

PROCEDURAL PATH DEPENDENCE: DISCRIMINATION AND THE CIVIL-CRIMINAL DIVIDE

JULIE C. SUK*

ABSTRACT

Procedural path dependence occurs when the particular features of the procedural system that is charged with enforcing a given legal norm determine the substantive path of that norm. This Article shows how the limits of employment discrimination law in two different national contexts can be explained by procedural dynamics. In France, as in several European countries, employment discrimination law is enforced predominantly in criminal proceedings. French criminal procedure enables the discovery of information necessary to prove the facts of discrimination, whereas the limits of French civil procedure make it impossible for such information to be revealed. As a result, the substantive legal norm of nondiscrimination is being developed in French criminal law, in which the element of intent and the defendant's strong presumption of innocence are essential. In the United States, liberal civil procedure rules permit the broad discovery of information relevant to proving discrimination. At the same time, the civil litigation system has undermined the law's adaptability to the evolving social practices that threaten equal employment opportunity. The civil dimension of this procedural system, deeply rooted in the paradigm of the private damages action, tends to favor the employment discrimination claims that most closely resemble torts, thereby limiting the law's ability to address the complex causes of unequal employment opportunity. This, too, is an example of procedural path dependence. These examples reveal that discrimination is neither criminal nor civil in nature. To overcome its present limits, antidiscrimination law must transcend the substantive

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principles that have become entrenched by the procedural systems in which it developed.

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INTRODUCTION: THE CRIME OF DISCRIMINATION?

Should employment discrimination be a crime? Most Americans would be shocked to hear that, in Paris, a marketing director for the cosmetics giant L'Oréal was recently sentenced to three months in prison for racial

discrimination in hiring.¹ After all, U.S. law treats employment discrimination as a tortious injury for which the victim may be compensated through a civil suit. Accordingly, American legal professionals view discrimination as the kind of conduct that belongs in a civil liability regime.² By contrast, French lawyers and policymakers tend to believe that discrimination is worthy of criminal punishment, and that civil sanctions alone would miss the point.³ And France is not alone. Several Western democratic legal systems impose criminal punishment for employment discrimination.⁴ What is the significance of these differences?

This Article shows how, over time, a regulated behavior comes to be regarded by different legal systems as substantively criminal or civil in nature as a result of the procedural dynamics of enforcement. Procedure can strongly influence a legal culture's continued perception of a social problem like discrimination as "civil" or "criminal." These categories endure in the substantive conception of the legally prohibited conduct, and ultimately limit the legal system's ability to regulate complex, evolving social problems. The limits of employment discrimination law exemplify what I call "procedural path dependence."

Almost all legal systems draw a sharp line between criminal and civil offenses.⁵ The primary goals of criminal and civil liability differ: The goal

1. Nathalie Brafman, *L'Oréal et Adecco condamnées pour discrimination*, LE MONDE, July 7, 2007. The defendant was given a suspended sentence, since this was a first time offense.

2. In the United States, judges often characterize discrimination as a tort that is appropriately enforced through a private damages action. *See, e.g.*, *U.S. v. Burke*, 504 U.S. 229, 254 (1992) (O'Connor, J., dissenting); *Curtis v. Loether*, 415 U.S. 189, 195 (1974); *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 269 n.10 (4th Cir. 1976); *Pavlo v. Stiefel Labs., Inc.*, No. 78 Civ. 5551, 1979 WL 105, at *1 (S.D.N.Y. Nov. 27, 1979).

3. In France, lawyers and researchers continue to proclaim the importance of the symbolic value of criminal punishment for discrimination. *See infra* text accompanying notes 69–74; *see also* GROUPE D'ETUDE ET DE LUTTE CONTRE LES DISCRIMINATIONS [GELD], LE RECOURS AU DROIT DANS LA LUTTE CONTRE LES DISCRIMINATIONS: LA QUESTION DE LA PREUVE 22 (2000) [hereinafter GELD Report].

4. Several European Union countries impose criminal liability for acts associated with racism, including employment discrimination. *See* C. PÉN. art. 225-1, 225-2 (Fr.); Law on the Suppression of Certain Acts Prompted by Racism or Xenophobia of 30 July 1981 (Belg.), *in* LEGISLATING AGAINST DISCRIMINATION: AN INTERNATIONAL SURVEY OF ANTI-DISCRIMINATION NORMS 116 (Nina Osin & Dina Porat eds., 2005) [hereinafter LEGISLATING AGAINST DISCRIMINATION]; SR art. 90quater (Neth.), *in* LEGISLATING AGAINST DISCRIMINATION 594; Penal Code ch. 11, art. 9 (Fin.), *in* LEGISLATING AGAINST DISCRIMINATION 303; L. 654, *in* Gazz. Uff. 1993, art. 3(1)(a) (Italy), *in* LEGISLATING AGAINST DISCRIMINATION 430; C. PÉN art. 454–57 (Lux.) *in* LEGISLATING AGAINST DISCRIMINATION 505; C.P. art. 314 (Spain), *in* LEGISLATING AGAINST DISCRIMINATION 846; Penal Code art. 240 (Port.), *in* LEGISLATING AGAINST DISCRIMINATION 654; Criminal Code art. 141 (Slovn.), *in* LEGISLATING AGAINST DISCRIMINATION 705.

5. *See* Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 201–02 n.1–14 (collecting sources detailing the civil-criminal distinctions in China, Switzerland, Saudi Arabia, Pakistan, Ireland, India, the former Soviet Union, Germany, Papua New Guinea, the Bedouin tribe, Singapore, Somalia, Thailand, Ukraine, and Ancient Rome).

of criminal law is to punish bad acts, whereas civil causes of action enforce the rights of private parties through compensation.⁶ The nature of the conduct punished by criminal law tends to be different from the conduct that is civilly compensated,⁷ such as tort. Criminal conduct tends to be widely regarded by the society as morally reprehensible, meaning that others have a moral right to be free from such conduct. Tortious conduct, by contrast, simply has social costs for which the actor ought to pay the price.⁸ Criminal law expresses public values more so than tort law.⁹ All of these differences underlie the justification for maintaining separate procedural regimes for criminal and civil liability that operate very differently with regard to information gathering, protection of defendants' rights, and standards of proof.¹⁰ Applied to antidiscrimination law, it is tempting to assume that one nation's enforcement by criminal process simply reflects the substantive conception of discrimination as morally wrong and worthy of punishment, whereas another nation's enforcement by civil process reflects its substantive conception of discrimination as a private injury, like tort, for which compensation is the appropriate response. In short, the received wisdom is that substance justifies and therefore determines procedure. This assumption is a fixture in normative debates about how sharply the criminal-civil line should be drawn.¹¹

But little attention is paid to the reverse dynamic of procedure shaping substance. This Article shows how the evolution of a substantive legal

6. This view is reiterated in many scholarly treatments of the civil-criminal distinction. *See, e.g.*, John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 679–80 (1999); Robinson, *supra* note 5, at 204; Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 785–86 (1997). This characterization of the difference between criminal and civil actions is also found in a leading French treatise on criminal law and procedure. *See, e.g.*, GEORGES LEVASSEUR ET AL., *DROIT PÉNAL GÉNÉRAL ET PROCÉDURE PÉNALE* 124 (14th ed. 2002) (“The criminal action has for its purpose a punishment inflicted on the individual, proportionate to the fault he has committed . . . the civil action has for its purpose compensation proportionate to the injury sustained.”) (“L’action publique a pour l’objet, une peine infligée à l’individu, proportionnée à la faute qu’il a commise . . . l’action civile a pour l’objet la réparation proportionnée au dommage subi.”).

7. Robinson, *supra* note 5, at 204.

8. *See* Coffee, *supra* note 6, at 1884.

9. *See* John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194 (1991).

10. The categories of “criminal” and “civil” are further differentiated in the United States in that the law of criminal procedure is largely constitutionalized while civil procedure is not. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1 (1996).

11. *See* authors, *supra* notes 5–10.

norm can be stifled by the logic of the procedural system in which the norm is enforced. To shed light on this dynamic, this Article compares the influence of criminal procedure on definitions of discrimination in France with the influence of civil procedure on definitions of discrimination in the United States. In each system, there are informational advantages to enforcing discrimination law in one particular procedural regime. In France, the informational advantages of criminal procedure drive litigants to criminal courts, where intent to discriminate is necessary for a finding of liability. Even though French law authorizes civil liability, French employment discrimination law is being developed through a narrow criminal law paradigm due to the advantages of criminal procedure. Similarly, in the United States, the wealth of information available to litigants in civil discovery has kept employment discrimination exclusively in civil proceedings. This has unduly advantaged the cases that most closely resemble torts and kept new forms of discrimination beyond the reach of employment discrimination law.

By comparing French criminal enforcement of employment discrimination law, on the one hand, and American civil enforcement of the same legal prohibition, on the other, this Article shows how a criminal enforcement regime in one national context can produce similar resistances to change as a civil enforcement regime in another national context. Both systems suffer from procedural path dependence, which occurs when the particular features of the procedural system which has been charged with enforcing a given legal norm determine the substantive path of that legal norm.

The comparative analysis of antidiscrimination enforcement shows that discrimination, like many complex social problems, is neither inherently criminal nor civil in its substantive goals. Yet, it comes to appear substantively criminal or civil as a result of its procedural path. In destabilizing the criminal-civil distinction in employment discrimination law, this Article aims to encourage the development of regulatory approaches to complex social problems that combine features of both types of enforcement system.

Part I describes the problem that the procedural path dependence theory seeks to illuminate: the inability of antidiscrimination law, in various legal systems, to effectively combat a myriad of social practices that cause unequal employment opportunity. Part II explains the concept of path dependence as developed by economists and political scientists and then applies this concept to procedural systems. Part III examines criminal liability for employment discrimination in France, arguing that the predominance of criminal enforcement can be traced to the informational

benefits of Continental criminal procedure as compared to Continental civil procedure. It also shows how, notwithstanding these benefits, criminal enforcement has limited the substantive scope of employment discrimination law. Part IV explores the effects of civil litigation on the American legal conceptualization of employment discrimination. It highlights the informational benefits of American civil procedure, and shows how some features of civil litigation have strengthened and reinforced the analogy between a private-law tort and employment discrimination, thereby limiting the law's ability to regulate the complex forms that discrimination currently takes. Part V synthesizes the mutual lessons of the procedural path dependencies of French and U.S. employment discrimination law. It points out some remarkable similarities between the current limits that both systems face and argues in favor of rethinking and reorienting the public and private dimensions of this body of law.

I. ANTIDISCRIMINATION LAW'S LIMITS

Much American employment discrimination scholarship has recently concluded that, while discrimination is pervasive in American society, antidiscrimination law is unable to combat most of its contemporary manifestations.¹² Antidiscrimination law seems unable to get beyond the "most easily understood type of discrimination,"¹³ namely, intentional disparate treatment, motivated by animus, based on a prohibited characteristic. In the early days of Title VII, employment discrimination lawsuits were very effective in driving out the overt and intentional forms of racial discrimination practiced by employers.¹⁴ Prior to the passage of Title VII and the first wave of litigation, many employers explicitly excluded black workers or segregated job categories on the basis of race. Such overt forms of discrimination are rare today; yet the law seems unable to remedy any other form of discrimination.

Scholars have documented the wide variety of discriminatory practices that persist today. Today, racial inequality in the workplace is rarely caused by acts stemming from racial animus. Rather, the most significant barriers to racial equality in employment are unconscious racism,¹⁵

12. See authors, *infra* notes 15–20.

13. See *Int'l Bd. of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977) (characterizing disparate treatment as the most easily understood type of discrimination).

14. John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1635–41 (1991).

15. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to*

implicit bias,¹⁶ disparate impact discrimination,¹⁷ structural discrimination,¹⁸ and “second generation” employment discrimination.¹⁹ Complex patterns of behavior, such as corporate culture, networking, and unconscious bias, tend to disadvantage racial minorities.²⁰ These complex behaviors and dynamics seem to be beyond the radar of current antidiscrimination enforcement.²¹ A widely cited empirical study reveals that most employment discrimination cases allege individual disparate treatment, rather than class claims or disparate impact claims,²² even though many scholars suggest that structural and unintentional discrimination are greater barriers to equal employment opportunity.²³ Other studies establish that plaintiffs in employment discrimination cases lose more frequently than plaintiffs alleging other causes of action.²⁴ Employment discrimination cases are difficult to prove, especially since few cases turn up “smoking-gun” evidence of discrimination.²⁵

Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1164 (1995).

16. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1072–73 (2006) (discussing implicit bias as cause of inequality). Christine Jolls notes that, even though antidiscrimination law may not directly remedy implicit bias, it may have the effect of decreasing implicit bias by increasing the presence of minorities in the workplace. See Christine Jolls, *Antidiscrimination Law’s Effect on Implicit Bias 2–3* (Nat’l Bureau of Econ. Research, Working Paper No. 343, 2005).

17. See Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 919–20, 987–88 (2005).

18. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 2 (2006); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91–92 (2003).

19. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–61 (2001).

20. See KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 125 (2004).

21. As Christine Jolls and Cass Sunstein note, ordinary antidiscrimination law will often face grave difficulties in ferreting out implicit bias even when this bias produces unequal treatment.

Of course, antidiscrimination law has long forbidden various forms of differential treatment on the basis of race and other protected traits. If, for example, a state official treats someone worse because of race, there might well be a violation of the Constitution as well as antidiscrimination statutes. Some of the hardest cases present problems of proof: if there is no “smoking gun,” how can bias be established?

Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 976 (2006). See also Sturm, *supra* note 19, at 459.

22. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998, 1020 (1991).

23. See *supra* notes 15–21.

24. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 894 (2006); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 559–61 (2001).

25. Federal courts have recognized that most disparate treatment plaintiffs must rely on the

The limits of antidiscrimination law are even more pronounced in France. In France, a very small number of employment discrimination cases are litigated in court.²⁶ Employers are rarely found liable without direct evidence of intent to discriminate.²⁷ Even though statutes prohibit discrimination,²⁸ including “indirect” or disparate impact discrimination, the law has not successfully remedied the widespread discrimination against North Africans in employment.²⁹ The wave of riots by black and North African young people in the autumn of 2005 was widely understood as an angry reaction against discrimination, unemployment, and alienation from French society.³⁰

I have elsewhere defended the view that antidiscrimination law, properly understood, ought to remedy and regulate all employer practices that undermine equal employment opportunity, not only overt and intentional forms of discrimination.³¹ The purpose of this Article is not to reiterate that normative view. Rather, it is to illuminate some of the dynamics that contribute to antidiscrimination law’s present shortcomings.³² In what follows, I show how antidiscrimination law’s

inferences that the factfinder can draw from circumstantial evidence since direct evidence of discriminatory intent is rarely discovered. *See, e.g.,* Ryther v. KARE 11, 84 F.3d 1074, 1080 n.6 (8th Cir. 1996) (“[I]ntentional discrimination will frequently be proven by circumstantial evidence . . .”) (citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)); *see also* Hollander v. Am. Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) (“[E]mployers rarely leave a paper trail—or ‘smoking gun’—attesting to a discriminatory intent . . .”).

26. *See* BERNARD STASI, VERS LA HAUTE AUTORITE DE LUTTE CONTRE LES DISCRIMINATIONS 37 (2003).

27. *See infra* Part III.F.

28. The principal antidiscrimination provisions are C. PÉN. art. 225-1 and 225-2 and C. TRAV. art. L. 122-45. *See infra* Part III.A & B.

29. Persons born in France to two North African parents have an unemployment rate of about 20.1%, as compared to a national unemployment rate of about 10.2%. *See* Louis Maurin & Patrick Savidan, *Données*, in L’ÉTAT DES INÉGALITÉS EN FRANCE 2007, 19, 96 tbl. (Louis Maurin & Patrick Savidan eds., 2006). Sociologists and NGOs have conducted various experiments that demonstrate that a CV bearing a North African name is significantly less likely to be selected for an interview by an employer, despite identical qualifications to a CV bearing a French name. *See* SAMUEL THOMAS, RAPPORT D’ANALYSE DES AFFAIRES RECENTES DE DISCRIMINATIONS A L’EMBAUCHE POURSUIVIES PAR SOS-RACISME 14 (2005); Jean-François Amadieu, Olivier, Gérard et Mohammed *ont-ils les mêmes chances de faire carrière? Une analyse des enquêtes emploi de l’INSEE*, April 2006, <http://cergors.univ-paris1.fr>.

30. *See* Fabien Jobard, *Sociologie politique de la “racaille”*, in ÉMEUTES URBAINES ET PROTESTATIONS: UNE SINGULARITÉ FRANÇAISE 59, 73 (Hugues Lagrange & Marco Oberti eds., 2006); Laurent Muchielli & Véronique le Goaziou, *Inégalités, humiliations collectives et violences urbaines*, in L’ÉTAT DES INÉGALITÉS EN FRANCE 2007, 199, 201 (Louis Maurin & Patrick Savidan eds., 2006).

31. *See* Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405 (arguing that antidiscrimination law is justified by principles of distributive justice, including the general societal duty to remove barriers to equal employment opportunity).

32. This article assumes that understanding the dynamics that cause these shortcomings can inform any future proposals for reform. Of course, for those who do not see the inability of

resistance to change in two different legal systems exemplifies procedural path dependence. In other words, the current limits of antidiscrimination law are produced by the initial decision to categorize discrimination as “criminal” or “civil,” and the historical path of procedural advantages that reinforces those initial choices.

II. PATH DEPENDENCE AND COMPARATIVE METHOD

A. *Path Dependence: Definition and Examples*

The concept of path dependence was developed by economists³³ and political scientists,³⁴ and has been particularly salient in the study of political behavior and political institutions. The concept can also illuminate law,³⁵ including the behavior of legal actors and the evolution of legal institutions, in both the common-law and civil-law traditions. In short, path dependence occurs when a present outcome is shaped by the historical path leading up to it.

Economists developed the idea of path dependence after noticing that economies and markets sometimes favored inefficient outcomes because these outcomes would become locked in by historical events. A concrete example, developed by Paul David and frequently discussed in the literature, is the predominance of the QWERTY keyboard on typewriters and computers.³⁶ Despite the fact that many subsequent keyboard designs demonstrate increased efficiency (i.e., allowing a person to type twenty to forty percent faster, thereby lowering costs of using typists), the QWERTY typewriter keyboard remains dominant.³⁷ David argues that the

antidiscrimination law to address a wider variety of practices as a shortcoming worthy of reform, understanding these dynamics may appear less useful.

33. See W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 *ECON. J.* 116 (1989); Paul A. David, *Clio and the Economics of QWERTY*, 75 *AM. ECON. REV.* 332 (1985); S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 *J. L. ECON. & ORG.* 205 (1995).

34. See Margaret Levi, *A Model, A Method, and a Map: Rational Choice in Comparative and Historical Analysis*, in *COMPARATIVE POLITICS: RATIONALITY, CULTURE AND STRUCTURE* 19, 28 (Mark Irving Lichbach & Alan S. Zuckerman eds., 1997); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 *AM. POL. SCI. REV.* 251 (2000).

35. See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 *B.U. L. REV.* 813 (1998); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 *IOWA L. REV.* 601 (2001); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 *U. CHI. L. REV.* 573 (2000).

36. See David, *supra* note 33, at 332; Arthur, *supra* note 33, at 126; Hathaway, *supra* note 35, at 611; Liebowitz & Margolis, *supra* note 33, at 213; see also Pierson, *supra* note 34, at 254.

37. David, *supra* note 33, at 332.

QWERTY keyboard got locked in because the dominance of the QWERTY keyboard at a particular historical moment led typists to learn how to type on that system, which then increased the costs of switching to another system.³⁸ Thus, there were increasing returns associated with continuing to choose the QWERTY keyboard.³⁹

The idea of “increasing returns” is central to political scientists’ development of the path dependence concept. As Margaret Levi has noted, the costs of reversal in the arrangement of political institutions are high once a polity has started down a particular path.⁴⁰ Paul Pierson suggests that political institutions have a “status quo bias” as compared with economic actors.⁴¹ The exit option, which is readily available in market transactions, is far more costly to those who feel poorly served by institutional arrangements.⁴² In fact, institutions are designed with durability in mind.

The status quo bias is even stronger in legal institutions and rules. Law imposes binding constraints on behavior, with the goal of binding actors in the future.⁴³ Indeed, the very concept of the rule of law depends on the value of predictability in law. In that sense, law is self-reinforcing. As Oona Hathaway has noted, the doctrine of stare decisis has made common-law systems explicitly and consciously path dependent.⁴⁴ A system that is based on the binding authority of precedent by its very nature imposes costs every time it changes course;⁴⁵ therefore, there are increasing returns to resisting change. Even in civil-law systems that have no formal doctrine of stare decisis, the values of predictability and legitimacy that underlie the strong positivist tradition of code systems impose costs on change.

Path dependence explanations are contrasted in the political science literature with functional explanations.⁴⁶ Functional arguments tend to explain political or legal outcomes as existing and persisting because they serve a particular function. Such arguments are prevalent among comparative political scientists as well as comparative legal scholars. Paul Pierson suggests that, while functional explanations may be a good way to

38. *Id.* at 335.

39. *Id.*

40. Levi, *supra* note 34, at 28.

41. Pierson, *supra* note 34, at 262.

42. *Id.* at 258.

43. *Cf. id.* at 262.

44. Hathaway, *supra* note 35, at 606.

45. *Id.*

46. *E.g.*, Pierson, *supra* note 34, at 264.

derive causal hypotheses, they do not account for the possibility that “a dynamic of increasing returns may have locked in a particular option even though it originated by accident, or the factors that gave it an original advantage may have long since passed away.”⁴⁷ By contrast, I shall show how functional explanations can shed light on path dependence in certain contexts. In other words, there may be a rational functional explanation for why a particular option originated rather than accident or happenstance. And there may exist additional factors that continue to make a present outcome desirable, at least in some respects. Yet, one can still explain the endurance of that present outcome as a form of path dependence if there are new, more complex factors that change and distort the workings of the factors that rendered the present state of affairs rational.

B. Procedure and Antidiscrimination Enforcement

In any national context, a procedural system may be selected to enforce the legal norm of nondiscrimination because, at the particular historical moment of choice, there is a fit between the substantive legal principles associated with that procedural system and the problems that constitute discrimination. Even when the substantive fit begins to erode, there remain certain practical conveniences in continuing to enforce the norm against discrimination through the existing procedural mechanism. There may be a good fit between the rules of procedure that govern information gathering and the discovery of information relevant to determining whether a norm articulated by antidiscrimination law has been violated. Yet, social practices evolve, and they evolve largely in response to the law itself. In the United States, for instance, the social practices that constitute “discrimination” have evolved since 1964 when Title VII was passed, in large part because the legal prohibition of discrimination has driven out the practices that were explicitly regarded as discriminatory when the statute was passed.⁴⁸ As a result, the fact patterns that constitute a claim of discrimination may change. Over time, some of these fact patterns may be a poor fit with the principles, policies, norms, and practices that pervade a particular procedural system.

47. *Id.* at 264.

48. This dynamic is what Reva Siegel has called “preservation-through-transformation” in the context of equal protection. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

C. Comparative Method and Path Dependent Processes

Comparative inquiry is an indispensable tool for shedding light on institutional arrangements that can be described as path dependent.⁴⁹ Because legal actors, including scholars, inhabit the institutional arrangements they seek to understand and critique, the path dependence of a particular feature of the institution may be difficult to identify.⁵⁰ We tend to think there is something natural, perhaps even optimal, about the institutional arrangements of our own legal universe, including the particular arrangement in which we vindicate our universal human rights like equality.

Encounters with foreign models destabilize this assumption in two important ways. First, foreign models, with their different institutional arrangements to address similar legal problems, are a reminder that our way is not the only way. Second, a critical perspective is often awakened and sharpened when the object of study is external to oneself. It is much easier to find fault with what is unfamiliar than with what is familiar. Thus, the hope is that understanding France's procedural path dependence with regard to employment discrimination law will sharpen the analytical frameworks by which we re-evaluate the sources of resistance to change in U.S. antidiscrimination law.

III. CRIMINAL PROCEDURE AND EMPLOYMENT DISCRIMINATION IN FRANCE

A. Criminal Liability for Discrimination and its Origins

In France, employment discrimination is a criminal offense. A person can face three years of imprisonment and €45,000 in criminal fines for firing or refusing to hire someone on the basis of race.⁵¹ It is also possible to enforce a legal prohibition of employment discrimination through a civil action by proceeding under a parallel provision of the Labor Code.⁵² But most employment discrimination cases are litigated through criminal

49. As Robert Kagan puts it, comparative analysis attempts to reveal, inter alia, "unconsciously maintained patterns, and sources of resistance to change." See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 5-6 (2001).

50. As John H. Langbein puts it, "[t]he purpose of comparative study is to help understand what is distinctive (and problematic) about domestic law." John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 545 (1995).

51. C. PÉN. art. 225-2.

52. C. TRAV. art. L. 122-45.

rather than civil proceedings.⁵³ This remains true six years after the passage of new laws implementing EU directives designed to make civil litigation of employment discrimination claims more friendly to potential plaintiffs.⁵⁴

An American will naturally wonder why and how France came to understand employment discrimination as a form of criminal activity. There is a historical explanation. When France first enacted employment discrimination laws in 1972, only a criminal provision was adopted, with the civil provision appearing ten years afterwards.⁵⁵ Today, the main statutory provision against discrimination is found in Article 225-1 of the Penal Code,⁵⁶ which originated with the codification of a 1972 anti-racism statute that prohibited, *inter alia*, racial discrimination.⁵⁷ The main impetus for adopting a new statute in 1972 was to implement France's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Why did France in 1972 choose to criminalize racial discrimination while other countries implementing ICERD, such as Great Britain, relied on civil and administrative sanctions?⁵⁸ The legislative history of the 1972

53. See MARIE-THERESE LANQUETIN & MANUELA GREVY, *PREMIER BILAN DE LA MISE EN OEUVRE DE LA LOI DU 16 NOVEMBRE 2001 RELATIVE A LA LUTTE CONTRE LES DISCRIMINATIONS 77* (2005) [hereinafter LANQUETIN & GREVY].

54. See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22; 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.

55. For a detailed treatment of the history of the 1972 anti-racism law and the politics of the memory of Vichy that influenced the antidiscrimination norm, see Julie Chi-hye Suk, *Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295 (2007).

56. The provision currently in force reads:

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.

Constitue également une discrimination toute distinction opérée entre les personnes morales à raison de l'origine, du sexe, de la situation de famille, de l'apparence physique, du patronyme, de l'état de santé, du handicap, des caractéristiques génétiques, des moeurs, de l'orientation sexuelle, de l'âge, des opinions politiques, des activités syndicales, de l'appartenance ou de la non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée des membres ou de certains membres de ces personnes morales.

C. PEN. art. 225-1 (Partie législative).

57. Law No. 72-546 of July 1, 1972, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 2, 1972, p. 6803.

58. For a detailed account of Great Britain's enforcement mechanisms for antidiscrimination law,

statute makes clear that the anti-racism law was building on an existing legal framework that already criminalized racist speech. The criminal prohibition of racial defamation in the press had first been adopted into French law in 1939 when anti-Semitic propaganda was on the rise.⁵⁹ The Marchandeu law, as it was known, amended the 1881 free press law to prohibit “defamation and insults against a group of persons belonging by their origin to a particular race or religion, which have for their purpose to incite hatred against citizens or residents.”⁶⁰ In 1972, when the law was adopted, controversies about France’s role in the Holocaust were at the forefront of public debate.⁶¹

Because French employment discrimination law was part of French anti-racism law, which already had a history in criminal law dating back to the pre-Vichy regulation of anti-Semitism, employment discrimination law became a matter of criminal law.⁶² The memory of the world before and during Vichy was present in the discussion of the 1972 anti-racism bill.⁶³ The legislative debates reflect the understanding that discrimination in employment was not a new problem but was simply another manifestation of racism, which had been regulated in the past through criminal law. Thus, France’s pre-Vichy laws criminally punishing anti-Semitic speech provided the template on which its current antidiscrimination law was built. This set of historical contingencies enabled French employment discrimination law to be established as a criminal provision in the Penal Code.

B. Civil Liability

Ten years later, a new provision of the Labor Code also prohibited discrimination, making it possible for victims of employment discrimination to seek civil remedies before a Labor Tribunal. The 1982 labor law, which generally protected the rights and liberties of employees in the workplace, included a ban on discrimination in matters of hiring, firing, disciplining, training, and promotion in the workplace, on the basis

see Suk, *supra* note 31.

59. For a thorough account of the rise in anti-Semitic propaganda and the legitimization of anti-Semitic voices in French public discourse in the 1930s, see MICHAEL R. MARRUS & ROBERT O. PAXTON, *VICHY FRANCE AND THE JEWS* 34–71 (1981).

60. Decree of Apr. 21, 1939, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Apr. 25, 1939, p. 5295.

61. For a detailed account of these controversies, see Suk, *supra* note 55, at 312–15.

62. See *id.* at 312–13.

63. See *Assemblée Nationale, Débats Parlementaires* of June 7, 1972, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 8, 1972, at 2282.

of origin, race, sex, family situation, political opinions, union activities, or religious convictions.⁶⁴ The antidiscrimination provision of this labor law was largely motivated by a 1976 European Council directive on equal treatment for men and women in employment.⁶⁵

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.”⁶⁶ 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.”⁶⁷ Codified at *Code du travail* Article L. 122-45, the version of this provision currently in force protects both employees and job candidates from discrimination in recruitment, firing, and all other conditions of work, on the basis of 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, political opinions, union activities, religious convictions, physical appearance, family name, state of health, or disability.⁶⁸

This statute, establishing a civil remedy for discriminatory firing and disciplining in the workplace, was part of a series of legal reforms that strengthened employee rights, particularly with regard to job security and the employee’s right to participation in the governance of the enterprise. The central thrust of the statute was the employee’s right to non-arbitrary treatment by the employer.⁶⁹ Discrimination on the basis of race, sex, or union membership constituted arbitrary treatment and was thus not permitted. Thus, *Code du travail* Article L. 122-45 is a general employee rights provision to which the norm against racial or other group-based discrimination is incidental. This understanding of the provision is

64. 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.

65. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 1976 O.J. (L 039) 40–42.

66. 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 (Section VI, Sous-section II).

67. *Id.* See also C. TRAV. art. L. 122-40.

68. C. TRAV. art. L. 122-45.

69. For an account of the discrimination provision in the context of the Labor Code’s general protections of employees, see Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 84–92 (2007).

reinforced by the fact that most litigation of this provision has not involved racial discrimination; it has involved complaints of discrimination on the basis of union membership.⁷⁰

Most of the developments with regard to civil liability for employment discrimination in France have occurred as a result of France's attempt to implement European law. In November 2001, the French law on "the fight against discrimination"⁷¹ implemented the indirect discrimination and burden of proof provisions of the EU Race Directive. The statute prohibited discriminatory measures, whether "direct or indirect"⁷² in hiring, disciplining, firing, access to training, and various other conditions of employment. The statute also added the following language to *Code du travail* Article L. 122-45:

In the case of litigation relative to the application of the preceding paragraphs, the concerned employee or candidate to recruitment, internship, or training period in the enterprise shall present elements of fact allowing the presumption of the existence of direct or indirect discrimination. In view of these elements, it shall fall upon the respondent to prove that the decision was justified by objective elements alien to all discrimination. The judge shall make a decision after having ordered, as necessary, all investigative measures that he deems useful.⁷³

According to this formulation, the employment discrimination plaintiff now only needs to present facts that raise an inference of discrimination. This showing then shifts the burden to the defendant to prove that there were nondiscriminatory "objective elements" that justified the challenged decision. Recent decisions by the *Cour de cassation* suggest that "presenting" facts under this statute requires more than merely alleging

70. The volume of union discrimination cases has only increased after the passage of the 2001 statute, while the volume of race discrimination cases under this provision has not. See LANQUETIN & GREVY, *supra* note 53, at 28, 51. This is ironic in light of the fact that the 2001 statute was an implementation of the EU's Race Directive.

71. 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.

72. *Id.*

73. *Id.* Article 1 reads:

En cas de litige relatif à l'application des alinéas précédents, le salarié concerné ou le candidat à un recrutement, à un stage ou à une période de formation en entreprise présente des éléments de fait laissant supposer l'existence d'une discrimination directe ou indirecte. Au vu de ces éléments, il incombe à la partie défenderesse de prouver que sa décision est justifiée par des éléments objectifs étrangers à toute discrimination. Le juge forme sa conviction après avoir ordonné, en cas de besoin, toutes les mesures d'instruction qu'il estime utiles.

these facts. The plaintiff must produce some evidence, albeit rebuttable evidence, that there is a disparity of treatment.⁷⁴

C. The Predominance of Criminal Employment Discrimination Proceedings

In France, victims of discrimination typically begin legal action in either the criminal or civil courts with the assistance of anti-racist organizations, including, most prominently, SOS-Racisme. French criminal procedure allows victims of crimes to participate in criminal proceedings as civil parties.⁷⁵ Furthermore, the *Code de procédure pénale* permits associations that have been committed to fighting against racism for at least five years to participate as civil parties in criminal prosecutions of racial discrimination.⁷⁶ If a civil party participates in a criminal prosecution, it may make claims as part of the same proceeding for compensation. Victims can get compensation for injuries that result from criminal acts, and associations can obtain some part of the criminal fine, which compensates them for their participation. This feature of French criminal procedure, which has no analogue in U.S. law, gives victims and organizations like SOS-Racisme a meaningful choice between litigating racial employment discrimination⁷⁷ in criminal and civil proceedings.⁷⁸

74. C. TRAV. art. L. 122–45. See Cass. soc., May 18, 2006, No. 04-46498; Cass. soc., Aug. 3, 2006, No. 04-44970.

75. C. PR. PÉN. art. 1.

76. C. PR. PÉN. art. 2-1 specifically provides:

Every organization regularly committed, for at least five years before the date of the facts, by its statutes, to combating racism or to assisting victims of discrimination on the basis of their national, ethnic, racial, or religious origin, could exercise their rights recognized civil parties in matters concerning discrimination prohibited by articles 225-2 and 432-7 of the Penal Code.

In recent employment discrimination litigation, SOS-Racisme has participated as a civil party in most of the cases that have been reported in the press. See, e.g., *supra* note 1. See generally THOMAS, *supra* note 29. Other organizations that have participated as civil parties include MRAP (Mouvement contre le racisme et pour l'amitié et la paix) and LICRA (Ligue contre racisme et antisémitisme). See, e.g., *infra* note 91.

77. The *Code Pénal*'s prohibition of discrimination is not limited to race or origin. Indeed, it includes the same categories as physical appearance, state of health, handicap, political opinions, and union activities. See C. PÉN art. 225-1. Nonetheless, the *Code de procédure pénale* does not allow associations to participate as civil parties in all these types of prosecutions. The *Code de procédure pénale* allows anti-racist associations to participate in race discrimination prosecutions, and other provisions allow anti-sexist organizations to participate in sex discrimination prosecutions. See C. PR. PÉN. art 2–1, 2–2.

78. In the United States, victims who seek redress for criminal acts do not participate as parties in prosecutions; nor do criminal proceedings enable them to seek compensation for injuries caused by criminal acts.

Most legal action challenging racial discrimination in employment has been brought in criminal rather than civil proceedings.⁷⁹ This has not changed despite the passage of the 2001 statute easing the plaintiff's burden of proof in civil employment discrimination cases brought under *Code du travail* Article L. 122-45. Although the statute implemented the Race Directive, it has had no effect on the number of civil race discrimination complaints.⁸⁰

Although there are also civil cases that have been brought under the Labor Code's antidiscrimination provision, few involve race or sex discrimination. The civil cases that have been brought under the Labor Code's antidiscrimination provision have mostly involved challenges to discriminatory treatment on the basis of union membership.⁸¹ The violence in the Fall of 2005 by France's second-generation immigrant population has brought attention to the widespread problem of racial discrimination in hiring, which is one explanation for the disproportionately high levels of unemployment amongst young people of North African origin.⁸² To the extent that French antidiscrimination law offers a remedy to the problem of racial discrimination in hiring, the remedies tend to be sought through criminal law and not through civil proceedings.⁸³

SOS-Racisme, the organization that most frequently participates as a *partie civile* in race discrimination cases, tends to choose criminal rather than civil proceedings. A March 2005 report of SOS-Racisme's recent legal activities describes over twenty cases in which it has participated over the last five years, all of which were criminal cases.⁸⁴ SOS-Racisme's website, which offers advice to victims of discrimination, does not even mention the possibility of civil actions or civil liability. It simply instructs

79. See STASI, *supra* note 26, at 37.

80. *L'arsenal juridique*, LE MONDE, Mar. 31, 2004.

81. LANQUETIN & GREVY, *supra* note 53, at 31.

82. For a discussion of hiring discrimination and its relationship to France's expansive job security protections, see Suk, *supra* note 69, at 95–100.

83. The Lanquetin and Grevy study notes that although *Code du travail* article L. 122-45 is normally litigated before the *Conseils des prud'hommes* (labor courts), racial discrimination in employment has seldom arisen in such proceedings because it was long assumed that the *Conseils des prud'hommes* can only hear cases arising from employment contracts, and racial discrimination in employment usually occurs prior to the formation of a contract—that is, in hiring. See LANQUETIN & GREVY, *supra* note 53, at 51. In December 2006, however, the Cour de cassation held that the *Conseils des prud'hommes* had jurisdiction over pre-contractual matters and could hear cases pertaining to access to employment and apprenticeships. Cass. soc., Dec. 20, 2006, Bull. civ. V, Nos. 06-40662, 06-40799, & 06-40864.

84. See generally THOMAS, *supra* note 29.

victims to write directly to the prosecutor or to commence an investigation through the investigating magistrate's office.⁸⁵

There is a widespread view amongst policymakers, activists, and academics that the nature of racial discrimination is inherently criminal. Racial discrimination cases are more often brought in criminal proceedings rather than civil proceedings because of the understanding that racial discrimination warrants the symbolic condemnation that only a criminal conviction can carry.⁸⁶ A related argument is that criminal convictions are uniquely able to make an impact on public opinion through media publicity.⁸⁷ SOS-Racisme made such arguments when it opposed the new provisions of the Equality of Opportunity Statute that authorize the HALDE to negotiate settlements with alleged discriminators. Such settlements would preclude the possibility of a criminal prosecution and conviction, thereby detracting from the purpose of publicly condemning those guilty of discrimination. Samuel Thomas, the vice president of SOS-Racisme, argued that this provision was a real "step backwards": "In giving the HALDE the possibility of imposing a simple financial sanction, even though discrimination is today a crime, punishable by a fine and the penalty of imprisonment, Parliament risks undermining the responsibility of the police and judges charged with enforcing the law. It is only by treating discriminators as delinquent that we can evolve behaviors and mentalities."⁸⁸

The symbolic value of a criminal conviction derives from the public nature of a criminal proceeding. The victim is a civil party in what is essentially a prosecution by the republic against the discriminator—thus framing the crime of discrimination as a wrong to the entire republic. In the civil context, the wrong of discrimination is treated as a private injury to be compensated, and the fear is that this private law model will be reinforced by a settlement in which the victim is compensated while the perpetrator is never condemned.

D. The Limits of Civil Procedure

A close look at the realities of employment discrimination litigation in France and the United States reveals that racial discrimination is neither

85. See *Discrimination à l'embauche*, http://www.sos-racisme.org/?Discrimination&var_recherche=1%27embauche (last visited Apr. 6, 2008).

86. See STASI, *supra* note 26, at 37.

87. *Id.*

88. Franck Seuret, *Discriminations: le bâton de la Halde*, L'ECONOMIE POLITIQUE, http://www.leconomiepolitique.fr/discriminations---le-baton-de-la-halde_fr_art_1999_23095.html.

inherently criminal nor inherently civil. Notwithstanding the social value of condemning and stigmatizing discrimination through criminal law, there are many other dynamics at work that tend to reinforce criminal law's dominance in the employment discrimination area in France. These dynamics have little to do with the substantive fit between employment discrimination and criminal law.

In reality, differences in civil and criminal procedure have made racially discriminatory hiring a problem of criminal law rather than employment law in France. John Langbein's *The German Advantage in Civil Procedure*, a fixture in the canons of comparative law, famously praised the virtues of Continental civil procedure, including the lack of adversary-driven fact gathering in Continental systems of civil justice.⁸⁹ Yet, this feature of French civil procedure, coupled with the French norm of a passive investigatory role for judges in civil suits, make civil proceedings ill-suited for unearthing information relevant to claims of racial discrimination in hiring. The advantages of Continental criminal procedure as compared to Continental civil procedure have thus pushed all such cases into criminal law in France.

To facilitate the comparison of French civil and criminal procedure in the employment discrimination context, it is useful to consider how a typical case would fare in each procedural system. As legislators debated the 2001 statute that eased the burden of proof, they often invoked the case of Raouf Lachhab,⁹⁰ a man of Tunisian origin who had applied for a job at *Crédit Mutuel* (a French bank) in the Alsace region in response to an advertisement for the position. After he was rejected, he sent his CV again, only this time bearing the Alsacien name of Thierry Meyer rather than Raouf Lachhab. The second CV was in all other respects identical to the first, rejected CV. As Thierry Meyer, he obtained an interview for the job.⁹¹ Legislators invoked this case mainly as a rhetorical device to demonstrate the persistence of racial discrimination in hiring.⁹² Although legislators did not focus on the problem of procedure, the case provides a useful device for exposing the limits of civil procedure as compared to

89. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833, 841 (1985). For criticisms of Langbein's argument, see Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988); Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987).

90. M. PHILIPPE VUILQUE, ASSEMBLEE NATIONALE, REPORT NO. 2609, 5-6 (2000).

91. These facts were reported in *Enquête. Une grande entreprise prise sur le fait de discrimination à l'embauche*. L'HUMANITE, Feb. 4, 2000.

92. See VUILQUE, *supra* note 90, at 5-6.

criminal procedure in employment discrimination and also highlights how recent reforms do not necessarily fill in these gaps.

Lachhab sent his CV bearing his own name several times before he received the response, “We regret that we are not able to respond favorably, since there is no vacant post that corresponds to your profile.”⁹³ Lachhab held a DEA (equivalent to master’s degree) in banking and finance. When he re-sent his own CV bearing the name Thierry Meyer, he received a message on his answering machine inviting him for an interview. Lachhab then filed a criminal complaint with prosecutors, accompanied by the anti-racist association LICRA (*Ligue contre le racisme et l’antisémitisme*) accompanying him as a *partie civile*.⁹⁴ But *Crédit Mutuel* was not convicted.⁹⁵

To understand why persons similarly situated to Raouf Lachhab and associations like LICRA choose to bring criminal rather than civil proceedings, it is helpful to consider what would have happened if Lachhab had brought a proceeding under *Code du travail* Article L. 122-45, governed by the *Nouveau code de procédure civile* (N.C.P.C.). Under the 1976 *Nouveau code*, a *juge de la mise en état*, an investigating magistrate, is in charge of the pretrial investigation of civil cases that are brought in the *Tribunaux de grandes instances*,⁹⁶ courts of general jurisdiction. The Lachhab incident occurred prior to the adoption of the 2001 statute. But even if the 2001 statute’s plaintiff-friendly burden-of-proof provision had been in effect, it is clear that French civil procedure would still have made it difficult to prove Lachhab’s case. Other racially discriminatory hiring cases that have been criminally prosecuted in the last few years demonstrate the important role French criminal procedure plays in uncovering evidence of discrimination.

The main problem that arises for plaintiffs claiming discriminatory hiring in the civil context is that parties cannot compel discovery of evidence in the adversary’s hands to acquire evidence that would prove the elements of one’s own case. In other words, bearing the burden of proof means bearing the burden of presenting evidence of the elements of one’s case. And, in stark contrast to litigants in the United States, a civil litigant does not have access to relevant evidence that is in the hands of the

93. *Enquête*, *supra* note 91.

94. *See id.*

95. *See* THOMAS, *supra* note 29, at 14.

96. N.C.P.C. art. 764.

adversary through the discovery devices that American lawyers rely on to get evidence that eventually supports one's allegations at trial.⁹⁷

Several rules in the French Code of Civil Procedure, understood through the principles that underlie these rules, make it highly unusual for one party to obtain evidence from the adversary that will help establish its own case. Article 2 of the French Code of Civil Procedure provides that "The parties conduct the suit under the burdens they carry. It is up to them to accomplish the procedural acts in the forms and time frames required."⁹⁸ This article is understood to establish the party-driven nature of the proceedings, which is elaborated by Article 9, providing "The burden is on each party to prove, consistent with the law, the facts necessary to the success of its claim."⁹⁹ An equitable proceeding requires each party to prove, without the aid of the court or the other party, the facts upon which the claim depends.¹⁰⁰ Some Americans assume that the civil law judge plays a central role in civil proceedings,¹⁰¹ largely because civil procedure rules do, in letter, authorize the judge to investigate facts. However, a strong norm of judicial neutrality emerges from the *Code de procédure civile*'s imposition of burdens on the parties, which in reality limits the judge's liberty of investigation.¹⁰²

Even though the 2001 statute provides for burden shifting, the plaintiff must still "present" elements of fact that leave the factfinder to infer that discrimination occurred, and it is now clear that this requires the presentation of some evidence, not mere allegations. It is only after the plaintiff has submitted some evidence of such facts¹⁰³ that the burden

97. See *infra* Part IV.

98. "Les parties conduisent l'instance sous les charges qui leur incombent. Il leur appartient d'accomplir les actes de la procédure dans les formes et délais requis." N.C.P.C. art. 2.

99. "Il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention." N.C.P.C. art. 9. Anglo-American commentators have noted that the role of the judge is also constrained by the requirement in N.C.P.C. art. 7 that the judge base his decision entirely on facts presented by the parties. See, e.g., C.N. Ngwasiri, *The Role of the Judge in French Civil Proceedings*, 9 CIVIL JUSTICE Q. 167, 177 (1990).

100. See Cass. 1e civ., Oct. 17, 2000, Bull. civ. I, No. 98-22046.

101. See KAGAN, *supra* note 49, at 105; Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1021 (1998).

102. Traditionally, "the principle of neutrality of the judge remains at the basis of the French conception of the civil suit. Combined with the principle of formality of proof, it indubitably leads to the limitation of the judge's liberty of investigation." Claude Giverdon, *The Problem of Proof in French Civil Law*, 31 TUL. L. REV. 29, 37 (1956). This has not changed with the *Nouveau code de procédure civile*'s delegation of more power to the judge. Judges are frequently unwilling to compel production of evidence. See James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 460-61 (1986).

103. See Catherine Minet, *Présomption et preuve de la discrimination en droit du travail*, JCP—La semaine juridique entreprise et affaires, May 22, 2003, at 894, 896.

shifts to the employer to prove that there was an objective nondiscriminatory reason for the adverse action.

Practically speaking, the plaintiff has to present evidence of disparity in treatment. Without establishing that there was any disparity in the treatment of candidates belonging to one protected category and candidates belonging to another group, there would be no inference of discrimination. The evidence may be rebuttable, but nonetheless, it is the plaintiff's duty to prove disparity in treatment.¹⁰⁴

Very often, reliable evidence of differential treatment correlated with one of the protected categories is difficult to find, especially for a job candidate who is an outsider to the enterprise in question. How does an outsider obtain evidence that the employer has granted interviews to candidates of a particular racial group? How does he obtain evidence that the employer is lying when he tells the candidate of color that the position is no longer vacant? French civil procedure has traditionally favored written proof of fact.¹⁰⁵ But the documents that would tend to prove these allegations are often in the hands of the employer—for instance, personnel files or internal memoranda indicating which candidates were interviewed and which candidates were not.

French civil procedure makes it very difficult to obtain documentary evidence that is in the hands of the adversary. Article 132 requires each party to disclose documents which support their own factual allegations.¹⁰⁶ A party can compel the disclosure of a document if the adversary is relying on it to prove a fact that the adversary alleges.¹⁰⁷ Finally, the investigating judge is authorized to issue investigatory orders with regard to facts on which the resolution of the dispute depends if one party requests such an order.¹⁰⁸ This power seems to encompass the judge's power to require the production of documents by an employer that would tend to support the plaintiff's factual allegation of disparate treatment, such as personnel or payroll records. But the judge's power to order the production of documents is limited by Article 146, which provides "[i]n no case can an investigatory order be issued for the purpose of supplying the deficiency of a party in administering proof."¹⁰⁹ As a result, ordering a defendant to produce documents to support plaintiffs' alleged facts, where

104. *Id.* at 895.

105. Beardsley, *supra* note 102, at 470.

106. N.C.P.C. art. 132.

107. *See* N.C.P.C. art. 142.

108. N.C.P.C. art. 142, 145.

109. "En aucun cas une mesure d'instruction ne peut être ordonnée en vue de suppléer la carence de la partie dans l'administration de la preuve." N.C.P.C. art. 146.

plaintiff has no other evidence in his own possession to support these allegations, is seen as the judge's attempt to supply plaintiff with helpful evidence for which plaintiff alone is responsible. Many decisions of the *Cour de cassation* have held such investigatory orders to be improper.¹¹⁰

Raouf Lachhab, as a result of his double-CV experiment, may have some evidence of the employer's disparate treatment of Alsaciens and Arabs: namely, his own testimony, oral or written, that he sent the two CVs, and was rejected first but invited for an interview under a new name. But under French rules of civil procedure, a party cannot be a witness in his own case.¹¹¹ The judge does have the power, however, to issue an investigatory order requiring a party to appear for questioning before the judge. Still, such orders are subject to the limitation that the judge cannot use the investigatory orders to supply a party with missing evidence that the party bears the burden of presenting.¹¹²

The 2001 statute, in addition to easing the burden of proof in employment discrimination cases, explicitly provides that "the judge shall form his conviction after having ordered, in case of need, all investigatory orders that he deems useful."¹¹³ Although the statute encourages judges to issue investigatory orders when necessary in light of the burden-shifting framework introduced by the same statute, a recent empirical study of antidiscrimination litigation since the adoption of the 2001 statute reveals that investigatory orders in employment discrimination cases are almost nonexistent.¹¹⁴ Civil judges are accustomed to the norm of refraining from issuing investigatory orders when the orders appear to help one party fill in the deficiencies of proof for which that party bears the burden pursuant to Article 146. As a result, even though the 2001 statute reaffirms the judge's discretion to issue orders he "deems useful," civil judges are likely to exercise this discretion in very limited circumstances,¹¹⁵ in light of the

110. See Cass. soc., Dec. 18, 1978, Bull. civ., No. 77-40657; Cass. 1e civ., Nov. 4, 1982, Bull. civ. I, No. 81-15814; Cass. 1e civ., Feb. 4, 1981, Bull. civ. I, No. 79-12908.

111. N.C.P.C. art. 199 provides that the judge can take the testimony of third parties to shed light on the facts in dispute of which the witness has personal knowledge. Since 1959, the *Cour de cassation* has understood this to mean that a party cannot be a witness on his own behalf. Cass. 1e civ., Oct. 12, 1959, Bull. civ., No. 401.

112. N.C.P.C. art. 146.

113. C. TRAV. art. L. 122-45 ("Le juge forme sa conviction après avoir ordonné, en cas de besoin, toutes les mesures d'instruction qu'il estime utiles.").

114. See LANQUETIN & GREVY, *supra* note 53, at 43.

115. As the country report commissioned by the European Commission's European Community Action Programme to Combat Discrimination puts it:

[Investigatory measure] is considered as an exceptional measure and it is conditional upon having already brought sufficient evidence before the Court. It is not in the legal culture of judicial actors, judges and lawyers, to use these procedural means of access to evidence, as

Code of Civil Procedure's traditional understanding of the civil judge's role.

Another problem facing employment discrimination plaintiffs in civil proceedings is that certain forms of evidence have been deemed inadmissible by the *Cour de cassation*.¹¹⁶ For example, recordings that are made without the adverse party's knowledge have been rendered illicit.¹¹⁷ This makes it very hard to use the forms of evidence often relied upon by SOS-Racisme. SOS-Racisme and other anti-racist organizations often send actors of different races—black, *Maghrébin*, and white—into a given establishment, one at a time, each purporting to be applicants for an advertised job. SOS-Racisme plants witnesses posing as patrons of the establishment during these encounters. Sometimes, the employer will tell the candidate of color that the job is no longer open, even while telling the white candidate who comes in thereafter that the job is available. In some cases, the testers or witnesses bear recording devices. By contrast, plaintiffs in civil proceedings are not able to use recordings produced during testing operations to establish the facts they allege.¹¹⁸

Article 9 of the Code of Civil Procedure requires each party to prove the facts necessary to the success of its claims “*conformément à la loi*,”¹¹⁹ consistent with the law. Thus, if a plaintiff obtains a document through illegitimate means, for example by theft (which encompasses copying the employer's documents without the employer's consent), the evidence is inadmissible.¹²⁰ Although courts have permitted employees to present copies of employer documents with which he is familiar through the exercise of his functions as employee,¹²¹ this exception is of no use to the job candidate complaining of discriminatory hiring.

In addition to the difficulties imposed by civil procedure rules, substantive law prevents French plaintiffs from relying on a method of proof that American Title VII plaintiffs frequently use to establish racial disparities: statistics. In France, a 1978 law regulates data collection by

the judge in civil matters is seen as not inquisitive and not taking part to the process leading to the introduction of evidence before the court.

SOPHIE LATRAVERSE, EUROPEAN COMMISSION REPORT ON MEASURES TO COMBAT DISCRIMINATION: COUNTRY REPORT, FRANCE 59 (2007) [hereinafter COUNTRY REPORT, FRANCE], http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm.

116. GELD REPORT, *supra* note 3, at 45.

117. Cass. soc., Nov. 20, 1991, Bull. civ. V, No. 88-43120.

118. THOMAS, *supra* note 29, at 15–16.

119. N.C.P.C. art. 9.

120. *See, e.g.*, Cass. crim., Jan. 8, 1979, Bull. crim., No. 77-93038; Cass. crim., Dec. 8, 1998, Bull. crim., No. 97-83318.

121. Cass. soc., Dec. 2, 1998, Bull. civ. V, No. 96-44258.

prohibiting the mention in computerized and other databases of certain descriptors of persons. These descriptors include racial origins; political, philosophical, or religious opinions; and membership in associations and groups.¹²² Under the 1978 statute, it is illegal for the state and for employers to keep data classifying persons on the basis of race. This also makes it difficult for an employment discrimination plaintiff to establish the low percentages of racial minority employees in a given enterprise.

E. Advantages of Criminal Procedure

In contrast, many features of French criminal procedure make it easier for victims of discrimination to unearth the evidence from which disparate treatment may be inferred. Most importantly, the *Code de procédure pénale* construes a far more active role for the *juge d'instruction*, the judge investigating the crime, than the limited investigatory role of the civil judge under the *Code de procédure civile*. Furthermore, recordings made without the adversary's knowledge are admissible in criminal proceedings, unlike in civil proceedings. In addition, the principle of the "*liberté des preuves*,"¹²³ freedom of means of proof, makes it more common in criminal proceedings for witness testimony to be utilized. Finally, the possibility for victims and associations to participate in criminal proceedings as civil parties, with damages awarded upon a conviction, makes it efficient for plaintiffs to pursue remedies through criminal law.

A victim of discrimination can file a complaint with the prosecutor, who then enlists a *juge d'instruction*, an investigating judge, to investigate the complaint. The *juge d'instruction* is strictly separate from the judge who hears the case at trial.¹²⁴ The victim of discrimination can also go directly to the *juge d'instruction*. The rules of criminal procedure make investigation by the *juge d'instruction* mandatory for all *crimes* but discretionary for *délits*. Because discrimination is a *délit*, not all claims of discrimination require investigation. But if a victim goes directly to the

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

123. The principle is embodied in C. PR. PÉN. art. 427, which provides that "Aside from the cases where the law provides otherwise, offenses may be established by any mode of proof, and the judge decides according to his inner conviction." ("Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son intime conviction.")

124. C. PR. PÉN. art. 45.

juge d'instruction and files a complaint as a civil party, the judge will ordinarily initiate an investigation.¹²⁵

Article 81 of the Code of Criminal Procedure provides that the *juge d'instruction* is to proceed, consistent with the law, in all acts of investigation that he judges useful for the manifestation of truth. This duty is in stark contrast with the principles underlying the Code of Civil Procedure, which charges the parties with the primary duty of establishing the facts in dispute between them. The Code of Criminal Procedure also puts the search for truth at the center of the judge's role, whereas the Code of Civil Procedure construes the judge's role as facilitating the resolution of a dispute between equal private parties.

Accordingly, the *juge d'instruction* has very broad powers to investigate, which she is obliged to utilize as she sees fit to discover the truth. She questions the accused, as well as witnesses, whom she can require to appear for questioning. She also has broad search and seizure power. Article 94 allows her to order searches of any place where objects may be discovered that will lead to the revelation of the truth.¹²⁶ Although some documents cannot be discovered due to various forms of professional privilege, the judge can order the police to seize all non-privileged documents that appear useful for the revelation of the truth.

Thus, in an employment discrimination case, investigation by the *juge d'instruction* is very useful for uncovering evidence of both disparate treatment and discriminatory intent that is in the hands of the employer. In the cases that have resulted in findings of employer liability for discrimination, there is usually evidence, either documentary or testimonial, that could not have emerged in a civil proceeding. For instance, in 2002, the owner of "Hotel La Villa" was convicted of racial discrimination in hiring after an investigation uncovered the CVs of various applicants for a porter job that were marked "Black," or "Black, non, non!"¹²⁷ In another case resulting in conviction of an Ikea recruiter, the investigation uncovered an e-mail memorandum concerning the

125. The first article of the *Code de procédure pénale* establishes that a civil party, a person who has been injured by a criminal act, can commence a criminal action. The *Cour de cassation* has understood this to mean that a complaint by a civil party to the *juge d'instruction* has the same effect as a prosecutor's request to the *juge d'instruction* to begin investigation. See C. PR. PÉN. art. 1; Cass. crim. Dec. 8, 1906, Bull. crim.

126. C. PR. PÉN. art. 94 establishes that searches can be effectuated in any place where objects or computerized data can be discovered which would be useful to determining the truth. This standard is similar to the liberal "relevance" standard of FED. R. CIV. P. 26(b).

127. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 17e ch. Nov. 14, 2002.

recruitment of employees responsible for the distribution of a catalogue. The e-mail stated, “For this type of work, do not recruit persons of color since it’s unfortunate to say that people open their doors to them less easily and it is important that we work quickly.”¹²⁸

In June 2006, a salon owner was convicted of racial discrimination after an investigation authorized by the *juge d’instruction*. The investigation consisted of oral interviews with the alleged victim, the defendant, and third-party witnesses. The alleged victim, a black woman, testified that she had appeared at the salon with her CV in response to a job advertisement she received from an employment agency, and that the salon owner said she was no longer looking for an employee.¹²⁹ A friend of the victim, a white woman, testified she applied for the same job the next day, describing her qualifications as identical to those of the victim.¹³⁰ The salon owner offered her an interview for the job. The defendant salon owner admitted: “Yes, I refused her application because I was looking for a white employee because that corresponds better to the clientele.”¹³¹ When asked why she thought a black hairdresser would harm the salon or its clients, the defendant answered, “I don’t know. I feel better with people of my color.” She was then asked, “Are you racist?” She replied, “No, not necessarily.”¹³²

Recently, the Paris Court of Appeals convicted the cosmetics giant L’Oréal, two of its subsidiaries, and temporary employment agencies, for racial discrimination in hiring, reversing a trial court’s acquittal.¹³³ In that case, a criminal investigation revealed a document and testimony by witnesses that the company was searching for a woman of the “type BBR.” This expression, standing for “bleu, blanc, rouge,” the colors of the French flag, is commonly associated with the Front National, an openly anti-immigrant political party in France.¹³⁴ The document came to light

128. “Pour ce type de travail, ne pas recruter de personnes de couleur car c’est malheureux à dire mais on leur ouvre moins facilement la porte et il s’agit d’avancer très vite. . . .” Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Versailles, 5e ch., Apr. 2, 2001, 8.

129. Procédure d’enquête préliminaire, Procès-verbal d’audition de personne gardée à vue No. 00028/2006, Gendarmerie Nationale Chateaubriant, Jan. 3, 2006.

130. *Id.*

131. Procédure d’enquête préliminaire, Procès-verbal d’audition de personne gardée à vue No. 00028/2006, Gendarmerie Nationale Chateaubriant, Feb. 14, 2006.

132. *Id.*

133. Note that French law recognizes no constitutional or statutory bar, such as double jeopardy or right to a jury trial, to allowing appellate courts to reverse acquittals. Appellate reversals may result in convictions (rather than new trials).

134. See Fête des Bleu Blanc Rouge 2005 avec Jean-Marie Le Pen, FRONT NATIONAL, <http://www.frontnational.com/bbr/bbr.html>; Le programme immigration, FRONT NATIONAL, <http://www.frontnational.com/programmeimmigration.php>.

because an employee of L'Oréal who had worked in recruitment had brought the matter to SOS-Racisme's attention, which led to the filing of a criminal charge. The recruiter testified the company had specifically instructed her not to hire persons of color.¹³⁵ Initially, the trial court acquitted all the defendants on the grounds that the proceeding had only presented "suppositions and approximations."¹³⁶ However, the Court of Appeals held that the facts constituted discrimination in hiring.¹³⁷

Furthermore, recordings made during testing operations are valid forms of evidence in criminal proceedings, in contrast to the civil context. The *Cour de cassation* has determined that recordings made without the knowledge of the employer do not constitute a crime of violating the private life of the employer. In that case, the recording consisted only of a telephone conversation discussing the possible firing of an employee and no private matters.¹³⁸ Since criminal liability is not imposed for making such recordings, they can be used as evidence consistent with the rules of criminal procedure.

The use of witness testimony of testing operations has been blessed by the *Cour de cassation* as a legitimate means of proving discrimination in violation of *Code pénal* Articles 225-1 and 2.¹³⁹ Initially, some lower courts were excluding testimony by witnesses to testing operations organized by groups like SOS-Racisme on the grounds that allowing such testimony violated the defendant's right to a fair defense and the presumption of innocence. Some judges dismissed the probative value of such witness testimony, particularly due to the lack of supervision by a police officer or bailiff. In a June 2002 decision, the *Cour de cassation* held that "[n]o legal provision permits criminal judges to dismiss methods of proof produced by the parties for the sole motive that they were obtained through an illicit or disloyal means."¹⁴⁰ Rather, the judges were instructed to consider the probative value of the testimony after having submitted it to an adversarial discussion.¹⁴¹

As a result, testing operations and recordings have played an important role in highly publicized cases of discrimination that resulted in

135. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, June 1, 2006, 7.

136. *Id.* at 10.

137. Cour d'appel [CA] [regional court of appeals] Paris, 11e ch., July 6, 2007.

138. *See, e.g.*, Cass. crim., Jan. 16, 1990, Bull. crim., No. 89-83075.

139. *See* Cass. crim., June 11, 2002, Bull. crim., No. 01-85559.

140. "[A]ucune disposition légale ne permet aux juges répressifs d'écarter les moyens de preuve produits par les parties au seul motif qu'ils auraient été obtenus de façon illicite ou déloyale." *Id.*

141. *Id.*

convictions over the last few years. Most notably, in November 2002, Moulin Rouge, the famous Parisian nightclub, was convicted for discrimination in hiring, with a fine of €10,000.¹⁴² After Moulin Rouge had advertised a position for a host in the main cabaret hall, an employment agency recommended a young man of Senegalese origin, Abdoulaye Marega. A Moulin Rouge representative told the employment agency representative over the telephone “[w]e only hire people of color in the kitchen, not in the main hall.” To obtain proof, SOS-Racisme organized a testing operation in which two black men presented themselves, with hidden recording devices, as candidates for the position. They were told that they would not be hired because the job required fluency in both English and Spanish, a requirement that had not been included in the job description. After these events, the employment agency representative visited Moulin Rouge, asking for an explanation of these new requirements. This conversation was recorded by hidden camera, in which the Moulin Rouge representative said that they do not hire people of color in the main hall.¹⁴³

If a plaintiff in a civil proceeding presented such evidence to prove disparate treatment, it would not be admissible under Article 9 of the *Code de procédure civile*. But when the evidence was submitted to the prosecutor, the prosecutor referred the case for an investigation,¹⁴⁴ during which it was confirmed that all of the persons of color employed by Moulin Rouge worked in the kitchen, not in the main hall. The *Tribunal correctionnel de Paris* convicted Moulin Rouge under *Code pénal* Articles 225-1 and 225-2. In addition to the €10,000 fine imposed on Moulin Rouge, the nightclub was ordered to pay damages in the amount of €4,500 to the victim and €2,300 to SOS-Racisme for its participation as *partie civile*.¹⁴⁵ The Moulin Rouge personnel director who communicated the

142. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 22, 2002, cited in Cour d’appel [CA] [regional court of appeals] Paris, 11e ch., Oct. 17, 2003.

143. Every major newspaper in Paris reported these events. See Ariane Chemin, *Au Moulin-Rouge, les Noirs sont priés de rester aux cuisines*, LE MONDE, Oct. 6, 2002; Delphine Moreau, *Le Moulin-Rouge condamné pour discrimination raciale*, LE FIGARO, Nov. 23–24, 2002; Claudine Proust, *Le Moulin-Rouge accusé de racisme*, LE PARISIEN, Oct. 4, 2002; Claudine Proust, *Le Moulin rouge condamné pour discrimination à l’embauche*, LE PARISIEN, Dec. 23, 2002; Emmanuelle Reju, *Le Moulin-Rouge ne voulait pas de serveur noir*, LE JOURNAL DE LA CROIX, Oct. 4, 2002; Emilie Rive et al., Oct. 4, 2002. See also Cour d’appel [CA] [regional court of appeals] Paris, 11e ch., Oct. 17, 2003.

144. Claudine Proust, *Le Moulin-Rouge accusé de racisme*, LE PARISIEN, Oct. 4, 2002.

145. Delphine Moreau, *Le Moulin-Rouge condamné pour discrimination raciale*, LE FIGARO, Nov. 23, 2002.

discriminatory preferences was also convicted and fined €3,000. These judgments were affirmed on appeal.¹⁴⁶

These examples highlight the ways in which criminal procedure enables persons who purport to be victims of discrimination to discover evidence confirming their assertions. In France, because anti-racist organizations have developed testing operations as their primary means of aiding persons claiming discrimination, the difficulty of using nonconsensual recordings as evidence in civil proceedings effectively excludes the only proof that a victim is likely to have. Establishing something as seemingly straightforward as the existence of disparate treatment of candidates of different races (whether motivated by racial animus or not) can be difficult without evidence from the testing operations. Because the job candidate cannot compel discovery of employer documents without first presenting some evidence of disparity, the difficulties of using testing evidence and the difficulties of obtaining employer documents are the main problems faced by employment discrimination plaintiffs in civil cases. Both of these problems are overcome by commencing criminal proceedings.¹⁴⁷

Furthermore, because victims can participate as civil parties to criminal proceedings and obtain damages through such proceedings, victims have little incentive to proceed in civil proceedings with the aid of a private attorney. Filing a criminal complaint that gives rise to a state-funded investigation is more cost-effective for victims of discrimination. As a result, racial discrimination in hiring is, for the most part, a matter of criminal law in France.

F. The Persistence of Criminal Intent

One consequence of concentrating discriminatory hiring cases in criminal proceedings is that criminal law's emphasis on the element of intent shapes the legal concept of discrimination. Combined with the defendant's presumption of innocence, it is very difficult for prosecutors to prove infractions of the criminal antidiscrimination provision, even when there is evidence of disparate treatment. As a result, even when personnel documents and testing operations unearth strong evidence of the disparate treatment, the burden is never on the employer to justify the

146. C.A. Paris, 11e ch., Oct. 17, 2003.

147. As the EU country report indicates, "The judicial tradition is to go to civil court with the element of evidence readily available to the party, which explains why plaintiffs often go to criminal court to obtain access to evidence." See COUNTRY REPORT, FRANCE, *supra* note 115, at 59.

disparity with a nondiscriminatory reason. Rather, the prosecution carries the burden of showing that the disparate treatment is motivated by the discriminatory intent of the employer. This is crucial because it is a fundamental and general principle of the *Code pénal* that there is no *crime* or *délit* without the intention to commit it.¹⁴⁸

In criminal proceedings, the defendant benefits from the presumption of innocence. As a practical matter, this presumption functions to raise the prosecutor's burden of proof. French criminal procedure does not employ different levels of standards of proof like the U.S. system. There is nothing like a "beyond a reasonable doubt" standard to be distinguished from the "preponderance of evidence" standard in civil cases.¹⁴⁹ There is only one standard of proof for both civil and criminal proceedings: the "*intime conviction*" or "inner conviction" of the judge.¹⁵⁰ Nonetheless, because the accused is presumed innocent, the prosecutor must prove the element of intent and cannot benefit from the burden-shifting framework that has been introduced into the civil liability regime, wherein simply establishing disparity of treatment between members of different groups could shift the burden to the employer to show that the disparity has a nondiscriminatory justification.

It appears that all of the recent cases in which an employer has been found liable of discrimination have included clear, direct evidence of intent to discriminate on the basis of race or origin, the "smoking gun" in American parlance. In all the examples discussed, it was not merely evidence of disparity, that is, the failure to hire persons of color, that sufficed to find discrimination. There was always a document or testimony that clearly stated the intent of the defendant to exclude persons of color. Prosecutors tend not to attempt to prove discrimination without direct evidence of discriminatory intent that can be clearly attributed to an identifiable defendant.¹⁵¹ Thus, even when criminal proceedings are brought, the vast majority result in dismissal for insufficiency of evidence.¹⁵²

148. C. PÉN. art. 121-3.

149. James Q. Whitman notes that the reasonable doubt rule, rooted in Christian theology, is unique to the Anglo-American world today. Continental systems have modernized their criminal procedure to facilitate factual proof by abandoning this standard of proof. See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 20–25, 209–10 (2008).

150. See C. PR. PÉN art. 427; Kevin Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 251 (2002).

151. See GELD REPORT, *supra* note 3, at 19.

152. Although statistics of discrimination case dispositions are not systematically available, one interview with the Paris prosecutor in charge of the section that processes these cases revealed that, of

The 2001 law, in adopting a burden-shifting framework for circumstantial cases, explicitly reserved this framework for civil cases only.¹⁵³ As employers and their human resources departments become more and more aware of the legal prohibition of discrimination, they will likely be more cautious to prevent traces of discriminatory intent, even if they do consciously exclude racial minorities when they hire.

G. The Migration of the Intent Requirement Beyond Criminal Enforcement

Because of the difficulty of proving discriminatory intent in criminal proceedings, there has been a move towards developing civil litigation of employment discrimination claims in France.¹⁵⁴ In order to aid victims in assembling their dossiers of evidence for legal proceedings alleging discrimination, Parliament in December 2004 created a new independent administrative body dedicated to fighting discrimination and promoting equality: *la Haute autorité de lutte contre les discriminations et pour l'égalité* (High authority for the fight against discrimination and for equality) (HALDE).¹⁵⁵

Like the EEOC, the HALDE lacks the power of administrative sanction. Its main function is to process individual claims, facilitate conciliation,¹⁵⁶ and to aid victims in gathering evidence¹⁵⁷ for criminal or civil actions. The agency has limited investigatory powers. It can demand information from alleged discriminators, but must petition a judge to order compliance with these requests.¹⁵⁸ If the HALDE concludes that the facts it uncovers constitute discrimination prohibited by the Penal Code, it is to inform the prosecutor. If a victim chooses to bring a civil proceeding, it may invite the HALDE to participate in the litigation by presenting its observations.¹⁵⁹

thirty-eight racial discrimination cases brought, twenty-eight had been disposed of, in which twenty-four were dismissed for insufficiency of evidence. See Fabienne Goget, "Il est difficile de prouver une discrimination": *Parole contre parole, ça ne suffit pas*, in GUIDE FRANCE INFO, DISCRIMINATIONS RACIALES, POUR EN FINIR 118 (Jean-Michel Blier & Solenn Royer eds., 2001).

153. 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.

154. See, e.g., MOHAMMAD REBZANI, DES JUENES DANS LA DISCRIMINATION 128 (2002); VERONIQUE DE RUDDER, CHRISTIAN POIRET, FRANÇOIS VOURC'H, L'INEGALITE RACISTE: L'UNIVERSALITE REPUBLICAINE A L'EPREUVE 148-49 (2000); GELD REPORT, *supra* note 3, at 67.

155. 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.

156. *Id.* art. 7.

157. *Id.* art. 4.

158. *Id.* art. 11.

159. *Id.* art. 12.

More recently, as part of the Equality of Opportunities statute passed in March 2006 as a response to the racial violence in France's suburban ghettos, the HALDE's powers were expanded. The agency is now authorized to negotiate settlements with alleged discriminators, but such settlements are limited to cases of intentional discrimination that could give rise to criminal sanctions. The statute provides that, if the HALDE concludes that the facts constitute discrimination in violation of the Penal Code provisions, the agency can offer the alleged violator a transaction by which the employer agrees to pay a fine, compensate the victim, or publish the fact of discrimination, in exchange for not being prosecuted.¹⁶⁰ If the alleged discriminator rejects the transaction, the HALDE can then initiate a criminal prosecution. If the transaction is accepted, it must be submitted to the prosecutor and ratified by the court in the appropriate jurisdiction.¹⁶¹

But the legislative design of the HALDE's settlement power reflects the understanding that discrimination is predominantly intentional and criminal. The legislature did not delegate power to the HALDE to negotiate civil settlements. To the extent that the transaction power is seen as a form of enforcement power, it does not exist with regard to non-criminal discrimination. For instance, the agency has no power to settle allegations of indirect discrimination. The settlement power is referred to as the "*transaction pénale*," and the Code of Criminal Procedure was amended to codify this provision of the statute.¹⁶² One inference that can be drawn from the recent statute's exclusion of civil discrimination claims from the HALDE's settlement powers is that the very idea of discrimination is largely influenced by the criminal-law understanding that discrimination requires group-based animus or intent to discriminate. The criminal-law conception of discrimination influenced the way legislators approached the powers of the administrative agency. Ironically, even while the administrative authority was created, in part, as an attempt to overcome the limits and difficulties imposed by existing, largely criminal, enforcement mechanisms for antidiscrimination law, the definition of discrimination emanating from years of criminal enforcement has infected the delegation of powers to the administrative agency.

Furthermore, judges in civil employment discrimination cases continue to look for proof of intent, perhaps as a proxy for fault,¹⁶³ even when the

160. 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; COUNTRY REPORT, FRANCE, *supra* note 115, at 67.

161. EUROPEAN ANTI-DISCRIMINATION LAW REVIEW No. 4, 58 (2006).

162. C. PR. PEN. art. D 1-1.

163. The notion that fault is essential for civil liability endures in judicial attitudes towards civil

element of intent is not essential under the Labor Code's antidiscrimination provision. There are very few civil cases challenging discrimination on the basis of origin (for reasons already discussed), but the following case is telling. Five plaintiffs of African and North African origin brought a case alleging that management gave differential evaluations of employees based on their origins and premised differential pay levels and access to promotion on these evaluations. The Labor Court—departing from typical practice—ordered the production of the employer's records with regard to the status, remuneration, and promotion of the plaintiffs and other employees, and appointed an expert to analyze the data.

The expert testified that there were differences in salary, status, and career development correlated with the origin of employees. The production of documents also turned up an internal memorandum detailing special programs that the employer provided for North African workers. These programs provided access to housing and assisted employees in returning to their native countries for retirement. The Labor Court ultimately rejected the plaintiffs' claims of discrimination on the grounds that, while the evidence established disparate treatment of employees based on origin, the evidence did not support the inference that there was an intent to discriminate on the basis of origin.¹⁶⁴

It appears that the Labor Court applied an intent standard that corresponds to the criminal-law understanding of intent as racial animus, rather than merely the intent to treat people differently on the basis of their origin. This decision demonstrates the extent to which developing antidiscrimination law in criminal law can affect the substantive development of the concept of discrimination itself. As a result, even when the norm against discrimination is enforced through civil and administrative mechanisms, in which intent to commit the offending act need not be elements, the element of intent continues to matter nevertheless, thereby limiting the potential of new reforms.

Thus, the French experience with employment discrimination law illustrates the theory of procedural path dependence. Criminal enforcement was chosen because it made sense within the political tradition of laws against racism in 1972. Over the next three decades, despite the adoption of a civil liability regime for discrimination, criminal enforcement also provided “increasing returns” in the form of informational benefits:

employment discrimination cases. See COUNTRY REPORT, FRANCE, *supra* note 115, at 72.

164. Conseil des Prud'hommes [Labor Court] Boulogne, Dec. 12, 2005, in EUROPEAN ANTI-DISCRIMINATION LAW REVIEW No. 3, 65–66 (2006).

criminal procedure was able to produce information essential to combating discrimination that civil procedure could not. Yet, a side effect of these increasing returns is the narrower definition of discrimination as a harm which requires discriminatory intent. This limited conception has affected the practice of civil enforcement, as well as the legislatively defined parameters of administrative enforcement power.

IV. CIVIL LITIGATION OF EMPLOYMENT DISCRIMINATION IN THE UNITED STATES

An analogous dynamic can be identified in the United States context. In this Part, I show how the procedural path dependence thesis can also explain the problems scholars have identified with the current state of employment discrimination law in the United States. Since Title VII was passed in 1964, the civil lawsuit has been the predominant means of enforcing the norm against employment discrimination. American rules of civil procedure, in contrast with the French system of civil procedure, make it relatively easy for plaintiffs to get access to information and evidence that would support factual allegations of discrimination. In short, civil actions provide informational benefits to employment discrimination plaintiffs. At the same time, other features of civil procedure and the civil justice system have led to some developments that ultimately distort the public and social goals of employment discrimination law. These dynamics, which I describe below, have reinforced the private-law tort paradigm of discrimination. The tort paradigm may appear more flexible than France's criminal-law conception of discrimination. Yet, the tort analogy has reinforced the notion that discrimination is a dispute between private parties, thereby undermining the public dimension of the problem of unequal employment opportunity.

A. The Origins of Private Enforcement of Title VII

When Title VII was passed, most discrimination was intentional, and it consisted of employers' identifiable acts of excluding or segregating blacks. Individual black job candidates and employees suffered identifiable injuries; they were not hired and they were segregated into less desirable and underpaid jobs. The intentional tort was a fitting analogy. A discriminatory practice, such as a refusal to hire blacks, was a wrongful act that directly caused a concrete injury to those not hired on account of

race.¹⁶⁵ Thus, the legislators' choice of a private civil cause of action by aggrieved parties as the primary mode of enforcement in 1964 makes sense, just as French legislators' choice of criminal enforcement in 1972 makes sense.

But the notion that civil actions would be the main enforcement mechanism for Title VII was contested from the very beginning. The bill's proponents envisioned the problem of discrimination as a broad public problem, not merely a private-law tort, that required enforcement by a strong administrative agency. When the bill was initially introduced in the House of Representatives, it delegated to the EEOC both rulemaking and enforcement powers,¹⁶⁶ to be governed by the Administrative Procedure Act. It was designed to be analogous to the NLRB.¹⁶⁷ The rulemaking authority would have permitted the agency to adopt civil rights policies directly, and the enforcement powers would have enabled the agency to issue cease-and-desist orders in adjudicatory proceedings. Yet, even before reaching the Senate, a compromise in the House stripped the EEOC of cease-and-desist powers.¹⁶⁸

As Daniel B. Rodriguez and Barry R. Weingast show, compromises in the Senate ultimately made the statute acceptable to Northern Republicans. In the Senate, the Mansfield-Dirksen Amendment further limited the EEOC's power. First, it limited the rulemaking authority significantly,¹⁶⁹ allowing the EEOC to adopt rules only with regard to the procedures by which complaints can be made. The amendment also deprived the EEOC the power to bring lawsuits in federal court,¹⁷⁰ a power which was later granted to the EEOC in 1972.¹⁷¹ Thus, under the 1964 Act, the EEOC would have to go through the Attorney General if it wanted to bring a lawsuit.¹⁷² Furthermore, the Attorney General could only bring lawsuits in "pattern and practice" cases, pursuant to another provision of the

165. John Gardner has likened intentional discrimination, as distinct from disparate impact or "indirect" discrimination, to the intentional tort. See John Gardner, *Liberals and Unlawful Discrimination*, 9 OXFORD J. LEG. STUD. 1 (1989).

166. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* 98 (1990).

167. *Id.* at 133.

168. *Id.* at 189.

169. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1491-92 (2003).

170. GRAHAM, *supra* note 166, at 148.

171. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(f) (2000).

172. See The Civil Rights Act of 1964, Pub. L. 88-352, § 705(g), 78 Stat. 241, (1964) (codified as amended in scattered sections of 42 U.S.C. § 2000e).

Mansfield-Dirksen Amendment.¹⁷³ The amendment also deleted the provision in the proposed bill that permitted groups like the NAACP to sue on behalf of an aggrieved worker.¹⁷⁴ The EEOC's role under the statute that ultimately passed was limited to investigating and conciliating individual claims of discrimination.¹⁷⁵

As a result, the only real mechanism for enforcement that remained was the civil lawsuit, to be brought by aggrieved individuals, or, in limited cases, the Attorney General.¹⁷⁶ The EEOC's main responsibility, as Hugh Davis Graham puts it, was "enforcing a *private* right to nondiscrimination by responding administrative to individual complaints," as contrasted with the original vision of enforcing "the *public's* interest in nondiscriminatory employment."¹⁷⁷ Favoring the private civil cause of action rather than a prosecutorial role for the EEOC was consistent with the private-law conception of discrimination that the Republicans favored. They insisted that the statute only prohibit intentional discrimination, and not "inadvertent" discrimination.¹⁷⁸ They also sought reassurance that the statute did not require employers to achieve racial balance in the name of equal employment opportunity.¹⁷⁹ In short, the compromise that permitted Title VII to become law¹⁸⁰ reflected a limited substantive definition of discrimination as intentional acts of exclusion on the basis of the prohibited categories, which made the law fit substantively with torts and other private-law causes of action normally enforced through civil actions.

B. Discovering Discrimination Under the Federal Rules of Civil Procedure

In the early days of Title VII, civil actions in federal courts facilitated the remedying of problems like employment discrimination. Perhaps to the dismay of those Senators who sought to blunt the effect of Title VII by stripping away the EEOC's powers and leaving only the individual cause of action, civil actions brought under Title VII deterred the most blatant

173. Rodriguez & Weingast, *supra* note 169, at 1497.

174. *Id.* at 1471–72.

175. GRAHAM, *supra* note 166, at 189.

176. See The Civil Rights Act of 1964, Pub. L. 88-352, § 706(e), 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e).

177. GRAHAM, *supra* note 166, at 189 (emphasis in original).

178. *Id.* at 151.

179. *Id.*

180. Rodriguez and Weingast argue that the compromise is more pertinent to the interpretation of Title VII, rather than the intent of the original bill's most avid supporters. See Rodriguez & Weingast, *supra* note 169, at 1422–24.

forms of discrimination.¹⁸¹ An important factor was that the Federal Rules of Civil Procedure developed in a way that facilitated the discovery of information relevant to allegations of discrimination.

Particularly as compared to the French rules of civil procedure, the Federal Rules of Civil Procedure make it easy for plaintiffs to obtain crucial evidence that would support their claims. The Federal Rules established a liberal pleading standard for the plaintiff's complaint. Once the complaint meets the standard adopted in Rule 8(a), which merely requires a "short and plain statement of the claim,"¹⁸² a plaintiff has access to discovery. The scope of discovery is also broad. Rule 26(b)(1) allows the parties to discover any matter that is relevant to a claim or defense.¹⁸³ Rules 30, 33, and 34 authorize parties to conduct depositions, serve each other with interrogatories which must be answered, and request documents from each other.¹⁸⁴ Thus, as a matter of right, any plaintiff who meets the pleading standard can get access to documentary and oral evidence, if it exists, that supports the allegation of discrimination. This is in sharp contrast to the French rules of civil procedure.

Furthermore, while criminal enforcement of employment discrimination law has never been attempted in the United States, one can only imagine how difficult it would be under American criminal procedure to prove the facts of discrimination. As William Stuntz has observed, criminal procedure, unlike civil procedure, is largely a matter of constitutional law in the United States.¹⁸⁵ Carol Steiker has observed that, in criminal cases, the Constitution requires costly procedural protections for criminal defendants, including the protection against double jeopardy, the prohibition of ex post facto laws, the burden of proof beyond a reasonable doubt, the free provision of legal counsel, the exclusion of unconstitutionally seized evidence, and a privilege against self-incrimination.¹⁸⁶ Thus, U.S. civil procedure likely makes it far easier for victims of discrimination to obtain information from employers as civil defendants than it would be for prosecutors to obtain information from employers if they were criminal defendants.

181. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015-16 (1991).

182. FED. R. CIV. P. 8(a).

183. FED. R. CIV. P. 26(b)(1).

184. FED. R. CIV. P. 30, 33, 34.

185. Stuntz, *supra* note 10, at 1.

186. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L. J. 775, 777-78 (1997).

The liberal approach to pleading and discovery was chosen in rejection of the more formal requirements of the common-law and code pleading systems that preceded the 1938 Federal Rules of Civil Procedure. The pleading standard became less stringent, and discovery broader, in the civil rights era. In a case that was initiated shortly after the Supreme Court's decision in *Brown v. Board of Education*, the Supreme Court held in *Conley v. Gibson* that class-action plaintiffs alleging employment discrimination by their union under the National Railway Act could meet their pleading burden as long as the complaint gave the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests."¹⁸⁷ As Geoffrey Hazard has noted, *Conley v. Gibson's* reading of Rule 8(a) was far broader than that applied by courts for twenty years prior. Lower courts understood a "short and plain statement" as requiring "a detailed narrative in ordinary language—one setting forth all elements of a claim under applicable substantive law."¹⁸⁸

In *Conley v. Gibson*, the Court noted that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim."¹⁸⁹ In order to have access to discovery, the plaintiff need not even allege (let alone prove) the specific facts upon which the claim is based. In the context of a class action employment discrimination complaint, the Court held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of claims which would entitle him to relief."¹⁹⁰ In that case, the plaintiffs had simply alleged that the union had refused to protect their jobs from wrongful discharge because they were Negroes. Although the defendants argued that the plaintiffs ought to have set forth specific facts to support the general allegations of discrimination in order to survive a motion to dismiss, the Supreme Court definitively rejected this understanding of Rule 8(a)'s pleading standard.

Not only did the liberal pleading standard of *Conley v. Gibson* make it easier for plaintiffs to obtain access to discovery, but discovery itself was broadened shortly after the passage of Title VII. Developments in the

187. *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *abrogated by* *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). *Twombly* narrowed the *Conley v. Gibson* pleading standard by rejecting the notion that plaintiff can survive a motion to dismiss unless there is no set of facts that would entitle him to relief. *Twombly*, 127 S. Ct. at 1969. Nonetheless, *Twombly* did not reject *Conley's* commitment to notice pleading.

188. Geoffrey C. Hazard Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998).

189. *Conley*, 355 U.S. at 48.

190. *Id.* at 45–46.

Federal Rules of Civil Procedure throughout the 1960s generally facilitated public law litigation asserting constitutional or related claims.¹⁹¹ As Richard Marcus has noted, the most important of these changes included a “discovery revolution.”¹⁹² By 1970, the Rules evolved so as to enable parties to direct interrogatories and document requests to all parties, schedule depositions by a simple notice, and subpoena witnesses who were not parties.¹⁹³ In short, once a party met the pleading standard to get to discovery, parties had enormous latitude to gather information.

Both the Supreme Court and lower courts have frequently invoked the *Conley v. Gibson* standard in civil rights cases, the paradigmatic cases engaging in “public law litigation” through civil actions.¹⁹⁴ In the 1974 case of *Scheuer v. Rhodes*, the Supreme Court cited *Conley v. Gibson* to support its reversal of a district court’s dismissal of § 1983 complaints in which the estates of deceased university students alleged that national guard officials had caused their deaths through illegal actions. In that case, the Supreme Court explicitly noted that the inquiry with regard to the sufficiency of the complaint was “whether the claimant is entitled to offer evidence to support the claims.”¹⁹⁵ Thus, in this civil rights case, even if a recovery were “very remote and unlikely,”¹⁹⁶ a plaintiff would still be entitled to discovery. The Court reaffirmed this liberal pleading standard in another civil rights case in 1994, also brought under § 1983. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, the Supreme Court rejected the Fifth Circuit’s application of a heightened pleading standard to § 1983 cases. Prior to that decision, some circuits required plaintiffs in cases alleging municipal liability to specifically allege factual details showing that the defendant was not immune from suit. Again, the Court cited *Conley v. Gibson* for the proposition that Rule 8(a)(2) does not require a claimant to set out in detail the facts upon which he bases his claim.¹⁹⁷

191. See Richard L. Marcus, *Malaise of the Litigation Superpower*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* 71, 86 (Adrian A.S. Zuckerman ed., 1999).

192. *Id.* at 87.

193. *Id.*

194. In the 1970s, scholars began to notice the possibility of using the civil action, which was traditionally a vehicle for dispute resolution between private parties, to achieve public reforms. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283–84 (1976); Owen M. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29–31 (1979).

195. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by* *Davis v. Scherer*, 468 U.S. 183 (1984).

196. *Id.*

197. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1994).

The Supreme Court also invoked *Conley v. Gibson* in 1976 in rejecting the argument that a Title VII complaint requires greater particularity.¹⁹⁸ This is significant because, in a Title VII case, a plaintiff can easily obtain access to evidence that is in the employer's hands by generally alleging discrimination. With access to this evidence, the plaintiff can then construct a more coherent factual and legal theory of his case. The liberal approach to pleading and, by extension, access to discovery in Title VII cases has endured. In the 2002 case of *Swierkiewicz v. Sorema*, the Supreme Court reversed the Second Circuit's requirement that a Title VII plaintiff allege specific facts constituting a prima facie case under the *McDonnell Douglas* standard in order to survive a motion to dismiss.¹⁹⁹ The Supreme Court unanimously held, citing *Conley*, that an employment discrimination plaintiff need only give a statement that gives the defendant fair notice of the claim. The Court noted that, if direct evidence of discrimination were uncovered during discovery, the *McDonnell Douglas* burden-shifting framework would not be necessary since that framework was a way of establishing a circumstantial case of discrimination.²⁰⁰ The Court pointed out that "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case."²⁰¹ The Court explicitly noted that "[t]his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."²⁰²

Thus, the liberal approach to pleading under the Federal Rules of Civil Procedure, particularly as it has been applied to the civil rights and employment discrimination contexts,²⁰³ makes it possible for victims of discrimination to have access to discovery before specific facts giving rise to a claim of discrimination can be articulated. This is in stark contrast to French civil plaintiffs in discrimination cases, who must present some evidence of the facts they allege without being able to compel the

198. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976).

199. *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002).

200. *Id.* at 511–12.

201. *Id.* at 512.

202. *Id.*

203. After the Supreme Court's decision this past Term in *Bell Atlantic v. Twombly*, the endurance of the liberal pleading standard, particularly in the antitrust context, is in question. Although the Court did not overrule *Swierkiewicz*, it held, in reversing a lower court's denial of a motion to dismiss a claim under the Sherman Antitrust Act, that dismissal for failure to state a claim does not require the appearance beyond a doubt that plaintiff can prove no set of facts in support of the claim that would entitle him to relief, explicitly rejecting the "no set of claims" language of *Conley v. Gibson*. See *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007).

production of evidence in the employer's possession. It is therefore obvious that, at least under the Supreme Court's procedural framework, the civil action has informational benefits for those who seek to remedy employment discrimination. Filing a civil complaint, even one with very general allegations of discrimination, may be sufficient to survive a motion to dismiss, which then makes the legal mechanisms for the discovery of relevant evidence available to both parties as a matter of right. In short, the civil lawsuit allows the plaintiff to uncover the various acts and practices of the employer that may or may not support an inference of discrimination. Just as the French *juge d'instruction* in criminal proceedings can investigate the premises and documents of the employer to determine whether discrimination has occurred, private parties in the United States can investigate the premises and documents of the employer in civil proceedings to establish discrimination.

In short, the same information that might be revealed during a criminal investigation in France can be revealed through civil discovery in the United States. And this is precisely why civil litigation has come to be seen as an appropriate way of enforcing public norms in the United States. As Jack Friedenthal put it in 1981, "developments in areas such as products liability, employment discrimination, and consumer protection have been the result at least partly of broad-ranging discovery provisions."²⁰⁴ Friedenthal correctly observed that causes of action would not have expanded through court interpretation or legislative action if proof of harms to these norms were not normally available in civil litigation.²⁰⁵

C. Consequences of Broad Discovery

At first glance, the informational benefits of American civil procedure create "increasing returns" that make the continued use of civil litigation rational and desirable. Yet, a close look at key Supreme Court decisions raising plaintiffs' evidentiary burdens in Title VII cases reveals a dynamic between the civil discovery regime and the narrowing of substantive doctrines of liability. The very availability of broad discovery has played an important justificatory role in narrowing employers' liability.

204. Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 818 (1981).

205. *Id.*

Take, for instance, the 1981 case of *Texas Department of Community Affairs v. Burdine*.²⁰⁶ The Supreme Court held that, when the employee proves a prima facie case of disparate treatment under *McDonnell Douglas*, the employer only bears a burden of putting forth a nondiscriminatory reason for its action, rather than a burden of persuasion.²⁰⁷ Prior to this decision, some lower courts had assumed that the plaintiff's establishment of a prima facie case raised an inference of discrimination and thus shifted the burden of persuasion to the defendant.²⁰⁸ The Supreme Court held, to the contrary, that in a Title VII case, the plaintiff always bears the burden of persuading the trier of fact that the defendant discriminated. This meant that the employer need only articulate—rather than prove—a legitimate nondiscriminatory reason for its actions in order to rebut the inference of discrimination established by the plaintiff's prima facie case.²⁰⁹ This holding made it more difficult for plaintiffs to prevail, by requiring plaintiffs to prove that the nondiscriminatory reason put forth was a pretext for discrimination. The Supreme Court insisted that this holding would not “unduly hinder the plaintiff”²¹⁰ because “the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint.”²¹¹ In light of the availability of liberal discovery, including access to EEOC files, the *Burdine* Court was “unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext.”²¹²

Similarly, in *Ward's Cove Packing v. Atonio*, the Supreme Court raised the disparate impact plaintiffs' burden by requiring proof that a specific employer practice caused the statistical disparities between white and minority employees and job candidates.²¹³ The plaintiffs had established that there had been a high percentage of nonwhite workers in the lower-paid cannery jobs and a low percentage of nonwhite workers in the more desirable non-cannery jobs.²¹⁴ The plaintiffs had also alleged that a variety

206. 450 U.S. 248 (1981).

207. *Id.* at 255.

208. *Id.* at 256–57.

209. *Id.* at 258.

210. *Id.*

211. *Id.*

212. *Id.*

213. 490 U.S. 642, 657 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 105, 42 U.S.C. § 2000e–2(k).

214. *Id.* at 650.

of employment practices, such as “nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within” had caused the racial stratification.²¹⁵ The Supreme Court held that the plaintiffs carried the burden of showing that “each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.”²¹⁶ In short, it was not enough for the plaintiffs to establish a statistical disparity and to point to the allegedly problematic practices. Again, the Supreme Court invoked the availability of liberal civil discovery rules to support its rejection of the notion that the specific causation requirement would be “unduly burdensome on Title VII plaintiffs.”²¹⁷ The Court noted that the “liberal civil discovery rules give plaintiffs broad access to employers’ records in an effort to document their claims.”²¹⁸ Although the Civil Rights Act of 1991 overruled *Ward’s Cove* in some respects, the plaintiff’s burden of showing that a “particular employment practice . . . causes a disparate impact”²¹⁹ was actually codified, rather than abrogated, by the statute.

Finally, another case which made it more difficult for plaintiffs to prevail, *St. Mary’s Honor Center v. Hicks*,²²⁰ also demonstrates the synergies between liberal discovery and a narrower doctrine of employer liability. *Hicks* held that, in a disparate treatment case proceeding under the *McDonnell Douglas* framework, even if the trier of fact rejected the nondiscriminatory reason put forth by the employer as not worthy of credence, that rejection did not automatically entitle the plaintiff to judgment as a matter of law.²²¹ Rather, the *Hicks* Court held that the plaintiff still carried the burden of persuading the factfinder that the real

215. *Id.* at 647.

216. *Id.* at 657.

217. *Id.*

218. *Id.*

219. Pub. L. No. 102-166, § 105(a) (2006).

220. 509 U.S. 502 (1993). Many employment discrimination scholars criticized *Hicks* for increasing the burden on Title VII plaintiffs. 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); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996).

221. *Hicks*, 509 U.S. at 507. *Reeves v. Sanderson Plumbing Products, Inc.* holds that while a plaintiff is not necessarily entitled to judgment by showing that the employer’s nondiscriminatory reason is unworthy of credence, the trier of fact is permitted to infer discrimination from this showing. 530 U.S. 133, 146–47 (2000).

motivation for the adverse employment action was intentional discrimination.²²²

Although the Court did not explicitly invoke the liberal civil discovery rules to justify its holding in *Hicks*, it is clear that plaintiffs seeking to prove disparate treatment after *Hicks* require broader discovery. After *Hicks*, if an employer presents some evidence of a nondiscriminatory reason for the employment decision, the plaintiff must prove not only that the reason is unworthy of credence but also that the real reason for the decision was discrimination. Unless the plaintiff can uncover direct evidence of discriminatory motive in the form of a “smoking gun,” which is extremely rare, the plaintiff will likely depend on circumstantial evidence. Circumstantial evidence of discriminatory motive will often take the form of comparative evidence (such as documents and testimony about the performance and circumstances of other employees) and statistical evidence, both with regard to complaints of discrimination against the employer, and with regard to the employer’s general wage, salary, and promotion patterns over a period of time.²²³ If an employee has to show not only that the employer is lying, but also that the lying is motivated by discrimination, broader information about other employees as compared to the plaintiff becomes necessary for plaintiffs to carry their burdens of persuasion.

D. The Overdetermined Tort Analogy

The flexibility and breadth of American civil procedure rules made it possible for civil lawsuits to uncover a variety of employer practices that may disadvantage the groups protected by employment discrimination laws. Yet, these informational benefits, like the informational benefits of criminal enforcement in France, come with other consequences of civil litigation. The “civil” dimension of civil enforcement has not been lost. Civil litigation of employment discrimination claims in the United States has encouraged and entrenched the logic of tort law in employment discrimination cases. It goes without saying in any tort case, for instance, that there is no cause of action in tort unless the plaintiff alleges an injury.²²⁴ These elements—injury in the form of adverse employment

222. *Hicks*, 509 U.S. at 507.

223. See Ann K. Hadrava, Note, *The Amendment to Federal Rule of Civil Procedure 26(b)(1) Scope of Discovery: An Empirical Analysis of Its Potential “Relevancy” to Employment Discrimination Actions*, 26 OKLA. CITY U. L. REV. 1111, 1144–45 (2001).

224. See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1643–44 (2002).

action and causation of that injury by an identifiable act or omission by the defendant—are central to courts' understanding of what constitutes employment discrimination under Title VII.

When the Federal Rules of Civil Procedure were promulgated in 1938, the private damages action was the paradigmatic case around which the rules were initially designed.²²⁵ Yet, as many scholars have shown,²²⁶ the current practices by employers that contribute most significantly to unequal employment opportunity are difficult to reform through this model of remediation. The enforcement of employment discrimination law has tremendous difficulty getting away from the tort paradigm, despite the distance between tort and the practices that undermine equal employment opportunity today. The persistence of the tort analogy explains several remarkable facts about the state of employment discrimination litigation today.

First, the predominance of the logic of tort law explains why individual sexual harassment claims tend to be more successful than other employment discrimination claims. Sexual harassment claims are the employment discrimination claims that, today, look most like torts.²²⁷ In fact, these are the claims that can easily be joined with actual state-law tort claims, such as intentional infliction of emotional distress.²²⁸ Charles Sullivan has identified sexual harassment suits as an exception to his general observation that plaintiffs rarely win employment discrimination suits.²²⁹ Although the statistics are not perfect, Michael Selmi has calculated, based on numerous empirical studies, that employment discrimination plaintiffs have a win rate of about 35% in federal courts, as compared with 50% for plaintiffs in other causes of action.²³⁰ Yet, sexual harassment plaintiffs seem to fare better than other employment discrimination plaintiffs, as their win rates are closer to those for other

225. As Judith Resnik observes:

[O]ne of the prototypical lawsuits for which the 1938 Federal Rules were designed was the relatively simple diversity case: a dispute between private individuals or businesses in which tortious injury or breach of contract was claimed, private attorneys were hired to represent the parties, and monetary damages were sought.

Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508 (1986).

226. See *supra* Part I.

227. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV., 2115, 2127 (2007).

228. *Id.* at 2118–19.

229. Sullivan, *supra* note 17, at 912 (“The state of employment discrimination practice can be easily summarized: plaintiffs are losing almost all of the cases they file except for a few isolated ones, most notably sexual harassment claims.”).

230. Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 UCLA L. REV. 701, 739 (2006).

causes of action. In an empirical study of sexual harassment suits in the federal courts in 1986–1995, Ann Juliano and Stewart J. Schwab note that sexual harassment plaintiffs tend to win 54% of cases decided on pretrial motions, 45.7% of bench trials, and 54.6% of jury trials.²³¹ Plaintiffs' win rates were increased in cases in which plaintiffs alleged physical contact (winning 55% of such cases), comments about physical appearance or of a sexual nature (winning 57% of such cases), or belittling or derogatory comments (winning 59% of such cases).²³²

In short, Juliano and Schwab find that plaintiffs alleging “harassment as sexualized behavior”²³³ tend to be more successful than other sexual harassment victims. Plaintiffs who alleged harassment on comments of a sexual or physical nature were more successful than plaintiffs who alleged comments that devalued women as women. This suggests that courts tend to view sexual harassment through the lens of tort—individual harms to an individual’s dignity—rather than through the lens of equal employment opportunity regardless of sex. Identifiable conduct that looks like other torts, such as defamation or battery, tends to be more likely to lead to employer liability than conduct that might, over time, undermine women’s status in the workplace.

Second, the persistence of the tort paradigm explains why disparate impact claims are seldom brought and seldom successful. John Donohue and Peter Siegelman’s 1991 study indicates that disparate impact cases had an extremely modest effect on employment discrimination litigation, finding, for instance, that the disparate impact theory only generated 101 additional cases in 1989.²³⁴ Much recent scholarship notes that disparate impact claims remain rare relative to disparate treatment claims.²³⁵ This is in part because the 1991 Act authorized compensatory and punitive damages only for intentional discrimination claims, thereby decreasing attorneys’ incentives to bring disparate impact claims, in which intent is not an element. In so doing, the 1991 Act’s provision of these tort-like damages for tort-like (intentional wrongdoing) discrimination only reinforced the tort paradigm for employment discrimination.

231. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 570 (2001).

232. *Id.* at 571.

233. Juliano & Schwab, *supra* note 231, at 580.

234. Donohue & Siegelman, *supra* note 22, at 998.

235. See Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J. COLLEGE & UNIV. L. 547, 549 (2007); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598 (2004); Sullivan, *supra* note 17, at 913–14.

Michael Selmi's recent empirical study of disparate impact cases, based on appellate cases in the LEXIS-NEXIS database, finds a declining success rate of disparate impact claims from 1984 to 2001, from fourteen out of twenty-five successful plaintiff claims in 1984–85 to two out of forty-three successful plaintiff claims in 1999–2001.²³⁶ The difficulty of winning a disparate impact claim can be attributed to the predominance of the tort paradigm that pervades the judicial framework of employment discrimination. Most fact patterns giving rise to this theory of liability do not fit neatly into a tort analogy. As Christine Jolls has noted, disparate impact cases often involve challenges to practices that disadvantage a group of people, rather than an individual injury.²³⁷ The disparate impact claim does not have a clear element of fault-based liability. Rather, the disparate impact theory seems to impose a duty of accommodation²³⁸: it requires employers not to engage in practices that disadvantage minorities, even practices that would be beneficial to their business operations, unless those practices are justified by business “necessity.” As a result, judges are resistant to this theory of liability. Samuel Bagenstos notes that, “[p]articularly in cases where it seems unlikely that the employer’s adoption of a practice with a disparate impact served as a cover for intentional discrimination, judges are hesitant to find liability under the disparate impact doctrine.”²³⁹

Third, the persistence of the tort paradigm may explain why class actions are in decline in employment discrimination litigation. Although there were 1,174 class action employment discrimination cases filed in federal court in 1976, there were only seventy-three in 2000–01 and 2001–02.²⁴⁰ One explanation is that courts are increasingly reluctant to certify classes, based on the belief that the named plaintiff is not “typical” of the other members of the class, as required under Rule 23(a),²⁴¹ or that the common questions of law and fact do not predominate, as required to

236. Selmi, *supra* note 230, at 738.

237. See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 671–72 (2001).

238. See *id.* at 653.

239. See Bagenstos, *supra* note 18, at 41.

240. See Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 820 (2004).

241. In *Gen. Tel. Co. v. Falcon*, the Supreme Court held that district courts must satisfy themselves that all the requirements of Rule 23(a), including typicality, are met before certifying a class. 457 U.S. 147, 161 (1982). As a result, many lower courts have been strict about the typicality requirement. See, e.g., *Griffin v. Dugger*, 823 F.2d 1476, 1486–87 (11th Cir. 1987); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1035 (9th Cir. 1990).

certify a class under Rule 23(b)(3).²⁴² Expressed in these terms, the reluctance to certify classes reflects the understanding that discrimination consists of individual facts and injuries that are increasingly harder to understand as structural problems that affect large numbers of employees. For some courts, this understanding has been reinforced by the 1991 Civil Rights Act's authorization of compensatory and punitive damages for intentional discrimination. Because these damages would require individualized proof for each plaintiff, it becomes increasingly harder to conclude that the common questions "predominate" as is required for the certification of a damages class action.²⁴³

Finally, the entrenchment of the tort model of discrimination is reflected in settlements that have resulted from the few large nationwide employment discrimination class actions in recent memory. As Michael Selmi has documented, settlements in these cases focus on monetary relief and produce little or no substantive change within corporations with regard to equal employment opportunity.²⁴⁴ One of the most famous settlements resulted from a class action against Texaco in which African American employees challenged the company's discriminatory salary and promotion practices. The 1996 Texaco settlement of \$140 million included \$115 million in monetary relief for the plaintiffs and their attorneys, in addition to \$35 million toward a diversity task force to improve the company's employment policies.²⁴⁵ Selmi's follow-up study of Texaco suggests that "[b]eyond the monetary relief awarded to the plaintiffs, which was substantial, it is difficult to conclude that Texaco has made much progress in reforming its culture."²⁴⁶ The civil suit drives toward a focus on monetary relief, even when problems of structural discrimination are revealed by the litigation.

242. See *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 407–10 (5th Cir. 1998).

243. See *id.* at 418. For a discussion of this view, see Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305 (2001).

244. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1250–51 (2003). Selmi's article focuses on the Texaco settlement, the Home Depot settlement, and the Denny's settlement, all of which included monetary and other forms of relief.

245. *Id.* at 1273–74.

246. *Id.* at 1280.

V. MUTUAL LESSONS

A. *Similarities of Criminal Enforcement in France and Civil Enforcement in the United States*

In many ways, the predominance of criminal enforcement of employment discrimination law in France appears to mark a stark contrast to the American system of enforcing the non-discrimination norm through civil litigation. Americans may be troubled by the image of the jailed discriminator—the L'Oréal recruiter behind bars. Indeed, in the L'Oréal case, the Paris Court of Appeals sentenced Thérèse Coulange, the author of the incriminating fax document, to three months in prison.²⁴⁷ At the same time, Coulange got a suspended sentence,²⁴⁸ making it highly unlikely that she will actually go to jail. Although courts have rarely imposed prison sentences (the maximum being three years) in discrimination cases, it remains to be seen whether lower courts will follow this Court of Appeals' example in imposing such sentences in the future. For the moment, most defendants in such cases typically face fines rather than a real possibility of imprisonment.

In the L'Oréal case, each of the three defendant companies were fined €30,000. The maximum statutory fine is €45,000. In the United States, pursuant to the Civil Rights Act of 1991, an employer can face compensatory and punitive damage awards of up to \$300,000 per plaintiff, which makes it possible for companies to face damage awards far exceeding €45,000, especially in multiple-plaintiff and class-action suits.²⁴⁹ Nonetheless, in practice, a recent study of confidential settlements in employment discrimination cases in one district suggests that the median damage award in confidential settlements, which are increasingly the typical way in which employment discrimination plaintiffs are compensated (if they are compensated at all), is \$54,651. That amount is almost identical to the maximum criminal penalty under the French employment discrimination statute and not much more than the criminal fine imposed in the recent L'Oréal case.

Another similarity between the French and U.S. contexts is that the procedural systems in which employment discrimination law is enforced

247. Cour d'appel [CA] [regional court of appeals] Paris, 11e ch., July 7, 2007, at 15.

248. *Id.*

249. Note that, if the plaintiff joins a state common-law tort claim to the Title VII claim, such as intentional infliction of emotional distress, the plaintiff can recover uncapped compensatory and punitive damages. See Chamallas, *supra* note 227, at 2118–19.

have contributed to the evolution of substantive law in ways that privilege intentional discrimination (over disparate impact) and impose a high evidentiary burden on the party seeking to prove the existence of discrimination. In France, the intent element of criminal law and the presumption of innocence in criminal procedure have led to the high evidentiary burden on prosecutors and civil parties accusing a defendant of discrimination. In the United States, the private-law logic of tort law has permeated employment discrimination cases in ways which emphasize wrongful (often intentional) acts, and the broad discovery in civil procedure have led courts to protect defendants by imposing high evidentiary burdens on employment discrimination plaintiffs.

These dynamics raise doubts about whether the civil or criminal categories matter at all in employment discrimination law. Is there a difference between criminal fines in France and civil damage awards in the United States? The difference between criminal and civil enforcement in France and the United States must be understood in light of the broader differences between the criminal and civil categories in the two national legal contexts. In France, there is a broader tendency to criminalize socially undesirable behaviors that American jurisdictions would address through tort law. French criminal law provides for the punishment of various offenses by fine. Lesser offenses are labeled “*délits*” and “*contraventions*,” as distinct from “*crimes*.” As James Q. Whitman has noted, this terminology is in reality a form of decriminalization: “A person convicted of something that is not ‘really’ a crime is a person who has not been stigmatized as ‘really’ a criminal.”²⁵⁰ Discrimination is a *délit*, and prison sentences are very rare, or suspended, as in the L’Oréal case. Other examples of *délits* that resemble American torts, punished mainly by fine, include the violation of privacy, including recording or transmitting an image of a person without that person’s consent,²⁵¹ libel,²⁵² and breaches of professional privilege.²⁵³ In all such cases, since victims of these acts can participate as civil parties and obtain damages in the event of a conviction, the criminal proceeding is a combined public and private proceeding for the regulation and compensation of a wrongful act.

By contrast, Continental legal systems represent an “activist” state, expressing the policies of the state. French criminal law regulates a variety

250. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 83 (2003).

251. C. PÉN. art. 226-1.

252. C. PÉN. art. 226-10.

253. C. PÉN. art. 226-13.

of private wrongs that have a public dimension. The differences between criminal and civil procedure, as demonstrated in the case of employment discrimination, have facilitated this development. The reverse, and equally peculiar phenomenon is found in the United States: The predominance of private causes of action to enforce public rights and to remedy public wrongs in U.S. law. In the United States, rules of civil procedure in both the federal and state systems favor liberal discovery, such that plaintiffs in private-law actions can immediately obtain access to evidence supporting their claims that they would never otherwise have access to without having filed a lawsuit. As a result, private law litigation has a very public dimension in the United States, and has been used since the 1960s to achieve various collective goals, including civil rights, the deterrence of pollution, fair lending practices, and the like.²⁵⁴ As Mirjan R. Damaška has noted, the Continental and American legal systems represent two different ideals of officialdom. The American style tends to be “reactive,” reflecting the understanding that the state has no interests apart from society, such that it has no rights that can be violated apart from the rights of private parties.²⁵⁵ The Continental style is “activist;” social problems are considered state problems.²⁵⁶

Nonetheless, the similar difficulties encountered by both French and American enforcement of employment discrimination law call into question the assumption that discrimination is a form of conduct that fits comfortably in one category or the other. Discrimination, like many forms of conduct regulated by modern legal orders, is neither “criminal” nor “civil” in nature. It is a multifaceted, complex, and evolving set of social practices and has both criminal and civil dimensions. An act that is motivated by racial animus, whether or not it ultimately results in harm to a particular member of a racial minority, should be considered an injury to public values and thus fits with the public condemnatory nature of criminal law. When individuals suffer a concrete setback to their interests, or an injury resulting from disparate treatment due to a negligent or intentional act that is not motivated by racial animus, tort law may seem more appropriate. Finally, the forms of behavior that tend to disadvantage racial minorities today, such as implicit bias, structural discrimination, lack of access to networking, or lack of comfort in the corporate culture, fit neither the criminal nor tort paradigms.

254. See KAGAN, *supra* note 49, at 51.

255. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 73 (1986).

256. *Id.* at 81.

B. The Advantages of Public Enforcement

Nonetheless, the relative differences between the two legal systems' understandings of discrimination do highlight a significant blind spot in U.S. law's understanding of discrimination. Notwithstanding the limits of French criminal enforcement discussed in Part III.F, criminal enforcement of the antidiscrimination norm does have one advantage over civil liability alone: It conceives of discrimination as a harm to the state and to that society's public values rather than a dispute between private parties with competing legitimate interests. It condemns discrimination; it does not merely price it.

Furthermore, criminal enforcement opens up the possibility of punishing discriminatory practices without the participation of an injured party. In several of the recent high-profile employment discrimination cases resulting in convictions, such as the Ikea case,²⁵⁷ the "Hotel La Villa,"²⁵⁸ and the L'Oréal case, no victim participated in the proceedings. In fact, in the Ikea case, the defendant argued (unsuccessfully) that there had been no discrimination, only attempted discrimination, because the message revealing the intent to discriminate had not necessarily resulted in the rejection of applicants of color at that point.²⁵⁹ Similarly, although the record in the L'Oréal case indicated that Asian, North African, and black candidates had been rejected,²⁶⁰ the injury to those candidates was insignificant in determining that the company had discriminated. In all these cases, the material element that had to be proven was the intent to discriminate, not the injury to a particular claimant.

By contrast, in the United States, a case could not conceivably be commenced without an action by an allegedly injured party, who then controls the investigation and prosecution of the claim. Without an allegation by a party of direct economic harm, there is no cause of action under Title VII.²⁶¹ In the three French cases mentioned above, the cases were commenced when employees who had witnessed the discriminatory practices, rather than the victims of discrimination, had complained to

257. See discussion at *supra* note 128 and accompanying text.

258. See discussion at *supra* note 127 and accompanying text.

259. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Versailles, Apr. 2, 2001, 15.

260. Cour d'Appel [CA] [regional court of appeals] Paris, July 6, 2007, 8.

261. For scholarly discussions of "actionable effects on the terms and conditions of employment, see Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions, or Privileges of Employment Under Title VII?* 37 B.C. L. REV. 643, 656-63 (1996); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1142-47 (1998).

SOS-Racisme or to the police. The Labor Code explicitly protects employees from being fired or disciplined for having witnessed or participated in legal actions against discrimination.²⁶²

In short, the enforcement of the norm against discrimination without the participation of an actual injured party opens up possibilities that do not exist in the United States for regulating discriminatory practices. Most of the criminal prosecutions in France challenge discriminatory failures to hire. It is not necessary for persons who were not hired to participate in cases that result in the imposition of fines for discriminatory hiring practices. In the United States, hiring discrimination cases are rare. Although hiring cases outnumbered termination charges by fifty percent in the mid-1960s, they have since constituted a smaller and smaller proportion of the docket.²⁶³ Since 1991, hiring cases constitute less than twenty percent of Title VII litigation.²⁶⁴

Yet, hiring discrimination persists in the United States. In the U.S. labor market, African Americans tend to be almost twice as likely as whites to be unemployed.²⁶⁵ While factors other than discrimination may also be at work, recent social science studies suggest that racial bias continues to play a significant role in producing these outcomes. A 2004 study by economists at the University of Chicago establishes that employers respond differently to resumes bearing white-sounding names as compared to resumes bearing African-American-sounding names.²⁶⁶ Another widely cited study shows that whites with criminal records are more likely to be interviewed than blacks without criminal records.²⁶⁷

262. See C. TRAV. art. L. 122-45 (“No employee can be disciplined, terminated, or made the object of a discriminatory measure for having witnessed the actions defined in the preceding paragraphs of this article.”); C. TRAV. art. L. 122-45-2 (“The termination of an employee is void if done following an action in justice engaged by the employee or in his or her favor based on the provisions of this code relative to discrimination, if it is established that the termination has no real or serious cause and constitutes in reality a measure taken by the employer because of the action in justice. In this case, the reintegration is the right of the employee and the employee is regarded as if s/he never stopped occupying her position.”)

263. Donohue & Siegelman, *supra* note 22, at 1015.

264. See Parker, *supra* note 24, at 944 (presenting national study of reported district court opinions on race discrimination cases, of which failure to hire constituted 3.9% of the cases in 2003).

265. The Labor Department’s statistics of January 2007 indicate an 8.2% unemployment rate for African Americans and 4.6% for whites. See Department of Labor, Bureau of Labor Statistics, Table A-2: Employment status of the civilian population by race, sex, and age, available at <http://www.bls.gov/news.release/empsit.t02.htm>.

266. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, Sept. 2004, <http://gsb.uchicago.edu/pdf/bertrand.pdf>.

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

Despite the persistence of hiring discrimination, there are few incentives for persons who are not hired to bring lawsuits: Job candidates in a fluid labor market may eventually find jobs so as to minimize the payoff of backpay and compensatory damages for bringing such suits. Lawyers rationally prefer firing or failure-to-promote cases for the higher contingency fees that the higher damage awards can bring. The logic of civil liability, with its focus on compensable damages to plaintiffs, tends to devalue the hiring discrimination suit. Yet, this should not lead to the conclusion that hiring discrimination should be beyond the reach of employment discrimination law. Thus, a public enforcement regime has an important role to play in combating hiring discrimination. But because France's criminal public enforcement regime is only effective in combating discriminatory acts that are accompanied by racist statements, France may not provide a model that is worth copying. Nonetheless, the French experience should inspire experimentation with public non-criminal modes of enforcement to overcome the limited logic of civil liability.

CONCLUSION: BEYOND CRIMINAL AND CIVIL

The procedural path dependence analysis does not necessarily produce a particular solution to the problem of employment discrimination. It does, however, identify some dynamics that contribute significantly to antidiscrimination law's current shortcomings. Comparing the American civil liability regime to the French criminal liability regime in this area of law enables us to see the extent to which substantive principles are embedded into the logic of each procedural system. These substantive principles both open up and restrict the possibilities for the substantive development of the antidiscrimination norm. Ultimately, the norm must evolve with the practices that threaten it.

One goal of employment discrimination law that both France and the United States share in common is to combat unjustified differences in treatment between persons based on their group-based characteristics. These unjustified differences in treatment are manifested in a variety of employer practices. These practices evolve, and over time, they consist of actions that may resemble crimes, torts, or other undesirable behaviors that fit neither of these legal categories. Yet, the predominant enforcement mechanism in each society has entrenched narrow substantive conceptions of discrimination.

To move beyond the perennial problem of procedural path dependence, the challenge for each society will be to preserve the strong articulation of

public norms that comes with criminal enforcement while allowing for the broader definition of discrimination that can only be legitimate outside of criminal enforcement. A regulatory approach to these practices, by administrative agencies²⁶⁸ or experimental self-regulation,²⁶⁹ may offer some hope. Regulation by administrative agencies, perhaps through administrative fines, does provide the possibility for combining the public dimension of criminal law with the greater flexibility in defining the substance of offending behaviors afforded by civil liability.²⁷⁰ But as of yet, the entrenched conceptions of discrimination have limited the legal framework in which both French and American equality agencies can operate, without the power to impose administrative sanctions. Thus, the future success of antidiscrimination reform in both countries requires greater flexibility than reliance on “criminal” or “civil” enforcement alone.

268. I have elsewhere argued that rulemaking and cease-and-desist powers should be delegated to the EEOC. See Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 469–73.

269. Susan Sturm’s account suggests that companies respond to the rules adopted by courts by inventing their own governance frameworks for promoting equality. See Sturm, *supra* note 19, at 522–25. For a discussion of this emerging approach to employment discrimination, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 419–27 (2005).

270. Kenneth Mann argues that the administrative state is capable of “hybrid” sanctioning by imposing fines intended to deter through the administrative rather than criminal process. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1850–51 (1992).