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Part IV
Equal Treatment

Chapter 16

Globalization, Equality and Non-discrimination: An Interdisciplinary Perspective from the US on Diversity Programming

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1. INTRODUCTION

Globalization is associated with a host of workplace trends that are detrimental to worker welfare. These trends include: increases in non-standard work; the declining power of labour unions; the feminization of labour, brought about by significant increases in the number of women working for wages; the use of migrants as a cheap source of labour; and the problem of child labour.¹ One hopeful trend, however, in what often feels like a constellation of troubles, is what might be described as the quest for workplace equality and non-discrimination, an

1. Roger Blanpain, Susan Bisom-Rapp, William R. Corbett, Hilary K. Josephs & Michael J. Zimmer, *The Global Workplace: International and Comparative Employment Law* 11–32 (2007) (hereinafter *The Global Workplace*). Regarding the feminization of labour, increased female participation in the paid labour force is not itself detrimental to workers. Rather, what is harmful is that women in many workplaces around the globe are seen as a cheap, disposable form of paid labour. *Id.* at 16–7.

undertaking that is the impetus for efforts spanning from the legislative to the decidedly soft and educational.

In one sense, the aspiration for a workplace open to all and free from discriminatory animus is nothing new. No less an authority than the Declaration of Philadelphia ties the goal of 'lasting peace' to the right of all people, 'irrespective of race, creed or sex to pursue [. . .] their material well-being [. . .] in conditions of freedom and dignity, of economic security and equal opportunity'.² Yet our understanding of how and why discrimination takes place, the legal and extra-legal tools available to combat bias and the efficacy of those mechanisms is of very recent origin. Similarly a product of recent times is a developing dialogue about workplace equality among the professional disciplines of law, psychology and sociology and the spread of the ideas generated by that conversation across national borders.

In the European Union, the year 2007 has been designated the European Year of Equal Opportunities for All.³ An ambitious initiative, following the milestone equal treatment directives of 2000⁴ and continuing the work of the Community Action Programme to Combat Discrimination (2001–2006), activities in 2007 aim to inform members of the public about their legal rights, place the benefits of diversity in the spotlight and place the EU on a firm path to tackle and ultimately vanquish discriminatory attitudes and conduct. Additionally, it is hoped that the events of the European Year of Equal Opportunities will assist in developing new tools and approaches for advancing Europe's equality agenda.⁵

From the vantage point of the United States, where the last major state sponsored equality initiative was the formation in 1991 of a national Glass Ceiling Commission,⁶ the activities in Europe are notable. The acknowledgment, at the supranational level, of the great need to address a significant societal problem is striking. The optimism, as expressed in official reports and other documentation,

2. Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia, ILO Constitution, *as amended* 9 October 1946, Annex, 62 Stat. 3485, 15 U.N.T.S. 35.
3. European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *Equality and Non-Discrimination: Annual Report 2006*, at 5 September 2006 (hereinafter Annual Report).
4. The Racial Equality Directive (Directive 2000/43/EC) and the Employment Equality Directive (Directive 2000/78/EC) together direct Member States to adopt a legal framework prohibiting discrimination on the grounds of race or ethnic origin, religion or belief, age, disability and sexual orientation. Annual Report, at 7.
5. *Id.* at 30.
6. In 1995, the national commission, after undertaking an extensive study, issued its findings and recommendations. See Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* (1995). While laudable, the federal Equal Employment Opportunity Commission's new E-RACE initiative (Eradicating Racism and Colorism from Employment) is not an equality campaign on the scale of the glass ceiling initiative of the 1990s. See *EEOC Initiative Highlights Persistence, Changing Forms of Race Bias in Workplace*, Workplace Law Report (BNA), 2 March 2007. The E-RACE initiative seeks to increase public consciousness about the persistence of race and colour bias in the workplace. *Id.*

that through monitoring, evaluation and analysis discrimination can be eradicated is refreshing. Also of interest, from an American perspective, is whether and how European strategies and experiences, which will play out across 27 distinctive member countries, will be similar to or different from those in the US. Perhaps most intriguing are questions about how new laws-on-the-books, promulgated in the wake of the equality directives, will change the everyday working lives of Europeans. Will the nascent European workplace diversity movement take root? And, if it does, will there be a relationship between the diversity movement and state antidiscrimination enforcement activities?

The aim of this paper is to muse a bit about the US experience of using law to stamp out employment discrimination, to think about how firms have responded to antidiscrimination law and to determine whether there is something useful that Europeans might learn from all this, especially in light of the equality and diversity initiatives increasingly being adopted by European companies. Although the ethos of the US workplace differs considerably from that found in many EU countries, there are reasons to consider the American experience. Despite the internationally aberrant employment at-will principle, which permits employment relationships to be dissolved for good, bad or no reason at all, one substantial area where American lawmakers have been willing to constrain employer authority is with respect to equal employment opportunity (EEO). Indeed, the US antidiscrimination regime is quite robust and well developed, especially in comparison to the laws and practices of many of America's industrialized counterparts.

Moreover, there is some indication that American EEO law is already viewed as instructive. An ethnographic study this author published in 2004, for example, which examined the efforts of one large, American labour and employment law firm to globalize its practice, identified employment discrimination law as an area where US legal doctrine and practice may influence the thinking of legal professionals in other countries.⁷ This conclusion was based on correspondence with lawyers from 13 different national jurisdictions.

Similarly, American Professor Sanford Jacoby has noted that 'when it comes to employment discrimination and its remedies, we may likely see a future flow' of ideas from the United States to Europe as the latter begins to respond to the challenges of an increasingly diverse population.⁸ Examples of Professor Jacoby's prediction can in fact be found. Professor Gregor Thüsing, a German, for instance, used the US experience as the intellectual touchstone for his comprehensive analysis of the consequences of the Europe's landmark equality directives.⁹ Lisa Waddington, a senior lecturer at Maastricht University, the Netherlands and

7. See Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 *Comp. Lab. L. & Pol'y J.* 257 (2004).

8. Sanford M. Jacoby, *Social Science in Europe, Japan and the United States*, 23 *Comp. Lab. L. & Pol'y J.* 819, 821 (2002).

9. See Gregor Thüsing, *Following the U.S. Example: European Employment Discrimination Law and the Impact of Council Directives 2000/43/EC and 2000/78/EC*, 19 *Int'l J. Comp. Lab. L. & Indus. Rel.* 187 (2003).

Aart Hendriks, a member of the Dutch Equal Treatment Commission, likewise use American law as a reference for considering the duty to reasonably accommodate disabled workers in Europe.¹⁰

With this in mind and in the firm belief that what is most important about law is how it functions in society, the paper will proceed in three sections. Section II will describe efforts in Europe to combat discrimination at the organizational level, drawing from the recently published report, *The Business Case for Diversity: Good Practices in the Workplace*.¹¹ Section III will consider the situation in the US, where organizations themselves have determined the terms of legal compliance with antidiscrimination law through the adoption of the kinds of programmes and policies just starting to appear in Europe.¹² The paper will conclude in Section IV with some cautionary words about the lessons Europeans might draw from the US experience.

2. COMBATING DISCRIMINATION AT THE ORGANIZATIONAL LEVEL: THE EUROPEAN APPROACH

Although European antidiscrimination law at the supranational level originates with Article 119 of the 1957 Treaty Establishing the European Community and its guarantee for women of equal pay for equal work,¹³ EU law on other forms of characteristic discrimination is of much more recent vintage. Building on the non-discrimination provision of Article 13(1) of the 1997 Treaty of Amsterdam, which empowers EU institutions to ‘take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’,¹⁴ the European Commission (EC) in 1999 promulgated two draft equality directives, which were adopted in 2000.¹⁵ The first, the Racial Equality Directive, requires equal treatment of people without regard to racial or ethnic origin and bans both direct and indirect discrimination.¹⁶ The second, the

10. See Lisa Waddington & Aart Hendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*, 18 Int’l J. Comp. Lab. L. & Indus. Rel. 403 (2002).

11. European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *The Business Case for Diversity: Good Practices in the Workplace* (2005) (hereinafter Business Case for Diversity).

12. One recent report notes that the ‘business case for investments in workforce diversity . . . is more developed in the USA and Canada than in Europe’. European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *The Costs and Benefits of Diversity* 13 (2003) (hereinafter Costs and Benefits).

13. The Global Workplace, at 315. See generally, Treaty of Rome, 25 March 1957, 298 U.N.T.S. 3.

14. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, O.J. (C 340) 1.

15. Jeff Kenner, *The European Union, in International Labour and Employment Laws*, 1–159, 1–160 (2nd ed., William L. Keller & Timothy J. Darby, eds, 2003).

16. See *supra* note 4.

Employment Equality Directive, provides a general framework for fighting discrimination on all grounds except sex, which is covered by the 1976 Equal Treatment Directive.¹⁷

Following adoption of the equality directives, the major challenge for EU members has been implementing the directives on the national level by adjusting existing legislation and promulgating new law.¹⁸ Additionally, to help put the principle of non-discrimination into practice, the EU created the Community Action Programme to Combat Discrimination (the Programme). Through a range of activities across the EU during years 2001–2006, the Programme sought to increase understanding of the phenomenon of discrimination, develop the capacity to combat and prevent it and promote the values that drive the fight against it.¹⁹ Included among the Programme's efforts were: support of 52 transnational projects; training in antidiscrimination law for judges, prosecutors and lawyers; publication of 92 reports authored by legal experts; funding of ten studies on issues related to discrimination; training for antidiscrimination trainers and representatives from nongovernmental organizations (NGOs); hosting of many conferences; production of 32 information leaflets; bestowing antidiscrimination and diversity awards on worthy recipients; and sponsoring photo and poster competitions.²⁰

One of the projects undertaken by the Programme was a study and report on the business case for diversity. Focus Consultancy and The Conference Board were hired as contractors for the project. The first author is 'a leading multi-ethnic and interdisciplinary consultancy [...] specializing in equality, diversity management and organizational change'.²¹ The Conference Board is a highly respected 'global independent business membership organization'.²² Their report, *The Business Case for Diversity: Good Practices in the Workplace*, is based on two surveys conducted in 2005. As noted in the report:

The first survey used questionnaires and in-depth interviews to identify examples of good practice in workplace diversity in the areas of race and ethnicity, age, sexual orientation, disability and religion or belief. The second, complementary survey used an online questionnaire to investigate diversity awareness and practices of member companies of the European Business Test Panel (EBTP) across all areas of diversity.²³

A total of 919 responses were received by the contractors.

17. Council Directive 76/207/EEC, 1976 O.J. (L 39) 40.

18. See, e.g., European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *Putting Equality Into Practice: Community Action Programme to Combat Discrimination* 8 (2006) (interview with Professor Colm O'Connell describing efforts in the United Kingdom).

19. *Id.* at 5.

20. *Id.* at 6.

21. *Business Case for Diversity*, at 2.

22. *Id.*

23. *Id.* at 5.

The report notes that European companies are increasingly adopting diversity and EEO policies and programmes. Among the outcomes sought by such firms are improvements in employee recruitment and retention, corporate image and reputational enhancement and increased innovation and marketing opportunities.²⁴ Of the EBTP survey respondents, fully half (50.2 per cent) reported having no diversity policy or practices, 20.3 per cent indicated that they have well established policies that have been in place for more than five years, 13.2 per cent reported implementing diversity policies and programmes within the last five years and the remainder responded either that they were implementing policies but more needed to be done (8.3 per cent) or that they were in the process of developing a diversity approach (6.7 per cent). The report also found that diversity and EEO policies and programmes are more likely in firms located in Northern and Western Europe than in companies in Eastern Europe's new EU member countries.²⁵

For the purposes of this paper and despite these interesting results, the study and report are viewed as a cultural product rather than a vigorous empirical investigation. In this respect and to bolster this classification, there are two points worth noting. First, one must consider the perspectives of the study's authors. Both are business organizations that actively promote diversity as part of their organizational mission. One of the institutional authors stands to gain by painting a rosy picture of corporate diversity efforts because such a conclusion helps build a market for its services.

Second, while the good faith and business expertise of the authors cannot be disputed, it is not as clear that generally agreed upon social science techniques were utilized by the contractors in conducting the study. For example, the speed with which the study was undertaken and concluded is surprising. The EBTP questionnaire was circulated online to 'around 3000' EBTP members for approximately one month – mid-June to mid-July 2005 – and the study was published in September 2005.²⁶ A timetable of such brevity would be unthinkable if this were an empirical investigation pursued by university-employed social scientists and published in a peer reviewed academic journal. Moreover, the response rate for the survey was 26.6 per cent,²⁷ which would be considered low in social science circles and unlikely to yield accurate observations for the population as a whole.

The possible methodological difficulties described above, however, do not lessen the report's value as a cultural product, one example of the business community's response to legal uncertainty as the 27 EU member countries work to transform the equality directives into law and practice.²⁸ From this author's

24. *Id.*

25. *Id.* at 14. The authors note, however, that some new Member States, like Poland and Hungary, have a higher percentage of companies in the process of implementing diversity programming than their counterparts in Northern and Western Europe. *Id.*

26. *Id.* at 11.

27. *Id.*

28. That we should consider the report a business community response rather than an embodiment of EC policy or position is bolstered by the disclaimer on page 2, which notes that the '[v]iews

perspective, as a student of American corporate responses to antidiscrimination law, three aspects of the report stand out.

First is its timing. The report appears at a moment when the legal environment in the European Union is dramatically changing. Implementing the equality directives is a project of immense scale, requiring alteration and innovation in law and legal enforcement and accompanied by the dawning legal consciousness of those benefited by the changes. Firms attempting to assess risk and responsibility in this new environment confront a fair amount of uncertainty. Out of this uncertainty comes the suggestion that businesses embrace the principles of diversity programming. Whether and how the suggestion might be implemented on a broad scale throughout the EU remains to be seen. But the response is notable nonetheless and given the American case, which will be described below, worth monitoring over time because the programmes and policies recommended, may if adopted broadly, significantly influence the way compliance with equality law is conceptualized.

Next, the report, in making the business case for diversity programmes in Europe, describes three organizational motives for their adoption. The authors report that their research found that employers tend to embrace such initiatives for ethical reasons (it seems like the right thing to do), regulatory/compliance reasons (desire to meet regulatory standards, ensure the organization complies with new law, avoid litigation) and economic reasons (enhancement of recruiting and retention, reputation, innovation and marketing opportunities).²⁹ All three factors have proved important in the spread of EEO compliance and dispute prevention practices in the US. Until recently, however, and in marked contrast to the US, European employers generally lacked the regulatory motive. One social scientist, using the case of France as an example, opines that lack of this catalyst explains the dearth of corporate EEO policies and practices in that country.³⁰ Will recent changes in French legislation and the European legal environment alter the incentive structure for French employers?³¹ Will changes in antidiscrimination law

expressed herein are those of the contractor producing the report, and do not necessarily represent any official view of the Commission [...]. *Id.* at 2.

29. These three motives for corporate action were also described in an earlier report published as part of the European Community Action Programme to Combat Discrimination. *See Costs and Benefits*, at 9.
30. Frank Dobbin, *Do the Social Sciences Shape Corporate Anti-Discrimination Practice? State Permeability and Disciplinary Influence in the United States and France*, 23 *Comp. Lab. L. & Pol'y J.* 829 (2002). Professor Dobbin notes that despite passage of race discrimination legislation in 1972, incentives for French employers to adopt EEO policies and programmes were lacking. Stringent evidentiary standards for proving discrimination claims and meager fines produced few successful cases in France. Additionally, the French government did not attempt to expand the reach of the initial legislation so that it never 'turned into a genuine threat'. *Id.* at 840. In short, US-style EEO policies and programmes failed to develop in France because there was no risk to manage.
31. *See generally*, Katell Berthou, *New Hopes for French Anti-Discrimination Law*, 19 *Int'l J. Comp. Lab. L. & Indus. Rel.* 109–37 (2003).

catalyze the widespread adoption of EEO programmes by European employers?³² And, if so, what sorts of programmes, if any, will be seen by regulators as inoculating firms from the risk of unwanted state intervention?

Finally, the report is notable because it details a wide range of possible programmes for adoption and highlights a key challenge to programmatic success. On the first point, *The Business Case for Diversity* lists a broad array of programmes including: targeted recruitment and fair selection policies, internship and mentoring programmes for ethnic minorities, anti-bullying policies, flexible working time policies, internal grievance and complaint procedures, diversity awareness training, fair performance appraisal processes, employee attitude surveys and diversity planning frameworks and checklists. As for the key challenge to determining the efficacy of these efforts, the report notes systematic monitoring and evaluation is necessary but only rarely in evidence among European employers adopting diversity programmes.³³ Monitoring and evaluation is lacking in many American EEO programmes as well. Yet that has not prevented some programmes from serving as important indicia of non-discrimination by regulatory authorities. The following section takes up this topic in greater detail.

3. COMBATING DISCRIMINATION AT THE ORGANIZATIONAL LEVEL: THE US EXPERIENCE

Employers in the United States are old hands at implementing antidiscrimination and diversity policies. American socio-legal scholars have amply documented the adoption and dispersal of an extensive range of personnel policies and programmes following passage of Title VII of the Civil Rights Act of 1964 (Title VII)³⁴ and Executive Order 11246 in 1965.³⁵ Turning to the statute, Title VII, which prohibits

32. A recent survey of top human resources (HR) professionals at 53 leading European companies casts doubt on the strength of European employers' regulatory motive. That study, produced by Hewitt Associates and the European Club for Human Resources, found that in terms of influencing HR's function within the organization, 'statutory requirements continue to be considered marginal or un-influential by HR [professionals]'. Leonardo Sforza & Bernard Lairre, 2nd European HR Barometer: Trends and Perspectives on the Human Resource Function in Europe (Hewitt Associates & European Club for Human Resources, 2006/2007).

33. See *The Business Case for Diversity*, at 25–6. Costs and Benefits, the earlier report on diversity programmes published as part of the European Community Action Programme to Combat Discrimination, warned that EU member countries' legal restrictions on collecting data about employees inhibits firms' ability to measure the outcomes of their diversity initiatives. European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *Costs and Benefits*, at 14.

34. 42 U.S.C. §§ 2000e-2000e-17 (2003).

35. Exec. Order No. 11,246, 3 C.F.R. 567 (1964–1965). E.O. 11246 requires non-construction employers (service and supply) with 50 or more employees and federal government contracts of 50,000 dollars (USD) or more to develop written affirmative action programmes. Such affirmative action employers must monitor their workforces to make sure they employ qualified women and minorities in proportion to their availability for various jobs.

employment discrimination on the basis of race, colour, religion, sex and national origin, represented a new and significant limitation on managerial authority over the American workplace.³⁶ Moreover, the statute and the social movements that gave rise to it provided a basis for criticizing employment decisions made in the exercise of that authority.³⁷

At the time it was passed, among the most notable aspects of the new legislation was its ambiguity.³⁸ While Title VII set forth a broad prohibition of discrimination, no new workplace policies or procedures were mandated by the law, leaving it subject to varying interpretations.³⁹ These ambiguities created great uncertainty for employers and simultaneously enabled them to play a central role in determining the terms of compliance with the new legislation.⁴⁰ In fact, passage of Title VII ushered in a period of corporate experimentation with achieving bias free working environments.⁴¹

The EEO compliance and litigation prevention mechanisms adopted by US employers are substantially similar to those now being recommended by the workplace diversity movement in the EU and include internal complaint procedures and disciplinary hearings,⁴² in-house EEO offices and antidiscrimination rules,⁴³ sexual harassment grievance procedures,⁴⁴ fair and formal performance evaluation and salary classification,⁴⁵ and diversity training programmes.⁴⁶ These policies and programmes were (and still are) vigorously promoted by human resources professionals and labour lawyers based on largely unsubstantiated claims that EEO mechanisms can help eradicate workplace discrimination while enhancing efficiency and profits. Embraced broadly by American employers, the structures

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36. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 Am. J. Soc. 1531, 1532 (1992) (hereinafter *Legal Ambiguity*).
 37. Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 Am. J. Soc. 1401, 1406–07 (1990) (hereinafter *Legal Environments*).
 38. Edelman, *Legal Ambiguity*, at 1536–38; John R. Sutton, et al., *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 Am. Soc. Rev. 794, 798 (1996).
 39. *Id.* at 1537.
 40. Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 Law & Social Inquiry 903, 923–24 (1996).
 41. Frank Dobbin, et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 Am. J. Soc. 396, 402 (1993) (hereinafter *Internal Labor Markets*). No doubt passage of subsequent antidiscrimination legislation, such as statutes prohibiting discrimination on the basis of age and disability, provided further impetus for corporate reform.
 42. Edelman, *Legal Environments*, at 1401; John R. Sutton, et al., *The Legalization of the Workplace*, 99 Am. J. Soc. 944 (1994).
 43. Edelman, *Legal Ambiguity*, at 1531.
 44. Lauren B. Edelman, et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 Am. J. Soc. 406 (1999).
 45. Dobbin, *Internal Labor Markets*, at 396. These mechanisms were initially adopted in response to 1930s federal labor legislation and federal labor market controls adopted during World War II. See *id.* at 422.
 46. Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 Res. in Soc. Stratification and Mobility 107 (1999).

seek to prevent disputes from occurring, or at least where they do occur, from being conceptualized by regulators as caused by illegal bias.⁴⁷

Although there is an impressive literature documenting the rise and spread of EEO policies and procedures in the United States, and this author has for some time warned that they may promote cosmetic rather than substantive compliance,⁴⁸ much less is empirically known about their effectiveness. Some recent social scientific studies, however, are instructive. Before reviewing them, however, we should pause for a moment to consider the measures one might use to assess the utility of these structures.

As noted in *The Business Case for Diversity*, there are a number of indicators companies can use to gauge the performance of their diversity programmes. These include analyzing the retention rates of women and minority managers, obtaining information about employees' attitudes on diversity issues and comparing one's own management framework and diversity benchmarks to those of other businesses.⁴⁹ The first indicator listed in the report – whether the representation of women and underrepresented minority groups in the firm is increasing, especially at senior levels⁵⁰ – is perhaps the most important. Many of the EEO policies and procedures described above were adopted by US employers in an effort to purge discrimination from the workplace. One should thus be vitally concerned about whether these efforts remove artificial barriers that limit the progress of underrepresented groups, a traditional goal of antidiscrimination law.

Quite simply, to ensure that compliance with EEO law is not merely cosmetic, one needs to determine whether EEO practices, over time, lead to a bettering of the position of women and people of colour within organizations. This measure is particularly salient given the important work done in the last decade by American employment discrimination scholars who focus on the structural, institutional and/or cultural aspects of bias and argue for creative, non-litigation-oriented solutions to these subtle yet pernicious phenomena.⁵¹ Assessing the progress of women and minorities is also important in light of the contentious debates in the US about the continued need for and advisability of affirmative action programs.⁵²

47. See generally Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 Fla. St. U. L. Rev. 959 (1999).

48. See Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 Employee Rts. & Emp. Pol'y J. 1 (1999); Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berkeley J. Emp. & Lab. L. 1 (2001).

49. *The Business Case for Diversity*, at 27.

50. *Id.* The report specifically recommends assessing increases in the number of 'women, disabled people and ethnic minorities, especially at senior levels [...]' *Id.*

51. See e.g. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001); see generally Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1 (2006) (describing the structural movement and expressing scepticism about the proposals offered).

52. *The Global Workplace*, at 127–28.

The study that most closely speaks to my concern is one published less than a year ago by sociologists Alexandra Kalev, Frank Dobbin and Erin Kelly.⁵³ Using changes in the representation of women and minorities in management as the measure of organizational success, the study reviewed data on EEO policies and programmes in 708 work establishments from 1971–2002.⁵⁴

Seven common types of diversity programmes were examined to determine the effect they have on the workforce representation of traditionally underrepresented groups. Those mechanisms were affirmative action plans, diversity committees,⁵⁵ diversity managers,⁵⁶ diversity training, diversity performance evaluations for managers, networking programmes and mentoring programmes.⁵⁷ The programmes fall into three broad categories:

- those that establish accountability for diversity;
- those that seek to reduce bias through training or feedback; and
- those that attempt to enhance the social connections of women and minority workers.⁵⁸

Some of the details of the study are especially revealing. For example, firms adopting diversity training programmes actually see a seven percent decline in the odds of black women achieving management status.⁵⁹ 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 eight percent decline in the chances for black men.⁶⁰ Mentoring programmes appear to increase the odds for African-American women in management, leaving other underrepresented groups untouched.⁶¹ Networking programmes seem to work for white women but produce a decline in the chances for black men.⁶² In contrast, those programmes establishing accountability for diversity outcomes – affirmative action plans, diversity committees and diversity managers – are associated with diversity increases across of the board.⁶³ These programmes, argue the

53. Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 589 (2006).

54. *Id.* at 596.

55. 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.

56. 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.

57. *Id.* at 590.

58. *Id.* at 591.

59. *Id.* at 604.

60. *Id.*

61. *Id.*

62. *Id.*

63. *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.

study authors, establish organizational responsibility for the changes necessary to realize a diverse workforce.⁶⁴

While helpful in beginning to identify the types EEO compliance mechanisms that are likely to promote substantive change as well as symbolic adherence to antidiscrimination norms, the study did not report results for two common forms of internal, anti-discrimination alternative dispute resolution: discrimination complaint procedures and sexual harassment grievance procedures. It would be surprising, however, to find that either has much impact on managerial demographics. I do have some basis for my opinion in addition to the fact that I know Kalev, Dobbin and Kelly looked at but have not published findings on the diversity effects of sexual harassment grievance procedures.⁶⁵ Given that a goal of their research is to identify effective diversity-enhancing mechanisms, one can assume that if the procedures produced tangible diversity outcomes they would report that fact.

Further support for my assertion may be found in a separate study published this January. In that study, Professors Dobbin and Kelly paint an intriguing description of how and why sexual harassment grievance procedures came to be adopted as mechanisms to protect employers from sexual harassment liability.⁶⁶ Their review of the spread of harassment procedures among 389 employers, along with a literature review spanning 1977–1997, establishes that this form of alternative dispute resolution was conceptualized and promoted by personnel professionals as a bureaucratic solution to manage risk in the face of legal uncertainty.⁶⁷

Although members of the legal profession were initially reluctant to proffer a strategy to stave off harassment law suits, human resources professionals exaggerated the risk of suit and aggressively advocated grievance procedures as an inoculation protecting employers. These devices were recommended even though there was no evidence that they would actually be accepted by courts as a defence.⁶⁸ Moreover, the programmes were billed more as shields from litigation than devices to reduce workplace harassment.⁶⁹ In the face of Kalev, Dobbin and Kelly's findings that diversity enhancing structures are those that establish organizational accountability for change, it seems highly unlikely that sexual harassment grievance procedures would affect the workplace representation of women and people of colour. There is certainly no evidence that they do.

Indeed, today there is scant evidence of judicial concern that the devices even prevent harassment. A forthcoming study of federal judicial decisions between 1965–1999 by Professors Lauren Edelman, Linda Krieger and their colleagues tentatively concludes that district courts are increasingly likely to view the

64. *Id.* at 611.

65. E-mail from Frank Dobbin, Professor of Sociology, Harvard University, to Susan Bisom-Rapp, Professor of Law, Thomas Jefferson School of Law (10 December 2006) (on file with author).

66. Frank Dobbin & Erin Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 *Am J. Soc.* 1203 (2007) (page proof on file with and cited by author herein).

67. *Id.* at 3.

68. *Id.* at 7–10.

69. *Id.* at 35.

presence of grievance procedures as relevant in harassment cases and to defer to them without scrutiny.⁷⁰ In other words, many judges seem to care that the procedures are there but not that they work. Viewed against the traditional goal of removing barriers to the progress of underrepresented groups, it appears the role of sexual harassment grievance procedures is often ceremonial rather than substantive. And yet this form of alternative dispute resolution is widely viewed as an employment best practice. In fact, the US Supreme Court, in a statement more aligned with the sentiments of the Society for Human Resource Management than the legislative history of Title VII, recently described the civil rights statute as designed to encourage 'the creation of anti-harassment policies and effective grievance mechanisms'.⁷¹

Why are diversity policies and programmes looked upon so favourably? What keeps people from evaluating them against the traditional goals of antidiscrimination law? I will briefly sketch out two possible answers to my queries. First, I think an over-commitment to procedural justice eclipses attention to substantive outcomes. Fair-looking procedures and policies are often inaccurately conflated with non-discriminatory working conditions.⁷² This phenomenon affects employees subject to the procedures and policies, corporate administrators charged with overseeing them and those outsiders – administrative regulators and in litigation, judges and juries – charged with evaluating procedural efficacy.

Second, I believe that in their day-to-day functioning, such procedures become imbued with what Professor Lauren Edelman calls 'managerial logic'.⁷³ For example, Edelman, Howard Erlanger and John Lande's study of internal procedures for handling discrimination complaints found that the personnel specialists responsible for administering the processes imposed on the systems the goal of good managerial practice rather than that of racial and gender equality.⁷⁴ They were not concerned with individual rights and remedies. Instead, they recast most disputes as individual personality clashes rather than instances of possible discrimination.⁷⁵ The procedures allowed for the venting of frustrations but were not designed to search for bias or to alter the status quo.⁷⁶ One might even argue that in giving voice to complainants, treating them with respect and restoring

70. Lauren B. Edelman, Linda H. Krieger, *et al.*, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures* 37 (21 June 2006) (unpublished paper on file with author).

71. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 145 (2004).

72. Susan Bisom-Rapp, Margaret S. Stockdale & Faye J. Crosby, *A Critical Look at Organizational Responses to and Remedies for Sex Discrimination*, in *Sex Discrimination in Employment: Multidisciplinary Perspectives* 273, 274–78 (Faye J. Crosby, Margaret S. Stockdale & S. Ann Ropp, eds, Blackwell, forthcoming 2007).

73. Lauren B. Edelman *et al.*, *Diversity Rhetoric and the Managerialization of Law*, 106 *Am. J. Soc.* 1589 (2001).

74. Lauren B. Edelman, *et al.*, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *L. & Soc'y Rev.* 497, 515–16 (1993).

75. *Id.*

76. *Id.* at 526–28.

workplace harmony, the procedures make it easy for claimants and decision-makers to remain oblivious to any biases that may be operative.

4. CONCLUSION

One must exercise extreme caution and speak with a great sense of humility in undertaking any comparative law project.⁷⁷ As we all know, there is a significant risk that an outsider will misunderstand the workplace laws of another country, no less the directives and initiatives of a unique supranational organization comprised of 27 Member States.

Moreover, we do not know whether social science research on US employers' responses to antidiscrimination law is salient or has predictive ability in other cultures. Yet I sense that a great debate is taking place in the EU about the shape and form that antidiscrimination law and practice will take. It is to those who strive to make the European workplace a site of true equal opportunity that I direct my comments in the hope that I may contribute in some small way to the conversation. A cautionary tale about the dangers of mistaking the trappings of EEO programmes for actual substantive change may assist in this respect.

77. *The Global Workplace*, at 37.