The Social Working of Anti-Discrimination Law

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1 Introduction

Sociology of law, as a distinct discipline, has existed for about a century, and during that time the subject to which probably the most attention has been addressed is the effectiveness of legislation. Although most of that attention has been confined within a paradigm – what I will call 'instrumentalism' – which ultimately proved quite sterile, nevertheless a great deal of insight has been won into how and when legislation produces social effects. More recently a more fruitful paradigm that I will call the 'social working' approach has emerged. This new way of looking at the way legal rules influence social behaviour permits us to present the accumulated insight that we have in a coherent and, I think, a useful way.[1] What I do in this article is present a brief sketch of the new approach and what it has to offer. I shall try to keep things as non-technical as possible. And since I am not an expert in anti-discrimination law in particular, I will have to leave to you most of the work of applying the ideas I will be discussing to that specific situation.

Theoretical knowledge is often counterpoised to practical knowledge and regarded by practical people as abstract, academic and, well, pretty useless. If called upon to justify nevertheless addressing a theoretical argument to a group of people whose concerns I suppose to be primarily practical, my short answer would be to quote a Dutch saying that, roughly paraphrased, goes as follows: 'Even a dimwit usually only stubs his toe once on the same stone'.[2] The dimwit has made a generalization out of his experience: he has inferred that stubbing your toe hurts, not just the first time but every time. The saying thus expresses the essence of scientific theory: theory is generalization from experience. Theoretical insight in this sense is fundamental to all intelligent action. This certainly applies to legislation. The theoretical approach I shall be sketching calls attention to a number of points at which legislative intervention to change established patterns of social interaction can fail. Such a theory is general, but not at all unpractical. It saves us from eternal condemnation to trial-and-error as the

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1 For a general statement of this approach see Griffiths, 'De sociale werking van recht', in: J. Griffiths (ed.), *De socinle werking van recht: een kennismaking met de rechtssociologie en rechtsantropologie* (1996), 469-513.

2 *De ezel stoot zich in 't gemeen slechts één keer aan dezelfde steen.*

only guide to action. That it may seem from time to time to suffer from *déja* vu is not a defect but a virtue: most of any good theory is not really new, but familiar experience presented in a systematic and general way.

2 The Social Working Approach

2.1 *Law* as Seen From the Shop Floor of Social *Life*

The instrumentalist approach to legislation thinks of a legal rule as a particular sort of instrument in the hands of a policy-maker: a command that those addressed are expected to obey, thereby bringing about a desired change. If they do not obey, the long arm of the law will force them to do so. In this way, the command not to discriminate, for example, produces non-discriminatorybehaviour, thereby promoting social equality.[3] Of course, every instrumentalist knows that people do not always obey and that usually nothing happens about it. In fact, much of the instrumentalist literature is depressingly monotonous, for law as an instrument seems rarely to work as it is supposed to do.[4]

In the course of the past decade, a new approach to legislation has developed that seems more promising. It begins by turning the top-down perspective of instrumentalism on its head and looking at the influence of legal rules on behaviour from the bottom-up perspective of those whose behaviour is the object of regulation. If we take the 'shop floor of social life' to refer to the concrete social situation in which that behaviour takes place, then the central question of the social working approach, given that concrete situation and a proposed legal rule, is this:
What will the *(wo)man* on the shopfloor do?

3 On instrumentalism, see Griffiths, *Is Law Important?* Inaugural lecture. Also published in 54 *New York University Law Review* (1978), 339-374; Griffiths, op. *cit.* note 1. McCrudden's lecture at the conference, included in this volume, is a good example of the instrumentalist approach, well illustrating its strengths and weaknesses: the perspective is entirely top-down; the focus is on cases that courts and tribunals deal with; success is *legal* success, measured in terms of the legal system and what it does: cases won, rules changed, etc. Anti-discrimination law is a 'quiver of arrows', judged by their fitness as arrows. The question the social working approach asks is, using this metaphor, not how well-formed the arrows are but how often they hit the target and whether they affect the outcome of the battle.

4 See e.g. Aubert, 'Some Social Functions of Legislation', 10 *Acta Sociologica* (1966), 98. Cf. generally, Griffiths, *op. cit.* note 3. McCrudden, in this volume, is an optimistic exception. To the question 'can I achieve group justice by vigorously pursuing individual justice' he answers 'yes', and he cautions us not to 'underestimate the symbolic power of anti-discrimination law'. The sceptic, instrumentalist or not, wonders whether there is any serious evidence so support this optimism.

2.2 How Could a *Law* Have *Effects* on the *Shop* Floor?

Instrumentalists tend to take for granted exactly those things that are really problematic, beginning with the question what a legal rule, as it emerges from the legislature, really is. To an instrumentalist, the very question seems a silly bit of academic pedantry. Of course everyone knows what a law is. It is a general command from the legislature telling people how to behave in particular situations. On the whole, supposedly, people obey such commands.

If you will bear with me I hope to convince you how useful it can be to be more sceptical about what a legal rule really is. Let us begin with a minimalist view: as it emerges from the legislature a legal rule, reduced to its essentials, is some pieces of paper with words printed on them. (It would be possible to be even more fundamentally sceptical, but this is not necessary for our purposes.) How is it possible that such a thing could influence behaviour that often takes place at a great remove, in both distance and time, from the legislative act?

In themselves, words on paper have no social effects at all, as the example of a beautiful Civil Code that accidentally washes ashore on a tropical island inhabited only by a non-literate society makes clear. The words on paper are there, but all the other conditions of social working are absent. In order for a rule to produce social effects, people must actually use the *rule*. The observation sounds trivial, but its implications are fundamental.

If we were to think the question when, why and how people use rules through in a systematic way, taking into account all the things in addition to the bare words on paper that have to be present if a rule is to have effects on behaviour, we would arrive at a complete theory of the social working of law. I do not propose to do any such thing today. I want only to call attention to a few things we would come across. The actors concerned must know of the rule and understand its meaning. They must be aware of the relevant facts. They must have a sufficient motive for using the rule and must consider doing so feasible and appropriate under the circumstances. And they must not have overriding motives for not using it. As we will see, these simple preconditions for the transformation of words on paper into behaviour contemplated by the legislator are often very problematic.

2.3 *The* Influence *of* the Shop Floor on the *Use* of Rules

The use of rules takes various forms. They can be treated as reasons for behaviour and as a basis for forming expectations about the behaviour of others. They can be invoked to explain or justify, or to object to or complain about behaviour. The use of rules can be articulated as such and clearly differentiated from other social behaviour, as when a person discriminated against makes a formal legal complaint. But it is fairly rare that a rule is thus used as a resource in a case of conflict. Most of the time the use of rules is part and parcel of ongoing social life. Whatever the nature of the use, it always takes place in a concrete social situation: what I have already referred to as the 'shop floor of social life'. It is the specific features of the

shop floor that largely determine the social effects of a legal rule. The key question the social working approach must address is this: what does this concrete social situation look like? and which of its features are important for our question?

Whether it be a workplace, a neighbourhood, a sport club, a hospital, an educational institution, or whatever, a local shop floor has a major influence on all of the conditions that must be met before a rule will be used. An actor, for example, must interpret both the factual and the legal information he or she possesses, and as we will see, the process of interpretation is dominated by the actor's immediate social surroundings. Local social fields have and enforce their own behavioral expectations and these may be quite different from those contained in legal rules: the rules of the shop floor may for example require behaviour that the law considers illegal – such as discrimination – or they may deem it improper to complain to outside authorities about local behaviour. Such shop-floor rules may, for an actor who is highly dependent on shop-floor relationships, be a strong motive for not invoking the law. And so forth.

Unfortunately, the concrete situation on the shop floor rarely plays an important role in the design of legal policy. I could give dozens of examples of this, varying from the regulation of euthanasia and other medical behaviour that shortens life in the Netherlands to land reform legislation in Africa. This June the spiritual grandmother of the social working approach, Prof. Sally Moore – an internationally respected anthropologist of law who has a wide experience in many countries with legislation and its social effects – was in Groningen for a conference. She described the lack of legislative attention to the shop floor as a practically uniform characteristic of the legislative process. I have no reason to suppose the situation is different as far as anti-discrimination law is concerned.

3 The Use of Legal Rules

3.1 Knowledge of Fact and of Law

Let us look for a moment more specifically at one of the most important conditions that must be met before any actor – whether a layperson or an enforcement official – is in a position to use a legal rule: knowledge of the rule and of the relevant facts.

Knowledge and Interpretation of Facts

The actor who uses a rule must be informed about the facts relevant to the application of the rule. Thus equal pay legislation, for example, can remain unused because the beneficiaries do not know they are being paid less than others for equivalent work.[5]

5 Cf. Snell, 'The Equal Pay and Sex Discrimination Acts: Their Impact in the Workplace', 1 *Feminist Review* (1979), 37-57.

A victim of indirect discrimination by a grant-giving agency may not know that she was not proposed for a grant, since all that happened was her professor's very low-visibility decision that because of the agency's discriminatory policy it was not worth the effort to propose her name.

The actor's interpretation of the facts is also critical. There is nothing intrinsic to an experience that determines how it is interpreted; the interpretation of what one knows is the outcome of processes of social interaction in which tentative personal interpretations are checked with those of others.[6] Abel[7] found, for example, that even the victims of discrimination in university promotion-decisions often find it difficult to question the meritocratic pretentions of academic life. They tend to interpret what happened in terms of their own failings. This interpretation by the victim is supported by those in her immediate social surroundings, even her own lawyer.[8] In short, it is his or her social surroundings, not the legislator, to whom an actor looks for a guide to the proper interpretation of an experience.

Knowledge and Interpretation of Law

The law that regulates behaviour is the law as known to and interpreted by the actors on the shop floor of social life. The instrumentalist tradition tends to take legal knowledge for granted: the single, legally 'correct' interpretation of a rule, the interpretation 'intended' by the legislator, is assumed to be known to the relevant actors and to be understood by them as the legislator meant it to be understood. The social working approach, by contrast, treats legal knowledge as *problematic* and *socially contingent*. The actor may not ever have heard of a particular rule and, if he has, what he knows about it may be distorted. And even if he knows a more or less verbally correct version of the rule, he may interpret its terms in a way different from that contemplated by the legislator.

Direct communication of legal information from the legislator to actors on the shop floor is rare. Most transmission of legal information probably takes place through non-specialized institutions such as the media, the educational system, social, religious, labour and commercial associations, and so forth. But all such intermediaries have limited capacities and resources. They generally also have their own axes to grind and they tend to pass along only what they consider it useful for their particular public to know.

The transmission process is, in other words, a 'transformation' process in which the original legislative message gets distorted and truncated, but also becomes enriched with all sorts of additional information (for example, concerning the risks of getting caught). The message about the law that ultimately comes to an actor's

6 See Verkruisen, *Dissatisjied Patients: Their Experiences, Interpretations and Actions,* Dissertation (1993).

7 E. Abel, 'Collective Protest and the Meritocracy: Faculty Women and Sex Discrimination Lawsuits', 7 *Feminist Studies* (1981), 505-538.

8 Compare Macaulay, 'Lawyers and Consumer Protection Laws', 14 *Law and Society Review* (1979), 115-171.

attention – if any message gets through at all – is seldom the same as, and almost always more complex than, what the legislator 'intended'.

One of the most elusive aspects of the problem of legal knowledge concerns the way legal information is interpreted. I suspect, for example, that concepts like 'equal treatment' and 'qualified' have significantly different meanings on the shop floor from the meaning they have among lawyers and others who concern themselves professionally with discrimination.' In my own experience in the academic world, there has never been a time when applicants were treated 'unequally', according to the interpretation of that concept in the academic world itself. Even in so blatant a case as that of the Dean of a very prestigious graduate school, who in the time I was a student announced in the student newspaper that he tried not to give grants to women as graduate students because in his experience after gelling their degree they just went off and became mothers and were 'lost to science', even he thought of himself as treating men and women quite 'equally'.

The legislator is often caught on the horns of a dilemma. Effective communication of legal information to the shop floor requires the use of rather general, socially well-understood concepts like 'equality' and 'discrimination', but if the legal information the public receives makes use of such concepts, the social meaning of a legal rule will not be what the legislator *intended* but what ordinary people on the shop floor *understand.* And that will usually not be very different from what they are already *doing.* Hence the oft-observed paradox that those rules are best known and obeyed that require the least departure from existing behavioral expectations.[10]

Organizations and Legal Knowledge

Knowledge of law is as a consequence of problems of transmission and reception generally sparse, vague, and inaccurate. But on the whole, organizations are better equipped to process and use legal information than individuals are.[11] It is thus relatively easy for a rule-maker to communicate with organizations.

With this in mind, we can predict that the conditions for the transformation and reception of information concerning anti-discrimination law will be relatively favourable in some situations and rather poor in others. In large organizations such as businesses, educational institutions, government bureaucracies and so forth, there will often be specialized functionaries (personnel officers or the like) charged with collecting this sort of information and transmitting it to the relevant units of the organization. Such functionaries will be relatively well-equipped to receive and interpret anti-discrimination rules, trained to understand them in the intended way and probably on the whole professionally committed to implementation. Another strategic target for legal communication is professionals such as real estate dealers, who (given

9 Compare Griffiths, 'Legal Knowledge and the Social Working of Law: the Case of Euthanasia', forthcoming in: H. van Schooten (ed.), *Semiotics and Legislation. Jurisprudential, Institutional and Sociological Perspectives.*

10 Cf. Aubert, *loc. cit.* note 4.

11 See, e.g., Macaulay, *loc. cit.* note 8.

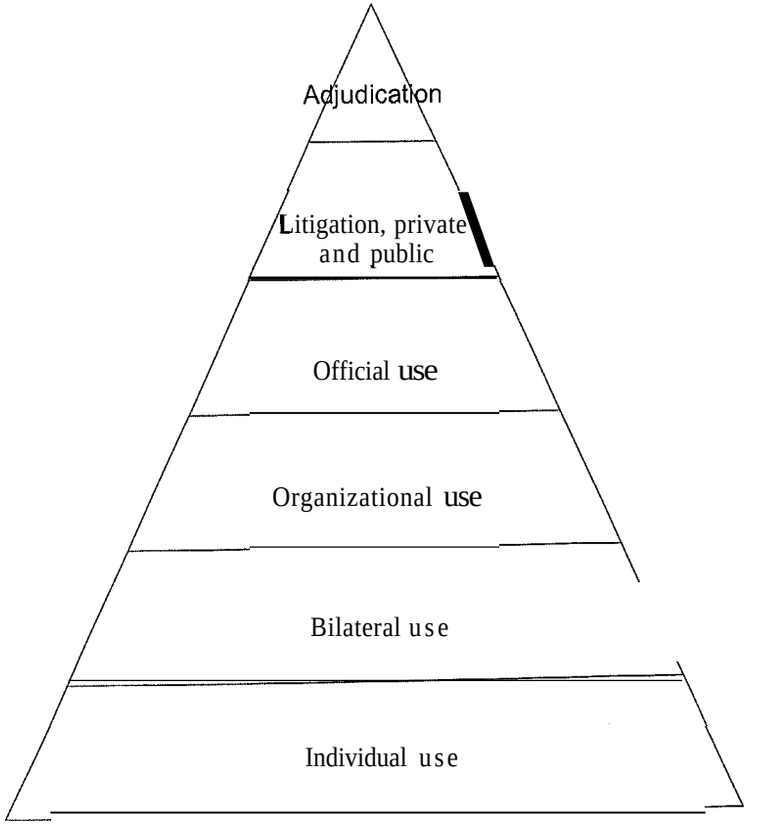
appropriate incentives, such as the risk of civil liability) can probably be induced to pay attention to and make use of legal information.

But on the other hand, much of the public to whom anti-discrimination rules are addressed is diffuse, inexpert and not oriented toward this sort of thing: small businesses, individual home-owners and small landlords, individual members of organizations (members of appointments committees, foremen, fellow-employees, etc.). Producing a significant level of accurate legal knowledge in such a public is not an easy project.

3.2 *When and by Whom are Legal Rules Used?*

The general conclusion from many studies of the uses of legal rules is that the influence of a legal rule on behaviour is usually dependent on *the use that actors on the shop floor themselves make of the rule.* The accompanying figure gives a rough sketch, based on the literature, of the frequencies of different sorts of use.

Figure 1. The Frequencies of Different Sorts of Uses of a Legal Rule



Some comments on the several tiers of this rough sketch are in order:

(1) The bottom-most and by far the largest tier is that of use by individuals: rule-following, use of the rule for forming expectations as to the behaviour of others, weighing behavioral options, appraising behaviour (one's own and that of others), and so forth. A person who knows of an anti-discriminationrule, for example, may expect his or her colleagues to behave in a particular way, may assess the desirability of applying for a particular job in a particular way, may be critical of behaviour he or she witnesses as a member of an appointments committee, and so forth.

(2) The next most important tier, in quantitative terms, is the use of rules in bilateral interaction: in entering into relationships, in everyday interaction (as a basis for mutual expectations and for adjusting relationships through negotiation and bargaining), and in dealing with possible conflict. Thus, when a person protected by anti-discrimination law applies for a job, the questions asked and the answers given in the job interview will reflect the parties' knowledge of the applicable rules; if hired, the mutual expectations derived from the rules will affect various everyday aspects of the employment relationship, such as the way the parties handle questions relating to promotion; if one of the parties is dissatisfied with some aspect of the relationship, anti-discrimination rules will play a part in how they go about making mutually acceptable adjustments; and should a conflict arise, the way it is handled will reflect their perceptions of their relative strengths and weaknesses, and anti-discrimination rules may be an important part of the balance sheet.

(3) The following tier is the organizational use of rules: as a basis for organizational decision-making in general, and more in particular in organizational rule-making and the management of problems and conflicts within the organization. Anti-discrimination law will play a part, for example, in an organization's design of its hiring and personnel rules and in the way in which it deals with conflicts among its personnel.

Let us turn now from these large-scale uses of rules to some more unusual ones. Despite the fact that most use of rules takes place elsewhere, it is the top three tiers to which both policy-makers and those who study legal effectiveness tend to devote most of their attention.

(4) The fourth tier is that of the use of rules by legal officials. This takes place at all levels of governmental decision-making, and only some of it (probably only a small part) has to do with enforcement.

The case-load of legal institutions is generally dependent on ordinary people bringing cases – very little of what is often called the 'mobilization' of law takes place at the initiative of legal institutions themselves. In the case of anti-discrimination law, for example, there are probably nowhere more than a few officials specifically charged with proactive enforcement. Most enforcement activities of anti-discrimination officials involve acting on complaints brought to them by non-officials, so that once again it is with the individual actor on the shop floor that the influence of the rule on social life in the first instance depends.

(5 & 6) The top two tiers comprise the use of rules in litigation. These two tiers tend to enjoy a degree of political and scholarly attention altogether out of proportion to their direct social importance. In fact, one important implication of the figure is that if one is interested in the social working of a legal measure it is not enough – and can often be very misleading – to limit one's attention to technical legal problems that, at least directly, only affect litigated cases (e.g. confidentiality, conciliation, burden of proof) without considering whether these things make any difference for the effects of the rule in question at lower and quantitatively more important tiers of the pyramid.

3.3 *The Legislative Importance of General Effects*

Contemplating the figure above confronts us with the fact that most of the use of legal rules is by ordinary people outside of formal legal conflicts and that even when officials make use of a rule, this is rarely in the context of a formal disposition of a case. So if we are interested in social working we must focus not on official enforcement but on ordinary actors on the shop floor. As legislators we must try to draft legal rules to as to produce a maximum of *general* effects: effects through use by ordinary actors, outside of the context of official application and enforcement. For the *special* effects that can be produced in the latter sort of situation will, in the nature of things, always be pretty marginal. Special effects – the effects of official enforcement – always suffer from being too little and too late.

What, then, are the conditions that determine when – without any officials being involved – people will use a rule, in one way or the other, thereby causing it to have general effects? Just to ask that question in the context of thinking about the effectiveness of legislation is a major step toward understanding why legal rules are so often ineffective.

If we assume something that, as we have already seen, is usually not the case, namely that the relevant legal knowledge is available to the actors concerned, then the general answer to our question is that people will only use a rule when *they have a reason to do so.* The legislator who wants a legal rule to produce general effects must design the rule to correspond to local needs: it must be a useful resource for solving local problems and there must be no strong local reasons *against* using the rule. It is precisely at this point that legislative discussions often allow moralizing and wishful thinking to take the place of serious attention to the problems of the shop floor. In the Dutch euthanasia discussion, for example, the problem of getting doctors to report cases in which they perform euthanasia is conceived of in essentially moral and legal terms, with little or no attention being paid to the ways in which reporting could be made a more attractive option from the perspective of the doctor on the shop floor. Similarly, legislators often enact measures to promote the access of women to various

sorts of employment, but do so in a way which has the practical effect of passing many of the costs – for example, of replacing an employee who uses her right to child-care leave – along to the employment unit, thereby making women of child-bearing age relatively unattractive, in that respect, as employees. That women are nevertheless being hired in increasing numbers in Dutch universities, for example, seems to me largely despite rather than ***thanks*** to such the emancipatory gestures of the Government.

4 The Enforcement of Legal Rules

The most important implication of our consideration of the use of a legal rule is that, as a general rule, most such use will be at a low level of formality: the rule will usually not be explicitly invoked as such even when it is heavily influencing behaviour. It may be used as a resource in case of conflict, but usually here, too, any reference to it will be indirect and unexplicit. Especially where ongoing relationships are involved, the use of legal institutions to deal with conflict will be rare.

But rules plainly do influence behaviour and this is not because people are spontaneously inclined to do what is expected of them. When a rule is effective in influencing behaviour, this is because, in one way or another, it is being backed by (potential) sanctions. Our next question therefore concerns the enforcement of legal rules.

4.1 Non-official Enforcement

As Moore observes, it would be wrong to assume that the relationship between state law and local social organization is always or simply one of resistance by the latter to the effectiveness of the former, for:

> 'the various processes that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or noncompliance to state-made legal rules.'[12]

There are many striking examples of external law being enforced by local social control. This is not the place to labour the point, but it seems pretty clear that if legal rules that prohibit discrimination and seek to promote equal treatment are to be effectively enforced, most of the enforcement will have to come from the shop floor. This means, among other things, that we must be concerned not only about the legal knowledge of the actor whose behaviour is concerned but also the legal knowledge available to all other actors on the shop floor who might participate in local, informal enforcement of the applicable legal rules.

12 'Law and Social Change: the Semi-autonomous Social Field as an Appropriate Subject of Study', 7 *Law and Society Review* (1973), 719-746, at 721.

The Enforcement of Smoking Rules

The extraordinary effectiveness in recent years of various anti-smoking measures, despite an almost total absence of official enforcement, is a good example of the phenomenon of non-official enforcement. Kagan and Skolnick have written a fascinating article on the subject.[13] From an informal survey covering different areas of the United States and a number of very different situations (such as schools, restaurants, fast-food chains, sport facilities, workplaces, even the editorial room of a newspaper), two things emerged. First, the level of conformity with rules governing smoking in public places was everywhere considered high and unproblematic. Second, nowhere had any official enforcement energy worth mentioning been invested in securing this conformity.

Kagan and Skolnick ask themselves how such conformity without official enforcement is possible. Their answer is that anti-smoking rules were effective because they were backed up by informal social control. This was possible because the social 'civility norms' with regard to smoking – and especially with regard to the interests of non-smokers – had already changed. The new, formally legal rule intended to protect non-smokers from unwanted exposure to tobacco smoke was in effect a 'reinstitutionalization' of the changed social norm. The legal norm was enforced not legally but by means of the usual social enforcement mechanisms.

But why was the change in social behaviour so dramatically and closely connected with the enactment of the new legal rule? Change in 'civility norms' is after all a gradual process and one might have thought that the improved social position of non-smokers, to the extent it was dependent on informal social control, would have emerged gradually. Nevertheless, experience everywhere is that the new anti-smoking rules – despite the absence of official enforcement – led almost overnight to a radically changed pattern of social behaviour. Kagan and Skolnick's answer to this question is as follows:

> 'The American experience with laws restricting smoking suggests that in a rapidly changing society, legal enactments can transform norms that are only partly or tentatively institutionalized at the social level into more authoritative and widely institutionalized norms. ... [Legal regulation] articulated and legitimated the inchoate norms concerning nonsmokers' "right" to breath "clean" air, and thereby accelerated the acceptance of "no smoking among nonsmokers" as a civility norm.'[14]

In other words, so long as the legislator does not march too far in advance of developments in social norms, legislation can help to articulate them, thus making the applicable norms clear and indisputable, at which point informal control can assume the task of enforcement. My own guess would be that where anti-discrimination laws have produced changes in social practices, this will usually have happened in precisely

13 'Banning Smoking: Compliance Without Enforcement', in: R. Rabin and S.C. Sugarman (eds.), *Smoking Policy: Law, Politics and Culture* (1993), 69-94.
14 *Loc. cit.* note 13, at 85.

the same way. If, as my personal experience suggests, anti-discrimination rules have been more effective in changing social practice on the shop floor than rules requiring 'reverse discrimination' (which may lead primarily to evasion practices), Kagan and Skolnick's study may help us understand why this is the case.

I know this is a rather 'conservative' conclusion. It reminds one of Sumner's infamous polemic almost a century ago against civil rights laws: 'Law ways cannot change folk ways'.[15] I do not like that aspect of the conclusion any more than most of you probably do, although Sumner's arguments have, in progressive circles, perhaps unjustly been vilified. I do believe that a less than perfect rule that works is better than a perfect one that does not. And when the state itself is not capable of enforcing its rules – which is the situation most of the time – then choosing to make them acceptable to actors and groups on the shop floor may be more sensible than having them be dead letters, at least if social change is what one really is interested in.

4.2 The 'Individual Rights Strategy' and the Mobilization of Institutions

One specific form of applied instrumentalism has been called by Macaulay[16] the 'individual rights strategy', by which the law brings new individual rights into being. Macaulay was concerned with consumer protection legislation, but anti-discrimination law affords numerous examples of the same strategy. It is assumed that when these rights are violated, the victim will seek the aid of an official institution which will give an appropriate remedy. The wrong will be righted and future wrongdoers will be put on notice that such behaviour does not pay. In this double way, the social change desired by the legislator will be brought about. To be able to predict the social working of such law – to the extent this is dependent on official enforcement – we need to know two things: Under what circumstances will victims choose to mobilize legal institutions? And what generally happens if they do?

The first requisite, often overlooked, is that they put themselves into a position to be a victim of discrimination. A person who for whatever reason is not interested in housing in an area where discrimination might take place cannot mobilize a law prohibiting discrimination in housing. Similarly, if no one from the group to be benefitted applies for a job, legislation providing for preferential treatment in the selection process has nothing to be applied to. Oden's research[17] shows, for example, that the main reason preferential treatment policy failed to secure the appointment of a substantial number of women as heads of primary schools in the

15 *Folkways* (1906).
16 *Loc. cit.* note 8.
17 *Voorkeursbeleid op lokaal niveau. Een rechtssociologisch onderzoek naar de sociale werking van maatregelen ter verbetering van de arbeidspositie van vrouwen bij de gemeentelijke overheid* [Affirmative Action at the Local Level. A Legal-Sociological Investigation of the Social Working of Measures to Improve the Position of Women Employed by Municipal Governments] (1993).

Dutch municipalities she studied, apparently had little to do with the selection process to which the preferential treatment policy was addressed, but rather was the result of the decisions of qualified women not to apply. Many of them had perfectly good reasons for their decision, but it is also the case that their social surroundings – at home and at school – were quite supportive of this negative self-selection.

But suppose one is a victim of a legal wrong? Victims usually do not bring the matter to the attention of a legal institution. They prefer the options of 'lumping it' (living with the injury, whatever it is), of 'avoidance' (reducing the chance of future contact with the offending person) or of 'exit' from an existing relationship.[18] From the literature we can surmise that these responses probably account for the lion's share of all reactions to discriminatory behaviour.

Why are people so passive in the face of wrongs done to them? One very important but often overlooked reason for choosing options other than invoking legal rules and legal institutions is that doing so is not seen as a useful or appropriate way of dealing with aspects of a relationship that may be unsatisfactory. This is true whether the relationship in question is a personal relationship, a business relationship, a neighbourhood relationship, an employment relationship, or whatever. Verkruisen, for example, has shown that people dissatisfied with the care they have received from a doctor do not think that making complaints about it is a good way of getting better care, and this is why they do not do so, even in cases of serious medical misconduct.[19] Similarly, an employee who is denied the benefits guaranteed by labour legislation is likely to consider finding another job a more effective way of getting what he or she wants than suing the present employer.[20] On the whole, a victim of discrimination by a prospective landlord would probably rather just find another place to live: housing one who has to sue one's way into is unlikely to prove a pleasant place to live.

Furthermore, litigation is risky, time-consuming and expensive. People often quite sensibly prefer to put the incident concerned behind them and get on with their lives. And there are important social costs of litigation. When the wrongdoer is someone with whom one has an important relationship that one wants to continue in the future, litigation is usually regarded as highly disruptive of the relationship and therefore undesirable. Married couples do not sue each other except in connection with divorce. Businessmen with long-term contractual relationships do not sue each other over problems that arise.[21] The employment relationship is a particularly sensitive one, and people who have a job that is important to them generally do not want to put the relationship at risk by bringing legal proceedings against their employer or even threatening to do so or raising 'legal' objections to the way they are treated. Even when the injury is concrete and the incident a rather neutral one, such as an industrial

18 Cf. Felsteiner, 'Influences of Social Organization on Dispute Processing', 9 *Law and Society Review* (1974), 63-94.
19 Op. *cit.* note 6.
20 Cf. Aubert, *loc cit.* note 4.
21 Cf. Macaulay, *loc. cit.* note 8.

accident, and even when it is only an insurance company that will actually have to pay the damages, people are said to be very reluctant to sue their employer.

The decision to invoke or not to invoke the law is not a purely individual one. In pondering the various considerations I have mentioned, a victim of discrimination (or some other legal wrong) will often receive strong indications from his or her social surroundings as to the socially appropriate course of action. In many cases, invoking the law is not considered appropriate and victims of discrimination will be advised against doing so, even by their own lawyer.[22]

How does the legal system, in the rare case that a victim does decide to mobilize it, typically react to claims for redress for violations of individual rights? If we start from the assumption that in discrimination cases the victim will generally be less highly organized, less wealthy, and more socially marginal than the defendant, then a large body of literature[23] tells us that, despite the legal system's pretence of formal legal equality, the tactical advantage with regard to a whole range of matters will be strongly with the defendant. Galanter has argued that the only real answer to this situation is for potential victims to organize to defend their rights. But if they are organized, they usually will not need to rely on litigation anyway.[24]

The conclusion we can draw from all of this is that mobilization of legal institutions by victims of discrimination is unlikely to occur very frequently (in relation to the number of relevant incidents) and that when mobilization does take place, the litigation cards are rather stacked against the victim. In short, the individual rights strategy, depending as it does on mobilization of law by individual victims, is unlikely to be a very effective instrument for combating discrimination.

5 Effective Regulation

I hope you do not expect me to perform a feat of alchemy and, using the social working approach as I have sketched it so far, stir together all the very imperfect material that human beings and their societies and their law offer us and come up with a golden solution to the problem of finally eradicating all forms of discrimination. If so, I have to disappoint you. I think the social working approach can be of assistance in thinking about concrete problems of combating discrimination with legal means, but it is not a kind of magic that can turn dross into gold. I want to end this article by calling attention to a number of aspects of the approach that seem to me particularly relevant to the case of anti-discrimination law.

22 *Cf.* Abel, *loc. cit.* note 7; Macaulay, *loc. cit.* note 8.

23 See in particular Black, *The Behaviour of Law* (1976); Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', 9 *Law and Society Review* (1974), 95-160.

First, and most importantly this: the social working approach emphasizes the importance of the specificity of the concrete situation. The housing market is a very different social situation from the labour market, and the housing market in a society with high geographic mobility such as the United States is very different from the housing market where mobility is low. The social working approach affords a specific theoretical prediction of the impact of such differences. The force of local social control, whether as a source of resistance to efforts to mobilize state anti-discrimination law or as a source of non-official enforcement, depends on the importance to the actors on the shop floor of local relationships of mutual dependency. Powerful dependency relationships have for centuries been a very important feature of the workplace, and social control there has generally been strong. In the modem world, by contrast, the mutual dependency of neighbours has steadily declined, and especially where geographic mobility is high, the social control among neighbours is usually quite weak.

The lesson is simple: effective regulation requires careful attention to the relevant characteristics of the shop floor where behaviour is to be regulated. Generalizations and assumptions will not do. The social working approach affords the legal policy maker with a catalogue of characteristics that should guide regulatory strategy.

Having stated a fundamental principle, I proceed now to violate it by engaging in a couple of sweeping generalizations. Roughly speaking, in the case of anti-discrimination law the social working approach points toward two regulatory strategies that offer some hope of substantially influencing behaviour on the shop floor.

The 'Individual Rights' Approach

We have seen that the 'individual rights' approach to anti-discrimination law confronts a number of serious obstacles. If, nevertheless, one decides to adopt it, a number of things can help to improve its effectiveness.

Rules creating individual legal rights (e.g. to equal or preferential treatment) should be designed primarily with their *general effects* in mind, that is, their influence on behaviour in cases in which official institutions are *not* mobilized. To be effective in social life, such rules must be used by actors in their everyday interactions without the intervention of legal officials since, as we have seen, official implementation is rare. Use on the shop floor depends on a number of factors which we have examined above, only some of which lend themselves to legislative manipulation. At a minimum the rules must be known to the relevant non-official actors. This means they must be clear and simple, even if this involves a considerable sacrifice of regulatory refinement. Equal pay rules that depend on highly sophisticated functional classifications, for example, whatever their moral virtue, are unlikely to be used on the shop floor. Care must likewise be paid to getting the rules transmitted to the shop floor.

The rules adopted cannot deviate very much from what is considered reasonable on the shop floor, or they will not secure the support of local social control. I think there is much to be learned in this regard by thinking about the parallels and differences between the regulatory problems of reducing the amount of discriminatory behaviour

and of eliminating smoking in public places. On the whole, at least in my personal experience in universities, anti-discrimination rules have come to enjoy a great deal of shop-floor support and are effectively enforced by local social control. But – and it is a very important but at many points in anti-discrimination law – on the whole this support is not enjoyed by rules requiring preferential treatment, especially if they go further than a preference in the case of 'equal qualification'. Appointments committees I have served on would on the whole give the preference to a woman or a member of an ethnic minority – if such persons applied, and the real problem is that far too few of them do – and in doing so would stretch the concept of 'equal qualification' quite far by taking account of non-academic desiderata. But there is little or no support for rules by which only certain preferred sorts of candidates are invited to apply, or by which if a person in a preferred category is minimally 'qualified', he or she must be preferred above plainly better candidates. I myself have been party to the ingenuity of appointments committees in subverting such rules, and I have never experienced an invocation of informal control on the shop floor to resist such subversion. In my opinion, such rules are therefore generally a bad idea – however justifiable they may be in moral terms – because they do seem to not enjoy shop-floor support, are therefore largely unenforceable, take the place of regulatory effort that could be spent on more hopeful approaches (and in that sense are a 'symbolic' substitute for more effective measures), and ultimately give the whole enterprise of promoting equality a bad name.

Non-'Individual Rights' Approaches

On the whole, the social working approach suggests that more is often to be expected from regulatory approaches that do not depend on the creation of individual rights that require mobilization and enforcement on the shop floor. The most hopeful of these, in my view, are measures that fall under the general heading of 'indirect positive discrimination': that is, measures designed indirectly to improve the position of the disadvantaged group one is concerned with. We have seen that in the case of the job market, the real problem may often lie not in the selection process but in the lack of qualified applicants. In some cases only a long-term strategy is relevant: for example, where there simply is not a pool of qualified persons (women math and physics teachers, at least in the Dutch situation; or members of recent immigrant groups in the case of many jobs requiring higher educational qualifications). But in other situations – Dutch higher education seems to me a good example – a great deal could still be done in the area of secondary labour conditions to make career-advancement more attractive to women. In fact, we have one obvious success story in this connection: within the last 20 years, the increasing possibilities of part-time employment have had an enormous effect on the number of women in university positions.

As a case I recently brought before the Dutch Commission on Equal Treatment revealed,[25] the level of consciousness concerning the career implications of all sorts of secondary labour conditions can still be pretty pathetic in official academic circles. The case involved age limitations for appointments to research positions imposed by the two most important granting agencies in the Netherlands. The Commission held that such restrictions are discriminatory because they are particularly unfavourable to women, whose careers are often held up in connection with bearing and caring for children.

Universities, granting agencies and the like are big organizations and therefore, relatively speaking, sitting-ducks for regulatory intervention. Measures aimed at their policies are far more likely to produce results than measures that require individual actors on the shop floor to change established patterns of behaviour. On the whole, I therefore think it would be a good idea to focus anti-discrimination energies as much as possible on the policies of such organizations, counting at least in the short term on processes of social diffusion to spread the required change of social attitudes and practices to smaller organizations and individuals.[26]

6 Conclusion

The social working approach to the effectiveness of legislation calls attention to a number of factors important to the success of anti-discrimination law. Rules have no effects if they are not used. Most use of rules takes place in the course of everyday social life; most use is by ordinary people, not by legal officials. People cannot use rules if they do not know about them, and legal knowledge is often problematic. People will not use rules unless they have a good reason for doing so and no pressing reasons not to do so, conditions that often are not met. When rules are effective, this is often more likely to be due to enforcement by informal social control than enforcement by legal officials, so the conditions under which informal social control will take over the enforcement of a legal rule are of great importance. Rules that do not require people to initiate a legal process in order to secure a new 'right' are often likely to be more effective than those that do. And rules aimed at large organizations are more likely to be effective than rules aimed at individuals.

It is proper to be modest about such conclusions. They are not recipes for success, nor do they specify concrete measures that in all circumstances can be expected to produce results. All they do is call attention to considerations that should be taken into account in designing measures to combat discrimination and promote equality. But on the other hand, it is distressing how little attention is often paid in policy discussions and in the legislative process to the features of the concrete social situation in which

25 See Equal Treatment Commission, Annual ***Report*** (1997), 12.

26 I wonder whether quotas, for example, may have been too much maligned: from the point of view of (relatively non-obtrusive) enforcement, there is obviously much to be said for them. The subject is, however, much too complex to treat here with the care it requires.

the behaviour one wants to regulate takes place, and the relevance of these features for the choice of regulatory strategy. If I had time and space I could give you a depressing collection of examples, ranging from environmental protection and euthanasia to the financing of health care and of legal assistance. I conclude with this exhortation: in considering anti-discrimination policy and law, let us focus attention first and foremost on the concrete social situations we are interested in and on their significance for the uses on the shop floor of the legal rules we are contemplating. And in that connection let us never forget that a less than perfect rule that works is better than a perfect one that does not.