5

The Multiple Grounds of Discrimination

Antidiscrimination legislation in every country contains an enumeration of protected grounds for discrimination, with the list often growing longer with each passing year. This corresponds to the logic of the law, which is rooted in the prohibition of differences in treatment based on specified categories, unlike norms that are derived from the principle of equality. These inventories like the list established by the European Convention for the Protection of Human Rights, are not necessarily exhaustive.[1] And, despite the many grounds listed—more in France than in other countries,[2] such as the United States[3]—rarely do they come accompanied with precise definitions. For example, age and sex. Once considered, perhaps, to be straightforward, objective traits, debate has now arisen about what exactly is meant by these terms. Sex, or gender? Youth, as well as old age? By examining how courts have applied the notions of direct and indirect discrimination, it is possible to obtain some indication of the contours of these grounds. The courts' decisions have expanded the application of these notions, changing the context in which the grounds are invoked in the different countries.[4] But might not the most cogent question be, What person are these prohibited grounds trying to protect and liberate from all forms of workplace discrimination? Is it possible to fight discrimination in this way without inevitably revealing tensions surrounding the identity of the legal subject—the person[5] whose individual characteristics are being eradicated? Doesn't the search for discriminatory impacts, which is the substance of establishing indirect discrimination, necessarily affect individuals? What is this impact? From a different angle, let's imagine how multiple categories of discrimination might apply to the same person.[6] What does this combination of categories say about the very nature of the discrimination and the effectiveness of antidiscrimination norms?

I. WORKPLACE DISCRIMINATION AND THE PERSON

In this conversation, Robert Post illustrates the implicit questions about the definition of a person that are raised by antidiscrimination law.

MARIE MERCAT-BRUNS: *Continuing with other questions outside of collective bargaining, what conceptions of the person does antidiscrimination law presuppose?*

ROBERT POST: Antidiscrimination law presupposes different concepts of law and, as it enforces antidiscrimination rules, it sets forth the notion of what people are and aren't. In some parts of antidiscrimination law, the person has no sex. In some parts of antidiscrimination law, the person has no color. But in other forms of antidiscrimination law, the issue is more complex. This is an example: a bank has men tellers, and the rule says men can't wear dresses. Antidiscrimination law in the United States says that that is not based upon sex. What does it mean logically?

What it means is not a logical point, because antidiscrimination law is not about logic: it is about what sort of persons we want the law to recognize. We want persons who essentially abide by certain dress codes—but not essentially in the sense that the work is given out according to a sex line base, or whatever.

So, as you follow through the various laws, you can reverse engineer the fact that these come from certain conceptions of the person, and these conceptions are what is most often in conflict in debates on antidiscrimination law.

MM-B: *What do you think about dress codes personally?*

RP: I think that you can follow this as a matter of action and not abstract principle: antidiscrimination law is not about abstract principle, so to imagine a form of law that is so disruptive of ordinary social conventions and social norms is utopian and would not be publicly accepted. I myself as a lawyer wouldn't want to go there, although I can see a role for people who are pushing toward a gender-neutral concept of antidiscrimination law, that is, a queer theory of the person.

Comparative Perspectives

The question of the person protected by antidiscrimination law will be reexamined in later discussions of discrimination on the basis of sexual orientation, of queer theory, and of discrimination on the basis of religion. Another crucial question is whether, depending on the ground of discrimination, the antidiscrimination law seeks to promote equality or promote freedom.

II. RACIAL DISCRIMINATION

I will begin by looking at racial discrimination because it largely served as an antidiscrimination model in the United States for all antidiscrimination norms.[7] Since race was quickly understood to be a stigmatizing social construct with no

biological or natural basis, evidence of racial discrimination did not involve a definition of this ground.[8] As of the postwar period, international treaties prohibited race discrimination, while sex discrimination served as the model for antidiscrimination in Europe via the Treaty-enshrined principle of equal pay for women and men.[9] Our scholars often highlight the distinctive character of the race ground by showing how analogies with other protected grounds can be problematic. David Oppenheimer has published extensively on antidiscrimination law in the United States and in Europe. In the interview excerpt that follows, he discusses the existence of race as a social construct.

MARIE MERCAT-BRUNS: *If I understand you correctly, in coining the term* diversity, *you raised the issue of identity, but certain critics say that there is no specific racial identity. What do you think about that?*

It is very hard to define racial identity. Is it diversity in the sense that each one of us is unique, or is there a specific racial cultural identity, or maybe a cultural identity linked to race? Or is the general principle the fact that we are not denying difference when we look at equality but instead promoting difference with specific identities?

DAVID OPPENHEIMER: Race is a social construct. So obviously race has no importance in biology aside from a few diseases that tend to be disproportionate in certain racial groups. Even the existence of a racial group is something we create socially.

But we do create them socially, and sometimes the majority creates minority identities in order to identify others as being "others"—as having another identity. It becomes a tool of discrimination and inequality.

But sometimes people looking for a sense of personal identity and community identify based on race and ethnicity, or religion, and though we deplore discrimination against people because of race, ethnicity, or religion, that does not mean it's illegitimate for people to feel a sense of identity based on those criteria. Sometimes that identity is the result of having a common experience of oppression.

White people are the majority in the U.S. both in terms of being the numerical majority and being the dominant group in terms of power, political influence, and culture. This is particularly true of white Christians. Americans who are members of minority groups often sense their experience—their *outsider* status—as providing them with a common identity based on that status.

It is not simply imposed on them by the majority. They experience it in a positive way. For example, consider the black empowerment movement throughout the 1960s and thereafter.

MM-B: *The Black Panthers?*

DO: Not necessarily. The Black Panthers were part of a much larger social movement for black people to be proud of their identity. "I'm black, I'm proud, I'm

beautiful." It opened up recognition that there are cultures of blackness in America.

MM-B: *That's not a problem for you.*

DO: It is not a problem when we are talking about black people self-identifying, recognizing, and legitimizing their own identity.

MM-B: *Is it a question of being a part of?*

DO: Yes, it is a question of being a part of, a question of membership, a question of identity.

MM-B: *Doesn't being a part of also mean "I am part of because I am excluded from something else"?*

DO: I have a sense of identity as a law professor and it gives me a sense of affinity with other professors. Some would say this is a sort of negative identity. They dislike law professors. I would say I am happy to be part of a community of law professors. It is part of my sense of identity.

I also have a sense of identity as someone who loves to ride a bicycle, and that's part of my sense of identity too. I also have a sense of identity as someone who grew up in New York, and I feel a closeness with people who live in New York, who grew up in New York, and when I meet them, we find common ground through our common affection for New York. I am a Francophile. I love France. I feel entitled to be very critical of French racism because I love France, and that's part of my sense of identity.

I am also Jewish although not a religious person, so it is not so much a religious identity, but it is certainly part of my cultural identity. To some extent, that identity is an outsider identity. In France, the grandchildren and great grandchildren of Jews who were French citizens and who were themselves Christians, Catholics, who had been baptized and whose parents had been baptized, were nonetheless identified as Jews under the Vichy regime—as *outsiders* subject to exportation and extermination. That was an identity imposed from outside. But it does not make it illegitimate for Jews or descendants of Jews to have a sense of Jewish identity.

MM-B: *The possibility of a negative cause of exclusion doesn't make the category illegitimate? Is that it? I am more familiar with the idea stated in case law on equal protection of the laws (referred to in the Supreme Court decision of* Carolene Prods.[10]*) that racial minorities are historically isolated minorities ("discrete and insular minorities"). Is this also what you are talking about when you talk about identity? But your identity, defined by your affection for New York or France or as a faculty member, does not have this historical dimension, other than your Jewish identity, for example.*

DO: Consider the *Bakke*[11] decision, which says a university may use race as one of the diversity criteria in attempting to select a diverse class. Justice Powell says an affinity for music, coming from a small town, speaking multiple languages, or being African American are four examples of the kind

of diversity that a university may legitimately consider in its admissions policies.

MM-B: *So there are different forms of diversity?*

DO: One of the tough questions is whether diversity is simply a code word for "racial minority" or a broader concept of wanting multiple points of view and multiple kinds of experience.

I had a conversation a few months ago with a student who signed up for my class, and she told me she was a little worried because she knew I was very liberal, and she was the leader of the Federalist Society.[12] I told her I had read she was active in the Federalist Society and I was thrilled, because it is great to have ideological diversity in the classroom; it means we will have much more interesting discussions because we will have a much wider range of points of view, and we all learn more under those circumstances.

Richard Ford, followed by Julie Suk, responds to the idea that there is a hierarchy of grounds of discrimination.

MARIE MERCAT-BRUNS: *When I listen to you, what seems to underlie your thoughts is the idea that there is a hierarchy among the different types of discrimination. If you can't go that far, it doesn't bother me. Some doctrinal work says there is absolute discrimination.*

For example, spurred by European law, France only recently introduced legal justification for differences in treatment based on any ground, including race, when it constitutes "a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."[13] *Exemptions for other grounds, such as sex, pregnancy, and differences like disability or age, already existed, and it is presumed that in certain cases they can justify a difference in treatment in employment. There is a sort of implicit historical hierarchy.*

I will tell you why this is a big issue in France: our legislation does not differentiate as much as American law between prohibited grounds for discrimination. Even if there are possible differences in treatment in law based on age and disability, if they are legitimate and proportionate, then the concepts of direct and indirect discrimination and the system of proof of discrimination is the same regardless of the ground invoked. In the United States, however, there are different statutes for different criteria: Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act (PDA), the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). For example, indirect discrimination based on age was recognized quite late, and the system of proof of discrimination based on age is not exactly the same: the requirements for proving discrimination based on age are higher. So do these legal differences reflect a hierarchy or ranking of cases of discrimination depending on the protected category?

RICHARD FORD: I wouldn't want to say it is more important to eliminate race discrimination than it is to eliminate sex discrimination. That would be wrong. But they are different. The types of social practices that the law is trying to counteract are different. There are different implications, and so there ought to be differences in the way we go about implementing those policies. Unfortunately, sometimes what happens is people draw the analogy too quickly without attending to the differences. You often hear: "Well, if this was race, no one would allow it; therefore you can't allow it here." So in that sense, you can understand why the United States Supreme Court said racial classifications receive strict scrutiny and sex discriminations receive what they used to call when I was in law school intermediate scrutiny.

MM-B: *It is not called that anymore?*

RF: There used to be an idea that there was this kind of three-part standard, but now rational basis standard[14] has kind of merged into intermediate scrutiny in an interesting way.

The idea is we should look to the purposes of the law: for instance, one of the unfortunate consequences of saying that racial classifications get strict scrutiny is that it has been more and more difficult to have things like affirmative action. In my view, that is a perverse result. In that sense, the hierarchy of concern, with race at the "top" has actually made it harder to remedy race discrimination than it is to remedy sex discrimination, for instance, which it is understood not to receive strict scrutiny.

But we can see the way a separate whites-only bathroom and a black bathroom is very different from a separate men's bathroom and women's bathroom. And it is silly to suggest if we would not allow racial segregation in the bathroom, therefore we cannot allow sex segregation in the bathroom. You can make an argument against sex segregation in bathrooms, but it is not the same thing. Yet some people make that argument because they are kind of enraptured with these conceptual approaches and they are not thinking of the practical implications on the ground.

MM-B: *What are the purposes of the law? How are they different?*

RF: In order to understand the law against race discrimination, you need to look at the practices of race in the United States. We are talking about this country and how it has evolved, and there are very specific practices. For instance, it is not an accident that the law tried to invalidate racially segregated bathrooms, because racially segregated bathrooms were one of the major symbols of Jim Crow segregation.[15] They were set up and designed and had the effect of sending a message of contempt for black people. If there had been a different history, maybe no one would care.

MM-B: *So history has a big influence.*

RF: Yes, it should.

MM-B: *So it is not something objective. You are not looking at the difference of treatment, outside of history, and saying there is something wrong about this.*

RF: I don't think you can do that in the abstract. It has got to be embedded in history and social context, and that's how we can understand why a practice is objectionable and deserves the extraordinary condemnation of the law.

Let's face it: for the most part, we let employers and proprietors make distinctions between people on all sorts of bases, and the law doesn't intervene, even when it is arbitrary, even when it is unfair.

There is a list of categories that we think are particularly problematic. There is a reason we picked those. That is because there is a history of discrimination, a history of irrational aversion, and there are social problems and dislocations that result from that.

Now, for sex, there is a different history; there is a different set of practices and a different set of problems—no less severe, but different. So it makes sense that you would have somewhat different interventions.

When you look at disability, when Congress passed the ADA, they had a sociological finding, which is in the Congressional Record, that disabled people were shut out of the labor market and were disproportionately poor, indigent, and unable to be integrated in any significant way in the mainstream economy or social life. That was the reason for the ADA.

Is that in a different place in the hierarchy? I don't know because in fact ADA, unlike Title VII as applied to race and sex, requires accommodations. Title VII requires accommodations in the religious context, too, but only when the cost to the employer is minimal—the ADA requires accommodations that can be quite costly.

So the ADA requires special treatment. Now, why? Not because discrimination against the disabled is more important, but because it is a different kind. In order to integrate disabled people in the workplace, they need accommodations. There are differences. If you are in a wheelchair, you need a ramp; if you are blind you need braille, and we could go on. Now the law is trying to balance the interest of integrating the disabled person with the cost to the business or the enterprise in question.

MM-B: *You seem often to come back to the idea of balancing of interests. To you, norms are often linked to that application.*

RF: As a practical matter, yes. Yes. When you really drill down, that is what we are doing. Lawyers don't like to talk about it in that way. So what we like to say is we are eliminating bias, we are eliminating bad motivations. We are trying to wipe that out. We are setting up an even playing field.

Even when you are dealing with a situation that requires costly accommodation, it is understood under the rubric of discrimination; if you don't reasonably accommodate, then that is discrimination. But the truth is that we

are doing something different, something that cannot quite be understood in practice as just getting rid of bias.

What we are really doing, what the courts are doing, and what we want the courts to do ideally, is strike a balance between what the employers have done in the past, what is easy to do because it is familiar, and a social policy that an individual employer might not take up on his or her own but that is important for social harmony between various groups and to help subordinated groups throw off the burden of the past.

It is easy to see that in the disability context, when you are often talking about costly accommodations. There is no way of making the case to the employer that he or she is just as well off making the accommodations as not making the accommodations. The accommodations are expensive and it would often be better for the employer not to make them. But you can certainly make the case that society is better off for making the employer do it.

Julie Suk also considers the idea of a hierarchy of grounds of discrimination.

MARIE MERCAT-BRUNS: *I would like to come to another question and actually tie together two questions: I think a comparison between French and American law is also useful for understanding in what respect there might be a hierarchy between grounds of discrimination. Do you think France and the United States see discriminations based on race, gender, and age differently, in a hierarchy, somewhat like the different standards of scrutiny of the U.S. Supreme Court: suspect classifications, intermediate scrutiny, and rational basis?*

JULIE SUK: I think both legal systems view different grounds of discrimination differently, and how they do so differs. In the United States, equal protection analysis scrutinizes racial classifications more closely than sex classifications, for instance. In France, only racial distinctions are absolutely prohibited by the Constitution, and in fact you have a constitutional clause that permits the recognition of sex difference through that clause essentially allowing parity through language favoring equal access of men and women to political representation.[16] So in effect, the French Constitution is much stricter with regard to racial distinctions than with regard to sex distinctions.

In the employment context, I think U.S. law tends to analogize race and sex much more easily than the French law. For instance, we have a strong anti-stereotyping doctrine in both race and sex cases under Title VII. In France, by contrast, generalizations about race are highly problematic and illegal, whereas the generalizations about gender that underlie generous maternity protections and differential treatment of maternity and paternity are generally unproblematic. (Of course I recognize that there are debates about this, as well as some pressure from European courts to take a more gender-neutral approach, but by comparison to the United States, this is a significant difference worth noticing.)

And, as I mentioned in our last session, we also have antistereotyping doctrine to age, and we have extended similar (though not identical) protections to older workers as we do to racial minorities. In Europe, including France, there is much more ambivalence about extending antidiscrimination protections to older workers.

Robert Post considers racial discrimination in constitutional law.

MARIE MERCAT-BRUNS: *At what level (federal constitutional or state legislative) is the combat against discrimination being fought?*

ROBERT POST: There is an inherent tendency to make constitutional law general, and there is more of an opportunity to make statutory law impact-oriented. . . . But even in the interpretation of statutory law, there has been a retreat in the courts.

MM-B: *So what you are saying is that in context, you go farther with the statute, but that in symbolic terms, it is very important that you have a constitutional principle.*

RP: Exactly. The symbol is acutely powerful because it stands for the national values. And we argue about that symbol, which brings us together in a way the statute doesn't.

MM-B: *The symbol focuses more on racial questions than gender.*

RP: No. Our gender constitutional law is a little more complicated. We permit discrimination in the military and in marriage.

Ruth Colker examines the historical dimension of racial discrimination.

MARIE MERCAT-BRUNS: *How do you interpret the race criterion?*

RUTH COLKER: Race is odd. What is the anthropological meaning of race? It is also a socially constructed term. From a subordination perspective, we can see that these groups have faced historical discrimination.

Disability is different from the other categories. Mental health issues, cognitive impairment, and those who do not have a visible disability are each quite different and have little in common, and yet they are lumped together as disabled. I wish there were more understanding and historical analysis in the United States because the term *disability* there is very broad.

Reva Siegel explains how racial discrimination has served as a model.

MARIE MERCAT-BRUNS: *So even for race, you think that constitutional case law on equal protection can explain this need for order and social cohesion in the field of discrimination? Does the constitutional analysis justify this third way of looking at equal protection (in addition to anticlassification and antisubordination)? In the French judicial system, constitutional review through individual litigation is recent (in force since 2010), so for now our constitutional case law on equality is not that extensive, although this is not necessarily true of other*

courts' jurisprudence, such as that of the Council of State or the Cour de Cassation. Some is based on formal equality, but this is changing. Is it perhaps because of your constitutional case law on equal protection that you can have these three perspectives of diversity? Maybe I am going too far.

REVA SIEGEL: Yes, this is very much judge-made law. We have large bodies of statutory civil rights law in the United States. In fact, most of our equality law is statutory. The Civil Rights Act of 1964 sets down nondiscrimination law in public accommodations, in employment, and in education. We have a Voting Rights Act, and we have a Fair Housing Act, and there are bodies of law on insurance with nondiscrimination with respect to sex. There is much legislation, some of which is near-constitutional in its character: a kind of legislative deliberation with creative judicial interpretation. By contrast, the constitutional jurisprudence is typically associated with the work of courts, although Robert Post and I have written on the role that legislation often plays in importing constitutional law into civil rights laws.[17]

So, yes, these antisubordination, anticlassification, and antibalkanization[18] concerns have emerged with the work of courts.

Later in the interview, Siegel speaks again about race discrimination and her classification of antidiscrimination models.

RS: First, I want to emphasize that if you asked others to describe the antidiscrimination tradition, they would probably talk about a dispute between two principles: anticlassification and antisubordination. These concerns about balkanization are only intermittent in the commentary. What I am doing is drawing together threads of comments and cases and drawing attention to something I have called antibalkanization. I have not published this piece yet,[19] so it would not be so squarely recognized as the American tradition. I have been writing to bring people to see that it is there. This is very new work.

Second, judges express these concerns about balkanization—about the value of social solidarity and the risks of social division—to guide how issues of race and equality are engaged in the political domain. They are advising administrators of affirmative action how to proceed so as to achieve a form of community in which there is less racial division and conflict. These observations are judicial, but they are judicial intuitions about cultivating understandings in the community at large. For example, the affirmative action cases teach educators how they ought to act if they want to be race-conscious without provoking racial conflict. Those who engage in race-conscious interventions have to proceed with extreme caution for a variety of reasons.

Comparative Perspectives

Racial discrimination is not only the most decried form of discrimination; it has served as the model in the United States for the construction of antidiscrimination

rules. To this day, it is still a benchmark of society's efforts to integrate minority groups, and the fiftieth anniversary of the Civil Rights Act in 2014 is a useful reminder of what still needs to be done despite court resistance.[20] More recently, two Supreme Court cases, one concerning a doctor of Middle Eastern descent[21] and the other an African American catering assistant,[22] modify two important standards in the employment discrimination context and make it more difficult for a plaintiff to plead and prove racial harassment and retaliation claims.[23] As mentioned by Ford, Suk, Post, Colker, and Siegel, in addition to considerations about the contours of the ground itself, cases involving race have led to the emergence of the disparate treatment and disparate impact discrimination mechanisms, the categorization of antidiscrimination law as being rooted in anticlassification or antisubordination discourse,[24] and different levels of judicial scrutiny of equality. In the United States, racial discrimination has served as a point of reference from which a body of antidiscrimination law has been created, through analogy, although some mutual influence with case law on other grounds can be observed.[25] This does not signify that racial discrimination is more serious than other forms of discrimination, but it seems to be perceived as possessing the greatest ontological weight in the U.S. body of antidiscrimination law.

Because of the deeply personal and odious nature of racial discrimination, a paradox has been created, which exists in France as well. The fight against racial discrimination is highly visible in society and seen as unquestionably legitimate, but by the same token, it has undermined the expansion of norms established to support this fight, through various perverse effects.[26] With the harsh indictment of overtly racist statements[27] and acts of disparate treatment discrimination[28] since the 1960s or 1970s, depending on the country, subtler acts of conscious and unconscious racial discrimination have surfaced. These biased acts have been identified in the United States but are more difficult to prove in court. Meanwhile, fundamental initiatives such as affirmative action have been stifled.[29] In the United States, these measures have gradually come to be perceived as differences in treatment based on race and are subject to strict judicial scrutiny, as Ford and Siegel point out. The high profile of racial discrimination in the United States[30] has been a trap for those endeavoring to fight it, in the sense that other forms of discrimination with fewer political and social stakes have been successfully addressed through the intermediary of law, using more interdisciplinary and sometimes more subversive measures.[31]

Our American scholars' commentary is therefore doubly relevant, because through the examination of racial discrimination cases, it allows us to track the milestones reached in antidiscrimination law and also measure what remains to be achieved within the logic of this law. American scholars can identify and explain the limits of legal norms with respect to this seminal issue of racial discrimination.

The issue of race, when considered in a comparative perspective with regard to antidiscrimination law, is intertwined with three fundamental questions. The first

concerns the blurry contours of the ground, noted in particular by Oppenheimer and Colker, which is more problematic in Europe than in the United States. The second question, closely related to the first, is about the effective enforcement of the law and proving racial discrimination in employment as opposed to in other areas of society. The third involves the different ways of maneuvering out of a relative impasse in the treatment of racial discrimination, by playing with the contours of the ground or the manner in which indirect discrimination is used.

What Is Race?

In the United States, we know that ethnoracial statistics can be collected and that people may volunteer self-stated data on their physical characteristics or race, described as white, black, and so on, or a combination of these.[32] However, one should not assume that there has never been any debate in the United States about collecting this data.[33] Controversy flared over the categories used by the U.S. Census Bureau for the 2000 census. In their commentary, Oppenheimer, Ford, and Colker remind us that the reference to race has a fundamentally historical origin in the Jim Crow laws enforcing racial segregation. This distinguishes race, a "suspect classification," from other grounds, as Ford shows with his compelling example of segregated bathrooms.[34] The scholars agree that race is perceived not as a biological reality but as a social construct. The race ground can therefore be interpreted as a subjective—not objective—ground. In fact, it is a ground with a subjective component, used to reveal not any genuine classification of human beings but the result of an odious social perception held by both those who are discriminated against and those who do the discriminating. Is this not the goal of antidiscrimination law?

The debate in the United States centers on how this social construct is used: either we simply develop the idea that the construct can be used to detect discrimination against people from visible minorities, or we take the idea further and consider the existence of a cultural identity that represents the positive aspects of belonging to a group, outside of racial exclusion. This is the choice that Oppenheimer seems to make when he talks about racial diversity, and his idea can be applied to other groups; it is interesting to see how race might be an important factor in fostering a sense of belonging, on the same level as many other descriptive characteristics cited by Oppenheimer, which are not protected grounds (the fact that he lives in New York, for example, and is a law professor). In his book *Racial Culture: A Critique,* Ford is much more reserved about the existence of a cultural dimension to the social construct of race, the emergence of multiculturalism, and the specificity of an "Afro-American culture," which could combine to create other racial stereotypes.[35] He gives cornrows as an example: can this hairstyle be said to partly represent the Afro-American "culture"? One can imagine the potential missteps leading to the identification of certain traits as specific to a "racial culture."[36] In light of the recent U.S. tension about police brutality with regard to the younger black population[37] and the issue of racial profiling, the question of identification of

individuals or groups becomes paramount. In this type of criminal case, the debate revolves around other tools to prove the discrimination: video technology rather than statistics.

In European and international law, race is far from being precisely defined. International law[38] provides a very broad definition of racial discrimination, which tends to encompass every category closely or remotely related to race. In the UN Convention on the Elimination of All Forms of Racial Discrimination, "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[39] The vagueness of this wording masks the multiple causes of racial discrimination, linked to physical traits in particular, and the differences among the protected grounds in various countries with respect to race.

In Europe, due to a lack of consensus in EU countries on the issue, no definition of race was included in Directive 2000/43[40] on racial equality.[41] EU case law is a little more articulate[42] and addresses each question separately, in particular, the question of differences in treatment based on origin and nationality, which has its own body of law.

The treatment of nationality is in fact complex. EU law contains extensive provisions prohibiting discrimination against citizens of an EU Member State on the basis of nationality.[43] Indirect discrimination was explicitly recognized by the European Court of Justice for the first time[44] in a case involving nationality,[45] with the Court holding that indirect discrimination against nationals of other EU countries was prohibited, as well as against EU nationals for whom free movement between countries is a part of their identity, namely, the Roma people.[46] The issue of discrimination against the Roma[47] reveals ambivalent attitudes in the European Union.[48] On the one hand, the European Union prohibits discrimination based on origin and promotes equal treatment of all EU citizens to ensure free movement[49] and has even condemned a Member State based on ethnic origin discrimination by association,[50] but on the other hand, national courts[51] do not consistently sanction differences in the treatment of the Roma.[52]

Under Article 14 of the European Convention on Human Rights,[53] the position of the European Court of Human Rights (ECtHR) is less ambiguous,[54] referring, in certain cases at least, to the UN international convention on the elimination of racial discrimination.[55] The court also addresses the question of the interaction between origin and ethnicity, whether real or perceived. Its approach to interpreting ethnicity[56] is important because of how it prohibits discrimination based on false perceptions that eventually lead to racial discrimination.[57] Is this not the aim of prohibiting discrimination: to fight against unfounded, arbitrary perceptions or perceptions founded on a false reality engendering unjustified differences in

treatment? The court considers not only "dissimilar treatment in similar situations" but also "equal treatment of different situations, without objective and reasonable justification" as discrimination.[58]

ECtHR judges leave scant margin of appreciation to the States if a category leads to racial discrimination[59] and is considered to be "suspect" in the meaning of the Supreme Court, since even differential treatment based on a perceived ethnicity would constitute racial discrimination:

> Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination. . . . Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.[60] . . . In any event, the Court considers that no difference in treatment which is based exclusively or to a significant extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.[61]

Thus the grounds of origin, nationality and race are considered to be implicitly "suspect" ("particularly invidious"), and this translates into a stricter scrutiny of the justification of differential treatment.[62] In some cases, the second prong of the judicial standard—a proportionality test to determine whether the differential treatment is proportional to the means employed and the intended purpose—is not even required; this approach echoes the position held by the U.S. Supreme Court and our scholars that race is a social construct. In 2008, the ECtHR reiterated its commitment to racial discrimination: "In view of the fundamental importance of the prohibition of racial discrimination, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest."[63]

The ECtHR has acknowledged in certain cases that States "enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment," but that very weighty reasons must be put forward in the case of a difference in treatment based exclusively on the ground of sex.[64] This varying intensity of scrutiny seems to reinforce the idea of a hierarchy of grounds, at least on a secondary level, depending of course on the context in which they are invoked.[65] Neither ethnicity nor origin define race, but both grounds produce racial discrimination, sometimes in similar situations, and this is the link between the three factors. Furthermore, the issue of perceived membership in an ethnic group does not mean that the judge's scrutiny of the ground of ethnic origin is more subjective than for race; in fact, they can have the same impact. As the court explained in a pedagogical manner, "Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according

to morphological features such as skin color or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language or cultural and traditional origins and backgrounds."[66] Some ECtHR decisions examine the discriminatory effects of stereotyping: focusing on the bias that racial and ethnic discrimination produces is a way to avoid dwelling on the specific contours of race and ethnicity.[67] Another legal strategy to grasp racial and ethnic discrimination in all its dimensions is to use the concept of indirect discrimination; this solution, however, has recently been less successful.[68] In the United States these definitions seem to merge, describing both origin and race as a social construct based on biological factors coupled with feelings of belonging to an ethnic or cultural group.[69]

Ban on Distinctions Based on an Indefinable "Race" in France

In France, for obvious historical reasons and current racial tensions,[70] the use of race and other personal data is strictly regulated,[71] which has not prevented the identification of racial discrimination in employment.[72] But the inability to collect data on large scale probably makes it more difficult to produce evidence of subtler discriminatory practices[73] (in the United States, it is possible to compare the pool of black applicants hired by a firm with the pool of black job applicants in that region). Criminal cases are more common outside of the employment arena[74] because they are based on established and observable facts such as racist statements[75] or gestures.[76] The contrast between the high numbers of discrimination complaints[77] based on origin and the low number of lawsuits in France is certainly proof of this.[78] Today, the criminalization[79] of racial discrimination in employment[80] is backed by a more ambitious approach in civil law where a shift of the burden of proof is possible.[81] In addition, based on the lack of transparent and coherent selection criteria and the absence of an objective selection method,[82] a presumption of discrimination on the ground of origin can be made, as the Cour de Cassation confirmed.[83] Although authorized, situation testing is unfortunately more commonly used to prevent discrimination than to sanction a discriminatory act after the fact.[84]

Cases of open racial discrimination have been identified in connection to unwise recruitment decisions by an employer[85] or a temporary work agency,[86] but are no longer those frequently encountered in the workplace.[87] Currently, racial discrimination is either based on conscious bias and more or less adroitly dissimulated,[88] or it is unconscious and revealed only through evidence of systemic or indirect discrimination.[89] France demonstrates a strong attachment to the ideology of equal treatment, which can even be labeled as egalitarianism. This seems to negate any difference in treatment of foreign-born French nationals in the workplace, but the facts are that discrimination on the basis of race or origin is a daily occurrence[90] and can even be exploited[91] to justify certain immigration policies.[92]

Furthermore, a form of racial segregation based on origin has undeniably reappeared in sociological studies of the current reality in France, even if analysts

disagree somewhat on this issue.[93] This is a salient point because the social classification of populations, a task now often performed by urban sociologists,[94] plays an important role in France and increasingly relies on surveys of the geographic distribution of the population and of occupational categories.[95] A person's individual status based on his or her occupation is widely used in statistical and sociological studies in France. Unlike the United States, France has other significant options for assessing a person's "status." In addition to tracking occupational data, precise records are kept of a person's civil status, and national ID cards are issued. For a comparative approach examining the grounds of discrimination and the norms that categorize people, it is important to consider how, in most cases, it is the nature of this classification that changes from one country to another. In the United States, racial and cultural statistics are gathered; in France, data on occupation, nationality, and civil status are collected. This is the logic that must be understood in order to fight racial discrimination in France and recognize the potential magnitude of the social and professional segregation of certain groups.

Impasse in the Fight Against Racial Discrimination

How can these difficulties be overcome to achieve a more complete eradication of racial discrimination, the cornerstone of all antidiscrimination law? By taking advantage of the lack of precision in France regarding the contours of this protected group and of what constitutes evidence of discrimination. The ground of origin already encompasses the surname.[96] One option is to choose from among the categories cited in Article L.1132–1 of the French Labor Code—which includes perceived differences (origin, *actual or perceived* membership or nonmembership in an ethnic group, nation or race, or a combination of these)—to refine the ground being invoked, relying on decisions demonstrating how these factors are directly or indirectly linked to racial discrimination. For example, in cases of age discrimination, it is common to demonstrate more legitimate, nonprohibited factors assimilated with age, such as seniority or experience. Race is invoked in references to origin, name, ethnic group, and nationality. Furthermore, since economic status is a more "performative" category in France, the addition of place of residence[97] as a protected ground or, more subversively, social origin,[98] as in the European Convention on Human Rights, might help reveal some forms of racial discrimination. A French legal expert has studied discrimination based on social origin in Quebec, where this ground exists in the Quebec Charter of Human Rights and Freedoms (Article 10),[99] and the Senate recently adopted a bill banning discrimination based on social hardship.[100] This is relevant, for example, for overseas territories and areas with a large proportion of foreign-born residents.

Another possible approach to detecting racial discrimination is to invoke grounds of indirect discrimination. If an employer hires someone on the basis of specific educational qualifications, specific schools, specific general culture tests,[101] or specific types of clothing, then there can be a presumption of discrimination

against applicants from economically disadvantaged areas who structurally will not have these characteristics and are therefore subject to multiple discriminations. The United States is also moving in this direction with affirmative action programs that increasingly use location as a selection criterion.[102] Since economic hardship affects both whites and minorities alike, this location-based approach helps reduce the risks of racial conflict highlighted by Siegel (such as the risk of balkanization) and meet the tough standards of constitutional review applied to affirmative action.[103]

III. SEX-BASED DISCRIMINATION

Discrimination based on sex is a legal concept with a long history, whose importance can be gauged by the tensions that continue to plague it.[104] Sex discrimination may not be a new concept, but disputes over its boundaries are still strong, whether in relation to other historic grounds of discrimination, such as race, or newly recognized grounds, such as gender. In the class action case against Wal-Mart,[105] Justice Ginsburg's dissent exposed the individual and systemic nature of this type of discrimination. It reads:

> The plaintiffs' evidence, including class members' tales of their own experiences, suggests that gender bias suffused Wal-Mart's company culture. Among illustrations, senior management often refer to female associates as "little Janie Qs."[106] One manager told an employee that "men are here to make a career and women aren't."[107] A committee of female Wal-Mart executives concluded that "stereotypes limit the opportunities offered to women."[108]
>
> Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal-Mart "can only be explained by gender discrimination [which encompasses sex discrimination in the United States] and not by . . . neutral variables."[109] Using regression analyses, their expert, Richard Drogin, controlled for factors including, inter alia, job performance, length of time with the company, and the store where an employee worked.[110] The results, the District Court found, were sufficient to raise an "inference of discrimination."

The following conversations with scholars seek to raise the curtain on specific sources of sex-based discrimination, which are found not only in the sphere of employment but also in assumptions made about a woman's reproductive ability as necessarily forming a part of her intrinsic identity, further consolidated by the "protection" bestowed on women in employment law or workplace policies.

To begin, Vicki Schultz looks back at the history of sex discrimination.

MARIE MERCAT-BRUNS: *Has Title VII been effective in fighting sex discrimination in the workplace, as compared with race discrimination? How have sex stereotypes been identified since Price Waterhouse? With respect to steps taken by employers to avoid disparate impact discrimination based on sex, what do you*

think of the Ricci v. DeStefano *race discrimination case? Is the decision a blow to voluntary compliance by employers and the interaction of disparate treatment and disparate impact discrimination?*

VICKI SCHULTZ: How receptive has Title VII been in fighting sex discrimination in the workplace as compared to race discrimination? I would say that with respect to both phenomena, although the time period that we are talking about is different, there has been a similar process. In the early period of Title VII (from 1965 to 1978 or 1979), there was very vigorous enforcement of all the antidiscrimination laws on all fronts simultaneously. The federal government played a big part in this, the Department of Justice Civil Rights Division in particular. There is some agreement, I think, among social scientists that initially, for a decade plus a few years, this was very effective, and the degree of racial segregation by job and by occupation declined very significantly during that period, along with the racial wage gap. So very significant strides were made in the wake of the vigorous enforcement of Title VII that occurred initially.

Things began to stagnate in the late 1970s. There is some controversy and disagreement among social scientists on why that occurred. There are a number of factors that people turn to: the decline in manufacturing jobs, for example, where racial minorities (males) had made headway in the wake of Title VII, due to the globalization and the exportation of many of these jobs abroad.

At one point too, the federal government's efforts to enforce the law begin to decline. In the late 1970s, across a variety of areas, we can see that the courts began to relax enforcement and to adopt slightly less pro-plaintiff standards. So there is some question about the extent to which the change in legal enforcement also contributed to the stagnation.

Sex discrimination enforcement didn't get off the ground during the same period. The National Organization for Women (NOW) was born because the EEOC was not enforcing Title VII with respect to sex discrimination, and Betty Friedan and other women decided to get together and do something about this and form NOW.

So the enforcement of sex discrimination does not begin in earnest until sometime in the early 1970s. We do see throughout the seventies and the eighties, for the first time in a century, the decline in sex segregation in the workplace, and that is a very significant achievement. There is also a decline in the attendance disparity, because those things go hand in hand, and a number of practices that plagued women in various industries are successfully challenged. I think of things like the marriage bar (if you were a flight attendant and you got married, you had to resign from your job). If you were larger than a certain weight, you had to resign from your job. All of these things were successfully challenged. The attack on pregnancy discrimination, which was not

successful at first in the Supreme Court,[111] found success in Congress in the Pregnancy Discrimination Act.[112]

There were a number of significant achievements in the 1970s and 1980s. What is interesting in terms of the social science is that we begin to see the same thing, which is the stagnation of the progress in the 1990s. Here the work is more preliminary than it has been in race: the evidence has been accumulating for much longer, and it's been studied more robustly by many people. But there are some papers suggesting that sex discrimination or sex segregation does not decline, and indeed there are some suggestions that it is increasing again in the 1990s. So we have a lot to do to understand why that is occurring and again whether there are structural factors (the decline of the manufacturing sector). I think no one really knows whether women themselves have begun to change their minds about of all of this. I shudder to think that's the case.[113] I think, as someone who has been concerned about these issues, all possible explanations need to be on the table.

There is also the question of less rigorous law enforcement. While I think that is possible, it is really too early to tell. So I think the story, in summary, is the same in both cases: a period of vigorous enforcement and great achievement that we should be very proud of, followed by stagnation and the need to figure out what is going on. Then time to try something new or something old (since the old policies are no longer being pursued).

Schultz goes on to discuss sex-based discrimination and segregation in the workplace.

MARIE MERCAT-BRUNS: *When we read your work, you don't only say it is a question of enforcement, you seem to say there are structural reasons why women are excluded from the workforce. Would that be linked to the specific context of certain workplaces?*

VS: Can you rephrase the question to make sure I understand what context?

MM-B: *The context has changed. Not only is there less enforcement of the law, but women are not given opportunities to achieve a work-life balance. In your analysis of the "lack of interest" argument,*[114] *advancing that employers configure the workforce, you shed a different light on the issue because you are not looking at how an individual is doing his or her job but at the structural resistance of employers in excluding women in the workforce.*

I don't know if this is compatible with what you just said. Would you like to talk about that now or later on?

VS: I'm happy to talk about that now. You bring out the work I have done on the lack-of-interest rationale, and as an example let's take race first. It is always important to consider what's happening in different areas of social bias. One of the things I found in looking at what happened in the race discrimination litigation is that there was a profound shift in the judicial attitude toward cases

challenging systemic exclusion, or what I call segregation, in the late 1970s. This period corresponds with the period where we begin to see stagnation in the progress. So for the first time beginning in 1977, judges of all ideological persuasions, supported by Democrats as well as judges appointed by Republicans, begin to accept some version of a lack-of-interest argument as a defense for patterns of fairly extreme segregation in the workforce.

It was very depressing to me to find this result, but it suggested to me that sometime in the 1970s the liberal consensus on race began to break down in the United States and we began to see the rise of neoconservative explanations for racial inequality. These are not structuralist explanations but instead tend to pin the responsibility or assign responsibility for the persistent patterns of inequality to privatized forces, like what's happening in family life, individual work ethic, or things of that kind, as opposed to large-scale public or quasi-public institutions, like what's happening in the workplace or what's happening in the educational sector or the welfare office.

Now, can we point to something like that in sex discrimination? You can see that in sex discrimination the underlying idea has always been and continues to be that sex inequality is really due to privatized forces and not due to anything that employers or governments or schools or large public or quasi-public institutions do. So even among many feminists, I would say—and here is a controversial assertion, but I do think that there are certain strands of feminist discourse and rhetoric about patterns of inequality by sex that, in a way, resonate with neoconservative explanations pinning the responsibility on women themselves, their choices, and privatized forces in the family, as opposed to looking at what large-scale institutions have done to encourage certain family forms and choices that occur within them. So women are consistently seen as creatures of domesticity whose allegiance is primarily to home and heart and for whom everything else is secondary. When you see women in this light, it makes certain explanations of why we are not found at the top of the heap pretty easy to accept. I am not saying there are not patterns of inequality in family life; of course there are. It is a question of how we explain those patterns.

MM-B: *So are you saying it is an interaction between the choices they make at home and the choices they make in the workforce? So the employers impose a "type" of workforce? I have a harder time understanding the liberal stance on the lack-of-interest argument. Are the liberals saying that women first make a decision at home and then react to pressure from employers?*

VS: I would not use the term *liberal* here, per se. I don't wish to be understood as saying it is all a question of what individual employers do. It is a question of whether you look at family formation in the context of the larger political economy. For example, if you take an individualized model—let's start there because this was your example: A family, a heterosexual man and woman, are

deciding upon the birth of a child: (a) whether one of them will stay home for six months or a year to be with that child, and (b) if so, which one it will be.

If the male makes more because of the pattern of sex discrimination in job assignment, hiring, wages, and so forth, it is going to seem rational to do this. So you can always look at that decision later and say the woman chose to stay home with her baby and that's why she is not getting ahead in the workplace. But that brackets out, as a natural fact of life, the pervasive pattern of sex discrimination that may have led to a lower wage to begin with, which would be antecedent to that choice for the couple. That is the sort of thing I mean in the sense that women are constantly seen as creatures of the family, and their duty is seen as primarily motherhood whereas men's is not. So that is one example.

There are other kinds of examples, if you looked at this at a macro level, where you could ascribe certain family formations to larger organizations of the economy: the nuclear family itself and the notion of a family wage that reached its zenith in the 1950s was a product of an economy that was growing, the postwar economy in the United States, in which at least for the first time, working-class men who were members of labor unions and so forth and who were able to capture the benefits of that in wages aspired to have a wife at home, the way the upper-middle classes have had.

Now that family form can't emerge: the notion of the wife at home or the notion of a woman who works part-time without the economy producing certain goods and being structured in a certain way. That ideal is no longer alive in the United States today. People are desperate for work: at least 50 percent of all part-time work is involuntary and this is before the Great Recession hit us. Now those numbers must be astronomical because so few people find full-time jobs and the unemployment rate is 10 percent.[115]

We constantly have to be looking at the way in which our private, intimate life is organized and asking how that is affected by the larger structures of politics and the organization of the economy.

Later in the interview, Schultz comes back to the subject of sex discrimination.

MM-B: *Would you go so far as to say that in the context where women are well-represented in certain fields, then it doesn't matter if stereotypes persist? So stereotyping would not be forbidden because basically the aim is for people, regardless of their sex, to feel comfortable in the workplace?*

VS: We are so far from that. Segregation in the workplace is still pretty prevalent in most countries. Certainly it is still in the United States. So it is not so much we have to face that question legally, although I am certainly prepared to face it. It is a more a question of how we understand these links. If there is ever evidence that shows that remarks that would be perceived as sexist or stereotypes in one context are not really perceived that way anymore in another context,

it shows that the context really matters. It really does matter for people on the ground. It should matter legally as well.

Look at the *[Price Waterhouse]*[116] case as well. It is no accident that in the case of Ann Hopkins, fewer than 1 percent of the partners at this great accounting job were women. The idea that women would be subjected to remarks like "walk more femininely, talk more femininely, and wear makeup" would not at all be surprising to someone like Susan Fiske, who understands the link between sex segregation and stereotyping. In fact, I think the harder case would be if those remarks had not been made to Ann Hopkins but instead she had simply been denied the partnership. The interesting question is, Would the courts be prepared? Would lawyers understand how to work with social scientists to uncover the more subtle dynamics that she undoubtedly faced in that environment and understand that stereotyping could still be a claim even in the absence of these kinds of overtly sexist remarks?

A stereotype that is very, very prevalent for women is that we are less competent in the workplace. And I suspect less research has been done on this, or at least that I am aware of. I think the same stereotype exists with respect to people of color. Something that would question their intelligence, their competence in the workplace setting. So if Ann Hopkins had been denied a partnership even without those remarks, I would hope we would still have legal and social scientific tools for uncovering the stereotypes that she might as well have faced. But in order to even know to look for that, you have to understand the links between segregation and stereotyping.

Christine Jolls looks at sex discrimination through the lens of behavioral economics.

MARIE MERCAT-BRUNS: *How do other disciplines help in the legal analysis of discrimination?*

CHRISTINE JOLLS: I believe strongly that work from a range of social sciences, including economics and psychology, is essential for understanding and shaping an effective and sensible antidiscrimination regime. The teachings of the IAT [Implicit Association Test][117] provide a perfect example of the important role of psychology.

With respect to economics, a critical contribution is analysis of the effects of particular antidiscrimination measures on the wages and employment of affected groups. The theoretical aspiration of any form of antidiscrimination law is (at least in part) to help the protected group, so it is obviously crucial to ascertain whether in fact this is what happens when the law is put in place. Much of the strongest contemporary research in this area concerns legal limits on discrimination on the basis of sex and disability.

In the case of sex discrimination law, a central chapter in the evolution of American law involved the elimination of health-insurance exclusions

for maternity-related hospital and medical expenses. (Such exclusions are prohibited under various state laws and are generally believed to be unlawful under the Pregnancy Discrimination Act of 1978 [PDA], an amendment to Title VII.) Economic analysis suggests that the prohibition on maternity health coverage exclusions may depress the wage levels of female employees, especially those likely to bear children, because of the very high medical cost of maternity health coverage and the substantial degree of occupational segregation by sex, at least until recent years.[118]

A leading empirical study by MIT economist Jonathan Gruber supports the theoretical prediction of declining wages in a period of significant occupation segregation; Gruber found that the legal mandating of maternity health coverage in the 1970s significantly reduced the wages of married women of childbearing age relative to the wages of the workers least likely to be affected by the mandate (workers beyond childbearing age and unmarried male workers of childbearing age). It should be noted, however, that the fact that occupational segregation has decreased over time means it is possible that a health insurance mandate targeted to female workers today would have effects different from what Gruber's study found.

Linda Krieger shares her views on the effects of employment discrimination case law on gender stereotypes.

MARIE MERCAT-BRUNS: *To come back to the employment context and the* Price Waterhouse *case again, some decisions did draw from the arguments of gender stereotypes to recognize rights to transsexuals, right?*

LINDA KRIEGER: Right. There have been some setbacks as well. Have you read the *Harrah's* case?[119] A new Ninth Circuit decision against Harrah's, which is a hotel chain. It involved a woman bartender at a Harrah's hotel in Las Vegas, which had instituted a policy called the "Personal Best" campaign. They brought in a beauty consultant who sat every female and male employee down. I will focus first on the women employees. They did their hair and they did their makeup, and they took a picture of them with their hair all done and then put it on their ID. They had to come to work looking like that. The men had a haircut and they had to clip their nails. So it was like nothing. This woman, who was a bartender and had been a bartender for years, very successful, did not wear makeup. She did not want to wear makeup. She did not want her hair teased and she refused to do it. She was fired. She sued, relying on *Price Waterhouse.* She lost en banc in the Ninth Circuit. The decision was unbelievable. It was as if *Price Waterhouse* had never happened. It is very uneven.

MM-B: *How do you explain it?*

LK: In terms of legal doctrine, it is just wrong. But the way that I explain it logically is that if the Supreme Court does not take certiorari, the Circuit

Court decision stands. I am not sure why the Supreme Court did not take certiorari for a decision that was obviously wrong. Maybe because there is no conflict yet among the circuits, which is one of the factors the Supreme Court uses in deciding what cases to take. Maybe the judge to whom the case was assigned for certiorari review likes gender stereotypes and likes sex roles and did not want this reviewed. I don't really know. It augurs poorly for the utility of Title VII continuing to break down gender norms as they are distinct from sexual categories of male and female.

My view is that employment discrimination to a great extent is sex discrimination in employment. It is all about gender. It is all about the construction of gender: What social roles are appropriate for women? What social roles are not appropriate for women? It gets back to this question of prescriptive or normative stereotypes. A lot of sex discrimination is about that, and a lot of descriptive stereotypes have been influenced by normative stereotypes. So the deconstruction of gender has an important role to play in opening labor markets to women.

I think the struggle of transgender people is extremely important not just for transgendered people themselves but for people who are gendered as male or female or otherwise. This is a very important struggle: these legal issues are very important, and until the world is safe for transgender persons, it will be safe for neither men nor women nor anyone in-between, because ultimately we need to give people the space in which to enact, in which to perform roles that are now coded as either male or female.

MM-B: *Do you think some trends of feminist doctrine created that strong dichotomy of male/female and their opposition and even reinforced it by promoting a view of a liberated woman free from male oppression?*

LK: Actually, I don't. The women's movement played a tremendous role in freeing women from many of the gender stereotypes that had a tremendously negative effect on their lives and to a lesser extent has opened some space for men to be different as well, although I think men have benefited less from the women's movement than women did. I actually see this whole rhetoric of feminists (in the United States at least) as being sex-negative. I don't really buy it. I think that rhetoric is doing a fair amount of damage to many young women. I raised three boys, and when the younger of the boys, who is now twenty-two, was in high school (a hip high school, Berkeley High), he would regularly come home with stories of how at parties the girls would get very drunk, the boys would line up, and the girls would give them blow jobs. To a certain extent, young women who objected to this were called prudes, all these nasty names that you can take as not sexually liberated. The guys when they were by themselves would refer to those girls as whores, and it is the girls giving the boys the blow jobs. It is a negative social consequence when you go in the other direction. I don't see anything particularly liberatory about this,

and yet that was one of the tropes that was being used to perpetuate it. So I think it is a much more complex story. Feminists are in flannel shirts, plaids. They are antisex, bigoted prudes. The queer theory people are sexually liberated, and the feminists are doing the damage. I don't really buy it.

IV. DISCRIMINATION ON THE BASIS OF FAMILY STATUS

France singles out family status as a protected characteristic in its own right,[120] a step that has not been taken in American or European law. Sometimes, the prohibition of "family responsibilities discrimination" in the United States and discrimination based on parenthood in Europe can serve the same purpose, expanding the understanding of equality between men and women.[121] In France, granting childbirth or child care allowances or special child-care-related leave to only mothers and not fathers[122] constitutes a discriminatory practice, but work disadvantages following a decision to take maternity leave, due to the absence from work, are suffered only by women, so distinguishing between men and women in compensating for these disadvantages is not discriminatory.[123] In European law, discrimination on the basis of parenthood must be distinguished from distinctions based on pregnancy or maternity, which are protected by specific measures in Europe, whereas no such difference exists in U.S. law.

Comparative equality law scholar Julie Suk discusses family responsibilities discrimination.

MARIE MERCAT-BRUNS: *What I appreciate immensely is the way you have linked stereotypes on an individual level with general norms, as we can see in your article on the work-family conflict.*[124] *However, you seem to say that stereotypes have prevented American law from evolving to better promote a work-family balance. On that point I see that French law may have something to offer but on the other hand it seems to need to recognize the potential interference of stereotypes perpetuated by the rules governing maternity benefits.*

JULIE SUK: I think there are trade-offs. A strong antistereotyping norm increases opportunities for individuals who defy the stereotypes (for example, a woman who does not have children, is not interested in having children, or has a husband who does most of the caregiving) but may prevent employers or the state from adopting policies and practices that address the social reality (however unjust) that underlies the stereotype, namely the fact that women tend to do more caregiving as a result of ingrained cultural norms. The challenge for French law is whether it can protect individuals from these stereotypes without compromising the robust policies that protect women and enable them to balance work and family. I am not sure.

MM-B: *Do you want to tell us what you think about the new form of indirect discrimination, family responsibility discrimination, and maybe other work you are doing?*

JS: Well, there are two issues that I'm afraid we've conflated: first, whether discrimination is a useful concept, and second, whether litigation is the best approach, as ways of addressing the complex set of social problems that tend to reinforce the effects of past racism and sexism.

Which brings me to family responsibilities discrimination. The concept of discrimination is useful only to the degree that it helps an individual supermom to avoid the stereotype that employers (and society at large) may hold, which is that women tend to experience work-family conflict, which undermines their ability to perform as ideal workers. The concept of discrimination does nothing to change the structural problem, which is that the workplace is designed around the assumption that the ideal worker is a person (i.e., a man) with no significant family responsibilities. So it's a trade-off: the concept of discrimination targets some problems and not others. We then have to ask ourselves which of these problems should be the focus of gender equality. If structural transformation of the workplace is the answer to that question, the concept of discrimination is not going to give us a lot of mileage.

Vicki Schultz shares her views about France's thirty-five-hour workweek.

MARIE MERCAT-BRUNS: *In light of a need for work-life balance, how do you view the question of flexible hours and the thirty-five-hour workweek, which was an important turning point in France?*

VICKI SCHULTZ: This is a very complicated issue. People who subscribe to one or another way of understanding of what discrimination means have different views about these matters.

For me, if I look at the U.S. context, the notion of reducing hours in a universal way, not through women only and not through parents only, would be a wonderful move, a utopian aspiration—although interestingly, in the context of the recession now, it is not nearly as utopian as it used to be. Two weeks ago I attended and gave a paper at a conference on the reduced workweek at the University of Connecticut law school.[125] Many employers and state governments are looking at this as an option now because they can't afford to pay all their employees. So they are actually looking at equitable ways to cost costs, and one way to do it is to reduce everyone's working hours. I wrote a paper[126] on this only three years ago, which I think was treated as really ridiculously utopian and irrelevant to anything American feminists might be considering, and now I think this is coming back on the table.

Why do I think it would be interesting and beneficial to pursue legislation of that kind? Because what I always seek to do in my work is to look for and uncover ways in which the broad structural framework limits the choices people can make. It limits the opportunities they have to practice equality. If we are in an economy and in a situation where there is a wage differential treatment between men and women, and the person who earns most of the

money for the family is forced to work extremely long hours in order to hold down his or her job and it is a family with care responsibilities (elders or children or lovers or whatnot), then that is going to put pressure on a member of the couple to work fewer hours: there is no question about it. This couple may not be able to practice equality if they want to in terms of achieving an equitable and an equal distribution of employment versus other forms of work, volunteer work and the like, whereas if that person who earned most of the money weren't subject to the demand to work long hours, the couple might be able to practice equality and work reasonably similar hours in the employment market and spend reasonably similar hours in domestic, volunteer work and the like. In the paper that I wrote, I cited evidence from the book *The Time Divide* by Jerry Jacobs and Kathleen Gerson, in which they find that in countries that have a more moderate workweek, couples are more likely to devote equal time to wage work and home work.[127] This is not to say that if we reduced the workweek in the United States, where people work very long hours, equality would be achieved automatically, because it requires a commitment to equality on the part of the couple that [a reduced workweek] alone would certainly not achieve.

MM-B: *Some studies on the thirty-five-hour workweek show that men in France are not necessarily devoting that extra time to the home or volunteer work or responding to emergency situations for the children, but instead develop their hobbies or sport activities.*

VS: The question is what did change since the thirty-five-hour week? This is actually very difficult methodologically. There has been some suggestion in the United States that men have increased their housework over the last generation. They still do far less than women, so you can look at that as, Do men do as much as women? No. But it is still significant that they have increased their housework and their child care over time, and so the question is, What have been the things that have either forced or enabled them to do that, depending upon how you see it? I think if you have more similar workweeks, as members of a heterosexual or gay couple, you're increasing the bargaining power of the person who worked no hours so the other could work long hours. You are now taking an argument off the table: "But I can't do it because I am working eighty hours a week." In that sense, you are creating a more level playing field that allows for the paradigm of equality (the disruption model)[128] even while it enforces it.

MM-B: *There are definitely examples in France of increased commitment of both parents for example to domestic work, but in a lot of cases the women are still supervising the coordination of family activities, for example.*[129]

VS: Changes are slow in coming. Many factors go into this, and what I would say is to not always see men as the villains—as a feminist, to understand that gender constrains men. Gender roles, stereotypes, and segregation constrain men

as much as they constrain women. If you look at the United States, there are Generation Y surveys and the younger men say that they don't want to work long hours. They just don't really want to do it. That was not true of the baby boomers: they would have not expressed that preference. Whether they will be able to achieve their preference is another matter, because it is not all what we want; it is what we are permitted to do.

I do think change is possible but it is slow in coming, and it may be that some of those mothers hang on to the family organization because they want to have a certain control. I can understand that, because they have less power and less control in other spheres of life, so it may be very difficult for many women to give up the one source they really have. It is a source of honor and power and control and virtue in many corners of society.

MM-B: *You mentioned the book by Jerry Jacobs and Kathleen Gerson.*

VS: Yes, *The Time Divide,* published by Harvard University Press. I should be pointing out that to talk about a reduced workweek in the United States is a misnomer because one of the things that Jacobs and Gerson show in this book, and it has been shown by other sources as well, is we really have a bifurcated labor force. We have some people who work very long hours, which is a problem where dual degree couples both work very long hours: that is an intense set of issues. But on the other set of issues, there are people who can't get enough hours, so they end up working two or three jobs and they end up working long hours, but a reduced workweek is not the solution for them.

In the paper I coauthored with Allison Hoffman on this, we were arguing for policies that would try to create convergences for a more moderate workweek for everyone. We weren't addressing the need of only the fancy professionals like lawyers who are forced to work long hours. We tackle the problem of contingent work, and I think it is the case in many other countries as well, where people work sporadic hours and don't even know if [their work] is going to be in the same building or at the same time. It is very involuntary. They would like to have more regularized work that is closer to thirty hours as opposed to ten. They have to paste together several menial jobs to manage to make a living.

MM-B: *Do all your theories revolve around work? Do you believe in all these theories about life paths that alternatively provide opportunities for education, training, and sabbaticals all through life without losing social security benefits during these different periods? This is known as "flexicurity" in Europe. Do you believe in these frameworks, or do you ground your analysis always on work as a foundation?*

VS: I believe both things: I believe work is very important because I cannot foresee a future in which the majority of people do not have to engage in some form of remunerative activity, so I think work will continue to be important in the twenty-first century. However, I do think we are living through a profound

paradigm shift in the organization of production and the organization of work that we don't fully understand yet. Some people have pointed out its fundamental features, but we don't really know whether they are fundamental features yet. We just know the emergence of newer technology and globalization have created a kind of rapidity of production, just-in-time production, that has led employers to believe they need a more flexible workforce that can be shed on a moment's notice to expand and contract in relation to these new globalized forms of production As a result of this, employment in many sectors, but not in all, does not have the same form of security as it did.

If we take this to be a fundamental paradigm shift in which people are going to be vulnerable to not having access to full-time work or work that will sustain them (it may not be full-time in its traditional sense), then we do have to do something to deal with the "precariousness" (a European expression) or vulnerabilities of people's existence in relation to employment. I think that we should see this as a fundamental form of vulnerability and risk and not celebrated as a wanted, new form of flexibility that is wonderful for workers, as some Americans economists have the inclination to do.

I think we have to protect people from the risk that they will be out of work to give them the opportunity to retrain and change as their sectors of the economy are becoming obsolete and they need to do something else. This does open up the possibility for thinking about the relationship between work and other spheres of life in new ways. But I don't think it is something to be celebrated as much as something to be understood and to be dealt with in its own terms. People at the bottom, people working two or three ten-hour-a-week jobs that don't promise any regularity will be the first to say it is not a form of flexibility that should be celebrated but something to be dealt with and protected against to render their situation more secure.

MM-B: *Do you think it will have a greater impact on women?*

VS: I can speak to only the American context here. There has been some work on who has contingent jobs in the United States. There are different results depending on what definition you give to contingent work. Interestingly, although there is a gender disparity, it is not as great as you might suspect. There are many, many men who are now facing more contingent forms of employment, including people who were forced out of their full-time job and made to work under contractual arrangements, where they no longer have access to benefits and so forth. Are they doing better than the women who work contingent jobs? Maybe yes, because the contract of employment is sort of on top of the hierarchy of contingent work. With something like seasonal work by migrants, you are at the bottom. There are disparities around this, and I do think in some ways the insecurity of employment and the shift of risk onto the individual worker has become a great equalizer. It leaves us a chance to have political coalition and political identification, if you will, that are new.

Perhaps the election of President Obama in the United States represents some understanding of the collective new forms of risks that we all face and the desire to address things in a new way.

Comparative Perspectives

Sex-based discrimination is probably the form of discrimination that most clearly exposes the ambivalent quality of antidiscrimination law, between its scope of application, which is at times quite extensive, and its limits. This observation is true both in the United States and in Europe.

On the one hand, as affirmed by Vicki Schultz, David Oppenheimer, Reva Siegel, and Linda Krieger in their descriptions of the United States context, the protected ground of sex, like race, laid the groundwork for a solid corpus of law on both sides of the Atlantic, which proved to be particularly effective in enforcing prohibitions of disparate treatment and disparate impact discrimination between men and women in many areas of employment. In some cases, legitimate sex-based distinctions can be made when they are linked to motherhood[130] or when sex is a "bona fide occupational qualification."[131] Sex is a very visible trait because it is an important variable in social protection policies, used to determine health insurance coverage, family benefits, and retirement benefits. In France, for example, retirement pension rules have been charged with creating inequalities between men and women, because women are more likely to have interrupted their careers to raise children and are therefore disadvantaged in accumulating sufficient pension rights.[132] Claims based on the sex ground can sometimes reinforce the static image of female identity as necessarily tied to maternity, for example, in the judgment of the CJEU in *Ulrich Hofmann v. Barmer Ersatzkasse* (C-184/83130),[133] where the court found it legitimate to protect a woman's "physiological and mental functions" after childbirth and the "special relationship between a woman and her child."

On the other hand, the sex ground has often proved ineffective in combatting more subtle problems such as gender discrimination,[134] indeterminate sex, and the oppositions instituted between men and women based on sex. Antidiscrimination law has been denounced as crystallizing a rigid binary distinction between men and women, positioning women as "victims" of discrimination and men as the "villains," to borrow the word used by Schultz. Additionally, more complex issues involving men and women exist, such as family responsibilities discrimination in any form, including discrimination against workers who have not founded a family. Can family status be regarded as introducing the notion of freedom to make personal lifestyle choices, in addition to the right to nondiscrimination? In any case, family status (as a prohibited ground covered by Article 1132–1 of the French Labor Code) is not bound to a personal attribute such as sex.[135]

Lastly, the prohibition of sex-based distinctions constantly raises the question of systemic discrimination against women,[136] due to sex segregation in the labor market and the glass ceiling phenomenon. Should we be investigating the workplace

to uncover how it influences the career choices made by women in terms of occupations or career development, as Schultz observed? Antidiscrimination law can cover up institutional discrimination and distract us from addressing the broader issue of establishing a more balanced relationship between work and family life, as noted by Suk.

So it is important to examine the tensions intrinsically joined to the sex ground in antidiscrimination law. First, I will take a comparative historical look at the sex ground. Then, having identified the forces pulling at this protected trait and its particularities, I will show how they can raise the curtain on a better grasp of the discriminations caused by the eminently functional nature of the sex ground and how the concept of gender has taken over from sex.

Is Sex Still a Relevant Ground Today?

Challenges to sex discrimination have been successful historically, as the scholars interviewed have intimated. First, analogies between race and sex discrimination have opened up a broad field of action.[137] As mentioned previously, it was in a race discrimination case that the obstacles to proving hidden direct discrimination were first exposed in the United States.[138] Sex discrimination case law has been particularly prolific in Europe and the United States,[139] carving the outlines of indirect discrimination.[140] In Europe, community case law on sex discrimination, recognizing the fundamental nature of the principle of equal treatment of men and women,[141] is part of the community acquis[142] on which court decisions on age discrimination, for example, have been based,[143] without being confined to the indications provided in directives addressing various individual grounds.

But the analogy between race and sex has created a competitive environment that has ultimately constrained as well as liberated women's rights.[144] In the United States, in particular, the women's rights movement was first perceived as supporting mainly the rights of privileged women. The traditional civil rights movement bringing suit in court, a movement typically associated with the lower social classes, tended to subscribe to the idea put forward in the Moynihan Report in 1965 that the matriarchal family structure in "black" households "emasculated" black men and hampered civil rights progress.[145] Groundbreaking women activists such as civil rights lawyer Pauli Murray, who was rejected from Harvard Law School because she was not the "right" sex, advocated for the rights of lower-class black women. These activists showed that sex-based discrimination could have a larger socioeconomic dimension, similar to, and implicitly related to, race discrimination. The largest organization of feminist activists in the United States, the National Organization for Women (NOW), was also created in response to the low enforcement of the Title VII law prohibiting employment discrimination for women (CRA of 1964), as noted by Schultz and other scholars.[146]

In the United States, the sex characteristic resonates across all occupational categories, certainly more so than race or origin, and in terms of pure numbers

it affects a larger population, namely, all women and men.[147] In Europe and in the United States, women encounter both vertical resistance (the glass ceiling)[148] and horizontal resistance (occupation-based) in their careers. These issues affect half of the working population and have a much wider scope of application than any other ground except age. Seen from this angle, the ground of sex appears to be effective in revealing overall rigidities in the employment market and in strongly leveraging the purchasing power of women.[149] The growing body of litigation on genuine occupational requirements[150] that exclude women from certain types of jobs illustrates the need for this incompatibility to be assessed on a case-by-case basis and not generalized to the entire occupation. Such exceptions to the antidiscrimination principle can also perpetuate biases, resulting in widespread, systemic impact when these biases are incorporated into an employer's selection criteria.[151] Upon close scrutiny for evidence of discrimination, certain historical occupational requirements, such as physical strength for law enforcement and security jobs, are shown to be obsolete yardsticks based on perceived needs and are now restrictively interpreted by judges.[152] An alternative to systemically excluding one sex from certain jobs could be to apply a proportionality test, as provided for in European law.[153]

Might it be considered that above and beyond the question of discrimination, the ground of sex has a stronger "functional" aspect than other prohibited grounds, because of the important economic impact of discrimination in pay[154] and in the assessment of occupational requirements?[155] There is a financial undercurrent to all sex discrimination cases involving pay equity[156] and the concept of "work of equal value."[157] The "equal pay for equal work" principle is foundational because it obliges employers to proactively rethink their compensation policies.[158] Judges are looking past the individual to focus on the nature of the work being performed.[159] Ultimately, as the Conseil d'État has already done in the past, courts can assess pay equality by testing for the proportionality of the sex-based difference in pay, comparing the purpose and relevance of the pay advantage to the company's business objective.[160] In France, the added appeal of assessing pay discrimination with respect to pay equity is that an initial comparability of jobs is not required to test the objective justification for a difference in treatment.[161] French policy sways between a discourse on combating sex discrimination and one on achieving "real equality between women and men," which is the name of the last piece of legislation in France, covering a wide scope of issues: domestic violence, quotas for women and men in public institutions, equal pay and protection against discrimination for independent workers on maternity leave.[162]

Wage differences between men and women are identifiable and occur throughout a person's career, even if Krieger explains that information proving the discrimination can still be withheld from plaintiffs, despite the discovery procedure used in the United States.[163] Are repeated absences from work for maternity enough to explain the stagnation in pay experienced by women after returning from leave

or their less favorable performance appraisals?[164] As Jolls mentions, is maternity protection the reason for the lower wages paid to women in the United States, as some economic research seems to indicate?

Tensions Surrounding the Sex Ground

Sex-based discrimination cannot be grasped simply by evaluating work and its requirements on a job-by-job basis: it is affected by other tensions.[165] Through the prism of equality, the sex ground reveals how society functions. In many court decisions and laws, organizations, families, and women's rights at home and in the workplace are closely correlated. As Schultz suggests, we might wonder why analyses of sex-based distinctions, even in the context of employment discrimination law, so often refer to women's private lifestyle choices. Isn't this the focus of Catharine MacKinnon's criticism of the legal construction of the concept of the right to privacy as a protected space where male domination over women can be more freely expressed without the possibility of an outside judgment?[166]

This leads to the more sensitive issue of the almost symbolic, institutional nature of sex as related to the employee's body. In the fight for equality, the protected ground of race refers to skin color, facial features, and other physical characteristics, but sex extends beyond the confines of the body and touches on reproduction,[167] sexuality, and private life and implicitly permeates all legal debate on equality and women in employment. Women's bodies, extensively discussed by feminist scholars, constitute a source of social oppression and, paradoxically, a space of freedom. Direct or indirect references to women's bodies in U.S. and European law, particularly in the workplace,[168] attract a great deal of attention from those who strive to achieve equality and women's right to make their own decisions.

This can be clearly seen on both sides of the Atlantic,[169] in the genealogy of the acquisition of women's rights[170] as well as equal employment policies,[171] which in France even provide for fines to be paid in the event of noncompliance.[172] Sex is closely tied to norms involving founding social institutions, such as the family, which are perceived as guaranteeing a cohesive society.[173] But focus has gradually shifted from the problem of sex-based inequalities in employment to the scrutiny of the lifestyle choices made by men and women to achieve a work-family balance. Rather than a dispute over equality and identity, battling discrimination in this context resembles a search to ensure that women and men have an equal right to a private life without any undue impact on their career. What often ensues is a systematic linking of employment-related choices and private-life choices, sometimes more for women than for men.

The development of American constitutional case law offers particularly telling insight into the difficulty of distinguishing between sex-based discrimination and the context in which women exercise their rights, often their right to have control over their bodies. The Supreme Court seems to be straddling a fine line: on the one

hand, it eases the constitutional principle of equal protection by justifying differences in treatment made to protect the perceived vulnerability of women,[174] and on the other hand, it uses the idea of privacy to enshrine certain rights over their bodies that sometimes ensnare rather than emancipate women.

In the United States, the first employment-related decisions handed down by the Supreme Court, including the landmark *Muller v. Oregon* decision,[175] found that distinctions in employment laws "protecting" women at work by restricting their working hours, like those that had emerged in France a little earlier,[176] were compatible with the equality principle, despite the fact that a few years prior, in *Lochner v. New York,* the Supreme Court chose to guarantee the liberty to contract, invalidating a law, not specifically directed to women, seeking to restrict working hours for the purpose of protecting workers' health.[177]

After *Muller,* the constitutional case law as a whole seems to accept the implicit stance that a woman's foremost role is to bear children. Even though the Supreme Court began to strike down sex-based legislation under the Fourteenth Amendment's Equal Protection Clause in the 1970s, forbidding government from enacting sex-discriminatory laws premised on the belief that women should bear children and men should support the family, the modern equal protection cases have not wholly broken from the *Muller* tradition. A lower standard of scrutiny is applied to laws drawing distinctions between the sexes, especially laws regulating pregnancy. Siegel shows us how, since *Roe v. Wade,* every abortion restriction has been enacted to protect the fetus, on the presumptions that pregnancy can be imposed on women and that to a certain extent the government can regulate the right to terminate a pregnancy.[178] Although *Roe* protects the right to terminate a pregnancy under a line of cases based in liberty and autonomy, rules regulating abortions can contribute to the subordination of women and should also, according to Siegel, be subject to scrutiny under the equal protection clause.[179]

In all equality case law, one can detect a desire to apply a separate set of standards to dissimilar treatment for men and women. This has crystallized, first, in the inability to amend the Constitution and expressly include the principle of equality between men and women[180] and, second, in the more lenient judicial review of sex-based distinctions under the Fourteenth Amendment's Equal Protection Clause. In *Reed v. Reed,*[181] the Supreme Court decided that sex was not a suspect classification subject to strict scrutiny, like race. Because of this, differential treatment based on sex was allowed if it bore a rational relationship with the objective of the law. The court then veered significantly from this decision and held in *Frontiero v. Richardson*[182] that benefits provided to dependents of members of the military could not be based on sex, suggesting that any classification based on sex must be justified by a compelling state interest, indicating a level of scrutiny (strict scrutiny) used for race distinctions. Finally, in *Craig v. Boren,*[183] the court rolled back and opted for an intermediate standard of judicial review of sex-based distinctions that must substantially relate to the achievement of an important

government objective. This more lenient level of review continues today—most prominently in United States v. Virginia, 518 U.S. 515 (1996)—and reflects an attachment to sex-differentiating theories. It can justify legitimate differences in treatment between men and women in the United States, despite the absence of more protective maternity laws such as those that exist in France.

French and European[184] laws offering women pregnancy and maternity protection have been in existence for some time[185] and aggravate the risk of discrimination against women when the period of protection, which employers may consider to be inconvenient or costly, comes to an end. Fortunately, inspired by European case law,[186] antidiscrimination can step into the breach: it considers as suspect any adverse action taken by an employer once maternity protection ends,[187] such as postponing training[188] or a promised promotion after maternity leave.[189] In this context, antidiscrimination laws and maternity protection measures are complementary.[190] Unlike French law, which immediately adopted maternity protection for women in employment[191] and even banned night work for a time as a nod to their perceived vulnerability, U.S. law took some time to recognize pregnancy as a source of discrimination.[192] The inclusion of pregnancy as a protected ground of discrimination first had to be enacted by statute.[193] Rather than adopt legal provisions for maternity leave, feminists preferred the more neutral route of incorporating unpaid, job-protected leave for medical reasons or family responsibilities into the Family and Medical Leave Act (FMLA). Extensive case law on family responsibilities discrimination then emerged, converging with European law, which is prolific on parenthood issues[194] not restricted to sex and, along with French law, reinforces legal norms protecting parental rights and supporting family,[195] generally understood to mean dependents in general.[196] French case law, like European law,[197] seeks to ensure that parental leave does not negatively affect employees when they return to the workplace in terms of working conditions and pay: the employee's job before the leave and after the leave must be compared and the jobs must be similar if not identical.[198] Since the EU directive on the application of the principle of equal treatment between men and women to the self-employed,[199] maternity protection has not been reserved for salaried workers.[200] In the *Danosa*[201] decision, the CJEU applied Directive 92/85 on the protection of pregnant workers to a woman executive committee member considered to be a "pregnant worker" and who was revoked due to her pregnancy. The protection applied to her because she was pregnant, regardless of her employment status. The CJEU has even reflected on maternity leave in surrogacy contracts: "EU law does not require that a mother who has had a baby through a surrogacy agreement should be entitled to maternity leave or its equivalent."[202] The court leaves a door open for Member States that support this form of parenting[203]: "The Pregnant Workers Directive merely lays down certain minimum requirements in respect of protection, although the Member States are free to apply more favorable rules for the benefit of such mothers." In France, the budding number of discrimination suits over pregnancy in

self-employment has not been successful, because no justification is required for the termination of simple civil law contracts with self-employed workers. The legislature had to recently intervene.[204]

How can the discernment of family responsibilities in the United States[205] and of family status in France, or parenthood, as an extension of sex discrimination in Europe, change the way employment discrimination is perceived? As Suk observes, perhaps antidiscrimination law does not have the financial or legal means to undertake in-depth transformations to establish a better balance between work and home and even obstructs such advances in the United States by redirecting attention to stereotypes. One can also consider, however, how an expansion of the protected characteristic of sex is coupled with assumptions made about how an individual performs: that is, the challenges of having or not having a family.

Antidiscrimination law is therefore undergoing a subtle but subversive transformation.[206] Like discrimination on the basis of trade union activity and discrimination based on sexual orientation, family responsibilities and family status discrimination introduce the issue of liberty beyond the fight against discrimination. The message being conveyed is that a characteristic like sex is not sufficient to describe a person's identity and life choices.[207] This premise, more reminiscent of a quest for personal dignity, reinforces the idea that sex does not indicate a person's performance in the workplace and even less so in his or her private life; sex is relational and must be contextualized in relation to other people. The new generation of prohibited characteristics has not been designed to weaken the role of the welfare state or do away with sex-based positive action.[208] These grounds help shed light on the impact of the collective measures enforced by the state and employer practices: either they overlook work-family dynamics or, on the contrary, they are not neutral and promote certain ideas about the employee and how any conflicts between work and family life should be resolved. In certain cases, the government or employers should be able to justify or explain the lifestyle choices that they are encouraging their employees to make to increase their rights and benefits, and, as required, do away with policies that are not consistent or compatible with changing behaviors: the legal debate on these issues is at the crossroads of concerns about fundamental rights that articulate simultaneous aspirations for equality and freedom. Is this not an inevitable change for antidiscrimination law in a society seeking to reconcile individual and group expectations in the workplace? This transformation begs the question of how to encourage a more systematic recognition of the ground of gender, coupled with sex.

V. DISCRIMINATION AND GENDER DECONSTRUCTION

To begin with, let us consider what we mean by *gender* and *deconstruction*. Certain works on gender deconstruction in various disciplinary fields have evidently

reverberated in American doctrinal thought, inspired by queer theory. Although in a different manner, these ideas have also penetrated French thought, which probably sprang from a different paradigm of sex equality and sex differences. If we proceed in stages, then understanding the gender issue follows from a distinction between the terms *gender* and *sex*. Joan Scott clearly addresses this question as she retraces the history of gender construction: "In its most recent usage, *gender* seems to have first appeared among American feminists who wanted to insist on the fundamentally social quality of distinctions based on sex. The word denoted a rejection of the biological determinism implicit in the use of such terms as sex or sexual difference. Gender also stressed the relational aspect of normative definitions of femininity. Those who worried that women's studies scholarship focused too narrowly and separately on women used the term gender to introduce a relational notion into our analytic vocabulary."[209]

In an effort to draw similarities with Europe, an exploration of these disciplinary fields is very useful for comparing U.S. gender studies with the scope of studies in France.[210] French feminist theory is often simplistically perceived. Early on, it took a relational, psychoanalytical approach to sex differences and relationships related to sexuality, symbolized by the MLF movement and Antoinette Fouque's "Psych et Po" group, which foregrounds the feminine symbolic and a form of essentialism found in the work of Luce Irigaray and Hélène Cixous.[211]

In reality, French analysis of the social construction of gender was more complex, as seen in Simone de Beauvoir's writings and the critique of the myth of woman,[212] and in the materialist feminism of Christine Delphy,[213] Colette Guillaumin,[214] and Monique Wittig,[215] who propose, without naming it as such, an avant-garde deconstruction of gender using Marxist analysis. Adding to this complexity is Pierre Bourdieu's work on masculine domination, which got a rather tepid reception by feminists, along with his useful analysis of the workplace and the impact of the rapid entry of women into a hitherto masculine profession, "in a certain way, threatening men's 'sexual identity,' the idea that they have of themselves as men."[216]

If we try to portray the contemporary debate on gender in France, Geneviève Fraisse proposes an essential philosophical perspective of gender and how it relates to equality, aptly illustrating the complex relationship between gender and liberty: "Equality is the central theme of feminist thought. An understandable theme, since it expresses the essence of feminist utopia, the critique of masculine domination and a point-by-point equilibrium between men and women. Freedom is therefore an obvious consequence. Conversely, the liberty of women, logically, does not always lead to equality between the sexes. Let's therefore temporarily set aside the question of liberty, which is both the opposite and the complement of the principle of equality."[217] For Françoise Héritier, recognizing the fundamental anthropological dimension to the relationships produced by a distinction between the sexes is key to identifying certain risks of discrimination that are inherent

to an ethnocentrist vision of gender. "The study of kinship terminologies in the Omaha, Crow, Iroquois, and Hawaiian systems led me to posit that the kin terms revealed something, not about actual status or roles at different ages in the life of gendered individuals in human societies, but about a certain idea of the relationship between the sexes through the internal framework of their interaction. They do not express nature, but ideology."[218]

More recently, sociologists have also considered the question of gender in employment in France, as seen in the essential analyses of Margaret Maruani,[219] Rachel Silvera,[220] and Jacqueline Laufer,[221] who reexamine the promotion of equality and antidiscrimination despite the sexual division of labor. Economic and legal analyses scrutinizing the effect of norms on the social roles of the sexes offer a systemic vision of discriminations, which are perpetuated from generation to generation, regardless of changes in employment[222] and are related to the way in which social protection was constructed in France, a reality that it must take into account.[223]

Finally, deconstruction of law, as a last step, enriches the legal analysis and forces a reexamination of Judith Butler's fundamental work, *Gender Trouble*.[224] In this critique, based on theories by Michel Foucault, she goes beyond the traditional distinction between sex and gender to question the individual and sexuality at different times and in different places. In addition to Christine Delphy[225] and Bruno Latour,[226] other researchers work on a certain form of gender deconstruction. In France, despite a probable lag with respect to the United States, where gender studies are more deeply anchored, "throughout its development, the sociology of gender has nevertheless maintained a constant dialogue with the major theoretical frameworks, streams of thought, and even 'schools' of sociology."[227]

All of American feminist legal thought has been more or less inspired by the work of Michel Foucault and of law as an instrument of domination and the central premise for all analysis of positive law.[228] Nevertheless this American thinking was expanded and even turned around to critique the feminists themselves as being responsible for a new form of domination replacing masculine domination.[229] Janet Halley,[230] Vicki Schultz, Nan Hunter, Katherine Franke, William Eskridge, and Duncan Kennedy express this view in their analyses of discrimination, as well as of sexual harassment, privacy law, and constitutional law.[231]

In France, through the lens of American law, in which he is well versed, the sociologist Éric Fassin exposes the "reversal of the homosexual question" and explains why France has resisted the theories of Judith Butler for rather ideological reasons.[232] He offers us a transatlantic comparison of gender, describing how sexual questions arose in an indirect fashion in France, in connection with issues involving the country's republican culture, from head veils to the civil union (*pacte civile de solidarité*, or PACS), including gender parity.[233] Marcela Iacub, Caroline Mecary, and Daniel Borillo deepen our understanding of questions regarding sexual orientation, reproduction, and sexuality,[234] departing from traditional positivist studies

on the law related to sex.[235] Only very recently, a broader approach was initiated to reexamine every concept of private law[236] and public law[237] and the notions of contract and consent[238] through the lens of power relations.

In the comparative observations made in the wake of these conversations on gender, I endeavor to better understand how these reflections fit in with the wider issue of discrimination in the workplace. What is its impact on the legal interpretation of inequality at work? How can this new light shed on the deconstruction of sex as a protected ground open a new forum for discussion about the identity of the person at work, his or her private life, sexuality, and the extent of freedom on the job? It is possible to explore even further. Why not offer a new reading of autonomy in employment law through a narrative that deconstructs sex and gender, as Janet Halley suggests? This is in fact a necessary step toward better understanding the differences between the category of sex, enshrined in law, and other closely related grounds of discrimination such as sexual orientation, gender, and physical appearance.

Janet Halley shares her analysis of the rights equality claimed by the gay movement in the United States.

JANET HALLEY: To look at the gay movement in the United States, you would think that marriage and military service are purely good institutions and never once caused anybody any harm! Here's a historical fact: Some centrist gay leaders were surprised when gay divorces started happening. Their strategy had been to argue that they were as committed to marital solidarity as straight couples and so should be allowed into the institution. To read their briefs, you would imagine that the only effects of marriage law are those emerging during marriage. But look at any American Family Law course: legally, the institution is mostly about entry and exit rules. That is, it's mostly about who can get married and how—and divorce. The gay agenda has produced a far more conservative image of marriage in the United States than we had when it started.

Later in the interview, Halley offers other analyses from an international perspective.

MARIE MERCAT-BRUNS: *So basically this new generation of researchers is focusing on labor relations and the effects of globalization.*

JH: Let's think about human mobility, smuggling, and trafficking. This new legal order has been hailed as a protection for the vulnerable. But it originated when countries receiving illegal migration started to take an international criminal law enforcement strategy to get the sending countries to stop sending so many illegal migrants; they basically clamped down on the developing world. Under the Palermo Protocols, states agreed to clamp down on labor migration in the forms of smuggling and trafficking.

This is a border control regime; it is about making it harder for people to migrate illegally. It contains a tiny sliver of protection for migrant workers who are coerced at certain points in their migration. Only in this sense is the trafficking regime in any way protective of the worker. If you are smuggled, you can be prosecuted in the receiving country, but if you are trafficked, you must not be punished and you may be repatriated. If the receiving country does not want you, it must send you back to your home country. You might be devastated when you are sent back to your home country; you might be desperate to migrate.

Meanwhile, the people who helped you or forced you to migrate—and at the border, decisions about which class you fall in are made by extremely low-level immigration officers and are in practice not appealable—are subject to intense criminal sanctions. So the price of migrating into countries that enforce the Palermo Protocols goes up because it's riskier for the middlemen; maybe your best second option is not migrating into the North or the West but into another developing state.

So it seems that the regime fosters South-South migration. Migrants who have good claims to refugee protection are swept into the trafficking-smuggling enforcement regime, also at the border and without time to develop their claims. The big Northern developed countries can wash their hands of the resulting movement of people back into the developing world and economic desperation. These are some of the downsides of the trafficking regime.

I see this as very ambivalent success for poor people. American feminists were against trafficking because they regarded women's migration from one country to the other or from one place to engage in sex work as a really bad thing. So they went to the Palermo convention on antitrafficking; they fostered the push for stronger criminalization because they cared so much about the sex worker. Too narrow a focus; too strong an identity politics; too simple an idea of power.

MM-B: *It is enriching to discover this broader perspective on the criminalization of international labor law.*

Coming back to the idea that some feminists might have fueled the constant perception of male domination, would you like to add on anything about gay rights activists proceeding in a similar view of power struggles, victimization, and constructing homosexual identity?

JH: There is fascinating chain of movement-to-movement imitation in which black civil rights constitutes the classic model, and women's and gay rights imitated it. This imitation process is interesting in its own right. One problematic result for the gay rights movement was that it got focused entirely on civil rights. Civil rights had been central for segregated blacks, so they must be central for the subjects of a despised sexuality. But the broader sexuality agenda included a lot more than civil rights. For instance, and here I draw on

the recent work of Libby Adler,[239] it included the question of the most sexually vulnerable population in the world: children and teenagers. They have to figure out their sexuality while under almost complete capture by the family and the State. There is almost no place for a kid to go except home and to school—and the bad things that happen to sexually exploratory kids there aren't violations of civil rights. What remedies do we have for them there? There are some legal avenues—and Adler is developing a clinic to help homeless kids through them—but a lot of the remedies aren't even legal; they involve deepening our commitment to sexual exploration. But the gay marriage campaign has been directly contrary to that commitment. It's been a hard piece of history to watch if your basic political instincts are queer.

MM-B: *Could you give me an example on how you could do that though? Would be through the State? Through education?*

JH: Well, here is one that Adler is working on. Homeless kids commit crimes simply to eat and have a place to sleep. The minute they get caught, they have a criminal record. And that record has a huge negative effect on every subsequent contact they have with the state—getting food stamps, getting an identity card, small things that can make the difference between life and death. Can this process be slowed down so that we don't routinely make things worse for these desperate kids? It's a very low-level bureaucratic question.

MM-B: *What do you think of stereotypes, sexuality in the workplace, and then maybe constitutional issues? Why does the United States not have federal protection of sexual orientation discrimination, when there is such a strong awareness of discrimination against gays?*

JH: Why we don't have prohibition of sexual orientation discrimination in Title VII? That is a political question. The political power is not there to include sexual orientation in Title VII. This is a culture war. Conservatives and especially conservative Christians do not want to see legal rights for nondiscrimination on the basis of sexual orientation. Why don't we get it from the Constitution through equal protection? Let me put this simply. Every constitutional right for homosexuals is either going to be an equal protection right or substantive due process right.[240] But those are highly politicized provisions of the Constitution. The way it is in our legal political world, for the Supreme Court to add gay-friendly rulings under those provisions, is to step into a culture war.

As I said at the beginning of this interview, I started my career thinking I could tell the Supreme Court, "You can grant equal protection to gays without acting politically." But then I realized that the Constitution and constitutional doctrine don't mandate such a decision; there is a political choice[241] that must be made. That's the impasse that we face.

MM-B: *You don't think that the United States is more "gay-friendly" than before with Obama?*

JH: Absolutely it is. It is constantly becoming more gay-friendly. I think we have transformed the political stage in the last twenty years. It is a struggle at every level of society, not just in the Supreme Court.

Robert Post discusses queer theory and the limits of law.

MARIE MERCAT-BRUNS: *What do you think about dress codes personally?*

ROBERT POST: I think that you can follow this as a matter of action and not abstract principle: antidiscrimination law is not about abstract principle and so to imagine a form of law that is so disruptive of ordinary social conventions and social norms is utopian and would not be publicly accepted. So I myself as a lawyer wouldn't want to go there, although I can see a role for people who are pushing toward a gender-neutral concept of antidiscrimination law—that is, a queer theory of the person.

MM-B: *Have you thought about the question of cross-dressers in the workplace and the ability to dress the way you like at work? How do you understand this trend?*

RP: There is a debate in Congress now about ENDA [Employment Non-Discrimination Act][242] and antidiscrimination law and about whether it should prohibit discrimination based on sexual orientation or upon gender. Based on sexual orientation, it is a social movement representation of gays as a group and gay rights; where based on gender, it is the notion that the person does not have any gender. We can't allow business to make any rules that reflect gender in the workplace. So one is extremely more difficult and transformational than the other; it requires more distance from ordinary social norms in which people do have stable identities.

MM-B: *What do you think of the self-development idea and the fact that we are all individuals and are entitled to a certain well-being in the workplace?*

RP: You and I have had that idea, but to imagine using law as an instrument to impose it to everyone else is to attribute to law a transformational possibility I don't think it has particularly. One has to have a very strong social system to do that. Right now that social base does not exist, and we are not sure it would work for one. At certain times the law could reflect that, but in my view, as a matter of social fact, we, in history, are at a certain distance from that.

MM-B: *You think that as a premise, we should accept the fact that there are stereotypes and work with them?*

RP: I don't think human beings think without stereotypes, so the notion that we should think without a stereotype is internally incoherent. The question for me is, which stereotypes?

MM-B: *I think we should emphasize this for the European public. For example, age biases are not easily admitted in Europe, and your reasoning takes a step further, saying you don't necessarily look at conscious or unconscious bias; you say, let's work with these biases, and maybe that is a more interesting way to talk to the European public about this.*

There is a sort of cynical European view that considers that people will always have biases, and you have a more pragmatic view of how to work with them. Do you agree?

RP: Do you know the philosopher Hans Georg Gadamer? He wrote *Truth and Method*.[243] He talks about determining the construction of human meaning, and in that book he talks about how humans always have their own understanding before anything else; you don't start with a blank slate. You always start from somewhere and that somewhere corresponds to your experiences interacting in the world. So the idea that there is an Archimedean point where one can see the world without prejudice—in other words, without preformed opinion, stereotypes, or generalization—that's impossible.

Next, Chai Feldblum discusses her Moral Values Project,[244] which she describes in a chapter of a book published in 2009 called *Moral Argument, Religion and Same-Sex Marriage: Advancing the Public Good*.[245] The project has two aims. First, to facilitate a meaningful conversation in the public arena on the moral neutrality of sexual orientation and the moral "benefit" of acting in line with one's sexual orientation and gender identity. Second, to build a legal argument, both in the public and political domains, in which government has a positive obligation to provide its citizens with equal access to the "moral goods" that are safety, happiness, care, and integrity.

MARIE MERCAT-BRUNS: *How does your work incorporate the issues of sexual orientation and gender identity?*

CHAI FELDBLUM: The theory underlying the Moral Values Project is that only by having substantive moral conversations about sexuality (including homosexuality) and about government's responsibilities to the individual can we ultimately shift the public's substantive moral assessments of LGBT people in a manner that will advance true equality and liberty for us.[246] The bulk of my scholarship, since my first legal scholarship article in this field was published in 1996, has focused on the question of whether and how moral reasoning can be used to advance equality for LGBT people.[247]

Linda Krieger also considers discrimination based on sexual orientation, queer theory, and its limitations.

MARIE MERCAT-BRUNS: *What do you think of queer theory and how it questions "traditional" feminist jurisprudence on male-female domination and provides new insights on gender discrimination law? We are looking for answers to issues with regard to transgender discrimination*[248] *and same-sex discrimination. Do you have any comments? As I understand it, sexual orientation discrimination is not recognized by Title VII of the Civil Rights Act of 1964,*[249] *but some states prohibit it.*

LINDA KRIEGER: Right. We still do not have federal protection against discrimination based on sexual orientation.

MM-B: *Cases like* Price Waterhouse *have shed some light on sex, or more specifically, gender stereotypes, and analogies were used to apply this case law to sexual orientation or transgender discrimination cases, right?*

LK: Just in the circuits on this question. There are two circuit court decisions that suggest that, in certain circumstances, sexual orientation can be understood as a form of gender discrimination, but that is a minority view. I think it is pretty much beyond question that if that issue were to reach the Supreme Court, it would hold that Title VII's prohibition against sex discrimination does not equate to protection against sexual orientation discrimination, and as a matter of statutory interpretation, I think that that decision—sadly I have to say this—would be well-founded. Congress has, on numerous occasions, refused to amend Title VII to add sexual orientation to the list of protected grounds.

MM-B: *Why?*

LK: Because the United States as a whole is an extremely homophobic country.

MM-B: *But there is a strong push towards recognition of same-sex marriage and same-sex parenting, so how do you explain this strong resistance on the employment question?*

LK: This is one of the conundrums of federalism: when you have a polity that is a federation rather than a republic, you can have different states doing very different things and have very little happening on the federal level because you still have a majority of the states that are not making social or legal progress on the issue in question. So we have a number of states that have state prohibitions against sexual orientation discrimination in employment and housing. For example, Hawaii does prohibit sexual orientation discrimination in housing and employment, but it does not permit gay marriage or civil unions, and just last spring, we had an extremely acrimonious civil union debate in which the religious right was mind-blowing in its vitriol. It was a nightmare, a homophobic blood bath in the legislature.

MM-B: *Coming back to the grounds of discrimination, I think what is interesting are the arguments used to try to extend the interpretation of the law (from sex to gender) and how grounds like sex can be seen as social constructs, covering other discriminatory situations. Some go further and believe that reconsidering grounds like sex can be a way to understand other grounds like race*[250] *from a different perspective. Certain categories are hard to define, and in France there is this challenge of fighting race discrimination without recognizing that race exists per se. I think that what is very interesting in the doctrinal debate in the United States is that sex is contingent and cannot be identified that clearly. The other question I had is, What do you think of the idea that feminist jurisprudence, by focusing on the male-female domination question in its analysis of law, has perpetuated a rigid, binary analysis of sex as necessarily male versus female, locking out any other interpretation of gender norms and without taking into consideration other perceptions of sex and other forms of sexual identity?*

LK: All categories are social constructs. The category "chair" is a social construct but we sit on them. We don't look at a chair and say, "I can't sit on you because you are a social construct." So sex is a social construction; sexual orientation is social construction. Social constructions form because they perform certain functions either socially or economically, and some of those uses perpetuate forms of oppression, but we are not going to stop using sexual constructed categories. Many categories, called study categories,[251] have boundaries that are more probabilistic in nature than they are fixed or formal. So sex is a fuzzy category. There are intersexed individuals. Gender is most certainly a fuzzy category, and gender varies from culture to culture. In some cultures, there are three formal genders. Gender constructs change over time, but again I think that, if there are forms of legal, social, cultural, and economic subordination that work because they use a particular category, we reject that category at our peril because we then cannot effectively participate in that social, political struggle to reduce that level of subordination.

My experience in the United States with queer theory is that it is primarily the problem of the educationally, economically advantaged. Ordinary, working-class American people believe that there is sex. They believe there is sexual orientation. They believe that there is race. If too many of the progressive social activists spend all of their time talking to each other on whether these are meaningful categories or whether these are meaningless social constructs that are simply a result of a random play of signifiers, then we are going to get run over by a thousand trucks. There is too much of a Marxist in me to go there. So it is very interesting, but to me, it doesn't work very well in the real world of political struggle or the real world of legal struggle in which I spent my professional and personal life.

MM-B: *Do you think it can be counterproductive?*

LK: Yes, I do think it can be counterproductive, and I think in some ways in the United States it has been counterproductive. But I think there are ways it can productive. For example, I think, in junior high schools and high schools, in many parts of the United States, young people are rejecting rigid gender categories and rigid sexual orientation categories, and that is having a liberatory effect across the board. I do think there is a generational thing happening here and that at the end of the day, this notion of gender, this notion of sexuality as being fluid, as being constructed, contested, may do some good as people now in their teens and twenties and in their early thirties grow up. I don't mean to sound like a bitter old baby boomer, because I think there is something liberating as an individual, as long as it doesn't disengage from dialogue with people who have not jumped on board. Part of the problem is that we are increasingly ending up with people in the United States who are talking across such an unbridgeable and unbridged ideological, cosmological divide that each group is asking of the other total conversion to each way of

viewing the world, and that is not going to work. So the concern I have with the queer theory movement is, in some ways, similar to the problem I have with evangelical Christians. They are both asking of each other a kind of total conversion that neither group is going to concede to. So then what do we do?

We still need our "chairs." We still need our categories so that we can talk about these gulfs, so that people are not just shouting across them.

Julie Suk shares her insight on discrimination based on gender.

Marie Mercat-Bruns; What do you think about the impact of antidiscrimination norms on gender stereotypes?

JULIE SUK: I think there are trade-offs. A strong antistereotyping norm increases opportunities for individuals who defy the stereotypes (for example, a woman who does not have children, is not interested in having children, or has a husband who does most of the caregiving) but may prevent employers or the state from adopting policies and practices that address the social reality (however unjust) that underlies the stereotype, namely the fact that women tend to do more caregiving as a result of ingrained cultural norms. I am not sure.

MM-B: *Yes, of course, but now with European law, some wonder whether antidiscrimination law will be as protective of the welfare state in member countries. . . . I would like to come to my second question: Have you considered homosexual or transgender issues when thinking about work-life balance?*

JS: Yes. I do notice that, perhaps as a result of greater tolerance for gendered generalizations and norms, the issue of same-sex parenting has been much more problematic in France than it is in the United States. I think this is due to a much stronger assumption in France that the ideal family includes one male parent and one female parent.

MM-B: *Do you think this could modify your analysis in your article on the work-family conflict?*[252] *I don't think you mention it. This is probably because it is not yet part of the debate in France.*

JS: Well, I think it gets at a much broader question: Is it possible to adopt policies that rest on the assumption that men and women have different valuable things to offer as parents, without excluding families that fail to adhere to the model? I think it is possible to devise policies that attempt to promote both maternal and paternal caregiving for children, on the one hand, without denying benefits to, say, single parents or homosexual parents. But arguably, the danger is that the state will essentialize and valorize the traditional family, which will lead to a culture that implicitly judges the single parent or the homosexual parents to be inadequate.

Comparative Perspectives

These interview excerpts evoke discriminations based on gender and sexual orientation but also touch upon broader questions about same-sex parenting,

international prostitution, homosexuality and children constructing an identity, and queer theory[253] applied to law. Without reviewing all of the issues mentioned, I would like to discuss three salient points: the question of discrimination based on homosexuality in a comparative approach; the distinctive nature of discriminations based on gender, homosexuality, and physical appearance, and the sphere of autonomy in the workplace that they affect; and the American doctrinal deconstruction of sex and gender, and whether it helps to better understand the contours of discrimination based on sex.

Discrimination Based on Homosexuality and Gender Identity

In the United States, despite the extensive American doctrine[254] devoted to homosexuality, same-sex parenting, queer theory, and sexual harassment involving persons of the same sex, as explained by Janet Halley, which echoes the public debate,[255] there is still no federal law prohibiting workplace discrimination on the basis of sexual orientation, and all attempts at passing this type of law have failed.[256] However, the EEOC has been instrumental in recognizing transgender rights in employment, and in July 2014 President Obama signed an executive order barring federal contractors from engaging in anti-LGBT workplace discrimination.[257]

Conversely, in Europe, this principle has been enshrined in the Treaty of Amsterdam (Article 19, TFEU) and Directive 2000/78,[258] and in France, legislation was enacted more quickly on this issue, after first introducing lifestyle as a protected ground.[259] European case law is surprising because it invokes direct discrimination based on sexual orientation in cases involving benefits that are related not to sexual orientation but to marital status, where indirect discrimination could have been equally appropriate.[260] This probably reflects the fact that some indirect discrimination involves discriminatory intent and that for the sake of transparency, it is best to highlight, in sexual orientation cases, the question of discriminatory animus. The French Cour de Cassation did ask for a preliminary ruling on the basis of indirect discrimination involving benefits granted to married couples but denied to partners in a registered civil union (*pacte civil de solidarité,* or PACS).[261] The reason may be that the French PACS is entered into by both gay and heterosexual couples, unlike in Germany, where the registered partnerships considered in the *Maruko* and *Römer* cases brought before the CJEU unite only same-sex couples.[262] However, the CJEU rendered its decision on the basis of direct discrimination, arguing that only same-sex couples could not marry. Therefore, excluding them from employment benefits (this was before the new French law allowing gay marriage[263]) was a pretext for discrimination based on sexual orientation.[264] The CJEU has recently expanded its case law on sexual orientation to the health sector in France, considering that forbidding all homosexuals from donating their blood is disproportionate and constitutes discrimination.[265]

This is not to say that this type of discrimination is always visible in the workplace,[266] since sexual orientation continues to be regarded as a private matter,

except in rare cases.[267] EU case law has confronted this issue of proof of sexual orientation by sanctioning an "appearance of discrimination" when overt homophobic remarks are made even if their author is not the direct employer.[268] French case law is also developing in this area.[269] It is true that in the United States, twenty-one states and the District of Columbia have laws prohibiting employment discrimination based on sexual orientation,[270] but there is no federal law in place despite efforts to introduce one.[271] The legal debate has raged at the constitutional level, defining the contours of the right to privacy[272] and equal protection following a state attempt to prevent the recognition of homosexuality as a protected ground for discrimination.[273] As Krieger mentioned, homophobia has a strong foothold in the United States, which may be partly attributable to the adherence of a segment of the population to religions that reject homosexuality on principle (even though on June 26, 2015, the U.S. Supreme Court ruled that the U.S. Constitution guaranteed the right for same-sex couples to marry in all fifty U.S. states[274] and, before the decision, same-sex marriage was legal in thirty-seven states).[275] Feldblum has in fact worked on resolving the difficult issue of reconciling "moral values" and homosexuality, particularly in the workplace, and on the possibility of expanding the circumstances in which accommodations for religious people are considered, while respecting gay rights.[276] At the same time, Post expresses reservations as to the value of passing legislation to resolve gender issues and the risks that this would engender for the protected individual at work, for whom all reference to sex or gender has been eradicated.[277]

In fact, this question is central to all efforts made to obtain a more precise legal definition of sex and how it relates to gender,[278] sexuality, and sexual orientation.[279] In the absence of a federal prohibition of discrimination based on sexual orientation, American case law has relied on drawing analogies between sexual orientation, transgender status,[280] and gender nonconformity. Based on the *Price Waterhouse* ruling, in which the Court held that discrimination against a female employee for not behaving in a manner considered to be feminine[281] constitutes sex discrimination under Title VII, transgender and gay plaintiffs sought to establish that the discrimination they experienced was sex discrimination in a broad sense, because it was based on their nonconformity with a masculine gender, masculine behavior, or a masculine appearance, for example.

Using the example of the chair, Krieger illustrates why social constructs are important. The analogy between sex discrimination and discrimination based on transgender status was well accepted,[282] except by some radical feminists,[283] so much so that one court went one step further. It considered that, whether pre- or post-transition, transgender status was not an issue of nonconformity. In fact, transgender persons are indeed endeavoring to conform to the sex to which they are transitioning. Discrimination in these cases is therefore based simply on sex.[284] This line of argument was supported by the EEOC in the recent *Macy v. Holder* decision.[285] Attempts to draw analogies between discrimination against homosexuality

and discrimination against gender nonconformity have often failed because courts consider that since Congress has repeatedly refused to pass legislation expanding antidiscrimination protection, sex is not intended to be interpreted more broadly to include sexual orientation.[286]

In France, this type of reasoning, which looks beyond sex to consider gender and the end result of the antidiscrimination law from a more functional perspective,[287] is not pervasive in case law. During the debates prior to the adoption of same-sex marriage in France, there were frequent protests by the Catholic Church and its supporters, not only contesting the passage of legislation but also objecting to "gender theory," which they feared would dismantle French society's strongholds: marriage, education and family.[288] Gender is implicitly referred to in cases of discrimination based on physical appearance, as illustrated in a ruling by the Cour de Cassation.[289] The case involved a waiter who was dismissed for wearing earrings at work. In the termination letter, the employee cited this behavior and the fact that it was seen as effeminate as grounds for dismissal. The court found discrimination based on physical appearance, in relation to sex. Concern for the image of the restaurant, which was not threatened, and subjective statements made by customers expressing value judgments on men who wear earrings were insufficient evidence that the decision was justified by objective elements unrelated to any discrimination. The court concluded:

> Whereas it has been recalled that by virtue of Article L.1132–1 of the Labor Code, no employee may be dismissed on the basis of sex or physical appearance, the appeal court noted that the dismissal was pronounced for the reason, as stated in the dismissal letter, that "your customer-service position does not permit us to tolerate the wearing of earrings by a man, which you are," signifying that the physical appearance of the employee, in relation to his sex, was the reason for dismissal; having observed that the employer did not justify his decision to require the employee to remove his earrings with objective elements unrelated to any discrimination, the Court was able to deduce that the dismissal was based on a discriminatory ground; that this ground, being based on Article L.1121–1 of the Labor Code, which the appeal court did not invoke, is unfounded.

This ruling does not invoke the infringement of the freedom to dress as one chooses, subject to certain work requirements but explores a new way of looking at discrimination based on physical appearance that can constitute gender discrimination.

The Cour de Cassation acknowledged that the employee who was dismissed for wearing earrings at work was the victim of discrimination based on "physical appearance in relation to sex." The notion of physical appearance in this context should be defined: it denotes the general impression that a person presents, not just their manner of dress or their physical characteristics. Case law on the subject is limited;[290] significant cases involve, for example, height.[291] The innovative aspect of this decision was the application of this prohibited ground to include the

general impression given by a male employee wearing earrings. The fact that a discrimination was involved meant that the employee faced a more serious sanction: namely, reinstatement of the unfairly dismissed employee.[292] Without the discrimination, since the freedom to dress as one chooses is not a fundamental freedom, arguing this ground would not have led to reinstatement.[293] The advantage of the discrimination charge is the shifting of the burden of proof: the employee provides elements demonstrating direct discrimination. Once this prima facie case has been established, the onus is on the employer to prove that its decision was justified by objective elements unrelated to any discrimination.[294] In this case, the dismissal letter explicitly mentioned two prohibited grounds of discrimination: physical appearance and sex. The Cour de Cassation cited the dismissal letter, which referred specifically to "the wearing of earrings by a man." The employee was therefore in possession of a rare avowal of reliance on a protected ground.[295]

The Cour de Cassation found the employer to be at fault in motivating its termination decision not only by criticizing the waiter's physical appearance, that is, the earrings worn, but also by condemning the employee for not conforming to a male stereotype. By articulating this link between physical appearance and sex, the court looked outside of biological sex and implicitly designated gender:[296] the socially constructed perception of what a man is and how he should behave, the most visible component of this being his physical appearance.[297] Outside of appearance, the ECtHR has recently reaffirmed that the right to a sex change is within the scope of the right to privacy and personal autonomy.[298]

Gender Discrimination

This brings us to our second point: the problem of discrimination based on sexual orientation[299] and gender that involves not only judgments about physical characteristics but also judgments about behaviors or the exercise of freedoms that could result in discrimination at work.[300] In these cases, is the search to identify discrimination very different from a judge's search to justify the restrictions on individual freedoms[301] imposed by dress codes, as shown in the "earring case" in France? Discrimination based on physical appearance in relation to sex is built on the idea that making decisions based on stereotypes of what is a manly appearance for a man or feminine for a woman, when these decisions are unrelated to work performance, is a discriminatory practice. However, beyond appearance, this type of bias can influence how an employee's personal behavior in the workplace is evaluated, in the absence of objective justification, based on that employee's perceived nonconformity with his or her gender. Unlike more traditional claims of discrimination probing motives based on personal traits (e.g., age or origin), the freedom to dress the way one wants, via the ground of physical appearance, has become a standard of nondiscrimination based on sex, as various scholars have predicted.[302]

We can sense how exercising personal autonomy in the workplace might be interpreted in antidiscrimination law and not only with respect to gender discrim-

ination. In the earrings case, would the employee have won his case if his employer had not referred to his status as a man? We cannot be sure, but much attention has been paid to prohibited grounds related to physical appearance, such as origin and a male flight attendant's cornrows.[303]

Can we consider that gender discrimination represents an intersection between the protection of equality and freedom, two concepts that are so difficult to reconcile?[304] We have therefore struck the core of the problems surrounding the protection of workplace human rights, which are becoming increasingly important in French case law;[305] the difference here is the focus, via discrimination, on the person in the work environment, and not on elements of his or her personal life that directly or indirectly cross into work.[306] In the end, a person's appearance is the crystallization of a set of common cultural representations; the fight against discrimination in employment does not seek to eradicate every reaction to manifestations of gender identity, as Post points out, since stereotyping is a part of human nature. But their impact on employment decisions affecting employees is another essential question added to that of an employee's workplace human rights.[307]

Understanding the Sex Ground Through Deconstruction

Finally, the evaluation of discrimination through the lens of individual freedom raises the question of gender deconstruction, rejecting the binary approach to the sexes as a form of verification of behavior intrinsic to the fight against discrimination based on sex, as shown by Halley. Certainly, Krieger expresses the potential need for a class struggle that takes precedence over queer theory, for a segment of the population that is not part of the elite, but the question of the contours of the sex ground nonetheless cut across all social strata. Sex discrimination problems are almost a unifying theme. How can one refuse to adhere to this approach to the extent that far from threatening the fight for women's rights, it informs it?[308] A better understanding of gender, sexuality at work, transgender issues, and sexual orientation would seem to lead to a better delineation of discrimination based on sex.[309] The earring decision illustrates this reality: women benefit from exposing socially constructed sex-stereotypes but also from revealing the law's implicit impact on sexuality, potentially distorting relationships between people of the same sex, or of different sexes, in the work environment.[310] In the absence of thoughtful discussion of these issues, an employer's brutal investigation of sexual harassment can end up creating a hostile environment and be perceived by a presumed female victim negatively affected by ensuing rumors as an infringement on her right to privacy.[311] This critical view of the power plays inherent in the employment contract clarifies the difficulty residing in issues of worker's consent, sex, or sexuality, which do not necessarily affect work relationships in the same way depending on the individual; for example, it helps revisit notions of sexual harassment.[312]

VI. DISABILITY AND AGE DISCRIMINATION

A certain ambivalence surrounds the idea of discrimination based on disability or age, since both grounds are sometimes used in law to attribute, rather than withhold, rights. Judges, legislators, and commentators face the task of determining how to deal with the special relationship to difference cultivated by age and disability.[313] On both grounds, discrimination often stems from a failure to understand the aging process, the manner in which various disabilities impact employment, and the full range of discriminatory situations potentially affecting individuals. Moreover, the legal norms applied in the workplace do not always succeed in filtering out the challenges of using age and disability as conditions for eligibility for employee benefits, introducing an economic dimension that employers must take into account. Unlike race, but in an analogous manner to sex, the grounds of age and disability have always been important markers of the welfare state, especially in Europe. Nevertheless, as working lives are stretched over increasingly long periods in Europe and the United States, the relevance of the age criterion has lost part of its meaning. How should discrimination be understood in this changing environment? What challenges do the aging working population and the aging of workers with disabilities pose, which aggravate the problems of age and disability discrimination?

Disability Discrimination

The scholars interviewed—Ruth Colker, Martha Minow, and Christine Jolls—examine the particularities of disability discrimination in the United States and its ambitious legal framework. With the Americans with Disabilities Act enacted in 1990, the United States was the first to incorporate, into its antidiscrimination legislation, an obligation to act through reasonable accommodations. It is surprising that this innovation should come from the United States, which has traditionally shown a reluctance to impose positive obligations on employers. As American scholars point out, the law has met with resistance, notably due to the financial constraints placed on employers, the special vulnerability of people with disabilities suffering from discrimination, and their effective access to law. Finally, one of the major difficulties encountered in the fight against disability discrimination is the heterogeneous nature of the disabilities that can lead to discrimination.

Ruth Colker offers her insight of the history of the Americans with Disabilities Act (ADA).

MARIE MERCAT-BRUNS: *Could you talk about the legislative history of the ADA?*
RUTH COLKER: I would be happy to talk about the history of the ADA. When I teach my ADA course, I always start with a long discussion of that because to understand the statute, you have to know where it came from.

I think the American perspective is very different than the European because we tend to think of things from a rights perspective, a discrimination perspective, instead of an entitlement perspective. The United States does not

have national health insurance (not yet!),[314] but instead of entitlements, as citizens, there are certain rights in order to be free from discrimination.

I know a bit about Australia. I don't know the French situation very well, but in Australia the perspective is very different from the United States, even though they have adopted the nondiscrimination statute.

For your audience, it is important to understand the breadth but also the limits of the antidiscrimination focus. It is a uniquely American way to think about these types of issues.

There are key aspects about how we got to where we were in 1990 (date the ADA was enacted). I am sure you know that we amended the statute in 2008.

MM-B: *We do indeed need to know if the amendments have really changed things. In terms of the entitlements-versus-rights issue, the same dichotomy exists in France, and it causes some problems. The antidiscrimination principle in France also reflects a rights mentality, but French judges are more familiar with the entitlement framework.*

The French perception of disability discrimination seems to be different from the U.S. perception as reflected in the ADA. I'll go into that in more detail later.

RC: The opportunity to compare is fabulous.

To get back to the legislative history, in 1973 we get the Rehabilitation Act. That was adopted during Nixon's presidency. He actually vetoed that statute in 1972 because he considered it to be too costly. Section 504 of the Rehabilitation Act was a small part of a very broad statute for people who were disabled and needed rehabilitation services. So, at the very beginning, it was a blend of nondiscrimination and entitlements ,which is interesting because we have moved so much away from the entitlement perspective. Nixon didn't veto it because of Section 504 but because of the overall costs, and then Congress revised the bill (but retained Section 504), and it was passed in 1973.

Section 504, which guaranteed nondiscrimination, did so only for entities that needed federal financial assistance. It was not a well-known provision. It was snuck in at the last minute with no discussion. The federal agencies charged with promulgating regulations did not do so until litigation was brought to force them to write regulations.

Nineteen seventy-three is an important moment, but it took five or six years for there to be any enforcement at all of that provision. The regulations were written only after a mass protest that started in Berkeley, California. Law enforcement authorities were baffled at how to respond to people in wheelchairs and with other visible disabilities, who started holding sit-ins and protests to spur public officials to action.

Then in 1975, we enacted the Education for All Handicapped Children Act, which is today the Individuals with Disabilities Education Act. That is huge in the United States. This has more of the entitlement focus: all children from ages three to twenty-one are entitled to public and free education if they are

disabled. I don't know that Europe has enacted a law as broad as the Individuals with Disabilities Education Act of 1975. The name changed when the ADA (1990) switched to the term *persons with disabilities* instead of *handicapped.* It is federally funded, but states have to promise to offer free public education to all children who are disabled from ages three to twenty-one. That was in 1975 and a very popular statute passed with a broad bipartisan margin.

The next year that was pivotal is 1988. In 1988, the Fair Housing Act, which had been enacted in 1968 to prevent housing discrimination against African Americans who tried to rent or purchase houses in various neighborhoods, was amended to include disability discrimination. People with disabilities were having housing difficulties: if you wanted to provide group housing for people with cognitive impairments or you wanted to put in a group home for people recovering from alcohol or drug addictions, often neighbors complained, so it was hard to get zoning permission. Because of a Supreme Court case on that issue, there was a large national debate about it. The disability community for the very first time, in 1988, worked in coalition with a broader race-based, civil rights community in the United States. They agreed to have the Fair Housing Act amended to ban disability discrimination. This was the first time a disability bill passed not because the disability community was pushing it, but because it became part of a major civil rights agenda.

MM-B: *How do you explain that the race-based community was suddenly sensitive to these issues? Did they realize all of a sudden that it was a civil rights issue?*

RC: Often the African American community itself is very impacted by disabilities. African Americans serve in the armed forces. A lot of veterans are disabled and in need of the kind of help those statutes provide. A lot of people think that the veteran community was pivotal to forge a national consensus on disability discrimination. In the veteran community, there are a lot of African Americans.

It is hard to say. It is give and take. The disability community also favored some amendments that helped to improve enforcement of the race-based aspects of the housing statute.

For the disability community, they thought it was time to get themselves a statute rather than amend another statute. The disability community wanted a statute for people with disabilities that was comparable to the Civil Rights Act of 1964, which was so important for gender and race in the United States.

As a side note, you might want to consider the parallel issue for the gay rights community in the United States. Some early gay rights activists pushed for Title VII to be amended to ban sexual orientation discrimination, but the fear has always been present that opening up Title VII to amendments would hurt that statute for the racial civil rights community (if narrowing amendments were adopted). So, the gay rights community has generally pushed for its own statute. That statute began very narrowly, banning only a small

amount of sexual orientation discrimination matters. Subsequent versions (which still have not become law) have become much more comprehensive and are starting to parallel the Civil Rights Act of 1964. So, a big issue in the civil rights community always is whether we should amend an existing statute or create an entirely new one. The disability community has used both approaches.

So in 1988, after the passage of the Fair Housing amendments, a decision in the disability community was made to seek to develop a broader statute.

Interestingly, at that time, Reagan was president and even if we can't say he was particularly interested in such matters, he actually formed a national commission on disability. He appointed people from the disability community to be on this national advisory board on disability. The people were not all Republicans because disability cuts across the Republican-Democratic line: any person can have a disabled child, a disabled parent. You are not "protected" from disability because of your class. Some of this is about the pervasiveness of disability. So one could give Reagan a little bit of credit for starting discussions at the national level.

This advisory group [the National Council on Disability] drafted the first version of the ADA in 1988. It was very radical; it broadened the definition of disability (compared to what was in Section 504). It covered anything imaginable. It provided for very extensive remedies. This version did not pass Congress. That is where we started, with a very radical, sweeping bill.

Another related development was because of a presidential candidate. Michael Dukakis (governor of Massachusetts) was running against George Bush, Sr. (who had been vice president under Reagan). During the presidential campaign, it came out that Michael Dukakis had mental health treatment following several disappointing episodes in his life: his brother had died in a tragic car accident and he sought medical help, and it came out in the media. They thought it would kill his campaign because several years earlier Jimmy Carter's vice presidential candidate (Eagleton) had sought mental health treatment and had been taken off the ticket. There was a fear that this would kill the Dukakis campaign.

At a press conference, a journalist asked President Reagan: "What do you think of the fact that Michael Dukakis sought mental health treatment?" President Reagan said (maybe jokingly), "I would not want to pick on an invalid." The press relayed this information, and the president got criticized in the press for that insensitive comment. Later, he said he was just joking.

That put George Bush (his vice-president and the presumptive presidential candidate) in an odd position. Bush had been moving to the left to win the presidential election, and he was worried that President Reagan's record on civil rights would hurt his presidential campaign. President Reagan had been very conservative on these issues. So at first Bush said nothing. Then he said

to the press that there was a disability bill in Congress and as soon as he was elected president, he would support that bill to become law. I am sure he had not read the bill pending bill in Congress at that time. It was a very far-reaching bill, but he did make that promise.

When Bush won with a landslide margin and was elected president, he said to his advisors one way to be reelected is to keep his campaign promises—one of which was this disability bill. So he met with his cabinet and with Richard (Dick) Thornburgh, who was his attorney general. Thornburgh had a son who had been disabled in a car accident in which his first wife was killed. Bush asked Thornburgh to take the lead in getting the disability bill through Congress.

This was the most fortuitous thing that could have happened to the disability community. Thornburgh was a very passionate advocate for disability and he took that charge very seriously. He obviously sought compromises and asked for the bill to be narrowed and cut back. But he worked considerably to get the bill through Congress. He became part of an overwhelming bipartisan majority.

Interestingly, conservative Republicans worked with Democrats and the bill became law. President Reagan's insensitive remark was an important happenstance in this bill becoming law because of the way it forced Bush to make disability rights a priority.

MM-B: *So the disability community's role was not that important in getting the bill passed?*

RC: No, the role of the disability community was huge. It had become empowered and effective at both a grassroots and national level. It played a crucial role at every stage of the legislative process. This fortuity meant the disability community was not facing opposition on the basic principle. The key legislative lobbyist was Chai Feldblum (who is now an EEOC commissioner but, at the time, worked for the ACLU [American Civil Liberties Union]), who worked tirelessly to get the bill through Congress and be acceptable.

In terms of the draft of the bill, as Chai would tell you, the position of the lobbyists was that, to the extent possible, we would use the language found in the 1973 Rehabilitation Act to not reopen those fundamental issues. That's why sections, such as the definition of disability from the 1973 act, were just added hook, line, and sinker into the 1990 bill even though Chai and I knew that there were some limitations with the approach taken in the 1973 act.

Moving forward to the present, I think that it is very interesting once again that a similar combination of fortuities caused a Republican president and Republican presidential candidate to support the 2008 amendments. John McCain was running against Barack Obama, who has a very strong record on civil rights. McCain, a veteran, supported the 2008 amendments. For the 2008 amendments, it was very much like George Bush, Sr. McCain did endorse the

bill. The political climate was such that he could not oppose the amendments introduced under the presidency of the second George Bush. McCain made it clear during the campaign that, if he became president, he would the sign the bill if it was passed by Congress. It was actually passed before the presidential election because Republicans worried that Congress would be even more liberal after the 2008 election (and that is exactly what happened).

A lot of people wondered, after so many years of the statute being interpreted strictly, why did this happen in 2008? I think the position among Republicans was they did accept the 2008 bill when it started to look like Barack Obama was going to become the president of the United States and win a possibly heavy Democratic margin in the House and Senate. So the bill that would come in 2009 (if it were not passed in 2008) would be even more proplaintiff than the one being proposed in 2008 before the new members of Congress took office. The Republicans concluded that was the best deal they could get. Therefore, they should accept those amendments, which were very broad in terms of the definition of disability.

What I should say is that, despite the 2008 bill, I am not particularly optimistic that we will see meaningful changes in the courts making it possible for plaintiffs to prevail. I have been doing the research to try to figure out what is going on in the court decisions. The bill became effective in January 2009.

My current research suggests (but I am just beginning this research—it is preliminary) that, going back to 2008 and looking at the cases in the entire U.S. courts in 2008; people are having enormously difficulty finding competent lawyers to take their cases. None of the legal aid organizations can take these cases. I don't think the key problem facing plaintiffs is a narrow definition of disability. I think the chief problem is a lack of access to competent legal counsel.

MM-B: *Is it harder to introduce a class action claim covering disability litigation? We don't have class action in France, and you would think that could foster some impetus to get cases through the ACLU, for example. I also thought that with the juries, you could get significant damages. I know that with age discrimination, that's what attracts the lawyers. In France, the amount of damages is much lower. Is there a specific question of procedure here with the ADA?*

RC: Very rarely can you do a class action with disability. Usually it is a fact-intensive, individual discrimination case. I am speaking right now only about employment and not the other forms of discrimination. Under the law (in employment), you can get back pay, front pay. People with disabilities are among the poorest of our country. They have the lowest hourly wages in our country.

There is rarely a plaintiff who makes enough money that the damages will be very significant. What lawyer will be interested in pursuing that kind of case on a contingency basis? One-third of low back pay is not enough to support legal fees.

MM-B: *Can you get punitive damages?*

RC: In disability cases, rarely do you have compensatory or punitive damages. That is only if you can prove intentional discrimination. If you have a case about accommodation and you have an employer who acted in good faith and made a suggestion and the court agrees with the plaintiff, the employer will not pay compensatory damages. So very rarely do you get compensatory damages.

For people earning eight to ten dollars an hour, it is not worth it for lawyers to take their case on a contingency basis. It is true that a lawyer can get money as the "prevailing party," but that is only if they actually go to trial and get a judgment from the judge or jury. If a case settles, it is not possible to go to a judge and get money for representing the prevailing party. Most cases settle, and therefore the lawyer is stuck with a contingency award that would usually be very low. Plaintiffs have a low chance of winning, and lawyers can't afford to take these cases where the plaintiff is not going to pay the bill. It is just not a good financial decision for some lawyers to take these kinds of cases.

In the following excerpt, Colker discusses the diverse nature of disabilities and the integration of people with disabilities into the workplace.

MARIE MERCAT-BRUNS: *My next question is deliberately provocative. Do you think there is a hierarchy in how different subgroups of the disability community are treated?*

RUTH COLKER: When Congress passed the ADA, specific groups helped pass law and so we have a very good rules for mobility impairment linked to the construction of building from a mobility impaired perspective, and so on.

The hearing impaired felt left out: they would like telephones to be widely available to them. The ADA had none of that—accessible for them in case of emergency calls (with great difficulty) but nothing more than that. Their needs were not prioritized.

When Congress amended the ADA in 2008, it reached a compromise with respect to visual impairment. Unlike other impairments, one would consider whether you are disabled after the use of corrective lenses. So the needs of that community received less priority than for some other groups. That is inevitable with legislation. There are compromises and not everyone's needs are equally represented.

MM-B: *What does the future hold for us? Now that we have the amendments, I suppose we are in a waiting period. How will they be interpreted? But as you said, that is not the main problem. The problem is getting more lawyers to take cases in this field. So the norms are not the question.*

Other professors, commenting on sex discrimination, are saying that the Civil Rights Act does not really grasp the problem: discrimination can be the result of the old boys' network and fewer opportunities to meet the right clients or get that

promotion; that is, exclusion is the result of social practice rather than a visible violation of the law, contested in the courts.[315] *Is that you are saying? That this is a financial, not a normative issue?*

At the end of the day, what can Europeans learn from the application of the ADA? Where should they go from here, considering that Europe has similar norms?

RC: I have not said much on voluntary compliance. There are many employers that go out of their way to hire people with disabilities and accommodate them. I have worked with a fabulous university coordinator on disability issues. I think my employer does fabulous things to accommodate people with disabilities.

MM-B: *In France, some collective bargaining agreements try to incite employers to hire people with disabilities. But there are not many candidates with disabilities applying to qualified positions, because few of them have degrees or technical skills. So it is not just about resistance from employers but also the pool of qualified applicants available. Is it the same situation in the States?*

RC: We do not really have those efforts. We don't proactively employ people. We don't run into that issue.

MM-B: *In the empirical data on people with disabilities, what kind of jobs do they have?*

RC: We know their average wage is very low.

MM-B: *Do they go to college?*

RC: I don't have data on that.

MM-B: *I suppose education is also a factor, if there is an education-training-employment continuum.*

RC: I do think the United States might have done a better job integrating people with disabilities in the workforce because they are getting their high school diploma. Maybe Europe can learn from that in terms of higher education.

Harvard Dean Martha Minow shares her perspective on how accommodation can benefit the entire workforce.

MARTHA MINOW: Accommodation for persons with a disability—done under statute—should be understood as another kind of justifiable accommodation. If a government employer accommodates someone with a disability, then it should as a matter of basic fairness accommodate someone with a religious ground needing a similar accommodation. As a sheer policy matter, disability accommodation offers a very instructive method for reviewing the essential elements of a job and permitting accommodations outside those essential elements. This invites employers to resist assuming the job has always been performed in this way by someone who look a particular way, wears particular clothes, and so forth, and may help open up some jobs to people who have never held them in the past.

In this way, individuals and the whole society can be enriched by an inquiry launched by disability law. It can be very instructive to find out the elements that have been burdensome for people with disabilities and find that similar burdens have existed for women or for members of racial or religious minorities. Here is an example where learning from the disability context can have real benefits for other visible minorities.

MARIE MERCAT-BRUNS: *So do you think we can find a common ground of interests to accommodate for different groups?*

MM: I do think that there is much to learn about unnecessary burdens and exclusions that have treated "differences" as inherent in people who do not fit old traditions. Rules can often serve their central purpose while being redesigned so that they do not fall so heavily on one group as opposed to another. For example, computer software developed to accommodate a person who is visually or hearing impaired can help a lot of other people as well.

From architecture, we learn the concept of universal design of workplaces that takes into account the variety of the people who are there. It turns out the adjustable chairs, ramps, and other accommodations help many kinds of people.

MM-B: *In that respect, you have a more structural view of accommodation, but it is also an individual one. It really depends on the context. Ruth Colker made an observation about the ADA: she said that disability discrimination is largely focused on the individual and that that is often the problem.*

MM: I am not sure I totally agree with Ruth Colker on the disability front, and I would have to know more about the particular statement to be clear about my response. I do note that both in the employment and school contexts, statutes are written without listing the categories of diagnosis and instead look at functions, what an individual can or not do. There is a good reason for this: the approach resists reducing an individual to a label or category and focusing on the work or educational challenge at hand. And the same can be done with regard to religion. An individual may be a Sikh or a Christian Scientist, but a requested workplace can pertain to the individual and the individual conscience.

The strength here is focusing on the individual; it is an individual's right being protected. It is not about group rights. It is not about creating new subclasses that have their own rights. It may seem paradoxical, but even the right to be in a group is protected as the right of the individual to affiliate.

This is the way to maximize individual freedom and reduce government imposition. Compare the individual rights approach to the use of personal law in places such as India and Israel—which assign individuals to a package of family laws based on their or their parents' religion. That personal law approach has been rejected by the United States, Canada, and England.

To look at someone and say because your parents are in a given religious group, then you are governed by the marriage and divorce laws of that group is to deprive the individual of the ability to choose. The individual may say, "I don't want my divorce law governed by Islam even though my parents are Muslim, because I have chosen to marry someone who is a Hindu or to be secular." The individual should have that choice.

A big controversy arose in Canada over whether or not religious dispute-resolution methods should be sanctioned by the government. The controversy unfortunately exposed a lot of Islamophobia because it arose when Muslim groups sought government recognition of Islamic arbitration. The government had permitted arbitration by Jewish groups. Ultimately, the government rejected all faith-based arbitration. That result makes some see if allowing people to create separate dispute-resolution systems means that some individuals would be pushed into a religious system against their own choice and lose access to the courts and the rights protections accorded to each individual under the law. Otherwise, there is a risk that the group could oppress individuals, and gender discrimination could ensue that the State itself would not permit directly.

The Limitations of Disability Discrimination Law

Employment law expert Christine Jolls points out some limitations of disability discrimination law from a law and economics perspective.

CHRISTINE JOLLS: With respect to economics, a critical contribution is analysis of the effects of particular antidiscrimination measures on the wages and employment of affected groups. The theoretical aspiration of any form of antidiscrimination law is (at least in part) to help the protected group, so it is obviously crucial to ascertain whether in fact this happens when the law is put in place. Much of the strongest contemporary research in this area concerns legal limits on discrimination on the basis of sex and disability.

In the case of disability discrimination law, economic analysis suggests that the law may depress the employment prospects of individuals with disabilities because of the financial costs of required disability accommodations coupled with the difficulty of enforcing legal prohibitions on the refusal to hire individuals with disabilities.[316]

At least some empirical economics work supports the prediction about disability discrimination law. The best-known study in this area, by MIT economists Daron Acemoglu and Joshua Angrist, compares wage and employment levels of individuals with and without disabilities before and after the effective date of the Americans with Disabilities Act of 1990. Acemoglu and Angrist find that the wages of individuals with disabilities exhibited no change relative to those of individuals without disabilities, while employment levels fell

significantly for individuals with disabilities aged twenty-one to thirty-nine, relative to individuals without disabilities in this same age cohort, and may also have fallen for individuals with disabilities aged forty and above, though the picture is more mixed. As Acemoglu and Angrist recognize, other things relevant to the employment situation of individuals with versus without disabilities may have changed at the same time that the ADA went into effect, and this makes it difficult to be certain that the changes in the relative employment situation of individuals with disabilities resulted from the ADA rather than from these other factors. Acemoglu and Angrist offer several tests to distinguish between the effects of the ADA and the effects of other forces. First, they control for increases in federal disability benefits receipts, since such increases could obviously cause reductions in disabled employment levels if some individuals would no longer work with more generous benefit levels. Second, they examine the change in the relative employment levels of individuals with disabilities at small firms (many of which are not subject to the ADA) relative to medium-sized firms that are both subject to the ADA and likely to have relatively high compliance costs (compared to still larger firms), and they find that the employment declines are greater at the medium-sized firms.[317]

A potentially important effect of the ADA not examined by Acemoglu and Angrist's empirical work is the law's possible encouragement of human capital investments by individuals with disabilities—a feature of the law that might lead to negative employment effects for individuals with disabilities, at least in the near-term, wholly apart from the financial costs of required disability accommodations. If the ADA's protection of individuals with disabilities encourages greater human capital investments, and perhaps also greater particularity about job matches, among this group, then the relative employment level of individuals with disabilities might drop after the ADA's enactment for this reason. Preliminary evidence provides some support for the human capital hypothesis, though further research is required before reaching a more definitive conclusion.[318]

Continued work by antidiscrimination lawyers, together with scholars in psychology, economics, and other fields, will, I hope, produce continued progress in our understanding of the diverse forms of discrimination and of the law's response.

Comparative Perspectives

The scholars discuss the definition of disability and its ties to the reasonable accommodation duty,[319] forcing a reexamination of a series of assumptions about American disability discrimination law and helping to evaluate French norms and better understand disability discrimination.

Colker's narrative dispels a first assumption about the origins of the Americans with Disabilities Act (ADA) and its amendments,[320] exposing the role the

Republicans played in getting the law adopted to fulfill a campaign promise and also prevent more radical provisions from being passed by Democratic opposition.

The second assumption put to the test is the belief that enforcement of the ADA was limited by the judges' narrow interpretation of what constituted a disability. The broad ADA definition covered several situations with respect to an individual: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."[321] In the initial case law (reversed by the 2008 amendments), judges refused to apply the ADA to several claims alleging disability discrimination in employment, on the basis that the impairment causing the adverse employment action did not meet the ADA definition of disability. As Minow noted, this was the risk taken by the legislator from the start. As she explained, the ADA definition was innovative in that it focused on functions without listing categories of diagnosis, looking at what people could or could not do and refraining from reducing them to a label or category. There is a risk, however, introduced by the 2008 amendments to the ADA. The fact that the act applies to a wide range of disabilities may generate discrimination among categories of disabilities, with some groups receiving less favorable treatment by employers. Less care may be given to individuals whose disabilities are not visible, on whom the impact of work relationships may be more difficult to predict or detect, versus people with physical disabilities that are more familiar to the public, such as those requiring the use of a wheelchair, for example.[322]

In France, the role of the occupational physician influences the manner in which disabilities are perceived in the workplace,[323] departing from the idea of balancing the interests of integrating disabled people with the associated costs for the business.[324] As Jolls explains, the significant financial burden of reasonable accommodation is perceived differently by companies of varying sizes and, according to some research, could deter them from hiring people with disabilities. Colker observes, nevertheless, that many employers voluntarily hire and accommodate people with disabilities.

The third assumption relates to the 2008 amendments enacted to counter the restrictive interpretation of who is covered by the ADA. The amendments clarified and broadened the definition's three prongs—"a physical or mental impairment that substantially limits one or more major life activities of such individual;[325] a record of such impairment; or being regarded as having such an impairment."[326] The supposition is that the precisions brought by the amendments were crucial and gave the law a new reach; Colker is unconvinced, citing the difficulty for workers with disabilities to find representation due to the low wages they earn on average.

Before exploring this idea further, let's look again at the definition of disability in the United States. Above all, it aims to identify qualified individuals with disabilities.[327] The ADA definition of disability did not supply any precise description of groups of disabilities; the legislator's intent[328] was to give the law a transformative

function with respect to the protected category, by reframing certain social norms regarding disabilities.[329] The premise was that a disability is constituted not only "in terms of the internal attributes of the arguably disabled individual" but also "in terms of the external attributes of the attitudinal environment in which that person must function."[330] This can be a person who is limited in his or her life activities but also a person who is perceived to have a disability or who has a record of disability. By referring to a "qualified" person with a disability, the law seeks to redefine how the qualification is perceived. A person is "qualified" not only "in terms of a person's ability to perform the functions of a particular job" but "in terms of her ability to perform the job's essential functions." Therefore, a person who cannot function effectively in the "world-as-it-is" is not unqualified unless he or she would also be unable to function effectively in the "world-as-it-could-be," after reasonable accommodations.[331]

Despite this conception, American courts, in particular the Supreme Court, interpreted the ADA of 1990 restrictively. The first decisions whittled away the scope of the definition, excluding impairments that could be corrected (acute myopia, for example) as well as certain perceived impairments (the third prong of the ADA definition of disability) by choosing to very narrowly interpret the meaning of a "substantial limitation" of major life activities and "activities that are of central importance to most people's daily lives."[332] The 2008 amendments explicitly acknowledged the need to reverse this trend and clarified the meaning of major life activities, providing a very broad definition that includes both general physical and mental activities, such as concentrating and thinking, and more specific bodily functions, such as reproductive functions.[333] The act also revised the provision on perceived disabilities, excluding transitory impairments lasting less than six months. Finally, the act specifies that "an impairment that substantially limits one major life activity need not limit other major life activities" in order to be considered a disability and may consist of "an impairment that is episodic or in remission."[334]

This adjustment to the ADA is interesting from an international perspective. In France, a difference in treatment based on a transitory impairment would be considered as discrimination on the basis of health status (a prohibited ground), rather than disability. This is a useful ground in light of the rather restrictive definition of disability in EU law, which does not recognize a sickness as a disability.[335] Recent CJEU case law, though, adopted a more functional meaning of disability, linked to the long-term effects of obesity at work.[336]

Another interesting aspect for international commentators is the manner in which the ADA invites the EEOC to specify the meaning of an impairment that "substantially limits one or more major life activities,"[337] which often involves highly technical and pragmatic considerations based on the type of occupation. The EEOC was quick to act accordingly and continues to implement the ADA and its amendments with Chai Feldblum's assistance.[338] The role given to the EEOC by

the ADA underscores the importance of having an independent, external body to assess, unbiased, what the real work limitations of an impairment are and which limitations are secondary. In France, for example, too many employment decisions probably continue to be based on rigid definitions—medical definitions developed from a social protection perspective and vocational definitions emerging from labor law and assessments from occupational physicians. These are combined with overly vague evaluations regarding potential reassignments for workers with disabilities, who are dependent on the discretionary power of employers and their perception of what constitutes a limitation, without concern for distinguishing essential job functions.[339] U.S. case law on what is considered to be an essential job function,[340] determining whether an employee is qualified, could probably be useful for the enforcement of French and European norms,[341] although the risk of assigning employees with disabilities to lower-skilled positions to keep them in employment should be avoided.[342]

As important as the 2008 amendments may have been, their consequences must be nuanced.[343] As Robert Post explained during our conversation, law is not "a rule." The development of statutes and case law must be thought of as "as a dynamic exchange between Congress and a court which has its own views," and exchange that is constantly "in motion." In Post's words, "You shouldn't imagine it as one thing just controlling. Congress has spoken, but whether the court is listening, whether it is going to resist, I don't know enough about it to say." We cannot predict how norms will be interpreted and applied; interacting with each norm is a set of actions that prevent us from anticipating its consequences. Colker shares this sentiment and does not believe that the amendments will produce a radical change. As she observes, in practice, lawyers are not interested in pursuing these cases, because the low wages generally paid to workers with disabilities mean that the damages won would not cover the legal fees.

This leads us to a fourth illusion, which is that disability discrimination is analogous to any other ground of discrimination. Yes, in addition to the concepts of direct and indirect discrimination (or disparate treatment and disparate impact), we have the very different framework of reasonable accommodation. But the particularity of disability discrimination is that proving an intent to discriminate is not the issue, as Colker points out, unlike with race discrimination, for example. The focus is on the adjustments that should be made to the work or the workplace. If the employer acts in good faith and a compromise is found to accommodate the worker with the disability, then the judge is satisfied. Ford believes that disability discrimination has a distinct nature. Commonalities can probably be found with age discrimination. In some respects, disability can be considered to be a relatively functional ground of discrimination, but, as Colker explains, the types of discrimination and the problems with discrimination encountered by people with disabilities vary widely because there are many different forms of disability. In France, various disability rights groups organized to defend the interests of people

with different types of disability. Chai Feldblum did the same when she helped to draft the ADA, reusing the language of the Rehabilitation Act. Clearly, the American public does not view disability and racial discrimination in the same light: their histories are dissimilar, even if at one point, as Ruth Colker revealed, civil rights advocates had joined the fight for disability rights, due to the large number of African American veterans with disabilities. As described by Colker, certain illnesses, such as sickle-cell anemia, can especially affect black people, although they are rare. In the United States, health status is not a ground protected by federal law, so what is at stake for people with disabilities is their right to health care and other benefits, in addition to the fight against discrimination.

What can be learned from these American insights on the nature of disability discrimination? Interest groups lobbying for people with disabilities are relatively well organized in France, for a country that does not traditionally incorporate lobbying into its social policies. The Employment Equality Framework Directive 2000/78 played a fundamental role in prohibiting employment discrimination against people with disabilities in France. However, as explained previously on the subject of reasonable accommodations,[344] it does not appear that France is expanding its notion of disability through extensive use of the concept of reasonable accommodation in employment law. Biases against people with disabilities in France seem to be inherently nourished by the attitude that a disability is an illness, a deficiency, a failure to measure up to the standard represented by the healthy employee, and that weakness must be compensated for.[345] Once a person has been assessed as having this characteristic, then the ADA prohibits discrimination in employment, but without addressing certain psychosocial reasons for the differences of treatment. According to certain European scholars,[346] the European proposal for a new directive on equal treatment moving toward an expansion of the application of Article 19 TFEU (the former Article 13) could embrace a more context-sensitive, relationship-oriented perspective of people with disabilities, inspired by Article 1 of the United Nations Convention on the Rights of Persons with Disabilities of December 13, 2006: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[347] The CJEU has recently been more demanding in its perception of what constitutes reasonable accommodation, including simple worktime adjustments,[348] and condemned Italy for lack of compliance with EU directives.[349]

Yet another unique dimension of disability discrimination emerges through EU case law and the CJEU's decision in *Coleman*.[350] The court found that discrimination by association had occurred when an employee was dismissed because of her caregiving responsibility toward her disabled child: "Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as meaning that the prohibition of harassment laid down by those provisions is not limited

only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3)."[351] This decision underscores how the fight against discrimination can even encompass relationships extending outside of the workplace, such as that between an employee and a dependent, as though protecting victims of ricochet. The court goes so far as to reiterate that "the Community Charter of the Fundamental Social Rights of Workers recognizes the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people."

Age Discrimination

Age discrimination was recognized more recently than the other forms of discrimination,[352] but is being pushed to the foreground by global demographic trends. The fight against age discrimination brings into direct confrontation the desire to treat people differently based on age, a principle on which social protection systems are based,[353] and the need to disregard age as a reliable indicator of a worker's ability, in accordance with the principle of nondiscrimination. The normative framework that has emerged from this issue in the United States and in Europe often crystallizes through the judicial scrutiny of exceptions to age discrimination.[354] Furthermore, the dual nature of age as an objective as well as a subjective trait, a potential source of bias, creates some difficulty in identifying victims of discrimination and the causes for this treatment, which vary depending on the age cohort in question. In some cases, perceptions of age are responsible for the termination of an employment contract,[355] while in others a young employee may be disadvantaged by a remuneration system that favors older employees without any legitimate justification. The key is often to look at whether the transitional pay schemes, based often on experience, still perpetuate age discrimination indefinitely.[356] In Europe, all age cohorts are protected by law, unlike in the United States, where the law addresses only people forty years of age or older.[357] Finally, like sex, age is a factor on which statistics are collected, so proving indirect discrimination appears, at least on the surface, to be easier. In France, however, it has been more difficult to prove exactly which age cohorts are the most disproportionately impacted by a facially neutral practice.[358]

Christine Jolls discusses age discrimination and its specific characteristics.

MARIE MERCAT-BRUNS: *Have the groups targeted by discrimination changed over time?*

CHRISTINE JOLLS: Well, certainly the groups targeted by antidiscrimination law have changed; American law now prohibits discrimination on the basis of traits such as age and disability, which were not covered when the Civil Rights Act of 1964 was passed.

Consider age discrimination. Employers' desire not to employ older individuals may differ quite a bit in nature from employers' desire not to employ individuals of a particular race. As the Supreme Court of the United States noted in *Massachusetts Board of Retirement v. Murgia,* "Old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span." Old age has a temporal and most critically a universal element (almost universal at least) that is lacking in the categories covered by Title VII. Old age is unlikely to be targeted by the same forms of bias and disadvantage that accompany race in America.

Yet for a distinct set of reasons, older workers may be as disadvantaged in the workplace as members of racial minorities. A striking empirical regularity in age discrimination cases is that older workers often suffer termination because they commanded far higher wages than younger workers capable of performing the same job. Higher pay based on age—wholly apart from either productivity or seniority at a particular firm—seems to be a fairly robust empirical fact about the American economy, rooted in economic considerations of bonding and incentives. Many employees may earn well below their value marginal product in their younger years and well above this amount in their later years. Accordingly, age discrimination law may be necessary to prevent opportunistic employer firing when older workers' pay exceeds their value marginal product. Specifically, disparate impact liability, which the Supreme Court of the United States has held applicable to age discrimination claims, imposes some, albeit probably quite weak, limits on the firing of older workers in such circumstances.[359]

MM-B: *In addition to the labor market factors that discourage employment of older individuals, are negative views of older workers' attributes and abilities a factor?*

CJ: There may well be conscious forms of bias against older individuals, notwithstanding the suggestion above that most individuals do not consciously revile older workers in the way that some white Americans consciously reviled black Americans a generation ago. But more important are implicit, or subconscious, forms of bias that have recently been rigorously studied using new advances in social psychology. Unlike conscious bias, such implicit bias cannot be captured simply by asking people direct questions about their views or attitudes.

Chai Feldblum examines how age can be a transformative factor in the workplace.

CHAI FELDBLUM: Age is universal! I do age in my workplace flexibility stuff. My main takeaways from Phyllis Moen[360] are that we have to change how we think, structurally, about school, about work, and about retirement.

Kathleen Christensen[361] from the Sloan Foundation[362] devoted $60 million between 1993 and 2001 on academic research in economics, sociology, psychology, linguistics, and anthropology. The main point is that it's not just about women and kids. The Sloan Foundation created the field of work-family policy in the United States and expanded it under the influence of its former president, Ralph Gomery. A number of CEOs participate in the work of the foundation. They focus on research to make business work well. Policy is about social structural change; that's why Sloan came to me. But they're working with businesses as well, and voluntary change. There is a need to change cultural norms; law is only one component.

Comparative Perspectives

Age is part of a "new generation" of discrimination,[363] as confirmed by Jolls. The main difficulty in enforcing this ground stems from the many paradoxes it produces, especially visible in the case law in Europe, where discrimination is prohibited based on any age, young or old.[364]

The first paradox relates to the universal nature of the age ground, mentioned by Feldblum, and its considerable relativity with respect to aging, of which it is an indicator. The biological aspect creates the illusion that age is an objective fact. "How old are you?" There is only one possible answer, but it can be interpreted in many different ways. This is the soil from which age biases grow, whether they focus on the young or old. Age is assumed to indicate ability or incompetence,[365] experience or immaturity, creativity or an inability to learn—all of these ideas can serve as a basis for discrimination. At the same time, age can be a Bona Fide Occupational Qualification (BFOQ)[366] in the United States,[367] even if this exception is narrowly interpreted in North America and in Europe.[368] Antidiscrimination law sometimes serves to distinguish[369] the true reason behind a difference of treatment based on age:[370] is it the employee's physical abilities, or is it his or her cost to the company as a worker with seniority[371], as Jolls believes? Is it because the employee is not qualified? Is it a desire to scrimp on training for workers in their late career[372] or on their right to a sabbatical?[373] Similar questions can be asked concerning discrimination against younger workers, about whom different assumptions are made regarding a lack of experience, qualifications, loyalty, or work ethic. Judges may take a contextual approach to uncover the "judicial truth" behind dismissal decisions or refusals to provide training. The enshrinement of the general principle of nondiscrimination based on age in European law[374] ensures the legitimacy of scrutinizing such decisions for discrimination, even though age is a pivotal criterion regulating access to social protection.[375]

The second paradox resides in the individual and group aspects of age. Age is a personal trait that describes an individual but also places that individual in an age cohort: a generation, as described by Louis Chauvel.[376] Discrimination can affect an entire generation or cohort in the workplace. In these cases, the indirect

discrimination model proves useful, as revealed by French supreme court decisions.[377] However, judges are reluctant to apply indirect discrimination strategies to age, as revealed by the case law in France[378] and even the United States, where disparate impact discrimination against older workers has only a recent history.[379] In *Gross v. FBL Financial Services, Inc.,* the Supreme Court held that the Age Discrimination in Employment Act (ADEA) requires proof that age was the "but-for cause" of an adverse employment action, such that a defendant is not liable if it would have taken the same action for other, nondiscriminatory reasons, imposing a higher standard of proof in age discrimination cases.[380] Moreover, ADEA claims can be subjected to compulsory arbitration.[381] Indirect discrimination has been more easily established on the combined grounds of sex and age in France.[382] In the United States, where antidiscrimination law only protects the upper end of the spectrum—workers aged forty and over[383]—this conflict is not felt, but in Europe, how can the interests of different age cohorts be reconciled? Are they not inherently contradictory? Experience works against both younger and older workers, as shown in the joined CJUE cases *Hennigs* and *Mai* in 2011.[384] Interestingly, European judges seem to be more open to the idea that differences in treatment based on age are unlawful and disproportionate when it is the younger workers who are being discriminated against,[385] leading to yet another paradox about age discrimination.

The third paradox is in the fact that age is an ineffective yet core factor in social policy, creating a façade beneath which to address the more cumbersome challenges of effectively combining labor law with employment and retirement policies.[386] Where age is an issue, often the deeper matter is one of social protection.[387] Symbolically, albeit anecdotally, the two areas targeted by the opposition during the French presidential elections in 2012 provided striking examples of attitudes toward age. They were retirement reform (at age sixty for individuals who began working at an early age) and access to employment for young people (emphasis on education and "generation contracts"[388]), key subjects of political debate in Europe.[389] The employment of older workers is a recurring theme in the European Union,[390] and Feldblum considers it to be a central concern for United States public policy as well.[391]

On both sides of the Atlantic, what is striking is the absence of any in-depth reflection on age discrimination. Age is a public policy tool. In France, it is used as a ready-made answer to settling unemployment or retirement issues (by promoting the employment of young people, for example), overlooking the need to uncover the connection between the individual and group aspects of age.[392] The social consequences of early retirement and job-sharing are too quickly forgotten.[393] The use of a ground of discrimination to further political agendas in France has tinges of the use of race by the Hortefeux immigration law—later declared to be unconstitutional by the French Constitutional Council—permitting ethnic and racial data to be collected in France.[394] Does such an approach serve to displace the

real issues raised by age discrimination, namely, how work hardship and professional education and training affect the rhythms of work and well-being in the workplace throughout an employee's life: early, middle, and late career?

Simone de Beauvoir's writings, although somewhat pessimistic, are as relevant as ever:

> That is the crime of our society. Its "old-age policy" is scandalous. But even more scandalous still is the treatment that it inflicts upon the majority of men during their youth and maturity. It prefabricates the maimed and wretched state that is theirs when they are old. It is the fault of society that the decline of old age begins too early, that it is rapid, physically painful and, because they enter in upon it with empty hands, morally atrocious. Some exploited individuals inevitably become "throw-outs," "rejects," once their strength has failed them.
>
> That is why all the remedies that have been put forward to lessen the distress of the aged are such a mockery: not one of them can possibly repair the systematic destruction that has been inflicted upon some men throughout their lives. Even if they are treated and taken care of, their health cannot be given back. Even if decent houses are built for them, they cannot be provided with the culture, the interests and the responsibilities that would give their life a meaning. I do not say that it would be entirely pointless to improve their condition here and now; but doing so would provide no solution whatsoever to the real problem of old age. What should a society be, so that in his last years a man might still be a man?[395]

Work has evolved since de Beauvoir's time, but difficult and stressful working conditions have only changed outwardly, becoming more subtle in their physical manifestations over a lifetime of work, intensifying psychosocial risks, for example, while shrinking the proportion of manual production-line labor. Rules placing limits on work hardship[396] and studies on working conditions proliferate,[397] enabling the connection between work hardship and retirement benefits more clearly delineated. But the risk of intergenerational conflicts is only partially addressed by agreements on employment for older workers; in France, old versus young stereotypes on age have only been touched upon.[398] We are seeing the emergence of "age management."[399] The enforcement of rules using age as an essential litmus test of the entitlement to cease work is a legitimate desire.[400] However, the dichotomy created by using age to push people into opposing groups covers up more structural questions about well-being in the workplace and changing workplace practices that do not always consider the impact of active aging[401] on intergenerational relationships[402] and relationships between men and women.[403]

The American approach described by Feldblum feels more structural, since it looks beyond categories and asks questions about shaping a labor market that is better adapted to workers with varying needs, about creating a more flexible workplace, and about changing "how we think, structurally, about school, about work, and about retirement."

Is this focus on employment relationships instead of status feasible in Europe? Can it coexist with the age-oriented categories used in social protection policies? It may be more difficult to achieve, but the indirect discrimination model can be used to reveal, alongside the legitimate age-based distinctions, the potential inconsistencies generated by employment practices based on seniority or experience without any other selection criterion.

VII. RELIGIOUS DISCRIMINATION

In this transatlantic comparison, the fight against religious discrimination in the United States can be comprehended only through the lens of the country's religious history.[404] Without denying the cultural importance of religion in American society, its secular underpinnings[405] are often overlooked, as the scholars interviewed will point out.[406] Today, religious pluralism continues to define the United States, creating challenges in educational and professional environments, in which there is a legal obligation[407] to provide reasonable accommodation.[408] In contrast, in France, the reasonable accommodation principle is simply an option that certain collective agreements or employer associations choose to implement to promote religious diversity.[409] At the European level, the issue of religious accommodations in the workplace is more complex. Although the Employment Equality Directive 2000/78/EC prohibits religious discrimination, it does not require reasonable accommodation, despite the fact that the national law of some EU countries provides for such measures.[410] In both France and Europe, debate on religion and, more specifically, religious discrimination, is raising questions about equal access to certain freedoms, shedding light on the state's approach to these issues in the public and private spheres.[411]

Martha Minow shares her views on religious freedom for all, secularism, and balancing the interests of different religious communities. In the following conversation, she begins by examining how religious freedom is protected differently in the United States and Europe and the origins of these differences.

MARTHA MINOW: It is interesting that the First Amendment in the Bill of Rights deals with religious freedom and the protection against the establishment of religion. By having both of those dimensions, there is a fascinating commitment to a private-public divide that is committed to encouraging the flourishing of religion in the private sphere but also a separation of the government from religion that is continuous to the present. This line of separation borders what is public and what is private. But the location of the line is up for grabs more than it has ever been before, including such factors as government outsourcing, activities like the provision of social services, even the operation of jails. And so when there is a contract with a private provider and a private provider is a religious provider, have we now crossed the border into establishment of religion? That's a hot issue.

On the other hand, there is a long-standing tradition in the United States ensuring freedom of religious expression for all, including public figures and including ceremonial government actions, like prayers at the opening of a session of Congress. As we are becoming a more diverse society, such events cannot proceed on the assumption that everyone is Protestant; so prayers opening Congress now rotate Jewish, Muslim, Hindu, Catholic, and other religious texts.

To Europeans, this practice may look like a violation of the commitment to keep religion outside of public life. Yet in the American context, it would be viewed as incursion on religious freedom not to preserve the space for ceremonial prayer. Americans want public spaces and public officials to exhibit religious freedom as long as the message embraces diversity and individual freedom to participate and not to do so.

Yet the privatization of government activities—through outsourcing and other methods—has opened up new questions about when and where either religious freedom or preference for one religion can be exhibited and expressed. When the government contracts out its social services to a religious organization, can that organization require prayer? Fire employees who do not abide by a particular set of religious views? The constant commitments are to preserve the individual freedom of religion and making sure that the government is not endorsing or suppressing one religion, and it's not always easy to ensure both of those commitments.

MARIE MERCAT-BRUNS: *What about certain professions where promoting religious freedom might be a more sensitive issue, such as in social work or fields where professionals work with the young and might serve as role models?*[412]

MM: Schools and social services have been sensitive areas in assessing government treatment of religion in the United States. For better or for worse, our legal system has relied on a public-private divide. So, for example, Kentucky Baptist Services, which is the largest single provider of social services in Kentucky, works under a contract with the State. And an employee who was a lesbian working for that organization was fired because her sexual orientation became known to the public. She objected that this firing violated her freedom and her rights; a reviewing court said: no, it is a private religious organization and it can choose a bona fide occupational requirement is comporting with religious tenets even when the organization provides services under a contract with the state.

Funding private religious schools is a subject attracting huge controversy and much litigation in the United States. After decades of court decisions rejecting many efforts to permit public funding to support aspects of religious education, in 2003 the United States Supreme Court reversed several precedents and permitted the City of Cleveland to offer vouchers, allowing

low-income parents to select a private religious school rather than send their child to a public school. Importantly, the court emphasized that the City of Cleveland schools were terribly inadequate and also it was parents, not public officials, who would make the choice—and the choice included a variety of options as well as religious schools because there were choices beside the religious schools.

Now a lot of people looked at that decision, named *Zelman v. Simmons-Harris,*[413] and said, "This is the end of the barrier between religion and government or religion and schools." Actually, matters have not developed that way. In fact, as a political matter, despite the constitutional green light, the voucher movement by all accounts is pretty much dead. Americans as a whole do not want to vote for public monies to support religious schools—and especially suburban parents do want to alter support for the public schools.

In an interesting sequel, the idea of school choice has exploded as a technique of innovation within the public schools. Whether styled as magnet schools drawing students district-wide, or neighborhood schools with specialized features, or charter schools—in which entrepreneurial groups of teachers, parents, and community members create new public schools with special themes—states across the country have witnessed the development of special science and technology schools, schools using computer game technology as a pedagogy while teaching students to design their own programs. There are schools that address needs of students with learning disabilities or autism, and Arabic language, Chinese, and Hebrew language schools. There are concerns that some of these schools are really religious schools, and they are monitored closely; there are concerns that some of these schools produce new kinds of segregation, and that's an ongoing inquiry.

On the other hand, no one doubts it would be helpful to have a departure from the American insularity especially with regard to language and culture. We are coming to realize how good it would be for the next generation to have more people who speak multiple languages. In New York City, the public Arabic-language school enrolled over half the students that come from homes where they do not speak Arabic. That is a real contrast with the two public Arabic-language schools in Minneapolis where 98 percent of the students are Somali immigrants who speak Arabic at home; there, the Arabic-language charter school can offer a bridge for immigrants to English and academic excellence. I cannot say that these developments are free of controversy. In Florida, a Hebrew-language charter school was created and it was run by a rabbi. There was an uproar. The rabbi was moved out, and the textbooks were changed so as to eliminate any reference to religion. When the public Arabic-language school opened in New York City, protestors held banners saying, "Stop the Madrassa,"[414] and the initial principal lost her job for failing to condemn the use of the phrase "intifada NYC."

MM-B: *Has there been an increase in cases of anti-Arab discrimination since 9/11? Are people wary of this type of educational initiative because they fear they are training future jihad terrorists? Is this a real issue?*

MM: The issue does arise, but not the way it does in Europe. The use of American schools as a melting pot or salad bowl is such a long-standing tradition. Most immigrant students attend public schools; only a tiny proportion of Muslim immigrants attend private Islamic schools (although there are many new private Islamic schools.) Most of the immigrants go to the public schools; most want to be integrated; and most of them are integrated in school and in society. You take an area like Detroit, Michigan which has a high concentration of Muslim immigrants. They are doing better economically on average than people who are born in the United States and their education levels are as good; they are engaged in business, politics, and identified with America as a place of opportunity; they participate in collaborations with Christians and Jews in projects promoting tolerance and community service.

The narrative of America as a land of immigrants offers a context for Muslim immigrants to feel American. I don't want to say there are no problems. Right after 9/11, there were incidents of discrimination and experiences of name-calling that prompted vigilant responses by government and advocacy groups. Most of the reactions are, in the American tradition, of pluralism and tolerance: in mainstream public institutions, how can they be inclusive and not appear to endorse any religion or preferring any group over others? How do we make sure there is a prayer room available in the public schools? How do we make sure that the dress code is revised to make room for head coverings that are religiously mandated? How can students learn about their differences as resources and features of the great American tapestry?

A fascinating story emerged in Maine. Maine is a state that until recently has not had much diversity of any sort except for French Canadians. Yet over the past few years, a big influx of Muslim immigrants have moved to Maine, especially to several towns like, for example, Lewiston, where groups like Catholic charities have played a large role in helping relocate refugees. Unfortunately, there have been some incidents of conflict in public schools, but the officials and the community have tried to work out the conflicts. One conflict involved the school dress code, which had banned all head coverings. Given the desires of many Muslim families to ensure that their girls could cover their hair, one school revised its code to allow head coverings but continued to ban the use of certain fabric—bandana material—associated with certain gangs. One of the young Muslim girls wore to school one day a head covering made out of bandana material and was really testing the line. I think that what this episode showed was two things: one, this student actually had a lot of solidarity with her non-Muslim classmates and her behavior shows a level of social integration; and, two, American adolescents are American adolescents: they

like to push the limits set by adults and test the line, and this refugee in this sense fit right in!

MM-B: *Would you like to add anything?*

MM: Some years ago many intellectuals predicted we were watching the end of religion and the triumph of the secular age. Recent trends just go to show how wrong predictions can be. We are living in a period in which religion is not only strong and vibrant in many communities, but we have also seen that in many instances, there are also more extreme, more fundamentalist versions of religious traditions. I think that many people rightly wonder what has happened to Enlightenment values, the values of tolerance, secularism, individual freedom, resistance to authority. What may have shaken up the apparent triumph of the Enlightenment is economic insecurity; also in some parts of the world, political insecurity produces desires for order and security that authoritarian religious leadership may offer. In communities with economic opportunity and political security, we do not see such a rise of religious authoritarianism even when there are revivals of religious practice. So I think it is very important to put these issues in a larger context.

MM-B: *In North Africa, for example, religious groups help out in the poor neighborhoods.*

MM: Religious groups also help the poor in the Middle East. Yes. How could impoverished people not be affected by the offer of material help?

MM-B: *One last question we haven't touched on is the Jewish religion. This is an issue of particular importance in France because its immigration history is linked to Arab countries, while the traumatic experience of the politics of the Vichy regime casts a shadow over France's past and its relationship to Jews. Jewish people often consider themselves as French foremost and not systematically as members of a religious community, but they recognize the suffering of the Jewish population in the past. I don't think the situation is the same in the United States.*

MM: I don't know enough to comment on the situation in France. I am a Jewish person myself so anti-Semitism is a concern to me personally. But in the United States, Jews are well integrated. We are past the days of overt exclusions, and Jews have access to every profession and line of work. I hope that knowledge of past success in struggles for equality and inclusion can produce support among prior generations of immigrants with new immigrant groups of different religious and nationalities.

MM-B: *Has Obama's arrival also helped?*

MM: President Barack Obama had a remarkable personal experience with multiculturalism and pluralism. I wonder how much living in Hawaii, where there is a multicultural society with enormous religious, racial, and cultural diversity, affected his worldview. Living in Indonesia and having a mother who was very committed to multicultural values influenced him, as he has described.

His family is multiracial: his grandparents being white, his half-sister being South Asian. His own family illustrates the diversity of the human experience. His speeches show commitment to celebrating the humanity in all people and recognizing that we are all part of the same family. His leadership offers much to this country going forward, and I hope, for the world community as well, in terms of this understanding of the human experience.

MM-B: *To find out whether religious integration has been successful (in employment or education), can the census be used to gather statistics on religion?*

MM: Not in the United States. The census does ask about ethnicity and race but not about religion. A public law prevents questions about religious affiliation or ancestry.

MM-B: *Has this been a problem in terms of proving religious discrimination?*

MM: The individual focus of American law provides the basis for proof of discrimination claims. An individual claiming employment discrimination on the basis of religious would say, "My belief is I cannot work on a Saturday because I cannot take transportation," or "I cannot engage in the manufacture of munitions due to a religious belief." It doesn't matter if there is a church or a religious group that agrees or disagrees with that view. The government does not turn to an organized authority or group of experts to validate a view as a religious view; it is about the individual's sincere belief. It has to be a sincere belief; it cannot be something that is manufactured for the moment.

MM-B: *It's a subjective view?*

MM: It is a sincere religious belief. It is the individual, not the group, that is protected under the law.

In the next conversation, Minow turns her focus to reasonable accommodation for religion.

MM-B: *You were talking about religious beliefs and practices, and you have mentioned public schools. In the workplace, is pluralism promoted in the same way? Do you have proactive measures to respect Ramadan in company cafeterias or any other diversity initiatives outside of antidiscrimination? I know there is a legal obligation to accommodate religion in the workplace. To what extent to companies comply voluntarily?*

MM: Proactive measures take the form of human relations training about what to say and what not to say, about when to shake hands and when not to shake hands. Compliance officers and diversity programs in large private companies train employees to understand how to work in a diverse workforce.

MM-B: *This is an issue in France. We now have collective bargaining agreements on diversity containing diversity measures that people don't really know how to apply, while reconciling all the religious beliefs in a meaningful way. That is what you were saying. There are many religions, and the work needs to accommodate them all. I was wondering how this is done in the United States. I know you*

don't have a lot of collective bargaining agreements, but I have seen many cases in which unions addressed this issue.

MM: It is true that a shrinking percentage of the American workforce is unionized except in the service sector and government workers. So collective bargaining and the union contracts do not provide the organizing framework for most employers in the United States. We have a federal statute, Title VII of the Civil Rights Act; we also have state and local human rights statutes and ordinances that in some instances are more ambitious in some communities than the federal statute.

The developments at the constitutional level apply only to government employers. When it comes to religious freedom, our courts have changed the reasonable accommodation standard so now the government employer just has to be neutral; there may be no constitutional defect when a general, neutral rule with a legitimate purpose has the incidental effect of burdening an employee's exercise of religion.

MM-B: *Where does that come from? Is that a case?*

MM: Yes, in 1990, the Supreme Court decided a case called *Employment Division v. Smith,* which dealt with refusal of unemployment benefits. The facts of the case involved several Native Americans who were fired from their jobs at drug rehabilitation clinic after they engaged in a ritual practice of smoking a substance, and then they sought unemployment benefits. They were denied the unemployment benefits. They saw this as a failure of religious accommodation, but they lost. The Supreme Court said they were being treated the same under a justifiable neutral rule applied to anyone; the rule says that if you are a drug counselor, you cannot use a prohibited substance, and you don't get an exemption from that simply because you have a religious claim. The crucial element there was that the justifiable rule was across the board. It was neutral. It did not single out the Native Americans. It would apply to anybody.

MM-B: *Was it like a BFOQ*[415] *because they were drug counselors?*

MM: The question did not come in that form, because they were asking for unemployment benefits. It is true that if it was bona fide occupational qualification, an employee would have to show that he or she was drug free as a qualification for the job of drug counselor, but that was not the question here.

That case has had huge impact in all kinds of government agencies where the issues of accommodating people arise with uniforms, dress codes, and work schedules that may conflict with individuals' free exercise of religion.

Congress enacted a law called the Religious Freedom Restoration Act,[416] directing that government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability exception if two conditions are met—first, the burden must be necessary to further a compelling government interest, and second, the rule must be the method that is least restrictive of individual freedom in which to advance that

government interest. But the Supreme Court rejected this statute in part—insofar as it applied to the states—as exceeding the power of Congress; hence, the statute restricts the federal government to protect religious liberty.

The Supreme Court also rejected a religious liberty claim by a member of the armed forces who wanted to wear a yarmulke—a kippah, or skullcap—despite the military regulation banning the head covering. The court deferred to the military regulation; Congress responded by allowing accommodations for neat and conservative religious clothing. Recently however, the U.S. Supreme Court construed the Religious Freedom Restoration Act to apply to protect religious beliefs of owners of a certain kind of closely held corporation and hence to require as a statutory matter some kind of accommodation for an employer whose religious beliefs pose an obstacle to providing employees with insurance coverage for certain kinds of contraception.[417] Stay tuned; this will be an area of ongoing debate, litigation, and decisions.

MM-B: *Can this trend be explained by the current conservative slant of the courts?*

MM: We have seen a turn away from judicial protection for individualized minority accommodations, perhaps because of the cost to the government of carving out exemptions.

In addition, there is theory, gaining academic as well as judicial approval, that religious claims should have no greater claim than those of other individuals, and if you have to accommodate one, you should accommodate another. Let me give you an example: a police department rule may say that officers should have no facial hair. If the department accommodates an individual who claims religious reasons for having a beard, shouldn't it also accommodate an African American man who has a health condition that makes it very painful to shave? If the department can make the exemption for the religious group, then it should be able to make the exemption on the health grounds as a matter of basic fairness. It is more controversial to treat this as a constitutional requirement; indeed, the department might refuse—equally—to accommodate both individuals.

Julie Suk shares a comparative perspective on religious discrimination.

MARIE MERCAT-BRUNS: *Could you talk about how religious discrimination occurs in France compared to religious accommodation in the United States? Could it be said that religious and race discrimination are sometimes confused?*

JULIE SUK: Discrimination against the Maghrebin population in France is very complicated and very different from discrimination against African Americans in the United States. Much of the discrimination against Maghrebins is rooted in Islamophobia, especially since Maghrebins are arguably less visible (in terms of different skin color) than African Americans in the United States.

But discrimination against Maghrebins is not really religious discrimination as such. Very often the Maghrebins who are discriminated against are not

even religious, and they are not always making accommodation demands. The discrimination is often based on perceived rather than actual religious difference. That's where it starts to look more like race discrimination.

MM-B: *What do you think of the burqa debate in France?*

JS: I find it astounding that one would contemplate banning the burqa in all public places. That said, I do think the issue is an entirely separate matter from the ban on headscarves in the schools, a policy that I think has reasonable justifications in light of the republican purposes of public schools.

Comparative Perspectives

The distinctive place occupied by religion in France, or Europe, and the United States is so specific to each region, and so dependent on the setting in which religion is practiced, that comparing the protection of religious discrimination in these countries at first appears to be a complex task. However, the template of employment discrimination provides a novel mechanism for articulating a few thoughts about the particular nature of this form of discrimination. A brief review of the legal background and framework is therefore of interest to illustrate how, as Minow has pointed out, governments have promoted the principle of religious neutrality even outside of the context of discrimination. Next, an attempt will be made to define the contours of religion, on which discrimination is implicitly based.[418] Widely divergent strategies to prohibit religious discrimination, mentioned by the scholars interviewed, are implemented in France and the United States.[419] These observations conclude with a more general questioning, from a comparative point of view, of the particular nature of this form of discrimination, based on the insights supplied by American academics: how can employers deal concretely with the tensions surrounding disparities in treatment based on religious practices?

Equal Treatment of Religions and the Role of the State

An examination of the legal norms governing the practice of religion in France and the United States sheds light on the interaction between religion and the state, helping to position the victim in the "private" or the "public" sphere when assessing discrimination.

Unlike the discourse often heard,[420] both France and the United States promoted the idea of a certain secularism and a separation between church and state, guaranteeing freedom of worship. To some extent, their starting point was the same: the United States, through the Establishment Clause of the First Amendment,[421] and France, through the constitutional principle of secularism,[422] promoted a religious neutrality of the state. This translated into a promotion of all religions in an equal manner[423] and, above all, a lack of any hostility toward religion.[424] America's history with religious persecution and the heavy influence of religion on France's past help to explain this historical progression and the stance taken by governments in search of legitimacy.[425]

From this shared foundation,[426] the implementation of statutes prohibiting religious discrimination followed a diverging path, reflecting each country's culture and history and later legislative changes. In a recent series of decisions in France, the Conseil d'État confirmed the idea that the state must support the practice of all religions equally,[427] and the U.S. Supreme Court, as Minow indicates, has at times interpreted the Establishment Clause narrowly. However, in the United States, the initial position taken in the Constitution reflects the nation's attitude of tolerance toward the religious diversity of its citizens. This is the source of the difficulty, because isn't the uniform application of this principle of religious neutrality the key to equality?[428] This premise is the reason why the French law banning face coverings in public,[429] the government guidelines implementing the law,[430] and the related French Constitutional Council decision[431] all use equality rather than secularism as their argument to justify this legislation and its constitutionality:[432] the circular, which echoes the language used in the law and by the Council, states that "face coverings are a violation of the minimum requirements of life in society. They place the people who wear them in a position of exclusion and inferiority that is incompatible with the principles of liberty, equality, and human dignity supported by the French Republic."

The main quandary in the battle against discrimination is to determine whether this normative framework enables the government, as the producer of norms and interpreter of the law, to maintain the same neutrality with respect to every religious denomination.[433] The stance openly adopted in the circular on face coverings supports equality for women and fights exclusion: is there not a paradox in, on the one hand, banning a sartorial item worn mainly by a religious minority, as well as preventing women from covering their faces when in public, while, on the other hand, using this ban in an attempt to liberate women who wear a full body-and-face covering, whether or not they do so voluntarily? Despite, or due to, its strong symbolic value, this law[434] has sparked a reaction in the United States, as echoed by Suk. The sphere in which the religious discrimination is assessed must also be taken into consideration: is it public or private? The boundaries between the two can be difficult to distinguish. The ECtHR has found that the principle of secularism does not always justify the infringement of religious freedom resulting from a ban on wearing religious garments in public.[435] In countries with reasonable accommodation, companies must allow wearing a cross if it allows other visible religious symbols like the hijab and turban.[436]

Is this issue of enforcement simply a question of frame of analysis? In France, the law tends to consider the individual, depending on the context in which the person desires to practice his or her religion. In the United States, as Minow explains, religious communities are clearly recognized, but individuals make their own choices. In this manner, the law in the United States differs from other countries. In Israel or India, for example, Minow has reservations about the application of a family law to individuals, determined by group choices, based on the religion

to which the family is affiliated and not on the individual.[437] Here we again encounter the issue of the visibility of groups in the United States, which has already been discussed with regard to racial discrimination. Unlike with race, however, in this case, identified and identifiable religious communities do exist in France.[438] This leads us to the slippery task of tracing the contours of religion as a prohibited ground of discrimination, undefined in the law of either country.

Comparing the Contours of Religion as a Prohibited Ground

First, a rapid detour from antidiscrimination norms[439] is required: at the European level, the ECtHR and CJEU interpret a variety of legislation that also protects the freedom of worship, through the freedom of religion.[440] This freedom is a part of the freedom of conscience principle enshrined in the European Convention on Human Rights[441] and is addressed separately in the EU Charter of Fundamental Rights,[442] which has become legally binding since the Treaty of Lisbon. But the language in European law is silent regarding a precise definition of religion, outside of distinctions between individual and group worship. A few clues can be gleaned from European case law, in the courts' appreciation of the scope of religion. The first is that, although the intent is not to limit religion to the major faiths, the alleged religion must be "identifiable."[443] This is an important point of departure from the more subjective American view of religion, limited only to beliefs that are "meaningful" and "sincere."[444] In France, efforts to formulate what constitutes a sect reflects an attempt to objectively define the concept of religion.[445] Meanwhile, the ECtHR sometimes shows a certain indulgence for well-established religions, such as in the *Lautsi v. Italy* decision of March 18, 2011, which did not see any violation of Article 14 of the European Convention on Human Rights, prohibiting discrimination, in the mandatory display of a religious symbol—a crucifix—in public schools.[446]

Most often, the challenge is not the definition of a religion or a religious belief but to understand how state interference can limit the exercise of this freedom of religion[447] or other freedoms such as the freedom of expression.[448] In fact, the case law reveals a need to distinguish between different manifestations of religion: the first involves beliefs, religious or otherwise, that are felt "in the depths of one's conscience"[449] and seem tied to a person's identity. The European Convention on Human Rights fully protects this intimate aspect of religion: "the freedom to believe as you wish, to adhere to the religion of one's choice, embodied in an organized religious group, and to manifest this choice and this belief in speech and/or action."[450] "A belief is different from a personal motivation (however strong) inasmuch as it must be possible to construe it as the expression of a coherent view of basic issues," that is, the freedoms guaranteed by Article 9 of the Convention. "Beliefs are protected against any form of discrimination."[451] A religious belief is individual[452] even if it can be practiced as a group. Another related issue is the need to prove adherence to a religion to justify an absence from work, which may

in turn generate discrimination.[453] Lastly, freedom of conscience also includes the freedom to not have a religion,[454] as in the United States.[455]

The external aspects of the freedom of religion are more problematic, resulting in a more relative freedom. Religious manifestations may be subject to limitations, "to reconcile the interests of the various groups and ensure everyone's beliefs are respected."[456] Accordingly, efforts have been made in each country to balance different interests in protecting the freedom of religion in the workplace, in accordance with laws prohibiting discrimination based on religion. Confronted with the seemingly broader, more subjective U.S. interpretation of religion, some French judges have concluded that religion incorporates two elements: an objective element, the existence of a community, however small, and a subjective element, a shared faith.[457] In U.S. law, *religion* and *religious* are not defined, but courts generally employ the definition used to justify exemptions from military service: "a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God for those admittedly qualified for the exemption."[458] Because "moral and ethical beliefs can function as a religion" in one's life,[459] the EEOC adds that religious practices "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[460] Accordingly, a practice resulting from an employee's anti-abortion sentiment, tied to her religion, came within the scope of this protection.[461] However, in order to be recognized as religious, these beliefs must not be so bizarre as to implicitly disrupt the workplace[462] nor may they convey racist or anti-Semitic ideas.[463]

It therefore appears that the concepts of religion and religious belief have a broader, less institutional meaning in the United States, where religion is more closely associated with the individual practice of religious beliefs. A more functional notion of religion and religious beliefs dominates, stemming from the legal obligation to provide reasonable accommodations. What strategies are used to fight employment discrimination based on religion in the United States, in France, and in Europe, and what are the unique challenges of this form of discrimination?

Differences Between French and American Implementation Standards for Laws Against Religious Discrimination

The enforcement of the prohibition of religious discrimination, in the field of employment in particular, is where the greatest differences between French and American law are found, revealing the complex nature of fighting discrimination based on a choice of belief and, sometimes, behavior. In France, the legal framework protecting against religious discrimination is the same as that for discrimination on any other ground, except where businesses of a religious nature are concerned, for which a derogation from ordinary law is applied. Employers may provide objective, nondiscriminatory reasons to justify disparities in treatment of employees, showing that the differences do not depend on an employee's religious beliefs:[464] consequently, they mobilize an arsenal of defenses based on the definition of the job

contained in the work contract, whose performance is required by the employer: objective impact on the company's business if the latter is of a religious nature[465] (or if the employee is proselytizing),[466] special requirements for employees in contact with customers,[467] or the company's image,[468] depending on the employee's position.

In France, however, an additional difficulty arises due to the potential application of two other legal norms to evaluate situations of differential treatment involving religion. Despite the fact that the shifting of the burden of proof in antidiscrimination law offers a promising strategy, case law on potential religious discrimination claims mostly challenge restrictions of individual freedoms in the workplace. But the standard of judicial scrutiny applied to infringements of religious freedom is different from that applied to alleged acts of religious discrimination.

As clearly explained in the deliberations of the HALDE regarding the application of Article 1121–1, pertaining to freedoms, and Article L1132–1, on nondiscrimination, of the French Labor Code, the provision on individual freedoms is more frequently used at this stage to justify the employer's objective and proportionate restrictions to religious freedom, as opposed to the nondiscrimination provision, which addresses only the use of religion as a criteria in making decisions relating to an individual's job.[469] The initial intent of Article L1121–1 of the French Labor Code was to protect the freedoms of employees in the workplace by scrutinizing the restrictions imposed by employers. The HALDE deliberations state that "a restriction may be neither general nor absolute. The situation must be concretely assessed, and the terms of the restriction must be open to negotiation by the parties involved, on a case-by-case basis.[470] The employer has the responsibility of providing justification, with regard to the concrete tasks to be performed by each employee, demonstrating that its decision is proportionate and necessary and founded on objective elements unrelated to any form of discrimination."[471]

For example, in the Baby Loup case regarding the dismissal of a day care center employee who wore an Islamic veil at work, the decision confirmed later by the Cour de Cassation "en banc,"[472] the labor relations court (Conseil des prud'hommes)[473] and the first Court of Appeal[474] focused primarily on whether there was an objective justification[475] of the employee's termination. However, the courts did not allow for any detailed investigation, on an individual level, of whether the wearing of an Islamic headscarf hindered the employee in any practical way from performing her child care job (by impeding interaction with adults and children, causing a reaction of fear in children, hampering movement), aside from considering the principle of religious neutrality upheld by the nonprofit day care center, in a position where the employee works with children. The question of an inference of religious discrimination was raised only by the Cour de Cassation in its first decision addressing the issue of the case, which was later reversed.[476]

One of the arguments raised before the Court of Appeal was the need for employees to promote neutrality—a requirement included in the internal rules—in this sensitive environment, namely, where employees are continually in con-

tact with very young children. Considering that the majority of the parents of the children attending this day care center may have been Muslims, given the general characteristics of the population in that area, the same argument could have been used to support the opposite stance, namely, that allowing the employee to wear the headscarf would contribute to a more welcoming environment. The "objective" justification of the incompatibility between the wearing of the head covering and the job therefore centered on the center's public service mission as a child care provider, rather than the employee's specific job requirements or the local environment of the day care center. The latest Supreme Court decision in 2014 reiterated this same argument of neutrality, which justified a specific restriction of the practice of religion in certain activities like day care.[477] A bill to extend the principle of neutrality to private institutions in charge of minors (day care, youth centers, summer camps, etc.) was put on hold after the National Commission on Human Rights considered that this initiative would create social strife.[478]

Private businesses providing public services may do well to incorporate a religious neutrality requirement into their internal regulations: although not yet a legal obligation, proposed laws also supported an expansion of this obligation.[479] In its assessment of the limitation of freedoms in the Baby Loup case, the Conseil des Prud'hommes applied this type of "soft" norm—the principle of secularism articulated in the day care center's staff rules—to justify the nondiscriminatory character of the ban on the Islamic head covering.[480] At first sight, this is a surprising decision, since the principle of religious neutrality does not generally apply to the private sector,[481] despite the desire of some to see this happen.[482] Upon further reflection, however, it is logical for the defense against an employee claiming a freedom (a religious freedom consisting of the right to wear a religious symbol) to be positioned on a constitutional level, claiming the principle of secularism (Article 1 of the French Constitution of 1958 states that France shall be a "secular" republic).

A traditional, functional judicial assessment of objective elements justifying a difference in treatment in employment, carried out on a case-by-case basis, free of any ideological consideration, was simply not performed. The indirect discrimination model was not considered at all. This strategy would nevertheless have been helpful in identifying seemingly neutral working conditions—working hours on Saturdays, dress codes banning head coverings, and grooming rules prohibiting beards—that disadvantage people who practice religions other than the so-called majority religions, as illustrated in American case law,[483] and shatter the pretense of "religious neutrality" in the workplace.

This tendency, even in the private sphere, to scrutinize the exercise of religious freedoms and the application of the principle of secularism, rather than apply antidiscrimination norms, is so prevalent in the French legal system that some are considering establishing such scrutiny as a legislative norm either in certain businesses or in all private sectors.[484] Without formulating any judgment

about this potential development, this shift in case law, and now legislation, reveals a certain reluctance to broach the subject of religious discrimination. This disruptive, subversive form of discrimination has both an individual and a group dimension: it is not tied to a specific trait but reflects the individual's desire for autonomy and recognition of his or her identity. It also raises more important concerns about the need to maintain public order and the relations between the state and religious groups. Protecting the religious freedoms of employees seems to threaten, in the minds of those with a nostalgic attachment to certain traditions, the very foundations of social protection rights and its Christian overtones:

> The emerging logic is not risk-free, because it conveys none of the principles of solidarity on which the rights to social protection were established: neither the all-encompassing solidarity of workers, nor the local solidarity so dear to Christian socialism. If religious imperatives no longer underpinning any societal project are too often given precedence over business needs, will they not also supplant social protection? Will the conscientious objector's point of view prevail over the union's perspectives on the interests of the all workers? In this case, will antidiscrimination law based on religion serve as an argument to protect employment, beyond more traditional employment law? Where would the 'common good' be found?[485]

Does the fight against discrimination in employment ultimately threaten secularism or the religion of the majority, namely, Christianity? Does it not challenge ambiguous relationships between employment law and religion?[486]

Since the Baby Loup decision, the courts have continued to shy away from religious discrimination based on the headscarf. They have either denied that it is religious discrimination, preferring to qualify the act as an unjust dismissal,[487] or have asked the CJEU for a preliminary ruling, when customer preference dictates that religion is a condition of employment.[488]

These questions echo certain introductory comments about the normative context in France, attitudes toward certain religious practices, and the assumption that certain religious practices are tied to a struggle for equality between men and women. What is the situation in the United States, where the concept of religious accommodation exists, in the light of the scholars' commentary?

First, a distinction must be made between the constitutional legal framework, which applies to public-sector workers and citizens subject to certain rules in particular in education and on the other hand, the prohibition of discrimination based on religion in Title VII of the CRA of 1964.

In the first instance, as explained by Dean Minow, the Supreme Court applies the Establishment Clause of the First Amendment to the U.S. Constitution, which implies a freedom to establish a religion while affirming the government's neutrality in promoting religious diversity.[489] Minow specifies that the Supreme Court restrictively interpreted the freedom to exercise religion by not obliging the government to grant reasonable accommodations for all religions.[490] Although the legislature attempted to revise this limitation of the scope of the freedoms imposed

by the law,[491] the Supreme Court struck down the initiative, considering that it overstepped Congress's enforcement powers.[492]

The same is not true in the private sector. As seen in Canada[493] and certain European Union countries, employers are not only prohibited from practicing direct or indirect discrimination, they also have the obligation to adjust a job to the employee's religious observances.[494] The religious accommodation requirement, which must be reasonable, has certainly been interpreted more narrowly in case law than the reasonable accommodation requirement for a disability.[495] Nonetheless, the current U.S. legal standards are undeniably more demanding than France's legal provisions. As the Supreme Court recently spelled out in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*: "To prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need."[496] The difficulty lies in identifying what accommodation is possible and necessary, in terms of working time, dress, and place of work, and does not place an undue burden on the employer or cause excessive hardship for other employees. How can certain forms of employee conduct in accordance with religious beliefs, for example, be accommodated while combating discrimination on the ground of sexual orientation? Feldblum examines this potential dilemma, but concludes that the framework of analysis of these different expectations needing to be reconciled in the workplace is sufficiently flexible to overcome such hurdles.[497] What can be observed in U.S. case law, in addition to a case-by-case approach, is that the analysis of accommodations is very concrete: feasibility is assessed without any ideological discussion of legitimacy. The issue of the protection of individual freedom arises more frequently when other employees protest against the undue hardship of accommodation. Beyond considerations about equality, which are paramount in France, the focus is on "the interpersonal impact of religious practices."[498]

In France, employers are not required to provide religious accommodations and can therefore limit such adaptations, when the employee's religious beliefs are made known upon recruitment, based on the type of work, reactions from third parties, or safety issues. Organizations are in the dark about their room for maneuver: a good-faith approach by employers and employees is essential to any adjustment of working hours or days.[499] Once again, a systematic refusal to accommodate can be assessed in France against the yardstick of proportionality to determine whether the prohibition is excessive.[500] Employers who have not taken steps to promote religious diversity from the start often proceed on a case-by-case basis at this point.[501] What are the specific challenges posed in fighting religious discrimination?

Raising the Veil on Clashes and Contradictions Between Identity and Freedom

"Even in the workplace,[502] where the opposite presumption is made, in the sense that the employee's subordination is the rule, an employee has a certain irreducible

autonomy and freedom that cannot be infringed upon by the employer."[503] More than ever, on the ground of religion, discrimination against the employee[504] focuses on the employee as a person, regardless of other characteristics.[505] The growing visibility of an employee's religion reflects a change in paradigm for labor law from the "rights of workers" to the "rights of people at work."[506] Many discriminatory motives correspond to facets of private life, like religious beliefs.[507] Religious beliefs can of course remain within the sphere of the employee's private life, and the prohibition of discrimination forbids employers from seeking out the protected information.[508] In French and American litigation, a shared concern is expressed that evokes similar questions about the invasion of employees' privacy: when do eminently personal choices regarding religious beliefs—often related to identity issues in addition to representing an exercise of individual freedoms[509]—come into conflict with the company's business and its interests, the interests of the other employees, and those of the state? The issue surrounding religion is less about content than practices[510] and their "intrusion in the workplace."[511] In France, there is an implicit agreement to respect the employee's religion as long as it remains confined to the private sphere, as explained by the head advisor at the Cour de Cassation, Philippe Waquet, who promotes "a positive secularism that respects religious beliefs but confines them to the employee's personal life."[512] The line separating personal and work life, drawn by law, has become increasingly blurred, however.[513] How can one achieve a "balancing of the interests"[514] of employees with respect to their personal lives (including religion inside and outside the workplace) with the interests of the company and other employees?

Is the antidiscrimination law model strong enough to embrace the conundrums posed by this type de discrimination, regardless of the strategy applied and with or without reasonable accommodation? How can one not see, in the combat against employment discrimination, an incongruity between the promotion of equality for men and women and the prohibition of religious discrimination that the courts, especially in France, have been unable to clarify through litigation? From this perspective, the benefit of antidiscrimination law—consisting in encouraging employers to be transparent in their justification of differences in treatment—loses its appeal, unless the dogmatic approach taken at times by judges and the government to discrimination is clarified and brought to light.

Are diversity agreements and, more generally, positive action[515] effective in proactively promoting such discussion? How can codes of conduct, codes of ethics, and whistleblowing measures directly or indirectly address this question?[516] Categorization prevents human beings from being reduced to abstract entities and is essential to the development of law. A renter, a consumer, an insurer, an employee, and so on each requires protection that is not provided by the Civil Code,[517] but should this categorization also protect an individual's personal characteristics in

one way or another? Should work not be adapted to the person,[518] even outside of the antidiscrimination legal framework?

As Minow points out, the global trend is toward the increasing influence of religion in all spheres of society. If a government wishes to expand norms promoting the principles of secularism, even in the workplace, then antidiscrimination law demands at the very least that these norms truly guarantee neutrality toward all religions. An individual judicial review of infringements of religious beliefs should be available to prevent any arbitrary treatment. Failing this, there is the danger of all discrimination being ultimately based on origin.[519]

VIII. MULTIPLE DISCRIMINATION AND THE INTERSECTIONALITY THEORY

In principle, antidiscrimination law works by identifying a prohibited ground of discrimination: the ground of discrimination then determines the applicable legal sanctions. However, an employer may put forward several reasons to justify a decision, adding legitimate, nondiscriminatory reasons to the discriminatory ground. This situation still qualifies as discrimination. But what happens when the decision is based on more than one discriminatory ground? Age as well as race, sex as well as disability[520] . . . the same individual can be affected by myriad potential combinations of protected characteristics.[521] Discrimination resulting from a combination of factors is decidedly distinct from that emerging from each component factor, but is it more serious? Does it require a greater remedy? Is it easier or more difficult to prove? These issues mainly arise when it comes to proving the discrimination. In France, after passing over a female employee of ethnic origin for promotion, an employer rebutted her claim of discrimination by showing that it had promoted both blacks (but who were men) and women (but who were white). It has been observed that cases in civil courts brought by plaintiffs claiming discrimination based on multiple grounds tend to be less successful than those involving a single prohibited ground, fostering a desire for a specific remedy for multiple discrimination claims.[522] Sometimes employers may discriminate against different groups simultaneously.[523]

In establishing a multiple discrimination claim, should the addition or the combination of characteristics be considered? After the fight to achieve formal equality, and then substantive equality, between men and women, this line of thinking inspired a new feminist theory of intersectionality,[524] first introduced by Kimberlé Crenshaw, a law professor and significant contributor to the black feminism movement in the United States.[525] Her idea was to show how for the feminist movement, combating discrimination tended to reflect the concerns of white women of certain social classes, while overlooking those of disadvantaged black women.[526] According to Crenshaw, the single-ground approach of antidiscrimination law fails to recognize the discrimination experienced by people who are at the intersection of several grounds and, according to the American conception of discrimination, at the

intersection of several classes of workers protected by the law. Consequently, the law does not reflect the unique characteristics of the factors of exclusion burdening these workers. Crenshaw gives the example of black women, whose experiences are very different from those of white women. Rather uniquely, this theory, which began as a legal discourse, was taken up by social sciences disciplines on the whole: sociology,[527] economics, political science, and so on. Intersectionality theory probably contributes to law on several levels: it facilitates the understanding of the nature of multiple discrimination—namely, discrimination resulting from certain behaviors generated by the specific situation of individuals with more than one characteristic—and it also helps to determine whether this situation has particular consequences in litigation, in terms of success or failure in court. Since the diversification of prohibited grounds in the Amsterdam Treaty,[528] multiple discrimination has been included in European directives and explored in European research such as the GendeRace project.[529] Finally, intersectionality theory casts doubt on the very logic of antidiscrimination law, or at least reframes the issues of this law, by revealing the risks of compartmentalization generated by the existence of grounds of discrimination. It also allows us to probe the very causes of discrimination, beyond the contours of identity and of human behavior as performance, in particular in employment.

Sociologist Devah Pager discusses intersectional grounds (race, gender, and class) and stereotypes.

MARIE MERCAT-BRUNS: *You have studied discrimination based on criminal background and race. Have you thought about working on gender? Do you analyze other mixed motives for hiring? For example, could mixed discriminatory motives involving race and disability be brought to light using your testing method?*

DEVAH PAGER: I haven't focused on gender myself, but I think it's an incredibly important area for study. I'd especially like to see some work examining the interaction between race and gender—I suspect racial stereotypes operate very differently for black men and black women. In terms of mixed motives, I do think the concept of statistical discrimination is very relevant here. Many employers don't have anything against black people per se, but believe that on average blacks are less motivated, less reliable, less subservient, and so on. It's likely that these expectations shape the way they evaluate the more objective information on the resumes. Unfortunately, it's very difficult to disprove these expectations. Even when employers have very positive experiences with black employees, they seem to treat this as an exception, rather than as a chance to reevaluate their assumptions.

MM-B: *So you believe intersectionality has some input to offer? In what way?*

DP: I think intersectionality can mean a lot of different things, depending on the context. In the context of low-wage employment, I believe that black men

are likely to be at a distinct disadvantage relative to other groups. Because of stereotypes about aggressiveness and criminality, black men are not viewed as appropriate for the growing number of customer service jobs that dominate the low-wage labor market. Though black women experience many disadvantages that compound the effects of race and gender, in this particular setting, I believe that black men are at the bottom of the hiring queue.

Richard Ford also looks at the role of intersectionality.

MARIE MERCAT-BRUNS: *What do you think about the "sex plus" issues?*[530] *Do you think that it is easier to prove discrimination if you have an older black woman or when you accumulate different traits? Could combining these different traits and statistics be useful, too? In other words, not relying on how these people identify with a specific category to take them into account?*

RICHARD FORD: Yes, this is what I would like to do in the United States, and I expect this could be true in France. You can do pretty well using commonsensical forms of identifications.

Maybe this would not true in France, but in the United States, given our history, it is very easy most of the time to identify someone based on race; you get widespread agreement. Now, a person might say "I don't like it" or "I think it is much more complicated" or I am Tiger Woods and I am "CaublanAsian" [a term he coined to reflect his mixed Caucasian, Asian and Black heritage]. But if Tiger Woods wasn't Tiger Woods and just some average guy, everyone would say, "He is black." That's good enough. Then we don't need to have a lot of questions about how he feels about it because the point is he is just part of a statistical aggregate about which we are gathering information: how large the percentage of blacks is in a particular employment pool? Where are blacks living when the state is drawing electoral districts? Things like that. That is the only information we are interested in.

For sex it is even easier. There is almost universal agreement on what counts to identify a women, what counts to identify a man. Yes, there are marginal cases where people are born with ambiguous genitalia but that is statistically insignificant. Even now in the United States, where there is a growing number of biracial people, I can still say that that is true here. Biracial people and people of ambiguous race are not going to be a problem for gathering data that is useful for the purpose of administering civil rights law. That is all we are trying to do with that data.

I suspect you could do that in France. I suspect there would be widespread agreement on whether a particular person is black. You would not have a lot of people saying, "Well, we are not sure." That is what I am talking about. Maybe it would be harder if you were dealing with: "Is this person North African?" "Is this person Arab"? But I suspect not.

MM-B: *This is an important question in France because the population which historically has been discriminated against is not the black population. Blacks have been subject to discrimination of course. But historically, discrimination has been against the North African and Jewish people in France.*

In France, we are authorized to look only at where the parents are from, the place of residence, and family names. Reports commissioned by the French government (the report by Patrick Weil on nationality and immigration in France and the COMEDD report on the use of statistics, for example) do not suggest amending the law to collect ethnoracial statistics. An attempt to do so, via a new immigration law, failed and was thrown out by the Constitutional Council because it was seen as a way to control immigration rather than fight discrimination. It is not possible to gather the statistics you mention outside of a specific claim in litigation (Article 8 of the data privacy law). But outside of that, there is a public consensus on the notion of origin, which is not the case for race.

RF: But that may not be what is triggering the discrimination, and that is the problem.

MM-B: *Interesting.*

RF: You need to focus on what is triggering the discrimination.

MM-B: *But sometimes the name is what is triggering the discrimination.*

RF: Then that makes sense if the name is what is triggering the discrimination, then you should include the name.

MM-B: *And there is also what they call* "délit de faciès," *a sort of racial profiling. They have noticed that people coming from the south of France that look like the Arabic people are sometimes suffering from the same discrimination. So it does happen. The problem is physical appearance can't be the criteria because these people are also suffering from it and they are not necessarily from the category.*

RF: Right. It seems to me that those are difficulties but they are surmountable difficulties. If you had savvy statisticians, they could work with that. Sometimes you would actually want to include the people from the south of France who are suffering discrimination in that category.

MM-B: *Like the Americans with Disabilities Act, where people who are "perceived as" disabled as also protected against discrimination.*

RF: If they are suffering the same discrimination, I see no reason to exclude them from the category just because their ancestors happen not to be from that region. What you care about is discrimination.

MM-B: *They are accepting studies by statisticians and researchers, but the material is confidential to protect the identities of the people surveyed. They won't let employers or other agencies gather personal data outside of these surveys, so employers in France don't feel equipped to defend themselves against lawsuits like in the United States. Race is included in European antidiscrimination law, so we have a law, but no one has the tools to identify race discrimination or defend themselves.*

RF: That is a really troubling situation. You have a situation where Brussels is telling you, "You have a law against racial discrimination" and you have the local law in France.

MM-B: *Brussels is not saying, "Use certain tools against racial discrimination." They are just saying, "Implement the law."*

RF: Implement with or without racial statistics.

MM-B: *So we are in a sort of impasse. I wanted to move away from recurring issues about the definition of race. That is the core of the problem in France. What you are telling me is that statistics are just a tool. They don't symbolize anything in particular. You are not trying to identify a category with its culture?*[531] *You don't necessarily think that these tools perpetuate stigma?*

RF: No. I think there is a risk, but this is like almost any policy, which can have some unintended consequences. But on balance, the benefits far outweigh the risk. The risk is doing nothing, and therefore, having no way to combat a lot of discrimination, at least the discrimination where you cannot prove the straightforward direct evidence of discrimination. That is much worse. Because if you do nothing, you are unlikely to make any serious headway on countering bias.

Janet Halley discusses the limitations of intersectionality theory.

MARIE MERCAT-BRUNS: *With regards to intersectionality, I would like to come back to your article in the Halley and MacKinnon book on sexual harassment*[532] *and on a certain shared attitude about sexuality in the workplace. I often think that when you look at people who belong to several protected categories—I have seen this with age, having written my PhD thesis on aging and the law*[533]*—it can be an interesting approach to take inspiration from intersectionality theories for a perception of the downsides of having distinct categories, or, on the contrary, to focus on the common ground between different situated groups.*

When I read about your views on eroticism in the workplace and how we should capitalize on it instead of crystallizing certain sex roles through theories of domination, it made me think that these approaches are similar: concerned with the issues and not the people or the categories.

Intersectionality seems more focused on the negative side of distinct categories, whereas the plight of some people should allow us to transcend these categories or understand how they produce new categories drawing from different groups. Do you have anything to add about sexuality as an issue that transcends individuals who want to live and work without being labeled?

JANET HALLEY: The way I understand this question: when I was writing about sexual orientation, one of the things that was most bothersome to me was the fact that we had segmented our political space of the discrimination order into blacks, into Latinos, into gays. We never asked ourselves whether white men ever get discriminated against—and there are places this happens—because

we developed these columns of thought: one of the words we should be using. They are like silos in a farm standing separate from the other. That's not how life is. Life isn't like that. You go to work one day and you feel like a woman, and you go to work another day and you never think about the fact you are a woman. There is a black guy there and he's making the highest salary, and there is another black guy who can't get a job. We discriminate against white men with equal employment in the United States. You're interesting if you are a women or a person of color, but if you are white guy, you have to be normal. If you are a white guy, you have to be normal in legal scholarship.

I always thought that real justice that would require getting out of these columns, out of these silos and looking at the whole thing. I don't think intersectionality goes quite far enough: it is about the intersections of the different subordinated groups: what about black women? Latino gays? But I want to get out of those vocabularies all together. I ask myself things like who in a particular workplace is, for instance, not being invited to the training session where you pick up a very useful skill. Do we let the janitor come and get that skill? No, we don't; they are just janitors. That discrimination goes down as completely normal. We don't even look at that. It is a broad distributional question.

MM-B: *It is a class question?*

JH: It is simply off the agenda. It is not only a class question because some male distribution isn't uniform in that way either. So it is about trying to get France to examine the justice of distribution without being controlled by these identity frames. Take them into account, but they are not the be-all and end-all: they don't do all the work for you. So, again and again, my articles end on who we get after identity. Can we go to an after identity phase and ask broader questions about justice?

MM-B: *So you refer to sexuality when the gender category gets in your way? Do you look at people's sexuality and their present life situation? I often feel that the promotion of self-development tools and the search for "diverse sexuality" are a reaction to the heterosexual norm.*

JH: I think that the diverse sexuality piece of this is very, very important. I'm committed to the idea we all have diverse sexuality and some of us have diverse sexuality in the following form: fetishists. There is one thing we like, and we really like that one thing. I am into diverse sexualities but without the moral stance that it has to be diverse. You can be the same. One of the things I got disenchanted with was the gay supremacy that people got into. The idea that being gay was better. It is a bit like the cultural feminist idea that being a woman is better, and I don't think that. I think it is fine to be a man; I think it is fine to be straight. The identity thing ended up as a supremacy thing. That's not my thing at all.

Julie Suk responds to the challenges of intersectionality.

MARIE MERCAT-BRUNS: *What do you think about intersectionality theory? Can we consider subgroups that are subject to discrimination (e.g. older workers with disabilities or minority women)? Can we promote the more positive ideas that we can find common ground or interests among groups to fight against their exclusion from the workforce? Maybe that's diversity?*

JULIE SUK: Intersectionality refers to the notion that a person might be discriminated against on multiple grounds (e.g., race and sex). Your positive formulation is interesting because usually the problem with intersectionality is that a person who is discriminated against on multiple grounds has compounded disadvantage, but sometimes the tools for remedying one form of discrimination may be at odds with remedying another form of discrimination.

And adding to this complication is that, sometimes, multiple strategies for combating discrimination on one ground (e.g., race) may conflict with each other, and we have to choose in individual instances which strategy is more valuable, by reference to the normative underpinnings of equality law. The *Ricci* case[534] is a rich illustration of this conflict.

Martha Minow raises the issue of sex and religious discrimination.

MARIE MERCAT-BRUNS: *Can we come to the question of the burqa, because it is a big debate in France? You have done extensive work on women and the law. This is a very sensitive issue in France, where feminists and others are wondering how to reconcile women's rights and the promotion of religious beliefs. The issue seems to involve a certain image of women.*

MARTHA MINOW: It is very difficult to address this kind of question especially if you hold, as I do, that individual freedom is what matters. So I think the important question concerns how to create a context in which the individual woman could choose what to wear. And yet this question of individual choice may itself be impossible where there are group pressures and even threats.

This is why the issue coming out of Turkey seems to be very, very difficult. Prohibition of the head covering in a Turkish university even when there are women who want to cover is necessary, the Turkish Supreme Court and the European Court of Human Rights decided, to preserve the freedom for women who do not want to cover,[535] because if any are allowed to cover, then all will be subject to harassment or physical jeopardy. Hence, forbidding the headscarf in the Turkish university means something different than it does in another context where the question of the protection of the right to cover is itself an expression of freedom. Context can matter enormously.

In the United States, the issue has come up in the context of driver's licenses. Can an individual get a driver's license without having her photograph taken showing her face? Actually, religious accommodations in the

United States for individuals have apparently increased rather than decreased due to heightened understandings of religious claims. Yet arguments against airport scans have less power in a context of heightened security concerns. As long as individuals are not treated differently in the face of the security concerns, greater intrusion on privacy can be justified.

MM-B: *It comes back to the neutral standpoint.*

MM: Yes, even privacy intrusions are more acceptable when they are across- the-board, not singling out members of one group; and of course, they are more acceptable when there is a compelling interest, an interest for public safety.

But even when justified, privacy intrusions can be done sensitively. For example in airport security, I can understand that someone wearing a burqa might need to be searched. But the individual does not need to be forcibly disrobed in public; it could be done in a private setting. There are ways to accommodate all of these interests and not always at the sacrifice of the religious expression.

MM-B: *Let's come back to the burqa and what it means for women in terms of representation and fostering stereotypes. Is the burqa a form of submission or oppression, given the fact you have to cover your face and hair? Is this the question being asked in the United States?*

MM: I have heard that some people are offended in Europe when a woman walks around covered in public. Some may have that view in the United States, but I think the more likely approach is to acknowledge diversity and recognize freedom of religious requires room for variation. Of course, what may affect one's judgment about this is whether the dominant narrative or understanding of the wearing of the burqa is that the women are oppressed and that they are not choosing to dress that way. Then the question comes: hat must society provide to ensure choice? In this country, we have seen some daughters of assimilated Muslims choose to wear head coverings when they go to college, sometimes to the displeasure of their mothers. It may be a way of fitting into American multiculturalism, or dealing with risks of sexual harassment—and yet other Muslim women resist covering and argue that it is not required religiously, or that they do not want to follow the practice. These issues of girls' and women's dress are prompting difficult debates and even legal disputes in England as well as in France.

MM-B: *In France, schoolgirls who wear a burqa can be excluded, adding more oppression to a potential oppression. They become invisible in the public school system with no opportunity to promote their individual rights. So we also have to look at the effect of some of these norms that try to take into account the individual rights of these women.*

MM: I worry about that by being so stringent in refusing accommodation, the result may actually lead some Islamic families to keep their girls outside mainstream schools, with the result of more confinement, less freedom, and fewer

options. Coming back to the example of Ontario again, the same risk could happen: by excluding the Islamic arbitration program from public recognition, the government may leave some women in very religious communities cut off from any access to dispute resolution—if these women cannot pay for a lawyer or gain access to court.

It reminds me of difficulties arising with efforts to ban the practice of *sati,* the practice of having a wife immolated after her husband dies. It was banned and yet apparently still going on in some small towns.[536] Many human rights groups around the world have protested against this. But some nongovernmental organizations working closely on the subject indicate that the ban is only a superficial and at times ineffectual response because it does not address the deeper question. The deeper question is not how this practice can happen, but instead how could it seem to a woman that participating in a practice that takes her own life is a better option than continuing to live? What other opportunities for honor and meaning does the society offer the woman? The ban on sati does not itself create avenues for a woman to have better options in her life, other ways to be honored rather than by killing herself upon her husband's death.

MM-B: *This reminds me of the right-to-die issue and hospice care. Ultimately, it's not about an individual right such as the right to die. It's not about choosing whether to end or prolong life, but about offering a person a better quality of life as he or she nears the end. Also, the relationships that the dying person had with the people around her or him seemed to be important in helping to make the "best" choice.*

MM: I have wondered about that kind of analogy as well. The question of "choice" at the end of life is exceedingly challenging. When our Supreme Court considered the question of physician-assisted suicide, I thought both sides were insufficiently in touch with the deep issues involved. Some people that said physician-assisted suicide was illegal as it devalued life; others people said it should be allowed to enhance self-determination. I was impressed by a third side: we need to make available to individuals sufficient access to pain reduction so that they can imagine a life without pain rather than thinking the only option is to die. The American Medical Association offered evidence that when patients have access to pain reduction, the number of people who want to die goes way down.

MM-B: *In what case was that?*

MM: *Washington v. Glucksberg,* 1997.[537]

Comparative Perspectives

Intersectionality theory points to three important avenues to be explored: understanding what constitutes common ground in analyses of multiple discrimination in its various forms and their influence on the plaintiff's chances of winning a case;

identifying the limitations of the logic of antidiscrimination law, as revealed by the theory; and bringing out certain issues relating to identity, which are often the sources of the discrimination.

Multiple discrimination, meaning discrimination based on more than one discriminatory ground, can be best explained by referring to certain studies in particular an article coauthored by Linda Krieger,[538] which describes the distinctive features of this type of discrimination. In the article, the researchers found that in civil courts, plaintiffs alleging discrimination on the basis of more than one ground are less likely to win their case than those who invoke a single ground,[539] supposing that the victims are even aware of the type of specific disadvantage they suffer from with multiple discrimination. Victims do not know how to enforce their rights in long, complex, and often costly procedures, due to their specific political, economic, and social situations, which are the causes or the consequences of the discrimination.

The victim's situation does not necessarily reflect a multiplication of disadvantages; it may show a new and distinct form of discrimination brought on by the person's specific combination of protected characteristics. Krieger gives the example of an employer who hires black men or white women but not black women, due to stereotypes depicting black women as single mothers in poverty.[540]

The multiplication of grounds can affect litigation outcomes in two ways. The first, which Krieger calls "demographic intersectionality," refers to overlapping demographic characteristics that awaken specific prejudices among employers, jurors, attorneys, and judges.[541] These biased perceptions of the plaintiff and the specific stereotypes associated with him or her may pervade the entire litigation process, making it more difficult to determine the source of the discrimination or its impact on the victim. As shown by Krieger, alleging multiple grounds of discrimination in the concluding arguments is sometimes perceived by judges as an implicit avowal of the weakness of the plaintiff's case if it were based on a single ground.[542]

The second possible effect is what Krieger calls "claim intersectionality." It refers to the added difficulty of proving discrimination when several possible grounds are involved, making litigation strategy more complex. This is a very important issue with respect to the comparability of situations. For intersectional claims, showing a difference in treatment in comparison to advantaged individuals can be problematic. This additional difficulty is reflected in the fact that in the United States, white women win more cases than black men, and black men win more cases than black women.

European case law has also addressed cases of multiple discrimination, even if they were not labelled as such. In the *Kücükdeveci* case,[543] the plaintiff, who was laid off, had been working for her employer for ten years. However, in accordance with the German civil code, in determining her notice period, seven of the years she worked were not taken into account because she was under twenty-five at the time.

The German labor court requested a preliminary ruling from the CJEU regarding age discrimination, but the case also points to a difference of treatment due to the employee's Turkish origin. Entering employment at a young age is characteristic of certain low-skilled, Turkish immigrant communities, especially women, who can encounter difficulties in finding new work or advancing professionally. The case also implicitly shows that in terms of strategy, it was probably better to claim the single ground of age or to claim the ground of age rather than origin, even if more recent European case law indicates some hope for taking a multiple-ground approach. In the *Odar* case,[544] the CJEU considered both age and disability discrimination, although it only found discrimination based on disability.

Intersectionality also comes up in the *Coleman* case,[545] in which the court found that Coleman had suffered discrimination by association as the caregiver for her disabled child. Her employer had approved flexible working arrangements for parents of nondisabled children but rejected Coleman's similar request, arguing that her decision to care for her disabled child, as a single mother, was partly to blame for the disadvantages she experienced at work. So the grounds of both disability and family status were at play in this situation.

European[546] and American[547] research has been devoted to intersectionality, but, according to Dagmar Schiek,[548] multiple grounds do not make it easier to handle the legal issue of proving intersecting grounds of discrimination. It is better to reduce the number of criteria to a minimal number covering the main grounds of race, gender, and disability, she explains, since the other motives are often associated with one of these three "nodes." Age, health, and pregnancy are associated with disability (and gender, too, for pregnancy); sexual orientation and sex in general (whether biological or as a social construct) are encompassed by gender; and origin, nationality, physical appearance, and surname can be grouped with race. This approach would make intersecting grounds more transparent: grouped with the main ground, they would help to reveal and prove the discrimination. In cases like *Kücükdeveci,* where the main source of discrimination was not age—a mere secondary issue next to ethnic origin or gender—redirecting attention to the main discrimination node can be salutary. A European ruling acknowledged the combined disadvantages of age and sex in *Brachner,* a case involving old-age pension entitlements.[549] The court recognized that excluding minimum pensions from a special increase in pensions could constitute indirect discrimination, since women were significantly more likely than men to be the recipients of these minimum pensions.

Other European research focuses on specific grounds.[550] Isabelle Carles's study aimed to assess the reach of race antidiscrimination laws from a gender perspective (Germany, Bulgaria, Spain, France, the United Kingdom, and Sweden). The question was whether women use law in the same way as men when faced with racial discrimination, due to different perceptions of law and diverse experiences of discrimination. An analysis of the complaint files and interviews with victims

and lawyers showed that social relationships between sex, class, and ethnic origin influence the perception of racial discrimination and the institutional handling of complaints. Studies show that black women who are subject to discrimination tend to claim race discrimination rather than sex. At the EU level and in national law, there is very little visibility as to the relevance of gender in the treatment of race discrimination claims: a coherent set of statistics on the sex of race discrimination victims is lacking. More efficient institutional monitoring of these specific scenarios of multiple discrimination is needed to address social concerns.[551]

In France, some litigation can be qualified as "intersectional" in the sense that several grounds are possible, such as origin and religion, trade union association and sex,[552] race and physical appearance, and age, health, and disability. However, multiple discrimination grounds, the simultaneous consideration of groups of characteristics, and how they can be reconciled in various employment environments are issues that are more likely to be addressed by diversity provisions and collective bargaining agreements. In France as in the United States, litigation is generally restricted to a single ground, even if a 2012 decision relating to physical appearance and sex uses the combination of these two grounds to refer to a third characteristic: gender.[553]

Another case, in 2011,[554] seems to bring the question of intersectionality to the fore: it is the story of a woman from Cape Verde, illegally residing in France, who was hired by a French couple for childcare and housework. After the couple separated, she continued to be employed by both parents, while lodging in a maid's room in the father's residence. Nine years later, her employment was terminated and she was asked to vacate this accommodation. She contested her illegal employment conditions and unfair dismissal before the labor court (Conseil de prud'hommes). The Cour de Cassation upheld the decision of the Paris Court of Appeal, stating that a comparison of situations with other employees was not required to show evidence of discrimination. The Court of Appeal had acknowledged that the couple had exploited the plaintiff's predicament, resulting in a negation of her legal and contractual rights and putting her at a disadvantage in comparison to domestic workers benefiting from the protection of employment law, and resulting in indirect discrimination on the basis of origin.

This decision is essential for several reasons: first, it reveals the special predicament of a certain number of illegal immigrant women. They suffer multiple disadvantages due to their sex, illegal status, and employment as domestic workers dependent on their employer for both income and housing. The subtle reasoning followed by the Cour de Cassation overcame the obstacles preventing these women from claiming their rights, due to the intersectionality of multiple grounds of discrimination. The first obstacle, comparability of situations, was simply bypassed by the court. The court considered that "a comparison of situations with other employees was not essential to establishing discrimination."[555] This is a main difficulty of intersectionality, as Krieger observed: people suffer-

ing from several sources of discrimination are not in a comparable situation with people who have only one protected characteristic (sex, origin, or age). A woman of foreign origin cannot simply compare her situation to other women or other foreigners, but only to other women who are also of foreign origin. In this case, the plaintiff was also an illegal resident and a domestic worker. Another strategy was required to show discrimination. The court stated, as it had in previous rulings,[556] that a lack of comparability does not remove the discrimination or cause it to cease to exist. Comparability is not the sine qua non for finding discrimination; it is one modus operandi the plaintiff can use to "present facts indicating the existence of discrimination . . . the existence of a discrimination does not necessarily imply a comparison with other workers." Interestingly, the CJEU drew the same conclusion regarding the lack of comparability and pregnancy discrimination,[557] although EU law emphasizes the need for a comparator, as the CJEU reiterated in the *Römer* decision.[558] The Cour de Cassation seems to be taking the CJEU's pragmatic approach in attempting to ensure the "effectiveness" of EU antidiscrimination law.[559]

In the case of the household employee from Cape Verde, the Cour de Cassation then implicitly circumvented the difficulty of recognizing the special vulnerability of people suffering from different factors of exclusion. It approached the issue from a different perspective, one that does not require comparability from the outset: indirect discrimination based on origin. The plaintiff's illegal status, a seemingly neutral characteristic creating a particular vulnerability, was the cause for the aggravated act of discrimination, qualified by the court as "manifest." In so doing, the court targeted systemic discrimination against illegal residents on the grounds of their origin. This state of nonentitlement increases their risk of discrimination. The court added, "Mr. X and Mrs. Y took advantage of Mrs. Z's undocumented status as a foreigner in France without worker's rights, putting her at complete disadvantage compared with local workers sheltered by employment law." The discrimination is therefore generated not only by unfavorable differences in treatment based on origin but also the employee's lack of recourse to law. The psychological hold generated by this situation is characteristic and can be observed in intersectionality cases outside of the employment sphere.[560]

The court overcame the barrier of the presumed lack of employment rights held by illegal workers, referring to workers who "benefit from employment law" and are not at a "total" disadvantage. In the same way that antidiscrimination law applies to recruitment practices prior to hiring and to hypothetical discrimination with no specific victim,[561] it can be enforced in situations beyond the scope of an employment contract.

Not only does intersectionality theory bring to light the limitations of the logic of antidiscrimination law and its silos of protected groups, it also calls into question our ideas of the identity of the person protected by antidiscrimination law. Intersectionality also paves the way to better understanding of Judith Butler's notion

of identity as "performance."[562] Grounds of discrimination can be understood in two ways: rigid, unchanging sources of discrimination to be suffered, as they are traditionally seen, or the consequences of the choices made by individuals with protected characteristics regarding the way that they express those characteristics. For example, what clothing, hairstyles, or accents can be chosen by minorities and tolerated in the workplace? What degree of autonomy does the employee have in asserting or minimizing his or her differences? Intersectionality theory is a way to grasp the close relationship between a conception of identity as performance, ensuring a certain respect of the worker's liberties, and the vulnerability caused by exclusion that antidiscrimination law aims to eliminate.[563]