

## **17. Diversity, Equality and Integration: A Workplace Perspective from the U.S.**

*Susan Bisom-Rapp* \*

### **1. Introduction**

The quest for equality, in the West a project dating back over two centuries, is, as Professor Blanpain has noted, a fundamental aspiration.<sup>497</sup> Yet the tools for its achievement, and even the definition of what is to be achieved, remain hotly contested in many countries. Clearly, the transformation of a given society requires measures on many fronts, including guarantees of fair access to employment, housing, public services, health care, and education. This paper, however, will focus primarily on the workplace, a key site of political agitation, experimentation, and, on occasion, remedial innovation in my home country, the United States.

That the U.S. is a pioneer in equal employment opportunity (EEO) law is not surprising given the heterogeneity of the American population. Indeed, the demographic diversity of the United States is a both a defining feature of the country's population and a central aspect of its national character. With the exception of the Native American, Alaskan and Hawaiian populations, which comprise less than one percent

\* Please direct comments about this paper to Prof. Bisom-Rapp at: [susanb@tjsl.edu](mailto:susanb@tjsl.edu).  
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of the populous, Americans generally trace their ancestry to somewhere else. This has resulted in a country of over 300 million people that is varied in terms of race, ethnicity, and religious affiliation.

For example, the U.S. Census Bureau's 2006 American Community Survey estimates that 66.2 percent of the resident population is non-Hispanic white, a category encompassing European Americans, Middle Eastern Americans, and Central Asian Americans. Persons of Hispanic ethnicity, defined as individuals with roots in a Latin American country or Spain, are 14.8 percent of the population. Black Americans, no longer the most numerous minority, represent 12.4 percent of the American people. Asian Americans, a classification that includes the Indian subcontinent, are 4.4 percent of the country.<sup>498</sup>

Diversity is not evenly spread across this large country. Some states are much more diverse than others. In California, a jurisdiction with almost 36.5 million people, non-Hispanic whites comprise only 43.8 percent of the resident population. Individuals claiming Hispanic origin are 35.2 percent, and Asian Americans make up 12.2 percent of the population of the state.<sup>499</sup> Recent estimates predict that by 2042, a majority of Californians will identify themselves as Hispanic.<sup>500</sup>

Over forty years ago, America's demographic diversity, a continuing legacy of inequality after the abolition of slavery in the mid-19<sup>th</sup> century, and the development of a vibrant civil rights movement led to the passage of path-breaking employment discrimination legislation. America's role as a pioneer in equal employment opportunity law, however, does not imply the discovery a legislative cure for employment bias. Instead, more than four decades of experience with EEO legislation positions the U.S. as an interesting and possibly instructive laboratory or object lesson for other countries.

<sup>498</sup> U.S. Census Bureau, 2006 American Community Survey, Selected Characteristics of the Total and Native Populations in the United States (2006).

<sup>499</sup> U.S. Census Bureau, State & County QuickFacts, California, available at: <http://quickfacts.census.gov/> (last visited 12 Aug. 2007).

<sup>500</sup> MAY, M., California: Hispanics expected to be state's majority by 2042, San Francisco Chronicle, 10 July 2007, at C1.

While the U.S. has made much progress on workplace equality, the eradication of employment discrimination remains elusive. One no longer sees jobs formally segregated by race or separate employment advertisements for women's and men's positions. Mandatory retirement based on age has, in most sectors, been abolished. Likewise, many high status professions like law and medicine are integrated. But disturbing, seemingly intractable wage gaps remain between men and women,<sup>501</sup> and whites and other racial groups. Older workers, who generally make more money than younger workers, find their jobs in jeopardy as employers aim to streamline operations and save on costs. And a great deal of *de facto* occupational segregation continues to exist.

Moreover, empirical studies find that opportunity, in a general sense, often turns on protected characteristics. For example, a recent study by Princeton University sociologists Devah Pager and Bruce Western found that Black job applicants for low wage jobs are "only two-thirds as successful [at obtaining employment] as equally qualified Latinos, and little more than half as successful as equally qualified whites."<sup>502</sup> Shockingly, the study revealed that Black male applicants without a prison record were about as successful at obtaining employment as white men with criminal records.<sup>503</sup>

Somewhat less surprising but of no less of concern is recent research demonstrating that parenthood results in a host of employment-related penalties for working women – affecting employer perceptions of competence, commitment and appropriate salary – that do not apply

<sup>501</sup> Professor Laura Padilla, focusing on the professions, notes that women's pay lags behind men's pay virtually across-the-board: "[F]emale lawyers' median weekly earnings are approximately \$300 less than male lawyers' earnings, female doctors' median weekly earnings are approximately \$500 less than male doctors' earnings, female professors' median weekly earnings are approximately \$170 less than male professors' earnings..." PADILLA, L.M., *Gendered Shades of Property: A Status Check on Gender, Race & Property*, 5 J. Gender, Race & Just. 361, 396 (2002).

<sup>502</sup> PAGER, D. & WESTERN, B., *Race at Work: Realities of Race and Criminal Record in the NYC Job Market* (2005), at 12.

<sup>503</sup> *Id.*

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to men. In fact, parenthood sometimes enhances employers' perceptions of male workers.<sup>504</sup>

With these facts about the American scene in mind, this paper sets forth two important teachings. First, although legal prohibition of discrimination is essential, bias is a complicated phenomenon not always easily addressed by litigation, which is essentially a reactive strategy. Therefore, proactive efforts must be undertaken to make law-on-the-books a reality on the ground. Second, as will be described below, some common non-litigation-oriented programs do not advance equality or integration, and may even result in hindering progress. Thus, careful monitoring of the effects of these efforts is necessary.

The next section, section II, gives a brief overview of the major equal employment opportunity laws in the United States. This recitation is provided as background only. What is far more interesting than the actual text of U.S. laws is how American society has reacted to those laws over time. That latter subject will be addressed in section III, which discusses why formal law is a blunt instrument for addressing the problem of workplace bias. Section IV examines recent research on the efficacy of traditional government enforcement mechanisms, and also describes the non-litigation oriented tools that advance equality and integration and those that do not. The paper concludes with section V, which recounts the present American ambivalence about continuing the project of employment integration, and notes that to vanquish discrimination, data collection – keeping track of the numbers – is essential.

### 2. The legal landscape

In the U.S., the modern statutory revolution in employment discrimination law began in 1963, with the passage of the Equal Pay Act (EPA), requiring equal compensation for men and women who are engaged in substantially equal work.<sup>505</sup> While the creation of the law was a

<sup>504</sup> CORELL, SH.G., BERNARD, S. & PAIK, I., Getting a Job: Is There a Motherhood Penalty?, 112 Am. J. Soc. 1297 (2007).

<sup>505</sup> 29 U.S.C. §206(d).

watershed event, the utility of this statute has been exceedingly modest. As applied to a workforce that continues to reflect *de facto* occupational segregation, especially on the basis of gender, the law's requirement of substantial equivalence places the vast majority of lower compensated female dominated occupations beyond remedial reach.<sup>506</sup> Parsimonious judicial interpretations of the EPA and the failure of courts to embrace the theory of comparable worth, have rendered the law a relatively impotent tool for addressing wage differentials between men and women.<sup>507</sup>

Much more important and longer lasting impact is associated with Title VII of the Civil Rights Act (Title VII), which the U.S. Congress passed in 1964.<sup>508</sup> This statute, which bars employment discrimination on the basis of race, color, religion, national origin, and sex, embodied American society's demand for social justice, and, in an employment regime based largely on at-will employment and unfettered employer discretion, represented a significant encroachment on employer prerogatives. Title VII also became at least a partial blueprint for two other important antidiscrimination laws, the Age Discrimination in Employment Act (ADEA),<sup>509</sup> which protects employees who are 40 and older, and the Americans with Disabilities Act (ADA),<sup>510</sup> passed in 1967 and 1990 respectively.<sup>511</sup>

Two major legal theories developed for litigating cases under Title VII. The first, *disparate treatment*, addresses cases of intentional discrimination, said to occur when an employer "treats some people less favorably than others because of their race, color, religion, sex, or na-

<sup>506</sup> RHODE, D.L. & WILLIAMS, J.C., Legal Perspectives on Employment Discrimination, in *Sex Discrimination in the Workplace* 235, 241-42 (2007).

<sup>507</sup> *Id.* at 242.

<sup>508</sup> 42 U.S.C. §2000e et seq.

<sup>509</sup> 29 U.S.C. §621 et seq.

<sup>510</sup> 42 U.S.C. §12101 et seq.

<sup>511</sup> Two other American antidiscrimination laws are worth mentioning in passing. First, a little used provision of the Immigration Reform and Control Act of 1986 (IRCA) prohibits citizenship discrimination against an individual authorized to work in the United States. 8 U.S.C. §1324b. Second, Section 1981 of the Civil War Reconstruction statutes, 42 U.S.C. §1981, guarantees equality for all races in the making of contracts and is sometimes used to address race discrimination in the employment context.

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tional origin."<sup>512</sup> The U.S. Supreme Court has noted that proof of a discriminatory motive is required, though whether the term "motive" signifies a truly conscious state of mind remains, among American courts, unclear.

Some courts may require identification of a perpetrator driven to act against a protected individual specifically because of that person's membership in the protected category. Others, however, employ the term "motive" more expansively, noting that unconscious stereotypical notions about a plaintiff, based on his or her membership in a protected class, may satisfy the intent requirement when they cause an employer to treat that person less favorably than similarly situated individuals who do not share the plaintiff's protected status. Under either interpretation of motive, the identification of a similarly situated comparator, one who is outside the plaintiff's group and who is treated better, is often an indispensable requirement.

*Disparate impact*, the second major theory of liability under Title VII, requires the identification of an employment practice that is neutral on its face, for example height and weight requirements, but disproportionately harms a protected group. Policies or practices which are "fair in form but discriminatory in operation"<sup>513</sup> are illegal, even when adopted without discriminatory intent, unless they can be justified as a matter of business necessity. Over time, difficulty in marshalling sufficient statistical evidence and the necessity of identifying the specific cause of any perceived impact have greatly reduced the numbers of disparate impact suits filed.<sup>514</sup>

Title VII liability may also be premised on the fact that an employer retaliated against an employee for asserting his or her rights under the statute, an employer harassed an employee because of that employ-

<sup>512</sup> *Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977).

<sup>513</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>514</sup> One recent study concluded that plaintiffs' success rates in these cases are quite low. SELMI, M., *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. Rev.* 701 (2006). Professor Melissa Hart argues that disparate impact theory can still play an important role in internal corporate compliance efforts because it directs employers' attention to the way so-called neutral policies and practices can disadvantage protected groups. HART, M., *Disparate Impact Discrimination: The Limits of Litigation, The Possibilities for Internal Compliance*, 33 *J. Coll. & Univ. L.* 547 (2007).

ee's protected status, or an employer made working conditions so intolerable for an employee because of his or her protected status that the employee was forced to abandon the job. This latter theory is known as *constructive discharge*.<sup>515</sup>

A final statute rounds out U.S. equal employment opportunity law although it is neither trailblazing nor cause for pride.<sup>516</sup> The Family and Medical Leave Act (FMLA)<sup>517</sup> provides up to 12 weeks of uncompensated leave for, among other reasons, the birth or adoption of a child. The law covers only those employers who employ 50 or more employees, and the leave is only available to employees who have worked for at least 12 months and at least 1,250 hours in the year before the requested leave. Thus, new employees, part-time employees, and those

<sup>515</sup> In addition to the federal laws described in this paper, the American states have passed their own antidiscrimination legislation. In many cases, state legislation provides protection on a greater number of grounds than federal law. For example, while federal law does not prohibit sexual orientation discrimination in private employment, the District of Columbia and 19 states presently do provide protection on this basis. That number will rise to 20 states when Oregon's new law comes into effect in January 2008. In some of the states that prohibit sexual orientation discrimination, gender identity discrimination is banned as well. There has been for some time a movement to amend Title VII to add as protected categories sexual orientation and gender identity. A proposed amendment, known as the Employment Non-Discrimination Act (ENDA), which was introduced in the U.S. House of Representatives in April 2007, was recently abandoned in favor of two new bills. Democratic Party supporters feared the initial bill would fail to pass due to its inclusion of gender identity as a protected characteristic. Thus, new H.R. 3685, introduced on 26 September 2007, omits mention of gender identity offering protection only against sexual orientation discrimination. A companion bill, H.R. 3686, introduced the same day, prohibits gender identity discrimination in employment. By separating the two grounds, supporters of the bills hope to increase the odds that sexual orientation discrimination will be added to the list of characteristics employers may not use in making employment decisions. Supporters of the gender identity bill hope to engage in efforts to educate lawmakers about the issue, which is less well understood than that of sexual orientation discrimination. Frank Removes Gender Identity from ENDA, Daily Labor Report, 1 Oct. 2007, at A-7.

<sup>516</sup> U.S. Constitutional law is an additional source of equality protection for employees employed by state or local governments. The Fourteenth Amendment to the U.S. Constitution prohibits states from denying equal protection of the laws, and can be used in race and gender discrimination cases. Unlike many constitutions, however, the U.S. Constitution does not contain an equal rights provision expressly guaranteeing women equality with men under law.

<sup>517</sup> 29 U.S.C. §2601 et seq.

who work for small employers are without protection of this very limited law. Even where it does apply, the FMLA only helps employees who can forgo income in order to attend to family needs.

### 3. Why formal law is a blunt tool for eradicating employment discrimination

At this point, it should be clear that while the U.S. is a pioneer in the promulgation of employment discrimination law, in the sense of being among the first nations to create a robust EEO regime, formal law alone will not banish bias from the workplace. There are a number of reasons for this, and American social scientists have excelled at conducting studies that help lawyers and policymakers understand the limits of the legislative enterprise and employment discrimination litigation.

In the first place, social psychologists have demonstrated that discrimination is a complex, context driven phenomenon. Rather than conceptualize individuals as stable, consistent and predictable in their actions, social psychologists note that peoples' behavior is affected by their surroundings. Thus, individuals will bring their own conclusions and conduct in line with those of a trusted authority figure or the beliefs and values of their work group.<sup>518</sup> If the values of a supervisor or workplace peers are biased, an individual in the group will often reflexively reach conclusions in harmony with them.

Additionally, as psychologists Peter Glick and Susan Fiske note, automatic, unconscious processes are often responsible for discriminatory actions. Even those who consider themselves fair and unbiased are susceptible to cultural stereotypes that influence the way members of protected groups are evaluated. For example, the belief that men are competitive, career-oriented, ambitious and aggressive while women are cooperative, nurturing and family-oriented can act as a subconscious lens through which male and female employees are perceived. Those who fall sway to these stereotypes may not realize that their

<sup>518</sup> GLICK, P. & FISKE, S.T., Sex Discrimination: The Psychological Approach, in Sex Discrimination in the Workplace 155, 156-58 (2007).



thinking has been affected.<sup>519</sup> Given this, it is easy to see how bias may be operative in a workplace even though the members of that workplace would deny that it is occurring.

Professor Linda Krieger has been the most articulate legal commentator to draw from the social psychological literature. Highlighting the weakness in existing law, she explains how legal conceptions of individual autonomy and consciousness are at odds with how human cognition actually works.<sup>520</sup> Krieger sees as problematic a key requirement in disparate treatment suits: that plaintiffs prove an employer's motive or intent to discriminate.<sup>521</sup> What sort of evidence might one gather to make this showing when individual decision-makers rarely overtly express and may not consciously experience biased thoughts? One might, as noted above, draw attention to how a comparator outside the plaintiff's group is treated. Perfect comparators, however, can be hard to find because there is usually some difference between individuals that can make them seem dissimilar. Moreover, discerning discrimination in an individual case is very difficult because there may be reasons in addition to bias for a particular decision.

The work of sociologists helps explain a second reason that formal law is an imperfect instrument for eradicating discrimination; discrimination can be subtly yet powerfully embedded in corporate culture and organizational structures. Sociological research demonstrates that firm culture tends to become "indelibly imprinted" on organizational policies and practices.<sup>522</sup> These policies and practices, once entrenched, come to be taken for granted as neutral and inevitable – simply a matter of how business is done in a particular organization.<sup>523</sup> Thus, dis-

<sup>519</sup> *Id.*

<sup>520</sup> KRIEGER, L. H., *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161 (1995).

<sup>521</sup> KRIEGER, L. H., *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 *J. Social Issues* 835 (2004).

<sup>522</sup> BARON, J. N., *Organizational Evidence of Ascription in Labor Markets*, in *New Approaches to Economic and Social Analysis of Discrimination* 113, 125 (R. Comwell & P. Wunnava, eds. 1991).

<sup>523</sup> *Id.* at 125-26; BIELBY, W. T., *The Structure and Process of Sex Segregation*, in *New Approaches to Economic and Social Analysis of Discrimination* 95, 105-06 (R. Comwell & P. Wunnava, eds. 1991).

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criminary conditions like *de facto* job segregation, bolstered through seemingly neutral practices, are quite resistant to change without extensive management intervention.<sup>524</sup>

Sociologists have identified particular organizational structures that allow stereotyping to flourish. These so-called subjective policies and practices – for example, failure to broadly advertise promotional and training opportunities throughout the organization, lack of guidance on how to set salary rates, providing broad discretion to managers to make employment decisions without any oversight – may appear benign but in actuality can distinctly disadvantage women and minority groups.<sup>525</sup> When managers know they will not be held accountable for or required to justify or explain the basis for their employment decisions, cultural stereotypes often come to the fore. Unfortunately, discrimination that arises in such circumstances, as Professor Susan Sturm has noted, is not only complex and subtle, it is usually impossible to trace to a single bad actor and therefore ill-suited to individual legal claims.<sup>526</sup>

Rather, claims challenging an employer's subjective decision-making processes require evaluating the company's data on pay, promotion and opportunity in total so that the barriers facing non-dominant groups become apparent.<sup>527</sup> In the U.S., while the class action law suit is available for mounting such challenges, some judges recoil at the idea of holding an employer liable for the decisions of its supervisors in the aggregate. Their anxiety about such suits manifests itself in the judges' denial of class certification.<sup>528</sup> Even where class actions are

<sup>524</sup> BARON at 126-27; BIELBY, W. T., Modern Prejudice and Institutional Barriers to Equal Employment Opportunity for Minorities, 43 J. Soc. Issues 79, 81 (1987); RESKIN, B., Sex Discrimination in the Workplace, 19 Ann. Rev. Soc. 241, 255 (1993).

<sup>525</sup> BIELBY, W. T., Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation, 7 Emp. Rts. & Emp. Pol'y J. 377 (2003).

<sup>526</sup> STURM, S., Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458 (2001).

<sup>527</sup> Id. at 471.

<sup>528</sup> HART, M., The Possibility of Avoiding Discrimination: Considering Compliance and Liability, 39 Conn. L. Rev. 1623, 1634 (2007).

certified, these cases require significant resources and can drag on for years, convincing some commentators that litigation is not the optimal way to address large scale bias in corporate culture, policies and procedures.

Research by social scientists underscores a third weakness of formal law as a cure for discrimination. The rise and spread of a wide range of human resource policies and programs after Title VII's passage – efforts purportedly aimed at eliminating bias and promoting merit-based decisions – has made it increasingly difficult to discern discrimination in a given workplace. Socio-legal scholars, assessing the effects on American society of the advent of EEO law, have extensively documented the adoption and dispersal of personnel practices including internal complaint procedures and disciplinary hearings,<sup>529</sup> in-house EEO offices and antidiscrimination rules,<sup>530</sup> sexual harassment grievance procedures,<sup>531</sup> formal performance evaluation and salary classification,<sup>532</sup> and diversity training programs.<sup>533</sup>

Commentators, including this author, warn that while such practices may on the surface seem to promote bias-free workplaces, they may also mask continuing conditions of inequality. To take formal performance evaluation, for example, in the U.S. supervisory training on how to conduct a performance review often emphasizes that reviews are important documentary evidence in employment litigation. Rather than instruct supervisors on how to ensure bias free evaluation, the training frequently focuses on the way to produce favorable evidence

<sup>529</sup> EDELMAN, L. B., *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 *Am. J. Soc.* 1401 (1990) (hereinafter *Legal Environments*); SUTTON, J. R., et al., *The Legalization of the Workplace*, 99 *Am. J. Soc.* 944 (1994).

<sup>530</sup> EDELMAN, L. B., *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 *Am. J. Soc.* 1531 (1992) (hereinafter *Legal Ambiguity*).

<sup>531</sup> EDELMAN, L. B. et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 *Am. J. Soc.* 406 (1999).

<sup>532</sup> DOBBIN, F. et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 *Am. J. Soc.* 396 (1993) (hereinafter *Internal Labor Markets*).

<sup>533</sup> EDELMAN, L. B. & PETERSON, S. M., *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 *Res. in Soc. Stratification and Mobility* 107 (1999).

for the employer, the importance of using the correct tone in providing a review, and the necessity of careful timing in taking adverse actions to minimize the chance of suit.<sup>534</sup>

It is certainly true that a carefully crafted performance review can be a key piece of evidence in a disparate treatment suit. Knowing how to write an unassailable performance review, however, is not the same as producing a review that is free from bias. Yet courts, agency personnel, and even plaintiffs' lawyers usually take performance reviews at face value. Indeed, many plaintiffs' lawyers will refuse to accept a case where the potential client has a poor performance record.<sup>535</sup>

Employer innovation on equal employment opportunity is, of course, a welcome development. In fact, because formal law, as rendered operative through litigation, has proven a somewhat limited tool in addressing discrimination, non-litigation oriented efforts to advance diversity are essential. If we refuse to assess the effects of these programs, however, we will promote a form of compliance with EEO law that is cosmetic rather than substantive. Fortunately, America's social scientists are just beginning to produce evidence of the diversity strategies that work and those that do not. This topic is the focus of the next section, section IV.

#### 4. Tools for advancing equality, diversity and integration: what works and what does not

As noted above, data collection is essential both to measure the pace of integration in the American workplace and to gauge the efficacy of various tools used to combat discrimination and promote diversity. Data collection can also assist the government in discerning discriminatory patterns in the employment decision-making of a particular employer and be of service to plaintiffs and defendants litigating dis-

<sup>534</sup> BISO-M-RAPP, S., *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 Fla. St. U. L. Rev. 959 (1999).

<sup>535</sup> BISO-M-RAPP, S., *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 Employee Rts. & Emp. Pol'y J. 1, 34-46 (1999).

crimination claims. In the United States, one very important source of data is the EEO-1 report, which private employers are required to file on or before 30 September every year.<sup>536</sup>

Since 1966, the U.S. Equal Employment Opportunity Commission (EEOC), the government agency responsible for enforcing federal antidiscrimination law, has annually collected data from private employers on the racial, ethnic and gender composition of various occupational categories.<sup>537</sup> This data, which is filed by employers using the EEO-1 report, is used by both the EEOC and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) for civil rights enforcement and compliance evaluation.

By law, information on the demographic composition of the workforce of a particular employer is confidential and may not be released to the public.<sup>538</sup> Moreover, although this data set represents a treasure trove for researchers, allowing them to examine, for example, the extent to which firms have desegregated over time, until 2000, the data were rarely examined by social scientists.<sup>539</sup> Recently, however, a number of studies that rely on EEO-1 data have been published, and there is hope that more will be forthcoming in the future.

The strength of EEO-1 data is that it is both firm-level, in other words by employer and worksite, and longitudinal, meaning that the surveys cover the same firm over time. Weaknesses include the fact that the reports are not checked by the EEOC for accuracy, workforce composition is surveyed for occupational categories rather than the jobs

<sup>536</sup> The reports are not required of all private employers. Rather, reports must be filed by employers of 50 or more employees who have federal government contracts of \$50,000 or more, and also by employers who do not have a federal government contract but employ 100 or more employees.

<sup>537</sup> TOMASKOVIC-DEVEY, D. et al., *Documenting Desegregation: Segregation in American Workplaces by Race, Ethnicity, and Sex, 1966-2003*, 71 *Am. Soc. Rev.* 565, 566 (2006).

<sup>538</sup> Title VII of the Civil Rights Act of 1964, § 709(e), 42 U.S.C. 2000e-8(e); 29 C.F.R. §1601.22.

<sup>539</sup> TOMASKOVIC-DEVEY, D. at 566, n.1.

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within categories,<sup>540</sup> and also, until recently, categorization of an employee was typically accomplished by the visual identification of his or her employer.<sup>541</sup> Nonetheless, one study has concluded that EEO-1 data is at least as high in quality as U.S. Census or Current Population survey data.<sup>542</sup>

Two recently published studies break new ground by demonstrating which diversity strategies produce increases in the representation of women and minorities in the management ranks of organizations. Both rely on EEO-1 data. The first sets the stage for the second by determining what impact over time two primary forms of civil rights enforcement have had on moving women and minorities into management.<sup>543</sup> Sociologists Alexandra Kalev and Frank Dobbin reviewed organizational survey and EEO-1 data for over 800 work establishments between 1971 and 2002 to examine the effect that law suits and government compliance reviews had on the integration of management ranks.

<sup>540</sup> Until recently, the 9 occupational categories in the EEO-1 survey were: 1) Officials and Managers; 2) Professionals; 3) Technicians; 4) Sales Workers; 5) Office and Clerical Workers; 6) Skilled Craft Workers; 7) Semiskilled Operatives; 8) Unskilled Laborers; and 9) Service Workers. Effective with the EEO-1 survey due 30 September 2007, the category Officials and Managers has been divided into two levels: Executive/Senior Level Officials and Managers; and First/Mid-Level Officials and Managers. This refinement will help with efforts to identify so-called "glass ceiling" effects in particular firms. Also assisting in identifying mobility trends for women and minorities is the move of "business and financial occupations" from the Officials and Managers category to the Professionals category.

<sup>541</sup> Among the most interesting aspects of the new EEO-1 reporting system, which goes into effect in September 2007, is the recommendation that employers ask employees to voluntarily self-identify their race and ethnic categories. Self-identification will greatly assist employers in the placement of employees in a new racial category added to the survey; that category is "Two or more races," a change that reflects both the increase of intermarriage in the U.S. and changes in identity politics in the country. Several other changes were made in reporting race and ethnicity on the EEO-1 form. Where an employee refuses to self-identify, employers are advised to visually determine the race and ethnicity of the employee.

<sup>542</sup> ROBINSON, C. L., et al., *Studying Race and Ethnic or Sex Segregation at the Establishment Level: Methodological Issues and Substantive Opportunities Using EEO-1 Reports*, 32 *Work & Occupations* 5-38 (2005).

<sup>543</sup> KALEV, A. & DOBBIN, F. *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 *Law & Soc. Inquiry* 855 (2006).

Law suits encourage steps to prevent discrimination through the threat of financial loss. Compliance reviews, conducted by the OFCCP on federal government contractors, operated differently. During the 1970s, the OFCCP and its predecessor, the Office of Federal Contract Compliance (OFCC), maintained a vigorous compliance program. This effort entailed thorough reviews of employer policies and practices, including affirmative action and nondiscrimination efforts.<sup>544</sup> Where the government concluded an employer's EEO efforts fell short, it would frequently negotiate a conciliation agreement with the employer specifying the steps the organization would take to correct the problem.<sup>545</sup> Thus, compliance reviews, unlike law suits, were designed to alter organizational routines. As a result, Kalev and Dobbin predicted that compliance reviews would have greater, longer-lasting effects in integrating management as compared with law suits.

Work by the OFCCP, however, has over time been affected by politics. Specifically, the deregulation movement of the Reagan years of the 1980s greatly impacted the OFCCP's efforts. The size of the agency's staff was halved, its budget was slashed, both agency-imposed sanctions, like contractor disbaring, and conciliation agreements declined dramatically. In light of these changes, Kalev and Dobbin predicted that compliance review would be more sensitive to political regime change as compared with law suits.<sup>546</sup>

Both hypotheses in the study proved true. Encouragingly, over time the integration of management increased significantly in the firms studied. On average, white males held 82 percent of the managerial positions in 1971. They held 61 percent of those positions by 2002. The percentage of white women in management on average increased from 15 percent to 26 percent over that period. Black males increased their percentage representation from 1.3 to 3.1 percent. African American women saw their representation in management go up from .4 percent to 2 percent.<sup>547</sup>

<sup>544</sup> KRIEGER, L. H. The Watched Variable Improves: On Eliminating Sex Discrimination in Employment, in *Sex Discrimination in the Workplace* 295, 304-06 (2007).

<sup>545</sup> *Id.* at 305.

<sup>546</sup> KALEV, A. & DOBBIN, F. at 865.

<sup>547</sup> *Id.* at 881.

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As for the impact of law suits and compliance reviews in catalyzing those trends, the study found that both devices had significant positive effects. Compliance reviews of the 1970s brought about the most significant and long lasting effects, while the technique was much less effective in the 1980s and 1990s. In contrast, law suits produced "more stable effects over time."<sup>548</sup> Nonetheless, lawsuits performed better for white women than they did for minority women and men. Minority men and women made gains from lawsuits only after the firm was sued multiple times. In fact, the first law suit in a firm sometimes caused their proportion in management to decline.<sup>549</sup>

Given the limitations associated with these two civil rights enforcement devices, diversity and EEO programming voluntarily undertaken by employers, as Professor Weiss has noted, is to be applauded.<sup>550</sup> Until quite recently, however, social scientific knowledge about program efficacy was quite sparse in comparison to the rhetorical claims of diversity programming advocates. Kalev, Dobbin and their colleague sociologist Erin Kelley published in August 2006 the most comprehensive study on the subject to date.<sup>551</sup> Using EEO-1 reports and organizational survey data, with changes in the representation of women and minorities in management as the measure of organizational success, the study examined 708 work establishments during the period 1971 to 2002.<sup>552</sup>

Seven common types of diversity programs were examined to determine the effect they have on the representation in management of traditionally underrepresented groups. Those mechanisms were: affirmative action plans, diversity committees,<sup>553</sup> diversity managers,<sup>554</sup>

<sup>548</sup> *Id.* at 883.

<sup>549</sup> *Id.* at 892.

<sup>550</sup> WEISS, M., Diversity, Equality and Integration: The German Case (Aug. 2007) (unpublished paper on file with author).

<sup>551</sup> KALEV, A., DOBBIN, F. & KELLY, E., Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies, 71 *Am. Soc. Rev.* 589 (2006).

<sup>552</sup> *Id.* at 596.

<sup>553</sup> Some companies appoint a committee made up of employees from different departments and professional backgrounds to monitor progress and ensure accountability in diversity programming. *Id.* at 593.

<sup>554</sup> Some firms assign the task of monitoring diversity outcomes to a full-time staff member or department dedicated to that effort. *Id.* at 592-93.



diversity training, diversity performance evaluations for managers, networking programs, and mentoring programs.<sup>555</sup> The programs fall into three broad categories: 1) those that establish accountability for diversity, 2) those that seek to reduce bias through training or feedback, and 3) those that attempt to enhance the social connections of women and minority workers.<sup>556</sup>

The study's results are surprising, and counsel caution in the embrace of certain common types of diversity programs. For example, firms adopting diversity training programs actually see a 7 percent decline in the odds of Black women achieving management status.<sup>557</sup> Employers evaluating managers on the basis of their performance in promoting diversity are likely to see slight increases in the percentages of white women entering management but also an 8 percent decline in the chances for Black men.<sup>558</sup> Mentoring programs appear to increase the odds for African-American women in management, leaving other underrepresented groups untouched.<sup>559</sup> Networking programs seem to work for white women but produce a decline in the chances for Black men.<sup>560</sup>

In contrast, those programs establishing accountability for diversity outcomes – affirmative action plans, diversity committees, and diversity managers – are associated with diversity increases across of the board.<sup>561</sup> These programs, argue the study authors, establish organizational responsibility for the changes necessary to realize a diverse workforce.<sup>562</sup>

Studies of this kind are helpful in beginning to identify the kinds of EEO compliance mechanisms likely to promote substantive change as well as symbolic adherence to antidiscrimination norms. They also

<sup>555</sup> *Id.* at 590.

<sup>556</sup> *Id.* at 591.

<sup>557</sup> *Id.* at 604.

<sup>558</sup> *Id.*

<sup>559</sup> *Id.*

<sup>560</sup> *Id.*

<sup>561</sup> *Id.* The authors note, however, that in manufacturing – computers, electronics, and transportation – affirmative action plans produce negative effects for black women. Such plans in service – retail, insurance, and business services – result in positive effects for the group.

<sup>562</sup> *Id.* at 611.

help make a second key point of this paper. A society that is serious about attaining equality in the workplace will make efforts to assess the utility of various EEO strategies. Without data collection and rigorous investigation, the promise of EEO law is unlikely to be realized.

## 5. Conclusion

The U.S. has produced an elaborate legal regime for enforcing principles of workplace equality. American social scientists are creating an impressive body of literature studying the phenomenon of employment discrimination, and also beginning to discern the efficacy of the tools designed to combat bias. These facts do not suggest, however, that equality, diversity and integration are uncontroversial subjects in the United States. The reality is quite the contrary.

Part of the debate centers on disagreement about the goals toward which Americans should strive. Should, for example, the U.S. work toward becoming a "color blind" society, a society in which a person's race or gender is entirely irrelevant? A plurality of the present U.S. Supreme Court would answer this question in the affirmative, as made plain by a recent decision striking down race conscious school assignment programs in Washington state and Kentucky. Although designed to combat the problem of *de facto* segregation in housing patterns, the programs, which sought to provide a degree of racial balance in the public schools, were held unconstitutional because they classified and admitted or rejected students based on race. Writing for the plurality in the case, *Parents Involved in Community Schools*, Chief Justice Roberts stated, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>563</sup>

Those who advocate the position espoused by the Chief Justice are driven by a vision of equality that is formal rather than substantive. Neutral rules – everyone attends his or her neighborhood school – that result in unequal outcomes, because white neighborhoods have better

<sup>563</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. \_\_\_, No. 05-908, slip op. at 40-1 (28 Jun. 2007).

schools, are not problematic in this view. So long as the segregation in housing patterns is *de facto* rather than *de jure*, the state may not affirmatively act to provide access by minorities to superior educational opportunity.

Many in America, however, have a different sense of what our society should aim to accomplish through equality law. Turning to the workplace, according to this view, we will not have a society that embodies equal employment opportunity unless we ensure that women and minorities are significantly represented in positions of power and prestige. As social science research is making clear, we will not achieve this goal if we choose to remain color and gender blind.

Some fear that the reasoning in *Parents Involved in Community Schools* will prove devastating to voluntary employment diversity programs, in particular those that seek racial and gender integration in job categories and gauge progress by paying attention to the demographic characteristics and distribution of employees in the organization. Others caution that while private employers can undertake diversity measures, those that "make specific employment decisions based on an individual's protected characteristics" will run afoul of Title VII.<sup>564</sup> The legally acceptable boundaries of diversity planning remain murky. It will indeed be a shame and an irony if American employers are ultimately dissuaded or prohibited from embracing the tools that social scientists find can actually make a difference. To vanquish discrimination in the workplace, data collection, keeping track of the numbers, and organizational accountability for outcomes is essential.

<sup>564</sup> Employers with Voluntary Diversity Plans Run Legal Risks at Margins, Speakers Say, *The United States Law Week*, 10 Apr. 2007, at 2605.