



REGULATING DISCRIMINATION

The Paradox of a Weak State

IN 1961, JOHN F. KENNEDY DECREED that companies wanting to do business with the federal government would have to take affirmative action to end discrimination. The year after Kennedy's assassination, Lyndon Johnson signed the Civil Rights Act of 1964, outlawing discrimination in education, housing, public accommodations, and employment. No one could have anticipated the effects of these mandates on the workplace. Not a single sentence remains from the corporate personnel manual of 1960. Firms have changed how they recruit, hire, discipline, evaluate, compensate, and fire workers.

The agents of change were civil rights activists and then politicians, but the people who invented equal opportunity—decided what it would mean on the ground—were personnel managers. After the Civil Rights Act was passed, social movement activists played bit roles. Members of Congress, judges, federal officials, and presidents had parts in the drama, but it was personnel experts who concocted equal opportunity programs, and later diversity management programs, in the context of changing ideas about discrimination. Public officials approved some new programs and rejected others, but it was personnel experts who put the programs together. Some of the changes were visible and dramatic, as when firms struck rules reserving good jobs for white men or wrote rules against trading jobs for sex. But many of the changes were subtle, as when firms began advertising every open job or set up written performance evaluation systems, and their origins in civil rights law were soon forgotten.

If the Civil Rights Act of 1964 had read, "It shall be unlawful for employers to operate without written job descriptions, diversity training programs, and sexual harassment grievance procedures," firms would have seen the revolution coming. Instead, the act outlawed discrimination in broad strokes. Most managers never imagined that the law applied to their companies. Yet once enforcement was expanded in the early 1970s, personnel experts were able to sketch equal opportunity programs with a free hand precisely because Congress had presented

employers with a tabula rasa rather than setting out precise rules and regulations. Personnel managers tried one thing after another, waiting to see if the courts would wipe the slate clean again. Mostly the courts let the changes stand.

This is the story of a professional network that changed course dramatically in the 1960s and 1970s. Circa 1960, personnel managers were negotiating with unions in some firms, trying to keep them at bay in others, and managing new hires and benefits everywhere. A decade later a group of personnel experts at military contractors such as Lockheed and General Electric had redefined the job of personnel. They invented the first wave of compliance measures and created a national network, tied together by military contractors worried about losing contracts and later by professional associations and business groups such as the Society for Human Resource Management and the Conference Board. This network of personnel specialists, some of whom now styled themselves as equal opportunity consultants, created wave after wave of equal opportunity innovations, linking each to ideas about discrimination put forth by activists and academics. In response to law professor Catharine MacKinnon's campaign to define sexual harassment as job discrimination, they built harassment grievance procedures and training programs. In response to new ideas about cognition and stereotyping from the social sciences, they devised diversity training programs that would make managers sensitive to their own unconscious biases. Now these privately concocted remedies are everywhere. Job hunters and judges are suspicious of firms that don't have them.

Personnel managers had created a legal code internal to the corporation—equal opportunity rules and pledges inscribed not in federal statutes but in corporate human resources manuals. Every new employee gets diversity training; job prerequisites are spelled out in writing; workers can only be disciplined by a committee; harassment claims go to a grievance panel. Firms have become states unto themselves.

This revolution has not been silent, but the public debate over equal opportunity has largely missed the point. Pundits decried quotas and reverse discrimination, which never became commonplace, but neglected the widespread adoption of performance evaluations and job descriptions, grievance procedures and training programs.¹ Many of these things were folded smoothly into the human resources manual, and so even human resources managers forgot that they became popular as equal opportunity measures. Then when affirmative action came under attack in the early 1980s, human resources experts pointedly argued that diversity training and work-family programs were not affirmative action measures at all, but were there to increase productivity.

Why Personnel Defined Equal Opportunity

There is a rich trove of books on each of the first three acts in the equal opportunity drama: the civil rights movement, passage of equal opportunity laws, and federal enforcement of those laws. Those books neglect the long fourth act, in which the personnel profession's compliance efforts translated the law into practice. The drama only had a fourth act because, rather than spelling out precisely what equal opportunity meant, Congress left it to judges and bureaucrats to decide, and judges and bureaucrats heard constant appeals from citizens to rethink the definition of discrimination. Public officials came to define fair employment by looking at the "best practices" of leading firms, and so in the end the personnel profession defined equal opportunity through its compliance initiatives.

In the first act of the equal opportunity story, the civil rights movement called for Congress to outlaw discrimination in employment, education, housing, and public accommodations, demanding legislation that, with the one hundredth anniversary of Lincoln's Emancipation Proclamation of 1862 looming, might make good on the promise that all men (and women) are equal in the eyes of the law.² While the civil rights movement spurred John F. Kennedy's affirmative action order in 1961 and the Civil Rights Act of 1964, activists played little role in deciding what compliance would look like. At first the Urban League and the NAACP created jobs banks and advised employers on how to recruit, but those contributions were short-lived. By the end of the 1960s, personnel administrators had taken the baton and were running the next leg of the relay on their own. As for that other social movement, the women's movement, it got rolling after personnel experts had already begun to define compliance. While activists went on to influence public policy, they no more designed corporate compliance than did civil rights activists.³

In the second act, politicians required federal contractors to practice equal opportunity in 1961, required employers to pay men and women the same wages for the same work in 1963, and required all employers to offer equal employment opportunity in 1964.⁴ Books chronicling how policymakers negotiated these policies, and which legislators and regions led the charge, document just how these changes came about. Yet these studies also made clear that from the time policymakers outlawed discrimination, they did little to define compliance.

In the third act, federal administrators and courts shaped how these vague laws would be enforced.⁵ Rather than encouraging a color-blind approach, for instance, federal administrators encouraged a race- and gender-conscious system of accounting for progress because they

needed a metric by which to judge firms.⁶ The federal reporting system focused employer attention on the issue of equal opportunity, but it did not define what employers would do. When bureaucrats or the courts took stands on compliance, most ratified what the Fortune 500 were doing. In 1971 the Supreme Court faulted Duke Power Company for excluding black applicants by testing them for skills not used on the job. That ruling ratified test validation practices that leading military contractors had embraced in the 1960s, based on decades-old advice from personnel psychologists. A generation later the Supreme Court's twin sexual harassment decisions of 1998, credited with encouraging companies to adopt harassment grievance procedures, in fact ratified procedures that 95 percent of employers already had in place. Over the years, then, personnel experts taught public officials what discrimination was through the programs they made popular.

Courts and bureaucrats played their part in defining compliance, but the popular corporate programs such as open job posting, job test validation, and maternity leave were worked out by personnel experts, not public officials. Judges rarely did more than give the nod to programs already popular among leading firms. Courts followed—they did not lead.⁷ Congress rarely did more than allow innovations to stand, but in some cases it put popular practices into writing, as in 1978 when it required all employers to treat pregnancy like other disabilities. The Supreme Court's follow-the-leader approach is also evident in its rulings on affirmative action in education. In his 1978 opinion in the famous five-to-four *Bakke* decision, overturning quotas in university admissions but supporting integration as a goal, Justice Lewis Powell held up Harvard as an example, quoting its amicus brief: "The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. . . . Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos."⁸

This book chronicles the fourth act in the drama, which began soon after John F. Kennedy signed Executive Order 10925 in 1961, requiring firms with federal contracts to take "affirmative action" to end discrimination. Personnel professionals crafted equal opportunity programs with instruments drawn from their professional arsenal, and those programs came to define fair employment and discrimination. It was personnel experts who decreed that managers should advertise jobs and that they should use performance evaluations to judge applicants for promotions.

Personnel took charge for three reasons. First, Congress, John F. Kennedy, and Lyndon Johnson had crafted bills and presidential edicts in high-minded, but vague, language. They outlawed discrimination without saying what it was. In the context of America's separation of

powers and common-law tradition, this meant that civil rights law was ripe for what sociologist Lauren Edelman terms the “endogenous” definition of compliance.⁹ Those being regulated helped to establish the terms of compliance. This happened in part because Congress had decided not to create a regulatory agency with independent authority to set compliance standards—an agency in the mold of the National Labor Relations Board.¹⁰ The result was a system in which scattered judges across the country evaluated claims about compliance. Judges were in no position to invent compliance standards from scratch, so they took their cues from leading firms.

Second, personnel experts took charge because they saw an opportunity to push programs they had long favored, at a time when unions were in decline and thus when many of their traditional duties were on the wane. They used civil rights law to expand their duties, and numbers, within the firm. They now snuck virtually every element of the “modern personnel system” of the fifties in through the back door as an equal opportunity measure, arguing that programs to rationalize the allocation of people to jobs, and their movement up through the ranks, would increase efficiency while eliminating bias. By the end of the century the profession had grown tenfold, while the workforce had only doubled.

Third, the other principal contender for defining compliance was the legal profession, but lawyers were not so anxious to take over this task. Personnel experts succeeded by arguing that bureaucratic innovations could keep firms out of court, but lawyers balked at the idea of peddling remedies that the courts had not approved. That was not part of the profession’s *modus operandi*. Thus personnel experts came to define compliance in part because they had something lawyers were not offering, plausible bureaucratic vaccines against litigation. Despite the absence of evidence that those vaccines stopped discrimination, judges gave companies that adopted those “best practices” credit for acting in good faith. They were suspicious of firms that weren’t doing all of the latest things.¹¹ And so what personnel made popular gradually became lawful.

How Public Policy Spawned Legal Codes in Companies

Because Washington never codified fair employment regulations, companies inscribed their own regulations in their human resources manuals. Perhaps if fair employment advocates had won a powerful administrative agency, that agency might have set clear standards. Instead, two toothless federal agencies and dozens of state fair employment agencies oversaw firms, and hundreds of judges were responsible

for interpreting the law. No single official could demand that an employer cease discriminating and sanction the employer who did not.¹² Thus no one could give employers a clear answer to the question, “How do we stay out of court?”

The Paradox of America’s Weak State

The fragmentation of the U.S. state, with powers dispersed across federal, state, and local governments, and with legislative, judicial, and administrative branches at each level, is usually described as a weakness. The paradox of this particular kind of weakness is that it led to extensive corporate compliance efforts by firms worried that agencies and courts might change compliance standards. Executives tried to anticipate where the law would move next and installed entire departments devoted to tracking legal change.¹³ Fragmentation made the law unpredictable in part by giving citizens so many venues for pursuing change. They could appeal to Congress to clarify and expand statutes, to federal judges to reinterpret statutes, to state judges to assess liability under tort laws, to state legislatures to expand the definition of discrimination, to federal bureaucrats to issue new guidelines, and to city governments to outlaw newly recognized kinds of discrimination. The result is that the state was “porous,” open to input.¹⁴ This system allowed citizens to appeal to judges and bureaucrats to reinterpret even laws that were written with crystal clear language, with the express purpose of preventing judicial expansion.¹⁵ Thus the Civil Rights Act, designed explicitly to protect against judicial expansion, was expanded by judges nonetheless.

Corporate equal opportunity experts speculated about how interpretation of the law might evolve, and how legislation might change. The speculations often followed new social scientific ideas, such as the idea of institutional discrimination or the idea of cognitive bias. Experts then set up their own regulatory systems within firms consisting of practices ranging from bureaucratic promotion procedures to halt institutional discrimination to mandatory diversity awareness programs to end cognitive bias. Discrimination came to be defined as the absence of such measures.

Seeing the rise of big corporations, the nineteenth-century French philosopher Henri de Saint-Simon feared that they might overwhelm weak states and threaten the rights of citizen-employees. Democratic nations that shared Saint-Simon’s concern created legal protections for employees. Paradoxically, in the United States, some of those very protections, such as civil rights laws that seemed to their champions to be too vaguely worded and spottily enforced, led corporations to create their own private codes of legal conduct. America’s weak state stimulated private-sector activism in the protection of citizens’ rights.

While some firms created their own elaborate equal opportunity systems, the absence of a strong central authority with clear standards meant that others did nothing. Leading firms had diversity task forces, diversity performance evaluations, and sexual harassment counseling programs by the turn of the century, but no one made the laggards follow suit. The vagaries of the law produced tremendous managerial activism, but uneven use of new innovations.

Other countries look very different. In France's civil law system, for instance, the courts do not offer broad new interpretations of legislation, and bureaucrats do not issue guidelines that stray far from the original language of legislation. Government authority is centralized in Paris, not dispersed to the provinces and towns. It is not that French laws are more precise than U.S. laws, but that the French legal system doesn't permit expansive reinterpretation or significant regional variation. In consequence, in France firms did not play the game of trying to guess where antidiscrimination laws would move—they guessed correctly that such laws would not be reinterpreted—and firms did not build their own elaborate internal legal codes.

Corporate Codes and Legal Consciousness

By decentralizing authority over interpretation of the law, the American system allowed legal consciousness to evolve over time, as activists promoted new definitions of discrimination, social scientists identified new dimensions of bias, and personnel experts concocted new measures to expand opportunity.¹⁶ Legal consciousness often corresponds not to black letter law but to social ideas about what should be lawful, and so it is not just that case law changed over time, but that notions of what should be lawful changed.¹⁷ Those ideas changed in the 1950s as American personnel systems were organized around the notion of employee citizenship. Employees came to talk as if the inalienable rights of citizenship carried over to employment.¹⁸ By the late 1950s, a chemical industry personnel executive reported, "Because of the type of country we live in, . . . a man carries this idea about his rights into his work." The head of personnel at a food-processing plant argued that even union members saw their rights as extending beyond the contract:

Implied rights are implicit in the expectations of the mutual parties to a relationship—like the employment relationship. Usually, when employees talk about their rights, they are not referring to contract provisions. Employees use the term in a broader sense. For example, if an employee feels his supervisor has treated him ill, he speaks of his rights as an individual with human dignity.¹⁹

Employees thought that the law must protect rights they believed they should have.

The Civil Rights Act was revolutionary, for it seemed to extend certain rights citizens held vis-à-vis the state to relations between citizens. The relationship between employer and employee had been governed by implied or express contract. The principle of freedom of contract meant that the employer and employee could contract with whomever they chose, and terminate the contract at will. The Civil Rights Act changed that, and in so doing, contributed to rights consciousness in the realm of employment. People came to think not only that no-Negroes policies were illegal, but that anything that smacked of unfairness might be illegal. This resonated with the American myth that human rights are inalienable, created not by the state but by the state of nature.

The fact that Title VII case law was voluminous and ever changing encouraged the view that the law must contain many specific prohibitions. Americans came to view as unlawful what personnel manuals prohibited. Even those who wrote the manuals thought this way. I have conducted hundreds of interviews with human resources managers since the early 1980s. They typically report a litany of actions proscribed by law—asking a woman applicant if she is married, firing a minority for not showing up for work, hiring someone without advertising the job, patting a subordinate below the first lumbar vertebra. The things they mention are covered in company manuals and diversity management “best practices” lists, but rarely in legislation or case law. For authority those managers are as likely to cite a discrimination complaint from the six o’clock news or the situation comedy *The Drew Carey Show*, whose main character is an HR manager, as they are to cite a Supreme Court ruling. Indeed, because journalists often cover the most ludicrous discrimination charges, personnel managers, like the rest of us, can end up with a warped sense of what the courts forbid.

The Invention of Equal Opportunity

The history of equal opportunity challenges the conventional wisdom about how social movements, the professions, corporations, and government interact in the United States. According to that wisdom, each citizen has a set of interests that derive from her place in society. Social movements arise to assemble people whose interests are not well represented. Government reacts by altering the distribution of resources or the rights and responsibilities of groups. Corporations either go along with new laws or fight them. Professionals such as lawyers carry out new policies, translating social movement agendas into action.

Journalists and social scientists mostly admire this portrait of the polity, journalists adding to it by showing flaws and social scientists by showing more complexity than meets the naked eye. My contribution is to point out that the conventional wisdom is a caricature that depicts a set of roles and relations. It shapes reality as well as describing it, because people who believe it behave according to its dictates.²⁰ This particular caricature is mistaken in part because it is static. Because roles and group relations and social norms are social inventions, they are in constant motion. Neither social movements nor professions, neither corporations nor governments follow any particular script for long. All are in constant flux, changing memberships, forms, roles, and interests, and we can see those changes in action by tracing the history of corporate response to equal opportunity law.

Social Movements

According to the conventional wisdom, social movements arise when people whose interests are poorly represented band together to influence the political process. The civil rights movement arose in the 1950s to represent disenfranchised blacks, with the goal of pushing Congress to eliminate discrimination in all realms of life. After Congress passed the Civil Rights Act of 1964, activists picketed employers who wouldn't hire blacks, organized job banks, and filed charges against companies that discriminated. Otherwise the movement turned to new tasks, and gradually petered out.

Soon a new social movement emerged, within the personnel profession, to carry the civil rights project forward. But because we don't have a language for describing a national network of professionals as a social movement, we have been blind to its emergence. Many personnel experts fought change, but by the late 1970s there were equal opportunity experts in every major personnel department, most of them women. By the end of the century, seven out of 10 personnel experts were women.²¹ They were rarely the same people who marched for civil rights in Selma and Washington, but they continued the work of that social movement just the same. Personnel was transformed from a bastion of white men with backgrounds in labor relations to a bastion of white women attracted by equal opportunity goals. Civil rights was neither the first nor the last social movement to morph into a professional project. From the 1930s, labor leaders and labor relations experts institutionalized the labor movement and its corporate opposition. From the 1970s, environmental engineers carried the green movement forward within the firm. Gynecologists and abortion clinics carried the women's reproductive rights movement forward.

The American model of the social movement as a force outside of the party system had arisen in the nineteenth century with the Second Great Awakening, and had only been institutionalized as part of the political process with the temperance, suffrage, and labor movements.²² The civil rights movement helped to reestablish that model for a new round of movements in the 1970s championing the rights of women, Latinos, the disabled, and many others.²³ The grassroots women's movement, for instance, was launched by women's advocates in government, building on the model of the civil rights movement.²⁴ The conventional wisdom about social movements, then, dates to a time when most Americans worked in farming, outside of corporations. As corporations absorbed more of the working population, and hired professional managers, they created the potential for social movements to be institutionalized in this way.

Professions

According to the conventional wisdom, the role of the professions in regulation is to make sure corporations act in accordance with the law. Historically the liberal professions fought to win state licensure and monopolies of authority over specific arenas of expertise. Within the firm, lawyers wrote contracts and approved legal documents and accountants produced financial reports, both groups with the blessing of state licenses.

Because it depicts the law as clear in its requirements, the conventional wisdom misses the role of networks of professionals who span firms in actively constructing and making sense of the law. The personnel profession created a national network of specialists who invented the compliance strategies companies tried out. Because it was personnel experts who won control of the area, rather than lawyers or accountants, virtually all of the new compliance strategies were recycled from the personnel arsenal. New recruitment and training programs of the 1960s, formal hiring and promotion systems of the 1970s, diversity management programs of the 1980s, work life and harassment programs of the 1990s—all of these came from the profession's toolkit. If lawyers had won control, firms might have bureaucratized fewer personnel procedures and codified more employee rights. If accountants had won control, firms might have instituted systems to scrutinize wage inequities and hiring disparities. In other regulatory arenas, such as benefits regulation or health and safety, it was other professionals who took charge, and they did indeed rely on their own professional kit bags.

By spawning a professional specialty devoted to managing compliance, equal opportunity law ensured that compliance would succumb

to management fads. Once they had instituted one round of innovations, the experts looked for new things to try, building programs around emergent ideas from academia and from activists. Formal promotion systems and diversity training and flextime spread through the network of corporate equal opportunity managers just as matrix management and quality management spread through corporate operations managers.

Another piece of conventional wisdom about the professions is that they compete for licensure from the state. In this case, personnel experts appealed to CEOs for unofficial licensure to control the domain, and they did so by proffering compliance solutions. This represents a new pattern, for professional groups are handling compliance in realms ranging from environmental protection to securities regulations to corporate governance. In these realms government policy establishes standards, but not the means for reaching those standards.²⁵ Professional groups then vie to win corporate approval of their strategies. In effect it is now the CEO, not the king, who grants professional licenses by choosing which group will handle compliance in each regulatory realm.

Corporations

According to the conventional wisdom, corporations respond to new regulations either by complying or by battling to have them changed. Corporations responded to the Civil Rights Act by eliminating bans on hiring blacks and married women, and by fighting against other requirements that emerged in case or administrative law. They fought guidelines requiring them to treat pregnancy like other disabilities and won in court, although Congress responded by passing a new law. They fought the definition of sexual harassment as sex discrimination and lost.

Because the conventional wisdom depicts new rules and regulations as codified in legislation, case law, and administrative law, it has blinded us to the fact that rules and regulations can be codified in internal corporate legal codes. Every major corporation developed lawlike rules governing hiring, promotion, discharge, discipline, maternity leave, sexual harassment, and a host of other issues. In embracing these innovations, corporations established compliance norms. Corporate practices were influential in part because federal officials, judges, and members of Congress had little relevant expertise. While each company developed its own legalistic code of behavior, that code resembled others because the components spread through a national network of professionals. Corporations increasingly became states unto themselves, but states that were similar to one another. What a manager could do, and could not do, in the realm of hiring and promotion and

discipline and discharge was, for the most part, defined vaguely in legislation and case law but quite precisely in the intercorporate network. At first it was personnel managers at leading federal contractors, worried about losing contracts, who devised equal opportunity measures in the private-sector Plans for Progress group. Personnel and management associations and journals took over the job of promoting equal opportunity innovations in the 1970s, and a new specialty of diversity consultants arose to invent and promote new programs to corporations. That same pattern of policy homogenization can be seen in the world of nation-states, where consultants and academics devise new policy norms that make nation-states look much alike in any policy arena.²⁶

Here our fascination with judicial decisions led to a misreading of the role of the courts. Seeing that many companies have sexual harassment policies and procedures that are in line with Supreme Court guidelines, for instance, many conclude that the Court's rulings were successful. In fact, human resources experts devised guidelines for corporations, and then the court vetted them. It was corporations that guided the judiciary, not the other way around. Congress and federal bureaucrats also took their cues from employers, approving some innovations and overturning others. For the most part, they went along with what leading employers were doing, though they rarely ruled that any one innovation, or any concoction, would fully protect employers. This was the case in part because, while the courts were the final arbiter, they did not have the authority to make law. Never knowing quite what might protect them, employers added one innovation after another in the belief that each might one day contribute to a "good-faith effort" defense.

Government

According to the conventional wisdom, Congress enacts new legislation in response to the changing political preferences of the electorate, conveyed through social movements and directly through elected representatives. Then the executive and judicial branches do their best to make sense of new edicts as citizens present their cases for how laws should be enforced. The three branches of government work together, and each checks the power and caprice of the others. The government determines what new laws mean and how they will be carried out.

This system of checks and balances is thought to make America's federal state unusually weak, because the legislature is hemmed in by constitutional constraints. In fact, the vicissitudes of case law led to elaborate corporate compliance efforts, and so this weak state's edicts had strong effects on firms. Fair employment laws led to more extensive corporate responses in the United States than elsewhere precisely because no federal authority could establish a simple litmus test for

compliance. If the executive branch could have established simple compliance criteria, as bureaucrats did in other countries, firms would not have had to guess where the law was going. Personnel experts not only created regulatory regimes internal to the firm. In defining how firms could comply with the law, they also defined what was illegal. They defined pregnancy discrimination as illegal by embracing maternity leave in the 1970s, and hostile environment harassment as illegal by banning it in corporate sexual harassment policies in the 1980s. Courts and legislatures followed their lead.

The conventional wisdom also depicts public policy as shifting dramatically with particular historical watersheds, such as the Civil Rights Act. That view is belied by the history of the enforcement of the act. Personnel experts expanded on the original definition. So did women's movement activists, judges, and members of Congress. Together these small steps amounted to a revolution, but a gradual revolution of small steps and missteps that continues today.²⁷

The equal opportunity policy nexus reveals blind spots in the conventional view of social movements, professions, corporations, and government. For instance, we see social movements as composed of activists who picket statehouses and corporate headquarters, not of personnel experts administering promotion rules. In the courts we see legal precedent leading everything else, not as responsive to what personnel experts convince firms to do. We see corporations as following the policy dictates of legislators and bureaucrats and judges, not as the locus of policy experimentation and evaluation. But, as we will see, human resources innovations were built on equal opportunity programs spawned by the state. We see the professions as competing for authority in the eyes of the state. But they are increasingly appealing to executives for authority, even over matters of legal compliance, and executives rather than state officials may ultimately choose which profession will reign.

Wave upon Wave of Corporate Programs

The role of the personnel profession in defining equal opportunity is the part of this story that has been least well documented. Personnel experts promoted one round of compliance measures after another. In the 1960s, they wrote nondiscrimination policies based on union nondiscrimination rules, and set up recruitment and training programs for women and minorities. In the 1970s, as the profession more than doubled in size and as the proportion of women rose from a third to nearly a half, they formalized hiring and promotion with performance evaluations, salary classification, and other measures to eliminate managers'

opportunities to exercise bias.²⁸ In the Reagan years, when affirmative action was on the ropes, they changed course, arguing that the new hiring and promotion practices helped to rationalize “human resources management” and relabeling “equal opportunity” programs as “diversity management” programs. Then in the 1990s and 2000s, the increasingly feminized human resources profession focused on women’s issues, pushing for the expansion of work and family programs and antiharassment programs. In each period the meaning of discrimination changed, and the roles of social movements, organizations, the professions, and the government evolved in ways that challenged the conventional wisdom.

Equal Opportunity versus Affirmative Action

While politicians and pundits often make a sharp distinction between equal opportunity and affirmative action, in practice the legal requirements for the two programs were only subtly different. All employers were required to practice equal opportunity, and federal contractors were required as well to take “affirmative action” to equalize opportunity. Contractors must write affirmative action programs and open their doors to Department of Labor inspectors. Yet the main legal risk to employers came from lawsuits filed under the Civil Rights Act, which covered everyone, and personnel experts recommended the same compliance strategies to all employers. Sometimes federal contractors installed innovations before noncontractors, but in the end, the two groups of firms installed the same measures for the most part.

The 1960s: Ending Jim Crow in Employment

In response to Kennedy’s 1961 order requiring federal contractors to take “affirmative action” to equalize opportunity, personnel executives began to dismantle de jure discrimination. Experts at Lockheed’s Georgia aircraft factory were first to propose changes, soon after Lockheed won a billion-dollar air force contract. In short order a network of firms with government contracts organized Plans for Progress as the private-sector arm of the President’s Commission on Equal Employment Opportunity (PCEEO), which was headed by Vice President Lyndon Johnson. That group soon had 300 members that pledged to strike rules that excluded blacks, Latinos, and women from jobs ranging from meat cutter to chief executive.

Personnel experts modeled new job posting systems on union posting requirements, so that minorities would hear of openings. Then they

built on traditional recruitment programs, which targeted Harvard and Yale and the Big 10, with recruitment programs for blacks and women, targeting Howard and Spellman, Wellesley and Mount Holyoke. They recruited production workers not only in white high schools, but in inner-city high schools that had never before seen recruiters. They built on conventional skill and management training programs, establishing programs designed for blacks and women. Through these changes, personnel experts defined discrimination first as the categorical refusal to consider minorities and women for jobs, and then as systems of recruitment and training that worked only for white men.

Federal agencies in charge of Title VII and affirmative action enforcement looked to what Plans for Progress employers were doing for guidance. The foot soldiers of equal opportunity were to be found not on the streets of Selma, but in the personnel office at Lockheed's Marietta, Georgia, plant. They weren't always willing conscripts, but now the personnel profession had added a specialty, and the old hands would have to change their focus from guarding against unions to protecting equality of opportunity.

The 1970s: Bureaucracy as the Antidote to Discrimination

Washington strengthened civil rights regulations in the early 1970s. The Supreme Court extended the definition of discrimination in 1971, in *Griggs v. Duke Power Company*, striking down employment practices that excluded blacks absent evidence of intent to discriminate. The Department of Labor expanded affirmative action reporting and enforcement. In 1972 Congress gave the EEOC power to bring lawsuits itself. The number of civil rights suits skyrocketed by the end of the decade, from several hundred a year to over five thousand.²⁹ With its new powers the EEOC negotiated \$75 million in consent decree settlements in 1973 and 1974 with AT&T, the first in a string.³⁰

The federal government clearly meant business, but no one knew what it expected of employers, not even government officials. Personnel experts like Barbara Boyle, who designed IBM's first equal opportunity program before opening a consultancy, now argued that the courts would question many common employment practices. They championed new equal opportunity programs built on the foundation of classic personnel administration, beginning with formal hiring and promotion practices to stop managers from discriminating.³¹ They recommended test validation procedures pioneered by industrial psychologists and recently championed by Plans for Progress. They designed quasi-judicial grievance and disciplinary mechanisms—adapted from their union management toolkit—to intercept discrimination complaints before they reached the courts.³²

In the process, Boyle and the growing cabal of equal opportunity experts defined formal, legalistic employment rules as the antidote to discrimination, equating fairness with the rule of law. Bias wasn't a problem of individual prejudice, but of management practices that had not been modernized. Eldridge Cleaver's attack on institutional racism gave force to their arguments. Individual bias might be difficult to counteract, but institutional racism could be fought with new institutions.

Personnel managers began to see equal opportunity law as the profession's best chance for expansion. Meanwhile the courts looked to leading firms to define compliance. The women's movement took off in this decade, modeling itself on the civil rights movement after women's advocates in the federal government called for grassroots support. That movement emerged not from the bottom up, but from the top down, organized by elites to build consciousness and support for women's issues.

The 1980s: How Reagan Promoted Diversity Management

Uncertainty about what the Civil Rights Act implied had led firms to appoint experts to track changes in the law and devise compliance strategies. These experts played the role that the courts are supposed to play, adjudicating debates over compliance. When Reagan suggested that affirmative action had done its job and could be dismantled, these experts came to the defense of their programs. They framed performance evaluations, skill training, and job-posting systems as part of an effort to rationalize the allocation of "human resources."³³ Those programs had been torn from the modern personnel administration manual of the 1950s, and rebranded as affirmative action measures, and so now they came full circle. In *The Economics of Discrimination*, economist Gary Becker had argued that discrimination raised wage costs by shutting some groups out of the labor market.³⁴ Experts now argued that it was inefficient to allow middle managers to favor workers of their own sex and race, and pointed out that new workers would be disproportionately female and minority.³⁵

The efficiency argument worked for programs like job-posting systems, which had nothing connecting them to equal opportunity law. For other programs, experts like uber-consultant R. Roosevelt Thomas dropped the language of legal compliance for a language of "diversity management."³⁶ Diversity training, culture audits, and diversity performance evaluations were built on personnel's sensitivity training, attitude surveys, and performance evaluations. To the extent that diversity experts could frame these programs as key to corporate effectiveness, they could win a permanent role for them. Experts aligned the new pro-

grams with ideas from the social sciences. The cognitive revolution that had swept through academia suggested that mental categories shape the behavior of managers and workers alike, and influence hiring and promotion decisions. One remedy was diversity training to alter managerial cognition. For disadvantaged workers, stereotyping can impede ambition and lead to self-handicapping. The remedy was mentoring and networking programs that would impart the skills and insider knowledge necessary to succeed, and at the same time offer positive role models.

The 1990s and 2000s: Gender Discrimination at Center Stage

The human resources profession had gradually become feminized between 1970 and 1990, and leaders came to champion women's issues. In the 1970s, personnel experts pushed firms to install maternity leave programs to comply with civil rights law, until the Supreme Court ruled in 1976 that Title VII did not require maternity leave. By that point, leading firms had maternity leave programs on the books, and so personnel experts' advocacy for them helped to quell corporate opposition to the Pregnancy Discrimination Act of 1978. After that, personnel experts did not argue that other work life programs were required by the Civil Rights Act, but they did argue that flexible working arrangements and child care supports could be part of a "good-faith effort" defense against claims of gender discrimination. The link between Title VII and work-family programs remained tenuous, but the proponents of Title VII programs and work-family programs within firms were one and the same. Public officials had created tax incentives and federal demonstration projects that supported on-site child care, dependent care expense accounts, flextime, and part-time career options, and these helped personnel experts to build a case for work-family programs.

Women's advocates in personnel did, by contrast, tie new programs to fight sexual harassment at work directly to Title VII. The women's movement focused attention on the issue of harassment at work in the 1970s. It was personnel experts who proposed the remedy: sexual harassment grievance procedures, modeled on union grievance procedures, and harassment sensitivity training, modeled on diversity training and ultimately on the management sensitivity training seminars of the late 1960s.³⁷ In 1991, Anita Hill's charge that Supreme Court nominee Clarence Thomas had sexually harassed her at the Equal Employment Opportunity Commission focused national attention on the issue, and it was human resources experts who pushed again for firms to create systems for fighting harassment. The press coverage helped win congressional support for the Civil Rights Act of 1991, which gave women the same right to sue for punitive damages that African-Americans had.³⁸ By popularizing harassment training and grievance

procedures, human resources experts helped to win judicial support for them in 1998, when the Supreme Court found that these practices could inoculate employers against liability in some hostile work environment cases. The court came to view practices that were widely popular as adequate compliance efforts.

A Note on Evidence

In the coming chapters I present graphs tracing the diffusion of dozens of different equal opportunity practices across firms. The data come from surveys I conducted in 1986 with colleagues John W. Meyer, W. Richard Scott, and John Sutton, in 1997 with Erin Kelly, and in 2002 with Alexandra Kalev. They cover 279, 389, and 829 employers respectively, and each sample covers a broad cross-section of industries.³⁹ Each covers small and middling firms as well as the corporate giants that most surveys focus on. To develop these longitudinal graphs my collaborators and I collected life histories of employment practices by asking managers whether, and when, they had used each practice. The surveys offer a picture of the diffusion of innovations. I report evidence from many cross-sectional surveys as well, and these typically show that the biggest firms were the first to embrace innovations. In later chapters I also quote from in-depth interviews with human resources managers, mostly conducted in collaboration with Erin Kelly, Alexandra Kalev, and Shawna Vican between 1997 and 2008. To chart the evolution of the personnel profession's position I rely on histories of firms, reports written by personnel experts, oral histories, studies done by management groups, and in particular, articles in the management press by personnel experts promoting new equal opportunity innovations.

Conclusion

Before 1960, it wasn't merely difficult for a black man or a white woman to get a job as a manager in most firms, it was impossible. Most American employers wouldn't hire women, blacks, or Latinos for any job a white man would take. There were some seeming exceptions, as when the Rosie the Riveter campaign brought women onto the factory floor during World War II. But Rosie was out of luck the moment veterans returned from the war. Many firms put it in writing: women and blacks were not eligible for skilled or management jobs. Federal rules against discrimination by munitions contractors and state laws against discrimination in government service had done little to change this.

The Civil Rights Act of 1964 revolutionized America's long-standing treatment of employment as a matter of free contract. Originally, employers could hire whomever they pleased under whatever terms they could

get. They could barter passage to the New World for seven years of indentured servitude. With the 1964 act, Congress extended the right of equal protection from the citizen-state relationship to the employee-employer relationship. Washington had already extended certain rights to employees, such as the right to bargain collectively, but the idea that you could not hire whomever you pleased was new in the eyes of many.

The law did not require anything specific, it merely outlawed discrimination. In the face of uncertainty about just how judges would interpret this ban, entrepreneurial personnel experts promoted one wave after another of equal opportunity innovations. Most of the programs were based on old personnel standards, such as the grievance procedure. This saga lays bare a peculiar dynamic between the state and society in the United States. The constitutional constraints on federal power—the separation of powers, the common-law tradition, and the sharing of authority with the states—opened the government to invasion, allowing activists, social scientists, and more than any other group, personnel experts to champion new ideas about what the law should require employers to do. Activists called for civil rights law to cover harassment. Women’s rights advocates in federal posts called for it to cover pregnancy discrimination. Social scientists argued that firms should protect against institutional racism and cognitive bias. Personnel experts designed practices and programs to respond to all of these ideas, and many notions of their own, even before federal officials ruled on them.

The constitutions of most other countries did not admit such changes in the meaning of the law. Thus, for instance, while the U.S. Supreme Court found in 1971 that seemingly neutral employer practices could be discriminatory if they had a “disparate impact” on disadvantaged groups, it was 30 years before a similar prohibition found its way into French law, and that only came through new legislation responding to the European Union’s Race Directive of 2000.⁴⁰ France’s less porous civil law system meant that employers did not worry that judges would reinterpret the laws against race and gender discrimination, and one result was that employers did very little to comply with those laws. That was true in nearly every country but the United States.

The great paradox of our federal system is that the constitutional weakness of our state contributes to a powerful collective culture. The 1964 law created not a single, episodic, change in public policy but a decades-long public debate about the definition of discrimination among civil rights leaders, women’s movement activists, social scientists, personnel experts, corporate executives, pundits, judges, federal bureaucrats, and legislators. Even though the statutory definition of discrimination remains nearly as vague as it was in 1964, in debating what

the law meant, we have come to a broad consensus about the details. We now think that sexual harassment constitutes employment discrimination and that stereotypes can affect promotion decisions. Workers see institutional racism and cognitive bias around them, largely because the law stimulated this debate and led an army of equal opportunity experts to devise remedies to these forms of discrimination. Americans encountered new definitions of discrimination at work, in the form of promotion systems to counter institutional racism and training programs to fix cognitive bias.

Americans have long seen their social institutions and national culture as originating in the community rather than in the state. We see culture as arising from below, even when it is stimulated by public policy. The form that equal opportunity law took contributed mightily to the view that fair employment practices were private inventions. Equal opportunity experts claimed civil rights grievance panels and diversity training as their own innovations, not as mechanistic responses to the law. That reinforced a long rhetorical tradition of *laissez-faire* that suggested that government interventions were illegitimate, and so were the compliance strategies they elicited. In defining equal opportunity measures as private innovations, personnel experts left the door open to redefine them as good business—as efficient in their own right. Near the end of the first decade of the twenty-first century, Fortune 500 companies have extensive diversity management offices, which administer relabeled compliance programs, and slim affirmative action offices, which write mandatory affirmative action plans and fill out federal forms. The link between most compliance programs and the law has been deliberately severed. The result is that most everything American firms did to comply with equal opportunity law, they now define as stimulated by one new management paradigm or another. In a nation that has long defined government regulation as illegitimate, this was perhaps the surest way to guarantee the survival of compliance measures.

The history of the Sherman Antitrust Act of 1890, designed to prevent large companies from quashing their smaller competitors through restraint of trade, may portend the future of equal opportunity. Sherman was roundly villainized by corporations as unwanted, inefficient, government meddling in industry, or as the beginning of a new form of tyranny. But it stuck, and through a Herculean effort of mass cognitive dissonance, Americans came to view it as reinforcing market competition. For most of the twentieth century, it was heralded as one of the foundations of America's greatness for its role in reinforcing the natural laws of the market. Americans came to see it not as an intervention at all. If one key to maintaining Americans' belief in *laissez-faire* was to frame compliance practices as private inventions, the other key was to deny

government policies as interventions, and to frame them as supports for natural market mechanisms. The Sherman Act was so redefined. Equal opportunity laws are not there yet, but when Reagan sought to tear down affirmative action, corporate America stood together to oppose the idea, arguing that it had improved corporate use of talent and made personnel systems more efficient. Equal opportunity laws may one day be viewed as outlawing price discrimination in the labor market just as antitrust outlaws it in the product market, preventing firms from paying more for white male labor than for black female labor.

One of the most surprising things about the compliance regimes that corporations popularized is that they remain largely untested. They spread among firms, and were vetted by courts, without evidence of their efficacy in equalizing opportunity. We still know little about whether the recruitment programs of the 1960s, the performance evaluations of the 1970s, the harassment grievance procedures of the 1980s, the diversity training of the 1990s, or the diversity councils of the 2000s actually helped to integrate workplaces. What we do know is discouraging. We know that employers subject to affirmative action edicts saw some increases in racial and gender diversity beyond the increases their peers saw during the 1970s, and that, in the 1980s, contractors stopped outpacing others.⁴¹ Yet even for the 1970s, we don't know which of the innovations helped federal contractors to hire and promote more blacks. Thus employers and regulators are still choosing strategies based on spin, rather than evidence. My colleagues and I are working on the question of which of these measures have been effective in equalizing opportunity, but the answer will have to wait for another book.⁴²

Another issue I do not take up in any detail is equal opportunity for the disabled. As corporate response to disability protections has not been to remaster favorites from the personnel playlist, a discussion of disability would not fit within the confines of this book.