

Introduction

Today, *discrimination* is not a popular term: it reflects past, present, and future wrongs. In our postmodern—and, presumably, postracial—society, the concepts that inspire are *equality, liberty, empowerment, capabilities*. Those words make people sit up and listen. But Islamophobia, police brutality, antigay hate crimes, unequal pay, sexual harassment, transgender bias, denial of disability rights, and pregnancy discrimination are also sharing the headlines. This book seeks to provide a comparative transatlantic framework of analysis and revisit the question of discrimination in employment in a pragmatic, critical way. The workplace is a strategic venue for confronting discrimination.¹ The setting of this book is a dialogue between a Franco-American academic and her colleagues from the United States.²

As Justice Ginsburg recalled in the *Ricci* case,³ in cases of discrimination, regardless of the country, “context matters.” Today, in and outside of employment, context is often vivid and sometimes tragic. In the United States, multiple issues are being raised. Consider the *Fisher* case on diversity in university admissions,⁴ the *Wal-Mart v. Dukes* class action sex-discrimination lawsuit,⁵ the *Hobby Lobby* case on religious rights of companies,⁶ and the racial quagmire⁷ surrounding the deaths⁸ of Michael Brown in Ferguson and Eric Gardner in New York.⁹ Fifty years after the Civil Rights Act¹⁰ and Martin Luther King’s “I Have a Dream” speech, where does the United States stand in tackling and solving issues of discrimination based on different grounds (sex, race, gender, disability, religion, age, etc.)?¹¹ Is Europe in a better place?

How can we understand France’s reaction to the Charlie Hebdo and kosher supermarket assassinations and the kamikaze attacks in Paris, when, at the same time, its government bans the full-face veil¹² and promotes a secular republic? How do second- and third-generation sub-Saharan and North African young men and

women cope with a color-blind model of equality by assimilation? On a higher level, European law has strived to reach the goal of antidiscrimination and equality. What can we say about the pattern followed by the law, its implementation, its enforcement and dilemmas in the workplace on the Old Continent? Today is an opportune time to compare the American and European legal frameworks that have shaped the concepts and grounds of discrimination. We now have enough experience on both continents to explore a variety of topics, ranging from the historical and constitutional dimensions of antidiscrimination law to its enforcement by independent bodies, and to critical comments on the specific issues raised by former or current civil rights specialists and policy makers.

Can the law be multidimensional on this issue? Today, the focus of research is on individual biases—often implicit, as Devah Pager demonstrates,¹³ but sometimes explicit—with the concept of microaggressions gaining prominence in the workplace¹⁴ and on campuses.¹⁵ Smoking out systemic discrimination in educational institutions, employment, and public policy is also of paramount importance, as Susan Sturm recommends.¹⁶

In a more global view, should we pursue our struggle for antidiscrimination, or should we privilege human rights law, which can offer a less stigmatizing approach to the problem?¹⁷ Should we be skeptical about “rights talk” in general, as Richard Ford and Janet Halley suggest?¹⁸ Does it always target entrenched economic subordination and follow principles of justice?¹⁹ Is antidiscrimination law efficient?²⁰ Can we interpret legal norms through the more incisive lens of social psychology, as Linda Krieger explains,²¹ or of behavioral economics, as Christine Jolls’s work indicates?²² Does enforcement of antidiscrimination law require a global policy, a powerful public agency? Do advocacy groups transform the debate on equality in unanticipated ways, as Reva Siegel describes?²³ Will promoting the more positive discourse on diversity or the affirmation of liberties make the difference?

Litigation in antidiscrimination law reflects cultural differences on religion and gender in Europe and the United States. The influence of colonization and the welfare state in Europe are reflected in antidiscrimination law and its application. Can French and European case law still learn from American thoughts on the foundations of equality law and its development? Can the United States draw from EU innovative judicial arguments on indirect discrimination? How does the American idea of intersectionality translate into the perception of multiple discrimination in Europe?²⁴ Can we confront systemic discrimination in a transnational perspective? Academics and legal practitioners in the United Kingdom, Belgium, South Africa, Canada, and Australia are also developing new ways of thinking about discrimination in law.²⁵

This book attempts to describe the challenges in antidiscrimination law rooted in respective geographical and technical contexts to brainstorm ideas originating from both sides of the Atlantic.

DISCRIMINATION CHANGES FORM BUT LINGERS ON EACH SIDE OF THE ATLANTIC

Discrimination is about facts. Sometimes, stories of injustice have happy endings in which rights are vindicated:²⁶ think of Lily Ledbetter, who discovered upon retirement that she had been receiving a lower salary than male colleagues in similar positions with the same career path. The Lily Ledbetter Fair Pay Act, the first law signed by President Obama, provides that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new paycheck affected by that discriminatory action.²⁷ Julie Suk argues that antidiscrimination law is not always transformative: it is path dependent and even counterproductive when it focuses only on individual bias.²⁸

The nature of discrimination might also have changed, becoming either more subtle or more invidious. It is rare for employers to discriminate overtly in the United States or in France. Discrimination is now either hidden or stems from unconscious bias. Finding evidence of discrimination is therefore more complex. It can also be inconspicuous when it permeates collective practices, such as general testing, dress codes, professional evaluations, and physical examinations, which seem facially neutral but disproportionately exclude women, workers with religious practices, older workers, and others. Moreover, employer evaluations of good job performance can be based on standards that monitor all types of job behavior and reject a more flexible view of “gender performativity.”²⁹

Discrimination is invidious in new ways when microaggressions create a hostile environment in the workplace and affect the dignity of the employee because of a monolithic view of the status of the worker and the protection of his or her rights. Hostile-environment harassment can produce a collective form of discrimination³⁰ and, as Vicki Schultz observes, a sex-segregated workforce,³¹ even in the absence of the more traditional pressure for sexual favors. Discrimination based on age or disability is of a more technical nature and requires guidelines,³² and, as Ruth Colker observes, mediation can be preferable to litigation in reasonable accommodation cases in the United States³³ and job reassignment cases in France.

THE STRUCTURAL AND ENVIRONMENTAL CAUSES OF DISCRIMINATION ON EACH SIDE OF THE ATLANTIC

Both Europe and the United States are facing discrimination on different scales. On a micro level, Robert Post explains that some forms of individual bias will always exist,³⁴ not always related to the core inequalities in the workforce, linked to historical subordination based on race, origin, and gender. On a larger scale, new attempts to combat systemic discrimination are being implemented through similar procedures in France and the United States: territorial affirmative action plans

in schools³⁵ and efforts to balance gender representation on executive boards.³⁶ Is it possible to detect the personal experience of discrimination and expose its link to a wider practice of exclusion? Events in 2014 and 2015 illustrate that discrimination is rooted in structural and environmental causes linked to the way the State has or has not dealt with “difference” in general, as reflected in policies on immigration, ethnic groups,³⁷ religion,³⁸ social security benefits, criminal prosecution, and welfare. We might be at a turning point. Today, models of equality and liberty on both sides of the Atlantic are challenged by a lack of social cohesion³⁹ and community values⁴⁰ in each country and a globalized world where the interpretations of these models can vary. Most often, the need for public order and national security takes precedence over the risks of racial and ethnic profiling.

LAW AMONG OTHER TOOLS TO FACE A CONTINUUM OF INSTITUTIONAL CHANGES

Once the eradication of all discrimination is recognized as a myth, the question is whether to accept that the law cannot always prevent arbitrary decisions from being taken by people who have economic power in employment. Can we promote “inclusive equality” in all institutional settings, from the educational realm to the job market?⁴¹ Critical thought allows us to acknowledge the risk that the prevailing dogma of universal rights, as Richard Ford names them,⁴² can also perpetuate certain modes of subordination. Janet Halley has demonstrated that certain modes of subordination simply replace other forms of subordination.⁴³ Moreover, Martha Minow’s “dilemma of difference”⁴⁴ between formal and substantive equality will always exist. Either we ignore difference, or we take it into account. The only way out is to focus on the framework in which difference is constructed.⁴⁵ It requires a relational view of difference to follow Chai Feldblum’s project and subvert the standard norms by which the majority evaluates the minority.⁴⁶ In what way can the victims of discrimination strive for active and constructive participation in society rather than only seek remedy? In what way can this recognition touch those who are most often disenfranchised at the intersection of multiple forms of subordination?⁴⁷ Law is only one of the tools used against discrimination in the workplace, notwithstanding the various ways companies manage to internalize legal norms, as Frank Dobbin points out.⁴⁸ Soft law, often a product of corporate social responsibility in France and the United States, collective bargaining in Europe, and informal networks between employers, colleagues, and clients can also constitute factors of inclusion or exclusion in employment.⁴⁹ If equal opportunity as a paradigm prevails, the difficulty will then be to reconcile very different interests in the firm, as Chai Feldblum demonstrates.⁵⁰ In France, the issue is also to distinguish individual difference between French citizens over recognition of group membership, seen as a sign of dangerous multiculturalism.

The tensions raised now by the aspiration to equality on both sides of the Atlantic beg the question, why should we compare antidiscrimination law, and why compare at all? The current attraction of our different common law and civil law legal systems to fundamental rights justifies the specific focus on antidiscrimination. This book's particular form, based on inspiring interviews of scholars, brings these issues to life.

WHY COMPARE ANTIDISCRIMINATION LAW?

Antidiscrimination law is worthy of attention as a relatively new field in Europe dealing with fundamental rights in the national and international legal order. The universal nature of equality and antidiscrimination (its companion principle) and the mass of laws and precedents they have inspired have prompted us to reflect, through a comparative perspective, on the actual scope and relevance of these principles and in the specific context of certain countries. What we learn from legal traditions and doctrinal commentary is that although there is no absolute consensus on antidiscrimination law, it is consistently linked to strenuous efforts to regulate the employment market and achieve increased transparency in selection decisions in employment and education.⁵¹ At times, these rules fail to follow the logic of more comprehensive yet segregating systems, such as those specific to welfare states. American scholars also turn a critical eye to the possibilities and limits of this body of law, while France in particular and Europe in general attempt to preserve social rights and promote employment without undermining social cohesion. Everywhere, globalization and its challenges have impacted employment law,⁵² regardless of the country's model, and this can be perceived in the writings of American scholars, who have been led to closely examine antidiscrimination law with respect to these global changes, echoed by the International Labour Organization and its 1998 Declaration on Fundamental Principles and Rights at Work.⁵³ An international doctrine also exists and furthers thought about the various antidiscrimination models in use internationally.⁵⁴

The field of antidiscrimination is also appealing because it encourages the use of a comparative approach to analyze the wealth of positive law while critiquing it.⁵⁵ The interviews and observations in the following chapters combine an anthropological vision of antidiscrimination law, in which the person is placed at the center of the constructed system, with an undeniable inclination of these scholars and the author to see law as an instrument of varying effectiveness in a comparative setting. As Gillian Hadfield says: "It may be true that there is an 'untranslatable abyss' between the law of one place and the law of another—just as there is between one person's experience of a strawberry and another's—but this does not mean that we have no business seeking to understand why law here produces this effect and law there produces that effect."⁵⁶

INTERVIEWS WITH AMERICAN SCHOLARS AS A SOURCE OF INSPIRATION FOR VIVID COMPARISONS

An analysis of antidiscrimination law⁵⁷ integrating insights drawn from conversations with foreign scholars, mostly law professors, breaks away from the conventional framework of comparative studies.⁵⁸ This approach, consisting of dialogues followed by comparative observations, marks a departure from traditional comparative-law exercises⁵⁹ relying exclusively on written sources while, at the same time, maintaining some similarities with them.

Generally speaking, comparative law exercises are not accorded the same legitimacy as the comparative methods employed in the observation of international law, despite an increasing interest in the scope of equality in transnational law.⁶⁰ In these pages, conversations with American scholars⁶¹ serve as an opportunity to address specific questions about the development of American norms that are stirring debate in European and French law.⁶² Since the adoption of Article 19 of the Treaty on the Functioning of the European Union⁶³ and Directives 2000/78 and 2000/43, antidiscrimination law has experienced an unprecedented expansion in the Member States.⁶⁴ Scholars observing American law since the 1960s can share their more distanced views of intertwining notions: equality, antidiscrimination, direct and indirect forms of discrimination, evidence of discrimination, and discrimination grounds.

Another valuable aspect of the book is related to the fact that American scholars do not constitute a uniform group as French doctrine has been considered traditionally. In France, *French doctrine* denotes the “people, the group of authors who write in the area of law” as well as the “opinions of these authors.”⁶⁵ A “doctrine” is said to be defined as much by what it is not as by what it is, notably, “the opinion generally expressed by those who teach Law, or even those who do not teach, but write about Law. This is where doctrine and jurisprudence diverge.”⁶⁶ This traditional definition of doctrine conveys the idea of a community of people at a distance from the law, which constitutes their sphere of observation.⁶⁷ Any debate tends to focus on the extent to which French doctrine influences law and can be considered a source of law in its own right.⁶⁸ Despite their roots in common-law tradition, American academics also exercised a powerful influence at the end of the 19th century.⁶⁹ Inspired by Dean Langdell of Harvard Law School,⁷⁰ they created “their own exegetical school of law, which professed to deduce abstract principles from the examination of a few carefully selected higher court decisions.” They nevertheless turned away from this approach in the 1920s, forming the legal realist movement⁷¹ and “drawing abundantly from the other social sciences, in the exact opposite manner from the French.” As a result, their science of law drew closer to the social sciences and even began to resemble “a social science . . . infused with all the others, while dogmatics became no more than a method of legal analysis, competing alongside methods borrowing from anthropology,

philosophy, psychology, literature, economics.” The consequence of this change was a shift of authority. According to Jamin and Jestaz, American law professors see themselves as academics and “do not claim to form an ensemble which as such has weight over the development of law—but this does not hinder them from exercising influence as individuals. They are intellectuals who reflect on law, as others reflect on economics or sociology.”⁷² Interviews bring out their different points of view.

Furthermore, interviewing makes it possible to quickly pinpoint difficulties encountered by American courts in applying or interpreting rules and concepts in both constitutional and statutory contexts. Although seldom used in law, this direct source of information and analysis by scholars rapidly puts into perspective the potential trends in European and national law—law, case law, and the positions of scholars and players in the judicial arena in Europe and France.⁷³ By conversing with outside observers, we can better gauge the amount of resistance or, on the contrary, creativity employed in applying antidiscrimination concepts and proving discrimination in national and European law. The strong influence of case law in discrimination cases debunks the preconceived idea of the need for judicial precedent to grasp the subtleties of complex forms of discrimination, deeply rooted in the assessment of facts.⁷⁴

These conversations simply provide inroads to comparative reflection: the interview excerpts, sorted by theme, are followed by comparisons and some broader questions they raise about national and European law. By forgoing the numbers-based approaches to comparative law currently in vogue—more concerned by the countries in the sample than the quality of the necessary analyses of each country⁷⁵—this book prompts thought on comparative methodology and the functions of comparative law.

Much has been written on the complexity and challenges of comparative law, whose value must be defended again and again.⁷⁶ In her notable article on “the subversive function of comparative law,” Horatia Muir Watt explains how comparative law can be seen as a critical reading of law in France, while other countries, such as the United States, prefer a critical doctrine that deconstructs law by favoring a more economic or contextual analysis rather than by making international comparisons.⁷⁷ Both approaches come into play in these interviews with American scholars, the majority of whom are members of critical movements: foreign scholars share their critical readings of positive law, inspiring equally critical comparisons from an international perspective.⁷⁸ Comparing employment antidiscrimination law (whose chief leitmotif is the fight against bias) offers the added benefit of freeing us from the inherent bias involved in analyzing foreign or domestic law. Interviews help to flush out these biases by supplying an immediate response, sensitive to history and context, to written analyses of sources of foreign law.⁷⁹ In addition to offering a functional approach,⁸⁰ this comparative method eschews the current trend of

opposing common law and civil law systems with the aim of demonstrating that one (the system originating in common law) engenders a more efficient economy. In fact, the interviews will reveal that antidiscrimination law, which pervades every system today, is much more complex than this argument, and the leximetric studies promoted by certain international organizations, would have us believe.⁸¹

More generally, the approach I have taken aligns with comparative studies allowing us to take a step back in our legal analysis and use greater discernment in designing our comparative methodology. However, I wish to point out certain risks associated with this comparison of antidiscrimination law based on conversations with the doctrine. Sometimes this dialogue emphasizes issues of special concern to the American scholars being interviewed that are not closely relevant to European judicial debate and vice versa. Professor Pierre Legrand tells us that “comparing means being willing to bring out differences”⁸² and that the comparative method is based only on a subjective perception of differences.⁸³ I have indeed made a point of following these comparative interviews with my own personal observations: they refine and tap into foreign ideas and analyses from a French and a European point of view. Without these observations, we might have been left with a mere presentation of American doctrinal commentary and analogies with how equivalent notions are interpreted in Europe, without shedding any light on fundamental differences in our legal, social, and cultural systems. Although similarities may be drawn between certain notions from either side of the Atlantic, it is not my purpose to reignite the debate over the circulation of ideas or the transplantation of legal mechanisms or systems.⁸⁴

This comparative method is also a valuable learning opportunity. It shows how American scholars repeatedly draw inspiration from interdisciplinary thinking to illuminate their ideas, the scope of law, and its underpinnings. Using this approach, equally well-suited to comparative law,⁸⁵ we discover that antidiscrimination law enforcement cannot overlook economic, cultural, sociological, and historical factors and how they are changing, since they contribute to the construction or negation of a person's identity with respect to the principles of equality and anti-discrimination in each country.

As I explained in the preface, this book draws from a careful selection of interviews of fascinating scholars, professors in law or sociology. This book is essentially about the meaning of antidiscrimination, the grounds of discrimination, and the diversity of critiques of fundamental rights in employment in light of comparative, international, and constitutional law. These amazing scholars have covered a wide spectrum of dilemmas posed by the equality paradigm in France and Europe.