

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

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ABSTRACT

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

Is employment at will bad for racial minorities? Ever since Title VII was proposed, the tension between employment discrimination law and employment at will has been noticed.¹ Recent empirical work shows that employment discrimination plaintiffs lose a lot,² and one widely shared explanation is that their

¹ When Title VII was being debated, conservatives' main objection to the legislation was that it would interfere with employers' freedom of contract. See Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, H.R. Rep. No. 914, 88th Cong. 1st Sess. 23534.

² See Kevin M. Clermont, Theodore Eisenberg, & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 547, 548 (2003); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?* 61 LA. L. REV. 555 (2001).

cases are extremely difficult to win because of the enduring rule of at will employment.³ Many scholars have argued or assumed that racial minorities would fare better under a for-cause employment regime, one that protects the legal right of all employees to job security.⁴

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

France's recent problems are instructive. French employment law made U.S. headlines⁵ in March 2006, as over a million people across the country staged massive demonstrations against a law that would have introduced a small dose of at will employment into the French workplace.⁶ Departing from the Labor Code's general protection of employee job security, the March 2006 law permitted employers to hire persons under the age of 26 for a period of two years during which the employee could be terminated for any reason. The "contrat première embauche," (CPE), or "first employment contract" provision, as it was known,

³ See William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305 (1996); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177 (2003); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2230 (1995); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006);

⁴ See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 156 (2003); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will*, 57 OHIO ST. L. J. 1443 (1996); Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At will*, 34 LOYOLA L.A. L. REV. 351 (2001).

⁵ See, e.g., Craig S. Smith, *Opponents of New French Labor Law Step Up Protests*, N.Y. TIMES, Mar. 21, 2006, at A3; Elaine Sciolino & Craig S. Smith, *Protests in France Over Youth Labor Law Turn Violent*, N.Y. TIMES, Mar. 29, 2006, at A1; Sebastian Rotella & Achrene Sicakyuz, *1 Million Across France March To Oppose Premier's Key Labor Law*, L.A. TIMES, Mar. 29, 2006, at A21; Molly Moore, *Top French Tribunal Upholds Jobs Law*, WASH. POST, Mar. 31, 2006, at A13.

⁶ See Loi no. 2006-396 du 31 mars 2006 pour l'égalité des chances, JORF du 2 avril 2006, at 4950, art. 11.

was ultimately rescinded by the Government in response to three weeks of nationwide strikes and unrest.⁷

An important fact that was largely ignored by American press accounts is that the proposal to allow at-will employment in limited circumstances was part of the law on “equality of opportunities,”⁸ adopted in direct response to the violent race riots throughout France in the fall of 2005.⁹ These riots also flooded U.S. newspaper headlines,¹⁰ as the French government declared a state of emergency in response to levels of unrest not seen since the student protests of May 1968.¹¹ Seeking to alleviate the mass unemployment of North African youths, the at will employment provision of the Equality of Opportunities law was intended to enhance the employment prospects of disadvantaged minorities.

The French experience provides a counterweight to American understandings of the relationship between employment discrimination and employment at will, which are predominantly shaped by litigation experience. In France, the strengthening of job security protections in the Labor Code over the last thirty years has coincided with reforms to strengthen employment

⁷ See Elaine Sciolino, *Chirac Will Rescind Labor Law That Caused Wide French Riots*, N.Y. TIMES, Apr. 11, 2006, at A1. The legislature eventually adopted a new law that replaced the article that contained the CPE provision. See Loi no. 2006-457 du 21 avril 2006 sur l'accès des jeunes à la vie active en entreprise, JORF du 22 avril 2006.

⁸ See Loi no. 2006-396 du 31 mars 2006 pour l'égalité des chances, JORF du 2 avril 2006

⁹ The initial report proposing the bill began with a discussion of the need to respond to the problems of unemployment and discrimination that had motivated the riots. See Laurent Hénart, Rapport no. 2825 fait au nom de la commission des affaires culturelles, familiales, et sociales sur le projet de loi (no. 2787) pour l'égalité des chances, 25 janvier 2006, at 7.

¹⁰ The increasing violence of the riots, and their spread throughout the nation, were reported almost daily in most of the major U.S. newspapers for about two weeks in November 2005, often on the front page. See, e.g., Craig S. Smith, *Chirac Appeals for Calm as Violent Protests Shake Paris's Suburbs*, N.Y. TIMES, Nov. 3, 2005, at A1; Cassell Bryan-Low & John Carreyrou, France Authorizes Curfews as Riots Cast Doubt on Its Policing System, WALL ST. J., Nov. 8, 2005, at A1; David Ignatius, *Why France Is Burning*, WASH. POST, Nov. 9, 2005, at A31. The riots also caught the attention of U.S. legal scholars. See The French Riots--Posner's Comment, BECKER-POSNER BLOG, November 13, 2005, at http://www.becker-posner-blog.com/archives/2005/11/the_french_riot.html (last visited July 21, 2006).

¹¹ Mark Landler, *France Declares State of Emergency; Curfews To Be Imposed*, N.Y. TIMES, Nov. 9, 2005, at A12.

discrimination law. Yet, the racial gap in employment has only expanded during this period. The historical and current sociological data support the conclusion that the Labor Code's employee job security protections have contributed significantly to employers' propensity to engage in both rational and irrational discrimination against racial minorities in hiring. The recent controversies in France, from race riots to student strikes, should inform American approaches to reforming employment law to eradicate racial inequality in employment.

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

Part II contrasts the goals justifying U.S. employment discrimination law with those underlying French employment discrimination law. In France, the Labor Code's prohibition of discrimination in employment is not about group-based disadvantage: It is part of a general protection of employees' rights against arbitrary treatment by the employer. This very bundle of employee rights encompasses the right to job security.

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

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

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

I. Title VII and Employment at Will: An Uneasy Coexistence

C. Title VII's Goal: Equal Employment Opportunity

The goal of employment discrimination law in the United States is equal employment opportunity, defined in light of the historical circumstances that gave rise to Title VII.¹² So understood, equal employment opportunity means eradicating the disadvantages of excluded and subordinated groups in acquiring and retaining jobs.¹³ More specifically, the primary goal of Title VII, the first employment discrimination statute, was to eradicate *race*-based disadvantages, particularly the severe disadvantages faced by African Americans.¹⁴ As Alfred Blumrosen observed in 1968, the crucial social fact giving rise to Title VII was the disproportionately high unemployment rate among blacks.¹⁵

Title VII also prohibited discrimination on the basis of sex, national origin, and religion,¹⁶ expressing the message that employment disadvantage on the basis of membership in these groups was also unacceptable. But it is clear that the main impetus for passing Title VII was a growing civil rights movement whose primary goal was to undo racial segregation and its disadvantaging effects on African Americans in education and employment.¹⁷ Indeed, the Civil Rights Act of 1964, of which Title VII was part, was a comprehensive federal statute attempting to eradicate various aspects of racial segregation and black disadvantage in voting, employment, education, and public accommodations.¹⁸

So, naturally, the eradication of race-based disadvantage has been articulated, both by scholars¹⁹ and by the Supreme

¹² See *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979).

¹³ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

¹⁴ See *United Steelworkers*, 443 U.S. at 203.

¹⁵ See Alfred W. Blumrosen, *The Duty of Fair Recruitment Under Title VII of the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 465 (1968) (attributing this goal to the Truman Committee on Civil Rights in 1947).

¹⁶ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).

¹⁷ See HUGH DAVIS GRAHAM, *CIVIL RIGHTS AND THE PRESIDENCY* 53-56 (1992).

¹⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964).

¹⁹ The classic statement to this effect was made by Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF 107 (1976) (arguing that the Equal Protection Clause should be understood to prohibit group-disadvantaging state

Court,²⁰ as the main goal of employment discrimination law. Although employment discrimination law has been extended to other groups, the history of group-based disadvantage has always been an important background for the interpretation of the antidiscrimination norm. Although the statute protects employees as individuals, it does so only insofar as the individual has been treated badly *as a member of a group*, and does not protect the individual from all forms of arbitrary and unjustified treatment by the employer. These features of U.S. employment discrimination law, as we shall see, make it distinctive.²¹

D. Employment at Will and Its Limits

The rule of employment at will allows either the employer or the employee to terminate the employment relationship at any time for good reason, bad reason, or no reason. As is well known, the legal right to fire for bad reasons is not absolute;²² both

action). Cynthia Estlund has argued that Title VII should be understood as an “equal protection clause for the workplace.” Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005). See also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 40-41 (2006) (arguing that the best explanation for employment discrimination law is its reflection of a broad goal of social change to eliminate group-based status inequalities).

²⁰ In *Griggs v. Duke Power Company*, the Supreme Court, in inventing the disparate impact theory of liability, saw Title VII as requiring “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” 401 U.S. 424, 431 (1971). The Supreme Court reaffirmed the view that the goal of Title VII was to eradicate group-based disadvantage in access to employment in *United Steelworkers v. Weber*, in holding that voluntary employer affirmative action policies did not violate Title VII. The Court characterized the goals of the Civil Rights Act as “the integration of blacks into the mainstream of American society.” *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979).

²¹ For a more detailed discussion of the distinctive features of U.S. antidiscrimination law as compared with the French model, see Julie C. Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. (forthcoming August 2007)

²² Indeed, the defenders of employment at will view the limits imposed on it by antidiscrimination, labor, and wrongful discharge doctrine to be excessive. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* (1990); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996).

legislatures and courts have rendered some reasons for termination illegitimate.

Title VII is perhaps the most salient example. Title VII prohibits the employer from terminating an employment relationship based on the employee's race, color, sex, religion, or national origin.²³ Other antidiscrimination laws, state and federal, also protect against discrimination on the basis of disability,²⁴ age,²⁵ or sexual orientation.²⁶ The antidiscrimination exceptions to employment at will embody a policy against employment decisions based on traits that have been but should not be a basis for group disadvantage.²⁷

The National Labor Relations Act prohibits employers from taking adverse actions against employees due to their union membership or activities.²⁸ State whistleblower statutes protect employees' right to speak out with regard to the employer's illegal activities.²⁹ And many state courts have invalidated or provided remedies for wrongful termination when the termination is against public policy, such as a termination in retaliation for an employee's reporting of a crime.³⁰

Nonetheless, despite these restrictions on employer discretion, the employee protections are exceptions that coexist with the rule of at will employment. For the most part, employers still retain broad firing discretion. In the early days of Title VII, some American labor and civil rights scholars believed or hoped that Title VII would be extended to encompass general job security protections for all workers,³¹ especially after the 1973 case of

²³ Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (2000).

²⁴ Americans With Disabilities Act, 42 U.S.C. § 12112 (2000).

²⁵ Age Discrimination in Employment Act, 29 U.S.C. § 628 (2000).

²⁶ For instance, New York's employment discrimination statute includes sexual orientation as a prohibited category. See N. Y. CLS Exec. § 296 (1a) (Consol. 2006).

²⁷ Cynthia Estlund, *Wrongful Discharge Protections in an At will World*, 74 TEX. L. REV. 1655, 1669 (1996).

²⁸ National Labor Relations Act, 29 U.S.C. § 151 (2000).

²⁹ For example, New York has a whistleblower statute, at N.Y. Lab. Law. § 740 (Consol. 1988), and New Jersey has a Conscientious Employee Protection Act that protects employees who engage in whistle-blowing activities. N.J. Stat. Ann. §§ 34:19-1-19-8 (2006).

³⁰ See, e.g., *Petermann v. Int'l Brotherhood of Teamsters*, 344 P.2d 25 (Cal. 1959).

³¹ See Alfred W. Blumrosen, *Strangers No More: Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L. J. 519, 520 (1978) ("[T]he

*McDonald v. Santa Fe Trail Transportation Company*³² read Title VII to prohibit race-based discrimination against whites. But to the dismay of many critics of employment at will,³³ no such universalistic ban on arbitrary discharge has emerged. An employee cannot be fired on the basis of race, but she can be fired for wearing a hairstyle that the employer doesn't like.³⁴ An employee cannot be fired because he is black, but he can be fired if the boss personally dislikes him and he happens to be black.³⁵

E. Employment at Will and Title VII Litigation

Since Title VII was passed, allegations of discriminatory firing have been litigated far more frequently than allegations of discriminatory hiring.³⁶ Most of these cases are individual disparate treatment cases.³⁷ In the at-will universe, the Title VII plaintiff may allege that she was fired on the basis of race or sex, but faces great difficulty in the doctrinal scheme of Title VII litigation if the employer claims that she was fired for all kinds of bad reasons, as long as those bad reasons are not group-based traits. Obviously, such a defense, if true, is legitimate in a world where at will employment is the background norm. By contrast, if the background rule was a presumption of job security protection,

common law rule of employer discretion has been superseded by the principle that personnel decisions must be based on just cause. The just cause standard arose initially under Title VII . . ."); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L. J., 1, 20 (1979) (arguing that *McDonnell Douglas's* requirement that an employer-defendant put forth a "legitimate nondiscriminatory reason" after a plaintiff's prima facie case effectively produced a just-cause standard).

³² 411 U.S. 792 (1973).

³³ See, e.g., Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000); Joseph Slater, *The "American Rule" That Swallows the Exceptions*, EMPLOYEE RTS & EMPLOYEE POL'Y (forthcoming 2007); Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295 (2005).

³⁴ Cf. *Rogers v. American Airlines*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (holding that an employer policy prohibiting employees from wearing all-braided hairstyles is not a violation of Title VII).

³⁵ These are the facts of *St. Mary's Honor Center v. Hicks*. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

³⁶ John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991).

³⁷ *Id.*

whereby the employee could not be fired except for just cause, with just cause defined as employee's job-related fault or employer's significant economic hardship, it follows that a personal animosity defense (to name one example of a bad reason) would not be a legitimate reason available to an employer-defendant in an employment discrimination lawsuit. Under a for-cause employment regime, an employer's inability to articulate and prove a *good* reason for terminating an employee would enable the employee plaintiff to prevail.

For the last fifteen years, employment discrimination scholars have argued that the goals of Title VII have been undermined by the endurance of the American doctrine of employment at will.³⁸ Although the critics of at will employment acknowledge that the at will rule is formally limited by Title VII and other exceptions,³⁹ many scholars have argued that what remains of employment at will seriously undermines the effectiveness of employment discrimination law in bringing about race and gender equality in the workplace. Specifically, the background norm of employment at will affects the burdens of production and proof under the *McDonnell Douglas* framework when individual Title VII cases are litigated, often to the detriment of plaintiffs.

The notion that employment at will is a doctrinal barrier to the employment discrimination plaintiff's case was fully articulated after the Supreme Court's 1992 decision in *St. Mary's Honor Center v. Hicks*.⁴⁰ In that case, Hicks, a black correctional

³⁸ See, e.g., Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2230 (1995); Cynthia Estlund, *Wrongful Discharge Protections in an At will World*, 74 TEX. L. REV. 1655 (1996); 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); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will*, 57 OHIO ST. L. J. 1443 (1996); Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At will*, 34 LOYOLA L.A. L. REV. 351 (2001); 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).

³⁹ For example, Cynthia Estlund points out that "the legal right to fire for bad reasons has been virtually decimated." Cynthia L. Estlund, *Wrongful Discharge Protections in an At will World*, 74 TEX. L. REV. 1655, 1655 (1996).

⁴⁰ 509 U.S. 502 (1993).

officer was subject to repeated and severe disciplinary actions after a new supervisor had come into office. The employee was eventually demoted and then discharged. Hicks brought a Title VII action, in which he presented a prima facie case under *McDonnell Douglas v. Green*.⁴¹ The defendant proffered nondiscriminatory reasons that the district court found to be false. Nonetheless, the district court found for the defendant because the plaintiff had not proven that the employer's actions were "racially rather than personally motivated."⁴²

Prior to the *Hicks* case, Title VII plaintiffs alleging disparate treatment benefited from an effective presumption that discrimination had occurred based on circumstantial evidence if they were able to prove the elements of a *McDonnell Douglas* prima facie case. The employer would then have the burden of producing a legitimate nondiscriminatory reason for its decision. After *Furnco Construction v. Waters*⁴³ and *Texas Department of Community Affairs v. Burdine*,⁴⁴ some courts took this to mean that, if the employer gave reasons that were not credible, or if the employer gave no reason at all for its decision, the plaintiff would prevail.⁴⁵ However, *Hicks* held that, even if the employer puts forth a reason that is not worthy of credence, or no reason at all for

⁴¹ Under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), a plaintiff could establish a prima facie case without direct evidence by proving (1) that he was a member of a protected group, (2) that he was qualified for the job, (3) he applied for the job and was rejected, and (4) the job continued to remain open.

⁴² *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508 (1993).

⁴³ 439 U.S. 567 (1978).

⁴⁴ 450 U.S. 248 (1981).

⁴⁵ In *Furnco Construction Co. v. Waters*, the Supreme Court stated that "a prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . we are likely to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." 439 U.S. 567, 577 (1978). In *Burdine*, the Court extended this reasoning by explicitly noting that a plaintiff can show that a discriminatory reason more likely motivated the employer than the proffered reason simply by showing that the proffered explanation was unworthy of credence. 450 U.S. at 256. As Malamud notes, the circuits applied *Burdine* very differently with regard to the question of whether a plaintiff who convinced the factfinder that the employer's proffered reason was false was then entitled to judgment as a matter of law. See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2223 n.23 (1993).

its actions, the the trier of fact is not required to find for the plaintiff. Unless the plaintiff proves that the employer's falsity or lack of reason stems from racial motivation (as opposed to, say, arbitrary personal hatred), *Hicks* held that the plaintiff would not be entitled to prevail.⁴⁶ The implication of *Hicks* was that the law permitted employers to act arbitrarily, irrationally and hatefully, as long as the arbitrariness, irrationality, and hatred was not motivated by one of Title VII's protected categories, such as race.

Many scholars reacted to the *Hicks* decision by attacking employment at-will.⁴⁷ They argued that, in a workplace where employers are permitted to terminate employees without just cause, arbitrary acts against members of racial minorities and women are not considered unlawful, however adversely it might affect them.⁴⁸ According to many commentators, the background norm of employment at will prevented courts from recognizing the situations in which arbitrary and adverse treatment of racial minorities could constitute racial discrimination. Some critics, like Ann McGinley, explicitly proposed the eradication of employment at will through federal or state legislation,⁴⁹ drawing on some

⁴⁶ *Hicks*, 509 U.S. 502, 519 (1993).

⁴⁷ It should be noted, however, that scholars began to notice the significance of employment at will as a barrier to the success of Title VII prior to *Hicks*. See, e.g., Blumoff & Lewis, *supra* note ___, at 70-72.

⁴⁸ 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, 330 (1996) (arguing that *Hicks* was evidence of the Supreme Court's refusal to displace employment at will to the extent necessary to effectuate Title VII's goal); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 Tex. L. Rev. 1655, 1679 (1996) (arguing that employment at-will undermines Title VII); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will*, 57 OHIO ST. L. J. 1443 (1996) (urging the adoption of a national discharge policy prohibiting employers from discharging an employee without just cause, for the sake of achieving race and gender equality); Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At will*, 34 LOYOLA L.A. L. REV. 351 (2001) (proposing greater general protections for employee job security, including prior notice of dismissal or pay in lieu of notice, in light of the collaborative role played by employment at will in the subordination of women and people of color). Deborah Malamud observed that "wrongful, or at least undefendable, employer actions are significant problems in the American workplace, even outside of the setting of actionable discrimination." See *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2233 n.23 (1993).

⁴⁹ See McGinley, *supra* note 48, at 1511-12. See also Young, *supra* note 48.

foreign countries' laws protecting job security, which effectively prohibit termination except for good cause.⁵⁰

This critique has enduring salience in recent employment discrimination scholarship.⁵¹ Building on the insights of law and economics scholars, Cynthia Estlund, in her important and acclaimed book, *Working Together*, argues that employers have perverse disincentives to hire racial minorities when Title VII operates in the context of employment at-will.⁵² Estlund builds on an insight first mentioned by Richard Posner and developed by John Donohue and Peter Siegelman with regard to the efficacy of Title VII: The possibility of discriminatory firing suits under Title VII leads the employer to avoid hiring minorities due to the incurring expenses in a Title VII-firing suit.⁵³ In their 1991 empirical study of employment discrimination litigation, Donohue and Siegelman showed that, since the early 1970s, firing cases under Title VII have overwhelmingly outnumbered hiring charges.⁵⁴ Under these conditions, a reasonable employer is likely to fear a firing case more than a hiring case, which produces a net

⁵⁰ McGinley borrows from the job security laws of the Virgin Islands, France, and Germany, *see* McGinley, *supra* note __, at 1511, 1515-14, 1519-21. McGinley acknowledges, however, that the labor laws of France and Germany are more restrictive of the employer's prerogative than her own proposal. *Id.* at 1520-21. Young notes that the United States "stands virtually alone among Western industrialized nations in its failure to furnish its workers adequate job security." Young, *supra* note __, at 355. See also *Comment, Employment-at-will: The French Experience As a Basis For Reform*, 9 COMP. LAB. L.J., 294 (1988); Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033 (1995).

⁵¹ See 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) (arguing that *both* employment at will *and* the difficulties faced by Title VII in addressing unconscious bias have detracted from employment discrimination law's ability to combat discrimination); CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003); Joseph Slater, *The "American Rule" That Swallows the Exceptions*, EMPLOYEE RTS & EMPLOYEE POL'Y (forthcoming 2007).

⁵² See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 152 (2003).

⁵³ Richard Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987).

⁵⁴ John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1016 (1991) (see Figure 6).

disincentive to hire racial minorities.⁵⁵ As Ian Ayres and Peter Siegelman put it, “protection against discriminatory firing acts as a kind of tax on hiring those to whom it is extended.”⁵⁶ Estlund refers to this problem as the “at-will gap,” arguing that these perverse disincentives arise largely due to the persistence of at-will employment.⁵⁷ The at-will employer can fire employees who are unprotected by antidiscrimination statutes without fear of liability, but cannot fire protected employees without considering the cost of defending suit.⁵⁸ One solution, Estlund argues, is to move to a just-cause regime for the sake of “refining the ‘equal protection clause’ of the workplace.”⁵⁹

Regardless of one’s policy conclusion as to whether employment at will should be abolished in favor of a for-just-cause employment regime, most U.S. scholars seem to agree that the employment at will doctrine is in tension with employment discrimination law. This explains why Richard Epstein, a vocal defender of employment at will,⁶⁰ has called for the repeal of employment discrimination law.⁶¹

In other words, whether they come out in favor of a for-just-cause employment regime or not, most U.S. scholars see a conflict between the goals and principles underlying the employment at will doctrine and the goals and principles underlying employment discrimination law. The conventional wisdom is that employment at will undermines the goals of employment discrimination law. Furthermore, many commentators assume that pursuing the goal of employment discrimination law (namely, giving disadvantaged groups access to good jobs) is contiguous with protecting all employees’ job security.⁶² But the persistence of vast racial inequalities in

⁵⁵ See *id.* at 1024.

⁵⁶ Ian Ayres & Peter Siegelman, *The Q-World as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1487 (1996).

⁵⁷ Estlund, *supra* note 52, at 156.

⁵⁸ Estlund also develops this view in Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1679 (1996).

⁵⁹ Estlund, *supra* note 52, at 156.

⁶⁰ See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

⁶¹ RICHARD EPSTEIN, *FORBIDDEN GROUNDS* 148 (1990).

⁶² See, e.g., Alfred W. Blumrosen, *Strangers No more: All Workers Are entitled to “Just Cause” Protection Under Title VII*, 2 INDUS. REL. L. J. 519, 565 (1978); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change*

employment in other post-industrial societies that have strongly protected employee job security challenges this assumption.

II. The French Alternative: Republicanism and Universalism in Employment Discrimination Law

France provides a fruitful resource for thinking about job security and racial inequality, particularly as recent waves of internationally-noticed riots and strikes have highlighted these issues. From an American perspective, the sight of a massive social movement against a small dose of employment at will seems surreal,⁶³ since contingent employment with no legal protection of job security is the norm for American workers.⁶⁴

In France, by contrast, for-cause employment is the background norm that shapes other aspects of workplace regulation. Like U.S. law, French law also prohibits discrimination on the basis of group membership by employers,⁶⁵ but unlike U.S. law, French labor law considers the norm against discrimination as a natural extension of a general package of employee rights protections. The norm against discrimination fits comfortably with the Labor Code's many limits on employer

in the Law, 40 OHIO ST. L. J. 1, 49 (1979). More recently, Cynthia Estlund argues that "the legal rights of employees and the corresponding limitations on employer power that have developed since 1964 provide rudimentary analogues to the constitutional rights of citizens as against the government," suggesting that the right against discrimination is part of a more universal right. See Cynthia Estlund, *Rebuilding the Law of the Workplace*, 105 COLUM. L. REV. 318-19 (2005). Ann McGinley argues that "[a]n employee who is discharged without just cause is an innocent victim of the employment at will doctrine. Dismissed employees suffer economic loss, relocation costs, depression, and loss of self esteem . . . The average worker finds herself in the same position as that of blacks and women before the existence of the antidiscrimination laws." Ann McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L. J. 1443, 1500 (1995). McGinley sees the employee discharged for a bad reason as suffering essentially the same injury as an employee who is discriminated against on the basis of race, sex, or other group traits.

⁶³ For a discussion of the French employment law controversy from an American perspective, see William Pfaff, *France: The Children's Hour*, N.Y. REV. BOOKS, Vol. LIII, No. 8 (May 11, 2006), at 40.

⁶⁴ See Clyde Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L. J. 503 (1997) (detailing the unstable nature of most Americans' employment).

⁶⁵ See C. trav. Art. L 122-45 (2006).

discretion,⁶⁶ which function to protect the rights of employees to job security and liberty in the workplace. As a result, although the law prohibits discrimination in hiring as well as disciplining and termination, the focus is on the protection of incumbent employees, rather than potential employees.

A. The Labor Code's Discrimination Provision

The French law that is analogous to Title VII's prohibition of employment discrimination under threat of civil liability⁶⁷ came into being through a statute on "the liberties of workers in the enterprise," which generally protected employees from the discretion of their employers. The 1982 law provided that "No 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."⁶⁸ 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."⁶⁹ The provision was later modified to prohibit discrimination in recruitment and hiring as well. Codified at Labor Code L. 122-45, the version of this provision currently in force provides:

No person can be excluded from a recruitment procedure or from access to an internship or period of training in an enterprise, no employee can be disciplined, terminated, or made the object of a discriminatory measure, direct or indirect, notably in matters of pay, training, placement, assignment, qualification, classification, professional promotion, change, or contract renewal because of his or her origin, sex, morals, sexual orientation, age, family situation, genetic characteristics, membership or

⁶⁶ See C. trav. Art. L. 122-4 et seq.

⁶⁷ Note that French law also imposes criminal liability for intentional discrimination in employment. See *infra*, note 72.

⁶⁸ Loi no. 82-689 du 4 août 1982 relative aux libertés des travailleurs dans l'entreprise (1), Section VI, Sous-section II, J.O.R.F. du 6 août 1982, at 2519.

⁶⁹ *Id.* See also C. Trav. L. 122-40.

non-membership, real or supposed, in an ethnicity, nation, or race, his or her political opinions, union activities, religious convictions, physical appearance, family name, or, with the exception of an inability confirmed by the medical inspector of labor, because of his or her state of health or handicap.⁷⁰

Like Title VII and in contrast to the French criminal provision, the French Labor Code's antidiscrimination provision prohibits "indirect" (or disparate impact) discrimination⁷¹ as well as intentional or "direct" discrimination, and applies not only to hiring and firing, but to all the terms and conditions of employment, which are spelled out in the provision.

The French prohibition of discrimination in hiring and firing originated in a criminal provision,⁷² still in effect, that was

⁷⁰ C. trav. L. 122-45. ("Aucune personne ne peut être écartée d'une procédure de recrutement ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, notamment en matière de rémunération, au sens de l'article L. 140-2, de mesures d'intéressement ou de distribution d'actions, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat en raison de son origine, de son sexe, de ses moeurs, de son orientation sexuelle, de son âge, de sa situation de famille ou de sa grossesse, de ses caractéristiques génétiques, de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie, une nation ou une race, de ses opinions politiques, de ses activités syndicales ou mutualistes, de ses convictions religieuses, de son apparence physique, de son patronyme ou en raison de son état de santé ou de son handicap.")

⁷¹ "Indirect" discrimination, a concept imported into French law from European directives which were themselves influenced by British law, corresponds roughly to the American notion of "disparate impact" discrimination, developed in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (holding that facially neutral practices with a disproportionate impact on blacks violate Title VII if they cannot be justified by reference to business necessity).

⁷² C. Pén. Art. L. 225-2 makes discrimination punishable by three years' imprisonment or € 45,000 when it consists of "refusal to hire, disciplining, and termination." Article L. 225-1 defines discrimination as "any distinction operated between physical persons by reason of their origin, their sex, their family situation, their size, their physical appearance, their family name, their state of health, their handicap, their genetic characteristics, their morals, the sexual orientation, their age, their political opinions, their union activities, their membership or non-membership, real or supposed, in a particular ethnicity, nation, race, or religion." C. Pén. Art. 225-1 (Partie législative). (« Constitue

passed in 1972 as part of a comprehensive anti-racism statute.⁷³ The antiracism statute was enacted before the enactment of the civil prohibition of employment discrimination was added to the Labor Code. The rest of the provisions in the 1972 law against racism had little to do with employment. The law's focus was on intentional acts of racism, primarily hate speech, for which the law imposed criminal liability.⁷⁴

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

B. Employee Protection and Republican Citizenship

The reforms were premised on the principle that workers ought to be citizens and full participants in the enterprise.⁷⁵ The

une discrimination toute distinction opérée entre les personnes physiques 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. ») Article 225-1 repeats the exact same language as applied to « moral persons, » which include corporations.

⁷³ Loi No. 72-546 du 1er juillet 1972.

⁷⁴ The 1972 law modified the freedom of the press statute of 1881, which already prohibited attacks in the press against racial and religious groups. The 1972 statute strengthened this regulation of racist speech, by criminally prohibiting speech provoking racial hatred, as well as defamation and insults of a racial nature, when they were targeted at individuals belonging to these groups in addition to the groups themselves. Loi No. 72-546 du 1er juillet 1972, art. 1-4. That statute, the first law prohibiting discrimination, implemented France's obligations under the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

⁷⁵ Jean Auroux, *Les droits des travailleurs*, Rapport au Président de la République et au Premier ministre, Septembre 1981, Collections des rapports officiels, available at Ladocumentationfrancaise.fr.

reforms were seen as an extension of the constitutional guarantee of the right to work. The Preamble to the 1946 Constitution declares that “[e]ach person has the duty to work and the right to employment,”⁷⁶ and that “[a]ll men may defend their rights and interests through union action and may belong to the union of their choice.”⁷⁷ The Preamble also invokes the “right to strike,” to be exercised within limits set by law.⁷⁸ It guarantees to all workers the opportunity to participate in the collective determination of their conditions of work and in the management of the workplace.⁷⁹ The 1946 Preamble re-established the commitment to workers’ rights that had been established by the Third Republic in 1936. The Matignon Accords, adopted by Prime Minister Léon Blum’s government in that year, guaranteed French workers a 40-hour workweek and two weeks of paid vacation a year.⁸⁰ The 1946 Preamble has been incorporated into the constitution that is currently in force.

The purpose of the 1982 law was to protect workers’ rights to exercise their “public liberties” in the workplace.⁸¹ It was understood that the public rights of workers necessitated the regulation of employer discretion, particularly the disciplinary power of the employer. The statute had three main components: First, it required all employers with more than 20 employees to establish internal written rules of conduct for employees,⁸² making explicit the conduct that could be punished by the employer. Second, it protected the employees from being punished by the employer for certain reasons, limiting the employers’ discretion.⁸³

⁷⁶ Preamble to the 1946 Const.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See JEAN PELISSIER, ALAIN SUPLOT, & ANTOINE JEAMMAUD, *DROIT DU TRAVAIL* 17 (23d ed. 2006). These protections have only gotten better for French employees. As of 2000, French employees enjoy a 35-hour workweek and 5 weeks of paid vacation annually. See C. trav. Art. L. 212-1; 223-4.

⁸¹ Jean Auroux, *Les droits des travailleurs*, Rapport au Président de la République et au Premier ministre, Septembre 1981, La Documentation Française, at 7.

⁸² Loi no. 82-689 du 4 août 1982 relative aux libertés des travailleurs dans l’entreprise (1), art. 1, *Journal officiel de la République française (J.O.R.F.)* du 6 août 1982, at 2518.

⁸³ *Id.*, art. 1-6.

Third, it protected the right of employees to express their opinions with regard to the conditions of work in the enterprise.⁸⁴

All three components of the law were consistent with a conception of the worker as an equal citizen of the enterprise. One of the main provisions of the statute was to protect the freedom of expression of workers, guaranteeing the employee a right to “direct and collective expression” on matters having to do with the conditions of work,⁸⁵ by declaring that the expressed opinions of an employee, regardless of his or her place in the professional hierarchy, could not motivate a punishment or termination of the worker. Furthermore, Auroux’s report proposing the law argued that workers ought to be agents of change with regard to decisions that directly interested them.⁸⁶ Thus, the Auroux law’s prohibition of discrimination has to be read in light of this conception of the employee as a citizen of the enterprise, who had rights not to be treated arbitrarily as well as rights to participation in decisions that affected him or her.

The 1982 Auroux laws built on a Labor Code that already protected employee rights to job security. For over a hundred years, French law has limited arbitrary dismissals, so the protection against wrongful discharge is much older than the regulation of employment discrimination. Since 1890, French employers do not enjoy a unilateral right to terminate an employee for bad reasons. In fact, at around the same time that employment at will became the default rule in most U.S. jurisdictions at the end of the 19th century,⁸⁷ the legal protection of employees from arbitrary discharge began to emerge in France. Throughout the twentieth century, different laws and decrees protected employees from discharge based on one’s military service⁸⁸ or performance of other public duties,⁸⁹ terminations because one took maternity leave

⁸⁴ *Id.* art. 7-10

⁸⁵ See Auroux, *supra* note __, at 8-9. See also Loi no. 82-689 du 4 août 1982 relative aux libertés des travailleurs dans l’entreprise (1), art. 7, J.O.R.F. du 6 août 1982, at 2520. Article 7 added Title VI to Book IV of the Labor Code, which protected the employees’ right to expression in defining actions towards improving the conditions of work in the enterprise. *Id.*

⁸⁶ Auroux, *supra* note __, at 15.

⁸⁷ See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118, 125-26 (1976) (arguing that the American at will rule emerged and was solidified in treatises around the 1870s).

⁸⁸ Loi no. 49-1092 du 2 août 1949, JORF du 6 août 1949.

⁸⁹ Decret no. 55-156 du 2 février 1955, JORF du 3 février 1955.

from six weeks before delivery until eight weeks after,⁹⁰ and terminations based on participation in strikes. Civil courts also held discharges based on membership in labor unions⁹¹ or based on religious or political beliefs⁹² to be abusive.

Furthermore, a 1958 statute imposed on employers the obligation of notice,⁹³ and another statute in 1967 authorized severance pay in the case of termination.⁹⁴ In 1973, the legislature adopted a Labor Code provision that imposed on employers the obligation to justify any termination by a true and serious cause, whether it was individual or economic.⁹⁵ Before 1973, the employee bore the burden of proving that a termination was an abuse of right in order to be entitled to damages. After 1973, the employer bore the burden of proving that the termination was justified by a true and serious cause, in order to avoid paying damages.

Today's Labor Code imposes a variety of procedural and substantive duties on employers undertaking to terminate an employee. For starters, the Labor Code severely restricts the circumstances under which employers can enter into temporary employment contracts, known as contracts for a specified duration. Such contracts are prohibited for jobs related to the normal and permanent activity of an enterprise.⁹⁶ The law only allows fixed-term contracts for work that is temporary, such as replacing an absent employee, a temporary project of the enterprise, or seasonal work, to name a few examples.⁹⁷ All other contracts must be "contracts for an unspecified duration," and can be terminated at any time by either party, subject to (very extensive) regulations by the Code.⁹⁸

The Labor Code's regulations prohibit arbitrary dismissals, and impose employer costs on carrying out just-cause dismissals. If an employee is dismissed for any reason other than a "serious

⁹⁰ Loi no. 50-205 du 11 février 1950, JORF du 12 février 1950.

⁹¹ Judgment of Civil Court, Mar. 18, 1930, D. P. II 171 (Fr.)

⁹² Judgment of Civil Court of Lille, Feb. 19, 1906 [1909] D. P. II 121 (Fr.).

⁹³ Jean PELISSIER, ALAIN SUPLOT, & ANOTINE JEAMMAUD, *DROIT DU TRAVAIL* 20 (23d ed. 2006).

⁹⁴ *Id.*

⁹⁵ Loi no. 73-3 du 13 juillet 1973 ; *see generally* JEAN PELISSIER, ALAIN SUPLOT, & ANOTINE JEAMMAUD, *DROIT DU TRAVAIL* 22 (23d ed. 2006).

⁹⁶ C. trav. Art. L. 122-1.

⁹⁷ C. trav. Art. L. 121-1-1.

⁹⁸ C. trav. Art. L. 122-4.

fault,” the Labor Code entitles the employee to a period of notice of one month if he has been with the employer for at least 6 months, and two months if he has been with the employer for at least two years.⁹⁹ The notice is required even when the termination is justified by a “real and serious cause,” including economic difficulty. If the notice period is not observed, except in instances of serious fault, the employee is entitled to damages independent of the severance pay. The Labor Code also strictly regulates severance payments. Except in cases of serious fault, a terminated employee who has worked for the employer for at least two years is entitled to minimum severance payments calculated by regulations.¹⁰⁰

The Labor Code further requires an employer proposing termination to send a letter and summons to the employee.¹⁰¹ The letter must explain the reasons for the proposed termination. The employee is thus summonsed to an interview, during which the employer gives the reasons for the proposed decision.¹⁰² This process applies even when the employer proposes to terminate employees as part of a reduction-in-force of at least 10 employees in a period of thirty days for economic reasons.¹⁰³ If the dismissal falls within this category, the economic reasons have to be authorized by the competent administrative authority in order for the termination to be deemed justified.¹⁰⁴ If a termination is unjustified, the employee will be entitled to tort damages¹⁰⁵ and/or reintegration into the job from which he was wrongfully terminated.¹⁰⁶ Finally, even if the termination is justified, either by economic reasons or “true and serious cause,” the law still requires the employer to pay severance.

There are also rules governing the burdens in litigation challenging terminations. In the case of an economically motivated termination, the employer has the burden of communicating to the judge all the elements that he is also required to communicate to the representatives of personnel and to the administrative authority competent to approve an economically

⁹⁹ C. trav. Art. L. 122-6.

¹⁰⁰ C. trav. Art. L. 122-9.

¹⁰¹ C. trav. Art. L. 122-14.

¹⁰² C. trav. Art. L. 122-14.

¹⁰³ C. trav. Art. L. 122-14.

¹⁰⁴ C. trav. Art, L. 122-14.

¹⁰⁵ C. trav. Art. L. 122-13.

¹⁰⁶ C. trav. Art. L. 122-4-4.

motivated layoff.¹⁰⁷ If there is any doubt, the presumption lies in favor of the employee.¹⁰⁸

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

France's universalistic approach to the problem of employment discrimination is, in part, of product of a larger race-blind approach to equality. The French guarantee of employees' rights to dignity and non-arbitrary treatment stems from the French conception of republican citizenship. To envision the worker as a citizen of the enterprise is to extend the French ideal of political citizenship to the workplace.¹⁰⁹ In this respect, French employment law does what many American employment law scholars propose:¹¹⁰ it regards the workplace as a place where citizenship values are fostered.

Under the French constitution, the equality of citizens means that citizens cannot distinguished on the basis of any arbitrary characteristics, including race. The constitution explicitly

¹⁰⁷ C. trav. Art. L. 122-14-3.

¹⁰⁸ C. trav. Art. L. 122-14-3.

¹⁰⁹ Auroux, *supra* note __, at 6.

¹¹⁰ See, e.g., Cynthia Estlund, *Working Together: The Workplace Civil Society, and the Law*, 89 GEO. L.J. 1, 51-55 (2000); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886 (2000); Noah D. Zatz, *What Welfare Requires from Work*, 54 U.C.L.A. L. REV. 373, 424 (2006);

prohibits the recognition of any distinctions of race,¹¹¹ and a 1978 statute prohibits the gathering or storing of data that classifies persons on the basis of their origins.¹¹² The French principle of race-blindness is far more rigid than the American norm against racial classifications.¹¹³ As a result, all public policy solutions to the problem of racial inequality in France are race-neutral and universalistic. Race-based affirmative action is out of the question,¹¹⁴ as are any measures that target benefits to members of groups classified by their origin.

III. Race Riots and Minority Unemployment

A. Race Riots

¹¹¹ The Preamble to the 1946 constitution, which has been incorporated into the 1958 constitution that is currently in force, reads:

Following the victory won by free people over regimes that attempted to enslave and degrade the human person, the French people proclaim again that every human, without distinction of race, religion, or belief, possesses inalienable and sacred rights. It solemnly reaffirms the rights and liberties of man and citizen consecrated by the Declaration of Rights of Man of 1789 and the fundamental principles recognized by the laws of the Republic.

The passage, in the original reads :

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

CONST., Preamble (IVe République) (Fr.)

¹¹² Loi no. 78-18 du 6 janvier 1978 relative à l'informatique, aux fichiers, et aux libertés, Section 2, art. 8.

¹¹³ For comparisons of French and American race-blindness, see Erik Bleich, *Anti-racism Without Races: Politics and Policy in a "Color-Blind" State*, in RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 162 (Herrich Chapman & Laura L. Frader eds. 2004); Robert C. Lieberman, *A Tale of Two Countries: The Politics of Color-Blindness in France and the United States*, in *Race in France*, supra, at 189; Julie C. Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. (forthcoming 2007).

¹¹⁴ However, affirmative action programs based on socioeconomic disadvantage, measured by residence in designated geographical areas, have been introduced.

For several weeks in November 2005, many young people in the poorest urban areas throughout France participated in waves of violence. This has brought racial inequality to the forefront of French public debate. The riots were precipitated by the death of two young North African men who were accidentally electrocuted while hiding in a dangerous location for fear of being harassed by the police.¹¹⁵ It was a well-known fact that young North Africans were frequently subject to police harassment in the banlieues.¹¹⁶ After these deaths, many young people in the banlieues burned cars, burned schools, and had violent confrontations with the police.

The predominant understanding by French intellectuals, politicians, and the media, was that the wave of violence was not only a protest against this particular event or police harassment, but rather, an angry reaction to all that is wrong with life in the *banlieues*, the poor urban areas on the outskirts of French cities. The most cited fact was the high rates of unemployment in these areas.¹¹⁷ The unemployment rate is disproportionately higher for members of visible minority groups in France than for others.¹¹⁸ Although statistical data with regard to racial and ethnic minorities is rare in France, due the force of all the legal norms against making legal distinctions or collective race-based data, limited studies by sociologists provide some evidence of racial disparities in France.

B. Unemployment

Sociologists estimate the unemployment rate in the heavily North African banlieues at about 40 percent. First and second generation North African immigrants also typically confront failing schools, increased segregation, discrimination in hiring, everyday racism, police harassment, and increasing levels of

¹¹⁵ See *22 Held for Riots in France*, N.Y. TIMES, Oct. 31, 2005.

¹¹⁶ See Fabien Jobard, *Sociologie politique de la « racaille »*, in *EMEUTES URBAINES ET PROTESTATIONS : UNE SINGULARITE FRANÇAISE* 59, 73 (Huges Lagrange & Marco Oberti eds. 2006).

¹¹⁷ See, e.g., Laurent Muchielli & Véronique le Goaziou, *Inégalités, Humiliations collectives et violences urbaines*, in *L'ETAT DES INEGALITES EN FRANCE 2007*, at 199, 201 (ed. Louis Maurin & Patrick Savidan 2006).

¹¹⁸ See infra notes __

incarceration amongst young men in the banlieues.¹¹⁹ In reporting on the riots, the *New York Times* interviewed several immigrants in the banlieues who complained of discrimination in employment. One Kader, age 23, who said “On paper we’re all the same, but if your name is Mohamed, even with a good education, you can only find a job as a porter at the airport.”¹²⁰

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

Some statistical data collected through voluntary surveys is available from the Institut national de la statistique et d’études économiques (INSEE, or National Institute for Statistics and Economic Studies), which produces an annual study of immigrants in France. The most recent report concluded that, amongst persons between the ages of 25 and 59 years of North African, subsaharan African, or Turkish origin, the unemployment rate was 20%, approximately double the national unemployment rate.¹²¹ For immigrants from European countries, the unemployment rate was 6.1%, which was lower than the unemployment rate for non-immigrants, which was 7.2%.¹²² A 1999 survey studying the descendants of immigrants (ie second generation), the results did not vary significantly. The unemployment rate for second-generation Algerian men was 23.2 %, as compared with 10.1 percent for French men born of two French-born parents.¹²³

INSEE also studied unemployment rates for foreign residents of France between the ages of 30 and 39. It is not

¹¹⁹ Stéphane Beaud & Michel Pialoux, *La “racaille” et les “vrais jeunes”*: critique d’une vision binaire du monde des cités, in BANLIEUE, LENDEMAN DE REVOLTE 17, 18-20 (ed. Chakri Belaïd 2006)

¹²⁰ Craig S. Smith, *Angry Immigrants Embroil France in Wider Riots*, N.Y. TIMES, Nov. 5, 2005, at A1.

¹²¹ INSEE, *Enquête emploi, 2002*, table in LOUIS MAURIN & PATRICK SAVIDAN, L’ETAT DES INEGALITES EN FRANCE 2007, at 95 (2006).

¹²² Chloé Tavan, *Les immigrés en France: une situation qui evolue*, INSEE Première No. 1042, septembre 2005, at 3.

¹²³ INSEE, *Enquête étude de l’histoire familiale*, 1999.

surprising that the unemployment rate for all foreigners is, at 23.7%, more than double the national unemployment rate. But some foreigners do better than others. The study shows that the unemployment rates for Algerians, Morroccoans, Tunisians, other nationalities of Africa, and Turks are 37.3%, 35.4%, 35.8%, 36.8%, and 31.6% respectively. Compare this to the unemployment rates for Spanish, Italian, Portuguese foreign residents in France, which are at 15.1%, 13.8%, and 10.1%. Foreigners of Vietnamese, Latian, and Combodian descent in this age group had an unemployment rate of 23.7%.¹²⁴

Another public research body, the Centre d'études et de recherches sur les qualifications (CEREQ), produced a study in 2004 of young people who had finished their education and attempted to enter the workforce in 1998. The data was compiled based entirely on voluntary responses to questionnaires administered by phone or mail to a random sampling of about a third of the 1.2 milliion young people entering the workforce.¹²⁵ Based on this data, statisticians have concluded that a French citizen of North African origin with a high school diploma was 1.6 times more likely to be unemployed in the first three years after graduating than a French citizen with French parents and the equivalent educational qualification.¹²⁶

Historical data also support the conclusion that the employment gap between persons of North African descent and other French residents has gotten wider over the last several decades during which antidiscrimination law has been in effect. The unemployment rate for immigrants of North African origin has steadily increased over the last thirty years. In the period from 1975 to 1990, young North African men comprised between 9-15% of all unemployed persons in 1975.¹²⁷ In 1982, they constituted 19-38% of all unemployed persons, and in 1990, they constituted 34-45 % of all unemployed persons.¹²⁸ Indeed, the

¹²⁴ INSEE, Enquête emploi, 2002, table in Louis Maurin & Patrick Savidan, *L'état des inégalités en France 2007*, at 95 (2006).

¹²⁵ Cereq, *L'enquête Génération 98*, Présentation de l'enquête, Questionnaire, at <http://www.cereq.fr/cereq/G98ind/enquete.htm>

¹²⁶ Cereq, *Bref no. 205*, Les jeunes issues de l'immigration: de l'enseignement supérieur au marché du travail, février 2004.

¹²⁷ Roxane Silberman, *Les enfants d'immigrés sur le marché du travail*, in FR. HERAN (ED.), *IMMIGRATION, MARCHE DU TRAVAIL, INTEGRATION* 297, 301 (2004).

¹²⁸ *Id.*

North African population in France has also grown since 1975, but today, persons of North African descent constitute less than 10 % of the population. Thus, they are disproportionately represented amongst the unemployed population.

The difficulties faced by North Africans and blacks in finding employment were emphasized by French lawmakers in their response to the riots.¹²⁹ The widespread joblessness explains why these young people have the time to engage in criminal activity, and also why this population is protesting, to the degree that the violence is understood as protest. The wave of violence in November 2005 led the French government to adopt new laws on the “equality of opportunity”¹³⁰ in response.

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

Although few French people are willing to say so explicitly, the data support the conclusion that French job security protections for all workers have, over time, exacerbated racial inequality and amplified employers’ incentives to discriminate against North Africans and other foreigners. Over the last thirty years, French law has strengthened employee job security protection. Reforms have sometimes included measures to make the employment discrimination prohibition more effective, if prompted by an EU directive.¹³¹ Nonetheless, racial inequality in access to employment has worsened.

Between 1974 and 1986, the national unemployment rate grew from 3 percent to 11 percent.¹³² For the last twenty years, unemployment has hovered around 10 percent.¹³³ Of those who are unemployed, many suffer from long-term unemployment, defined as a bout of joblessness of one year. Between 1985 and

¹²⁹ Assemblée Nationale, Rapport No 2825, fait au nom de la commission des affaires culturelles, familiales et sociales sur le projet de loi no 2787 pour l’égalité des chances, par M. Laurent Hénart, Député, 25 janvier 2006, at 7.

¹³⁰ Loi no. 2006-396 du 31 mars 2006 pour l’égalité des chances, JORF du 2 avril 2006, at 4950

¹³¹ Loi no. 2001-1066 du 16 novembre 2001 relative à la lutte contre les discriminations, J.O.R.F., 17 novembre 2001.

¹³² Jonah D. Levy, *France: Directing Adjustment?* in FRITZ SCHARPF & VIVIEN SCHMIDT, EDS., *WELFARE AND WORK IN THE OPEN ECONOMY: DIVERSE RESPONSES TO COMMON CHALLENGES* (2000), vol. II, at 308.

¹³³ Smith at 9.

1995, more than twenty percent of the unemployed were jobless for more than two years.

During the “trente glorieuses,” the thirty “glory” years of economic growth in France from 1945-1975, the France enjoyed a full-employment economy. In the 1960s, for instance, the unemployment rate was under 2 percent,¹³⁴ and the entry of guest workers and immigrants was encouraged to keep up with the pace of economic growth.¹³⁵ Immigrants, since they entered France as guestworkers to fill the demand for labor, were employed during the 1960s

From 1974-1981, unemployment rose from 3 percent to 7 percent, and from 1981 to 1986, it grew to 11 percent.¹³⁶ Historians and economists have devoted a wealth of literature to exploring the causes of the growth of unemployment in France during this period.¹³⁷

A recent OECD study observes that employee protection legislation has played a significant role in keeping unemployment levels high in France.¹³⁸ Under the Labor Code’s regulations that ensure the employment contracts are not terminable at will, firing an employee, even an unproductive employee, is extremely costly for the employer.¹³⁹ With the exception of “serious fault,” even terminations for economic reasons or just cause, which are permissible under the Code, cost the employer procedural costs and severance payments. A 1995 study shows that employers lose

¹³⁴ *Id.* at 75-76.

¹³⁵ See PATRICK WEIL, *LA FRANCE ET SES IMMIGRÉS* (2005).

¹³⁶ Jonah D. Levy, *supra* note __, at

¹³⁷ See, e.g., E. Milinvaud, *The Rise of Unemployment in France*, 53 *ECONOMICA* S197 (1986) (focusing on depression of demand facing French firms since 1973); Gerard J. Van den Berg & Jan C. van Ours, *Unemployment Dynamics and Duration Dependence in France, the Netherlands, and the United Kingdom*, 104 *ECONOMIC JOURNAL* 432 (1994) (focusing on the dynamic between personal characteristics and stigma in long-term unemployment); TIMOTHY SMITH, *FRANCE IN CRISIS* (2003) (focusing on pension and minimum wage regulation as causes of unemployment); Olivier Blanchard & Justin Wolfers, *The Role of Shocks and Institutions in the Rise of European Unemployment: the Aggregate Evidence*, 110 *ECONOMIC JOURNAL* C1 (2000) (comparing explanations that focus on the role of economic shocks to explanations that focus on the role of adverse market institutions).

¹³⁸ Stéphanie Jamet, *Improving Labour Market Performance in France*, Organization for Economic Cooperation and Development (OECD) Economics Department Working Paper, July 24, 2006, at 12.

¹³⁹ See PHILIP H. GORDON & SOPHIE MEUNIER, *THE FRENCH CHALLENGE: ADAPTING TO GLOBALIZATION* 35 (2001).

74% of litigated wrongful termination cases in France (as compared with 48% in Canada, 51 % in Italy, and 38% in Great Britain).¹⁴⁰ One economic study estimates the marginal cost of terminating one worker at 14 months' wages of a median wage worker.¹⁴¹

As a result, employers rarely create new jobs in France, leaving very few positions open to young people attempting to enter the labor market. Throughout the 1990s, 50 percent of the unemployed were young people, between the ages of twenty-one to thirty.¹⁴² This problem was often discussed in debates about the CPE. French business leaders claimed that they would hire more people if it were not so costly to lay off an employee.¹⁴³ Without the severance pay obligations under the Labor Code, a business could take more risks, and hire more people than absolutely necessary without taking into account firing costs if the business does not meet its projected targets.¹⁴⁴

Even if the job security laws are not the primary or exclusive cause of the high levels of youth unemployment in France, any evaluation of the job security laws from the perspective of racial equality has to consider the high French unemployment rate, at around 10%, as given. In the context of such a high and constant (20 years and counting) unemployment rate, job security laws have had a disproportionate adverse impact on racial minorities. The increased costs of termination affect the ways in which employers exercise their discretion in hiring. An employer knowing how costly it will be to fire a full-time employee is less likely to hire candidates whom they consider risky hires. This leads to both "rational" and racially biased failures to hire racial minorities.

When unemployment is high, employers find it easier to find white males to substitute for minorities a slack labor market,

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

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

¹⁴² Smith, *supra* note __, at 10-12.

¹⁴³ See Rachel Tiplady, *Job Security Ignites Debate in France*, BUSINESS WEEK Mar. 21, 2006, available at <http://www.businessweek.com>

¹⁴⁴ *Id.*

since there will be an abundance of qualified whites available for the job.¹⁴⁵ The inability to fire someone without “just cause” will lead employers to be more selective in hiring, and selectivity will be higher when the ratio of candidates to available positions is high – which is inevitable when unemployment rates are high. Higher selectivity increases the opportunities for two types of employer decisions that undermine minorities’ access to employment.

1. Merit-Based Failures to Hire. Increased selectivity makes it far more difficult for persons with fewer qualifications (such as education, diplomas, experience) to be hired. When an employer in a society where residential segregation has resulted in a correlation between membership in a minority group and educational achievement, racial minorities will be disadvantaged by increased selectivity in hiring processes. As a result of patterns of residential segregation and their social consequences, young people of North African descent are disproportionately less qualified for employment than others. Persons of North African descent are concentrated in particular banlieus, as a result of French housing policies over the last thirty years. Many North Africans arrived in France in the 1960s as temporary workers, and were thus housed in publicly funded housing projects separately from French nationals in the public housing system.¹⁴⁶ Furthermore, housing discrimination in the private sector made it difficult for visible minorities to find housing outside of the public sector.¹⁴⁷ As a result, many North Africans have remained in public housing in the banlieues. As many industrial enterprises reduced their workforce by 40% between 1975-1990, the unemployment rates in the banlieues rose significantly.¹⁴⁸

¹⁴⁵ See John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709, 723 (1995). Donohue and Siegelman claim that slack labor markets make it cheaper for employers with discriminatory tastes to “indulge their preference” for white workers. While I agree with Donohue and Siegelman on this point, I argue further that slack labor markets not only create incentives for such indulgences in irrational discriminatory “tastes,” but also that slack labor markets create more opportunities for rational discrimination.

¹⁴⁶ See YAZID SABEG & LAURENCE MEHAIGNERIE, *LES OUBLIES DE L’EGALITE DES CHANCES* (2006).

¹⁴⁷ See YAZID SABEG & LAURENCE MEHAIGNERIE, *LES OUBLIES DE L’EGALITE DES CHANCES* 199 (2006).

¹⁴⁸ *Id.* at 197.

The residential segregation has led to educational segregation. In the “zones urbaines sensibles” (ZUS), or “urban sensitive zones,” which were designated based on socio-economic indicators in 1981, there are larger percentages of students who are left behind, and lower percentages of students succeeding in the national diploma relative to the French average.¹⁴⁹ National education statistics indicate a 10 point gap in sixth-grade standardized tests in average scores (on a 100-point scale) between students with two immigrant parents as contrasted to students with two French-born parents.¹⁵⁰ Only 46.9% of the children of immigrants finish the Baccalauréat (Bac), the high school diploma necessary to advance to university education, as contrasted with 63.7% of children with French nationality. One study indicates that 31 percent of youth from a recent immigrant background exits the education system without a diploma of any kind, as compared to 14 percent of French-born youths.¹⁵¹

Young people of North African origin in the *banlieues* have difficulty finding employment, due in significant part to their lack of educational success. A 2004 report indicates that, for persons under the age of 25 years, the national unemployment rate is 23 percent, but in the ZUS, the unemployment rate for persons in this age group is 38 percent.¹⁵² The youth unemployment rate in France is so high that competition for every available job is fierce. A young person’s employment prospects are directly correlated to his or her educational background. A 2003 INSEE study of persons 15-29 years of age (excluding those continuing their education) indicates that 59.9% of persons with a Bac or equivalent are employed in contracts of indeterminate duration, as compared with 42.7% of persons without any diploma.¹⁵³ 72.2%

¹⁴⁹ See Assemblée Nationale, Rapport fait au nom de la commission des affaires culturelles, familiales, et sociales sur le projet de loi pour l’égalité des chances, par M. Laurent Hénart, 25 janvier 2006, at 14-15.

¹⁵⁰ Education Nationale, panel 1995 et évaluations nationales à l’entrée en 6e.

¹⁵¹ INSEE, La promotion sociale des jeunes dans les quartiers en difficulté, Rapport, June 2003, at 10.

¹⁵² Claude Bébéar, Rapport au Premier Ministre, Minorités visibles: Relever le défi de l’accès à l’emploi et de l’intégration dans l’entreprise, Des entreprises aux couleurs de la France, at 14, (November 2004).

¹⁵³ INSEE, Enquête Emploi, actifs occupés de 15 à 29 ans interrogés pour la première fois en 2003 et présents lors des quatre trimestres suivants (sont exclus les personnes en cours d’études initiale, les stagiaires, et les apprentis), in Maurin & Sagadin, at 36.

of persons in this age group with a Bac plus 2 more years of education have such jobs.

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

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

This hypothesis is consistent with some available data with regard to hiring discrimination. Organizations like SOS-Racisme and Observatoire des discriminations have conducted various “testing” operations whereby a job candidate sends an identical CV, one bearing an Arab name and address in a banlieue and another bearing a traditional French name and address in a respectable Parisian neighborhood.¹⁵⁵ In many of these studies, the Arab name resume is rejected without an interview, whereas the

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

¹⁵⁵ Jean-François Amadiou, Enquête, available at <http://cergors.Univ-paris1.fr>.

French name resume is invited for an interview.¹⁵⁶ In one study, researchers sent two identical CVs to 258 employers, with the only difference between the two CVs being the name of the candidate. One CV bore a “traditional” French first and last name, whereas the other bore a North African first and last name. The first CV received 75 requests for an interview, whereas the second received 14.¹⁵⁷ This study demonstrates the persistence of racial bias amongst employers. The CVs listed the same address for both names.

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

I do not want to be a pessimist, but to have the qualification “bac plus five” and to be unemployed .

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

In other contexts, such as hiring for the police force, sociologists have studied the pervasiveness of racial stereotyping.

¹⁵⁶ Samuel Thomas, Rapport d’Analyse des affaires récentes de discriminations à l’embauche poursuivies par SOS-Racisme, Mar. 21, 2005, at 14 (detailing three such experiments).

¹⁵⁷ Jean-François Amadiou, Enquête, available at <http://cergors.Univ-paris1.fr>.

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

¹⁵⁹ Abdelhak Eltmali, *Regards de jeunes*, in MUSTAPHA BOURMMANI (ED.), LA DISCRIMINATION A L’EMPLOI: L’INSERTION PROFESSIONNELLE DES JEUNES ISSUS DE L’IMMIGRATION 47, 48-49 (2001).

For instance, candidates of North African origin report being asked what they would do if their brother were arrested.¹⁶⁰ In a supermarket, one Algerian employee has reported racial segregation – the placement of Algerians away from cash registers and in the stocking areas, where they are hidden from customers’ view.¹⁶¹

In an economy with such high rates of unemployment amongst the young, employers are overwhelmed with job applications for every available position. This increases the discretionary power of the employer in hiring; the employer must find ways of distinguishing desirable from undesirable applicants.¹⁶² These decisions cannot rest solely on qualifications, since there are more qualified applicants than there are positions. Thus, the opportunity to consider other characteristics that do not bear on one’s ability to perform the job is amplified. Even if the employer does not refuse to hire a candidate on the basis of their race, an employer can easily end up failing to hire minority candidates as a result of choosing candidates with whom they seem to “fit” better.

IV. The Rejected Solutions

A. The Law on the Equality of Opportunities

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

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

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

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

¹⁶² SMITH, *supra* note __, at 178.

The crisis that came upon certain quarters of our cities were a revelation. That which we knew, but at times did not want to see, appeared clearly. These quarters could seem like the low point of all the evils of French society: massive failures in the education system, at times the lack of natural authority which should be that of the parents, unemployment, instability, shocking discrimination

¹⁶³

. . .

The November riots were seen as a reaction to lack of educational opportunity and unemployment in the suburbs, in addition to discrimination. But the legislative response mostly attempted to improve education and employment opportunities in the suburbs without framing the lack of such opportunities as caused by racism or discrimination.¹⁶⁴ This legislative response is also representative of the French tendency to universalize the solution to problems of race discrimination.

In addition to providing incentives to employers to hire more young people from the disadvantaged zones, the Equality of Opportunities statute attempted to limit the hiring discretion of employers. Another provision required employers of a certain size to accept anonymous CVs at the initial stages of a hiring process. Article 24 of provides that, in enterprises of more than 50 employees, information requested of job candidates must be presented in a way that preserves the anonymity of the candidate.¹⁶⁵

¹⁶³ The French text reads :

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

Assemblée Nationale, Rapport No 2825, fait au nom de la commission des affaires culturelles, familiales et sociales sur le projet de loi no 2787 pour l'égalité des chances, par M. Laurent Hénart, Député, 25 janvier 2006, at 7.

¹⁶⁴ Loi no. 2006-396 du 31 mars 2006 pour l'égalité des chances, JORF du 2 avril 2006, at 4950

¹⁶⁵ *Id.*, art. 24.

At the same time, the statute increased the discretion of employers with regard to termination, in a provision that proved too unpopular to be sustained. Article 8 of the statute created a new form of employment contract, the “contrat première embauche,” (CPE) or first employment contract, which could be terminated at the will of either party without just cause in the first two years of employment.¹⁶⁶ After the first two years, the contract would become a contract for an unspecified period, governed by the Labor Code’s strong job security protections. Only employers with 20 or more employees could enter into these contracts, which were limited to employees under the age of 26 years and entering into their first job. An employer could terminate the CPE without incurring normal obligations under the Labor Code’s job security protections.

B. Student Strikes and Employment At Will

After the Equality of Opportunities law was adopted, over a million young people took to the streets to protest the CPE. The protesters consisted mainly of university students from middle-class backgrounds. According to one sociologist, there was little geographical overlap between the March protests against the CPE and the November 2005 protests.¹⁶⁷

The opponents of the CPE saw the provision as the beginning of the end, a symbolic first step towards the dismantling of the Labor Code’s protections of employee job security and the egalitarian republican values for which they stood. The CPE validated unstable employment, which many young people rejected. The very notion that an employee could work for two years and then be fired for no reason, without the normal severance pay was, for the movement’s leaders, “scandalous.”¹⁶⁸ They predicted that this would lead employers to replace those hired

¹⁶⁶ Loi no. 2006-396 du 31 mars 2006 pour l’égalité des chances (1), art. 8, JORF du 2 avril 2006, at __.

¹⁶⁷ Hugues Lagranges & Marco Oberti, *Le mouvement anti-CPE et l’unité des jeunes*, in *EMEUTES URBAINES ET PROTESTATIONS: UNE SINGULARITE FRANÇAISE* 131, 139 (2006).

¹⁶⁸ See *Que veulent les lycéens anti-CPE?* (Interview with Tristan Rouquier, president of the Independent and Democratic Federation of High School Students), *Le Monde*, March 17, 2006.

with new CPE employees every two years,¹⁶⁹ instead of retaining the CPE employee after two years as a permanent employee protected by the Labor Code. They rejected the premise that the CPE would create more jobs, and predicted that jobs that might otherwise be contracts of unspecified duration (with all the ordinary protections of the Labor Code) would become CPE jobs, simply increasing the percentage of French workers with precarious employment without creating more jobs.

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

Ultimately, the social movement against the CPE prevailed. After protests that turned violent, and strikes that disrupted schools, universities, post offices, banks, government offices, and transportation, Chirac eventually repealed the unpopular provision. The legislature went back to the drawing board, and in late April, adopted a new law on the “access of young people to active life in enterprises.”¹⁷⁰

C. The Anonymous CV and Incentives to Promote Minority Hiring

The most interesting consequence of these controversies is that, once the Government withdrew the CPE provision, employers became increasingly vocal against the anonymous CV provision of the Equal Opportunities law. In October 2006, the government announced recently, however, that the anonymous CV rule would not be enforced due to resistance from enterprises.¹⁷¹

¹⁶⁹ See CPE: Les arguments contre (Interview with Bruno Juilliard, President of the National Union of Students of France) *Le Monde*, March 2, 2006.

¹⁷⁰ Loi no. 2006-457 du 21 avril 2006 sur l'accès des jeunes à la vie active en entreprise, *JORF* du 22 avril 2006.

¹⁷¹ Michel Delbherghe, *Le CV anonyme ne sera pas obligatoire dans les entreprises*, *Le Monde*, 13 octobre 2006.

After the CPE provision was repealed, a new version of the law, adopted in April 2006, provided that employers would receive a subsidy from the state for entering into employment contracts to specific classes of disadvantaged persons: (1) young people between 16 and 25 whose level of education is inferior to that of a second-cycle diploma (equivalent to bachelor's degree in the United States); (2) young people of the same age group residing in urban sensitive zones; or (3) young people who are in a "contract of insertion in social life" with the state.¹⁷² The "contract of insertion in social life" refers to a state program for young people between 15 and 25 years of age who are having difficulties in social and professional integration. Participants in the program are provided with the assistance of a local state agency in finding a job, professional training, specific measures to address difficulties, and assistance in the job search.¹⁷³

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

V. The Political Economy of Employment Discrimination

A. French Lessons: Comparative Method

What are the lessons for the American law of equal employment opportunity? There are obviously significant differences in history, legal institutions, culture, racial and ethnic minorities between France and the United States. I have explored these in more detail elsewhere,¹⁷⁴ and concluded that these

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Julie Chi-hye Suk, *Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. (forthcoming 2007); Julie Chi-hye Suk, *The French Disadvantage in Employment Discrimination: The Limits of*

differences cast doubt on the applicability of mutual lessons.¹⁷⁵ Understanding what went wrong in France for racial inequality does not give us perfect, or even reliable information about what will go wrong in the United States. But a comparative perspective can unsettle our basic intuitions about the relationship of job security protections to racial equality. Doing so brings into sharper focus the new problems that can come into play as a result of reforming employment law. These problems may undermine the goals of employment discrimination law in *different* ways that at will employment does. Such possibilities must be understood by those interested in fixing the inadequacies of Title VII.

American lawyers and scholars tend to focus on the problems raised by the litigation of discrimination cases – including barriers to judgment for plaintiffs and employer incentives generated by the threat of litigation – rather than on the broader political economy of employment. Examining the relationship between job security protection and the disproportionately high levels of racial-minority unemployment in France enables the American observer to see the big picture, beyond these litigation-centered concerns, more clearly.¹⁷⁶ It may

Civil Procedure and the Consequences of Criminalization (manuscript on file with author).

¹⁷⁵ Traditional comparative method has looked to foreign law as a source of models that can be imported to solve presumably similar problems. *See, e.g.*, ALAN WATSON, *LEGAL TRANSPLANTS* 94-95 (1993) (arguing that transplanting is a fertile source of legal development); ZWEIGERT & KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (TONY WEIR TRANS. 3D ED. 1998) (same); James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 *Am. J. Comp. L.* 555, 560 (1995) (arguing that many legal problems are conceptually the same wherever they arise, thereby calling for transnational inquiry). Scholars have recently critiqued the notion that comparative law should search for transplantable models. *See, e.g.*, William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try A Rat?*, 143 *U. PA. L. REV.* 1890, 1896 (1995) (criticizing the “legal transplant” approach); Pierre Legrand, *On the Singularity of Law*, 47 *HARV. INT’L L.J.* 517, 523 (2006) (noting that law always works in a particular local context).

¹⁷⁶ In arguing that the French experience can be instructive for American employment law and equal opportunity, I do not suggest that the disasters that have befallen France as a result of its choices with regard to job security protection will also plague the United States if we, too, adopt such norms. Rather, it is my hope that observing the dynamics and tensions between job security protection and the failing struggle to achieve racial equality in France will sharpen the critical perspective and imagination that American lawyers

be easier for the American lawyer to notice the tension between employee job security protections and racial equality in a foreign context rather than in one's own country, largely because one is more removed from the political consequences of noticing such problems outside of one's own borders.¹⁷⁷

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

B. The Persistence of Hiring Discrimination

By treating the prohibition of discrimination in employment as an element of a larger package of employee job security protections,¹⁷⁸ French law has paid insufficient attention to the main site of employment discrimination: employers' exercise of wide discretion in hiring decisions. Granted, both the Penal and Labor Codes formally prohibit discrimination in recruitment and hiring.¹⁷⁹ But most of the Labor Code's extensive regulation of employer discretion, such as the imposition and regulatory enforcement of detailed termination procedures, govern the employment contract itself. Outside of the contract, the Labor Code limits employer discretion in hiring only by prohibiting

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

¹⁷⁷ As Robert Kagan has astutely noted, the relevant medical metaphor should not be transplant, but psychotherapy. Like psychotherapy, Kagan notes, "comparative analysis attempts to reveal roads not taken, unconsciously maintained patterns, and sources of resistance to change, thereby encouraging new courses of action that build on existing resources and potentials. ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 5-6 (2001).

¹⁷⁸ *See supra*, Part II.

¹⁷⁹ Section 225-2 of the Penal Code prohibits, inter alia, the refusal to hire a person on the basis of the prohibited characteristics in Section 225-1. *See* C. PÉN. L. 225-2 (2006). Section 122-45 of the Labor Code provides, inter alia, "that no person can be excluded from a recruitment process or from access to an internship or a period of training in an enterprise" on the basis of any of any of the prohibited characteristics, which include race, origin, sex, and many other categories. C. Trav. L. 122-45 (2006).

certain types of employment contracts (such as temporary contracts for the ordinary work of the enterprise) and through a general prohibition of discriminatory recruitment and hiring which is enforced through private civil lawsuits or, for the parallel criminal provision, through prosecution.

These formal prohibitions of discriminatory hiring have no deterrent effect in France. The reality is that employers clearly discriminate against candidates of North African descent, resulting in this population's disproportionately high levels of unemployment.¹⁸⁰ The persistence of discrimination in hiring, despite the formal legal prohibition of such conduct, is explained by barriers to the effective enforcement of this prohibition in French criminal and civil procedure. In short, convictions for discriminatory hiring under the Penal Code are rare due to the intent requirement and burden of proof for criminal liability, and employers are rarely found civilly liable for discriminatory hiring because the lack of discovery in French civil procedure makes it nearly impossible for plaintiffs to prove even the most basic facts that could give rise to an inference of discrimination.¹⁸¹ Most discrimination cases are brought in criminal proceedings, and convictions are very rare. Antidiscrimination law hardly deters even the most overt forms of discrimination.

By comparison with France, the civil litigation under Title VII has been very effective in deterring overt discrimination. In the first two years of Title VII enforcement, EEOC charges based on hiring discrimination allegations outnumbered termination charges by 50 percent.¹⁸² Any employer who failed to hire qualified blacks in the late 1960s or early 1970s would probably have faced a class-action lawsuit.¹⁸³ Overt forms of discrimination, such as a systematic refusal to hire blacks, were likely to produce plaintiff victories at the time, in light of the widespread understanding that the purpose of the statute was to combat these forms of discrimination in recruitment and hiring.¹⁸⁴ As Donohue and Siegelman observe: "A rational employer in

¹⁸⁰ See *supra*, Part IV.

¹⁸¹ See Julie Chi-hye Suk, *The French Disadvantage in Employment Discrimination: The Limits of Civil Procedure and the Consequences of Criminalization* (manuscript on file with author).

¹⁸² John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991).

¹⁸³ *Id.* at 1027-28.

¹⁸⁴ *Id.* at 1031-32.

1965 need not have waited until he was actually sued to change his employment practices. Thus, the mere threat of litigation would probably have induced an employer to change his behavior.”¹⁸⁵ The threat of litigation for *overtly* discriminating, either at the hiring or firing stage, has effectively driven out discriminatory behavior by employers in which the racially discriminatory motive is apparent.

But many American scholars note that most of the behaviors that cause inequality in the workplace today can be attributed to implicit bias rather than the overt manifestation of racial bias that Title VII litigation can effectively remedy and deter.¹⁸⁶ The current high ratio Title VII firing cases relative to hiring cases does not necessarily support the inference that firing discrimination is more common than hiring discrimination.¹⁸⁷ Rather, employers continue to engage in a variety of subtle practices that undermine racial minorities’ access to good jobs. As Linda Hamilton Krieger has shown, the cognitive processes that lead employers to discriminate are automatic; they use “stereotypes, scripts, and schemas” to interpret information

¹⁸⁵ *Id.* at 1032.

¹⁸⁶ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. (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, 95-111 (2003), Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1211 (1995); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136-37 (1997); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458-74 (2001).

¹⁸⁷ While it is clear that employers faced a real threat of liability for overtly discriminating against African Americans right after Title VII was passed, recent studies suggest that the threat of liability today is more limited. Michael Selmi, for instance, shows in an empirical study of class action employment discrimination litigation that these lawsuits do not substantially influence stock prices. These cases are usually settled, and these settlements do not significantly harm firm value. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1267-68 (2003).

relevant to social, judgments¹⁸⁸ including judgments about who is the ideal candidate for a given job. Title VII has effectively driven out obvious and overt discrimination,¹⁸⁹ but subtler forms of hiring discrimination that are difficult to prove in civil litigation persist in the United States.¹⁹⁰ Many scholars have criticized Title VII for its inability to deter or remedy the subtler forms of discrimination.

C. Firing Discretion and the Migration of Discriminatory Tendencies

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

¹⁸⁸ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1239 (1995).

¹⁸⁹ See Donohue & Siegelman, *supra* note ___, at ___.

¹⁹⁰ Nonetheless, Christine Jolls argues that antidiscrimination law has had the effect of decreasing implicit bias. Jolls argues that, to the extent that antidiscrimination law has increased the presence of minorities in the workplace, implicit bias has been decreased. She reaches this conclusion by citing to social science literature establishing that the presence of minorities decreases the level of implicit racial bias exhibited by others. See Christine Jolls, *Antidiscrimination Law's Effect on Implicit Bias*, in *Behavioral Analyses of Workplace Discrimination* (forthcoming).

discrimination to decisions over which employers retain discretion, namely hiring decisions.

In the United States, Title VII's success in driving out overt discrimination has not extinguished discriminatory tendencies. Rather, racial bias has morphed and migrated.¹⁹¹ Now, it is manifested in more subtle forms of employer conduct, both at the hiring stage and at the firing stage (and in between). To the extent that freedom of contract gives employers discretion over hiring, employers can exercise it in ways that manifest racial bias without the overtness often needed as a practical matter to establish a Title VII violation in a litigated case. And, to the extent that employment at will gives employers broad latitude to fire, employers can exercise that discretion in ways that manifest racial bias without generating the direct evidence often needed as a practical matter to establish a Title VII violation after the *Hicks* line of cases. To sum up: in neither country does employment law eradicate racial bias. Rather, the law functions to move racial bias to the employment decision over which employers legally exercise the greatest degree of discretion. In France, it's the hiring decision. In the United States, it's the firing decision.

Furthermore, subtle forms of hiring discrimination persist in the United States, even though hiring discrimination is not litigated as frequently as firing discrimination. Existing empirical data¹⁹² support the conclusion that implicit racial bias continues to affect employers' exercise of hiring discretion in the United States. A recent Chicago study establishing that, when identical resumes are sent to employers with African American and white sounding names, white names receive 50 percent more callbacks than African American ones.¹⁹³ Another study, by Devah Pager,

¹⁹¹ The morphing of discrimination that I describe is a variant of what Reva Siegel has called "preservation-through-transformation." Siegel argues that status-enforcing state action evolves as it is regulated by law and contested. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997). Similarly, employment discrimination evolves in response to the way law proscribes certain employment practices.

¹⁹² For a good discussion of the methodology and limits of some of these empirical studies, see John J. Donohue, *The Law and Economics of Antidiscrimination Law*, at 38-44, available at <http://ssrn.com/abstract=763486>,

¹⁹³ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, NBER Working Paper, at 12, available at <http://www.economics.harvard.edu/faculty/mullainathan/papers/emilygreg.pdf>.

demonstrates that hiring discrimination against blacks is so great that a black applicant without a criminal record has the same chance of success as a white applicant with a criminal record.¹⁹⁴ Many other audit-pair studies, in which the testers were trained to exhibit similar personal characteristics, also establish that whites are more likely than blacks with the same qualifications to be offered interviews or jobs.¹⁹⁵

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

The historical experience of internal job markets in the United States is instructive. In the United States, prior to the 1970s, many employees enjoyed job security, even in an at-will legal regime, because their employers observed the social norm of promising lifetime employment, in firms that were structured to enable employees to move up the ladder at the same firm throughout their careers. Women were not hired by large corporations with internal labor markets, largely because employers assumed that women would quit or disrupt their progress up the job ladder to have children.¹⁹⁶ Internal labor markets also excluded black employees.¹⁹⁷ Promises of job security were often obtained when unions negotiated for them with employers, and unions excluded or segregated on the basis of race. The forms of solidarity and trust associated with lifetime employment and job security protection may sharpen an employer's tendency to avoid hiring persons who, by stereotype and scheme, seem like outsiders.

¹⁹⁴ Devah Pager, *The Mark of A Criminal Record*, 108 *Am. J. Sociology* 937 (2003).

¹⁹⁵ W.A. Darity & P. L. Mason, *Evidence of Discrimination in Employment: Codes of Color, Codes of Gender*, 12 *J. ECON. PERSPECTIVES* 63 (1998).

¹⁹⁶ KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 161 (2004).

¹⁹⁷ *Id.* at 163.

Moreover, in the absence of the liberty to terminate at will, one can reasonably predict that employers will be reluctant to practice voluntary affirmative action in hiring to the same extent as they do the at-will world. Affirmative action is a form of risk-taking. It also plays an important role in integrating the American workplace,¹⁹⁸ which could easily be eroded by a for-cause regime. The French employers' resistance to the anonymous CV rule is telling. While the provision was passed as part of the statutory package that included the employment at-will provision, resistance to the anonymous CV provision grew after the student movements buried employment at will. Surely this is not a mere coincidence.

Although racial inequality in the United States is different in various respects from the situation in France, one similarity that should not be overlooked is the high level of residential segregation that has led to low levels of educational achievement amongst African Americans.¹⁹⁹ The rational employer will naturally be more risk-averse, knowing that it will be extremely difficult and costly to fire someone once hired. The difficulty of firing will strengthen the desire to avoid hiring persons with fewer educational credentials. To the extent that the black-white gap in education remains a reality in the United States, this dynamic can work to the disadvantage of blacks. Therefore, in the U.S. context, a for-cause regime can exacerbate a whole range of discriminatory tendencies in hiring.

VI. Rethinking Equal Employment Opportunity Law

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

A. The Management of Racial Bias

¹⁹⁸ See CYNTHIA ESTLUND, *WORKING TOGETHER*, *supra* note __, at 147.

¹⁹⁹ See DOUGLAS MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993). This sociological study documents the persistence of residential segregation in the United States, which has undermined African Americans' social mobility.

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

Any proposed reform of employment law or employment discrimination law undertaken to combat discrimination and achieve equal employment opportunity must take these dynamics into account. The French experience helps us imagine the possibility that a for-cause employment regime can create different and potentially worse problems of discrimination in employment than the ones that the at will regime has produced. For-cause employment will benefit plaintiffs in Title VII termination cases, but, over time, how might it affect minorities entering the job market? Might it exacerbate the racial minorities' disadvantage in access to employment? If so, to what extent? These are precisely the questions that need to be explored if employment law is to serve the goals of employment discrimination law.

If equal opportunity is the goal of employment discrimination law, the effect of employment law norms on the overall employment prospects of disadvantaged groups in the long-term requires far more attention than litigation has been able to generate. Thus, a broader regulatory approach to employment discrimination and equal employment opportunity is needed, to supplement the remedies achieved when enforcement occurs primarily through litigation.²⁰⁰ Applying this big-picture approach

²⁰⁰ I develop an argument in favor of a greater role for administrative agencies in achieving equal employment opportunity in Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 455.

requires consideration of the following question? What is worse for the long-term goal of eradicating racial disadvantage in employment, exclusion from entry into the labor market, or discriminatory termination?

A definitive and detailed answer to this question is beyond the scope of this article, but I offer some preliminary considerations. This question should not be answered in the abstract; it must take into account the realities of today's workplace and the political economy of employment. As Katherine V.W. Stone has documented in great depth, the American workplace has undergone a tremendous transformation throughout the twentieth century. Up until the 1970s, employment for most American workers was centered on a single, primary employer. Even though employment at will was the law, firms were generally set up with internal job ladders, and employees would advance in the ranks within the firm, with mutual expectations that the employee would stay with the employer for life.²⁰¹

But over the last thirty years, the structure of employment has changed significantly. Now, most American workers have a "boundaryless career" that does not depend on notions of advancement within a single hierarchical organization.²⁰² Employees don't expect to stay with the same firm for life, but they expect each new job to give them opportunities to improve their human capital. In this universe, discriminatory failures to hire racial minorities may diminish their employment opportunities more severely in the long-run than discriminatory or otherwise unjust terminations. Thus, equal employment opportunity requires a shift in focus from the discriminatory firing suits that dominate the Title VII docket towards legal and regulatory means of protecting and promoting racial equality at the hiring stage.

B. The Limits of Universalistic Solutions to Racial Inequality

²⁰¹ Katherine V.W. Stone, *The New Psychological Contract*, 48 U.C.L.A. L. REV. 519, 529-32 (2001). Stone argues that this model emerged largely from scientific theories of management that were prevalent in the era of industrialization.

²⁰² *Id.* at 554.

The French resistance to race-targeted, race-conscious ways of mitigating the disadvantage of racial minorities, such as race-conscious affirmative action, also provides important lessons. Specifically, it should raise skepticism about the many race-neutral approaches that have been proposed as alternatives to race-conscious affirmative action in the pursuit of equal opportunity. In France, the race-blindness arises from a republican commitment to social solidarity, which directly conflicts with any race-conscious distribution of benefits. The universalistic approach of French employment discrimination law reveals the belief that job security protections and protection against racial discrimination protect the same set of rights and interests, rather than interests that may conflict with each other. Yet, it is clear that job security protections conflict with racial minorities' equal access to employment.

In the United States, employers' use of affirmative action may get a lot of minorities hired, but even its most vocal advocates worry about affirmative action's potential to harm the social solidarity that is essential to a truly integrated workplace.²⁰³ Doing what is best for the eradication of racial disadvantage in access to employment may be at odds with doing what is best from the standpoint of universal social welfare goals, such as employee job security and social solidarity. American lawyers and scholars contemplating reforms to protect employee job security or to combat racial inequality in employment should anticipate conflicts between these two goals, rather than assuming that they are always compatible. The French example shows how job security protections can freeze racial minorities out of labor markets, particularly when historical and social circumstances have contributed to their being undereducated and regarded as foreign. Job security protections under such conditions directly conflict with measures like the CPE that could improve racial minorities' employment prospects. Furthermore, the CPE itself was a universalistic solution to the particular problem of racial disadvantage: The introduction of at-will employment applicable to all young people was proposed because there is no alternative of targeting benefits towards disadvantaged racial groups.

Job security protections and the pursuit of equal employment opportunity can impose mutual costs on each other.

²⁰³ See, e.g., Cynthia Estlund, *Working Together*, *supra* note ___, at 89-90.

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

Conclusion

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

Unequal employment opportunity, in both the United States and France, will continue to pose challenges for a long time. But the difficulty of finding a solution is no argument for avoiding an honest account of the problem.