (1984); Paul J. DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263 (1997).

74. ROSABETH KANTER, *MEN AND WOMEN OF THE CORPORATION* (1980).

75. Robert Rosenthal & D.B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 BEHAV. & BRIAN SCI. 377 (1978).

76. Claude M. Steele, *Race and the Schooling of Black Americans*, 269 THE ATLANTIC 68 (1992).

race before the test.⁷⁷ Subsequent studies (e.g., Lovaglia et al. 1998) have reinforced the idea that “expectancy effects” extend to students themselves – that where race, or gender, is made salient to test-takers, performance is affected. This reinforced Kanter’s finding that women face particular status anxiety when they are in positions typically held by men.⁷⁸ To fight cognitive discrimination among managers, human resources managers advocated diversity training. To reduce stereotype threat and status anxiety among female and minority workers, they advocated mentoring and networking programs.

B. Diversity Training, Networking, and Mentoring

Workforce 2000, a report commissioned by Reagan’s Department of Labor and produced by the Hudson Institute, projected that the proportion of minorities and immigrants in the workforce would grow substantially.⁷⁹ Two key challenges facing employers were to reconcile “the needs of women, work, and families” and integrate “Blacks and Hispanics fully into the labor market.”⁸⁰ Corporate anti-discrimination specialists seized on *Workforce 2000* to justify their role in the context of declining federal enforcement of the Civil Rights Act. Management journals soon published a spate of articles about diversity management.⁸¹

By the late 1980s, EEO/AA specialists were promoting diversity programs in terms of their competitive advantages. In a Harvard Business Review article, R. Roosevelt Thomas emphasized the business case: “A lot of executives are not sure why they should want to learn to manage diversity. . . . I believe only business reasons will supply the necessary long-term motivation. . . . Learning to manage diversity will make you more competitive.”⁸² To attract women and minority workers, organizations would have to become “employers of choice,” welcoming people of different cultures, backgrounds, and identity groups.⁸³ A group of management consultants began to

77. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797 (1995).

78. KANTER, *supra* note 74.

79. WILLIAM B. JOHNSTON & ARNOLD H. PACKER, *WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY* (1987).

80. *Id.* at ix.

81. Edelman, *supra* note 2.

82. R. Roosevelt Thomas, Jr., *Foreward*, in DIFFERENCES THAT WORK: ORGANIZATIONAL EXCELLENCE THROUGH DIVERSITY 13 (Mary C. Gentile ed., 1994); R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, in DIFFERENCES THAT WORK: ORGANIZATIONAL EXCELLENCE THROUGH DIVERSITY 34 (Mary C. Gentile ed., 1994).

83. Mary Winterle, *Work Force Diversity: Corporate Challenges, Corporate Responses* (Conference Board Report No. 1013) (1992).

develop training programs that would increase sensitivity, with the goal of changing cognitive categorizing among managers responsible for promotions. Thomas, a Harvard M.B.A. who had taught at the Harvard Business School, developed a training program for supervisors of black managers. Lewis Griggs and Lennie Copeland were Stanford M.B.A.s who in 1988 produced a series of successful videos, "Valuing Diversity." Copeland published three articles in *Personnel* and *Personnel Administrator* in 1988, which helped bring attention to the video series. The new Kaleel Jamison Consulting Group, focusing on creating "High-Performance Inclusive" firms.

The model for these diversity training programs, which were soon adopted by a wide range of large corporations, came from the Organizational Development consultants who had been popular in the early 1970s, whose training model had been followed in the race relations workshops that a handful of large corporations were required to run in the wake of Equal Employment Opportunity consent decrees in the early 1970s, perhaps most notably AT&T's 1972 decree. The Organizational Development⁸⁴ field of management consulting was oriented to making managers sensitive to the process of decision-making, and to the motives and perspectives of others in the decision-making group.⁸⁵ OD-style training became the core of the diversity management tool-kit. The idea was to make managers and employees sensitive to differences of race, ethnicity, and gender so as to undermine cognitive categorizing.

High-profile companies such as the Digital Equipment Corporation, Avon, and Xerox led the diversity-management charge.⁸⁶ By 1990, one directory of corporate trainers listed 15 diversity consultants. Two years later, the number was 85.⁸⁷ Soon a "workforce diversity director" in a high technology firm reported that she heard from about twenty consultants per week.⁸⁸ Anti-harassment trainers often built on the same foundation.⁸⁹

Mentoring and networking programs were the other mainstay of diversity management. As early as the mid-1980s, large companies

84. RICHARD BECKHARD, *ORGANIZATIONAL DEVELOPMENT: STRATEGIES AND MODELS* (1969); EDGAR H. SCHEIN, *PROCESS CONSULTATION: ITS ROLE IN ORGANIZATIONAL DEVELOPMENT* (1969).

85. Kochan & Cappelli, *supra* note 55, at 150.

86. Thomas, *supra* note 82; Bureau of National Affairs, *Affirmative Action After Adarand*, 147 DAILY LAB. REPORT (BNA) (Aug. 1, 1995); FREDERICK R. LYNCH, *THE DIVERSITY MACHINE: THE DRIVE TO CHANGE THE "WHITE MALE WORKPLACE"* (1997).

87. LYNCH, *supra* note 86, at 330.

88. Michael L. Wheeler, *Diversity Training* (Conference Board Report Number 1083-94-RR) 15 (1994).

89. Saguy, *supra* note 15.

embraced Kanter's insight that women and minorities needed positive role models to succeed. A 1985 study of nine exemplary anti-discrimination programs found that they encouraged mentoring between seasoned managers and junior women and minorities, informally if not formally.⁹⁰ The diversity management literature began to promote formal mentoring and networking programs. At the same time, the New York chapter of the American Bar Association created a network of black attorneys, designed to provide mutual support.⁹¹ By 1991, a Conference Board study of 406 large firms found that 28% had mentoring programs for women and minorities.⁹²

C. *The Diffusion of Diversity Training, Mentoring, and Networking*

Diversity management quickly became an important sub-field of human resources management. Beginning in 1991, consultants set up the Annual National Diversity Conferences and promoted diversity management through local branches of the American Society for Training and Development (ASTD).⁹³ Two major business groups, the Conference Board, and the Society for Human Resource Management (SHRM) developed diversity management programs.⁹⁴

While diversity management programs included a variety of components⁹⁵ the core programs were training, networking, and mentoring.⁹⁶ By the beginning of 1990s, 70% of Fortune 50 companies had adopted some type of "diversity initiative."⁹⁷ Over half of the respondents to a 1991 Conference Board survey of 406 large firms had diversity training for managers and diversity policy statements and over a quarter had a mentoring program specifically for women or minorities.⁹⁸ A 1994 report on large New York companies found that 16% had formal mentoring programs for minorities and 20% had such

90. Susan Vernon-Gerstenfeld & Edmund Burke, *Affirmative Action in Nine Large Companies: A Field Study*, 62 PERSONNEL 67 (1985).

91. Paul Marcotte, *Minority Networking: Informal New York Mutual Support Group Formed*, 75 A.B.A.J. 25 (1988).

92. See also, Thomas, *supra* note 82.

93. LYNCH, *supra* note 86.

94. LYNCH, *supra* note 86; Wheeler, *supra* note 88; L. Wheeler, *Diversity: Business Rationale and Strategies* (Conference Board Report Number 1130-95-RR) (1995).

95. Wheeler, *supra* note 88, at 8.

96. David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, 74 HARV. BUS. REV. 79 (Sept.-Oct. 1996); R. ROOSEVELT THOMAS, JR., BEYOND RACE AND GENDER: UNLEASING THE POWER OF YOUR TOTAL WORK FORCE BY MANAGING DIVERSITY 33 (1991); Elsie Y. Cross, *Letters to the Editor: Managing Diversity*, 74 HARV. BUS. REV. 178 (Nov.-Dec. 1996).

97. Wheeler, *supra* note 88, at 8.

98. Winterle, *supra* note 83, at 21.

programs for women.⁹⁹ Thomas found that most of firms profiled in the popular press as diversity leaders had instituted some sort of networking or support group program for women or minorities by the early 1990s.¹⁰⁰

Figure 2:
The Rise of Cognitive Remedies: Diversity Practices

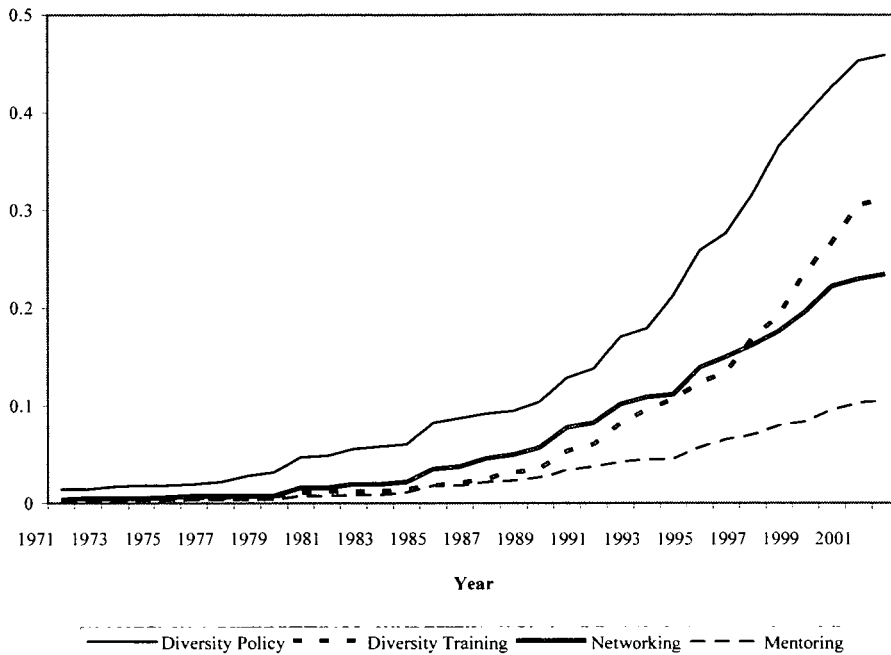


Figure 2 presents data from the survey I conducted with Alexandra Kalev in 2002, covering diversity practices among 829 companies between 1971 and 2002. About one-third of the employers we surveyed had diversity training programs by 2002. Twenty-three percent of firms had formal mentoring programs for women or minorities. Ten percent had mentoring programs for women or minorities. All four programs grew slowly during the 1980s, and in the 1990s diversity training skyrocketed, with some 25% of employers adding such programs after 1990. While the courts did not weigh in on diversity training, it is clear that these measures originated as mechanisms for handling equal opportunity issues in the context of

99. MILLER, *supra* note 70.

100. Thomas, *supra* note 82.

the new definition of discrimination that the cognitive revolution in the social sciences had promoted.¹⁰¹

VII. CONCLUSION

How has social-scientific thought shaped the evolution of corporate anti-discrimination measures in the United States and France? In the United States, changes in social-scientific thinking have been paralleled by changes in corporate practice and legal interpretation, such that anti-discrimination practices and our understanding of discrimination have evolved in tandem. It may seem quite natural that the law has followed changes in the social-scientific understanding of discrimination. But it is not the case everywhere. In France, the legal definition of discrimination scarcely changed between passage of the law of July 1, 1972, outlawing hiring and firing decisions based on race, and legislative revisions in the fall of 2001. Moreover, employers have done little to fight discrimination—they have not adopted new anti-discrimination measures in the wake of the institutional and cognitive revolutions in social-scientific thought.

I argue that the fragmentation and porousness of the American state created openings for a series of new ideas in the social sciences to filter into discrimination law. State fragmentation did this by creating, within the firm, a semi-professional group devoted to tracking and anticipating changes in the meaning of discrimination, and institutionalizing personnel practices to comply with potential shifts. This permitted social science thinking to color the evolution of corporate practice, and also of case and administrative law. Over time, the core ideas from the institutional and cognitive revolutions in the social sciences were incorporated into business practices and some found their way, eventually, into the law. One consequence of state fragmentation was that employers could not get a fix on how the courts and administrative agencies would define discrimination, or on what sorts of programs and practices they would accept as inoculation against discrimination suits. In consequence, human resources experts have been on the front lines, adapting practices from their arsenal to fight discrimination. For them, the project is one of professional expansion and consolidation, for as a group they soon recognized their collective interest in expanding anti-discrimination efforts and thereby expanding their staffs and their authority within the corporation.

101. Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management*, 41 AM. BEHAV. SCIENTIST 960 (1998).

The institutional revolution that swept across the social sciences in the 1970s suggested that institutional structures shape social outcomes. In sociology, structural theorists of stratification argued that organizational characteristics influence attainment—that hiring practices and promotion practices may have direct, and indirect, effects on individual careers.¹⁰² In labor economics, Doeringer and Piore's analysis of internal labor markets focused on firm practices and their implications for careers. Employers and personnel consultants were influenced by these ideas, and this led them to experiment with structural solutions to the problem of discrimination; formalizing hiring, evaluation, and promotion practices and eliminating practices that had the unintended consequence of discriminating. Courts and administrative agencies were also influenced by this revolution. They came to favor class action suits over individual complaints—suits that identified a pattern of discrimination that was, typically, built into hiring, promotion, and disciplinary procedures.

In the 1980s and 1990s, the social sciences underwent a cognitive revolution, which entailed rethinking the bases of social behavior at the levels of individual cognition and collective cognitive schemas. This revolution had two implications for theories of workplace stratification. One implication was that managers' cognitive schemas might prevent them from treating workers fairly despite their best efforts to do so. Managers' cognitive maps of the world shape how they see, and interact with, workers of different genders, races, and ethnicities. And importantly, managers will tend to see people with the same characteristics as existing managers, in terms of race and gender, as best able to perform the organization's most important jobs. The second implication is that employees' sense of self and worth are shaped by broader stereotypes, and by corollary that members of disadvantaged groups will tend to buy into stereotypes about their groups and will perform less well than they might otherwise and set their sights on lower occupational goals than they might otherwise. Stereotyping cuts both ways. This revolution as well found its way into organizational practice and legal precedent. The new wave in anti-discrimination practice was diversity training, designed to redraw the cognitive maps of managers, and mentoring programs, designed to provide members of disadvantaged groups with

102. James N. Baron, *Organizational Perspectives on Stratification*, 10 ANN. REV. SOC. 37 (1984).

role models who would give them a positive vision of their own status group and of their chances for success.

In American firms, changes in employment practices were often anticipatory. Personnel experts argued that the law would move toward a more institutional, and later toward a more cognitive, interpretation of discrimination. Hence, employers moved en masse toward practices that fought discrimination on the basis of that new interpretation of its meaning, and the courts often came to the party only after large numbers of employers had already arrived. The courts accepted formal internal labor market mechanisms as a first defense against discrimination only after many firms had already put them into place. In the case of sexual harassment, the courts gave the nod to formal grievance mechanisms only after some 90% of middling to large employers already had such mechanisms in place.

While the initiative appeared to be with employers, in fact the structure of state policymaking produced this pattern, for it was only because personnel managers could credibly tell executives that the law was a moving target that they could win executive support for new anti-discrimination measures that anticipated where the courts might move in the future.

These changes in employer practice were not paralleled in France, where anti-discrimination law has evolved little since it was adopted in the early 1970s, with a focus on race-blindness, on individual remedies, and on criminal rather than civil avenues of redress. It is not only that the law did not much change in France, but that French employers knew that they would not be held responsible for forms of discrimination that were not yet envisioned by the state. Thus the original legislation did not produce a semi-professional corps of anti-discrimination experts intent on divining what the future would hold.

