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# Why France Needs to Collect Data on Racial Identity . . . In A French Way

By DAVID B. OPPENHEIMER\*

[1] Statistics by ethnic categories are dangerous because they stigmatize people and are likely to support xenophobic or racist behavior. [2] Statistics by ethnic categories are necessary to fight against discrimination.

– Laurent Thévenot<sup>1</sup>

## I. Introduction

In the fall of 2003, as I was preparing a comparative law presentation<sup>2</sup> for a French conference commemorating the fiftieth anniversary of *Brown v. Board of Education*,<sup>3</sup> I hired a number of

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\* Professor of Law & Associate Dean for Faculty Development, Golden Gate University School of Law. This essay is derived from a talk presented in June 2007 at a conference on race and diversity at the University of Paris X (Nanterre) — Colloque diversité et discrimination raciale. A version will be published in French in 2008 by Dalloz as part of the conference proceedings. I am grateful to Sophie Robin-Olivier and Daniel Sabbagh for their comments on an earlier draft of this paper; Anne Deysine, Sheila Foster, Sophie Latraverse, Daniele Lochak, Marie Mercat, and Kendall Thomas for our discussions of the issue; and Elisabeth De Carvalho, Benedicte Magdelaine, and Nadege Morvant for their research and translation assistance.

1. Laurent Thévenot, *Droit et Bonnes Pratiques Statistiques en Matière de Discrimination, Jalons historiques d'un questionnement sur les origines* (INSEE 15-16 2006). “[1] Les statistiques par catégories ethniques sont douteuses et dangereuses parce qu'elles stigmatisent les personnes et risquent de favoriser des comportements xénophobes ou racistes. [2] Les statistiques par catégories ethniques sont nécessaires pour lutter contre les discriminations.” (Translation by author).

2. See David Benjamin Oppenheimer, *Evaluating the U.S. Policy of Using Private Lawsuits to Remedy Employment Discrimination*, 49 2005/1 DROIT ET CULTURES 109 (2005) (the presentation was published as part of symposium issue *Egalité et Discrimination: Etats-Unis, Europe, France*).

3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

students as research assistants. Some were French nationals who had recently earned their law degrees in France and were enrolled in an L.L.M. program at Golden Gate University School of Law. Soon after I hired them, two of the students returned from the Social Security office, where they had applied to enroll in the United States Social Security system so that we could pay them for their work. One, I'll call her Emilie, was visibly upset. I asked her what was wrong. "You would not believe what happened to me at the Social Security office," she began, "it was ridiculous." "What happened?" I asked. "The clerk, she asked me for my 'race or ethnicity'—how can I answer such a question?" In my naivety I thought I could help her understand the question, which I assumed had confused her. "Emilie," I asked, "where did your family come from, before moving to France?" Emilie rose from her chair, now apparently angry with me, as well as the social security clerk. In a commanding voice, she exclaimed "Professor, I am a citizen of France."

Emilie's friend, let's call her Christine, had until then been silent. Now she spoke, helping me out. "Well, professor, the clerk asked me the same question, what is my race or ethnicity, so I asked her, 'You mean I get to choose?' And she replied, 'Yes, of course, this is America; everyone gets to choose.' So I told her, 'In that case I choose to be white, because in America it is good to be white.'"

I now understand that this exchange illustrates a critical difference between the legal and cultural conceptions of equality and race in the United States and France. The question asked by the clerk was completely proper in American law and culture, where we routinely gather data about race and ethnicity.<sup>4</sup> But in France, where a central principle of republicanism is that the only legitimate identity in the public sphere is citizenship, it is unacceptable for a state agent to ask a person for her race or ethnicity, and for me to press the question was rude and insulting.

It is central to the French ideal of equality and citizenship that the state refrain from making distinctions based on race or ethnicity.

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4. For example, the United States has collected racial identification data as part of our census since 1790. See Jamin B. Raskin, *Common Sense, Common Census: Should America Follow France and Abolish Race Questions on the Census*, 49 2005/1 DROIT ET CULTURES 21 (2005) (symposium issue on *Egalité et Discrimination: Etats-Unis, Europe, France*); MELISSA NOBLES, *SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS* (Stanford University Press 2000); PETER SKERRY, *COUNTING ON THE CENSUS? RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS* (Brookings Institution 2000).

The principle has its roots in the revolution of 1789 and the resulting Declaration of the Rights of Man and Citizen.<sup>5</sup> The most recent French Constitution, adopted in 1958 carries forward this principle, banning all distinctions based on racial identity.<sup>6</sup> The French state is therefore generally barred from collecting data that we regard as commonplace in the United States.<sup>7</sup> This bar was recently affirmed by the Conseil Constitutionnel, which rejected part of a bill passed by the French parliament permitting the collection of statistics reporting racial and ethnic identity for the purpose of measuring discrimination.<sup>8</sup>

But to bar state recognition of race is not to eliminate racism. While racial/ethnic/religious discrimination and inequality may be difficult to measure in France, most observers agree that it is a serious problem. And, to comply with European law, France has now adopted legislation prohibiting “indirect” employment discrimination, and thus adopting the “adverse impact” theory of anti-discrimination law.<sup>9</sup> Such discrimination is commonly proven by examining racial or ethnic identification data; for example, by comparing workforce data collected through a national census with employer utilization data to prove employment discrimination. Yet such data are not currently available in France. How then, can France enforce its laws against discrimination?

In this essay I argue that France must find a way to collect data on racial identity. I offer some suggestions from the American experience that might be helpful in designing a French solution to the problem, but I recognize that to comply with important values in

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5. *1789 Declaration of the Rights of Man and Citizen* (incorporated in the Constitution of the Republic of France in 1958) art. 1 (men are born free and equal), art. 6 (all citizens are equal in the eyes of the law, and eligible to all public positions and occupations according to their abilities).

6. 1958 CONST. art. 1 (FRN) (assuring equality before the law of all citizens without distinctions based on origin, race or religion).

7. Law No. 78-17 of 1978, *Journal Officiel de la Republique Francaise* [J.O.][Official Gazette of France], Jan. 6, 1978, secs. 1-8 (amended Aug. 6, 2004). The Act prohibits collecting “any information that shows, directly or indirectly, racial origins, political, philosophical or religious opinions, trade union membership, or moral principles” without either the written consent of the individual or an advance recommendation of the National Commission for Information Technology & Civil Liberties (CNIL), which must first be approved by the Conseil d’Etat. Section 8-I.

8. CC decision no. 2007-557DC, Nov. 15, 2007, J.O. Nov. 21, 2007 p. 19001.

9. See Council Directive 2000/43, 2000 O.J. (L 180) (EC) (requiring member states to prohibit direct and indirect discrimination); C. TRAV. Art. L. 122-45 (adding indirect discrimination to prohibition of employment discrimination).

French law and culture, France must find a uniquely French method of data collection.

## II. Measuring Discrimination in the United States – State Generated Data

In the United States, it is routine for the state to collect data on race. Although our Fourteenth Amendment prohibits the state from depriving persons of “equal protection of the laws” and thus restricts the use of racial criteria in public decision making, it does not limit state collection of racial data.<sup>10</sup> The United States Census Bureau collects and reports extensive data about American demography based on race and ethnicity. As a result, it is relatively easy to measure the existence of racial inequality in the United States.

For example, a quick look at the Census Bureau’s annual report, the Statistical Abstract of the United States, reveals that:

- A black family is nearly three times as likely as a white family to earn under \$15,000/year (22 percent – 8 percent), while a white family is over twice as likely as a black family to earn over \$100,000/year (21 percent – 9 percent).<sup>11</sup>
- The median family income of a white, non-Hispanic family is \$55,768, while it is just \$34,272 for an Hispanic family and \$34,369 for a black family.<sup>12</sup>
- The median family net worth of a white, non-Hispanic family is \$120,900, while the median family net worth of a non-white or Hispanic family is \$17,100.<sup>13</sup>
- Blacks constitute 12 percent of the workforce,<sup>14</sup> but only 6 percent of the college professors or physicians, 5 percent of the lawyers, and 3 percent of the architects and pharmacists. However, they are 22 percent of the home

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10. *Parents Involved in Cmty. Sch. v. Seattle Sch. I Dist. No. 1*, 127 S.Ct. 2738, 2796 (2007) (Kennedy, J., concurring).

11. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, Table 677 (125th Edition) Washington, DC, 2005, available at <<http://www.census.gov/compendia/statab/2006/2006edition.html>>.

12. *Id.* at Table 679.

13. *Id.* at Table 702 (this is NOT a typographical error; black and non-white Hispanic families have a median family net worth that is just 14 percent of the median white family net worth).

14. *Id.* at Table 632.

care aids, 28 percent of the security guards, and 30 percent of the postal clerks and refuse collectors.<sup>15</sup>

Another example is data measuring the racial isolation of American school children. A report by the Harvard/UCLA Civil Rights Project, relying substantially on state-generated data, reported that 58 percent of US public school students are white, with 17 percent black and 19 percent Latino. But on average white students attend schools that are 78 percent white, while black and Latino students attend schools that are only 29 percent white. Among black students, 73 percent attend schools that are over 50% non-white, with 38 percent attending schools that are over 90 percent non-white. This data is important because “majority minority” schools have the worst facilities (buildings, labs, libraries, athletic facilities), the least qualified teachers, the worst overcrowding, and the least financial support.<sup>16</sup>

Yet another example is data measuring racial differences in police conduct. A 2005 study by the United States Justice Department reports that when police stop a motorist, Hispanic drivers or their cars were searched 11.4 percent of the time and blacks 10.2 percent of the time, but whites were only searched 3.5 percent of the time.<sup>17</sup> A similar study by the Portland, Oregon Police Department revealed that the police were far more likely to stop black or Hispanic drivers than white drivers, and far more likely to search black and Hispanic drivers than white drivers they stopped, even though they were more likely to find evidence of wrongdoing in searches of white drivers.<sup>18</sup> In 1999 in New York, police were far more likely to stop and search black or Hispanic pedestrians than white pedestrians; six times more likely for blacks, four times more likely for Hispanics.<sup>19</sup> By 2007 the problem had increased so that

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15. *Id.* at Table 604.

16. Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation* (Harvard/UCLA Civil Rights Project 2006).

17. Jonathan D. Glater, *Race Gap: Crime vs. Punishment*, N.Y. TIMES, Oct. 7, 2007.

18. See Portland Police Bureau Planning and Support Division, *Portland Police Bureau Traffic Stops Data Collection 2006 Statistical Report*, Feb. 21, 2007, available at <<http://www.portlandonline.com/police/index.cfm?c=42284>> (visited Dec. 22, 2007).

19. See Attorney General of New York, *New York State Attorney General's Stop and Frisk Report* (1999), available at <[http://www.oag.state.ny.us/press/reports/stop\\_frisk/ch5\\_part1.html](http://www.oag.state.ny.us/press/reports/stop_frisk/ch5_part1.html)> (visited Dec. 22, 2007).

blacks were nearly ten times as likely to be stopped as whites.<sup>20</sup>

These kinds of state-generated data measuring racial inequality in the United States play an important role in public debate over the problem of inequality. As discussed herein, they have no counterpart in French society.

### III. Measuring Discrimination in the United States – Social Science Data

In addition to state-generated data, American social scientists collect substantial data that further illustrates the impact of race in American life. The most common methodology is “audit studies” in which teams of white and black auditors pose as job seekers (or home-seekers, car buyers, etc.). By comparing the treatment of the auditors, the examiner can determine whether discrimination is occurring. Such studies can be directed at a community or industry, or at a single employer or seller. Other studies rely on direct observation, in which race (or whatever feature is being examined) is recorded based on the visual observations of the examiner. Other studies, while less precise, may rely on neighborhood, measuring whether a difference in treatment can be detected between residents of minority neighborhoods and residents of majority neighborhoods.<sup>21</sup> For example:

- In one recent experiment conducted in Wisconsin, employers given a choice between two job candidates, one a black high school graduate, the other a white high school drop out who had spent the past year in jail, preferred the white candidate.<sup>22</sup>
- In another experiment, when resumes are equal except for the name, employers strongly preferred candidates named Kristen (a common name for whites) over those named Tamika (a common name for blacks).<sup>23</sup>

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20. See New York Civil Liberties Union, *Analysis of New NYPD Stop-and-Frisk Data Reveals Dramatic Impact on Black New Yorkers*, available at <<http://www.nyclu.org/node/1504>> (visited Dec. 22, 2007).

21. As discussed herein, many of these U.S. studies, and thus much of these data, could be replicated without relying on State collection of data efforts.

22. Devah Pager, *The Mark of a Criminal Record*, 108(5) AM. J. SOC. 937 (2003).

23. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94(4) AM. ECON. REV. 991; Alan B. Krueger, *Economic Scene; Sticks*

- In a third experiment testing employer hiring practices in Chicago and Washington D.C., researchers found that when equally qualified job applicants apply for identical entry level jobs, white applicants were two to three times as likely to be offered the job as black applicants. When both were offered a job, the white applicant was frequently offered a higher starting salary; the black applicant was never offered a higher salary.<sup>24</sup>
- An audit study of hiring practices in California revealed that temporary employment agencies preferred white workers over equally qualified black workers by a 2-1 ratio in San Francisco and a 4-1 ratio in Los Angeles.<sup>25</sup>
- A study reported in the Harvard Law Review revealed that automobile dealers in Illinois charge black customers substantially more than white customers.<sup>26</sup>
- Other studies of automobile dealers examined the interest rate charged to buyers of new cars who finance their purchase. They revealed that dealers charge higher interest rates to black buyers.<sup>27</sup>
- Social science studies looking at black home buyers found that they were more likely to be steered to “sub-prime” loans, with higher interest rates, as compared to white home buyers with identical credit ratings.<sup>28</sup>

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*and stones can break bones, but the wrong name can make a job hard to find*, N.Y. TIMES, Dec. 12, 2002, at C2.

24. Margery A. Turner et. al., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING at 41 tbl.4.4 (Urb. Inst. Rep. 91-9, 1991).

25. Jenny Bussey & John Trasvina, *Racial Preference: The Treatment of White and African American Job Applicants by Temporary Employment Agencies in California*, Discrimination Research Center (Dec. 2003), <<http://www.impactfund.org/DRC%20December%202003%20Report.pdf>>.

26. Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 831, 872 (1991) (white men offered cars at \$818 over dealer cost while black men asked for \$1,534 over dealer cost and black women asked for \$2,169 over dealer cost; Ayers estimates that blacks pay an extra \$150,000,000 annually for new cars because of race-based price discrimination).

27. Diana B. Henriques, *Review of Nissan Car Loans Finds that Blacks Pay More* (2001), N.Y. TIMES, Jul. 4, 2001 available at <[http://query.nytimes.com/gst/fullpage.html?res=9902E6D71F39F937A35754C0A9679C8B63&sec=&spon=&page\\_wanted=1](http://query.nytimes.com/gst/fullpage.html?res=9902E6D71F39F937A35754C0A9679C8B63&sec=&spon=&page_wanted=1)>.

28. Debbie Gruenstein Bocian et al., *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending



These privately generated data play a critical role in revealing the depth and breadth of racial inequality in the United States. They help illustrate the truth of the otherwise controversial proposition<sup>29</sup> that racial discrimination remains a serious problem, over fifty years after the *Brown* decision, and over forty years after the 1964 and 1965 Civil Rights Acts, banning discrimination in employment, education, public accommodations, and voting.

These are powerful data. They give us a revealing look at the enormous disparity of wealth, income and educational opportunity, and at the differences in treatment, between whites and non-whites in the United States. But do they have any relevance for France?

#### IV. Racial Discrimination and Inequality in France

Racial, ethnic and religious discrimination violates the fundamental principle of equality before the law, a founding principle of French republicanism, found in the French Constitution, in numerous provisions of the French Codes, and in the Directives of the European Commission.<sup>30</sup> France is thus, in American parlance, officially "color-blind." But in France as in the United States, the principle of color-blindness can mask a color-conscious society, in which race and ethnicity are closely linked to discrimination and disadvantage.

In interviews and research conducted over the past three years with French scholars, lawyers, law students and activists, I have asked whether problems of inequality similar to the United States, and similar data measuring the problem, exist in France. The most common response has been speculation that French census data

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(2006) at 3, available at <<http://www.responsiblelending.org/pdfs/rr011-Unfair%5FLending-0506.pdf>>.

29. Despite these data, many Americans believe that racial discrimination and inequality have been largely eliminated from American life. For a best-selling book supporting that view, see Stephan and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (1997).

30. See the *1789 Declaration of the Rights of Man and Citizen* (incorporated in the Constitution of the Republic of France in 1958), art. 1 (men are born free and equal), art. 6 (all citizens are equal in the eyes of the law, and eligible to all public positions and occupations according to their abilities), 1958 CONST. art. 1 (FRN) (assuring equality before the law of all citizens without distinctions based on origin, race or religion); C. PEN. Art. 225-1 (FRN) (prohibition of discrimination); C. TRAV. Art. L. 122-45 (prohibition of employment discrimination); Council Directive 2000/43, 2000 O.J. (L 180) (EC) (requiring member states to prohibit discrimination).

would reveal similar, if less dramatic, inequality, but that since the data are not collected we cannot measure the extent of the problem. But as discussed herein, those most knowledgeable have pointed to data collected by social scientists that constitute substantial evidence of inequality, yet receive little attention in the French press. In the absence of state-generated data, it seems clear that there are important questions about the wealth, income, opportunities and social status of French citizens that we cannot fully answer. As a result, those who wish to address the problem are left without an important tool, while those who do not regard discrimination and inequality as an issue in French life are permitted to hide behind this lack of data. Nonetheless, there are more data than are generally acknowledged, and they reveal a substantial divide based on race and ethnicity.

From my limited time spent in France,<sup>31</sup> my own impression is that there is more racial and ethnic integration than in the United States. In particular, inter-racial friendships and intimate relationships appear to be more common in France than in the United States, and appear to be less controversial. Nonetheless, even a visitor sees enormous differences in the social status of non-whites in France. Nor do the French disagree; in my interviews, most of the French Muslims and French citizens of African descent (including North African and sub-Saharan African) with whom I spoke regard discrimination as a serious problem, as did many “non-minority” French citizens. Polling data confirms that these responses are representative.<sup>32</sup> For example, according to a 2007 poll conducted by TNS-Sofres, over half of black French respondents stated that they had experienced racial discrimination.<sup>33</sup> According to a 2006 poll, conducted by the European Union (the “Euro-barometer”), 80 percent of French respondents believe that ethnic origin discrimination is widespread in France, and over half believe that it

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31. I’ve spent approximately seven months in France over the past three years, during which time I have taught courses on comparative equality law, lectured on questions of U.S. equality law, and met with French scholars, lawyers, law students and activists.

32. See *Black Residents of France Say They Are Discriminated Against*, INTERNATIONAL HERALD TRIBUNE (Paris), Jan. 31, 2007, available at <<http://www.ihrt.com/articles/2007/01/31/news/bias.php>>.

33. *Id.*

had become worse in the prior five years.<sup>34</sup> According to a 2003 poll by TNS-Sofres, 71 percent of French respondents believe that a person from North Africa or Africa faces increased discrimination.<sup>35</sup>

Whether we describe them as “minorities” or “visible minorities” or “immigrants” (a term sometimes extended to non-immigrant French citizens who are descended from non-European ancestors), or “blacks and Arabs” or “Africans” or “North and sub-Saharan Africans” or some other term of outsider identity, there are a substantial number of French citizens who are distinguished from French citizens of European descent by their skin color and ancestral origins. These French citizens are widely believed, and by some data revealed, to be less likely to have high-paying and/or high-status jobs, less likely to attend top schools and universities, and less likely to live in high-quality housing, than lighter-skinned French citizens. Although the dark-skinned population of France is believed to be substantial, there are only a handful of dark-skinned French citizens elected to the National Assembly from the constituencies within continental Europe. (There are several more elected from the overseas Departments in the Caribbean and South America.) In the first poll ever taken of self-identified French blacks, they overwhelmingly responded that they were discriminated against because of their color.<sup>36</sup>

Housing segregation is sufficiently entrenched that an affirmative action admissions program that provides preferences to students who live in economically disadvantaged neighborhoods (“banlieues”) can substitute for a race-based program in recruiting students perceived as not being “native French” to an elite (and largely white) school.<sup>37</sup> The riots that began in the suburbs of Paris in the fall of 2005 and

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34. See *Special EUROBAROMATOR 263 “Discrimination in the European Union”* 7 (2007) (survey on European Commission website), available at <[http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_263\\_sum\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_sum_en.pdf)>.

35. TNS-Sofres, *Discriminations sur l'apparence dans la vie professionnelle et sociale* (survey May 2003), available at <<http://cergors.univ-paris1.fr/docsatelecharger/Discrimination%20sur%l'apparence-dia%20Int%E9rim%20.pdf>> (discussed in Jean-François Amadiou, *Employment Discrimination: The Situation Today and Future Research Required* (May 2005) (paper presented at Columbia University), available at [http://www.egalites.net/dmdocuments/EMPLOYMENT\\_DISCRIMINATION.pdf](http://www.egalites.net/dmdocuments/EMPLOYMENT_DISCRIMINATION.pdf))).

36. See *Black Residents of France Say They Are Discriminated Against*, *supra* note 32.

37. See Daniel Sabbagh, *Affirmative Action at Sciences Po*, 20 *FRENCH POL. CULTURE & SOC'Y* 52, 52-53 (Fall 2002).

spread to many minority neighborhoods were widely understood around the globe and within France to be race riots, and a wake-up call for France.

In the wake of the riots and the growing evidence of intolerable inequality why not begin collecting racial identity data, and thus, measuring discrimination and inequality?

Two arguments are raised in support of the position that the French state should not collect data on racial identity. The first goes to the central role that equality plays in French law and culture. The ideal of French equality goes beyond race, origin or religion, to favor equality without regard to any characteristic other than merit.<sup>38</sup> And when race is invoked, there is a deep commitment to “color-blindness.”<sup>39</sup> As the first half of the quote by Laurent Thévenot in the introduction of this essay reveals, there is a deep concern that “statistics by ethnic categories are dangerous because they stigmatize people and are likely to support xenophobic or racist behavior.”<sup>40</sup> In other words, some worry that simply by identifying individuals and collecting data about them by racial category, we legitimize the categories, and thus make it easier to discriminate.

This view is endorsed by at least some French minority citizens, who fear the use of such data will be not to reveal discrimination, but to perpetuate it. Thus, in a 2005 poll by the National Institute of Demographic Studies (INED), while only 12 percent of all of the respondents (French citizens) were uncomfortable (“mal à l’aise”) with being classified in an ethno-racial category for the French census, twice as many among the respondents who were immigrants and their direct descendants were reluctant to be so classified. This reluctance was highest among French Arabs.<sup>41</sup>

The reluctance may be more understandable in light of the second argument, which concerns the use of race in French history. Two examples stand out. First, the “black codes” of the seventeenth and eighteenth centuries permitted “Negro slavery” in the overseas

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38. See generally Julie Chi-Hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295 (2007).

39. *Id.*

40. “[1] Statistics by ethnic categories are dangerous because they stigmatize people and are likely to support xenophobic or racist behavior. [ 2 ] Statistics by ethnic categories are necessary to fight against discrimination.” Thévenot, *supra* note 2. (Translated by author).

41. Patrick Simon & Martin Clément, *L’enquete mesure de la diversité de l’INED*, INED Population & Sociétés, juillet - août 2006, no. 425.

territories (the “Outre Mer”) of the Caribbean and South America.<sup>42</sup> Even when France abolished slavery in 1848, the law continued to distinguish between French citizens from “metropolitan France” and French citizens of the “Outre Mer.” The distinction was only abandoned after World War II.<sup>43</sup>

Second, when the collection of data about racial identity is discussed, it raises the memory of how the state collected religious/racial identity data during the period of collaboration with the Nazis, when over 75,000 Jews were deported from France and murdered in the death camps.<sup>44</sup> One cannot visit the French police files on the Jews (“fichier juif”), and view the actual file cards, each stamped with a large “J,”<sup>45</sup> without profoundly understanding how collecting data on racial identity contributed to the genocide in recent French history.<sup>46</sup>

Despite this history of abuse, in May 2007 a proposal was made by the French agency charged with protecting privacy (CNIL) that the Parliament consider authorizing the collection of ethnic data in order to measure discrimination, while carefully protecting individual privacy.<sup>47</sup> In October 2007 the French National assembly and Senate passed a controversial immigration bill that included an amendment to the Data Protection Act which would permit limited collection of racial and ethnic data, under the protection of the CNIL, for the purpose of measuring discrimination and diversity.<sup>48</sup> The bill was proposed by the majority party UMP (Union pour un Mouvement Populaire) and opposed by the Socialists, who immediately asked the Constitutional Council (Conseil Constitutionnel) to review the act

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42. See Danièle Lochak, *La race: une catégorie juridique*, in *Actes du colloque Sans distinction de ... race* 33 (Presses de la FNSP 1992).

43. *Id.* Professor Lochak dates the end of the legal discrimination as 1956, when the voting law was amended.

44. See Suk, *supra* note 38, at 295.

45. They are now housed and displayed by the French National Archives at the Memorial de la Shoah in Paris.

46. For more on the files, and the Shoah memorial museum, see <<http://www.memorialdelashoah.org>>.

47. *Mesure de la diversité et protection des données personnelles: Les dix recommandations de la CNIL*, CNIL 16 mai 2007. See also, Tribune d'Anne Debet, October 5, 2007, *Mesure de la diversité: Le CNIL entendue par le Parlement*. <[www.ldh-toulon.net/spip.php?article2280](http://www.ldh-toulon.net/spip.php?article2280)> (visited Nov. 9, 2007).

48. Law No. 47 of October 23, 2007, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], 2008, available at <<http://www.assemblee-nationale.fr>> (last visited March 2, 2008).

before permitting it to take effect.<sup>49</sup> On November 15, 2007, the Conseil Constitutionnel rejected the amendment, finding that it conflicted with the French Constitution's requirement of equality.<sup>50</sup>

In light of this decision, and of the French historical perspective on the use of racial/ethnic categorization, but given the need to measure discrimination, how can France proceed?

## V. A "French Way" to Legitimately Collect Racial Identity Data

I do not wish to be so arrogant as to tell my French friends and colleagues how to find a French solution to a French problem. No nation has a better reputation for thinking through hard problems, and finding creative solutions. The French contributions to science, math, technology, political theory, urban planning, transportation, health care, and philosophy demonstrate the enormous capacity of the French people to solve difficult problems. Moreover, clearly my country has not solved the problem of racial discrimination, even if we are more adept at measuring it. But perhaps a few thoughts from an American perspective might prove helpful.

First, despite the recent decision of the Conseil Constitutionnel, there is some question as to how controversial it would be to collect racial identity data. In one recent poll conducted for the European Commission, 78 percent of the French respondents stated that they would not object to answering anonymous questions about their racial identity if it would help in the fight against discrimination.<sup>51</sup>

Second, under the Data Protection Act<sup>52</sup> questions about "race" are not permitted, but some research on ethnic origin can be done without changing the law. In the 1999 census, respondents were asked about their status and experience as immigrants or the descendants of immigrants; the practice was controversial, but has not been prohibited.<sup>53</sup> Important work by French demographer Patrick

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49. Under the French legal system, constitutional review of a law passed by the legislature occurs before the law takes effect, at the request of a minimum of 60 members of the Parliament, the prime minister, the president, the president of the Senate, or the president of the National Assembly.

50. CC decision no. 2007-557DC, Nov. 15, 2007, J.O. Nov. 21, 2007 p. 19001.

51. See *Special EUROBAROMATOR 263 "Discrimination in the European Union," supra* note 34.

52. See *supra* note 7.

53. See P. Simon & Joan Stavo-Debaugue, *Les Politiques Anti-Discrimination et*

Simon and others demonstrates that such data can be collected, and that studies of the data reveal significant discrimination.<sup>54</sup> One such 2006 study revealed that the unemployment rate for Algerian male immigrants was 30 percent and for Turkish male immigrants was 25 percent while for Portuguese, Spanish and Italian male immigrants it was under 11 percent, and that these disparities continued in the second generation.<sup>55</sup>

Third, there are no obvious barriers to social scientists conducting audit studies to determine whether certain industries, or certain employers, are discriminating in their hiring practices. Is a particular employer (or industry) rejecting applications from dark-skinned applicants at a higher rate than light-skinned candidates? This is a testable question. Is a certain store treating dark-skinned customers differently than light-skinned customers? If so, an audit study will reveal it. Such studies can be used to examine and publicize the problem of discrimination, or as evidence in a discrimination case brought at the request of the HALDE (the French "High Authority for Combating Discrimination and Against Inequality," alternatively translated as the "Independent High Commission for Equality and Against Discrimination") or a private individual.

Such studies are already underway, and each study published has consistently revealed high levels of discrimination against racial and ethnic minorities.<sup>56</sup> The Cour de Cassation has approved of using an audit study to prove discrimination by a night club accused of excluding persons of North African ancestry,<sup>57</sup> and of proving

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*Les Statistiques: Parametres D'Une Incoherence*, 53 SOCIETES CONTEMPORAINES 57 (2004).

54. See P. Simon, *France and the Unknown Second Generation*, 37(4) INT'L MIGRATION REV. 1091 (2003); E. Cediey & F. Foroni, *Les Discriminations à Raison de "L'Orgine" dans Les Embauches en France*, Bureau International du Travail (2007), available at <[http://www.ilo.org/public/french/bureau/inf/download/discrim\\_france.pdf](http://www.ilo.org/public/french/bureau/inf/download/discrim_france.pdf)>.

55. Dominique Meurs et. al., *Persistence des inégalités entre générations liées à l'immigration: l'accès à l'emploi des immigrés et de leurs descendants en France*, 61(5-6) Population-F 763 (2006).

56. See Jean-François Amadiou, *Enquête "Testing" sur CV*, l'Observatoire des discriminations (2004); Emmanuel Duguet et. al., *Discriminations à l'embauche: Un testing sur les jeunes des banlieues d'Île-de-France*, Centre d'analyse stratégique (2007), available at <[http://www.strategie.gouv.fr/IMG/pdf/2007-03-05discrimination\\_sambauche-testing.pdf](http://www.strategie.gouv.fr/IMG/pdf/2007-03-05discrimination_sambauche-testing.pdf)>; Cediey, *supra* note 54.

57. L'Association SOS Racisme, Cass. crim., June 11, 2002, Bull. Crim., No. 131 at 482. See also L'Association SOS Racisme, Bull. Crim. June 3, 2003, No. 02:86158.

discrimination through telephone audits.<sup>58</sup> In response, the penal code has been amended to permit such testing.<sup>59</sup>

In an example cited by Professor Amadiou, a telephone audit was conducted in which a job candidate with an Algerian or African name called about an opening, and a candidate with a "French" name called immediately thereafter. Eighty percent of the favorable responses favored the majority candidate.<sup>60</sup> In a case decided by the Court of Appeal of Orleans, a young woman with a black-African father and a white-French mother applied for a job with a clothing store by sending them a resume with her photo attached. She was rejected. She then re-sent it with her mother's name and a picture of a white friend. She was offered the job. Her suit under the labor code was successful.<sup>61</sup> The HALDE supports the use of audit testing and encourages large employers to self-test.<sup>62</sup>

Fourth, a proposal was made in the National Assembly (but subsequently withdrawn) that would have required large employers to redact names from resumes before reviewing them.<sup>63</sup> Some companies have undertaken this policy voluntarily, including the large insurance company AXA.<sup>64</sup>

Fifth, polling can reveal bias and prejudice, or discriminatory inclinations. French social scientists are already using polling surveys to measure discrimination; here again, the results point to a high level of discrimination against minorities.<sup>65</sup>

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58. Cour de cassation, chambre criminelle [Cass. crim.] [Court of Cassation, criminal chamber], June 7, 2005, Bull. Crim., No. 04-87354, available at <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007609194&fastReqId=771083443&fastPos=1>>.

59. C. PEN. Art. 225-3.1. See Christophe Wilmann, *Discrimination raciale a l'embauche: la methode du testing*, Lexbase Hebdo No. 252 15 Mars 2007 edition sociale.

60. Amadiou, *supra* note 56.

61. Cour d'appel [CA] [regional court of appeal] Orleans, Mai 11, 2006, No. 311/2006, 05/01195.

62. See HALDE 2006 Annual Report at 37-42 (on file with author), available at <http://www.halde.fr>.

63. *Is ont mis en place le CV anonyme*, JOURNAL DU NET, Feb. 8, 2006, available at <<http://www.journaldunet.com/management/0602/0602121cv-anonyme.shtml>>.

64. *Id.*

65. See, e.g., *Discriminations sur l'apparence dans la vie professionnelle et sociale*, *supra* note 36; *Special EUROBAROMATOR 263 "Discrimination in the European Union," supra* note 35; *Black Residents of France Say They Are Discriminated Against*, *supra* note 33. See generally the work of Professor Jean-



Sixth, there are similarly no obvious objections to observational studies. Are the police more likely to stop dark-skinned drivers than light-skinned? If so, this can be measured through observation. Do taxi drivers pass by dark-skinned clients (a common problem in the United States)? A good test can observe and measure the problem.

Seventh, even if state-collected data does not include race, if there is a close correlation between race/ethnicity and another characteristic which is measured, it can be used as a proxy. Are certain neighborhoods predominantly populated by members of certain minority groups? If so, neighborhood may be a proxy for race/ethnicity. Are those neighborhoods also associated with poverty, or high unemployment, or less access to health care, or inadequate schools? Racial/ethnic discrimination is a likely explanation. This kind of correlation is used by the Institute for the Study of Political Science ("Sciences-Po"), one of the "Grandes Ecoles," to recruit minority students from the economically disadvantaged neighborhoods.<sup>66</sup>

Finally, the French census bureau, INSEE, could be authorized to collect racial identification data anonymously. For example, many American employers need to collect racial identification data about their applicants ("applicant flow data") in order to compare whom they select with who applied. But they do not want to keep racial identification data as part of an applicant or employee's personnel file, where it could be used to discriminate against the employee. So, they include a tear off page on the application, which the applicant completes, but is torn off and filed without the applicant's name, thus keeping his or her racial identification anonymous. A census could be performed in a similar manner. This is similar to the legislation approved by the French Parliament but rejected by Conseil Constitutionnel. Thus, it would require a change from the current view of the Conseil Constitutionnel.

## VI. Conclusion

There are many practices used in the United States to measure racial discrimination that do not require the state to collect racial identification data, or that permit it to be collected anonymously.

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66. Sabbagh, *supra* note 37.

French social scientists, demographers and advocates are already using some of these methods, and others, to permit the collection of racial identification data without violating fundamental principles of French law and society. Each study conducted paves the way for more, by demonstrating that racial and ethnic inequality and discrimination are a serious problem in France. Once we acknowledge that racial discrimination is a problem, it is hard to defend the failure to attempt to measure how serious a problem it is.

The importance of collecting racial identification data was well summarized by Patrick Lozes, president of La CRAN, the largest black civil rights group in France, in a 2007 interview in the *International Herald Tribune*. Discussing a poll revealing that black citizens in France experienced widespread discrimination, Mr. Lozes complained: "If you're not counted, you don't count."<sup>67</sup>

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67. *Black Residents of France Say They Are Discriminated Against*, *supra* note 32.

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