



DISCRIMINATION AT WILL: JOB SECURITY
PROTECTIONS AND EQUAL EMPLOYMENT
OPPORTUNITY IN CONFLICT

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The conventional wisdom amongst scholars and advocates of employment discrimination law is that the success of Title VII is significantly hampered by the enduring doctrine of employment at will. As long as employers have broad discretion to fire employees for any reason, no reason, or a bad reason, employers can easily get away with terminating or refusing to promote racial minorities and women as long as some credible nondiscriminatory reason, such as personal animosity, can be presented. This account feeds the widely accepted view that employment at will and the goals of Title VII, namely equal employment opportunity, are at odds. This Article challenges this piece of conventional wisdom by showing how job security protections can also exacerbate racial inequality in employment. It examines the recent race riots and student protests against proposed labor law changes in France to unearth the tension between combating racial discrimination in hiring and protecting all employees' job security. Scholars and advocates of employment discrimination law should be aware of the ways in which both employment at will and job security protections can function in different contexts to exacerbate racial inequalities in employment. Such awareness should encourage the development of a broader perspective on equal employment opportunity that moves beyond the limited set of problems that are identified by the litigation of employment discrimination cases.

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INTRODUCTION

Is employment at will bad for racial minorities? Ever since Title VII of the Civil Rights Act of 1964¹ was proposed, the tension between employment discrimination law and employment at will has been noticed.² Recent empirical work shows that employment discrimination plaintiffs lose a lot,³ and one widely shared explanation is that their cases are extremely difficult to win

1. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

2. When Title VII was being debated, conservatives' main objection to the legislation was that it would interfere with employers' freedom of contract. *See* H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2431-62 (minority report).

3. *See* Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

because of the enduring rule of at-will employment.⁴ Many scholars have argued or assumed that racial minorities would fare better under a for-cause employment regime, one that protects the legal right of all employees to job security.⁵

This Article challenges the notion that for-cause employment would enhance equal employment opportunity for racial minorities. It explains how a regime of general protections for all employees' job security, like those prevalent in many European countries, can, over time, severely undermine racial equality in access to employment.

France's recent problems are instructive. French employment law made U.S. headlines in March 2006,⁶ as over a million people across the country staged massive demonstrations against a law⁷ that would have introduced a small dose of at-will employment into the French workplace. Departing from the Labor Code's general protection of employee job security, the March 2006 law permitted employers to hire persons under the age of twenty-six for a period of two years, during which the employee could be terminated for any reason. The *contrat première embauche* (CPE), or "first employment contract" provision, as it was known, was ultimately rescinded by the government in response to three weeks of nationwide strikes and unrest.⁸

An important fact that was largely ignored by American press accounts is that the proposal to allow at-will employment in limited circumstances was part of the law on "equality of opportunities,"⁹ adopted in direct response to the

4. See William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305 (1996); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177 (2003); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995); Parker, *supra* note 3.

5. See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 156 (2003); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996); Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351 (2001).

6. See, e.g., Molly Moore, *Top French Tribunal Upholds Jobs Law*, WASH. POST, Mar. 31, 2006, at A13; Sebastian Rotella & Achrene Sicakyuz, *1 Million Across France March to Oppose Premier's Key Labor Law*, L.A. TIMES, Mar. 29, 2006, at A21; Elaine Sciolino & Craig S. Smith, *Protests in France over Youth Labor Law Turn Violent*, N.Y. TIMES, Mar. 29, 2006, at A12; Craig S. Smith, *Opponents of New French Labor Law Step Up Protests*, N.Y. TIMES, Mar. 21, 2006, at A9.

7. See Law No. 2006-396 of Mar. 31, 2006, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 2, 2006, p. 4950, art. 8.

8. See Elaine Sciolino, *Chirac Will Rescind Labor Law That Caused Wide French Riots*, N.Y. TIMES, Apr. 11, 2006, at A1. The legislature eventually adopted a new law that replaced the article that contained the CPE provision. See Law No. 2006-457 of Apr. 21, 2006, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 22, 2006, p. 5993.

9. See Law No. 2006-396 of Mar. 31, 2006, Journal Officiel de la République

violent race riots throughout France in the fall of 2005.¹⁰ These riots also flooded U.S. newspaper headlines,¹¹ as the French government declared a state of emergency in response to levels of unrest not seen since the student protests of May 1968.¹² Seeking to alleviate the mass unemployment of North African youths, the at-will employment provision of the Equality of Opportunities law was intended to enhance the employment prospects of disadvantaged minorities.

The French experience provides a counterweight to American understandings of the relationship between employment discrimination and employment at will, which are predominantly shaped by litigation experience. In France, the strengthening of job security protections in the Labor Code over the last thirty years has coincided with reforms to strengthen employment discrimination law. Yet, the racial gap in employment has only expanded during this period. The historical and current sociological data support the conclusion that the Labor Code's employee job security protections have contributed significantly to employers' propensity to engage in both rational and irrational discrimination against racial minorities in hiring. The recent controversies in France, from race riots to student strikes, should inform American approaches to reforming employment law to eradicate racial inequality in employment.

Part I articulates the predominant view amongst American scholars that at-will employment is at odds with the goals of employment discrimination law. It begins by establishing that equal employment opportunity has long been understood to be the primary goal of Title VII.

Part II contrasts the goals justifying U.S. employment discrimination law with those underlying French employment discrimination law. In France, the Labor Code's prohibition of discrimination in employment is not about group-based disadvantage: it is part of a general protection of employees' rights

Française [J.O.] [Official Gazette of France], Apr. 2, 2006, p. 4950.

10. The initial report proposing the bill began with a discussion of the need to respond to the problems of unemployment and discrimination that had motivated the riots. See Laurent Hénart, Rapport no. 2825 fait au nom de la commission des affaires culturelles, familiales, et sociales sur le projet de loi (no. 2787) pour l'égalité des chances 7 (Jan. 25, 2006), available at <http://www.assemblee-nationale.fr/12/rapports/r2825.asp>.

11. The increasing violence of the riots, and their spread throughout the nation, were reported almost daily in most of the major U.S. newspapers for about two weeks in November 2005, often on the front page. See, e.g., Cassell Bryan-Low & John Carreyrou, *France Authorizes Curfews as Riots Cast Doubt on Its Policing System*, WALL ST. J., Nov. 8, 2005, at A1; David Ignatius, Op-Ed., *Why France Is Burning*, WASH. POST., Nov. 9, 2005, at A31; Craig S. Smith, *Chirac Appeals for Calm as Violent Protests Shake Paris's Suburbs*, N.Y. TIMES, Nov. 3, 2005, at A11. The riots also caught the attention of U.S. legal scholars. See Posting of Richard Posner to the Becker-Posner Blog, *The French Riots*, http://www.becker-posner-blog.com/archives/2005/11/the_french_riot.html (Nov. 13, 2005, 6:08 P.M.).

12. Mark Landler, *France Declares Emergency; Curfews to Be Imposed*, N.Y. TIMES, Nov. 9, 2005, at A12.

against arbitrary treatment by the employer. This very bundle of employee rights encompasses the right to job security.

Part III establishes that the widespread race riots throughout France were a reaction, in large part, to the problem of the mass unemployment of French people of North African origin residing in the suburbs of major cities. It then argues that French employee job security protections have, over the last thirty years, exacerbated racial disadvantage in access to employment.

Part IV explains why at-will employment was proposed in France in order to alleviate racial inequality and promote equal opportunity. It also explains the logic of the massive social movement that resisted and ultimately killed the at-will provision.

Parts V and VI draw insights from the French experience that illuminate a rethinking of American law's pursuit of equal employment opportunity. The central lesson is that limiting employer discretion in termination can exacerbate discriminatory tendencies in hiring. As a result, no reforms should be undertaken without considering their broader potential effects on the political economy of employment and their consequences for racial minorities' access to jobs. Such considerations may require broader, long-term approaches to equal employment opportunity that move beyond the narrow lens of civil litigation.

I. TITLE VII AND EMPLOYMENT AT WILL: AN UNEASY COEXISTENCE

A. Title VII's Goal: Equal Employment Opportunity

The goal of employment discrimination law in the United States is equal employment opportunity, defined in light of the historical circumstances that gave rise to Title VII.¹³ So understood, equal employment opportunity means eradicating the disadvantages of excluded and subordinated groups in acquiring and retaining jobs.¹⁴ More specifically, the primary goal of Title VII, the first employment discrimination statute, was to eradicate *race*-based disadvantages, particularly the severe disadvantages faced by African Americans.¹⁵ As Alfred Blumrosen observed in 1968, the crucial social fact giving rise to Title VII was the disproportionately high unemployment rate among blacks.¹⁶

Title VII also prohibited discrimination on the basis of sex, national origin, and religion,¹⁷ expressing the message that employment disadvantage on the basis of membership in these groups was also unacceptable. But it is clear that

13. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979).

14. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

15. See *United Steelworkers*, 443 U.S. at 203.

16. See Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 465 (1968) (attributing this goal to the Truman Committee on Civil Rights in 1947).

17. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000).

the main impetus for passing Title VII was a growing civil rights movement whose primary goal was to undo racial segregation and its disadvantaging effects on African Americans in education and employment.¹⁸ Indeed, the Civil Rights Act of 1964, of which Title VII was part, was a comprehensive federal statute attempting to eradicate various aspects of racial segregation and black disadvantage in voting, employment, education, and public accommodations.¹⁹

So, naturally, the eradication of race-based disadvantage has been articulated, both by scholars²⁰ and by the Supreme Court,²¹ as the main goal of employment discrimination law. Although employment discrimination law has been extended to other groups, the history of group-based disadvantage has always been an important background for the interpretation of the antidiscrimination norm. Although the statute protects employees as individuals, it does so only insofar as the individual has been treated badly *as a member of a group*, and does not protect the individual from all forms of arbitrary and unjustified treatment by the employer. These features of U.S. employment discrimination law, as we shall see, make it distinctive.²²

B. *Employment at Will and Its Limits*

The rule of employment at will allows either the employer or the employee to terminate the employment relationship at any time for good reason, bad reason, or no reason. As is well known, the legal right to fire for bad reasons is

18. See HUGH DAVIS GRAHAM, *CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS, 1960-1972*, at 53-56 (1992).

19. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6 (2000).

20. The classic statement to this effect was made by Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (arguing that the Equal Protection Clause should be understood to prohibit group-disadvantaging state action). Cynthia Estlund has argued that Title VII should be understood as an “equal protection clause for the workplace.” Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 331 (2005); see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 40-41 (2006) (arguing that the best explanation for employment discrimination law is its reflection of a broad goal of social change to eliminate group-based status inequalities).

21. In *Griggs v. Duke Power Co.*, the Supreme Court, in inventing the disparate impact theory of liability, saw Title VII as requiring “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” 401 U.S. 424, 431 (1971). The Supreme Court reaffirmed the view that the goal of Title VII was to eradicate group-based disadvantage in access to employment in *United Steelworkers of America v. Weber*, in holding that voluntary employer affirmative action policies did not violate Title VII. The Court characterized the goals of the Civil Rights Act as “the integration of blacks into the mainstream of American society.” 443 U.S. 193, 202 (1979).

22. For a more detailed discussion of the distinctive features of U.S. antidiscrimination law as compared with the French model, see Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295 (2007).

not absolute;²³ both legislatures and courts have rendered some reasons for termination illegitimate.

Title VII is perhaps the most salient example. Title VII prohibits the employer from terminating an employment relationship based on the employee's race, color, sex, religion, or national origin.²⁴ Other antidiscrimination laws, state and federal, also protect against discrimination on the basis of disability,²⁵ age,²⁶ or sexual orientation.²⁷ The antidiscrimination exceptions to employment at will embody a policy against employment decisions based on traits that have been, but should not be, a basis for group disadvantage.²⁸

The National Labor Relations Act prohibits employers from taking adverse actions against employees due to their union membership or activities.²⁹ State whistleblower statutes protect employees' rights to speak out with regard to the employer's illegal activities.³⁰ And many state courts have invalidated or provided remedies for wrongful termination when the termination is against public policy, such as a termination in retaliation for an employee's reporting of a crime.³¹

Nonetheless, despite these restrictions on employer discretion, the employee protections are exceptions that coexist with the rule of at-will employment. For the most part, employers still retain broad firing discretion. In the early days of Title VII, some American labor and civil rights scholars believed or hoped that Title VII would be extended to encompass general job security protections for all workers,³² especially after the 1976 case of

23. Indeed, the defenders of employment at will view the limits imposed on it by antidiscrimination, labor, and wrongful discharge doctrine to be excessive. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 9 (1990); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996).

24. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

25. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

26. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000).

27. For instance, New York's employment discrimination statute includes sexual orientation as a prohibited category. See N.Y. EXEC. LAW § 296 (McKinney 2007).

28. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1669 (1996).

29. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000).

30. For example, New York has a whistleblower statute, N.Y. LAB. LAW § 740 (McKinney 2007), and New Jersey has a Conscientious Employee Protection Act that protects employees who engage in whistle-blowing activities, N.J. STAT. ANN. §§ 34:19-1 to 19-8 (West 2007).

31. See, e.g., *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

32. See Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519, 520 (1978) ("[T]he common law rule of employer discretion has been superseded by the principle that personnel decisions must be based on just cause. The just cause standard arose initially under Title VII . . ."); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40

McDonald v. Santa Fe Trail Transportation Co. read Title VII to prohibit race-based discrimination against whites.³³ But to the dismay of many critics of employment at will,³⁴ no universal ban on arbitrary discharge has emerged.³⁵ An employee cannot be fired on the basis of race, but she can be fired for wearing a hairstyle that the employer doesn't like.³⁶ An employee cannot be fired because he is black, but he can be fired if the boss personally dislikes him and he happens to be black.³⁷

C. *Employment at Will and Title VII Litigation*

Since Title VII was passed, allegations of discriminatory firing have been litigated far more frequently than allegations of discriminatory hiring.³⁸ Most of these cases are individual disparate treatment cases.³⁹ In the at-will universe, the Title VII plaintiff may allege that she was fired on the basis of race or sex but faces great difficulty in the doctrinal scheme of Title VII litigation if the employer claims that she was fired for all kinds of arbitrary reasons that are unrelated to job performance, as long as those arbitrary reasons are not group-based traits. Obviously, such a defense, if true, is legitimate in a world where at-will employment is the background norm. By contrast, suppose the background rule were a presumption of job security protection, whereby the employee could not be fired except for just cause, with just cause defined as an employee's job-related fault or an employer's significant economic hardship. Under such conditions, a personal animosity defense (to name one example of a bad reason) would not be a legitimate reason available to an employer-defendant in an employment discrimination lawsuit. Under a for-cause employment regime, an employer's inability to articulate and prove a *good*

OHIO ST. L.J. 1, 20 (1979) (arguing that *McDonnell Douglas*'s requirement that an employer-defendant put forth a "legitimate, nondiscriminatory reason" after a plaintiff's prima facie case effectively produced a just-cause standard).

33. 427 U.S. 273 (1976).

34. See, e.g., Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295 (2005); Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53 (2007); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

35. In the United States, the only state that adopts a just-cause standard for the discharge of employees by statute is Montana. See Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-901 (2005).

36. Cf. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (holding that an employer policy prohibiting employees from wearing all-braided hairstyles is not a violation of Title VII).

37. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

38. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991).

39. *Id.* at 998.

reason for terminating an employee would enable the employee plaintiff to prevail.

For the last fifteen years, employment discrimination scholars have argued that the goals of Title VII have been undermined by the endurance of the American doctrine of employment at will.⁴⁰ Although the critics of at-will employment acknowledge that the at-will rule is formally limited by Title VII and other exceptions,⁴¹ many scholars have argued that what remains of employment at will seriously undermines the effectiveness of employment discrimination law in bringing about race and gender equality in the workplace. Specifically, the background norm of employment at will affects the burdens of production and proof under the *McDonnell Douglas* framework when individual Title VII cases are litigated, often to the detriment of plaintiffs.

The notion that employment at will is a doctrinal barrier to the employment discrimination plaintiff's case was fully articulated after the Supreme Court's 1993 decision in *St. Mary's Honor Center v. Hicks*.⁴² In that case, Hicks, a black correctional officer, was subject to repeated and severe disciplinary actions after a new supervisor had come into office. The employee was eventually demoted and then discharged. Hicks brought a Title VII action, in which he presented a prima facie case under *McDonnell Douglas v. Green*.⁴³ The defendant proffered nondiscriminatory reasons that the district court found to be false. Nonetheless, the district court found for the defendant because the plaintiff had not proven that the employer's actions were "racially rather than personally motivated."⁴⁴

Prior to the *Hicks* case, Title VII plaintiffs alleging disparate treatment benefited from an effective presumption that discrimination had occurred based on circumstantial evidence if they were able to prove the elements of a *McDonnell Douglas* prima facie case. The employer would then have the burden of producing a legitimate nondiscriminatory reason for its decision. After *Furnco Construction Corp. v. Waters*⁴⁵ and *Texas Department of Community Affairs v. Burdine*,⁴⁶ some courts took this to mean that, if the employer gave reasons that were not credible, or if the employer gave no

40. See, e.g., Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990); Corbett, *supra* note 4; Derum & Engle, *supra* note 4; Estlund, *supra* note 28; Malamud, *supra* note 4; McGinley, *supra* note 5; Young, *supra* note 5.

41. For example, Cynthia Estlund points out that "the legal right to fire for bad reasons has been virtually decimated." Estlund, *supra* note 28, at 1655.

42. 509 U.S. 502 (1993).

43. Under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), a plaintiff could establish a prima facie case without direct evidence by proving (1) that he was a member of a protected group, (2) that he was qualified for the job, (3) he applied for the job and was rejected, and (4) the job continued to remain open. *Id.* at 802.

44. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993).

45. 438 U.S. 567 (1978).

46. 450 U.S. 248 (1981).

reason at all for its decision, the plaintiff would prevail.⁴⁷ However, *Hicks* held that, even if the employer puts forth a reason that is not worthy of credence, or no reason at all for its actions, the trier of fact is not required to find for the plaintiff. Unless the plaintiff proves that the employer's falsity or lack of reason stems from racial motivation (as opposed to, say, arbitrary personal hatred), *Hicks* held that the plaintiff would not be entitled to prevail.⁴⁸ The implication of *Hicks* was that the law permitted employers to act arbitrarily, irrationally, and hatefully, as long as the arbitrariness, irrationality, and hatred were not motivated by one of Title VII's protected categories, such as race.

Many scholars reacted to the *Hicks* decision by attacking employment at will.⁴⁹ They argued that, in a workplace where employers are permitted to terminate employees without just cause, arbitrary acts against members of racial minorities and women are not considered unlawful, however adversely these acts might affect them.⁵⁰ According to many commentators, the background norm of employment at will prevented courts from recognizing the situations in which arbitrary and adverse treatment of racial minorities could constitute racial discrimination. Some critics, like Ann McGinley, explicitly proposed the eradication of employment at will through federal or state

47. In *Furnco Construction Corp. v. Waters*, the Supreme Court stated that:

A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors [W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

438 U.S. at 577 (citation omitted).

In *Texas Department of Community Affairs v. Burdine*, the Court extended this reasoning by explicitly noting that a plaintiff can show that a discriminatory reason more likely motivated the employer than the proffered reason simply by showing that the proffered explanation was unworthy of credence. 450 U.S. 248, 256 (1981). As Malamud notes, the circuits applied *Burdine* very differently with regard to the question of whether a plaintiff who convinced the fact finder that the employer's proffered reason was false was then entitled to judgment as a matter of law. See Malamud, *supra* note 4, at 2234 n.23.

48. 509 U.S. at 519.

49. It should be noted, however, that scholars began to notice the significance of employment at will as a barrier to the success of Title VII prior to *Hicks*. See, e.g., Blumoff & Lewis, *supra* note 40, at 70-72.

50. See Corbett, *supra* note 4, at 330 (arguing that *Hicks* was evidence of the Supreme Court's refusal to displace employment at will to the extent necessary to effectuate Title VII's goal); Estlund, *supra* note 28, at 1679 (arguing that employment at will undermines Title VII); McGinley, *supra* note 5 (urging the adoption of a national discharge policy prohibiting employers from discharging an employee without just cause, for the sake of achieving race and gender equality); Young, *supra* note 5 (proposing greater general protections for employee job security, including prior notice of dismissal or pay in lieu of notice, in light of the collaborative role played by employment at will in the subordination of women and people of color). Deborah Malamud observed that "wrongful, or at least undefendable, employer actions are significant problems in the American workplace, even outside of the setting of actionable discrimination." Malamud, *supra* note 4, at 2255.

legislation,⁵¹ drawing on some foreign countries' laws protecting job security, which effectively prohibit termination except for good cause.⁵²

This critique has enduring salience in recent employment discrimination scholarship.⁵³ Building on the insights of law and economics scholars, Cynthia Estlund, in her important and acclaimed book, *Working Together*, argues that employers have perverse disincentives to hire racial minorities when Title VII operates in the context of employment at will.⁵⁴ Estlund builds on an insight first mentioned by Richard Posner and developed by John Donohue and Peter Siegelman with regard to the efficacy of Title VII: the possibility of discriminatory firing suits under Title VII leads the employer to avoid hiring minorities due to the possibility of incurring expenses in a Title VII-firing suit.⁵⁵ In their 1991 empirical study of employment discrimination litigation, Donohue and Siegelman showed that, since the early 1970s, firing cases under Title VII have overwhelmingly outnumbered hiring cases.⁵⁶ Under these conditions, a reasonable employer is likely to fear a firing case more than a hiring case, producing a net disincentive to hire racial minorities.⁵⁷ As Ian Ayres and Peter Siegelman put it, "protection against discriminatory firing acts as a kind of tax on hiring those to whom it is extended."⁵⁸ Estlund refers to this problem as the "at-will gap," arguing that these perverse disincentives arise largely due to the persistence of at-will employment.⁵⁹ The at-will employer can fire employees who are unprotected by antidiscrimination statutes without fear of liability but cannot fire protected employees without considering the cost of defending suit.⁶⁰ One solution, Estlund argues, is to move to a just-

51. See McGinley, *supra* note 5, at 1511-12; see also Young, *supra* note 5.

52. McGinley borrows from the job security laws of the Virgin Islands, France, and Germany. See McGinley, *supra* note 5, at 1511, 1514 n.413, 1519-21. McGinley acknowledges, however, that the labor laws of France and Germany are more restrictive of the employer's prerogative than her own proposal. *Id.* at 1520-21. Young notes that "the United States stands virtually alone among Western industrialized nations in its failure to furnish its workers adequate job security." Young, *supra* note 5, at 355; see also Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033 (1995); Madeleine M. Plasencia, Comment, *Employment at Will: The French Experience as a Basis for Reform*, 9 COMP. LAB. L. & POL'Y J. 294 (1988).

53. See ESTLUND, *supra* note 5; Derum & Engle, *supra* note 4 (arguing that both employment at will and the difficulties faced by Title VII in addressing unconscious bias have detracted from employment discrimination law's ability to combat discrimination); Slater, *supra* note 34.

54. See ESTLUND, *supra* note 5, at 152.

55. See *id.*; Donohue & Siegelman, *supra* note 38; Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987).

56. Donohue & Siegelman, *supra* note 38, at 1015, 1016 fig.6.

57. *Id.* at 1024.

58. Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489 (1996).

59. ESTLUND, *supra* note 5, at 156.

60. Estlund also develops this view in Estlund, *supra* note 28, at 1679.

cause regime for the sake of “refining the ‘equal protection clause’ of the workplace.”⁶¹

Regardless of one’s policy conclusion as to whether employment at will should be abolished in favor of a for-cause employment regime, most U.S. scholars seem to agree that the employment at will doctrine is in tension with employment discrimination law. This explains why Richard Epstein, a vocal defender of employment at will,⁶² has called for the repeal of employment discrimination law.⁶³

In other words, whether they come out in favor of a for-cause employment regime or not, most U.S. scholars see a conflict between the goals and principles underlying the employment at will doctrine and the goals and principles underlying employment discrimination law. Furthermore, many commentators assume that pursuing the goal of employment discrimination law (namely, giving disadvantaged groups access to good jobs) is contiguous with protecting all employees’ job security.⁶⁴ But the persistence of vast racial inequalities in employment in other post-industrial societies that have strongly protected employee job security challenges this assumption.

II. THE FRENCH ALTERNATIVE: REPUBLICANISM AND UNIVERSALISM IN EMPLOYMENT DISCRIMINATION LAW

France provides a fruitful resource for thinking about job security and racial inequality, particularly as recent waves of internationally noticed riots and strikes have highlighted these issues. From an American perspective, the sight of a massive social movement against a small dose of employment at will

61. ESTLUND, *supra* note 5, at 145.

62. See EPSTEIN, *supra* note 23.

63. *Id.* at 148.

64. See, e.g., Blumrosen, *supra* note 32, at 565; Peck, *supra* note 32, at 49. More recently, Cynthia Estlund argued that “the legal rights of employees and the corresponding limitations on employer power that have developed since 1964 provide rudimentary analogues to the constitutional rights of citizens as against the government[,]” suggesting that the right against discrimination is part of a more universal right. Estlund, *supra* note 20, at 332-33. Ann McGinley argues:

An employee who is discharged without just cause is an innocent victim of the employment at will doctrine. Dismissed employees suffer economic loss, relocation costs, depression, and loss of self esteem The average worker finds herself in the same position as that of blacks and women before the existence of the antidiscrimination laws.

McGinley, *supra* note 5, at 1500. McGinley sees the employee discharged for a bad reason as suffering essentially the same injury as an employee who is discriminated against on the basis of race, sex, or other group traits.

seems surreal,⁶⁵ since contingent employment with no legal protection of job security is the norm for American workers.⁶⁶

In France, by contrast, for-cause employment is the background norm that shapes other aspects of workplace regulation. Like U.S. law, French law also prohibits discrimination on the basis of group membership by employers.⁶⁷ But unlike U.S. law, French labor law considers the norm against discrimination as a natural extension of a general package of employee-rights protections. The norm against discrimination fits comfortably with the Labor Code's many limits on employer discretion,⁶⁸ which function to protect the rights of employees to job security and liberty in the workplace. As a result, although the law prohibits discrimination in hiring as well as disciplining and termination, the focus is on the protection of incumbent employees, rather than potential employees.

A. The Labor Code's Discrimination Provision

The French law that is analogous to Title VII's prohibition of employment discrimination under threat of civil liability⁶⁹ came into being through a statute on "the liberties of workers in the enterprise," which generally protected employees from the discretion of their employers. The 1982 law provided that "[n]o employee can be punished or terminated because of his origin, sex, family situation, or membership in an ethnicity, nation, or race, political opinions, union membership, or religious convictions."⁷⁰ Punishing or sanctioning a worker was defined by the statute as "any measure, other than verbal observations, taken by the employer after an act of the employee considered by the employer to be faulty, whether or not the measure immediately affects the presence of the worker in the enterprise, his function, his career, or his pay."⁷¹ The provision was later modified to prohibit discrimination in recruitment and hiring as well. Codified at Labor Code article L. 122-45, the version of this provision currently in force provides:

No person can be excluded from a recruitment procedure or from access to an internship or period of training in an enterprise, no employee can be

65. For a discussion of the French employment law controversy from an American perspective, see William Pfaff, *France: The Children's Hour*, N.Y. REV. BOOKS, May 11, 2006, at 40.

66. See Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L. & POL'Y J. 503 (1997) (detailing the unstable nature of most Americans' employment).

67. C. TRAV. art. L122-45.

68. See C. TRAV. art. L122-4 to 122-49.

69. Note that French law also imposes criminal liability for intentional discrimination in employment. See *infra* note 74.

70. Law No. 82-689 of Aug. 4, 1982, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 6, 1982, p. 2519.

71. *Id.*; see also C. TRAV. art. L122-40.

disciplined, terminated, or made the object of a discriminatory measure, direct or indirect, notably in matters of pay, training, placement, assignment, qualification, classification, professional promotion, change, or contract renewal because of his or her origin, sex, morals, sexual orientation, age, family situation or pregnancy, genetic characteristics, membership or non-membership, real or supposed, in an ethnicity, nation, or race, his or her political opinions, union activities, religious convictions, physical appearance, family name, or, with the exception of an inability confirmed by the medical inspector of labor, because of his or her state of health or handicap.⁷²

The French Labor Code's antidiscrimination provision prohibits "indirect" (or disparate impact) discrimination⁷³ as well as "direct" or intentional discrimination, and applies not only to hiring and firing, but to all the terms and conditions of employment, which are spelled out in the provision.

The French prohibition of discrimination in hiring and firing originated in a criminal provision,⁷⁴ still in effect, that was passed in 1972 as part of a comprehensive anti-racism statute.⁷⁵ The anti-racism statute was enacted

72. C. TRAV. art. L122-45 (translated by author). The French text reads:

Aucune personne ne peut être écartée d'une procédure de recrutement ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, notamment en matière de rémunération, au sens de l'article L. 140-2, de mesures d'intéressement ou de distribution d'actions, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat en raison de son origine, de son sexe, de ses moeurs, de son orientation sexuelle, de son âge, de sa situation de famille ou de sa grossesse, de ses caractéristiques génétiques, de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie, une nation ou une race, de ses opinions politiques, de ses activités syndicales ou mutualistes, de ses convictions religieuses, de son apparence physique, de son patronyme ou en raison de son état de santé ou de son handicap.

73. "Indirect" discrimination, a concept imported into French law from European directives which were themselves influenced by British law, corresponds roughly to the American notion of "disparate impact" discrimination, developed in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that facially neutral practices with a disproportionate impact on blacks violate Title VII if they cannot be justified by reference to business necessity).

74. C. PÉN. art. 225-2 makes discrimination punishable by three years' imprisonment or €45,000 when it consists of "refusal to hire, disciplining, and termination." Article 225-1 defines discrimination as

any distinction operated between physical persons by reason of their origin, their sex, their family situation, pregnancy, their physical appearance, their family name, their state of health, their handicap, their genetic characteristics, their morals, the sexual orientation, their age, their political opinions, their union activities, their membership or non-membership, real or supposed, in a particular ethnicity, nation, race, or religion.

C. PÉN. art. 225-1 ("Constitue une discrimination toute distinction opérée entre les personnes physiques à raison de leur origine, de leur sexe, de leur situation de famille, de leur grossesse, de leur apparence physique, de leur patronyme, de leur état de santé, de leur handicap, de leurs caractéristiques génétiques, de leurs moeurs, de leur orientation sexuelle, de leur âge, de leurs opinions politiques, de leurs activités syndicales, de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée.") Article 225-1 repeats the exact same language as applied to "moral persons," which includes corporations. *Id.*

75. Law No. 72-546 of July 1, 1972, Journal Officiel de la République Française [J.O.]

before the enactment of the civil prohibition of employment discrimination was added to the Labor Code. The rest of the provisions in the 1972 law against racism had little to do with employment. The law's focus was on intentional acts of racism, primarily hate speech, for which the law imposed criminal liability.⁷⁶

The French Labor Code's employment discrimination provision must also be understood in the context of the broader legal statutory package that accompanied it, as well as the regime of employment law into which it was inserted. The 1982 statute, establishing a civil remedy for discriminatory firing and disciplining in the workplace, was part of a series of legal reforms known as the "Lois Auroux." Named for the Labor Minister, Jean Auroux, these laws strengthened employee rights significantly, particularly with regard to job security and the employee's right to participation in the governance of the enterprise.

B. Employee Protection and Republican Citizenship

The reforms were premised on the principle that workers ought to be citizens and full participants in the enterprise.⁷⁷ The reforms were seen as an extension of the constitutional guarantee of the right to work. The Preamble to the 1946 Constitution declares that "[e]ach person has the duty to work and the right to employment,"⁷⁸ and that "[a]ll men may defend their rights and interests through union action and may belong to the union of their choice."⁷⁹ The Preamble also invokes the "right to strike," to be exercised within limits set by law.⁸⁰ It guarantees to all workers the opportunity to participate in the collective determination of their conditions of work and in the management of the workplace.⁸¹ The 1946 Preamble re-established the commitment to workers' rights that had been established by the Third Republic in 1936. The Matignon Accords, adopted by Prime Minister Léon Blum's government in that

[Official Gazette of France], July 2, 1972, p. 6803.

76. The 1972 law modified the freedom of the press statute of 1881, which already prohibited attacks in the press against racial and religious groups. The 1972 statute strengthened this regulation of racist speech by criminally prohibiting speech provoking racial hatred, as well as defamation and insults of a racial nature, when they were targeted at individuals belonging to these groups in addition to the groups themselves. *Id.* arts. 1-4. That statute, the first law prohibiting discrimination, implemented France's obligations under the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

77. JEAN AUROUX, *LES DROITS DES TRAVAILLEURS, RAPPORT AU PRESIDENT DE LA REPUBLIQUE ET AU PREMIER MINISTRE* 7 (1981), available at <http://www.vie-publique.fr/documents-vp/auroux.pdf>.

78. 1946 CONST. pmbl.

79. *Id.*

80. *Id.*

81. *Id.*

year, guaranteed French workers a forty-hour workweek and two weeks of paid vacation a year.⁸² The 1946 Preamble has been incorporated into the constitution that is currently in force.

The purpose of the 1982 law was to protect workers' rights to exercise their "public liberties" in the workplace.⁸³ It was understood that the public rights of workers necessitated the regulation of employer discretion, particularly the disciplinary power of the employer. The statute had three main components: First, it required all employers with more than twenty employees to establish internal written rules of conduct for employees,⁸⁴ making explicit the conduct that could be punished by the employer. Second, it protected the employees from being punished by the employer for certain reasons, limiting the employers' discretion.⁸⁵ Third, it protected the right of employees to express their opinions with regard to the conditions of work in the enterprise.⁸⁶

All three components of the law were consistent with a conception of the worker as an equal citizen of the enterprise. One of the main provisions of the statute was to protect the freedom of expression of workers, guaranteeing the employee a right to "direct and collective expression" on matters having to do with the conditions of work,⁸⁷ by declaring that the expressed opinions of an employee, regardless of his or her place in the professional hierarchy, could not motivate a punishment or termination of the worker. Furthermore, Auroux's report proposing the law argued that workers ought to be agents of change with regard to decisions that directly affected them.⁸⁸ Thus, the Auroux law's prohibition of discrimination has to be read in light of this conception of the employee as a citizen of the enterprise, who had rights not to be treated arbitrarily as well as rights to participation in decisions that affected him or her.

The 1982 Auroux laws built on a Labor Code that already protected employee rights to job security. For over one hundred years, French law has limited arbitrary dismissals, so the protection against wrongful discharge is much older than the regulation of employment discrimination. Shortly after employment at will became the default rule in most U.S. jurisdictions at the end

82. See JEAN PÉLISSIER, ALAIN SUPLOT & ANTOINE JEAMMAUD, *DROIT DU TRAVAIL* 17 (23d ed. 2006). These protections have only gotten better for French employees. As of 2000, French employees enjoyed a thirty-five-hour workweek and five weeks of paid vacation annually. See C. TRAV. art. L212-1, L223-4.

83. AUROUX, *supra* note 77, at 7.

84. Law No. 82-689 of Aug. 4, 1982, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Aug. 6, 1982, p. 2518.

85. *Id.* arts. 1-6.

86. *Id.* arts. 7-10.

87. See AUROUX, *supra* note 77, at 8-9; see also Law No. 82-689 of Aug. 4, 1982, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Aug. 6, 1982, p. 2520. Article 7 added Title VI to Book IV of the Labor Code, which protected the employees' right to expression in defining actions towards improving the conditions of work in the enterprise. *Id.*

88. AUROUX, *supra* note 77, at 15.

of the nineteenth century,⁸⁹ the legal protection of employees from arbitrary discharge began to emerge in France. In 1906, one civil court held that an employer's discharge of an employee based on the employee's religious or political beliefs was an abuse of right.⁹⁰

Throughout the twentieth century, several laws and decrees protected employees from various forms of unjust discharge. One law shortly after World War II prohibited discharge based on one's military service or performance of other public duties.⁹¹ The following year, a statute regulating collective bargaining agreements guaranteed workers' rights to unionize and to liberty of opinion,⁹² effectively making it illegal to discharge an employee on the basis of union participation. A few years later, a decree prohibited employers from terminating women based on their having taken maternity leave. It protected from discharge women who took leave from six weeks before delivery until eight weeks after.⁹³

Furthermore, a 1958 statute imposed on employers the obligation of notice,⁹⁴ and a 1967 ordinance authorized severance pay in the case of termination.⁹⁵ In 1973, the legislature adopted a Labor Code provision that imposed on employers the obligation to justify any termination by a true and serious cause, whether it was individual or economic.⁹⁶ Before 1973, the employee bore the burden of proving that a termination was an abuse of right in order to be entitled to damages. After 1973, the employer bore the burden of proving that the termination was justified by a true and serious cause, in order to avoid paying damages.

Today's Labor Code imposes a variety of procedural and substantive duties on employers undertaking to terminate an employee. For starters, the Labor Code severely restricts the circumstances under which employers can enter into temporary employment contracts, known as contracts for a specified duration.

89. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125-26 (1976) (arguing that the American at will rule emerged and was solidified in treatises around the 1870s).

90. Cour d'appel [CA] [regional court of appeal] Lille, Feb. 19, 1906 [1909] D.P. II 121.

91. Law No. 49-1092 of Aug. 2, 1949, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 6, 1949, p. 7713.

92. Law No. 50-205 of Feb. 11, 1950, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 12, 1950, p. 1688.

93. Decree No. 55-156 of Feb. 2, 1955, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 3, 1955, p. 1241.

94. Law No. 58-158 of Feb. 19, 1958, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 20, 1958, p. 1858. For a discussion of this law, see PÉLISSIER ET AL., *supra* note 82, at 20.

95. Ordinance No. 67-581 of July 13, 1967, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 19, 1967, p. 7241.

96. Law No. 73-3 of July 13, 1973, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 18, 1973, p. 7763. See generally PÉLISSIER ET AL., *supra* note 82, at 22.

Such contracts are prohibited for jobs related to the normal and permanent activity of an enterprise.⁹⁷ The law only allows fixed-term contracts for work that is temporary, such as replacing an absent employee, a temporary project of the enterprise, or seasonal work, to name a few examples.⁹⁸ All other contracts must be “contracts for an unspecified duration,” and can be terminated at any time by either party, subject to (very extensive) regulations by the Code.⁹⁹

The Labor Code’s regulations prohibit arbitrary dismissals and impose employer costs on carrying out just-cause dismissals. If an employee is dismissed for any reason other than “serious fault,” the Labor Code entitles the employee to a period of notice of one month if he has been with the employer for at least six months, and two months if he has been with the employer for at least two years.¹⁰⁰ The notice is required even when the termination is justified by a “real and serious cause,” including economic difficulty. If the notice period is not observed, except in instances of serious fault, the employee is entitled to damages independent of the severance pay. The Labor Code also strictly regulates severance payments. Except in cases of serious fault, a terminated employee who has worked for the employer for at least two years is entitled to minimum severance payments calculated by regulations.¹⁰¹

The Labor Code further requires an employer proposing termination to send a letter and summons to the employee.¹⁰² The letter must explain the reasons for the proposed termination. The employee is thus summonsed to an interview, during which the employer gives the reasons for the proposed decision.¹⁰³ This process applies even when the employer proposes to terminate employees as part of a reduction-in-force of at least ten employees within a period of thirty days for economic reasons.¹⁰⁴ If the dismissal falls within this category, the economic reasons have to be authorized by the competent administrative authority in order for the termination to be deemed justified.¹⁰⁵ If a termination is unjustified, the employee will be entitled to tort damages¹⁰⁶ and/or reintegration into the job from which he was wrongfully terminated.¹⁰⁷ Finally, even if the termination is justified, either by economic reasons or “true and serious cause,” the law still requires the employer to pay severance.

There are also rules governing the burdens in litigation challenging terminations. In the case of an economically motivated termination, the

97. C. TRAV. art. L122-1.

98. *Id.*

99. C. TRAV. art. L122-4.

100. C. TRAV. art. L122-6.

101. C. TRAV. art. L122-9.

102. C. TRAV. art. L122-14.

103. *Id.*

104. *Id.*

105. *Id.*

106. C. TRAV. art. L122-13.

107. C. TRAV. art. L122-4-4.

employer is required to follow various procedural and evidentiary rules before committees representing personnel and the relevant administrative agencies.¹⁰⁸ These same burdens apply if a judicial proceeding is brought challenging an economically motivated termination.¹⁰⁹ If there is any doubt, the presumption lies in favor of the employee.¹¹⁰

The antidiscrimination provision of the Labor Code reflects the understanding that what's really wrong with employment discrimination is not the harms it occasions on racial or ethnic subgroups of the population, but the harm to certain universal ideals, such as right of all persons to be free from arbitrary mistreatment in the workplace. Firing or disciplining someone because of their race is wrong because race is an arbitrary criterion on which to make an employment decision. On this logic, however, race is not the only arbitrary criterion on which to make an employment decision—nor is it the worst arbitrary criterion. It is equally wrong, then, to fire or discipline an employee on the basis of other characteristics that should not be considered, such as physical appearance, family name, age, and so forth. Furthermore, this reasoning attributes no particular significance to the history of racism, sexism, or other group-based animus in France as a justification for the employment discrimination provision; the provision is justified by reference to universally applicable ideals of liberty and equality.

France's universalistic approach to the problem of employment discrimination is, in part, the product of a larger race-blind approach to equality. The French guarantee of employees' rights to dignity and non-arbitrary treatment stems from the French conception of republican citizenship. To envision the worker as a citizen of the enterprise is to extend the French ideal of political citizenship to the workplace.¹¹¹ In this respect, French employment law does what many American employment law scholars propose:¹¹² it regards the workplace as a place where citizenship values are fostered.

Under the French Constitution, the equality of citizens means that citizens cannot be distinguished on the basis of any arbitrary characteristics, including race. The constitution explicitly prohibits the recognition of any distinctions of race,¹¹³ and a 1978 statute prohibits the gathering or storing of data that

108. C. TRAV. art. L321-2.

109. C. TRAV. art. L122-14-3.

110. *Id.*

111. AUROUX, *supra* note 77, at 6.

112. See, e.g., Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 51-55 (2000); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-88 (2000); Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373, 424 (2006).

113. The Preamble to the 1946 constitution, which has been incorporated into the 1958 constitution that is currently in force, reads:

Following the victory won by free people over regimes that attempted to enslave and degrade the human person, the French people proclaim again that every human, without distinction of

classifies persons on the basis of their origins.¹¹⁴ The French principle of race-blindness is far more rigid than the American norm against racial classifications.¹¹⁵ As a result, all public policy solutions to the problem of racial inequality in France are race-neutral and universalistic. Race-based affirmative action is out of the question,¹¹⁶ as are any measures that target benefits to members of groups classified by their origin.

III. RACE RIOTS AND MINORITY UNEMPLOYMENT

A. Race Riots

For several weeks in November 2005, many young people in the poorest urban areas throughout France participated in waves of violence. These events brought racial inequality to the forefront of French public debate. The riots were precipitated by the death of two young North African men who were accidentally electrocuted while hiding in a dangerous location for fear of being harassed by the police.¹¹⁷ It was a well-known fact that young North Africans were frequently subject to police harassment in the *banlieues*,¹¹⁸ the poverty-stricken areas in the suburbs of major French cities, where many public housing projects are located. After these deaths, many young people in the *banlieues* burned cars, burned schools, and had violent confrontations with the police.

The predominant understanding by French intellectuals, politicians, and the media was that the violence was not only a protest against this particular event

race, religion, or belief, possesses inalienable and sacred rights. It solemnly reaffirms the rights and liberties of man and citizen consecrated by the Declaration of Rights of Man of 1789 and the fundamental principles recognized by the laws of the Republic.

The passage, in the original reads:

Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés. Il réaffirme solennellement les droits et libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la République.

1946 CONST. pmbl. (author's translation).

114. Law No. 78-17 of Jan. 6, 1978, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 7, 1978, pp. 227, 229.

115. For comparisons of French and American race-blindness, see Erik Bleich, *Anti-Racism Without Races: Politics and Policy in a "Color-Blind" State*, in RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 162 (Herrick Chapman & Laura L. Frader eds., 2004); Robert C. Lieberman, *A Tale of Two Countries: The Politics of Color-Blindness in France and the United States*, in *id.* at 189; Suk, *supra* note 22.

116. However, affirmative action programs based on socioeconomic disadvantage, measured by residence in designated geographical areas, have been introduced.

117. See 22 *Held for Riots in France*, N.Y. TIMES, Oct. 31, 2005, at A10.

118. See Fabien Jobard, *Sociologie politique de la « racaille »*, in EMEUTES URBAINES ET PROTESTATIONS: UNE SINGULARITE FRANCAISE 59, 73 (Hugues Lagrange & Marco Oberti eds., 2006).

of police harassment, but rather, an angry reaction to all that is wrong with life in the *banlieues*. The most cited fact was the high rate of unemployment in these areas.¹¹⁹ The unemployment rate is disproportionately higher for members of visible minority groups in France than for others.¹²⁰ Although statistical data with regard to racial and ethnic minorities is rare in France, due to the force of all the legal norms against making race-based legal distinctions or collecting race-based data, limited studies by sociologists provide some evidence of racial disparities in France.

B. Unemployment

Sociologists estimate the unemployment rate in the heavily North African *banlieues* at about 40%. First- and second-generation North African immigrants also typically confront failing schools, increased segregation, discrimination in hiring, everyday racism, police harassment, and increasing levels of incarceration amongst young men in the *banlieues*.¹²¹ In reporting on the riots, the *New York Times* interviewed several immigrants in the *banlieues* who complained of discrimination in employment. One Kader, age twenty-three, said, "On paper we're all the same, but if your name is Mohamed, even with a good education, you can only find a job as a porter at the airport."¹²²

It is undisputed that North African immigrants and French citizens of North African descent fare worse in their employment prospects than French citizens of European descent. Because of the strong norms against collecting statistical data that classifies persons by race, class, and origin, the data supporting this conclusion is by no means comprehensive. Nonetheless, the statistics that have been collected are consistent with the inference that, by most measures, persons of North African descent are disadvantaged in employment relative to other residents of France.

Some statistical data collected through voluntary surveys are available from the *Institut national de la statistique et d'études économiques* (INSEE, or National Institute for Statistics and Economic Studies), which produces an annual study of immigrants in France. Foreigners from non-EU countries have an unemployment rate of 25.1%, as compared to 8.3% for French citizens, and 7.4% for foreigners from EU countries.¹²³ As for second-generation

119. See, e.g., Laurent Mucchielli & Véronique le Goaziou, *Inégalités, humiliations collectives et violences urbaines*, in L'ETAT DES INEGALITES EN FRANCE 2007 at 199, 201 (Louis Maurin & Patrick Savidan eds., 2006).

120. See *infra* notes 123-24.

121. Stéphane Beaud & Michel Pialoux, *La "racaille" et les "vrais jeunes": critique d'une vision binaire du monde des cités*, in BANLIEUE, LENDEMAIN DE REVOLTE 17, 18-20 (Chakri Belaïd ed., 2006).

122. Craig S. Smith, *Angry Immigrants Embroil France in Wider Riots*, N.Y. TIMES, Nov. 5, 2005, at A1.

123. INSEE, *Enquête Emploi, 2002*, in L'ETAT DES INEGALITES EN FRANCE 2007, *supra*

immigrants, the unemployment rate for persons born in France to two North African parents was 20.1%, as compared with 10.2% for French men born of two French-born parents.¹²⁴

INSEE also studied unemployment rates for foreign residents of France between the ages of thirty and thirty-nine. It is not surprising that the unemployment rate for all foreigners is, at 23.7%, more than double the national unemployment rate. But some foreigners do better than others. The study shows unemployment rates for Algerians (37.3%), Moroccans (35.4%), Tunisians (35.8%), other nationalities of Africa (36.8%), and Turks (31.6%), respectively. Compare this to the unemployment rates for foreign residents in France from Spain (15.1%), Italy (13.8%), and Portugal (10.1%). Foreigners of Vietnamese, Laotian, and Cambodian descent in this age group had an unemployment rate of 23.7%.¹²⁵

Another public research body, the *Centre d'études et de recherches sur les qualifications* (CEREQ), produced a study in 2004 of young people who had finished their education and attempted to enter the workforce in 1998. The data was compiled based entirely on voluntary responses to questionnaires administered by phone or mail to a random sampling of about a third of the 1.2 million young people entering the workforce.¹²⁶ Based on this data, statisticians have concluded that a French citizen of North African origin with a high school diploma was 1.6 times more likely to be unemployed in the first three years after graduating than a French citizen with French parents and the equivalent educational qualification.¹²⁷

Historical data also support the conclusion that the employment gap between persons of North African descent and other French residents has gotten wider over the last several decades during which antidiscrimination law has been in effect. The unemployment rate for immigrants of North African origin has steadily increased over the last thirty years. Young North African men comprised between 9% and 15% of all unemployed persons in 1975.¹²⁸ In 1982, they constituted 19% to 38% of all unemployed persons, and in 1990, they constituted 34% to 45% of all unemployed persons.¹²⁹ Indeed, the North African population in France has also grown since 1975, but today, persons of

note 119, at 95 tbl.

124. Centre d'études et de recherches sur les qualifications (CEREQ), *Enquêtes Générations, 1998*, in *L'ÉTAT DES INÉGALITÉS EN FRANCE 2007*, *supra* note 119, at 96 tbl.

125. INSEE, *Enquête Emploi 2002*, in *L'ÉTAT DES INÉGALITÉS EN FRANCE 2007*, *supra* note 119, at 95 graph.

126. CEREQ, *L'enquête génération 98*, <http://www.cereq.fr/cereq/G98ind/enquete.htm>

127. CEREQ, BREF NO. 205, *LES JEUNES ISSUS DE L'IMMIGRATION: DE L'ENSEIGNEMENT SUPÉRIEUR AU MARCHÉ DU TRAVAIL* (2004), available at <http://www.cereq.fr/pdf/b205.pdf>.

128. Roxane Silberman, *Les enfants d'immigrés sur le marché du travail*, in *IMMIGRATION, MARCHÉ DU TRAVAIL, INTÉGRATION* 297, 301 (François Héran ed., 2002).

129. *Id.*

North African descent constitute less than 10% of the population. Thus, they are disproportionately represented amongst the unemployed population.

The difficulties faced by North Africans and blacks in finding employment were emphasized by French lawmakers in their response to the riots.¹³⁰ The widespread joblessness explains why these young people engage in criminal activity, and also why this population is protesting. The wave of violence in November 2005 led the French government to adopt new laws on the “equality of opportunity”¹³¹ in response.

C. How Job Security Protections Have Exacerbated Racial Inequality in France

Although few French people are willing to say so explicitly, the data support the conclusion that French job security protections for all workers have, over time, exacerbated racial inequality and amplified employers’ incentives to discriminate against North Africans and other foreigners. Over the last thirty years, French law has strengthened employee job security protection. Reforms have sometimes included measures to make the employment discrimination prohibition more effective, when prompted by an EU directive.¹³² Nonetheless, racial inequality in access to employment has worsened.

An important factor exacerbating the racial unemployment gap is the high national unemployment rate. Between 1974 and 1986, the national unemployment rate grew from 2.4% to 10.4%.¹³³ For the last twenty years, unemployment has hovered around 10%.¹³⁴ Of those who are unemployed, many suffer from long-term unemployment, defined as a bout of joblessness of at least one year.¹³⁵ Between 1985 and 1995, more than 20% of the unemployed were jobless for more than two years.¹³⁶ By comparison, during the “*trente glorieuses*,” the thirty “glory” years of economic growth in France from 1945-1975, France enjoyed a full-employment economy. In the 1960s, for

130. See Hénart, *supra* note 10, at 7.

131. Law No. 2006-396 of Mar. 31, 2006, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 2, 2006, p. 4950.

132. See, e.g., Law No. 2004-1486 of Dec. 30, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 31, 2004, p. 22567 (creating an administrative agency to combat discrimination and to promote equality); Law No. 2001-1066 of Nov. 16, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 17, 2001, p. 18311 (easing the burden of proof for plaintiffs in civil employment discrimination cases).

133. Jonah D. Levy, *France: Directing Adjustment?*, in II WELFARE AND WORK IN THE OPEN ECONOMY: DIVERSE RESPONSES TO COMMON CHALLENGES 308, 321, 324 (Fritz W. Scharpf & Vivien A. Schmidt eds., 2000).

134. TIMOTHY B. SMITH, FRANCE IN CRISIS: WELFARE, INEQUALITY, AND GLOBALIZATION SINCE 1980, at 9 (2004).

135. *Id.*

136. *Id.*

instance, the unemployment rate was under 2%,¹³⁷ and the entry of guest workers and immigrants was encouraged to keep up with the pace of economic growth.¹³⁸

A recent Organization for Economic Co-operation and Development (OECD) study observes that employee protection legislation has contributed to high unemployment levels in France.¹³⁹ Under the Labor Code regulations that ensure that employment contracts are not terminable at will, firing an employee, even an unproductive employee, is extremely costly for the employer. With the exception of "serious fault," even terminations for economic reasons or just cause, which are permissible under the Code, impose on the employer procedural costs and severance payments. A 1995 study shows that employers lose 74% of litigated wrongful termination cases in France (compared with 48% in Canada, 51% in Italy, and 38% in the United Kingdom).¹⁴⁰ One economic study estimates the marginal cost of terminating one worker at 14 months' wages for a median wage worker.¹⁴¹

As a result, employers rarely create new jobs in France, leaving very few positions open to young people attempting to enter the labor market. Throughout the 1990s, 50% of the unemployed were young people between the ages of twenty-one and thirty.¹⁴² This problem was often discussed in debates about the CPE. French business leaders claimed that they would hire more people if it were not so costly to lay off an employee.¹⁴³ Without the severance pay obligations under the Labor Code, it can be inferred that businesses could take more risks and hire more people than absolutely necessary without worrying about firing costs if the business does not meet its projected targets.

Even if the job security laws are not the primary or exclusive cause of the high levels of youth unemployment in France, any evaluation of the job security laws from the perspective of racial equality has to consider the high French unemployment rate, at around 10%, as given. In the context of such a high and constant (twenty years and counting) unemployment rate, job security

137. *Id.* at 75-76.

138. See Virginie Guiraudon, *Immigration Politics and Policies*, in 3 DEVELOPMENT IN FRENCH POLITICS 154 (Alistair Cole, Patrick Le Galès & Jonah Levy eds., 2005).

139. See Stéphanie Jamet, *Improving Labour Market Performance in France* 5-6 (OECD Econ. Dep't, Working Paper No. 504, 2006), available at <http://econpapers.repec.org/paper/oecocaaa/504-en.htm> (arguing that reducing strict employment protection legislation could increase overall labor market participation in France).

140. Giuseppe Bertola, Tito Boeri & Sandrine Cazes, *Employment Protection in Industrialized Countries: The Case for New Indicators*, 139 INT'L LAB. REV. 57, 67 (2000).

141. Francis Kramarz & Marie-Laure Michaud, *The Shape of Hiring and Separation Costs* 15 (Inst. for the Study of Labor (IZA) Discussion Paper Series, Paper No. 1170, 2004), available at <http://ideas.repec.org/p/iza/izadps/dp1170.html>.

142. SMITH, *supra* note 134, at 10-12.

143. See Rachel Tiplady, *Job Security Ignites Debate in France*, BUS. WK. ONLINE, Mar. 22, 2006, http://www.businessweek.com/globalbiz/content/mar2006/gb20060321_896473.htm.

laws have had a disproportionately adverse impact on racial minorities. The increased costs of termination affect the ways in which employers exercise their discretion in hiring. An employer knowing how costly it will be to fire a full-time employee is less likely to hire candidates whom they consider risky hires. This leads to both “rational” and racially biased failures to hire racial minorities.

When unemployment is high, employers find it easier to find white males to substitute for minorities, since, in a slack labor market, there will be an abundance of qualified whites available for the job.¹⁴⁴ The inability to fire someone without “just cause” will lead employers to be more selective in hiring, and selectivity will be higher when the ratio of candidates to available positions is high—which is inevitable when unemployment rates are high. Higher selectivity increases the opportunities for two types of employer decisions that undermine minorities’ access to employment.

1. *Merit-based failures to hire*

Increased selectivity makes it far more difficult for persons with fewer qualifications (such as education, diplomas, experience) to be hired. In a society where residential segregation has resulted in a negative correlation between membership in a minority group and educational achievement, racial minorities will be disadvantaged by increased selectivity in hiring processes. As a result of patterns of residential segregation and their social consequences, young people of North African descent are disproportionately less qualified for employment than others. Persons of North African descent are concentrated in particular geographic areas on the outskirts of major cities, as a result of French housing policies over the last thirty years. Many North Africans arrived in France in the 1960s as temporary workers and were thus housed in publicly funded housing projects, separate from French nationals in the public housing system.¹⁴⁵ Furthermore, housing discrimination in the private sector made it difficult for visible minorities to find housing outside of the public sector.¹⁴⁶ As a result, many North Africans have remained in public housing in the *banlieues*. Between 1945 and 1975, many of these immigrants were employed as guest workers in low-skilled industrial jobs.¹⁴⁷ As many industrial

144. See John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle*, 66 S. CAL. L. REV. 709, 723 (1993). Donohue and Siegelman claim that slack labor markets make it cheaper for employers with discriminatory tastes to “indulge their preference” for white workers. *Id.* While I agree with Donohue and Siegelman on this point, I argue further that slack labor markets not only create incentives for such indulgences in irrational discriminatory “tastes,” but also that slack labor markets create more opportunities for rational discrimination.

145. See YAZID SABEG & LAURENCE MEHAIGNERIE, *LES OUBLIES DE L’EGALITE DES CHANCES* (2004).

146. See *id.* at 199.

147. See SMITH, *supra* note 134, at 179-80.

enterprises reduced their workforce by 40% between 1975 and 1990, the unemployment rates in the *banlieues* rose significantly.¹⁴⁸

The residential segregation has led to educational segregation. In the “*zones urbaines sensibles*” (ZUS), or “urban sensitive zones,” which were designated based on socioeconomic indicators in 1981, there are larger percentages of students who are left behind, and lower percentages of students who attain a diploma as compared to the French average.¹⁴⁹ National education statistics indicate a ten-point gap in sixth-grade standardized tests in average scores (on a one hundred-point scale) between students with two immigrant parents as contrasted to students with two French-born parents.¹⁵⁰ Only 46.9% of the children of immigrants finish the *Baccalauréat* (Bac), the high school diploma necessary to advance to university education, as contrasted with 63.7% of children with French nationality. One study indicates that 31% of youth from a recent immigrant background exit the education system without a diploma of any kind, as compared to 14% of French-born youths.¹⁵¹

Young people of North African origin in the *banlieues* have difficulty finding employment, due in significant part to their lack of educational success. A 2004 report indicates that, for persons under age twenty-five, the national unemployment rate is 23%, but in the ZUS, the unemployment rate for persons in this age group is 38%.¹⁵² The youth unemployment rate in France is so high that competition for every available job is fierce. A young person’s employment prospects are directly correlated to his or her educational background. A 2003 INSEE study of persons fifteen to twenty-nine years of age (excluding those continuing their education) indicates that 59.9% of persons with a Bac or equivalent are employed in contracts of indeterminate duration, as compared with 42.7% of persons without any diploma.¹⁵³ Seventy-two percent of all persons in this age group with a Bac plus two more years of education have jobs that are protected by the job security provisions of the Labor Code. Given that immigrants are less likely to obtain a Bac, employers may be tempted to use race as a proxy for educational qualifications, which exacerbates discriminatory tendencies.

148. *Id.* at 197.

149. See Hénart, *supra* note 10, at 14-15.

150. Education Nationale, *Panel 1995 et évaluations nationales à l’entrée en 6^e*, in L’ETAT DES INEGALITES EN FRANCE 2007, *supra* note 119, at 97 tbl.

151. HAUT CONSEIL A L’INTEGRATION, LA PROMOTION SOCIALE DES JEUNES DANS LES QUARTIERS EN DIFFICULTE 10 (2003), available at <http://i.ville.gouv.fr/divbib/doc/AVISpromosociale.pdf>.

152. CLAUDE BÉBÉAR, RAPPORT AU PREMIER MINISTRE, DES ENTREPRISES AUX COULEURS DE LA FRANCE: MINORITES VISIBLES: RELEVER LE DEFI DE L’ACCES A L’EMPLOI ET DE L’INTEGRATION DANS L’ENTREPRISE 13 (2004), available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/044000573/0000.pdf>.

153. INSEE, *Enquête Emploi*, in L’ETAT DES INEGALITES EN FRANCE 2007, *supra* note 119, at 36 tbl.

2. Racially biased failures to hire

The increased selectivity of a hiring process is likely to amplify the workings of irrational racial bias. “Just cause” means that you can’t fire someone for arbitrary reasons—you can’t fire someone simply because you personally find him annoying, awkward, or humorless. This will heighten the employer’s mechanisms for avoiding a bad hiring choice. When the number of qualified applicants for a job is high, the employer has incentives to use irrational proxies, such as racial stereotypes, as a basis for excluding some of the candidates.

Forcing employers into a lifelong commitment with anyone they hire makes the initial hiring decision more and more like choosing a marriage partner or adoptive family member. It is reasonable to conclude that, particularly in a high-unemployment labor market in which there are far more qualified applicants than there are positions, this dynamic will disadvantage those who seem less familiar, more foreign, or culturally different.¹⁵⁴ Racial bias, not only against disfavored groups, but also in favor of those most like oneself, excludes minorities. The bias may be overt and conscious or implicit and unconscious. Either way, minorities lose.

This hypothesis is consistent with some available data with regard to hiring discrimination. Organizations like SOS Racisme and Observatoire des discriminations have conducted various “testing” operations whereby a job candidate sends two identical CVs, one bearing an Arab name and address in a *banlieue* and another bearing a traditional French name and address in a respectable Parisian neighborhood.¹⁵⁵ In many of these studies, the Arab-name resume is rejected without an interview, whereas the French-name resume is invited for an interview.¹⁵⁶ In one study, researchers sent two identical CVs to 258 employers, with the only difference between the two CVs being the name of the candidate. One CV bore a “traditional” French first and last name, whereas the other bore a North African first and last name. The CVs listed the same address for both names. The first CV received seventy-five requests for an interview, whereas the second received 14.¹⁵⁷ This study demonstrates the persistence of racial bias amongst employers.

154. British scholars and policymakers have long recognized that women and minorities are disadvantaged when people in power unconsciously give more favorable treatment to persons of the same social, cultural, or religious background as themselves because they feel more comfortable with them. See BOB HEPPLE QC, MARY COUSSEY & TUFYAL CHOUDHURY, EQUALITY: A NEW FRAMEWORK, REPORT OF THE INDEPENDENT REVIEW OF THE ENFORCEMENT OF UK ANTI-DISCRIMINATION LEGISLATION 15 (2000).

155. Jean-François Amadieu, Enquête «Testing» sur CV (2004), available at <http://cergors.univ-paris1.fr>.

156. SAMUEL THOMAS, RAPPORT D’ANALYSE DES AFFAIRES RECENTES DE DISCRIMINATIONS À L’EMBAUCHE POURSUIVIES PAR SOS RACISME 14 (2005) (detailing three such experiments).

157. Amadieu, *supra* note 155, at 3-4.

Sociologists are now only beginning to collect qualitative interview data describing the experience of racial minorities in various aspects of employment.¹⁵⁸ A young person of North African descent reported that despite his having obtained a baccalaureate and a master's degree in psychology, he was having difficulty finding an internship necessary to become a psychologist. He reported:

I do not want to be a pessimist, but to have the qualification "bac plus five" and to be unemployed The problem is the basic problem, that is, today, if you are Maghrebin it's hard to find a position. They make you feel when you are interviewed, that it's just a formality, or, I don't know what, but they make you feel that way. You go through the interview, and they tell you they'll call you back, but in the end they never call you back. My letters remain without response, maybe it's because of my name but I don't know. I don't know if this is discrimination, but there is a problem. . . . There is no room for foreigners, and when they take you, it's to clean behind a bar for example, where they can't see you . . . !¹⁵⁹

In other contexts, such as hiring for the police force, sociologists have studied the pervasiveness of racial stereotyping. For instance, candidates of North African origin report being asked what they would do if their brother were arrested.¹⁶⁰ In a supermarket, one Algerian employee has reported racial segregation—the placement of Algerians away from cash registers and in the stocking areas, where they are hidden from customers' view.¹⁶¹

IV. THE REJECTED SOLUTIONS

A. *The Law on the Equality of Opportunities*

Consistent with the universalistic approach to policies that are intended to ameliorate the dismal situation of North African immigrants in the *banlieues*, the legislative response to the 2005 race riots was framed in universal, rather than race-conscious, terms. The statute, styled "Law on the Equality of Opportunities," included various race-neutral provisions that were intended to combat the disadvantages faced by the residents of the *banlieues*, many of whom are second-generation immigrant citizens of the French Republic.

The statute was presented as a response to the urban violence:

The crisis that came upon certain quarters of our cities were a revelation. That which we knew, but at times did not want to see, appeared clearly. These

158. See, e.g., MICHÈLE LAMONT, *THE DIGNITY OF WORKING MEN* (2002).

159. Abdelhak Eltmali, *Regards de jeunes*, in *LA DISCRIMINATION A L'EMPLOI: L'INSERTION PROFESSIONNELLE DES JEUNES ISSUS DE L'IMMIGRATION* 47, 48-49 (Mustapha Bourmmani ed., 2001).

160. SOPHIE BODY-GENDROT & CATHERINE WIHTOL DE WENDEN, *POLICE ET DISCRIMINATION RACIALES* 147 (2003).

161. VERONIQUE DE RUDDER, CHRISTIAN POIRET & FRANÇOIS VOURC'H, *L'INEGALITE RACISTE* 142 (2000).

quarters could seem like the low point of all the evils of French society: massive failures in the education system, at times the lack of natural authority which should be that of the parents, unemployment, instability, shocking discrimination¹⁶²

The November riots were seen as a reaction to the lack of educational opportunity and unemployment in the suburbs, in addition to discrimination. But the legislative response focused on improving education and employment opportunities in the poor geographic regions rather than on combating racism or discrimination.¹⁶³ This legislative response is also representative of the French tendency to universalize the solution to problems of race discrimination.

In addition to providing incentives to employers to hire more young people from the disadvantaged zones, the Equality of Opportunities statute attempted to limit the hiring discretion of employers. Another provision required employers of a certain size to accept anonymous CVs at the initial stages of a hiring process. Article 24 provides that, in enterprises of more than fifty employees, information requested of job candidates must be presented in a way that preserves the anonymity of the candidate.¹⁶⁴

At the same time, the statute increased the discretion of employers with regard to termination, in a provision that proved too unpopular to be sustained. Article 8 of the statute created a new form of employment contract, the “*contrat première embauche*,” (CPE) or first employment contract, which could be terminated at the will of either party without just cause in the first two years of employment.¹⁶⁵ After the first two years, the contract would become a contract for an unspecified period, governed by the Labor Code’s strong job security protections. Only employers with twenty or more employees could enter into these contracts, which were limited to employees under the age of twenty-six years and entering into their first job. An employer could terminate the CPE without incurring normal obligations under the Labor Code’s job security protections.

162. The French text reads :

La crise qu’ont traversée cet automne certains des quartiers de nos villes a agi comme un révélateur. Ce que nous savions, mais parfois ne voulions pas voir, est apparu clairement. Ces quartiers peuvent apparaître comme le précipité de tous les maux de la société française : décrochages massifs du système scolaire, parfois carence de l’autorité naturelle qui doit être celle des parents, chômage, précarité, discriminations choquantes

Hénart, *supra* note 10, at 7.

163. See Law No. 2006-396 of Mar. 31, 2006, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 2, 2006, p. 4950. Most of the provisions enhanced training and educational opportunities through various new programs. See, e.g., arts. 2, 11, 25, 29, 38. The law included one significant provision to strengthen antidiscrimination law, by strengthening the powers of the administrative agency that enforces this body of law. See *id.* art. 41.

164. *Id.* art. 24.

165. *Id.* art. 8.

B. Student Strikes and Employment at Will

After the Equality of Opportunities law was adopted, over a million young people took to the streets to protest the CPE. The protesters consisted mainly of university students from middle-class backgrounds. According to one sociologist, there was little geographical overlap between the March protests against the CPE and the November 2005 protests.¹⁶⁶

The opponents of the CPE saw the provision as the beginning of the end, a symbolic first step towards the dismantling of the Labor Code's protections of employee job security and the egalitarian republican values for which they stood. The CPE validated unstable employment, which many young people rejected. The very notion that an employee could work for two years and then be fired for no reason, without the normal severance pay was, for the movement's leaders, "scandalous."¹⁶⁷ They predicted that this would lead employers to replace those hired with new CPE employees every two years,¹⁶⁸ instead of retaining the CPE employee after two years as a permanent employee protected by the Labor Code. They rejected the premise that the CPE would create more jobs and predicted that jobs that might otherwise be contracts of unspecified duration (with all the ordinary protections of the Labor Code) would become CPE jobs, simply increasing the percentage of French workers with "precarious" employment without creating more protected, permanent jobs.

They were probably right on the latter prediction. The CPE would have created more jobs from which employees could easily be terminated, and fewer jobs in which employees enjoyed the extensive job security protections. This development would have benefited the least advantaged, least qualified employment candidates in the population, those who are considered too risky to be hired immediately into lifelong positions. It would have created more points of entry into the labor market, which gives opportunities to more people, while giving long-term security to fewer people.

Ultimately, the social movement against the CPE prevailed. After protests that turned violent, and strikes that disrupted schools, universities, post offices, banks, government offices, and transportation, President Chirac eventually repealed the unpopular provision. The legislature went back to the drawing

166. Hugues Lagranges & Marco Oberti, *Le mouvement anti-CPE et l'unité des jeunes*, in EMEUTES URBAINES ET PROTESTATIONS: UNE SINGULARITE FRANCAISE, *supra* note 118, at 131, 139.

167. See *Que veulent les lycéens anti-CPE?*, LE MONDE.FR, Mar. 17, 2006, <http://www.lemonde.fr/web/chat/0,46-0@2-734511,55-751216,0.html> (publishing interview with Tristan Rouquier, President of the Independent and Democratic Federation of High School Students).

168. See *CPE: Les arguments contre*, LE MONDE.FR, Mar. 2, 2006, <http://www.lemonde.fr/web/chat/0,46-0@2-3224,55-745929,0.html> (publishing interview with Bruno Juilliard, President of the National Union of Students of France).

board, and in late April, adopted a new law on the “access of young people to active life in enterprises.”¹⁶⁹

C. The Anonymous CV and Incentives to Promote Minority Hiring

An interesting consequence of these controversies is that, once the government withdrew the CPE provision, employers became increasingly vocal against the anonymous CV provision of the Equal Opportunities law. In October 2006, the government announced that the anonymous CV rule would not be enforced due to resistance from enterprises.¹⁷⁰

After the CPE provision was repealed, the new version of the law, adopted in April 2006, provided that employers would receive a subsidy from the state for entering into employment contracts to specific classes of disadvantaged persons: (1) young people between sixteen and twenty-five whose level of education is inferior to that of a second-cycle diploma (equivalent to bachelor's degree in the United States); (2) young people of the same age group residing in urban sensitive zones; or (3) young people who are in a “contract of insertion in social life” with the state.¹⁷¹ The “contract of insertion in social life” refers to a state program for young people between fifteen and twenty-five years of age who are having difficulties in social and professional integration. Participants in the program are provided with the assistance of a local state agency in finding a job, professional training, specific measures to address difficulties, and assistance in the job search.¹⁷²

The new law provides incentives for employers who voluntarily recruit young people from disadvantaged backgrounds. A parallel can be drawn to U.S. policies of requiring companies contracting with the federal government to adopt affirmative action programs. It remains to be seen, however, whether this provision will actually increase minority hiring in a world where every employee, once hired, is legally guaranteed job security. In light of employers' resistance to the seemingly innocuous proposal that they require anonymous CVs from job applicants, the outlook is not optimistic.

169. Law No. 2006-457 of Apr. 21, 2006, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 22, 2006, p. 5993.

170. See Michel Delberghe, *Le CV anonyme ne sera pas obligatoire dans les entreprises*, LE MONDE, Oct. 12, 2006, at 10.

171. Law No. 2006-457 of Apr. 21, 2006, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 22, 2006, p. 5993.

172. *Id.*

V. THE POLITICAL ECONOMY OF EMPLOYMENT DISCRIMINATION

A. *French Lessons: Comparative Method*

What are the lessons for the American law of equal employment opportunity? There are obviously significant differences in history, legal institutions, culture, and racial and ethnic minorities between France and the United States. I have explored these in more detail elsewhere¹⁷³ and concluded that these differences cast doubt on the applicability of mutual lessons.¹⁷⁴ Understanding what went wrong in France for racial inequality does not give us perfect (or even reliable) information about what will go wrong in the United States. But a comparative perspective can unsettle our basic intuitions about the relationship of job security protections to racial equality. Doing so brings into sharper focus the new problems that can come into play as a result of reforming employment law. These problems may undermine the goals of employment discrimination law in *different* ways than at-will employment does. Such possibilities must be understood by those interested in fixing the inadequacies of Title VII.

American lawyers and scholars tend to focus on the problems raised by the litigation of discrimination cases—including barriers to judgment for plaintiffs and employer incentives generated by the threat of litigation—rather than on the broader political economy of employment. Examining the relationship between job security protection and the disproportionately high levels of racial-minority unemployment in France enables the American observer to see the big picture, beyond these litigation-centered concerns, more clearly.¹⁷⁵ It may be

173. See Suk, *supra* note 22; Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. (forthcoming 2008) [hereinafter Suk, *Dependence*], available at <http://ssrn.com/abstract=1006759>.

174. Traditional comparative method has looked to foreign law as a source of models that can be imported to solve presumably similar problems. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS* 95 (1993) (arguing that transplanting is a fertile source of legal development); KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., 3d ed. 1998) (same); James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 560 (1995) (arguing that “[m]any legal problems are conceptually the same wherever they arise,” thereby calling for transnational inquiry). Scholars have recently critiqued the notion that comparative law should search for transplantable models. See, e.g., William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1896 (1995) (criticizing the legal transplant approach); Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L.J. 517, 522-25 (2006) (noting that law always works in a particular local context).

175. In arguing that the French experience can be instructive for American employment law and equal opportunity, I do not suggest that the disasters that have befallen France as a result of its choices with regard to job security protection will also plague the United States if we, too, adopt such norms. Rather, it is my hope that observing the dynamics and tensions between job security protection and the failing struggle to achieve racial equality in France will sharpen the critical perspective and imagination that American

easier for the American lawyer to notice the tension between employee job security protections and racial equality in a foreign context rather than in one's own country, largely because one is more removed from the political consequences of noticing such problems outside of one's own borders.¹⁷⁶

The consequences of universal employee job security protections for equal employment opportunity in France highlight the dynamic between limitations on employer firing discretion and hiring behavior that disadvantages minorities. Comparing the limitations on employer discretion in hiring and firing in two national contexts can help illuminate this dynamic. This dynamic is central to the political economy of employment discrimination, which is also affected by residential segregation, inequities in education, and the general unemployment rate.

B. The Persistence of Hiring Discrimination

By treating the prohibition of discrimination in employment as an element of a larger package of employee job security protections,¹⁷⁷ French law has paid insufficient attention to the main site of employment discrimination: employers' exercise of wide discretion in hiring decisions. Granted, both the Penal and Labor Codes formally prohibit discrimination in recruitment and hiring.¹⁷⁸ But most of the Labor Code's extensive regulation of employer discretion, such as the imposition and regulatory enforcement of detailed termination procedures, govern the employment contract itself. Outside of the contract, the Labor Code limits employer discretion in hiring only by prohibiting certain types of employment contracts (such as temporary contracts for the ordinary work of the enterprise) and through a general prohibition of discriminatory recruitment and hiring which is enforced through private civil lawsuits or, for the parallel criminal provision, through prosecution.

These formal prohibitions of discriminatory hiring have no deterrent effect in France. The reality is that employers clearly discriminate against candidates of North African descent, resulting in this population's disproportionately high

lawyers bring to their attempts to achieve racial equality through law in the United States.

176. As Robert Kagan has astutely noted, the relevant medical metaphor should not be transplant, but psychotherapy. Like psychotherapy, Kagan notes, "comparative analysis attempts to reveal roads not taken, unconsciously maintained patterns, and sources of resistance to change, thereby encouraging new courses of action that build on existing resources and potentials." ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 5-6 (2001).

177. See *supra* Part II.

178. Section 225-2 of the Penal Code prohibits, *inter alia*, the refusal to hire a person on the basis of the prohibited characteristics in Section 225-1. See C. PÉN. art. 225-2. Section 122-45 of the Labor Code provides, *inter alia*, "that no person can be excluded from a recruitment process or from access to an internship or a period of training in an enterprise" on the basis of any of the prohibited characteristics, which include race, origin, sex, and many other categories. C. TRAV. art. L122-45.

levels of unemployment.¹⁷⁹ The persistence of discrimination in hiring, despite the formal legal prohibition of such conduct, is explained by barriers to the effective enforcement of this prohibition in French criminal and civil procedure. In short, convictions for discriminatory hiring under the Penal Code are rare due to the intent requirement and burden of proof for criminal liability, and employers are rarely found civilly liable for discriminatory hiring because the lack of discovery in French civil procedure makes it nearly impossible for plaintiffs to prove even the most basic facts that could give rise to an inference of discrimination.¹⁸⁰ Most discrimination cases are brought in criminal proceedings, and convictions are very rare. Antidiscrimination law hardly deters even the most overt forms of discrimination.

By comparison with France, the civil litigation under Title VII has been very effective in deterring overt discrimination in the United States. In the first two years of Title VII enforcement, EEOC charges based on hiring discrimination allegations outnumbered termination charges by fifty percent.¹⁸¹ Any employer who failed to hire qualified blacks in the late 1960s or early 1970s would probably have faced a lawsuit, perhaps even a class action.¹⁸² Overt forms of discrimination, such as a systematic refusal to hire blacks, were likely to produce plaintiff victories at the time, in light of the widespread understanding that the purpose of the statute was to combat these forms of discrimination in recruitment and hiring.¹⁸³ As Donohue and Siegelman observe: "A rational employer in 1965 need not have waited until he was actually sued to change his employment practices. Thus, the mere threat of litigation would probably have induced an employer to change his behavior."¹⁸⁴ The threat of litigation for *overtly* discriminating, either at the hiring or firing stage, has effectively driven out discriminatory behavior by employers in which the racially discriminatory motive is apparent.

But many American scholars note that most of the behaviors that cause inequality in the workplace today can be attributed to implicit bias rather than the overt manifestation of racial bias that Title VII litigation can effectively remedy and deter.¹⁸⁵ The current high ratio of Title VII firing cases relative to

179. See *supra* Part IV.

180. See Suk, *Dependence*, *supra* note 173.

181. Donohue & Siegelman, *supra* note 38, at 1015-16.

182. *Id.* at 1027-28.

183. *Id.* at 1032.

184. *Id.*

185. See Bagenstos, *supra* note 20; Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95-111 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-211 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136-37 (1997); Susan Sturm, *Second Generation*

hiring cases does not necessarily support the inference that firing discrimination is more common than hiring discrimination.¹⁸⁶ Rather, employers continue to engage in a variety of subtle practices that undermine racial minorities' access to good jobs. As Linda Hamilton Krieger has shown, the cognitive processes that lead employers to discriminate are automatic; they use "stereotypes, scripts, and schemas to interpret . . . information relevant to social judgment[s],"¹⁸⁷ including judgments about who is the ideal candidate for a given job. Title VII has effectively driven out obvious and overt discrimination, but subtler forms of hiring discrimination that are difficult to prove in civil litigation persist in the United States.¹⁸⁸ Many scholars have criticized Title VII for its inability to deter or remedy the subtler forms of discrimination.

C. Firing Discretion and the Migration of Discriminatory Tendencies

The French experience shows that a general limitation on employers' firing discretion, by way of job security protections, can magnify employers' tendencies to discriminate in hiring. In other words, general constraints on employers' firing discretion cause racial bias to migrate from firing decisions to the hiring decisions. This dynamic is similar to the dynamic discussed by Posner, Donohue, Siegelman, and Ayres, by which Title VII's regulation of discriminatory firing effectively imposes a "tax" on minority hiring. In the United States, limiting employers' firing discretion may not increase the incidence of overt hiring discrimination, given how effective Title VII is at deterring overt discrimination. But strong limitations on employers' firing discretion, by way of job security protection, can increase the likelihood that racial bias, both conscious and implicit, will be manifested in an employment decision. In France, this means that, since discretion over firing is virtually nonexistent, all of the employers' discriminatory tendencies migrate to the

Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 468-74 (2001).

186. While it is clear that employers faced a real threat of liability for overtly discriminating against African Americans right after Title VII was passed, recent studies suggest that the threat of liability today is more limited. Michael Selmi, for instance, shows in an empirical study of class action employment discrimination litigation that these lawsuits do not substantially influence stock prices. These cases are usually settled, and the settlements do not significantly harm firm value. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1267-68 (2003).

187. Krieger, *supra* note 185, at 1239.

188. Nonetheless, Christine Jolls argues that antidiscrimination law has had the effect of decreasing implicit bias. Jolls argues that, to the extent that antidiscrimination law has increased the presence of minorities in the workplace, implicit bias has been decreased. She reaches this conclusion by citing to social science literature establishing that the presence of minorities decreases the level of implicit racial bias exhibited by others. See Christine Jolls, *Antidiscrimination Law's Effect on Implicit Bias*, in BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION (forthcoming 2007).

exercise of hiring discretion. When a law broadly limits employers' discretion over firing, as applied to every employee, the law does not eradicate the discriminatory tendency: it simply moves discrimination to decisions over which employers retain discretion, namely hiring decisions.

In the United States, Title VII's success in driving out overt discrimination has not extinguished discriminatory tendencies. Rather, racial bias has morphed and migrated.¹⁸⁹ Now, it is manifested in subtler forms of employer conduct, both at the hiring stage and at the firing stage (and in between). To the extent that freedom of contract gives employers discretion over hiring, employers can exercise that discretion in ways that manifest racial bias without the overtness often needed to establish a Title VII violation in a litigated case. And, to the extent that employment at will gives employers broad latitude to fire, employers can exercise that discretion in ways that manifest racial bias without generating the direct evidence often needed to establish a Title VII violation after the *Hicks* line of cases. To sum up: in neither country does employment law eradicate racial bias. Rather, the law functions to move racial bias to the employment decision over which employers legally exercise the greatest degree of discretion. In France, it's the hiring decision. In the United States, it's the firing decision.

Furthermore, subtle forms of hiring discrimination persist in the United States, even though hiring discrimination is not litigated as frequently as firing discrimination. Existing empirical data¹⁹⁰ support the conclusion that implicit racial bias continues to affect employers' exercise of hiring discretion in the United States. A recent Chicago study established that, when identical resumes are sent to employers with African-American- and white-sounding names, white names receive fifty percent more callbacks than African-American ones.¹⁹¹ Another study, by Devah Pager, demonstrates that hiring discrimination against blacks is so great that a black applicant without a criminal record has roughly the same chance of success as a white applicant with a criminal record.¹⁹² Many other audit-pair studies, in which the testers were trained to exhibit similar personal characteristics, also establish that

189. The morphing of discrimination that I describe is a variant of what Reva Siegel has called "preservation-through-transformation." Siegel argues that status-enforcing state action evolves as it is regulated by law and contested. Siegel, *supra* note 185, at 1113. Similarly, employment discrimination evolves in response to the way law proscribes certain employment practices.

190. For a good discussion of the methodology and limits of some of these empirical studies, see John J. Donohue, *The Law and Economics of Antidiscrimination Law* 38-44 (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 101, 2005), available at <http://ssrn.com/abstract=763486>.

191. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 12 (MIT Dep't Econ. Working Paper No. 03-22, 2003), available at <http://ssrn.com/abstract=422902>.

192. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958 (2003).

whites are more likely than blacks with the same qualifications to be offered interviews or jobs.¹⁹³

Imagine these employers making hiring decisions in a legal regime that prohibits them from terminating any employee except for cause. Increasing employers' risk aversion in hiring can also exacerbate irrational discrimination. The knowledge that it will be difficult to fire anybody who is hired creates incentives for employers to pick people with whom they feel comfortable and familiar. The potential for a lifetime relationship drives up the significance of solidarity, trust, and loyalty. This strengthens the reliance on stereotypes, scripts, and schemas in choosing employees.

The historical experience of internal job markets in the United States is instructive. In the United States, prior to the 1970s, many employees enjoyed job security, even in an at-will legal regime, because their employers observed the social norm of promising lifetime employment, in firms that were structured to enable employees to move up the ladder at the same firm throughout their careers. Women were not hired by large corporations with internal labor markets, largely because employers assumed that women would quit or disrupt their progress up the job ladder to have children.¹⁹⁴ Internal labor markets also excluded black employees.¹⁹⁵ Promises of job security were often obtained when unions negotiated for them with employers, and unions excluded or segregated on the basis of race. The forms of solidarity and trust associated with lifetime employment and job security protection may sharpen an employer's tendency to avoid hiring persons who, by stereotype and scheme, seem like outsiders.

Moreover, in the absence of the liberty to terminate at will, one can reasonably predict that employers will be reluctant to practice voluntary affirmative action in hiring to the same extent as they do the at-will world. Affirmative action is a form of risk-taking. It also plays an important role in integrating the American workplace,¹⁹⁶ which could easily be eroded by a for-cause regime. The French employers' resistance to the anonymous CV rule is telling. While the provision was passed as part of the statutory package that included the employment-at-will provision, resistance to the anonymous CV provision grew after the student movements buried employment at will. Surely this is not a mere coincidence.

Although racial inequality in the United States is different in various respects from the situation in France, one similarity that should not be overlooked is the high level of residential segregation that has led to low levels

193. See William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, J. ECON. PERSP., Spring 1998, at 63, 76-81.

194. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 161 (2004).

195. *Id.* at 163.

196. See ESTLUND, *supra* note 5, at 147.

of educational achievement amongst African Americans.¹⁹⁷ The rational employer will naturally be more risk-averse, knowing that it will be extremely difficult and costly to fire someone once hired. The difficulty of firing will strengthen the desire to avoid hiring persons with fewer educational credentials. To the extent that the black-white gap in education remains a reality in the United States, this dynamic can work to the disadvantage of blacks. Therefore, in the U.S. context, a for-cause regime can exacerbate a whole range of discriminatory tendencies in hiring.

VI. RETHINKING EQUAL EMPLOYMENT OPPORTUNITY LAW

The French experience highlights two important lessons: First, it highlights the need for equal employment opportunity law to manage the manifestations of racial bias that it is unable to eradicate. Second, it provides a concrete example of the limits of race-neutral universalistic approaches to addressing racial discrimination in employment.

A. *The Management of Racial Bias*

Racial bias, overt and implicit, tends to express itself in the employment decisions over which employers retain discretion. Both job security laws and employment discrimination laws impose limits on employer discretion. In so doing, they push the racial bias into the remaining areas of discretion. In both countries, employer hiring decisions remain vulnerable to the intrusion of racial bias because neither state is likely to *completely eradicate* employers' freedom to hire whomever they please. Even as this freedom is limited by a prohibition on discriminatory hiring, enough discretion remains such that employers can easily manifest forms of racial bias that are difficult to prove in court. As a result, tightening firing discretion amplifies the manifestation of racial bias in hiring. In the context of strong job security protections, French employers have been reluctant to adopt even the most color-blind, innocuous measures such as the requirement that candidates submit anonymous CVs.

Any proposed reform of employment law or employment discrimination law undertaken to combat discrimination and achieve equal employment opportunity must take these dynamics into account. The French experience helps us imagine the possibility that a for-cause employment regime can create different and potentially worse problems of discrimination in employment than the ones that the at-will regime has produced. For-cause employment will benefit plaintiffs in Title VII termination cases, but, over time, how might it

197. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (documenting the persistence of residential segregation in the United States, which has undermined African Americans' social mobility).

affect minorities entering the job market? Might it exacerbate the racial minorities' disadvantage in access to employment? If so, to what extent? These are precisely the questions that need to be explored if employment law is to serve the goals of employment discrimination law.

If equal opportunity is the goal of employment discrimination law, the effect of employment law norms on the overall employment prospects of disadvantaged groups in the long term requires far more attention than litigation has been able to generate. Thus, a broader regulatory approach to employment discrimination and equal employment opportunity is needed, to supplement the remedies achieved when enforcement occurs primarily through litigation.¹⁹⁸ Applying this big-picture approach requires consideration of the following question: what is worse for the long-term goal of eradicating racial disadvantage in employment, exclusion from entry into the labor market, or discriminatory termination?

A definitive and detailed answer to this question is beyond the scope of this Article, but I offer some preliminary considerations. This question should not be answered in the abstract; it must take into account the realities of today's workplace and the political economy of employment. As Katherine V.W. Stone has documented in great depth, the American workplace has undergone a tremendous transformation throughout the twentieth century. Up until the 1970s, employment for most American workers was centered on a single, primary employer. Even though employment at will was the law, firms were generally set up with internal job ladders, and employees would advance in the ranks within the firm, with mutual expectations that the employee would stay with the employer for life.¹⁹⁹

But over the last thirty years, the structure of employment has changed significantly. Now, most American workers have a "boundaryless career" that does not depend on notions of advancement within a single hierarchical organization.²⁰⁰ Employees don't expect to stay with the same firm for life, but they expect each new job to give them opportunities to improve their human capital. In this universe, discriminatory failures to hire racial minorities may diminish their employment opportunities more severely in the long-run than discriminatory or otherwise unjust terminations. Thus, equal employment opportunity requires a shift in focus from the discriminatory firing suits that dominate the Title VII docket towards legal and regulatory means of protecting and promoting racial equality at the hiring stage.

198. I develop an argument in favor of a greater role for administrative agencies in achieving equal employment opportunity in Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405.

199. See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 535 (2001). Stone argues that this model emerged largely from scientific theories of management that were prevalent in the era of industrialization. *Id.* at 529-35.

200. *Id.* at 554.

B. The Limits of Universalistic Solutions to Racial Inequality

As the discrimination provision in the Labor Code reflects, the French approach to employment discrimination is universalistic—it is primarily concerned with protecting the worker as citizen from a myriad of abuses (including discrimination) rather than with protecting the worker's status as a member of racial minority. This approach breeds a resistance to race-targeted, race-conscious ways of mitigating the disadvantage of racial minorities, such as race-conscious affirmative action. The universalistic approach prevalent in France also provides important lessons for the United States. Specifically, it should raise skepticism about the many race-neutral approaches that have been proposed as alternatives to race-conscious affirmative action in the pursuit of equal opportunity. In France, the race-blindness arises from a republican commitment to social solidarity, which directly conflicts with any race-conscious distribution of benefits. The universalistic approach of French employment discrimination law reveals the belief that job security protections and protection against racial discrimination protect the same set of rights and interests, rather than interests that may conflict with each other. Yet, it is clear that job security protections conflict with racial minorities' equal access to employment.

In the United States, employers' use of affirmative action may get a lot of minorities hired, but even its most vocal advocates worry about affirmative action's potential to harm the social solidarity that is essential to a truly integrated workplace.²⁰¹ Doing what is best for the eradication of racial disadvantage in access to employment may be at odds with doing what is best from the standpoint of universal social welfare goals, such as employee job security and social solidarity. American lawyers and scholars contemplating reforms to protect employee job security or to combat racial inequality in employment should anticipate conflicts between these two goals, rather than assume that they are always compatible. The French example shows how job security protections can freeze racial minorities out of labor markets, particularly when historical and social circumstances have contributed to their being undereducated and regarded as foreign. Job security protections under such conditions directly conflict with measures like the CPE that could improve racial minorities' employment prospects. Furthermore, the CPE itself was a universalistic solution to the particular problem of racial disadvantage: the introduction of at-will employment applicable to all young people was proposed because there is no alternative of targeting benefits towards disadvantaged racial groups.

Job security protections and the pursuit of equal employment opportunity can impose mutual costs on each other. Universal job security protections might exclude racial minorities from the labor market in the long run, and

201. See, e.g., ESTLUND, *supra* note 5, at 82-83.

measures that target benefits to racial minorities can have detrimental effects on social solidarity. Universalistic, race-blind strategies for eradicating group disadvantage tend to obscure, if not deny, the possibility that promoting racial equality can conflict with promoting social welfare for all. This is a conflict that equal employment opportunity law should negotiate and manage rather than ignore.

CONCLUSION

Recognizing the reality of these conflicts and tensions intensifies the difficulty of proposing a solution to the problem of racial inequality in employment. We cannot know with any certainty whether racial minorities would have been better off in the past if France had adopted American-style antidiscrimination law and at-will employment, just as we can't know whether racial minorities in the United States would be better off today had Title VII not imposed a "tax" on minority hiring. But it is clear, based on the two countries' experiences, that limiting firing discretion increases discriminatory tendencies in hiring decisions. If employment discrimination law is to improve equal employment opportunity, it must manage these dynamics with the goal of minimizing the overall effect of racial bias, overt and implicit, in racial minorities' access to, and retention of, good jobs. This may require job security protections in some contexts and at-will employment in others.

Managing the tension between equal employment opportunity and job security does not require an abandonment of the principle of just cause in employment law. Indeed, a just-cause regime need not go as far in protecting employees as the French Labor Code. Nonetheless, the effect of any just-cause regime on the political economy of equal employment opportunity must be understood and considered. Unequal employment opportunity, in both the United States and France, will continue to pose challenges for a long time. But the difficulty of finding a solution is no argument for avoiding an honest account of the problem.

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