

NOTES

PREFACE

1. Some comparative law specialists have already followed this track and interviewed experts in the field. *See, e.g.*, Pierre Legrand, *Questions à Rodolfo Sacco*, 47 REV. INT'L DR. COMP. 943 (1995).
2. JEAN-CLAUDE COMBESSIE, LA MÉTHODE EN SOCIOLOGIE 13, 45 (2007).
3. BILL MOYERS, *HEALING AND THE MIND* (1995).
4. Susan P. Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006).
5. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1991).
6. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000).
7. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).
8. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1992).
9. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).
10. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995).
11. RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE* (2005).
12. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008).
13. Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 4 (2010).
14. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).
15. RUTH COLKER, *The Disability PENDULUM: The First Decade of the Americans With Disabilities Act* (2005).

16. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).
17. Devah Pager, Bruce Western, and Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOCIOLOGICAL REV. 777–99 (2009).
18. See Ruth Colker's blog, <http://moritzlaw.osu.edu/sites/colker2/>. Her published work includes *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* (2013); *THE LAW OF DISABILITY DISCRIMINATION HANDBOOK: STATUTES AND REGULATORY GUIDANCE* (7th ed., 2011); *SPECIAL EDUCATION ADVOCACY* (with JULIE WATERSTONE) (2011); *FEDERAL DISABILITY LAW IN A NUTSHELL* (4th ed., 2010); *THE LAW OF DISABILITY DISCRIMINATION* (7th ed., 2009); *WHEN IS SEPARATE INHERENTLY UNEQUAL?: A DISABILITY PERSPECTIVE* (2008); *EVERYDAY LAW FOR INDIVIDUALS WITH DISABILITIES* (with ADAM MILANI) (2005); *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* (2005); *AMERICAN LAW IN THE AGE OF HYPERCAPITALISM: THE WORKER, THE FAMILY, AND THE STATE* (1998); *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* (1996). *Hybrid Revisited*, 100 GEO. L.J. 1069 (2012); *The Learning Disability Mess*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 81 (2011) (symposium); *Speculation about Judicial Outcomes Under 2008 ADA Amendments: Cause for Concern*, 4 UTAH L. REV. 1029 (2010) (symposium); *Reflections on Race: The Limits of Formal Equality*, 69 OHIO ST. L.J. 1089 (2008); *Extra Time as an Accommodation*, 69 U. PITT. L. REV. 413 (2008); *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1 (2007); *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007); *Absentee Voting by People with Disabilities: Promoting Access and Integrity* (with Daniel P. Tokaji), 38 MCGEORGE L. REV. 1015 (2007); *Justice Sandra Day O'Connor's Friends*, 68 OHIO ST. L.J. 517 (2007); *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841 (2006); *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006); *Homophobia, HIV Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33 (2004); *The ADA's Journey Through Congress*, 39 WAKE FOREST L. REV. 1 (2004); *Empirical Studies: How Do Discrimination Cases Fare in Court? Proceedings of the 2003 Annual Meeting of the Association of American Law Schools, Section on Employment Discrimination*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 533 (2003).
19. Frank Dobbin's published work includes *Resisting the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity* (with Daniel Schrage & Alexandra Kalev), AM. SOCIOLOGICAL REV. (forthcoming); *Why Firms Need Diversity Managers and Task Forces* (with Alexandra Kalev), in *HOW GLOBAL MIGRATION CHANGES THE WORKFORCE DIVERSITY EQUATION* 170–98 (Massimo Pilati et al. eds., 2014); *Institutions and the Economy* (with Carl Gershenson), in *EMERGING TRENDS IN THE BEHAVIORAL AND SOCIAL SCIENCES* (forthcoming); *Finance and Institutional Investors* (with Jiwook Jung), in *THE OXFORD HANDBOOK OF THE SOCIOLOGY OF FINANCE* 52–74 (Karin Knorr Cetina & Alex Preda eds., 2012); *Review of Nancy Plankey-Videla, We Are in This Dance Together: Gender, Power, and Globalization at a Mexican Garment Firm*, 59 ADMIN. SCI. Q. 182–83 (2014); *Review of Virginia Doellgast, Disintegrating Democracy at Work: Labor Unions and the Future of Good Jobs in the Service Economy*, 58 ADMIN. SCI. Q. 152–54 (2013); *The Origins and Effects of Corporate Diversity Programs* (with Alexandra Kalev), in *THE OXFORD HANDBOOK OF DIVERSITY AND WORK* 253–81 (Quinetta Roberson ed., 2012); *A Sociology of Institutions: Review of Cathie Jo Martin and Duane Swank: The Political Construction of Business Interests*, REVIEWS & CRITICAL COMMENT. (Dec. 10, 2012), available at SSRN: <http://ssrn.com/abstract=2278499>; *Progressive Corporations at Work: The Case of Diversity Programs* (with Soohan Kim & Alexandra Kalev), 36 N.Y.U. REV. L. & SOC. CHANGE 171–213 (2012); *Review of J. C. Sharman, The Money Laundry: Regulating Criminal Finance in the Global Economy*, 118 AM. J. SOCIOLOGY 850–52 (2012); Frank Dobbin, *Industrial Policy* (with Soohan Kim), in *PALGRAVE ENCYCLOPEDIA OF STRATEGIC MANAGEMENT* (David J. Teece & Mie Augier eds., 2012); *Review of*

Greta Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance*, 23 *TRAJECTORIES* 2–4 (2012).

20. Richard Thompson Ford's published work includes *Bias in the Air: Rethinking Employment Discrimination Law*, 66 *STAN. L. REV.* 1381 (2014); *The Double Secret Danger in the Supreme Court's Affirmative Action Ruling*, *SLATE* (June 27, 2013); *UNIVERSAL RIGHTS DOWN TO EARTH* (2011); *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* (2011); *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008); *RACIAL CULTURE: A CRITIQUE* (2005); *Law's Territory (A History of Jurisdiction)*, 97 *MICH. L. REV.* 843–930 (1999); *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841–1921 (1994).

21. Other published work by Janet Halley includes *After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family*, 31 *PACE L. REV.* 881 (2011); *Le genre critique: Comment (ne pas) genrer le droit?* (Vincent Forray trans.), *JURISPRUDENCE: REV. CRITIQUE* 109 (2011); *Vergewaltigung in Berlin: Neue Überlegungen zur Kriminalisierung von Vergewaltigung im Kriegsvölkerrecht*, *KRITISCHE JUSTIZ* (German translation of *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*); *Behind the Law of Marriage, Part I: From Status/Contract to the Marriage System*, 6 *UNBOUND: J. LEGAL LEFT* 1 (2010); *Does Law Have an Outside?* 7 *OSGOODE HALL L. SCH. COMP. RES. L. & POL. ECON. RES. PAPER SERIES* (2010); *Tribute to Eve Kosofsky Sedgwick* (Janet Halley ed., with an introduction by Janet Halley, *A Tribute from Legal Studies to Eve Kosofsky Sedgwick: Introduction*) 33 *HARV. J.L. & GENDER* 309 (2010); *Note sulla Costruzione del Sistema delle Relazioni di Coppia: Un Saggio di Realismo Guiridico*, 27 *REVISTA CRITICA DEL DIRITTO PRIVATO* 515 (2009); *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 *MICH. J. INT'L L.* 1 (2008); *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 *MELBOURNE J. INT'L L.* 78 (2008); *My Isaac Royall Legacy*, 24 *HARV. BLACKLETTER L.J.* 117 (2008). *WORDS: FROM THE HLS CREATIVE WRITER'S GROUP*, *SPRING 2006* (Janet Halley & Rose Moss eds., 2006); *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006), *excerpted in FEMINIST JURISPRUDENCE: CASES AND MATERIALS* (Cynthia Grant Bowman, Laura A. Rosenbury, Deborah Tuerkheimer, & Kimberley A. Yuracko, eds., 2010); *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism* (with Prabha Kotiswaran, Hila Shamir & Chantal Thomas), 29 *HARV. J.L. & GENDER* 335 (2006); *The Politics of Injury: A Review of Robin West's Caring for Justice*, *HARVARD UNBOUND* (Spring 2005); *Of Time and the Pedagogy of Critical Legal Studies*, in *DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (2004).

22. Christine Jolls's published work includes *Behavioral Economics Analysis of Employment Law*, in *BEHAVIORAL ECONOMICS AND PUBLIC POLICY* (2011); *The New Market for Federal Judicial Law Clerks* (with Christopher Avery, Richard A. Posner & Alvin E. Roth), 74 *U. CHI. L. REV.* 447 (2007); *Employment Law*, in *HANDBOOK OF LAW AND ECONOMICS* (A. Mitchell Polinsky & Steven Shavell eds., 2007); *The Law of Implicit Bias* (with Cass R. Sunstein), 94 *CAL. L. REV.* 969 (2006); *Antidiscrimination Law's Effects on Implicit Bias*, in *NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW, VOL. 3, BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION* 69 (Mitu Gulati & Michael J. Yelnosky eds., 2007); *Law and the Labor Market*, 2 *ANN. REV. L. & SOC. SCI.* 359 (2006).

23. Linda Krieger's main publications on employment discrimination law include *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 *L. & SOC'Y REV.* 991 (2011); *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in *SEX DISCRIMINATION IN EMPLOYMENT* (Faye J. Crosby et al. eds., 2007); *Implicit Bias: Scientific Foundations* (with Anthony G. Greenwald), 94 *CAL. L. REV.* 945

(2006); *Socio-Legal Backlash*, in *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* (Linda Hamilton Krieger ed., 2003); *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995); *Civil Rights Perestroika: Equal Employment Opportunity After Affirmative Action*, 86 *CAL. L. REV.* 1251 (1998); *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment* (with Susan T. Fiske), 94 *CAL. L. REV.* 659 (2006). She recently coauthored a book with Paul Brest, *PROBLEM SOLVING AND DECISION MAKING: A GUIDE FOR LAWYERS AND POLICY MAKERS* (2010).

24. Martha Minow's published work includes *IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010); *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002); *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 110 (with Jody Freeman eds., 2009); *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); *NOT ONLY FOR MYSELF: IDENTITY POLITICS AND LAW* (1997); *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990). She has also edited or coedited the following publications: *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (with Jody Freeman eds., 2009); *JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE* (with Richard A. Shweder & Hazel Markus eds., 2008); *IMAGINE CO-EXISTENCE: RESTORING HUMANITY AFTER ETHNIC CONFLICT* (with Antonia Chayes eds., 2003). She has also coedited casebooks for law students, including *CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT* (4th ed. 2012) and *WOMEN AND THE LAW* (4th ed. 2007).

25. David Oppenheimer's published work includes articles in French law reviews: *L'alerte éthique, Etats-Unis*, 3 *REV. DR. TRAVAIL* 184 (2009); *The Legality of Promoting Inclusiveness: May the University of California Use Race or Ethnicity as Factors in Applicant Outreach?*, 27 *CHICANO-LATINO L. REV.* 11 (2008); *Why France Needs to Collect Racial Data on Racial Identity . . . In a French Way*, 31 *HASTINGS INT'L & COMP. L. REV.* 735 (2008); *La rupture conventionnelle* (with Pascal Lokiec et al.), 9 *REV. DR. TRAVAIL* 550 (2008); *La période d'essai (1re partie)* (with Pascal Lokiec et al.), 4 *REV. DR. TRAVAIL* 257 (2008); *Mise en oeuvre du droit du travail et cultures nationales* (with Sophie Robin-Olivier et al.), 2 *REV. DR. TRAVAIL* 124 (2007); *Prise d'acte et rupture du contrat de travail à l'initiative du salarié* (with Pascal Lokiec et al.), 3 *REV. DR. TRAVAIL* 196 (2006); *Le discours sur la flexibilité, le droit du travail et l'emploi* (with Pascal Lokiec & Sophie Robin-Olivier), 1 *REV. DR. TRAVAIL* 48 (2006); *Evaluating the U.S. Policy of Using Private Lawsuits to Remedy Employment Discrimination*, 49 *DROIT & CULTURES* 109 (2005); *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 *U.C. DAVIS L. REV.* 511 (2003); *McDonnell Douglas Corp. v. Green Revisited: Why Non-Violent Civil Disobedience Should Be Protected From Employer Retaliation by Title VII*, 34 *COLUM. HUM. RTS. L. REV.* 635 (2003); *Rethinking Equality in the Global Society*, *Washington University Law* (with Dorsey D. Ellis et al., transcribed conference proceedings), 75 *WASH. U. L.Q.* 1561 (1997); *From Little Acorns Great Oaks Grow: Neil Gotanda's Contribution to the Law Permitting General & Punitive Damages in Employment Discrimination Cases*, 4 *ASIAN AM. L.J.* 63 (1997); *Trina Grillo—A Personal Remembrance*, 31 *U.S.F. L. REV.* 965 (1997); *Inclusiveness, Interrelatedness, and the Affirmative Action Debate in California—Introduction to the GGU School of Law Symposium on Race Relations in America*, 27 *GOLDEN GATE U. L. REV.* 287 (1997); *Employer Liability for Sexual Harassment by Supervisors: A Comparison of Federal (Title VII) and California (FEHA) Law* (with Mark Vickness), 10 *CAL. LAB. & EMP. L.Q.* 3 (1997); *Understanding Affirmative Action*, 23 *HASTINGS CONST. L.Q.* 921 (1996); *Workplace Harassment and the First Amendment: A Reply to*

Professor Volokh, 17 *BERKELEY J. EMP. & LAB. L.* 321 (1996); *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 *CORNELL L. REV.* 66 (1995); *Negligent Discrimination*, 141 *U. PA. L. REV.* 899 (1993); *Distinguishing Five Models of Affirmative Action*, 4 *BERKELEY WOMEN'S L.J.* 42 (1989); *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?* (with Margaret M. Baumgartner), 23 *U.S.F. L. REV.* 145 (1988); *Boalt Hall's Employment Discrimination Clinic: A Model for Law School/Government Cooperation in Integrating Substance and Practice*, 7 *INDUS. REL. L.J.* 245 (1985); *Employment Discrimination: Rightful Place Seniority under Title VII and Section 1981, The Teamsters Roadblock May Be Only a Detour*, 1 *HAMLIN L. REV.* 15 (1979); *COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW: CASES, CODES, CONSTITUTIONS, AND COMMENTARY* (with SHEILA FOSTER & SORA HAN) (2012).

26. Devah Pager's other published work includes *Race, Self-Selection, and the Job Search Process* (with David Pedulla), 120 *AM. J. SOC.* 1005 (2015); *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization* (with Lincoln Quillian), 73 *SOC. PSYCHOL. Q.* 79 (2010); *Discrimination in a Low Wage Labor Market: A Field Experiment* (with Bruce Western & Bart Bonikowski), 74 *AM. SOC. REV.* 777 (2009); *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records* (with Bruce Western & Naomi Sugie), 623 *ANNALS AM. ACAD. POL. & SOC. SCI.* 195 (2009); *Bayesian Bigot? Statistical Discrimination, Stereotypes, and Employer Decision-Making* (with Diana Karafin), 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 70 (2009); *The Republican Ideal? Ethnic Minorities and the Criminal Justice System in Contemporary France*, 10 *PUNISHMENT & SOC.* 375 (2008). Her working papers include *Prison As a Social Context: Inmate Trajectories and Their Facility Environments over Time* (with Michelle Phelps) (2012).

27. Robert Post's articles and chapters include *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 *CAL. L. REV.* 1319 (2010); *Constructing the European Polity: ERTA and the Open Skies Judgments*, in *THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY* (Miguel Poiares Maduro & Loïc Azuolai eds., 2010); *A Progressive Perspective on Freedom of Speech and Democratic Constitutionalism* (with Reva B. Siegel), in *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009); *Roe Rage: Democratic Constitutionalism and Backlash* (with Reva B. Siegel), *HARV. C.R.-C.L. L. REV.* (2007); *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, *WM. & MARY L. REV.* (2006); *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, *HARV. L. REV.* (2003); and *Subsidized Speech*, *YALE L.J.* (1996).

28. Vicki Schultz's published work includes *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* (Judith Fudge & Rosemary Owen eds., 2006); *The Sanitized Workplace*, 112 *YALE L.J.* 2063 (2003); *Life's Work*, 100 *COLUM. L. REV.* 1881 (2000); and *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683 (1998).

29. Reva Siegel's published work on constitutional law and inequality includes Chapters 7–9 of *PROCESSES OF CONSTITUTIONAL DECISION-MAKING* (with Paul Brest et al. eds., 6th ed., 2014). Her articles include *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 *HARV. L. REV.* 1 (2013); *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278 (2011); and *Remembering How to Do Equality* (with Jack M. Balkin), in *THE CONSTITUTION IN 2020* (with Jack M. Balkin eds., 2009). Her writing on reproductive rights includes *Dignity and the Duty to Protect Unborn Life*, in *UNDERSTANDING HUMAN DIGNITY* (Christopher McCrudden ed., 2014); *The Constitutionalization of Abortion*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1057 (Michel Rosenfeld & András Sajó eds., 2012); *Dignity and Sexuality:*

Claims on Dignity in Transnational Debates Over Abortion and Same-Sex Marriage, 10 INT'L. J. CONST. L. 335 (2012); BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (with LINDA GREENHOUSE, 2nd ed., 2012); *Before (and After) Roe v. Wade: New Questions About Backlash* (with Linda Greenhouse), 120 YALE L.J. 2028 (2011); *Roe's Roots: The Women's Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875 (2010); *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination* (with Neil S. Siegel) 59 DUKE L.J. 771 (2010); *Pregnancy and Sex-Role Stereotyping, From "Struck" to "Carhart"* (with Neil Siegel), 70 OHIO ST. L.J. 1095 (2009). Her more recent work on antidiscrimination law includes *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics* (with Douglas NeJaime), 124 YALE L.J. 2516 (2015). For earlier work, see *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

30. Susan Sturm's published work includes *Full Participation: Building the Architecture for Diversity and Public Engagement in Higher Education* (with Tim Eatman, John Saltmarsh, & Adam Bush), COLUM. L. SCH. CTR. FOR INSTITUTIONAL & SOC. CHANGE (2011); *Building Pathways of Possibility from Criminal Justice to College* (with Kate Skolnick & Tina Wu), COLUM. L. SCH. CTR. FOR INSTITUTIONAL & SOC. CHANGE (2010); *Scaling Up* (with Lourdes Hernández-Cordero, Kathleen Klink, & Allan J. Formicola), in MOBILIZING THE COMMUNITY FOR BETTER HEALTH: WHAT THE REST OF AMERICA CAN LEARN FROM NORTHERN MANHATTAN (Allan Formicola & Lourdes Hernández-Cordero eds., 2010); *Linking Mobilization to Institutional Power: The Faculty-Led Diversity Initiative at Columbia* (with Emma Freudenberger, Jean E. Howard, & Eddie Jauregui), in RECONSTRUCTING THE ACADEMY: FACULTY TAKE THE LEAD (Winnifred Brown-Glaude ed., 2008); *Negotiating Workplace Equality*, 2 INT'L ASS'N FOR CONFLICT MGMT. 92–106 (2009); *Conflict Resolution and Systemic Change* (with Howard Gadlin), 2007 J. DISP. RESOL. (2007); *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 249 (2006); *Law's Role in Addressing Complex Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH (Laura Beth Nielsen & Robert Nelson eds., 2005); *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. (2003–2004); *Lawyers and the Practice of Workplace Equity*, 2002 WISC. L. REV. 277 (2002); *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); and WHO'S QUALIFIED? (with Lani Guinier, 2001). *The Architecture of Inclusion* was the focus of a symposium issue of HARV. J.L. & GENDER (June 2007).

31. Julie Suk's published work includes *Criminal and Civil Approaches to Antidiscrimination Enforcement in Europe*, 14 EUR. ANTI-DISCRIMINATION L. REV. 11 (2012); *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. (I*CON) 449 (2012); *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010); and *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007).

INTRODUCTION

1. See interviews of Devah Pager in this book and her study on discrimination in hiring candidates with criminal records; for example, Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIOLOGY 937 (2003); see Olatunde Johnson, *Leveraging Discrimination*, in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT 50 (Samuel Bagenstos & Ellen Katz eds., forthcoming 2015); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 705–06 (2003); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003).

2. Christine Jolls (Yale Law School), Reva Siegel (Yale Law School), Susan Sturm (Columbia Law School), Dean Martha Minow (Harvard Law School), Dean Robert Post (Yale Law School), Linda Krieger (University of Hawaii Law School), Ruth Colker (Ohio State University, Moritz School of Law), Julie Suk (Benjamin Cardozo Law School), Vicki Schultz (Yale Law School), Chai Feldblum (Equal Employment Opportunity Commission), Richard Ford (Stanford Law School), David Oppenheimer (Berkeley Law School), Devah Pager (Harvard Law School), Frank Dobbins (Harvard Law School), Janet Halley (Harvard Law School).

3. Citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003), Justice Ginsburg starts her dissent in *Ricci v. DeStefano*, 557 U.S. 557 (2009), with this observation.

4. 570 U.S. ____ (2013).

5. 131 S. Ct. 2541 (2011): sex discrimination case in which the Supreme Court decided the plaintiffs did not have enough issues of law and fact in common to constitute a class: “the existence of a class of persons who have suffered the same injury must be bridged by significant proof that an employer operated under a general policy of discrimination. Such proof is absent here.” See Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 2015, 1133. Marie Mercat-Bruns, *Comparaison entre les discriminations fondées sur l'appartenance syndicale, l'âge et le sexe, révélatrice de la discrimination systémique*, 11 REV. DR. TRAVAIL 92 (2015).

6. *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014).

7. Ian F. Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

8. George Yancy & Judith Butler, *What's Wrong With "All Lives Matter"?* N.Y. TIMES: OPINIONATOR, <http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter>.

9. *Shelby County v. Holder*, 570 U.S. ____ (2013), on voting rights.

10. Ann C. McGinley, *Title VII at Fifty Years: A Symposium*, 14 NEV. L.J. 661 (2014).

11. Theresa M. Beiner, *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673 (2014).

12. See CHRISTINE DELPHY, *SEPARATE AND DOMINATE: FEMINISM AND RACISM AFTER THE WAR ON TERROR* (2015). See also Cass. soc., April 9, 2015, No. 13–19855: the Cour de Cassation is asking the Court of Justice of the European Union (CJEU) for preliminary ruling on the question whether banning the veil of an engineer can be an essential and determining requirement for the job because of customer preference.

13. See interviews of Devah Pager in this book.

14. John Fitzgerald Gates, *Microaggression: The New Workplace Bigotry*, HUFFINGTON POST BUSINESS: THE BLOG, http://www.huffingtonpost.com/john-fitzgerald-gates-phd/microaggression-the-new-w_b_5544663.html.

15. See John McWhorter, *"Microaggression" Is the New Racism on Campus*, TIME: OPINION, <http://time.com/32618/microaggression-is-the-new-racism-on-campus/>.

16. See interviews of Susan Sturm in this book. Marie Mercat-Bruns, *L'identification de la discrimination systémique*, 11 REV. DROIT TRAV. 672 (2015) & Marie Mercat-Bruns, Emmanuelle Boussard-Verrecchia, *Appartenance syndicale, sexe, âge et inégalités : vers une reconnaissance de la discrimination systémique ?* 11 REV. DROIT TRAVAIL 660 (2015).

17. See the development of human rights bodies replacing equality bodies in the combat against discrimination in the Netherlands and France, for example.

18. See interviews of Janet Halley and Richard Ford.

19. Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837–70 (2003); Samuel Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013).

20. See generally JOHN J. DONAHUE III, *FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW* (2002).

21. See interviews of Linda Krieger in this book.

22. See interviews of Christine Jolls in this book.
23. See interviews of Reva Siegel in this book.
24. Marie Mercat-Bruns, *Les discriminations multiples et l'identité au travail au croisement des questions d'égalité et de libertés*, 1 REV. DR. TRAVAIL 28 (2015).
25. See AILEEN MCCOLGAN, DISCRIMINATION, EQUALITY AND THE LAW (2014); DAVID OPPENHEIMER ET AL., COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW: CASES, CODES, CONSTITUTIONS AND COMMENTARY (2012); Richard Ford in collaboration with David Oppenheimer, Comparative Antidiscrimination Law (Stanford Law School online course forthcoming in 2015); S. Jagwanth, *Affirmative Action in a Transformative Context: The South African Experience*, 36 CONN. L. REV. 725 (2003–2004).
26. Linda Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in SEX DISCRIMINATION IN EMPLOYMENT (Faye Crosby et al. eds., 2007).
27. The law reverses *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
28. See interviews with Julie Suk in this book and her article *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010).
29. On the socially constructed aspect of gender performativity, see JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990).
30. L. Camille Hebert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341 (2005).
31. See interviews of Vicki Schultz in this book.
32. See the work of the EEOC; for example, *Selected Enforcement Guidances and Other Policy Documents on the ADA, LAWS, REGULATIONS, GUIDANCE, & MOUs*, http://www.eeoc.gov/laws/types/disability_guidance.cfm.
33. See interviews of Ruth Colker in this book.
34. See interviews of Robert Post in this book and ROBERT POST & REVA SIEGEL ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTI-DISCRIMINATION LAW (2001).
35. See, for example, Sciences Po's "conventions d'éducation prioritaires" and percentage plans in Texas and California, explained in Chapter 2.
36. Parity rules in France and diversity programs in U.S. corporate firms.
37. See, for example, the discriminatory policies against the Roma in Europe and in France, ERIC FASSIN ET AL., ROMS & RIVERAINS: UNE POLITIQUE MUNICIPALE DE LA RACE (2014). See recently CJEU Case C-83/14, *Chez* (July 16, 2015).
38. STÉPHANIE HENNETTE-VAUCHEZ & VINCENT VALENTIN, L'AFFAIRE BABY-LOUP OU LA NOUVELLE LAÏCITÉ (2014).
39. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).
40. On community values, see Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law of Tort*, 77 CAL. L. REV. 957 (1989).
41. COLLEEN SHEPPARD, INCLUSIVE EQUALITY: THE RELATIONAL DIMENSIONS OF SYSTEMIC DISCRIMINATION IN CANADA (2010).
42. RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY (2012).
43. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2008).
44. See interviews of Martha Minow and her work MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1991).
45. See interviews of Minow and MAKING ALL THE DIFFERENCE, *supra* note 44.

46. See interviews of Minow and MAKING ALL THE DIFFERENCE, *supra* note 44; Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159 (2000).

47. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, U. CHI. LEGAL F. 138 (1989).

48. See interviews of Frank Dobbin in this book.

49. Susan P. Sturm, *The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J.L. & GENDER 407 (2007).

50. See interviews with Chai Feldblum in this book.

51. Even if American judges, unlike European judges, seem to use proportionality less often than rationality or reasonableness as a requirement for justification. See Moshe Cohen-Eliya, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463 (2011).

52. See generally global law as a way to rethink the legal norms; NEIL WALKER, *INTIMATIONS OF GLOBAL LAW* (2014).

53. Matteo Borzaga, *Accommodating Differences: Discrimination and Equality at Work in International Labor Law*, 30 VT. L. REV. 749 (2006); ARTURO BRONSTEIN, *INTERNATIONAL AND COMPARATIVE LABOUR LAW: CURRENT CHALLENGES* (2009); Faina Milman-Sivan, *Book Review, reviewing Arturo Bronstein, International and Comparative Labour Law: Current Challenges*, 59 AM. J. COMP. L. 289 (2011).

54. Manuela Tomei, *Discrimination and Equality at Work: A Review of the Concepts*, 142 INT'L LAB. REV. 401, 401–05 (2003), in which the author cites in particular Christopher McCruden, *The New Concept of Equality*, 3 ERA FORUM 9, 13–17 (2003). The models of equality he identifies are the procedural or individual justice model, the social or group justice model, and equality as diversity. For a more transnational grid of analysis to reframe the study of law and society, see *TRANSNATIONAL LEGAL ORDERS* (Terence Halliday & Gregory Shaffer eds., 2015).

55. See also MATHIAS MÖSCHEL, *LAW, LAWYERS, AND RACE: CRITICAL RACE THEORY FROM THE UNITED STATES TO EUROPE* (2014).

56. The quotation comes from the following excerpt, which partly illustrates this position:

Some seek to understand the law as a human phenomenon, as a cultural artifact, as a text; to seek the meaning in law in the way one would seek the deeper meaning in a piece of literature or art or social practice. The commitments here are to the non-instrumental. . . . The scholar's ethical commitment is, in essence, to law itself. . . . But some also seek to understand law as an instrument. Understanding law as an instrument is goal-oriented, directed not to measurement against hermeneutic standards but against practical ones. Law is not (just) a text. . . . Here the scholar's ethical commitment is to the person on whom law operates. . . . How law and legal institutions work systemically to produce people's lives—not in its individual instances but in its often obscure aggregative effects—has not traditionally been the affair of legal education and scholarship. Perhaps this is why the scholar who focuses on the instrumental is so often seen as an interloper doing violence to law itself. It may be true that there is an 'untranslatable abyss' between the law of one place and the law of another—just as there is between one person's experience of a strawberry and another's—but this does not mean that we have no business seeking to understand why law here produces this effect and law there produces that effect. To my mind, the goal of the legal scholar is to be competent across these different perspectives.

Gillian K. Hadfield, *The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law*, 59 U. TORONTO L.J. 223 (2009).

57. I have chosen the term *antidiscrimination law* to refer to the rather dense body of law made up of rules, procedures, case law, and doctrinal sources dealing exclusively with

the fight against employment discrimination, and the instruments used to prevent and sanction this discrimination. I have emphasized the scope of private law, although public law currently offers very fertile ground for analysis. See LUCIE CLUZEL-METAYER & MARIE MERCAT-BRUNS, *DISCRIMINATIONS DANS L'EMPLOI: ANALYSE COMPARATIVES DE LA JURISPRUDENCE DU CONSEIL D'ÉTAT ET DE LA COUR DE CASSATION* (2011). The new French Labor Code recognizes the importance of antidiscrimination, devoting an entire section (Titre III) to the topic in Book I of Part I. In the United States, where areas of specialization tend to be narrower, it is common to refer to *employment discrimination law*, and the subject is taught in almost every American law school.

58. The question of choosing and assessing a method is central to all international legal research. See Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999) ("To elucidate the theoretical underpinnings of contemporary scholarship through recourse to the methods employed by various theories, we decided upon seven methods for appraisal: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics. In our view, they represent the major methods of international legal scholarship today").

59. Although they have previously been used in comparative law. See, e.g., Pierre Legrand, *Questions à Rodolfo Sacco*, 47 REV. INT'L DR. COMP. 943 (1995).

60. The approach taken in this work, that is, interviews punctuated with comparative observations, cannot be as easily combined with a methodology based on a preestablished taxonomy of orders and norms, as also seen in international law; Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT'L L. 385 (2011); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997). Interest in a transnational perspective of equality law is nevertheless growing in an era of globalization: see the papers presented at the 2014 American Association of Law Schools (AALS) Workshop on Transnational Perspectives on Equality Law, June 22–24, 2014, in Washington, DC. See also Gregory Shaffer, *Transnational Legal Ordering and State Change* (2013).

61. Naturally, the author is not implying that American law and American doctrine are the only fields of research worthy of interest in this respect. See *infra* the authors cited in the notes in Chapter 1 on the limits to the reach of constitutional norms and nondiscrimination as a fundamental right.

62. The perspective of the author of a comparative analysis is always present. Here, two perspectives are put forward depending on the interview: a European perspective or a French perspective. For more on the challenges of this dual perspective in comparative employment law, see BOB HEPPLE & BRUNO VENEZIANI, *THE TRANSFORMATION OF LABOUR LAW IN EUROPE* (2009), and Sebastian Krebber, "The Grand Duchy, Tucked Between Belgium, France and Germany": *Some Thoughts Upon the Methodology of Bob Hepple & Bruno Veneziani, the Transformation of Labour Law in Europe*, 32 COMP. LAB. L. & POL'Y J. 811 (2011).

63. Previously Article 13 of the Treaty of Amsterdam. After the European Court of Justice decisions in *Defrenne* I, II, and III (see *infra* Chapter 1, note 36), national courts began to make references for preliminary rulings on the interpretation of European antidiscrimination norms, especially the gender equality directives, and their scope.

64. For an economic assessment of its effectiveness, see page 54 et seq. of *L'évaluation du droit du travail: problèmes et méthodes* (research report by the Institut International pour les études comparatives, supervised by Antoine Lyon-Caen, dated April 11, 2008).

65. See, e.g., PHILIPPE MALINVAUD, *INTRODUCTION À L'ÉTUDE DU DROIT* 150 (2004).

66. VOCABULAIRE JURIDIQUE 318 (Gérard Cornu ed., 2004).

67. Christophe Jamin and Philippe Jestaz critique the development of doctrine in France, which they liken to a French “school,” tracing the origins of this doctrinal tradition. The French doctrine, they say, “was formed around the time of the transition from the 19th to the 20th century, establishing the principles of a science of law closely identified with legal dogmatics.” For jurists of the Roman tradition, this was not new, but as Jamin and Jestaz explain, the innovation was that the doctrine was now “theorized by a school that called itself *scientific*.” This theory countered the social sciences, which were gaining ground at the time and threatening the autonomy of the legal system. Consequently, they say, the French notion of doctrine incorporates both “the self-proclaimed authority of a body of jurists and the appeal of well-tempered dogmatics,” with a few rare exceptions. In this context, can it truly be said that doctrinal writing in France is characterized by “liberty” and “diversity,” as some scholars claim? CHRISTOPHE JAMIN & PHILIPPE JESTAZ, *LA DOCTRINE* 8, 9, 11 (2004); GÉRARD CORNU, *DROIT CIVIL: INTRODUCTION, LES PERSONNES, LES BIENS* 153 (8th ed. 1997).

68. See Adhémar Esmein, *La jurisprudence et la doctrine*, 1 REV. TRIM. DR. CIV. 5 (1902); Christian Atias, *La mission de la doctrine universitaire en droit privé*, 1 JCP 2999 (1980); Henri Batiffol, *La responsabilité de la doctrine dans la création du droit*, RD PROSP. 175 (1981); Christian Mouly, *La doctrine, source d'unification internationale du droit*, 38 REV. INT'L DR. COMP. 351 (1986); Christian Atias, *Des réponses sans questions 1804–1899–1999 (quantitatif et qualitatif dans le savoir juridique)*, RECUEIL DALLOZ 406 (1998); Nicolas Molfessis, *Les prédictions doctrinales*, in *L'AVENIR DU DROIT: MÉLANGES EN HOMMAGE À FRANÇOIS TERRÉ* 141 (1999); Philippe Malaurie, *La pensée juridique du droit civil au XXe siècle*, 1 JCP 283 (2001); Pierre-Yves Gautier, *Les articles fondateurs (réflexions sur la doctrine)*, in *ÉTUDES OFFERTES À PIERRE CATALA: “LE DROIT PRIVÉ FRANÇAIS À LA FIN DU XXÈME SIÈCLE”* 255 (2001).

69. The case law approach of the common-law system, ever mindful of judges' opinions, is less favorable to the construction of a doctrine. Blackstone's commentaries, which largely influenced the development of American law, provide more of an overview, at times a less than accurate one, of the scope of English jurisprudence, rather than an analysis of underlying dogmatics or principles.

70. See JAMIN & JESTAZ, *supra* note 67, at 269.

71. See the emergence of realism in legal thought in the article by Justice Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) and his famous dissent in the Supreme Court case *Lochner v. New York*, 198 U.S. 45 (1905).

72. JAMIN & JESTAZ, *supra* note 67, at 11.

73. One of the cardinal functions of comparative law is to gain insight into one's own legal system and its characteristics: Horatia Muir Watt, *La fonction subversive du droit comparé*, 52 REV. INT'L DR. COMP. 503, 518 (2000) (“A better understanding of oneself, facilitated by looking at others”); see also Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L. J. 411 (1985), in which the author observes that the failure of comparatists to critically evaluate their own law explains why comparative law is considered as a second-class discipline. Christopher McCrudden, *Why Compare? The Theory and Practice of Comparative Anti-discrimination Law*, paper presented at the Berkeley Comparative Anti-Discrimination Law Study Group, First Annual Symposium, Sciences-Po in Paris (May 4, 2012).

74. This line of thought is also explored in research on law and economics; Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: a Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519 (2006).

75. Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. 797 (2009).

76. See, e.g., Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002).

77. "There is a rather remarkable parallel between what comparatists write about the advantages of comparison and the more massive tendency to engage in subversive activities by the deconstructive trends internal to the American system." Muir Watt, *supra* note 73, at 509.

78. Antidiscrimination law reveals a characteristic shared by the scholars, which is their tendency to "deconstruct" law to varying degrees. They are able not only to unravel the meaning of a rule and how it fits into a body of law but also to connect with thinking from other disciplines to subsequently enrich the legal analysis. At the same time, these academics express their critical opinions, without precluding them from joining interdisciplinary schools of thought permeated by the social sciences.

79. See Muir Watt, *supra* note 73, at 506; Edward J. Eberle, *The Methodology of Comparative Law*, 16 ROGER WILLIAMS UNIV. L. REV. 60 (2011).

80. Such as the approach taken by KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 30 (1992); nor does the American scholar Mary Ann Glendon reject the functional perspective. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS, AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, GERMAN, ENGLISH AND EUROPEAN LAW 11 (2nd ed. 1994).

81. Cf. Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L.J. 287 (2011) (defending French civil law); see also Vivian Grosswald Curran, *Comparative Law and Legal Origins Thesis*: "[N]on scholae sed discimus vitae discimus," AM. J. COMP. L. 863 (2009); for the terms of the debate, see Catherine Valcké's introduction to *Focus: Economics and Comparative Law*, 59 U. TORONTO L.J. 179 (2009).

82. "Comparison pursues the goal of underscoring the variety in law and organizing this variety. . . . The comparatist must recognize—and this is the deepest point of convergence of the questions that comparison raises—that difference is not indifferent and include this comparison within the *difference*. This means that the person who is comparing must first overcome the 'particular repugnance to conceiving of difference, to describing separations and dispersions.'" Pierre Legrand, *Comparer*, REV. INT'L DR. COMP. 279, 295 (1996) (quoting MICHEL FOUCAULT, L'ARCHÉOLOGIE DU SAVOIR 21 (1969)). See also PIERRE LEGRAND, COMPARER LES DROITS, RÉSOLUMENT (2009).

83. "Arguing that a comparison does not give us insight into one type of law, but into a perspective of law . . . should not undermine the comparative undertaking." Legrand, *Comparer*, *supra* note 82, at 310.

84. See Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); RODOLFO SACCO, LA COMPARAISON JURIDIQUE AU SERVICE DE LA CONNAISSANCE DU DROIT (1991).

85. "Regardless of whether one considers that anthropology or linguistics should or should not contribute to an extended notion of law, the author of a comparison cannot ignore these different fields of knowledge essential to his or her undertaking." Legrand, *Comparer*, *supra* note 82, at 290.

1. HISTORY OF ANTIDISCRIMINATION LAW: THE CONSTITUTION AND THE SEARCH FOR PARADIGMS OF EQUALITY

1. Dred Scott v. Sandford, 60 U.S. 393 (1857).
2. Plessy v. Ferguson, 163 U.S. 537 (1896).

3. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).
4. *Brown v. Bd. of Education of Topeka*, 347 U.S. 483 (1954).
5. LE DÉFENSEUR DES DROITS, <http://www.defenseurdesdroits.fr/>
6. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.
7. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
8. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (recognizing disparate treatment and introducing the burden-shifting framework (*prima facie* case) for the first time); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing disparate impact for the first time); *United Steelworkers of Am. v. Weber* 443 U.S. 193 (1979) (holding that affirmative action in employment is not incompatible with the nondiscrimination provisions of the Civil Rights Act of 1964).
9. See Daniel Sabbagh, *La tentative de l'opacité: le juge américain et l'affirmative action dans l'enseignement supérieur*, 111 POUVOIRS 5 (2004); Gwénaële Calvès, *Les politiques françaises de discrimination positive: trois spécificités*, 111 POUVOIRS 29 (2004).
10. See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1992).
11. *DeFunis v. Odegaard*, 414 U.S. 1038 (1973).
12. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
13. In assessing equal protection, strict scrutiny is the most rigorous form of judicial review, applied to race classifications, which must be justified by a compelling state interest.
14. See *infra* Chapter 4 on diversity.
15. See GWÉNAËLE CALVÈS, *LA DISCRIMINATION POSITIVE*, (2nd ed. 2008); LES POLITIQUES DE LA DIVERSITÉ: EXPÉRIENCES ANGLAISE ET AMÉRICAINE (Emmanuelle Le Texier et al. eds., 2010); DANIEL SABBAGH, *L'ÉGALITÉ PAR LE DROIT: LES PARADOXES DE LA DISCRIMINATION POSITIVE AUX ÉTATS-UNIS* (2003).
16. Jacqueline Laufer, *L'égalité professionnelle entre les hommes et les femmes: est-elle soluble dans la diversité?*, 21 TRAVAIL, GENRE & SOCIÉTÉS 35 (2009).
17. Act No. 2006-396 of March 31, 2006.
18. Françoise Favennec-Héry, *Non-discrimination, égalité, diversité: la France au milieu du gué*, DR. SOC. 3 (2007).
19. Amendment to the French Constitution adopted on July 23, 2008 (articles 61-1, 62); French Law No. 2009-1523 of Dec. 10, 2009. Judicial review has been available since March 1, 2010, and authorizes the Conseil Constitutionnel to declare null and void any provision that violates the Constitution by infringing on rights and liberties, arising in any litigation before courts under the jurisdiction of the Conseil d'État or the Cour de Cassation. "Equality has been continually affirmed in the first article of its 1958 constitution, in Article 6 of the Declaration of the Rights of Man and of the Citizen and in paragraphs 3 and 5 of the preamble of the French constitution of 1946, and has long ranked as a general principle of law." CE Ass. [Conseil d'État, plenary session], Apr. 1, 1938, *Société de l'Alcool dénaturé de Coubert*, Rec. Lebon 337, REV. DR. PUB. 487 (1939); CE Sect. [Conseil d'État, section], Mar. 9, 1951, *Société des concerts du conservatoire*, Rec. Lebon 151, DR. SOC. 168 (1951). It has even been referred to as a constitutional principle (CC [Conseil constitutionnel], July 12, 1979, *Ponts à péage*, 9 AJDA 38 (1979)). This "founding principle of democracy" (CONSEIL D'ÉTAT, SUR LE PRINCIPE D'ÉGALITÉ 21 (1996) (annual report of the Conseil d'État)), embedded in French law since the Revolution, has long been the subject of substantial judicial interpretation.
20. Bertrand Mathieu, *Neuf mois de jurisprudence relative à la QPC: un bilan*, 137 POUVOIRS 66 (2011); Ferdinand Mélin-Soucramanian, *Le principe d'égalité dans la jurisprudence*

du Conseil constitutionnel: *Quelles perspectives pour la question prioritaire de constitutionnalité?* 29 CAHIERS DU CONSEIL CONSTITUTIONNEL 5 (2010).

21. "There is no longer any question of a purely formal reading of equality: the administrative courts have long since recognized that different situations may be treated in different ways and that exceptions may be established to serve the general interest." Therefore, "the principle of equality is not opposed to the rule-making authorities ruling differently in different situations or to their departing from equality to serve the general interest, provided that, in either case, the resulting difference in treatment is directly related to the purpose of the law from which it originates and not manifestly disproportionate with respect to the differences in situation or justifying reasons." CE Ass., July 13, 1962, Conseil national de l'ordre des médecins, Rec. 479, REV. DR. PUB. 739 (1962) (conclusion by Guy Braibant). This ruling was later fine-tuned (in particular, CE, May 15, 2000, Barroux, Rec. 172); CE, Jan. 10, 2005, Hardy, Le Cornec, Rec. 9, AJDA 1575 (2005) (note, Jean-Claude Hélin); CE Sect., July 25, 2007, Syndicat des avocats de France, No. 288720; see Bertrand Seiller, *Contribution à la résolution de quelques incohérences de la formulation prétorienne du principe d'égalité*, in LE DROIT ADMINISTRATIF: PERMANENCES ET CONVERGENCES, MÉLANGES EN L'HONNEUR DE JEAN-FRANÇOIS LACHAUME 979 et seq. (2007). "The principle of equality simply implies that people in the same situation are treated in the same manner." LUCIE CLUZEL-MÉTAYER & MARIE MERCAT-BRUNS, DISCRIMINATIONS DANS L'EMPLOI: ANALYSE COMPARATIVE DE LA JURISPRUDENCE DU CONSEIL D'ÉTAT ET DE LA COUR DE CASSATION (2011) (study submitted to HALDE).

22. CC [Conseil constitutionnel] decision No. 2009-588 DC, Aug. 6, 2009, Rec. 163. It has applied the same standard before and after judicial review. See Morgan Sweeney, *La diversité des sources de l'exigence d'égalité*, in LE DROIT SOCIAL, L'ÉGALITÉ ET LES DISCRIMINATIONS 49 (Georges Borenfreund & Isabelle Vacarie eds., 2013); no violation of the principle of equality: CC decision No. 2014-373 QPC, Apr. 4, 2014 (on night work and equal treatment for employers); CC decision No. 2014-401 QPC, June 13, 2014 (on short-term contracts and violation of equality between workers); CC decision No. 2014-402 QPC, June 13, 2014; CC decision No. 2014-700 DC, July 31, 2014 (declaring constitutional the law on substantive equality between men and women).

23. See generally FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2009).

24. The French government plans to revamp and simplify the Labor Code in 2018 to give more room to collective bargaining while maintaining antidiscrimination law as a legislative mandate. As an example of this proposed trend, see ROBERT BADINTER & ANTOINE LYON-CAEN, LE TRAVAIL ET LA LOI (2015).

25. *Communication from the European Commission on Renewed Commitment for Non-discrimination and Equal Opportunities*, COM (2008) 420 final (July 2, 2008); see Frédérique Michéa, *La cohésion sociale en droit communautaire* (2003) (unpublished thesis, Université de Rennes, supervised by Daniel Gadbin).

26. Notably, these quotas first did not apply to companies established under a simplified legal form known as an SAS, of which there are a large number in France, nor to other types of executive committees. See Philippe Reigné, *Les femmes et les conseils d'administration: réponse à un éditorial de M. François-Xavier Lucas*, 3 JCP 27 (2010). See *infra* Chapter 4. Considering this limit of the 2011 law, the new law on "substantive equality between women and men" of August 4, 2014, extended this parity requirement of 40 percent to executive boards of larger companies (more than 500 employees), covering listed and unlisted companies, which must be implemented by January 1, 2017. This obligation now also targets companies with 250-499 employees that make more than €50 million in annual sales.

27. French Law 2013-660 of July 22, 2013 (on higher education and research). The percentage of students benefitting from this right to access preparatory programs is set each

year by executive order. For example, if the measure applies to 7 percent of high school students, 3,700 students are affected. Executive Order [Décret] 2014–610 of June 11, 2014, set this percentage at 10 percent for 2014.

28. Since this interview, in *Fisher v. University of Texas*, 570 U.S. ____ (2013), No. 11–345, decided June 24, 2013, Justice Kennedy wrote the opinion on the affirmative action admissions policy of the University of Texas at Austin. In a 7–1 decision, the Court vacated and remanded the Fifth Circuit’s ruling.

29. In the academic sphere, see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger* 539 U.S. 306 (2003) (No. 02–241); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (striking down affirmative action in schools).

30. Daniel Sabbagh, *Vertus et limites de la discrimination positive indirecte dans l’enseignement supérieur: l’expérience du Texas et de la Californie*, 3–4 MOUVEMENTS 102 (2008).

31. Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).

32. *Monroe v. City of Charlottesville*, 579 F.3d 380 (2009), cert. denied; see also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); see *Melendres v. Arpaio*, 2013 WL2297173, § 19.

33. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); see Jon Greenbaum, Alan Martinson, & Sonia Gill, *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOWARD L. J. 811 (2014).

34. Siegel, *supra* note 31, at 67.

35. When arguments combine references to standards of equality and liberty, see recently *Obergefell v. Hodges*, 576 U.S. ____ (2015).

36. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671, 174 L. Ed. 2d 490 (2009).

37. See Étienne Picard, *L’émergence des droits fondamentaux en France*, AJDA (SPECIAL ISSUE) 6 (1998); LOUIS FAVOREU ET AL., DROIT DES LIBERTÉS FONDAMENTALES 13 (2005). See also DROITS FONDAMENTAUX ET DROIT SOCIAL (Antoine Lyon-Caen & Pascal Lokiec eds., 2004); ISABELLE MEYRAT, DROITS FONDAMENTAUX ET DROIT DU TRAVAIL (1998).

38. Community case law developed only in the 1970s; see Case 80/70, *Defrenne v. Belgian State*, 1971 E.C.R. 445 [hereinafter *Defrenne I*]; Case 43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455 [hereinafter *Defrenne II*]; 149/77, Case 149/77, *Defrenne v. Sabena*, 1978 E.C.R. 1365 [hereinafter *Defrenne III*]; Case 152/73, *Sotgiu v. Deutsche Bundespost*, 1974 E.C.R. 153; Case 96/80, *Jenkins v. Kingsgate Ltd.*, 1981 E.C.R. 911.

39. A fundamental right can be defined as “a legal norm, able to be set forth in a constitution (German constitutional law) or an international treaty (European Convention on Human Rights), unable to be overridden by a constitutional court.” Dictionnaire du Vocabulaire Juridique 152 (2nd ed. 2004).

40. In 2010, the European Commission published a communication called *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union* (COM (2010) 573/4). See Bruno Nascimbene, *Les droits fondamentaux vingt ans après le traité de Maastricht*, 2 LAW & EUR. AFF. 267 (2012).

41. JEAN-SYLVESTRE BERGÉ & SOPHIE ROBIN-OLIVIER, INTRODUCTION AU DROIT EUROPÉEN 209 (2008).

42. “By referring to fundamental rights, the category can be enlarged to include economic rights and freedoms indisposed to being qualified as ‘human rights.’” *Id.* at 208.

43. For example, *Demir and Baykara v. Turkey*, App. No. 34503/97, Eur. Ct. H.R. (2008); *Eskelinen v. Finland*, App. No. 63235/00, 45 Eur. H.R. Rep. 43 (2007).

44. Court of Justice of the European Union [CJEU], Dec. 18, 2014, Opinion 2/13; and see David Szymczak, *Juridictions européennes et principe de non-discrimination: analyse croisée à l’aune de la garantie des droits fondamentaux*, 2 LAW & EUR. AFF. 217 (2009–2010).

45. Although indirect discrimination was not found in this case, *see* *Jordan v. United Kingdom*, App. No. 24746/94, 37 Eur. H.R. Rep. 2 (2001); *see* JEAN-FRANÇOIS RENUCCI, *DROIT EUROPÉEN DES DROITS DE L'HOMME: DROITS ET LIBERTÉS FONDAMENTAUX GARANTIS PAR LA CEDH* (2010). On indirect discrimination, *D.H. v. Czech Republic*, No. 57325/00, 47 Eur. H.R. Rep. 3 (2008). On religious discrimination where indirect discrimination was rejected: *Eweida v. The United Kingdom*, Nos. 48420/10, 59842/10, 51671/10, 36516/10, Eur. Ct. H.R. (Jan. 15, 2013).

46. Sometimes its decisions are progressive, as in *Goodwin v. the United Kingdom*, No. 28957/95, 35 Eur. H.R. Rep. 18 (2002) (on transgender rights). But the Court has also complied with strong national sentiment and accepted state justifications for restrictions, disregarding the risks of discrimination based on religion or sex: *see* *S.A.S. v. France*, No. 43835/11, Eur. Ct. H.R. (July 1, 2014) (upholding France's ban on full-face veils in public) (*infra* Chapter 5); *ABC v. Ireland*, Eur. Ct. H.R. (December 16, 2010) (holding that Ireland's ban on abortion does not violate the Convention) In other instances, the ECtHR does not refer to Article 14 but has still condemned the country, as in *Winterstein v. France*, No. 27013/07, Eur. Ct. H.R. (October 17, 2013) (in a case of eviction of French travelers from private land where they had been living for many years), and in *Y.Y. v. Turkey*, No. 14793/08, Eur. Ct. H.R. (Mar. 10, 2015), the Court unanimously ruled that by barring a transsexual man from access to gender reassignment surgery for several years, Turkey violated his right to privacy (ECHR, Article 8).

47. Indeed, following Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-9981 and Case C-555/07, *Kücükdeveci v. Swedex*, 2010 E.C.R. I-365, Case C-147/08, *Römer v. City of Hamburg*, 2011 E.C.R. I-3591, explicitly consecrates the principle of equal treatment as a general principle of European Union law. This status has been reinforced by the now legally binding character of the Charter of Fundamental Rights of the European Union. The Court of Justice considers that access to EU citizenship is becoming the foundational status of member-state citizens, crystallized by "broad access to social security benefits by mobile citizens," with certain moderations nonetheless, reflected in Community case law. *See* Caroline Picheral, *Du droit des citoyens de l'Union européenne à la non-discrimination en matière de prestations sociales*, 2 LAW & EUR. AFF. 294 (2009–2010); *see* Article 21 of the Charter, which prohibits "any discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation."

48. This is not always the case regarding its interpretation of directives pertaining to employment. *See* Mark Bell, *Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work*, 37 EUR. L. REV. 31 (2012).

49. Zdeněk Kühn, *Nina-Louisa Arold, The Legal Culture of the European Court of Human Rights*, 58 AM. J. COMP. L. 205 (2010) (book review).

50. Some scholars believe there is a correlation between European citizenship and anti-discrimination, where combating all illegal discrimination enlarges the social content of European citizenship, uncovering new protected grounds for discrimination, such as age. *See* Case C-555/07, *Kücükdeveci v. Swedex*, 2010 E.C.R. I-365; *see* Anastasia Iliopoulou, *Citoyenneté européenne et principe de non-discrimination*, 1 LAW & EUR. AFF. 58 (2011).

51. Sonia Morano-Foadi, *EU Citizenship and Religious Liberty in an Enlarged Europe*, 16 EUR. L.J. 420 (2010).

52. Nondiscrimination is a necessary step toward citizenship. *See* Jürgen Habermas, *Bringing the Integration of Citizens into Line with the Integration of States*, 18 EUR. L.J. 485 (2012).

53. Jo Shaw, *The Many Pasts and Futures of Citizenship in the European Union*, 22 EUR. L. REV. 554 (1997) (showing how the symbolic value of these principles is nevertheless important in the construction of EU citizenship).

54. See Case C-555/07, *Kücükdeveci v. Swedex*, 2010 E.C.R. I-365, ¶¶ 22, 55; and Case C-147/08, *Römer v. City of Hamburg*, 2011 E.C.R. I-3591, ¶ 60, referring to pt. 23 of CJEU *Kücükdeveci*.

55. On the visibility of disputes in this area involving European Union staff, see Siofra O’Leary, *Applying Principles of EU Social and Employment Law in EU Staff Cases*, 36 EUR. L. REV. 769, 769, 782 (2011).

56. See Case C-345/89, *Criminal Proceedings against Stoeckel*, 1991 E.C.R. I-4047 (condemning the ban on women’s night work in France as a violation of the equal treatment principle, leading to the ban being removed) (regardless of the judgment that may be made on the opportunity of this withdrawal). For decisions involving other possible infringements of rights, see Case C-438/05, *International Transport Workers’ Federation v. Viking Line*, 2007 E.C.R. I-10,779; Case C-341/05, *Laval v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11,767; Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-1989.

57. Case C-147/08, *Römer v. City of Hamburg*, 2011 E.C.R. I-3591; Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R. I-1757 (showing a functional approach to the comparability of married couples and couples in other forms of union in terms of access to a specific social benefit and its nature).

((from Paragraph 42) . . . It should be pointed out that, as is apparent from the judgment in *Maruko* (paragraphs 67 to 73), first, it is required not that the situations be identical, but only that they be comparable and, second, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. In that judgment, concerning the refusal to grant a survivor’s pension to the life partner of a deceased member of an occupational pension scheme, the Court did not carry out an overall comparison between marriage and registered life partnership under German law, but, on the basis of the analysis of German law carried out by the court which made the reference for a preliminary ruling, according to which there was a gradual harmonisation in German law of the regime put in place for registered life partnerships with that applicable to marriage, it made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow’s or widower’s pension.

((Paragraph 43] Thus, the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.)

58. Case C-267/12, *Hay v. Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres*, 2013 E.C.R. I-0000.

59. Law No. 2013–404 of May 17, 2013 (extending marriage to same-sex couples).

60. RICHARD BELLAMY, *CITIZENSHIP: A VERY SHORT INTRODUCTION* 12 (2008); recently, indirect discrimination has been used to vindicate men’s pension rights, Case C-173/13, *Leone, Leone v. Garde des Sceaux et Caisse nationale de retraites des agents des collectivités locales* (July 17, 2014), and concerning citizens indirectly discriminated against by association because they lived in Roma districts, Case C-83/14, *CHEZ Razpredelenie Bulgaria AD* (July 16, 2015).

61. See Article 157 of the Treaty on the Functioning of the European Union (TFUE) and the *Defrenne I*, *Defrenne II*, and *Defrenne III* judgments.

62. See Justice Oliver Wendell Holmes’s celebrated dissenting opinion in *Lochner v. New York*, 198 U.S. 45 (1905) (upholding this view).

63. See the preamble to the Charter, paragraph 2; and Mélanie Schmitt, *La dimension sociale du traité de Lisbonne*, 6 DR. SOC. 682, 684, 685 (2010).

64. Armin Von Bogandy, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*, 16 EUR. L.J. 95, 103–04 (2010).

65. Christophe Radé, *La question prioritaire de constitutionnalité et le droit du travail: a-t-on ouvert la boîte de Pandore?*, 9/10 DR. SOC. 873, 881 (2010).

66. See CC [Conseil constitutionnel] decision No. 2010–613 DC, Oct. 7, 2010 (declaring the full-face veil ban constitutional and no violation of principle of equality); see also the 2014 Baby Loup case on the veil in employment, Cass. soc., June 25, 2014, No. 13–28369, *infra* Chapter 5, and the Cour de Cassation has recently asked the CJEU for a preliminary ruling on the legality of a company ban of the veil imposed on a female engineer seen as an essential requirement for the job because of customer preference, Cass. soc., Apr. 9, 2015, No. 13–19855.

67. See FERDINAND MÉLIN-SOUCRAMANIEN, *LE PRINCIPE D'ÉGALITÉ DANS LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL* 194 (1997).

68. JEAN GICQUEL & JEAN-ERIC GICQUEL, *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES*, MONTCHRESTIEN 746 (2010).

69. CC [Conseil constitutionnel] decision, No. 2008–568 DC, Aug. 7, 2008 (reforming working hours) (recitals 7 and 8, referring to CC decision No. 87–232 DC, Jan. 7, 1988).

70. See commentary on CC [Conseil constitutionnel] decision, No. 2009–588 DC, Aug. 6, 2009, in 27 *LES CAHIERS DU CONSEIL CONSTITUTIONNEL* (2009). This was confirmed recently concerning the regulation of night work (Code du travail [C. Trav.] [Labor code] arts. 3122–32, 3122–33, 3122–36): the Conseil Constitutionnel decided the protection of health, security, rest, and leisure in the Preamble of the Constitution of 1946 should prevail over the right to freedom of enterprise. See CC decision No. 2014–373 QPC, Apr. 4, 2014.

71. Recent decisions do not often favor employees. See CC [Conseil constitutionnel] decision No. 2012–232 QPC, Apr. 13, 2012 (ruling no violation of the Constitution because of a difference of treatment concerning employees with under two years of seniority).

72. CC [Conseil constitutionnel] decision No. 2010–1 QPC, May 28, 2010.

73. CC [Conseil constitutionnel] decision No. 2010–83 QPC, Jan. 13, 2011, holds that Article 28 of the Civil and Military Retirement Pensions Code is unconstitutional, considering that it creates a difference in treatment “with regard to the increase in pension to include a family allowance among retired disabled civil servants who have raised at least three children and retired civil servants who are not disabled and have raised at least three children” and that “the difference in treatment thus created is not justified by the purpose of the law.”

74. The same observation can be made with respect to applications for preliminary rulings (QPC) relating to nondiscrimination issues that were not transmitted to the Conseil Constitutionnel: see Cass. ass. plén., June 25, 2010, No. 10–40.009 (on whether Labor Code art. 3245–1 infringes the principle of accessibility and comprehensibility of the law, the principle of equality, the right to ownership, the right to employment, and the antidiscrimination principle because it applies a five-year statute of limitations for wage claims made pursuant to Labor Code arts. L.7321–1 to L.7321–5). The Court declined to refer the application to the Conseil Constitutionnel, stating that “the issue raised, relating to the statute of limitations for wage claims, is not of a serious nature.”

75. On the role of the QPC in labor law, Jean-François Cesaro, *La QPC sociale: l'Eldorado des causes perdues?*, 22–23 JCP S. 17 (2011).

76. CC [Conseil constitutionnel] decision No. 2010–92 QPC, Jan. 28, 2011, considering “that by maintaining the principle according to which marriage is the union of a man and a woman, the legislature has, in exercising its power under Article 34 of the Constitution,

deemed that the difference in situation between couples of the same sex and those composed of a man and a woman can justify a difference in treatment with regard to the rules regarding the right to a family; that it is not for the Conseil Constitutionnel to substitute its judgment for that of the legislator regarding the consideration of this difference of situation” (recital 9).

77. Taking age into account does not infringe on the right to employment or the principle of equality. See Art. L. 1237–5 of the French Labor Code; CC [Conseil constitutionnel] decision No. 2010–98 QPC, Feb. 4, 2011. See also CC decision No. 2010–617 DC, Nov. 9, 2010 (on the law reforming retirement pensions).

78. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

79. See, e.g., the reasoning in *Lawrence v. Texas*, 539 U.S. 558 (2003). See also Roozbeh (Rudy) B. Baker, *Balancing Competing Priorities: Affirmative Action in the United States and Canada*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 527 (2009).

80. See Matthias Herdegen, *The Relation Between the Principles of Equality and Proportionality*, 22 COMMON MKT. L. REV. 683 (1985).

81. See Cass. soc., May 11, 2010, No. 08–45307 and No. 08–43681, Bull. civ. V, No. 105; Marie Mercat-Bruns, *Retour sur la discrimination fondée sur l’âge*, 10 REV. DR. TRAVAIL 587 (2010); Marie Mercat-Bruns, *Age and Disability Differential Treatment in France: Contrasting EU and National Courts Approaches to the Inner Limits of Anti-discrimination Law*, INT’L J. DISCRIMINATION L. (Nov. 12, 2014).

82. See Nicolas Moizard, *Quelques observations sur les méthodes d’interprétation de la Cour de justice en matière de droit social*, 12 DR. SOC. 1216, 1218 (2010); Frédérique Michéa, *Le traitement judiciaire du critère discriminatoire de l’âge: retour sur la jurisprudence récente de la CJUE*, 11 DR. SOC. 1060, 1068 (2010). See examples of recent CJEU age discrimination case law on legitimacy and proportionality test: Case C-20/13, Daniel Unland (Sept. 9 2015); Case C-515/13, Landin (Feb. 26, 2015), C-417/13, Starjakob (Jan. 28, 2015).

83. See the comparison between the proportionality tests in German and in EU law, Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 185 (2010).

84. See § 23–2 of Ordinance No. 58–1067, Constituting an Institutional Act on the Constitutional Council.

85. Case C-188/10, Melki v. France, and Case C-189/10, Abdeli v. France, 2010 E.C.R. I-5667; Xavier Prétot, *La Constitution, la loi et le droit de l’Union européenne*, 11 REV. JURIS. SOC. 734 (2010).

86. See *supra* notes 63, 64, 83.

87. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

88. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). See also MARIE MERCAT-BRUNS, *VEILLISSEMENT ET DROIT À LA LUMIÈRE DU DROIT FRANÇAIS ET DU DROIT AMÉRICAIN* (2001); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (providing an almost contrary critical reading considering fundamental rights to be cardinal rights); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (providing a critical reading with a different understanding that values courts).

89. See RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE* (2005).

90. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 54 (2010).

91. *Infra* Chapter 4 and Chapter 5 on gender discrimination.

92. Inspired by American legal realism, the CLS movement emerged in the 1970s. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); COSTA DOUZINAS &

ADAM GEAREY, *CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE* (2005); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983); LEFT LEGALISM / LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2003); DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION* (2004); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997).

93. MICHEL FOUCAULT, *SURVEILLER ET PUNIR* (1975); Jacques Derrida, Introduction, in EDMUND HUSSERL, *L'ORIGINE DE LA GÉOMÉTRIE* (1962); JACQUES DERRIDA, *FORCE DE LOI* (1994); JACQUES DERRIDA, *L'ÉCRITURE ET LA DIFFÉRENCE* (1967).

94. See François Ewald, *Le droit du travail: une légalité sans droit?*, 11 DR. SOC. 723, 723–28 (1985); Antoine Jeammaud, *Propositions pour une compréhension matérialiste du droit du travail*, 11 DR. SOC. 337, 337–45 (1978); Antoine Jeammaud, *La règle de droit comme modèle*, RECUEIL DALLOZ 199, 199–210 (1990); Antoine Jeammaud & Evelyne Serverin, *Evaluer le droit*, RECUEIL DALLOZ 263, 263–68 (1992); Antoine Jeammaud, *Les règles juridiques et l'action*, RECUEIL DALLOZ 207, 207–12 (1993); Antoine Jeammaud et al., *L'ordonnement des relations du travail*, RECUEIL DALLOZ 359, 359–68 (1998). On legal sociology, see JEAN CARBONNIER, *FLEXIBLE DROIT* (2001). See critical thought in other countries: Birkbeck (University of London), University of Melbourne, University of Kent, Keele University, University of Glasgow, and University of East London. There is also a strong critical legal tradition of course in Belgium. See also the law reviews *LAW AND CRITIQUE* and *AUSTRALIAN FEMINIST LAW JOURNAL*, among others.

95. See Marie Mercat-Bruns, *La doctrine américaine sur les discriminations et le genre: dialogue entre la critique du droit et la pratique*, 2 JURIS. REV. CRIT. 93 (2011).

96. See generally LIBBY S. ADLER ET AL., *WOMEN AND THE LAW* (4th ed. 2008); and WILLIAM N. ESKRIDGE & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (2nd ed. 2004).

97. For all of these issues, see *infra* Chapter 5, Sections III, IV, and V.

98. Chapter 4 will look at the contours of “institutional” discrimination found in disparate impact cases, for example.

99. See generally ROBERT C. POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 1 (2001).

2. ANTIDISCRIMINATION MODELS AND ENFORCEMENT

1. This interview has been enriched, at the request of Robert Post, with excerpts from his publications.

2. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 4 (1995).

3. *Id.* at 4–5.

4. *Id.*

5. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law of Tort*, 77 CAL. L. REV. 957 (1989).

6. PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 358 (1994).

7. POST, *supra* note 2, at 3.

8. *Id.*

9. POST, *supra* note 5.

10. POST, *supra* note 2, at 3.

11. Post, *supra* note 5, at 961.
12. FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS, § 16.2 (1956).
13. POST, *supra* note 2, at 27.
14. See ROBERT POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 1 (2001).
15. POST, *supra* note 2, at 6.
16. *Id.* at 7.
17. *Id.*
18. *Id.* at 7–8.
19. *Lochner v. New York*, 198 U.S. 45 (1905) (Supreme Court decision holding that the Fourteenth Amendment protects an individual's "general right to make a contract in relation to his business" and striking down a New York law prohibiting individuals from working in bakeries for more than ten hours per day or sixty hours per week).
20. POST, *supra* note 2, at 8.
21. For a better understanding of the first, second, and fourth functions, see POST, *supra* note 2, at 1.
22. See *infra* Chapter 4, for reflections on the concept of reasonable accommodation and systemic discrimination.
23. See *Jordan v. United Kingdom*, App. No. 24746/94, 2001-III Eur. Ct. H.R. 537; *Zarb Adami v. Malta*, App. No. 17209/02, Eur. Ct. H.R. 305 (2006-VIII); *D.H. v. Czech Republic*, App. No. 57325/00, Eur. Ct. H.R. (2007); *Oršuš v. Croatia*, App. No. 15766/03, Eur. Ct. H.R. (2010); and see JEAN-FRANÇOIS RENUCCI, DROIT EUROPÉEN DES DROITS DE L'HOMME 82 (2010). On the other hand, no indirect discrimination based on religion in *S.A.S. v. France*, No. 43835/11, Eur. Ct. H.R. (2014).
24. See Sophie Robin-Olivier, *Politique sociale de l'Union européenne*, 3 RTD EUR. 673 (2010).
25. Especially when the notion of harassment as it affects the dignity of the person is considered as a form of discrimination. See, e.g., Directive 2000/78/EC.
26. See also Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008).
27. Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 158 (2010).
28. On the employment of older workers, see Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-9981, even though today the CJEU is more often deferent when scrutinizing, for example, retirement policies targeting older workers, see Case C-141/11, *Torsten Hörnfeldt v. Posten Meddelande AB*, 2012 E.C.R. I-00000, or pay grading schemes if they are transitional; see, for example, Case C-501/12, *Specht* (June 19, 2014); Case C-20/13, *Daniel Unland* (Sept. 9, 2015).
29. See Mark Bell & Lisa Waddington, *Reflecting on Inequalities in European Equality Law*, 28 EUR. L. REV. 349, 351 (2003).
30. *Id.* at 351–52.
31. See also Moshe Cohen-Eliya, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463 (2011).
32. Mark Bell & Lisa Waddington, *More Equal Than Others: Distinguishing European Union Equality Directives*, 38 COMMON MKT. L. REV. 587 (2001).
33. See Marie Mercat-Bruns, *Âge et discrimination indirecte: une jurisprudence en gestation* (Soc. 19 octobre 2010, 2 arrêts), 7–8 REV. DR. TRAVAIL 441, 443 (2011). The challenges of disparate impact discrimination in the United States have let some American scholars to provide another, more global view of equality norms: "Antidiscrimination law is best

justified as a policy tool that aims to dismantle patterns of group-based social subordination, and that does so principally by integrating members of previously excluded, socially salient groups throughout important positions in society. . . . I recognize that my definition of 'antidiscrimination' leaves out an important aspect of what we usually call antidiscrimination law—the prohibition on practices that have a disparate impact on members of protected classes and that lack a sufficient business justification." Samuel Bagenstos, *Rational Discrimination, Accommodation and the Politics of Disability (Civil) Rights* 89 VA. L. REV. 833, 839 (2003); Samuel Bagenstos, *Employment Law and Social Equality* 112 MICH. L. REV. 226 (2013); Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory* 38 HARV. C.R.-C.L. L. REV. 91 (2003).

34. See EQUAL, http://ec.europa.eu/employment_social/equal_consolidated/ (archived Mar. 24, 2011); EQUINET, EUROPEAN NETWORK OF EQUALITY BODIES, <http://www.equineteurope.org/>.

35. Christopher McCrudden, Theorizing European Equality Law and the Role of Mainstreaming, in Equality Authority Conference on Equality Law, Dublin (2001); AILEEN MCCOLGAN, DISCRIMINATION, EQUALITY AND THE LAW 6 (2014).

36. Bell & Waddington, *supra* note 32, at 358.

37. See from the lower court case Conseil de Prud'hommes [CP] [labor court] Mantes la Jolie, Dec. 13, 2010, Association Baby-Loup, No. 10-00587, to the last decision of the Cour de Cassation upholding a restriction of religious practice (veil) in a day care center, Cass. soc., June 25, 2014, No. 13-28369, on the dilemmas of equality and liberty in the workplace; see also Cass. soc., Apr. 9 2015, No. 13-19855: the Cour de Cassation is asking the CJEU for preliminary ruling on the question whether banning the veil of an engineer can be an essential and determining requirement for the job because of customer preference; see Marie Mercat-Bruns, *Les discriminations multiples au croisement des questions d'égalité et de libertés*, 1 REV. DR. TRAVAIL 28 (2015).

38. Case C-303/06, *Coleman v. Attridge Law & Steve Law*, 2008 E.C.R. I-5603; for a more recent decision on indirect discrimination by association, see *supra* Chapter 1, note 60: Case C-83/14, *CHEZ Razpredelenie Bulgaria AD* (July 16, 2015).

39. Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R. I-1757; Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg* 2011 E.C.R. I-03591; Case C-267/12, *Hay v. Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres*, 2013 E.C.R. I-0000 (Dec. 12, 2013); Case C-81/12 25 Accept (Apr. 25, 2013).

40. "Under article L.331-8 and D.331-4 of the Social Security Code, paternity leave is linked to the father because of the legal parent-child relationship; these provisions exclude any discrimination based on sex or sexual orientation and do not infringe on the right to a family life. Considering the Court of Appeals rightly decided that Miss X could not benefit from the paternity leave . . .," Cass. 2e civ., Mar. 11, 2010, No. 09-65.853, Bull. civ., II, No. 57. This contrasts with the CJEU's consideration of cases involving leave for mothers who use surrogates, although it has not recognized the right at this point: see recently Cases C-167/12, *C.D. v S.T.*, 2014 E.C.R. I-000 and C-363/12, *Z. v. A Government Department*, E.C.R. I-000.

41. See Laure Bereni, *Faire de la diversité une richesse pour l'entreprise: La transformation d'une contrainte juridique en catégorie managériale*, 35 RAISONS POLITIQUES 87 (2009).

42. See the unsuccessful litigation of an employer contesting the investigations of the HALDE, which were seen as favoring the employee and violating the principle of equality of arms at trial under article 6 of the European Convention, Cass. soc., June 2, 2010, No. 08-40.628, Bull. civ. V, No. 124.

43. See proportionality test in art. 6 of Directive 2000/78/EC.

44. See generally LUCIE CLUZEL-MÉTAYER & MARIE MERCAT-BRUNS, *DISCRIMINATIONS DANS L'EMPLOI: ANALYSE COMPARATIVE DE LA JURISPRUDENCE DU CONSEIL D'ÉTAT ET DE LA COUR DE CASSATION* (2011).

45. Law 2001-1066 of Nov. 16, 2001 (against discrimination); Law 2008-496 of May 27, 2008 (on adjustments to EU law to combat discrimination).

46. The concept of systemic discrimination is not included in French law, whereas the United States refers to systemic disparate treatment, and case law in Canada defines systemic discrimination; see decision of the Supreme Court of Canada, ATF c. C.N. (25 juin 1987, RCS 1114). The EEOC describes it on its website (<http://www.eeoc.gov/eeoc/systemic/>):

Systemic discrimination involves a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area. [...] Examples of systemic practices include: discriminatory barriers in recruitment and hiring; discriminatorily restricted access to management trainee programs and to high level jobs; exclusion of qualified women from traditionally male dominated fields of work; disability discrimination such as unlawful pre-employment inquiries; age discrimination in reductions in force and retirement benefits; and compliance with customer preferences that result in discriminatory placement or assignments.

The French class action bill still pending in Parliament (<http://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000030962821&type=general&typeLoi=proj&legislature=14>) might lead to further reflection on structural discrimination; see Marie Mercat-Bruns & Emmanuelle Boussard Verrecchia, *Appartenance syndicale, sexe, âge et inégalités: vers une reconnaissance de la discrimination systémique*, REV. DR. TRAVAIL 91 (2015); Marie Mercat-Bruns, *Comparaison entre les discriminations fondée sur l'appartenance syndicale, l'âge et le sexe, révélatrice de la discrimination systémique* REV. DR. TRAVAIL 103 (2015).

47. See the reports from the HALDE (the last annual report was submitted by Éric Molinié for 2010) and the current reports from the Defender of Rights, <http://www.defenseurdesdroits.fr/documentation>.

48. It is necessary to compare, for example, the decision making of the HALDE in the public sphere and that of the Defender of Rights; see art. 1 of Organic Law 2011-333 of Mar. 29, 2011 (describing the organization of the Defender of Rights): the Defender of Rights is not the competent authority for claims between public persons and institutions with public service missions, but it is a constitutional body.

49. The recent introduction of a French bill to promote a form of class action (*action de groupe*) against discrimination reflects the increasing political momentum to encourage broader litigation against discrimination through NGOs and unions. See link for legislative history of bill still pending: <http://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000030962821&type=general&typeLoi=proj&legislature=14>.

Two different versions of the bill passed in the National Assembly and Senate, which are going to be merged by legislative committee into a final version of the law, submitted for adoption in January 2016.

50. At this point, it looks like the French judicial review (*question prioritaire de constitutionnalité* [QPC]) serves more to legitimize the changes brought about exclusively by the legislative branch, without applying its own substantive equality standard. Consider the way the Constitutional Council decided, before the French law of 2013 on same-sex marriage, that treating people in different situations (same-sex couples) differently did not violate the principle of equality: CC decision No. 2010-92 QPC, Jan. 28, 2011. Following the adoption of the same-sex marriage law, the Conseil Constitutionnel reversed its position: CC decision No. 2013-669 DC, May 17, 2013. Compare with the more progressive recent

U.S. Supreme Court decision on same-sex marriage: *Obergefell v. Hodges*, 576 U.S. ____ (2015).

51. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) [hereinafter Siegel, *Equality Talk*]; Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278 (2011) [hereinafter Siegel, *Colorblindness to Antibalkanization*]; Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013) [hereinafter Siegel, *Equality Divided*].

52. Siegel, *Colorblindness to Antibalkanization*, *supra* note 51.

53. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

54. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

55. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671, 174 L. Ed. 2d 490 (2009).

56. Siegel, *Colorblindness to Antibalkanization*, *supra* note 51, at 1278, 1282.

57. See Frédérique Michéa, *La cohésion sociale en droit communautaire* (2003) (unpublished thesis, Université de Rennes, supervised by Daniel Gadbin).

58. The article has since been published: Siegel, *Colorblindness to Antibalkanization*, *supra* note 51.

59. See *infra* Chapter 3 on systemic discrimination.

60. Siegel, *Colorblindness to Antibalkanization*, *supra* note 51.

61. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

62. “The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality’s postulate that ‘[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race’ . . . is not sufficient to decide these cases. . . . The enduring hope is that race should not matter; the reality is that too often it does.” *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring in part and concurring in the judgment).

63. *Id.* at 789.

64. *Id.* at 797.

65. *Id.* at 789.

66. See MARTHA MINOW, *MAKING THE DIFFERENCE : INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

67. Law 2011–103 of Jan. 27, 2011 (on the balanced representation of women and men in executive boards and professional equality). Its scope was extended to other institutions within the public sector by Law 2014–873 of Aug. 4, 2014 (on real equality between men and women), http://www.legifrance.gouv.fr/eli/loi/2014/8/4/FVJX1313602L/jo/article_61; *Commission Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-executive Directors of Companies Listed on Stock Exchanges and Related Measures*, COM (2012) 614 final (Nov. 14, 2012).

68. The HALDE also recommended adding place of residence as a prohibited ground of discrimination in its decision No. 2011–121 of Apr. 18, 2011; this proposal was adopted in a recent law on urbanization, Law 2014–173 of Feb. 21, 2014.

69. See FRENCH AMERICAN FOUNDATION, *PROMOUVOIR L’ÉGALITÉ DES CHANCES DANS L’ENSEIGNEMENT SUPERIEUR SELECTIF: L’EXPÉRIENCE AMERICAINE DES PERCENTAGES PLANS ET SA PERTINENCE DANS LE CONTEXTE FRANÇAIS* (2008).

70. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671, 174 L. Ed. 2d 490 (2009).

71. Siegel, *Colorblindness to Antibalkanization*, *supra* note 51, at 1365–66.

72. Senator Barack Obama, *A More Perfect Union*, Address at the National Constitution Center (Mar. 18, 2008), http://constitutioncenter.org/amoreperfectunion/docs/Race_Speech_Transcript.pdf.

73. Siegel, *Equality Divided*, *supra* note 51.
74. Michéa, *supra* note 57.
75. Jean-Philippe Lhernould, *L'éloignement des Roms et la directive 2004/38 relative au droit de séjour des citoyens de l'UE*, 11 DR. SOC. 1024 (2010) ; Serge Slama, *Roms, Go Home*, Recueil Dalloz 2056 (2010); Jean-Pierre Margénaud & Jean Mouly, *Délogement et relogement des Roms: la France dans le collimateur de la CEDH*, Recueil Dalloz 2678 (2013).
76. See *infra* Chapter 4 on indirect discrimination.
77. See on gender, ÉRIC FASSIN, *L'INVERSION DE LA QUESTION HOMOSEXUELLE* (2005); Éric Fassin, *Statistiques raciales ou racistes? Histoire et actualité d'une controverse française*, in LES NOUVELLES FRONTIÈRES DE LA SOCIÉTÉ FRANÇAISE 427 (Didier Fassin ed., 2010); ÉRIC FASSIN ET AL., *ROMS ET RIVERAINS, UNE POLITIQUE MUNICIPALE DE LA RACE* (2014).
78. See Siegel, *Colorblindness to Antibalkanization*, *supra* note 51, at 1346 ("managing the 'public social meaning'").
79. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).
80. See CONSEIL REPRÉSENTATIF DES ASSOCIATIONS NOIRES, <http://lecran.org/>.
81. See LOUIS CHAUVEL, *LE DESTIN DES GÉNÉRATIONS: STRUCTURE SOCIALE ET COHORTES EN FRANCE DU XXIÈME SIÈCLE AUX ANNÉES 2010* (2011).
82. See the growing body of case law on age discrimination, Marie Mercat-Bruns, *Retour sur la discrimination fondée sur l'âge*, 10 REV. DR. TRAVAIL 587 (2010) and *infra* Chapter 5; Marie Mercat-Bruns, *Age and disability differential treatment in France—Contrasting EU and national courts approaches to the inner limits of anti-discrimination law*, INT'L J. DISCRIMINATION & L. (Nov. 12, 2014), <http://jdi.sagepub.com/content/early/2014/11/12/1358229114558383.abstract>. See more recently for example, CJEU Case C-529/13, *Felber*, (Jan. 21, 2015); Case C-417/13, *Starjakob* (Jan. 28, 2015); Case C-20/13, *Daniel Unland* (Sept. 9, 2015); Case C-432/14, *Bio Philippe Auguste SARL* (Oct. 1, 2015).
83. See EEOC, <http://www.eeoc.gov/>; Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and structural reform of the American workplace*, 91 WASH. U.L. REV. 1519 (2014); Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC* 95 B.U. L. REV. 1133 (2015).
84. See also Julie C. Suk, *Criminal and Civil Enforcement of Antidiscrimination Law in Europe*, 14 EUR. ANTI-DISCRIMINATION L. REV. 11 (2012).
85. The comparative outlooks in this work do not dwell on remedies, but the interviewed scholars cover this point.
86. Punitive damages do not exist in France, and in the United States these damages do not exist for age discrimination.
87. Even though a statute of limitations exists in claims for discrimination, the "reality" of the discrimination, as the Cour de Cassation calls it, can cover periods of time prior to that specified by this statute of limitations to acknowledge the difference of treatment with colleagues hired at the same time with the same qualifications. See Cass. soc., Jan. 26, 2010, No. 08-44397; Cass. soc., Feb. 4, 2009, No. 07-42697; see also Cass. soc., June 12, 2012, No. 10-14632; Cass. soc., Jan. 15, 2014, No. 12-24860 and No. 12-24966 (after reinstatement, on the calculation of remedies in a case of discrimination based on health status).
88. See Julie C. Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295 (2007).
89. National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69.
90. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, <http://www.naacp.org/content/main>.
91. AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/>.

92. NATIONAL LAWYERS GUILD, <https://www.nlg.org/>.
93. On the prohibition of discrimination based on race, color, religion, sex, and national origin in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and its amendments with the Civil Rights Act of 1991 (Pub. L. 102-166).
94. See *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) on June 20, 2011, limiting the scope of class action lawsuits in cases of discrimination under civil procedure Rule 23(b) (2). It does not apply to equal pay class action cases (Equal Pay Act): Allen Smith, *Pay Class Actions Will Survive*, Jun. 1, 2011, <http://www.shrm.org/legalissues/federalresources/pages/payclassactions.aspx>.
95. David Benjamin Oppenheimer, *Verdicts Matter : An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003).
96. Julie C. Suk, *supra* notes 84 and 88.
97. See laws and guidelines of the EEOC: <http://www.eeoc.gov/laws/regulations/index.cfm>; <http://www.eeoc.gov/laws/guidance/index.cfm>.
98. See *infra* Chapter 5 for case law on the concept of disability in the Americans with Disability Act (ADA), reversed by the 2008 amendments of the ADA, <http://www.ada.gov/pubs/ada.htm>.
99. On physical appearance discrimination, see ROBERT POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 1 (2001).
100. Thereza M. Beiner, *The Many Lanes Out of Court : Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837 (2014).
101. On pregnancy discrimination, Marie Mercat-Bruns, *La portée de l'interdiction de licenciement au moment du congé maternité*, 1 REV. DR. TRAVAIL 31 (2011).
102. Although today, experts like Julie Suk observe that the challenge is more often that cases like *Bell Atlantic v. Twombly* 550 U.S. 544 (2007) have raised the burden of pleading for plaintiffs in civil proceedings; the burden of proof of discrimination has not been raised, but it is harder for plaintiffs to vindicate rights in court.
103. SERVICE EMPLOYEES INTERNATIONAL UNION, <http://www.seiu.org/>.
104. AMERICAN FEDERATION OF LABOR, <http://www.aflcio.org/>.
105. Montgomery passed away in 2011. DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND RADICAL REPUBLICANS 1862-1872* (1981); DAVID MONTGOMERY, *BLACK WORKERS' STRUGGLE FOR EQUALITY IN BIRMINGHAM* (2004); DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* (1994).
106. Even though case law on union discrimination is extensive; see recently an interesting case on indirect discrimination based on different wage calculations after participation in a strike, Cass. soc., *July 9, 2015*, 14-12779.
107. Despite the challenges the ILO is facing in the global context, which is less favorable to social norms. See Jean-Michel Servais, *L'incontournable besoin d'une agence de régulation sociale*, REV. DR. TRAVAIL 530 (2012).
108. See Cass. soc., *July 10, 2001*, Bull. No. 261: under article L.412-2 of the French Labor Code, the dismissal of an employee based on union discrimination is null and void; see also Cass. soc., *July 9, 2014*, No. 13-16434 and No. 13-16805.
109. Outside of European collective bargaining agreements, see MICHEL MINÉ ET AL., *DROIT SOCIAL INTERNATIONAL ET EUROPÉEN EN PRATIQUE* 73 (2013).
110. See CLUZEL-MÉTAYER & MERCAT-BRUNS, *supra* note 44, at 65; see recently Cass. soc., *Jan. 15, 2014*, No. 12-24860; Cass. soc., *Oct. 8, 2014*, No. 13-18342; Cass. soc., *Nov. 26, 2014*, No. 13-21379.

111. CLUZEL-MÉTAYER & MERCAT-BRUNS, *supra* note 44, at 23. Recent decisions on equal pay demonstrate that diplomas still play a role to identify work of comparable value, Cass. soc., Sept. 30, 2015, No. 14-17748.

112. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944).

113. See Law 2008-789 of Aug. 20, 2008 (on the renovation of social democracy and reform of worktime), and Law 2013-504 of June 14, 2013 (on securing employment).

114. On the “Justice for Janitors” campaign by Latino immigrants, see Maria Ontiveros, *A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalization*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 418 (Joanne Conaghan et al. eds., 2002).

115. Michael Selmi & Molly S. McUsic, *Difference and Solidarity: Unions in a Postmodern Age*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION*, *supra* note 114, at 430.

116. *Id.* at 443.

117. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).

118. See Morgan Sweeney, *L'égalité en droit social au prisme de la diversité et du dialogue des juges* (2010) (unpublished thesis on diversity, Université Paris Ouest Nanterre).

3. DISPARATE TREATMENT DISCRIMINATION: INTENT, BIAS, AND THE BURDEN OF PROOF

1. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, at 986.

2. In the absence of overt discrimination, a “smoking gun.” See *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). But overt discrimination is not always required in mixed motive cases; see *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

3. On the difficulty of obtaining access to proof in discrimination cases in France, see LUCIE CLUZEL-MÉTAYER & MARIE MERCAT-BRUNS, *DISCRIMINATIONS DANS L'EMPLOI: ANALYSE COMPARATIVE DE LA JURISPRUDENCE DU CONSEIL D'ÉTAT ET DE LA COUR DE CASSATION* 69 (2011).

4. Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn*, 2008 E.C.R. I-5187 (discriminatory statements made to a newspaper by a Belgian employer who said he could not hire persons from the Maghreb to sell gates door-to-door because customers would not open to them).

5. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

6. See *McDonnell*, 411 U.S.; and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 253 (1981) (“the plaintiff has the burden of establishing a prima facie case, which he/she can satisfy by showing that (i) he belongs to a racial minority; (ii) he applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with plaintiff's qualifications”); and subsequent cases: *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). See also later cases on the prima facie framework, not necessarily on hiring: *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 918-19 (8th Cir. 2000); *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998); *Silvera v. Orange Cnty. Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001); *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1311 (11th Cir. 1998).

7. Cécile Michaud, *La preuve des discriminations en droit du travail*, 46 JCP S 11 (2012); generally, on rules of evidence in France, see ETIENNE VERGES, GERALDINE VIAL, & OLIVIER LECLERC, *DROIT DE LA PREUVE* (2015).

8. *McDonnell*, 411 U.S. at 807; *Lindahl v. Air France*, 930 F.2d 1437 (1991); *Lowe v. City of Monrovia*, 775 F.2d 1008 (1985); see Deborah C. Malamud, *The Last Minuet: Disparate*

Treatment After Hicks, 93 MICH. L. REV. 2229 (1995); Note, *Title VII—Burden of Persuasion in Disparate Treatment Cases*, 107 HARV. L. REV. 342, 348 (1993).

9. See Cass. soc., Nov. 10, 2009, No. 07-42849; Cass. soc., Mar. 23, 2011, No. 09-42666 FSPB; Cass. soc., Jun. 29, 2011, No. 10-14067; Cass. soc., June 12, 2013, No. 12-14.153; Cass. soc., Feb. 20, 2013, No. 10-30028.

10. In this case, it was simpler to prove indirect discrimination; proof of direct discrimination was harder without a comparator. See Cass. soc., Nov. 3, 2011, No. 10-20765 (“To characterize discrimination does not require a comparison with the situation of other workers”).

11. Cass. soc., Oct. 8, 2014, No. 13-11789. See Marie Mercat-Bruns, *Inaptitude physique non professionnelle et discrimination directe dans une convention collective*, 2 REV. DR. TRAVAIL 119 (2015).

12. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

13. Susan P. Sturm, *The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J.L. & GENDER 407 (2007).

14. Marie Mercat-Bruns, *Sciences sociales et discrimination dans l'emploi: leçons de l'expérience américaine*, 2 LAW & EUR. AFF. 185 (2010).

15. Research on this field is prolific outside of the work by L. Krieger and C. Jolls. For example, see Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381 (2014); Samuel Bagenstos, *The Structural Turn and Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Barbara Flagg, *Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Tristin Green, *Discrimination in the Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. REV. 91 (2003); Anton Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); Kevin Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009); R. A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Jerry Kang & Mazahrin Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063 (2006).

16. Anthony Greenwald & Linda Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006). See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/>. It is still difficult to win a case on gender bias within a certain profession; see the 2015 *Ellen Pao v. Kleiner Perkins* case: <http://www.npr.org/sections/thetwo-way/2015/09/10/439232954/ellen-pao-former-reddit-ceo-drops-appeal-in-gender-discrimination-lawsuit>.

17. Amy Wax, *The Discriminating Mind: Find It, Prove It*, 40 CONN. L. REV. 979 (2009).

18. Richard T. Ford, *Lutter contre les discriminations raciales: les vertus de la mesure statistique*, in DIVERSITÉ ET DISCRIMINATIONS RACIALES: UNE PERSPECTIVE TRANSATLANTIQUE 76, 83 (Frédéric Guionard & Sophie Robin-Olivier eds., 2009).

19. See Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

20. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

21. Greenwald & Krieger, *supra* note 16, at 945.

22. Christine Jolls, *Behavioral Economics Analysis of Employment Law*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 264 (Eldar Shafir ed., 2013).

23. For further discussion of empirical evidence of implicit racial and other bias, see Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

24. *Id.*

25. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957); Edmund Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972); Ariane Ghirardello, *Pour une analyse économique positive de la discrimination*, 11 ECON. & SOC. 1891 (2004); Stéphane Carcillo & Etienne Wasmer, *Discrimination and Bilateral Human Capital Investments Decisions*, 71–72 ANNALES D'ÉCONOMIE & STATISTIQUES 317 (2003).

26. *La validité méthodologique du testing*, OBSERVATOIRE DES DISCRIMINATIONS, UNIVERSITÉ PARIS 1 PANTHÉON SORBONNE, <http://www.observatoiredesdiscriminations.fr/#!testing/cid3j>.

27. See Devah Pager, *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization*, 73 SOC. PSYCHOL. Q. 79 (2010); Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009).

28. A new report came out on May 19, 2015, from France's Ministry of Labor, Ministry of Justice, and Ministry of Youth and Sports, recommending eighteen measures to fight discrimination in employment: among them, the report recommends auto-testing measures that encourage companies to participate in external evaluations and verify résumé selection to check for biases in recruitment. The report also advises introducing into law a type of class-action type procedure against discrimination. See *infra* Chapter 2, note 47. See also *Trois ministres engagés contre les discriminations au travail*, MINISTRY OF JUSTICE (May 19, 2015), <http://www.justice.gouv.fr/la-garde-des-sceaux-10016/trois-ministres-engages-contre-les-discriminations-au-travail-28097.html>.

29. Elizabeth Levy Paluck & Donald P. Green, *Prejudice Reduction: What Works? A Critical Look at Evidence from the Field and the Laboratory*, 60 ANN. REV. PSYCHOL. 339 (2009).

30. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006).

31. *Rep. from the European Commission to the European Parliament and the Council on the Application of the Racial Equality Directive 2000/43/EC and Employment Equality Directive 2000/78/EC*, at 10, COM (2014) 2 final (Jan. 17, 2014), http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf.

32. Linda Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in *SEX DISCRIMINATION IN EMPLOYMENT* 295, 310 (Faye Crosby et al. eds, 2007).

33. See Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Tristin Green, *The Future of Systemic Disparate Treatment Law* 32 BERKELEY J. EMP. & LAB. L. 387 (2011).

34. Gwénaële Calvès, *Reflecting the Diversity of the French Population*, 57 INT'L. SOC. SCI. J. 165 (2005); REJANE SENAC, *L'INVENTION DE LA DIVERSITÉ* (2012).

35. Definition of *social framework evidence*: "In employment litigation, an expert offering social framework testimony will explain the general social science research on the operation of stereotyping and bias in decision making and will examine the policies and practices operating in the workplace at issue to identify those that research has shown will tend to increase or limit the likely impact of these factors." Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 39 (2009).

36. See Marie Mercat-Bruns, *Égalité salariale, discriminations individuelles et systémiques: un éclairage de la jurisprudence américaine*, 114 REVUE DE L'OFCE 95 (2010).

37. Marie Mercat-Bruns, *Sciences sociales et discrimination dans l'emploi: leçons de l'expérience américaine*, 2 LAW & EUR. AFF. 185 (2010).

38. Criminal sanctions are found in arts. 225–1 and 225–2 of the French Penal Code. The articles prohibit (intentional) direct discrimination but not indirect discrimination.

There is no shift in the burden of proof in criminal procedure. On the limits of proving discrimination through criminal sanctions, see Elisabeth Fortis, *Réprimer les discriminations depuis la loi du 27 novembre 2008: entre incertitudes et impossibilités*, ACTUALITÉS JURIDIQUES PÉNAL 303 (2008). For a recent example of a criminal case in which discrimination based on disability was rejected, see Cass. crim., *Mar. 17, 2015, No. 13-88062*.

The French version of this book also goes into more depth to explain the scope of criminal law prohibiting antidiscrimination and the limited case law in the employment sector because of the standard of proof in criminal proceedings: MARIE MERCAT-BRUNS, DISCRIMINATIONS AU TRAVAIL: DIALOGUE AVEC LA DOCTRINE AMÉRICAINE 210 (2013).

39. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA L. REV. 899 (1993).

40. *Id.* at 899–978.

41. This development in tort law stems from a broad interpretation of art. 1384 of the Civil Code; see Matthieu Poumarède, *L'avenement de la responsabilité du fait d'autrui*, in MÉLANGES EN L'HONNEUR DE PHILIPPE LE TOURNEAU 839 (2008).

42. JACQUES FLOUR ET AL., LES OBLIGATIONS: 2. LE FAIT JURIDIQUE 80 (2011).

43. See RAYMOND SALEILLES, LES ACCIDENTS DE TRAVAIL ET LA RESPONSABILITÉ CIVILE: ESSAI D'UNE THÉORIE OBJECTIVE DE LA RESPONSABILITÉ DÉLICTEUELLE (1897), <http://gallica.bnf.fr/ark:/12148/bpt6k5455257c>.

44. Yvonne Lambert-Faivre, *Léthique de la responsabilité*, REV. TRIM. DR. CIV. 1 (1998).

45. See PHILIPPE BRUN, RESPONSABILITÉ CIVILE EXTRA CONTRACTUELLE 11 (2009).

46. See PHILIPPE KOURILSKY & GENEVIÈVE VINEY, LE PRINCIPE DE PRÉCAUTION: RAPPORT AU PREMIER MINISTRE (2000).

47. Some authors are worried that there is a progressive tortification of employment discrimination law in the United States; see William Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?* 75 OHIO ST. L.J. 1027 (2014) (following Supreme Court decisions like *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1191 (2011)).

48. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), was the first case to confront the issue directly. Then the Civil Rights Act of 1991 (Pub. L. No. 102–166, 105 Stat. 1071, § 2 (1991) (codified as amended at 42 U.S.C. § 1981 (2008))) made it easier on the plaintiff in these types of cases.

49. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2532–33 (2013).

4. FROM DISPARATE IMPACT TO SYSTEMIC DISCRIMINATION

1. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009). See Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 411 (2010); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1345 (2010); for a critical view of disparate impact discrimination, see Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 625 (2011).

2. See, for example, Cass. soc., June 6, 2012, No. 10–21489; Cass. soc., July 3, 2012, No. 10–23013; Cass. soc., May 23, 2012, No. 10–18341; Cass. soc., Feb. 12, 2013, No. 11–27689; Cass. soc., Sept. 30, 2013, No. 12–14752; see Marie Mercat-Bruns, *Pourquoi certains métiers féminisés ne rentrent pas dans le “cadre”?* 35 JCP 908 (2012) [hereinafter Mercat-Bruns, *Métiers féminisés*]. After asking the CJEU whether it was indirect discrimination to treat married and civil union couples differently with regard to a collective bargaining right, the court followed the CJEU and concluded that it was direct discrimination, See Cass. soc., July 9, 2014, No. 10–18341; Cass. soc., Sept. 24, 2014, Nos. 13–10233, 13–10234; Cass. soc.,

Oct. 22, 2014, joined cases No. 13–16936 and No. 13–17209 (a case rejecting indirect sex discrimination).

3. See CHRISTA TOBLER, *INDIRECT DISCRIMINATION: A CASE STUDY IN THE DEVELOPMENT OF THE LEGAL CONCEPT OF INDIRECT DISCRIMINATION UNDER EC LAW 424* (2005).

4. According to the EEOC, “systemic practices include: discriminatory barriers in recruitment and hiring; discriminatorily restricted access to management trainee programs and to high level jobs; exclusion of qualified women from traditionally male dominated fields of work; disability discrimination such as unlawful pre-employment inquiries; age discrimination in reductions in force and retirement benefits; and compliance with customer preferences that result in discriminatory placement or assignments. . . . The identification, investigation and litigation of systemic discrimination cases, along with efforts to educate employers and encourage prevention, are integral to the mission of the EEOC.” *Systemic Discrimination*, EEOC (n.d.), <http://www1.eeoc.gov/eeoc/systemic/index.cfm>. The Ministry of Justice and the Defender of Rights have also ordered a report on the implementation of antidiscrimination law in France that will cover the issue of systemic discrimination, headed by the Sciences Po law school/political research center and CERSA (Centre d’Études et de Recherches de Sciences Administratives et Politiques): see MARIE MERCAT-BRUNS & JEREMY PERELMAN, *LES JURIDICTIONS ET LES INSTANCES PUBLIQUES DANS LA MISE EN OEUVRE DU PRINCIPE DE NON-DISCRIMINATION: PERSPECTIVES PLURIDISCIPLINAIRES ET COMPARÉES* (forthcoming 2016); see also *infra* note 140. See also Marie Mercat-Bruns & Emmanuelle Boussard Verrecchia, *Appartenance syndicale, sexe, âge et inégalités: vers une reconnaissance de la discrimination systémique* 11 REV. DR. TRAVAIL 660 (2015) ; Marie Mercat-Bruns, *Comparaison entre les discriminations fondée sur l'appartenance syndicale, l'âge et le sexe, L'identification de la discrimination systémique*, REV. DR. TRAVAIL 672 (2015).

5. Ricci, 129 S. Ct. at 2677 (“We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action”).

6. *Id.* at 2690.

7. *Id.* at 2700.

8. *Id.* at 2678.

9. *Id.*

10. Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993).

11. See also on disparate impact, Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

12. Twenty-one states and the District of Columbia have passed laws prohibiting employment discrimination based on sexual orientation. Attempts to prohibit discrimination on a federal level include the Employment Non-Discrimination Act (ENDA), H.R. 1755; S. 815 was approved by the Senate on November 7, 2013, by a bipartisan vote of 64–32.

13. See Griggs v. Duke Power Co. 401 U.S. 424 (1971) (recognizing disparate impact discrimination for the first time); David Garrow, *Toward a Definitive History of Griggs v. Duke Power Co.*, 67 VAND. L. REV. 197 (2014); ROBERT BELTON, *THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE GRIGGS V. DUKE POWER STORY* (2014).

14. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).

15. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

16. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

17. On judicial scrutiny on just cause of economic layoffs (CODE DU TRAVAIL [LABOR CODE] art. L. 1233–3); the justification can be the need to restructure the company to stay competitive (Cass. soc., Mar. 24, 2010, 494 REV. JURIS. SOC. 2010).

18. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).
19. The requirement of business necessity: *see infra* “Establishing Indirect Discrimination: A Two-Step Test and a Reversal of the Burden of Proof.”
20. Julie Suk, U.S. Equality Law, in *Workshop on Evolution of Equality Law and Theory*, European University Institute, Florence (Jan. 29, 2010).
21. One of the assets of employment discrimination law is the shift of the burden of proof of discrimination.
22. *See* Marie Mercat-Bruns, *Âge et discrimination indirecte: une jurisprudence en gestation* (Soc. 19 octobre 2010, 2 arrêts), 7–8 REV. DR. TRAVAIL 441 (2011) [hereinafter Mercat-Bruns, *Âge et discrimination indirecte*]; Cass. soc., Mar. 30, 1994, Dr. Soc. 561 (1994); Cass. soc., Apr. 9, 1996, Dr. Ouvrier 10 (1988); Cass. soc., Jan. 9, 2007, No. 05–43962; Cass. soc., June 6, 2012, No. 10–21489; Mercat-Bruns, *Métiers féminisés*, *supra* note 2, at 908; Cass. soc., July 3, 2012, No. 10–23013; Cass. soc., Nov. 3, 2011, No. 10–20765; Cass. soc., Feb. 12, 2013, No. 11–27689; Cass. soc., Sept. 30, 2013, No. 12–14752; Cass. soc., July 9, 2014, No. 10–18341 (finally preferring direct to indirect discrimination in light of CJEU preliminary ruling); Cass. soc., Sept. 24, 2014, No. 13–10233, 13–10234; Cass. 2e civ., July 12, 2012, No. 10–24661 (no indirect discrimination in a case before the Second Civil Chamber of the Cour de Cassation); *see* Cass. soc. July 9, 2015, No. 14–12779 (more recently recognizing indirect discrimination after participation in a strike).
23. *See* Julie Suk, *Disparate Impact Abroad*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT 50* (Samuel Bagenstos & Ellen Katz eds., forthcoming 2015).
24. Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 UCLA L. REV. 701 (2006).
25. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and research on its impact: Michael Evan Gold, *Griggs’ Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987); Amy Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621 (2011).
26. *Griggs*, 401 U.S. at 437.
27. Pub. L. 102–166, 105 Stat. 1072 (Nov. 21, 1991). It was, among other things, to counter the effects of a Supreme Court that had heightened the burden of proof of plaintiffs in a disparate impact case, *Ward’s Cove Packing v. Atonio*, 490 U.S. 642 (1989).
28. Susan Carle, *A New Look at the History of Title VII Disparate Impact Doctrine*, 63 FLA. L. REV. 251 (2011).
29. *Id.*
30. William L. Bulkley, *The Industrial Condition of the Negro in New York City*, 27 ANNALS AM. ACAD. POL. & SOC. SCI. 128 (May 1906).
31. New York State’s Ives-Quinn Act, 1945 N.Y. Laws 457.
32. *See* Carle, *supra* note 28, at 283; *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581, 584 (1954); this was almost disparate impact discrimination based on religion, looking systematically at maiden names, and the judges observed that there are ways to discriminate in a more subtle and discreet manner.
33. *Myart v. Motorola, Inc.* No. 636–27, reprinted in 110 Cong. Rec. 5662 (1964).
34. *See* Carle, *supra* note 28, at 292.
35. 401 U.S. 424, 430 (1971), 420 F.2d at 1232; Melissa Hart, *From Wards Cove to Ricci: Struggling Against the “Built-In Headwinds” of a Skeptical Court*, 46 WAKE FOREST L. REV. 262 (2011).
36. *See* McClain v. Lufkin Indus., Inc., 519 F.3d 264, 275–79 (5th Cir. 2008); *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1275, 1288 (11th Cir. 2000); *Davis v. Cintas Corp.*, 717 F.3d 476, 497 (6th Cir. 2013).
37. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

38. *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).
39. Erica E. Hoodhood, *The Quintessential Employer's Dilemma: Combating Title VII Litigation by Meeting the Elusive Strong Basis in Evidence Standard*, 45 VALPARAISO U. L. REV. 111 (2010); Lindsey E. Sacher, *Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine under Title VII*, 61 CASE W. RESERVE L. REV. 603 (2010).
40. Especially in view of the fact the disparate impact theory does not apply to the equal protection clause: see *Washington v. Davis*, 426 U.S. 229 (1976); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).
41. Antidiscrimination law is not just a blame game.
42. See Equal Treatment Directive 1976/207, art. 2 (1), and Directive 97/80/EC of Dec. 15, 1997, on the Burden of Proof in Cases of Discrimination Based on Sex, art. 2.
43. PETER OLIVER, *FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY* (2003); even though some authors still rely on the notion of indirect discrimination in their analysis of the free circulation of goods and services in Europe; GARETH DAVIES, *NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET* (2003).
44. Case C-236/09, *Test-Achats v. Council of Ministers*, 2010 E.C.R. I-773.
45. Case C-152/73, *Sotgiu v. Deutsche Bundespost*, 1974 E.C.R. I-153.
46. Case C-96/80, *Jenkins v Kingsgate*, 1981 E.C.R. 911.
47. Christine Jolls describes the subtle nature of disparate impact discrimination; see Jolls, *supra* note 11, at 670.
48. Case C-170/84, *Bilka-Kaufhaus v. Hartz*, 1986 E.C.R. 1607.
49. See the first definition in Article 2, Directive 97/80/EC of Dec. 15, 1997 on the burden of proof in cases of discrimination based on sex; Directive 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2000/78/EC of Nov. 27, 2000, establishing a general framework for equal treatment in employment and occupation. Regarding the direct influence of British politicians and lawyers on the adoption of an indirect discrimination framework in Europe, see Suk, *supra* note 23, at 5.
50. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
51. Case C-300/06, *Voss v. Land Berlin*, 2007 E.C.R. I-10573.
52. Joined Cases C-297/10 and C-298/10, *Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Mai*, 2011 E.C.R. I-7965, pt. 101; see Marie Mercat-Bruns, *La CJUE et les présomptions sur l'âge*, 12 REV. JURIS. SOC. 815 (2011). See more recently for example of acquired rights and transitional pay schemes based on experience but still linked to age, Case C-501/12 to Case C-506/12, Case C-540/12 and Case C-541/12, *Specht* (June 19, 2014); Case C-20/13, *Daniel Unland* (Sept. 9, 2015).
53. In the most recent cases on discriminatory pay schemes, see *supra* 52, transitional pay systems that still refer to age produce differential treatment based on age but are justified and proportionate if not indefinite in perpetuating discrimination for disfavored categories under old pay schemes. The debate focuses on admissibility of exception to direct discrimination based on age and not indirect discrimination.
54. Case C-123/10, *Brachner v. Pensionsversicherungsanstalt*, 2011 E.C.R. I-000. A more recent decision on law pertaining to disability pensions for part-time workers in Spain did not consider that the legal norm statistically disadvantaged part-time workers, particularly women, and ruled out indirect discrimination: Case C-527/13, *Fernandez v. Instituto Nacional de la Seguridad Social*, CJEU (Apr. 14, 2015).
55. Indirect discrimination based on sex can favor men; concerning pension rights for men, see Case C-173/13, *Leone and Leone v. Garde des Sceaux* (July 17, 2014) (on indirect discrimination based on age discrimination), and Case C-152/11, *Odar v. Baxter Deutschland GmbH*, 2012 E.C.R. I-0000.

56. Case C-83/14 *CHEZ Razpredelenie Bulgaria AD* (July 16, 2015):

The concept of “discrimination on the grounds of ethnic origin,” . . . [in] . . . Directive 2000/43/EC of 29 June 2000 . . . must be interpreted as being intended to apply in circumstances such as those at issue before the referring court—in which, in an urban district mainly lived in by inhabitants of Roma origin, all the electricity meters are placed on pylons forming part of the overhead electricity supply network at a height of between six and seven metres, whereas such meters are placed at a height of less than two metres in the other districts—irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure.

57. See Jean-Philippe Lhernould, *Les discriminations fondées sur le sexe et la Cour de cassation*, 11 REV. JURIS. SOC. 731 (2012); see *infra* “Establishing Indirect Discrimination: A Two-Step Test and a Reversal of the Burden of Proof.”

58. Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 3–5 (1987).

59. See Oppenheimer, *supra* note 16.

60. Hart, *supra* note 35, at 262.

61. Civil Rights Act (CRA) of 1991, SEC. 2000e-2; Section 105; (a); Section 703, CRA of 1964, Title VII (42 U.S.C. 2000e-2). See Susan Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387 (1996).

62. The other directives focus on nationality, race, origin, and sex.

63. See Lhernould, *supra* note 57, at 731.

64. Outside of *Griggs*, see other cases on selection processes and whether they are job-related: *Conn. v. Teal*, 457 US 440 (1982); *N.Y. City Transit Auth. v. Beazer*, 523 US 83 (1979); *Dothard v. Rawlinson*, 433 US 321 (1977); *Albermarle Paper Co. v. Moody*, 422 US 405 (1975); after the CRA of 1991, see also *Lanning v. Southeastern Pa. Transp. Auth.*, 181 F.3d 478 (Ed Cir 1999); *Bryant v. City of Chicago*, 200 F.3d 1092 (7th Cir. 2000).

65. 42 U.S.C. § 2000e-2(k)(1) (2006). Congress amended Title VII of the CRA of 1991 to counter the Supreme Court’s holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989): an employer whose practice is found to have such an impact may avoid liability by proving that the challenged discriminatory practice is required by “business necessity.”

66. The plaintiffs must designate the specific employment practice that caused the disparate impact. See *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 275–79 (5th Cir. 2008); *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1275, 1288 (11th Cir. 2000); *Davis v. Cintas Corp.*, 717 F.3d 476, 497 (6th Cir. 2013).

67. Hoodhood, *supra* note 39, at 111, 122.

68. The Supreme Court acknowledges the importance of this rule: Eang L. Ngov, *When the “Evil Day” Comes, Will Title VII’s Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?* 60 AM. U. L. REV. 543 (2011).

69. This calculation is also essential to prove systemic disparate treatment discrimination; see *Teamsters v. United States*, 431 U.S. 324 (1977).

70. Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L. REV. 773–74 (2009).

71. Mercat-Bruns, *Âge et discrimination indirecte*, *supra* note 22, at 441. Cases on direct age discrimination towards younger workers are emerging more and more on the EU level; see recently Case C-432/14, *Bio Philippe Auguste SARL*, Oct. 1, 2015.

72. CRA of 1991, SEC. 2000e-2; Section 105; (a); Section 703, CRA of 1964, Title VII (42 U.S.C. 2000e-2). But in the United States, the contours of the protected age group are

limited to those over 40 (see Chapter 5 on age discrimination) whereas in France, all ages are covered.

73. Case C-147/08, *Römer v. City of Hamburg*, 2011 E.C.R. I-3591.

74. This point can be crucial if the scope of the apparently neutral law is not explicit. It is then easier to show that the law benefits a certain type of people and that the discriminatory impact of the law targets the majority of the protected group.

75. See, for example, Cass. soc., Nov. 10, 2009, No. 07-42849; Cass. soc., Mar. 23, 2011, No. 09-42666; Cass. soc., June 29, 2011, No. 10-14067; Cass. soc., Feb. 20, 2013, No. 10-30028.

76. Cass. soc., Nov. 3, 2011, No. 10-20765.

77. 42 U.S. Code § 2000e-2 (k); respondent must demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. Courts have often accepted employer justifications for their practices; see some earlier decisions: *Lanning v. Se. Pa. Transp. Auth.*, 308 F.3d 286 (3d Cir. 2002); *Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572 (9th Cir. 2000).

78. The French Cour de Cassation examined this second prong of the indirect discrimination test in 2012 for the first time; *Mercat-Bruns, Métiers féminisés*, *supra* note 2, at 908.

79. EEOC Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 and 1607.4.

80. *Id.* at 29 CFR § 1607.4.

81. Mark J. Simeon, *Symposium: Perspectives on Equal Employment Opportunity Litigation: Title VII Defenses: An Overview*, 27 HOWARD L.J. 479, 486 (1984).

82. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); or the plaintiff can show there was a possible alternative selection process with no disparate impact, as in *Albemarle v. Moody*, 422 U.S. 405, 425 (1975).

83. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), reversed by the Civil Rights Act (CRA) of 1991 (Pub. L. 102-166).

84. Cass. soc., June 6, 2012, No. 10-21489.

85. See Case C-96/80, *Jenkins v Kingsgate*, 1981 E.C.R. 911; Case C-300/06, *Voss v. Land Berlin*, 2007 E.C.R. I-10573.

86. *Mercat-Bruns, Âge et discrimination indirecte*, *supra* note 22, at 443.

87. Cass. soc., June 6, 2012, No. 10-21489.

88. Cass. soc., Jan. 9, 2007, No. 05-43962. See also Cass. soc., Feb. 12, 2013, No. 11-27689.

89. See *Mercat-Bruns, Métiers féminisés*, *supra* note 2, at 908.

90. See similar discussion on modes of evaluation of wage standards in joined cases C-297/10 and C-298/10, *Hennigs v. Eisenbahn-Bundesamt* and *Land Berlin v. Mai*, 2011 E.C.R. I-07965, and subsequent cases *supra* note 52.

91. See, e.g., Cass. soc., Nov. 10, 2009, No. 07-42849: proof of discrimination does not necessarily require a comparison with the status of other employees.

92. Cass. soc., Nov. 3, 2011, No. 10-20765.

93. CODE DU TRAVAIL [LABOR CODE] art. 1132-1.

94. Case C-147/08, *Römer v. City of Hamburg*, 2011 E.C.R. I-3591.

95. Cass. soc., Nov. 3, 2011, No. 10-20765.

96. See Cass. soc., July 3, 2012, No. 10-23013; Cass. 2e civ., July 12, 2012, No. 10-24661.

97. Cass. soc., Nov. 3, 2011, No. 10-20765: this undocumented domestic worker was not in a comparable situation with workers legally protected by law who can contest their dismissal in court.

98. Treaty on the Functioning of the European Union [TFEU] art. 157, § 1.

99. *Lhernould*, *supra* note 57, at 734, 735.

100. *Lhernould*, *supra* note 57, at 737.

101. Case C-381/99, *Brunnhofer v. Bank der österreichischen Postsparkasse*, 2002 E.C.R. I-4961.
102. CODE DU TRAVAIL [LABOR CODE] art. L.3221-4.
103. Case C-147/08, *Römer v. City of Hamburg*, 2011 E.C.R. I-3591; Case C-267/12, *Hay v. Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres*, 2013 E.C.R. I-0000, §37.
104. Cass. 2e civ., July 12, 2012, No. 10-24661.
105. Julie Suk, Robert Post, and David Oppenheimer.
106. *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).
107. Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 UCLA L. REV. 701, 705 (2006).
108. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-57 (1976); John Donohue, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2609 (1994); Samuel Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 228 (2013).
109. *Washington v. Davis*, 426 U.S. 229 (1976); *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979). For an excellent analysis of the case law, see Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 16 (2013) [hereinafter Siegel, *Equality Divided*].
110. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).
111. See Suk, *supra* note 23, at 1.
112. Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 4 (2010).
113. Hart, *supra* note 35, at 271.
114. Cheryl Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 163-65 (2010).
115. Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 224 (2010).
116. Case C-17/05, *Cadman v. Health and Safety Executive*, 2006 E.C.R. I-9583.
117. Case C-297/10 and C-298/10, *Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Mai*, 2011 E.C.R. I-07965. See subsequent cases, *supra* note 52.
118. See more recently Case C-173/13, *Leone v. Garde des Sceaux*, July 17, 2014, which extends retirement rights to men based on indirect discrimination.
119. In Case C-83/14, *CHEZ Razpredelenie Bulgaria AD*, July 16, 2015 (see *supra* note 56), the Court combines indirect discrimination with discrimination by association (which is a form of direct discrimination; see CJEU *Coleman* described *infra* in Chapter 5, “VI. Disability and Age Discrimination”).
120. See *supra* note 77.
121. Strong basis evidence.
122. See Marie Mercat-Bruns, *Sciences sociales et discrimination dans l'emploi: leçons de l'expérience américaine*, 2 LAW & EUR. AFF. 185 (2010).
123. Cases on indirect discrimination at the European Court of Human Rights: *D.H. v. Czech Republic*, App. No. 57325/00, Eur. Ct. H.R. 2007; *Jordan v. United Kingdom*, App. No. 24746/94, 2001-III Eur. Ct. H.R. 537, § 154; *Zarb Adami v. Malta*, App. No. 17209/02, 2006-VIII Eur. Ct. H.R. 305; *Oršuš v. Croatia*, App. No. 15766/03, Eur. Ct. H.R. 2010.
124. Jolls, *supra* note 11, at 642.
125. “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, J., concurring).
126. Strong critics of this view: RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 234-36 (1992); Deborah Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1693 (1997).

127. Jolls, *supra* note 11, at 642.
128. Herbert Bernhardt, Griggs v. Duke Power Co.: *The Implications for Private and Public Employers*, 50 TEX. L. REV. 901, 928 (1972); Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments* 63 CHI.-KENT L. REV. 3–5 (1987).
129. See also Julie Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 228 (Deborah Hellman & Sophia Moreau eds., 2013).
130. Rejection of the “bottom line analysis” in *Conn. v. Teale*, 457 US 1982, p. 440; The same analysis is implicit in Directive 2000/78/EC (“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons . . . at a particular disadvantage”).
131. Ambivalent term sometimes used in France.
132. Flexible quotas with saving clause required: Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051; Case C-409/95, *Marschall v. Land Nordrhein Westfalen* 1997 E.C.R. I-6363; Case C-158/97, *Badeck v. Landesanwalt beim Staatsgerichtshof des Landes Hessen*, 1999 E.C.R. I-1875; Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-5539. For a reevaluation of quotas in light of European initiatives, see Suk, *supra* note 129, at 237.
133. *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 269–70 (1978); *Fisher v. Univ. of Texas*, 570 U.S. ____ (2013); see also state bans on state preferential treatment on the basis of race among other grounds (Arizona, Oklahoma, New Hampshire, etc.).
134. Case C-411/05, *Palacios de la Villa v. Cortefiel Servicios SA*, 2007 E.C.R. I-8531; Case C-447/09, *Prigge v. Deutsche Lufthansa AG* 2011 E.C.R. I-8003; joined Cases C-297/10 and C-298/10, *Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Mai*, 2011 E.C.R. I-7965; see Marie Mercat-Bruns, *La CJUE et les présomptions sur l'âge*, 12 REV. JURIS. SOC. 815 (2011), *supra* note 52, especially Case C-501/14 to C-506/12, *Specht* (June 19, 2014). Also compare with two cases that consider a legislative norm: Case C-530/13, *Schmitzer* (Nov. 11, 2014) (where budgetary considerations alone cannot justify a discriminatory pay scheme but deference of the Court concerning pension grading scheme based on a law); Case-529/13, *Felber* (Jan. 21, 2015).
135. Lauren B. Edelman & Mark C. Suchman, *When the Haves Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999).
136. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).
137. In France, a similar debate exists on employment policies that conflict because they favor one category of unemployed workers over another. Companies then take advantage of these subsidies strategically, which implies that the interests of all vulnerable workers in employment cannot be taken into account.
138. HR in companies invites employers to review their job profiles and selection processes to avoid liability based on disparate impact discrimination; see DOBBIN, *supra* note 136, at 129.
139. See *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), which involved antitrust law and civil procedure; *Ashcroft v. Iqbal* 556 U.S. 662 (2009) explicitly extended the *Twombly* holding to constitutional civil rights/discrimination cases, but the lower courts had already begun to apply *Twombly* to Title VII plaintiffs. As Suk also mentions, the Supreme Court decision *Walmart Stores, Inc. v. Dukes*, 564 U.S. ____ (2011), considered one of the requirements of the procedural rules was not fulfilled (commonality; Federal Rule of Civil Procedure, Rule 23(a)), and so smaller-scale, regionally based class actions have been filed, in which the plaintiffs have more commonality.
140. The idea of systemic discrimination is increasingly present in the debate on discrimination in France. It is referred to in one of the former reports for the Ministry of

Justice on a possible class action to fight against collective discrimination: Laurence Pecaut-Rivoliér, *LUTTER CONTRE LA DISCRIMINATION AU TRAVAIL: UN DEFI COLLECTIF* 27 (2013). Outside of systemic disparate treatment in U.S. case law, this form of discrimination has already been recognized by the Supreme Court of Canada in *Action Travail des Femmes v. Canadian National Railway*, [1987] S.C.R. 1114, 1139 (Can.), 8 C.H.R.R. D/4210 (S.C.C.). The French class action bill still pending in Parliament (<http://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000030962821&type=general&typeLoi=proj&legislature=14>) might lead to further reflection on structural discrimination. See Marie Mercat-Bruns & Emmanuelle Boussard Verrecchia, *Appartenance syndicale, sexe, âge et inégalités : vers une reconnaissance de la discrimination systémique ?* 11 REV. DR. TRAVAIL 660 (2015) ; Marie Mercat-Bruns, *L'identification de la discrimination systémique* 11 REV. DR. TRAVAIL 672 (2015).

141. *Fisher v. University of Texas* 570 U.S. ____ (2013), June 24, 2013; Siegel, *Equality Divided*, *supra* note 109.

142. See CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES 11 (The Civil Rights Project at Harvard University, 2003) ("Percent plans by state universities . . . guarantee admission for a fixed percentage of the top students from every high school in the state").

143. *Fisher*, *supra* note 141, at 8–13.

144. Siegel, *supra* note 109, at 1.

145. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1300–08 (2011).

146. See *Grutter v. Bollinger* 539 U.S. 306 (2003), at 387–88, 395 (Kennedy, J., dissenting).

147. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) at 787–90, 797–98 (Kennedy, J., concurring).

148. Siegel, *supra* note 109, at 44.

149. See, for example, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger* 539 U.S. 306 (2003) (No. 02–241).

150. Suk, *supra* note 129, at 228.

151. Gwénaële Calvès, *Les politiques françaises de discrimination positive: trois spécificités*, 111 POUVOIRS 29 (2004).

152. See Mitu Gulati & Patrick S. Shin, *Showcasing Diversity*, 89 N.C. L. REV. 1031 (2011).

153. Beth Bilson, *A Dividend of Diversity: The Impact of Diversity on Organizational Decision Making*, 44 U.B.C. L. REV. 9 (2011).

154. Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV., 715, 745 (2011): "The best diversity management practices are rooted in procedural justice principles. Interpersonal respect, a proactive attitude towards diversity, the promotion of an overarching organizational identity, and respect for subgroup identities all play an important role in a positive diversity climate."

155. See Colleen Sheppard, *Grounds of Discrimination: Towards an Inclusive and Contextual Approach*, 80 CANADIAN BAR REV. 893, 911 (2001).

156. See RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE* 48 (2005).

157. Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1590 (2001); Tristin Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 EMORY L. J. 595 (2010); Erin L. Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Anti-discrimination Law, 1961–1996*, 41 AM. BEHAV. SCI. 972 (1998).

158. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1072–75 (2006).

159. Stephen A. Ross, *The Determination of Financial Structure: The Incentive Signaling Approach*, 8 BELL J. ECON. 35 (1977).

160. For a critique of this perspective, see Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?* 89 MICH. L. REV. 1222, 1226–29 (1991).

161. Katharine Bartlett, *Making Good and Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1895–98 (2009); Linda Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1213–16 (1995).

162. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 988 (2006).

163. Angela Onwuachi-Willig, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?* 96 CAL. L. REV. 1299 (2008).

164. See Gulati & Shin, *supra* note 152, at 1040.

165. *Id.* at 1041.

166. See David B. Wilkins, *From “Separate Is Inherently Equal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1597–98 (2004).

167. See *United Steelworkers of Am. v. Weber* 443 U.S. 193 (1979); *Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616 (1986).

168. Laure Bereni, *Faire de la diversité une richesse pour l'entreprise: la transformation d'une contrainte juridique en catégorie managériale*, 35 RAISONS POLITIQUES 87, 104 (2009).

169. For example, this was the reaction of Renault and Ikea.

170. Same importance and ambivalence of diversity measures in the United States: Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945 (2011); James Fanto et al., *Justifying Board Diversity*, 89 N.C. L. REV. 901 (2011).

171. Through the “business case” of diversity, employers try to attract more women to their companies. See Wendy C. Schmidt, *Deloitte's Initiative for the Retention and Advancement of Women 2009 Brochure*, in DIVERSITY IN LAW PRACTICE 2010: STRATEGIES AND BEST PRACTICES IN CHALLENGING TIMES (Practising Law Institute, 2010).

172. CODE DE COMMERCE [COMMERCIAL CODE] art. L.225–18–1 as amended by Law 2014–873 of Aug. 4, 2014:

The proportion of directors of each sex must not be less than forty percent in companies whose shares are admitted for trading on a regulated market and, at the close of the next general meeting called to appoint directors, in companies that, for the third consecutive year, employ an average of at least two hundred fifty permanent employees and have net revenues or a balance sheet total of at least fifty million euros. In these same companies, when there are more than eight members on the board of directors, the difference between the numbers of members of each sex must not be more than two. . . . Any appointment made in violation of the first paragraph that does not have the effect of remedying the irregularity of the composition of the board shall be null and void. This nullity does not invalidate the deliberations in which the irregularly appointed director may have participated.

As stated in art. 5 of Loi 2011–103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Law 2011–103 of January 27, 2011 on the balanced representation of women and men on boards of directors and supervisory boards and on equality in the workplace], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680:

I. Sections II to VI and VIII of article 1, sections III to VII of article 2 and section II of article 4 come into force as of January 1 of the sixth year following the year of publication of this law. The

compliance of the boards of directors and supervisory boards of the companies concerned will be assessed at the close of the first ordinary general meeting following this date. The third consecutive year referred to in the first paragraph of articles L.225-18-1, L.225-69-1 and L.226-4-1 of the French Commercial Code is understood as from January 1 of the sixth year following the year of publication of this law. II. In the companies mentioned in Chapters V and VI of Title II of Book II of the Commercial Code whose shares are admitted for trading on a regulated market, the proportion of directors or supervisory board members of each sex must not be less than twenty percent at the close of the first ordinary general meeting following January 1 of the third year following the year of publication of this law. If one of the two sexes is not represented on the board of directors or supervisory board on the date of publication of this law, at least one representative of this sex must be appointed at the next ordinary general meeting held to appoint directors or supervisory board members.

Art. 7 of Law 2011-103:

By December 31, 2015, the government shall establish a report for the Parliament assessing the role of women on the boards of directors or equivalent bodies of public administrative establishments or publicly owned industrial and commercial establishments and presenting the State's efforts to achieve a representation of at least forty percent of each sex in these bodies.

173. See Law 2011-103 of Jan. 27, 2011 on the balanced representation of women and men on boards of directors and supervisory boards and on equality in the workplace, *supra* note 172; in the United States, Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55 (2009); see also Law 2014-873 of Aug. 4, 2014 on "real equality" between men and women (extends parity rules to certain institutions of the public sector, sport organizations and unlisted companies employing, for three consecutive years, at least 500 employees and reporting profits of at least €50 million), *supra* note 172.

174. Julia Redenius-Hoevermann & Daniela Weber-Rey, *La représentation des femmes dans les conseils d'administration et de surveillance en France et en Allemagne*, 4 REV. SOCIÉTÉS 203 (2011); Véronique Martineau-Bourgninaud, *L'obligation de mixité dans les conseils d'administration et de surveillance*, 10 RECUEIL DALLOZ 599 (2010). See Anne-Françoise Bender, Isabelle Berberi-Hoffmann, & Philippe Reigné, *Les quotas de femmes dans les conseils d'administration*, 34 TRAVAIL GENRE SOCIÉTÉ 169 (2015).

175. See Dan Kahan, *The Cultural Cognition of Risk: Theory, Evidence and Implications*, Cultural Cognition Project (Oct. 8, 2009); THE CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL, <http://www.culturalcognition.net>.

176. Using a typology established by anthropologist Mary Douglas and cultural theorist Aaron Wildavsky, these Yale researchers have tested the hypothesis that worldviews (i.e., individual views of an "ideal society") can explain variations in individual perceptions of what is risky despite available facts on these risks: Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1072 (2006). According to Douglas and Wildavsky's typology, there are four worldviews: communitarian, individualistic, egalitarian, and hierarchist. See Mary Douglas, *A History of Grid and Group Culture Theory*, available at <http://projects.chass.utoronto.ca/semiotics/cyber/douglas1.pdf>.

177. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); see Regina F. Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L.J. 585, 621 (2011). In her article, Burch discusses risk in corporate law before and after the 2008 financial crisis and the passage of the Dodd-Frank Act, and argues that "corporate fiduciary duty law is sparse with respect to holding directors liable for taking unreasonable risks. Further, the Dodd-Frank Act contains risk management provisions, but does not go far enough." See Dodd-Frank Act, tit. I, § 165, 124 Stat. 1376, 1423 (requiring large, interconnected financial institutions to set up risk

committees) and tit. IX, § 956 (requiring that certain financial institutions report information about incentive-based compensation programs and that corporate governance systems balance risks and financial rewards).

178. The Dodd-Frank Act requires listed financial companies to form risk management committees within boards of directors to “prevent or mitigate risks to the financial stability of the United States that could arise from material financial distress or failure, or ongoing activities, of large, interconnected financial institutions.”

179. See Burch, *supra* note 177, at 585, 621.

180. Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1584 (2004).

181. See Theresa A. Gabaldon, *Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders*, 65 MD. L. REV. 538 538, 547 (2006).

182. See RICHARD LEBLANC & JAMES GILLIES, *INSIDE THE BOARDROOM: HOW BOARDS REALLY WORK AND THE COMING REVOLUTION IN CORPORATE GOVERNANCE* 8 (2005) (advancing the thesis that “board decision-making is a function of the competencies and behavioural characteristics of the individual directors and how they fit together”); Burch, *supra* note 177, at 585, 625 (“Creative tension must also exist in the boardroom. This chemistry results from the interaction of directors who bring different interpersonal skills to the boardroom”); LEBLANC & GILLIES, at 143 (“A board cannot work, that is, reach good decisions, unless there are directors who, through credibility, leadership and interpersonal and communication skills, are on occasion able to persuade other directors and management of their point of view or of a particular course of action. At the same time, a board cannot work unless there are directors who can find common themes within dissenting views and bring about a consensus”). See also DOUGLAS BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE KEEPS WOMEN OUT OF AMERICA'S BOARDROOMS* 167–75 (2007) (describing how stereotyping and tokenism prevent women from reaching and remaining in the top corporate echelons) (“Research on the experience of women and people of color on boards indicates that these directors must prove their qualification to serve on the board and build credibility in a way that is qualitatively different from the experience of white male directors”); Burch, *supra* note 177, at 585, 625 (referring to the idea of critical mass) (“Research suggests that a minimum of three directors who are women or people of color increases the credibility of the directors and facilitates the directors' ability to build consensus around ideas that may conflict with established behavioral norms”); ALISON M. KONRAD ET AL., *CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE* 3–4, Wellesley Ctrs. for Women, Report No. WCW 11 (2006), <http://www.wcwonline.org/pdf/CriticalMassExecSummary.pdf> (finding that achieving a critical mass of women in the boardroom broadens discussions and enhances decision-making); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV., 1233, 1309 (2003) (contending that greater diversity improves the ability of a group to make decisions”).

183. Philippe Reigné, *Les femmes et les conseils d'administration: réponse à un éditorial de M. François-Xavier Lucas*, 3 JCP E. 27 (2010); François-Xavier Lucas, *La 'modernitude' s'invite dans les conseils d'administration*, BULL. JOLY 945 (2009). Moreover, there is a move to transform listed corporations into simplified joint-stock companies (*Société par Action Simplifiée*) with no executive boards; see Bender, Berrebi-Hoffmann, & Reigné, *supra* note 174.

184. See *supra* note 172: Law of Aug. 4, 2014.

185. Report to Signatories of the Statement of Diversity Principles, *Beyond Diversity 101: Navigating the New Opportunities* 2008, PRACTISING LAW INSTITUTE CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, PLI No. 14119 (Feb. 27, 2008).

186. Mitu Gulati & Devon W. Carbado, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1662 (2004).

187. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).

188. *Id.*, at 222.

189. *Id.*

190. In 1996, Texaco settled a racial discrimination case for \$176 million, and in 2001, Coca-Cola settled for \$193 million; see DOBBIN, *supra* note 187, at 232.

191. DOBBIN, *supra* note 187, at 222.

192. See Robert W. Ackerman, *How Companies Respond to Social Demands*, 51 HARV. BUS. REV. 92 (1973).

193. DOBBIN, *supra* note 187, at 138.

194. See DOBBIN, *supra* note 187, at 157; R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, in DIFFERENCES THAT WORK: ORGANIZATIONAL EXCELLENCE THROUGH DIVERSITY 29 (Mary C. Gentile ed., 1994).

195. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger* 539 U.S. 306 (2003) (No. 02-241).

196. DOBBIN, *supra* note 187, at 161.

197. *Id.* at 232.

198. Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

199. Lauren B. Edelman & Mark C. Suchman, *When the Haves Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999).

200. Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law Society Tradition*, 21 LAW & SOC. INQUIRY 903 (1996).

201. See also LES ENGAGEMENTS DANS LES SYSTÈMES DE REGULATION (Marie-Anne Fritson Roche ed., 2006).

202. See also Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95-160 (1974).

203. Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOCIOLOGY 1401-40 (1990).

204. Marie Mercat-Bruns, *Les discriminations multiples et l'identité au travail au croisement de l'égalité et des libertés*, 1 REV. DR. TRAVAIL 28, 36 (2015).

205. Edelman et al., *supra* note 198.

206. Edelman & Suchman, *supra* note 199, at 982. See also Linda Hamilton Krieger, Rachel Kahn Best, & Lauren B. Edelman, *When "Best Practices" Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases* 40 LAW & SOCIAL INQUIRY 843 (2015).

207. CENTER FOR INSTITUTIONAL AND SOCIAL CHANGE: <http://www.changecenter.org/>.

208. Susan P. Sturm, *The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J.L. & GENDER 409 (2007); Susan P. Sturm, *The Architecture of Inclusion: Advancing Workplace Equality in Higher Education*, 29 HARV. J.L. & GENDER 249 (2006).

209. Marie Mercat-Bruns, *Égalité salariale, discriminations individuelles et systémiques: un éclairage de la jurisprudence américaine*, 114 REV. OFCE 95 (2010).

210. See generally JÉRÔME PORTA, *LA RÉALISATION DU DROIT COMMUNAUTAIRE: ESSAI SUR LE GOUVERNEMENT JURIDIQUE DE LA DIVERSITÉ* (2007).

211. See Commission Green Paper on Equality and Non-discrimination in an Enlarged European Union, COM (2004) 379 final.

212. *Id.* See recently the global work of the the European Platform for Roma inclusion (http://ec.europa.eu/justice/events/roma-platform-2015/index_en.htm), a forum

for concerted thinking and discussion of all relevant stakeholders for the integration of Roma people in Europe. It aims to contribute to making both European and national policies more sensitive to Roma needs. See, for example, the meeting of the European Roma Platform on March 16–17, 2015, which had two aims. On the one hand, it was to provide the possibility for operational-level discussions among all types of stakeholders of Roma integration on topics that are considered as particularly relevant for the way forward for Roma integration policies and practices. On the other hand, it was to reflect the policy commitment and the high position of Roma integration on the EU member states' national political agendas. Based on the operational-level and policy reflections, meetings contribute to set the agenda for the future steps of the European Platform for Roma inclusion.

213. Equal opportunity was one of the priorities of France's Regional Competitive-ness and Employment Operational programs funded by the European Social Fund (ESF) for 2007–2013. The ESF finances national, regional, and local policy in the fields of employment, training, and an inclusive labor market. France defined four priority themes facilitating initiatives to anticipate and respond to economic change, fight unemployment, increase social inclusion, combat discrimination in the workplace, and promote human capital, innovation, and equal opportunity for all.

214. Communication from the Commission to the Council, the European Parliament, the Committee of the Regions, and the European Economic and Social Committee of 6 October 2008, Green paper on territorial cohesion: *Turning Territorial Diversity into Strength*, COM (2008) 616 final (not published in the *Official Journal*). See more recently, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, *Sixth Report on Economic, Social and Territorial Cohesion: Investment for Jobs and Growth* (ECO/370, EESC-2014–4756), COM (2014) 473 final (Jan. 21, 2015).

215. See how the CJEU makes an analogy between employees and those independent workers who are in fact under economic subordination: Case C-256/01, *Allonby v. Accrington & Rossendale Coll.*, 2004 E.C.R. I-873; Catherine Barnard, *Discrimination Law, Self-Employment and the Liberal Professions*, 12 EUR. ANTI-DISCRIMINATION L. REV. 29 (2011); extending rights to workers from non-EU Member States: C-311/13, *Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, CJEU, Nov. 5, 2014. See also efforts to define workers to allow them to acquire child care benefits: C-516/09, *Borger v. Tiroler Gebietskrankenkasse*, 2011 E.C.R. I-1493; to acquire pension rights: C-379/09, *Casteels v. British Airways plc*, 2011 E.C.R. I-1379; to avoid abuse with renewed short-term workers: C-109/09, *Deutsche Lufthansa AG v. Kumpan*, 2011 E.C.R. I-1309 (without referring to age discrimination in this case).

216. Case C-333/13, *Dano v. Jobcenter Leipzig*, CJEU, Nov. 11, 2014: “economically inactive EU citizens who go to another Member State solely in order to obtain social assistance may be excluded from certain social benefits.”

217. Directive 2010/41/EU of the European Parliament and of the Council of July 7, 2010, on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

218. See Recital 3 of Directive 2010/41/EU (“In its conclusions of 5 and 6 December 2007 on ‘Balanced roles of women and men for jobs, growth and social cohesion,’ the Council called on the Commission to consider the need to revise, if necessary, Directive 86/613/EEC in order to safeguard the rights related to motherhood and fatherhood of self-employed workers and their helping spouses.”)

219. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions,

Towards Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security, COM (2007) 0359 final.

220. On the less favorable plight of workers hired by subcontractors, see CJEU, September 18 2014, aff. 549/13, *Bundesdruckerei GmbH c/ Stadt Dortmund*.

221. Council Directive 2010/18/EU of 8 March 2010, implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance).

222. MORAL VALUES PROJECT, <http://www.law.georgetown.edu/moralvaluesproject/>.

223. Chai R. Feldblum, *The Moral Values Project: A Call to Moral Action in Politics*, in *MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD* 205 (Gordon A. Babst et al eds., 2009).

224. According to Feldblum, those who oppose gays and lesbians feel under siege in today's world. This is reflected in the discourse of organizations like the Traditional Values Coalition, Focus on the Family, and Concerned Women for America. See Chai R. Feldblum, *The Moral Values Project: A Call to Moral Action in Politics*, in *MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD* 205 (Gordon A. Babst et al. eds., 2009); Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 *YALE J. L. & FEMINISM* 139 (2005); Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 *NYU. L. REV.* 992, 994 (1997); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 *U. PITT. L. REV.* 237 (1996).

225. Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons From Religion, Disability, Sexual Orientation, and Transgender*, 54 *ME. L. REV.* 159 (2000).

226. Gwénaële Calvès, *Les politiques de discrimination positive*, 111 *POUVOIRS* 30 (2004).

227. See Laure Bereni & Eléonore Lépinard, *Parité, mythe d'une exception française*, 111 *POUVOIRS* (2004).

228. There are collective bargaining agreements in France for "seniors" without precisely defining the age group.

229. A 6-percent quota exists for the recruitment of workers with a disability; if the quota is not filled, employers must pay a fine into a fund for people with disabilities.

230. This implicitly excludes immigrants who are noncitizens: "The democratic system requires that all groups of society be able to participate in the public debate, exchange arguments and controversies by way of their representatives. By refusing this opportunity to immigrants, a category stigmatized by those who construct public opinion, the French Republic has opened the door, in the twentieth century, to a flow of racist and nationalist discourse." GERARD NOIRIEL, *IMMIGRATION, ANTISÉMITISME ET RACISME (XIX—XXÈME SIÈCLE): DISCOURS PUBLICS, HUMILIATIONS PRIVÉES* 134 (2007).

231. See Michèle Lamont, *Le rôle de l'immigration, de la race et de la pauvreté*, in *LES CODES DE LA DIFFÉRENCE: RACE, ORIGINE, RELIGION, FRANCE—ALLEMAGNE—ÉTATS-UNIS* 258 (Riva Kastoryano ed., 2005); CLAUDE NICOLET, *LA RÉPUBLIQUE EN FRANCE, ÉTAT DES LIEUX* 122–68 (1992). A similar attitude resembling an "injunction to integrate" extends to immigrants. See Danièle Loschak, *L'intégration comme injonction: enjeux idéologiques et politiques liés à l'immigration*, 64 *CULTURES & CONFLITS* 131 (2006).

232. Riva Kastoryano, *Définir l'autre: en France, en Allemagne et aux États-Unis*, in *LES CODES DE LA DIFFÉRENCE* (Kastoryano ed.), *supra* note 231, at 14.

233. "The Welfare State ignores people to promote categories: social insurance replaces individual responsibility and the notion of fault is replaced by the concept of risk. It was no longer people who were concerned but representatives of collective categories (labeled later as 'management' and 'labor')." NOIRIEL, *supra* note 230, at 118. See also FRANÇOIS EWALD, *L'ÉTAT PROVIDENCE* (1986).

234. Jérôme Porta, *Égalité, non-discrimination et égalité de traitement: à propos des sens de l'égalité dans le droit de la non-discrimination (1re partie)*, 5 REV. DR. TRAV. 290 (2011); Jérôme Porta, *Égalité, non-discrimination et égalité de traitement: à propos des sens de l'égalité dans le droit de la non-discrimination (2ème partie)*, 6 REV. DR. TRAV. 354 (2011).

235. Cass. soc., Oct. 12, 2011, No. 10-15101; Cass. soc., June 8, 2011, Nos. 10-14725 and 10-11933.

236. Cass. soc., June 8, 2011, No. 10-30162; Cass. soc., Mar. 23, 2011, No. 09-42666; Cass. soc., July 6, 2011, No. 09-65554 (considering advantages given to employee representatives); Cass. soc., Oct. 14, 2009, No. 08-40161 (differences of treatment between part-time and full-time workers); Cass. soc., July 1, 2009, RJS 10/09, No. 760 (differences between managers and nonmanagers); Cass. soc., Jan. 11, 2012, No. 10-14614; *see also* Cass. soc., Mar. 13, 2013, No. 11-20490; Cass. soc., Mar. 13, 2013, No. 10-28022; Cass. soc., Mar. 13, 2013, No. 11-23761. More recently, another case presumes justified differences of treatment in collective bargaining agreements between more qualified (engineers and managers) and lower-level professionals adopted by the employee representatives and the burden of proof thus lies with the party that questions this difference of treatment: Cass. soc., Jan. 27, 2015, No. 13-22179. *See also* Jean-François Césaro, *L'ascension du principe jurisprudentiel d'égalité*, 26 JCP S 44 (June 30, 2015).

237. Cass. soc., Nov. 10, 2009, No. 07-42489; Cass. soc., Jan. 19, 2011, No. 09-42541; Court of Appeals Paris, May 5, 2010, Niel No. 08-08694; Court of Appeals Versailles, Jan. 5, 2011, No. 10-01866. It is nevertheless harder for female union members to prove unequal pay because male union members have higher wages: Cass. soc., Apr. 10, 2013, No. 11-26986; *see also* Marie Mercat-Bruns, *Discrimination multiple: le défi de la preuve*, *Panorama Droit et Genre*, 16 RECUEIL DALLOZ 963 (2014).

238. *See* RACHEL SILVERAS & SÉVERINE LÉMIÈRE, *COMPARER LES EMPLOIS ENTRE LES FEMMES ET LES HOMMES: DE NOUVELLES PISTES VERS L'ÉGALITÉ SALARIALE* (2010) (for the HALDE).

239. *See recently* Cass. soc., Oct. 22, 2014, No. 13-18362.

240. Cass. soc., June 8, 2011, Nos. 10-30162, 10-30163, 10-30164, 10-30165, 10-30166, 10-30167, 10-30168, 10-30169, 10-30170, and 10-30171.

241. Judicial scrutiny of differential treatment based on the system's aim, in accordance with CODE DU TRAVAIL [LABOR CODE] art. L.1222-3; Court of Appeals Versailles, Sept. 8, 2011, No. 10-00567.

242. Cass. soc., Feb. 20, 2008, No. 06-40085; Cass. soc., Mar. 31, 2009, No. 07-45522.

243. KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA* (2009).

244. *See* WHITE HOUSE FORUM ON WORKPLACE FLEXIBILITY, http://www.workplace-flexibility2010.org/index.php/whats_new/white_house_forum.

245. *See* Rubin's biography at Paula N. Rubin & Susan W. McCampbell, *The Americans With Disabilities Act and Criminal Justice: Mental Disabilities and Corrections*, Research in Action, National Institute of Justice, NCJ 155061 (July 1995), 7, <https://www.ncjrs.gov/pdffiles/amdisact.pdf>, and her work cited by Center for Innovative Public Policies, <http://www.cipp.org/workforce/index.htm>.

246. Fair Labor Standards Act, Pub. L. 75-718, ch. 676, 52 Stat. 1060, June 25, 1938, 29 U.S.C. ch. 8.

247. Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 328 (1990).

248. *See* Report on the reform of employee councils on working conditions: Pierre-Yves Verkindt, *Les C.H.S.C.T. au milieu du gué: Trente-trois propositions en faveur d'une instance de représentation du personnel dédiée à la protection de la santé au travail*, Report to the

Minister of Labor and Employment (Feb. 2014); and see Loïc Lerouge & Camille Hebert, *The Law of Workplace Harassment of the United States, France, and the European Union: Comparative Analysis After the Adoption of France's New Sexual Harassment Law*, 35 COMP. LAB. L. & POL'Y J. 93 (2013).

249. WORKPLACE FLEXIBILITY 2010, <http://workplaceflexibility2010.org/>, and KATHLEEN CHRISTENSEN & BARBARA SCHNEIDER, WORKPLACE FLEXIBILITY: REALIGNING 20th-CENTURY JOBS FOR A 21ST-CENTURY WORKFORCE (2010).

250. Same terminology in art. 5 of Directive 2000/78/EC.

251. Preferred term in CODE DU TRAVAIL [LABOR CODE] art. L.1226-2–L.1226-4; Law 2005-102 of Feb. 11, 2005 on equal treatment, equal opportunity, participation, and citizenship of people with disabilities.

252. Americans with Disabilities Act (ADA) (Pub. L. 101-336, 104 Stat. 327), 42 U.S.C. § 12101 (July 26, 1990); Amendments to the ADA (Pub. L. 110-325), 42 U.S.C.A. §§ 12101, 12102, 12111–12114, 12210, 12206–12213 (Sept. 25, 2008).

253. The quota requiring companies to employ 6 percent of people with disabilities can be regarded as equivalent to a form of affirmative action, and now there is also a quota for gender parity on the boards of directors of listed companies. Law 2011-103 of Jan. 27, 2011, on the balanced representation of women and men on boards of directors and supervisory boards and on equality in the workplace; see Julia Redenius-Hoevermann & Daniela Weber-Rey, *La représentation des femmes dans les conseils d'administration et de surveillance en France et en Allemagne*, 4 REV. SOCIÉTÉS 203 (2011); Véronique Martineau-Bourguinaud, *L'obligation de mixité dans les conseils d'administration et de surveillance*, 10 RECUEIL DALLOZ 599 (2010).

254. ADA, *supra* note 252, Title III.

255. Marie Mercat-Bruns, *Discrimination fondée sur l'âge: un exemple d'une nouvelle génération de critères discriminatoires*, 6 REV. DR. TRAVAIL 360 (2007).

256. The Family Medical Leave Act (FMLA) (Pub. L. 103-3, 29 CFR 825) 29 U.S.C. § 2601 (Feb. 5, 1993) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

257. The 2008 ADA amendments (*supra* note 252) reversed case law restrictively interpreting the concept of disability: see *infra* Chapter 5.

258. Some authors are skeptical: Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?* 79 N.C. L. REV. 307 (2001).

259. The ADA defines a qualified individual as one “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires,” 42 U.S.C. 12111(8). See *infra* Chapter 5.

260. See Title VII, § 701 (j), on religious discrimination; and see case law: *TWA v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113. See also *infra* Chapter 5.

261. See 42 U.S.C. 12111(8).

262. On legislative history, see Ruth Colker, *The ADA's Journey Through Congress*, 39 WAKE FOREST L. REV. 1 (2004); RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT (2007).

263. See generally MARTHA MINOW, MAKING A DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990).

264. See Sharona Hoffman et al., *The Definition of Disability in the Americans with Disabilities Act: Its Successes and Shortcomings*, 9 EMP. RTS. & EMP. POL'Y J. 473 (2005) (proceedings of the 2005 Annual Meeting, Association of American Law Schools Sections on Employment Discrimination Law; Labor Relations and Employment Law; and Law, Medicine and Health).

265. See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Mathew Diller, *Judicial Backlash, the ADA and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 41 (2000).

266. For opposing arguments on the economic cost of employing people with disabilities, inspired by supporters of Law and Economics theory and the neoclassic theory, Michael Ashley Stein, *Labor Markets, Rationality and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 193 (2000).

267. On the notion of “undue hardship”: a response that requires difficulty and expense, § 101(10(A)), which seems more extensive than the one applied to religious accommodation: *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d, 257: “Undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of the employer’s size, financial resources, and the needs of the business.” See also Samuel Bagenstos, *Rational discrimination, Accommodation and the politics of (disability) rights*, 89 VA. L. REV. 825 (2003).

268. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, HARV. C.R.-C.L. L. REV. 99, 100 (1999).

269. See Chai Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R., 187 (2008).

270. Art. 5 of Directive 2000/78/EC:

Reasonable accommodation for disabled persons: In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

271. CODE DU TRAVAIL [LABOR CODE] art. L.5213–6 provides that to guarantee the respect of equal treatment with regard to people with disabilities, the employer must take the appropriate measures, according to the needs in a concrete situation, to allow the workers mentioned in art. L.5212–13 to be employed or keep their employment reflecting their qualifications, to perform their work, progress, or gain access to training if needed. These measures are taken except if they involve in their implementation an undue burden which is disproportionate, despite of the financial support provided by art. L.5213–10 to compensate all or part of the designated expense. The refusal to take these measures can constitute discrimination according to § 1 of art. L.1133–2. The Defender of Rights (French equality body—see *supra* Chapter 2) has recommended an amendment in the bill pending on class action (*supra* note 140), which would include adding reasonable accommodation as a form of discrimination by modifying art. 1 of Law No. 2008–496 of May 27, 2008 on discrimination; see Opinion of Defender of Rights No. 15–23 (October 28, 2015). This would expand the scope of reasonable accommodation outside of employment (housing, contract law, goods and services).

272. Most cases that apply the notion of “appropriate measures” have been decided by the Conseil d’État, not the Cour de Cassation.

273. CE, July 11, 2012, No. 347703 on appropriate measures taken for a judge; in the private sector, Labor Court of Nantes, Apr. 22, 2010, No. 09/00440, case followed by the HALDE (in which an employee was dismissed on the basis of her disability after the occupational physician suggested an accommodation of work time following sick leave; the employer was fined €42,000, of which €33,000 were in damages); see also CPH Nîmes,

Dec. 13, 2010 (in which an employer took disciplinary measures against a person with a disability who had requested accommodation, but the occupational physician suggested that the employer refuse to accommodate, based on allegations of an undue burden for the workshop; the employer lost the case and was ordered to pay €15,000 in damages).

274. See also the HALDE decision for refusing to accommodate an applicant for a job as salesman after confirmation by the occupational physician that the candidate is qualified with accommodation. The application was rejected based on the justification that the applicant no longer fit the job profile. The HALDE proved that this was a pretext to avoid accommodation and constitutes discrimination, according to CODE DU TRAVAIL [LABOR CODE] art 5213-6: Decision No. 2009-128 of Apr. 27, 2009.

275. Francis Kessler, *Droit européen, handicap et intégration à l'emploi*, RDSS 806 (2011). See on the EU concept of disability, Case C-13/045, Chacon Navas v. Eurest Colectividades, July 11, 2006, RDSS 75 (2007), note Augustin Boujeka.

276. See Sandra Fredman, *Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?* in DISABILITY RIGHTS IN EUROPE; FROM THEORY TO PRACTICE 199-203 (Anna Lawson & Caroline Gooding eds., 2005).

277. See CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NONDISCRIMINATION LAW 631 (Dagmar Schiek et al. eds., 2007); Lisa Waddington & Aart Hendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*, INT. J. COMP. LAB. L. IND. REL. 403-27 (2002).

278. Olivier De Schutter, *Reasonable Accommodations and Positive Obligations in the European Convention of Human Rights*, in DISABILITY RIGHTS IN EUROPE; FROM THEORY TO PRACTICE 35-63 (Anna Lawson & Caroline Gooding eds., 2005).

279. United Kingdom, Disability Discrimination Act de 1995, s. 3A(2); Ireland, Employment Equality Act 1998, s. 16, and Equal Status Act 2000, s. 4; Sweden, Disability Discrimination Act, s. 6.

280. Case C-335/11, Ring v. Dansk (2013) and on the need to reasonably accommodate someone affected by obesity. National courts must decide whether obesity amounts to a disability in the particular circumstances of a case where the worker's obesity caused reduced mobility or other medical conditions. If an obese worker is disabled, then the employer would have to make "reasonable accommodation" to allow that person to "have access to, participate in or advance in employment." Case C-354/13, Fag og Arbejde (FOA), acting on behalf of Kaltoft v. Kommunernes Landsforening (KL) (Dec. 18, 2014).

281. Case C-312/11, Commission v. Italy, 2013 E.C.R. I-000.

282. Bernadette Pélissier, *L'obligation de reclassement*, I RECUEIL DALLOZ 399 (1998). For the worker with a disability that is recognized officially (as a handicap, a word still used in France), other obligations prior to reassignment, such as retraining, can be required outside of reasonable accommodation: Cass. soc., Feb. 17, 2010, No. 08-45476.

283. See Cass. soc., Jan. 31, 2007, No. 05-42855.

284. Pélissier, *supra* note 282.

285. Cass. soc., Mar. 24, 2010, No. 09-40339; Cass. soc., Mar. 21, 2012, No. 10-12068; Cass. soc., July 9, 2008, No. 07-41318; Cass. soc., Jan. 26, 2011, No. 09-43193; Cass. soc., Feb. 17, 2010, No. 08-43725; Cass. soc., Feb. 20, 2013, No. 11-26793.

286. See Cass. soc., Feb. 6, 2001, RJS 2001, No. 433; Cass. soc., Oct. 12, 2011, No. 10-18038. See also when Court considers dismissal without just cause when the right procedure is not followed, Cass. soc., Dec. 5 2012, No. 11-17913

287. CODE DU TRAVAIL [LABOR CODE] art. L.1132-4; some authors suggest that if the employer does not provide the necessary readjustment, the dismissal is not only without just cause, but it is null and void, according to the prohibition of discrimination in CODE

DU TRAVAIL [LABOR CODE] art. L.1132. See JEAN PÉLISSIER ET AL., LES GRANDS ARRÊTS DU DROIT DU TRAVAIL 367 (2008); but some cases maintain that the dismissal is without cause, Cass. soc., May 21, 2008, No. 07-41277.

288. Cass. soc., May 21, 2008, No. 07-41380; see recently, Cass. soc., Jan. 7, 2015, No. 10-27105; Cass. soc., Oct. 15, 2014, No. 13-16113.

289. Cass. soc., Jan. 28, 2010, No. 08-42616.

290. Cass. soc., Mar. 30, 2011, No. 09-71542.

291. CODE DU TRAVAIL [LABOR CODE] art. L.1133-2.

292. Serge Frossard, *Les contextes de l'obligation de reclassement*, DR. SOC. 963 (2010).

293. Péliissier, *supra* note 282, at 400-01; see also Cass. soc., Feb. 16, 1999, No. 96-45394.

294. Labor Court CPH Nîmes, Dec. 13, 2010.

295. On the positive side, if the occupational physician certifies the state of disability, and if the employer does not follow the procedure required to show that dismissal is unavoidable, after two medical examinations and no work adjustment possible, the violation of this formality could constitute discrimination, Cass. soc., Feb. 16, 1999, No. 96-45394. See Marie Mercat-Bruns, *Les contours de la discrimination professionnelle en raison de l'état de santé à la lumière du droit américain*, 11 LES CAHIERS DE DR. DE LA SANTÉ 16 (2010).

296. See Mathilde Caron & Pierre-Yves Verkindt, *Inaptitude, invalidité, handicap: l'image du "manque" en droit social*, RDSS 862 (2011) (to illustrate "the inadequacy in labor law, one must imagine being at the center of a triangle with angles named disability, handicap and inability"); see also Cass. soc., Jan. 25, 2011, No. 09-42766; Cass. soc., Feb. 15, 2011, No. 09-43172; Cass. soc., Apr. 28, 2011, No. 09-70845.

297. Frédéric Tallier, *L'évaluation du handicap et de l'aptitude à l'emploi*, RDSS 821(2011):

The term *employability* is increasingly used but remains controversial. Like the term disability, people tend to take advantage of the vagueness of the concept to define it as they choose. Employability refers to a person's capability of obtaining and maintaining employment: in other words, it means that the person can demonstrate the skills required to perform the job duties. This is a multidimensional concept that varies according to level of training, whether prior to employment or on-the-job, work experience, time away from a job, functional abilities, social and family environment, and the adaptability of the person and his/her environment.

298. Cass. soc., Feb. 6 2008, No. 06-44413; this implies that the employee accepts the work adjustment, Cass. soc., Feb. 20 2008, No. 06-44867.

299. Caron & Verkindt, *supra* note 296 ("The centrality of the concept of inadequacy is at the heart of welfare schemes and reflect the idea of need").

300. *Id.*

301. Cass. soc., Oct. 6, 2015, No. 13-26052 (*it is difficult to prove discrimination after dismissal of a worker who is put on disability and who also contends discrimination based on union membership*).

302. Cass. soc., Apr. 9, 2008, No. 07-40356 (physical disability without a possible work adjustment does not constitute a specific cause of dismissal).

303. Cass. soc., Jan. 13, 1998, No. 95-44301; Cass. soc., July 3, 2001, No. 99-41738.

304. Cass. soc., Feb. 20, 2008, No. 06-44712; Court of Appeals Paris, Sept. 7, 2010, No. S07/07628 (declaring null and void the dismissal of a worker based on the disruptive effect that her absence had on the work team, given that this effect and the need to replace the worker were not proven); see also Cass. soc., Sept. 16, 2009, No. 08-41879 (finding that the dismissal of a sick worker whose absence is disruptive to the work in the department cannot be justified seventeen months after the position has been filled by a replacement).

305. Cass. soc., Jan. 9, 2007, No. 05-43962. Indirect discrimination based on health status was also found in a more recent case in which an employer imposed an interview with

employees after their absence from work, regardless of the cause of that absence, Cass. soc., Feb. 12, 2013, No. 11–27689.

306. Pierre Verge & Dominic Roux, *Personnes handicapées: l'obligation d'accommodement raisonnable selon le droit international et le droit canadien*, DR. SOC. 965 (2010): this notion in Canadian law is closer to a global concept of the person and discrimination as an infringement of dignity.

307. See the work of Amartya Sen cited by Philippe Pédrot, *Handicap, aptitude à l'emploi et vulnérabilité*, RDSS 791 (2011) ("With the aging of people with disabilities, the increase in long-term care, and the tightening of the labor market, the idea is to integrate in our legal thinking the notion of 'capabilities' coined by Nobel prize economist Amartya Sen, to allow people with disabilities to effectively exercise their right to citizenship"). Through the idea of capability, the vindication of individual rights is not determined by resources or assets but based on the freedom people really have in choosing the life they value. Equality of income can leave behind great inequalities in our ability to act. An individual with a disability cannot act in the same way as a person without a disability. Level of education, work environment, capacity for resilience are the parameters which influence his/her action. Principles of justice, based on capabilities, stem from the idea of varying needs of individuals according to their ability to benefit from their resources. Amartya Sen considers the freedom of choice as an integral part of well-being. "Capability reflects the freedom of an individual to choose between different ways of living": AMARTYA SEN, *ÉTHIQUE, ÉCONOMIE ET AUTRES ESSAIS* 189 (1993).

308. The idea is not to identify the potential of an individual to act to compensate incapacity but to identify his or her potential to respect the freedom of each person as a source of dignity. See also Martha Nussbaum and her philosophy of "care," also inspired by Amartya Sen's work, and how the French law of 2005 reflects this way of thinking; Pédrot, *supra* note 307.

309. Nussbaum suggests that the capabilities approach can justify a core of human entitlements that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires. She identifies a list of "central human capabilities" (including life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; and control over one's political and material environment), arguing that all of them are implicit in the idea of a life worthy of dignity. The approach uses the idea of a threshold level of each capability, beneath which it is held that truly human functioning is not available to citizens. See MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* 70 (2006).

310. See Sophie Fantoni-Quinton et al., *Un avenir pour la santé au travail sans "aptitude périodique" est possible*, 48 JCP S 10, 11 (2011) (showing the limits of the mechanism focused on medically certified disability).

311. Cass. soc., Oct. 8, 2014, No. 13–11789.

312. Sexual harassment can even be reconceptualized in the workplace as a form of disparate impact discrimination; see the excellent work of L. Camille Hebert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?* 53 U. KAN. L. REV. 341 (2005).

313. See generally Marie Mercat-Bruns, *Harcèlement sexuel au travail en France: entre rupture et continuité*, in *LA LOI ET LE GENRE 201* (Stéphanie Hennette-Vauchez et al. eds, 2014) [hereinafter Mercat-Bruns, *Harcèlement sexuel*]. See also Loïc Lerouge & Camille Hebert, *The Law of Workplace Harassment of the United States, France, and the European Union: Comparative Analysis After the Adoption of France's New Sexual Harassment Law*, 35 COMP. LAB. L. & POL'Y J. 93 (2013).

314. *Rogers v. EEOC*, 454 F.2d 234 (CA5 1971), cert. denied, 406 U.S. 957 (1972) which involved a Hispanic and was apparently the first case to recognize a cause of action based on a discriminatory environment.

315. See for example, the Supreme Court case *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and the EEOC regulations, 45 Fed. Reg. 74676 (1980), mentioned in the case to consider that hostile environment harassment violates Title VII antidiscrimination law as sex discrimination.

316. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998); *Vance v. Ball State Univ.* 570 U.S. ____ (2013).

317. The harassment becomes severe and pervasive, See *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993).

318. See, for example, *infra* note 339, where Cass. soc., Oct. 19, 2011, No. 09-72672, is explained.

319. For a European comparison of sexual harassment, see Sophie Robin-Olivier et al., *Le harcèlement sexuel: droit italien, droit anglais, droit espagnol*, 5 REV. DR. TRAVAIL 353 (2013).

320. The Constitutional Court decided the criminal code definition of sexual harassment was not precise enough (CC, May 4, 2012, No. 2012-240); see Béatrice Lapérou-Schneider, *L'éclipse du harcèlement sexuel*, 7/8 DR. SOC. 714 (2012). The new definition of sexual harassment applies to criminal and labor law and is more expansive: see Law 2012-954 of Aug. 6, 2012; CODE PÉNAL [PENAL CODE] art. 222-33.I and CODE DU TRAVAIL [LABOR CODE] art. L.1153-1, defining sexual harassment as the act of repeatedly subjecting a person to unwelcome verbal or physical conduct of a sexual nature that either compromises the victim's dignity through its degrading or humiliating nature or that creates an intimidating, hostile or offensive situation for the victim ("II.: is assimilated as sexual harassment, even nonrepeated acts, using all forms of strong pressure to obtain, in a real or apparent way, acts of sexual nature, regardless of the fact this is to benefit the author of the acts or a third party"). See the guidelines of the Minister of Justice of Aug. 7, 2012 (circulaire CRIM 2012 -15 / E8) explaining what the definition covers and how to implement the law.

321. The European definition covers verbal harassment and does not imply a request for sexual favors. Curiously, sexist comments were not sufficient to characterize sexual harassment justifying dismissal of the perpetrator before the new law of 2012 (Cass. soc., Feb. 27, 1992, No. 91-41057).

322. Before the 2012 law, case law was already covering situations outside of quid pro quo harassment to obtain sexual favors (Cass. soc., Nov. 14, 2007, No. 06-45263), even though these situations of sexual favors do exist: see Cass. soc., Mar. 3, 2009, No. 07-4082; Court of Appeals Paris, Oct. 6, 1995 (involving a manager who promised to promote an intern in exchange for sexual favors); Cass. soc., Sept. 24, 2008 (involving a manager who tried to kiss an underage coworker in the workplace and made repeated attempts to accompany her home, triggering anxiety and depression).

323. For a case of harassment of a journalist during her maternity leave, see Cass. soc., Mar. 3, 2015, No. 13-23521.

324. Cass. soc., Oct. 25, 2007, No. 06-41806 (involving a company manager who used inappropriate language and behavior toward an employee who informed the union representatives and filed complaints with the human resources department and the local police); Cass. soc., Feb. 9, 2010, No. 08-44632 (involving the dismissal of an employee who had offended his female colleagues and an intern by sending them inappropriate messages and inviting them to see pornographic films on his computer); Cass. soc., Dec. 15, 2009, No. 08-44848 (involving an employee's inappropriate behavior and language despite objections from female employees who found it offensive); Cass. soc., Oct. 11, 2006, No. 04-45719. The employer is liable for sexual harassment when he ignores a complaint of sexual assault from one of his employees in a fixed term contract, see Cass. soc., May 6, 2015, No. 13-24261. However, the employer has no liability if the complaint of the employee

concerns only nostalgic text messages from her boss, the rejected lover, Cass. soc., Sept. 23, 2015, No. 14–17143.

325. See Rikki Holtmaat, *Sexual Harassment and Harassment on the Ground of Sex in EU Law: A Conceptual Clarification*, 2 EUR. GENDER EQUALITY L. REV. 4 (2011) (observing that there are forms of sexual harassment that are not linked to sex, but to sexuality as a way of abusing power, and showing a possible causal relationship between sexual harassment and inequality, in cases of abuse based on an employee's homosexuality or religion, for example).

326. See Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT L. 1 (Reva B. Siegel & Catharine A. MacKinnon eds., 2003); Catharine A. MacKinnon, *Afterword*, in DIRECTIONS IN SEXUAL HARASSMENT L. 672 (2003).

327. See William N. Eskridge, Jr., *Theories of Harassment "Because of Sex,"* in DIRECTIONS IN SEXUAL HARASSMENT LAW 155 (2003); Katherine M. Franke, *What's Wrong with Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 169 (2003); Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182 (2003); Mark Spindelman, *Discriminating Pleasures*, cited, in DIRECTIONS IN SEXUAL HARASSMENT LAW 201 (2003); see also Marie Mercat-Bruns, *La doctrine américaine sur les discriminations et le genre: dialogue entre la critique du droit et la pratique?* 2 JURIS.REV. CRIT. 93 (2011); Mercat-Bruns, *Harcèlement sexuel*, *supra* note 313, at 201.

328. See *Barnes v. Costle*, 561 F. 2d 983, 990 (DC Cir. 1977).

329. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

330. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1832 (1990); see also Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2063 (2003).

331. Comparative studies between U.S. and European legal frameworks already existed: see Abigail Saguy, *Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law*, 34 LAW & SOC'Y REV. 1091 (2000); Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003); see generally KATHRIN ZIPPEL, *THE POLITICS OF SEXUAL HARASSMENT: A COMPARATIVE STUDY OF THE UNITED STATES, THE EUROPEAN UNION, AND GERMANY* (2006).

332. The institutional environment and the type of company and job can increase the risk of sexual harassment, which can be combined with other sources of vulnerability, such as religion or origin. See Holtmaat, *supra* note 325, at 9.

333. Cass. soc., Mar. 11 2015, No. 13–18603 (*some cases condemn the employer for moral harassment and sexual harassment when moral harassment from other workers is triggered by rumors of complaint to employer who did not respect rules of confidentiality*).

334. Neither the EU directives nor French law (CODE DU TRAVAIL [LABOR CODE] arts. L.1153 and L.1132–1) refer to an abuse of authority. Instead, they use a hostile environment as a basis for assessment, although the definition refers to a hostile situation, not environment. See the EEOC's guidelines.

335. Journal Officiel of Aug. 7, 2012.

336. This decision of the Constitutional Council interrupted all criminal suits that were pending. The criminal sanction is two years of imprisonment and a fine of €30,000, increased to three years of imprisonment and a fine of €45,000 if the offender has abused his or her authority or targeted a victim who is fifteen years of age or whose particular vulnerability, due to age, illness, infirmity, physical or mental deficiency, or pregnancy, is apparent or known to the offender. These increased sanctions also apply if the victim's

particular vulnerability or subordination is due to economic or social status and is apparent or known to the offender or an accomplice.

337. A parallel can be drawn with the development of the concept of privacy in family law to protect the immunity of couples in domestic violence cases and thwart plans to incriminate the abuser.

338. *Recently* Cass. soc., Jan. 28, 2014, No. 12-20497 (an older worker sexually harassing a young intern).

339. Cass. soc., Oct. 19, 2011, No. 09-72672:

Considering on the one hand, the employee had used sexual explicit language with two female colleagues in his messages on MSN sent outside of office hours and outside of the office between noon and 1:30 PM, because he worked from 3 PM to 11 PM or during events organized after work, and on the other hand, that he had, during work time, made inappropriate comments to another female employee about her physical appearance and had followed a third female colleague into the bathroom, the Court of Appeals decided that the initial facts were part of the personal life of the male employee and hence could not constitute a breach in the performance of the contract and that the second series of facts were not sufficient to constitute acts of sexual harassment. By adopting this line of argument, despite the fact that his verbal comments of a sexual nature and his inappropriate attitude towards female employees, with whom the concerned employee interacts because of his work, are not part of his personal life, the Court of Appeals has violated the cited rules . . .

See also Cass. soc., Jan. 11, 2012, No. 10-12930. In addition, Cass. soc., Mar. 3, 2009, No. 07-44082 (demonstrating the same trend in case law, in a case in which sexual harassment in a person's private life causes a disability at work, also constituting moral harassment); for prior case law in which privacy is used as a defense for the alleged harasser, see Cass. soc., Nov. 30, 2005, No. 04-13877.

340. Cass. soc., Feb. 3, 2010, No. 08-44019 (the employer cannot justify the lack of preventive measures because the harasser resigns).

341. The attitude of the victim of moral harassment cannot limit the responsibility of harasser, Cass. Crim., May 27, 2015, No. 14-81489; Cass. soc., May 13, 2015, No. 14-10854. It is only if the employee knows the acts are untrue that the employer can argue bad faith, Cass. soc., June 10, 2015, Nos. 14-13338 and 13-25554.

342. The Court reminds the finder of fact that he or she must consider all the facts together, (the humiliation and mistreatment) which contribute to presume harassment is present: *see recently* Cass. soc., Sept. 24, 2014, No. 13-12073; Cass. soc., Apr. 30, 2009, No. 07-43219; Cass. soc., Jan. 25, 2011, No. 09-42766; this includes what is called managerial harassment, Cass. soc., Nov. 10, 2009, No. 07-45321 ("methods of management adopted by supervisor if, directed against one specific employee, involve repeated acts which constitute or have the effect of deteriorating working conditions to the point of violating the rights of the person, his dignity, his physical and mental state or compromise his career").

343. Law 2008-496 of May 27, 2008 introduced harassment as a form of discrimination (CODE DU TRAVAIL [LABOR CODE] art. L.1132-1). However the Defender of Rights (Opinion of Defender of Rights, No. 15-23, Oct. 28, 2015) recommends introducing more clearly in the law of 2008 (amendment to art. 1) that harassment based on discrimination can be linked to an isolated act (no repetition need like moral harassment). Introduction in the pending bill on class action: *see supra* note 140.

344. *See* Cass. soc., Oct. 19, 2011, No. 09-68272 (involving moral harassment committed by a third party exercising an authority, in fact, over employees); *see also* Cass. soc. 1er, Mar. 1, 2011, No. 09-69616; Cass. soc., Feb. 3, 2010, No. 08-40144.

345. See one of the first cases on environmental sexual harassment since the law of 2012: Cass. soc, Feb. 18, 2014, No. 12-17557 (proof of sexual harassment through witnesses of sexually explicit remarks, and the Court reminds us that the employer must protect workers for health reasons from sexual harassment; there is no need to communicate complaints to presumed harasser).

346. Except it is linked to a prohibited ground; if that is the case, one act is sufficient because it is qualified as discriminatory harassment.

347. Cass. soc., June 21, 2006, No. 05-43914.

348. See Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOCIOLOGY 406-54 (1999).

349. DOBBIN, *supra* note 187, at 213.

350. Burlington Industries v. Ellerth, 118 S. Ct 1998, 2263.

351. Cass. soc., May 21, 2014, No. 13-12666; Marie Mercat-Bruns, *Enquête interne, atteinte à la vie privée et obligation de sécurité*, 9 REV. DR. TRAVAIL 554 (2014).

352. Cass. soc., Nov. 19, 2014, No. 13-17729. The Cour de cassation has recently applied a lower standard in its scrutiny of the employer's obligation to protect the health and security of employees, Cass. soc. Nov. 25 2015 No. 14-24444.

353. It all depends on how dignity is defined: is it a subjective or an objective standard? Who decides? What is the implicit norm in the workplace? See DUNCAN KENNEDY, *SEXY DRESSING ETC.* (1995). In France, dignity can often be linked to vulnerability, and it begs the question of agency linked to harassment. See Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 111 (Reva B. Siegel & Catharine A. MacKinnon eds., 2003). The Court has also recently distinguished damages linked to moral harassment from those linked to discrimination based on maternity: see Cass. soc., March 3, 2015, No. 13-23521.

354. Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 595 (Reva B. Siegel & Catharine A. MacKinnon eds., 2003).

5. THE MULTIPLE GROUNDS OF DISCRIMINATION

1. European Convention on Human Rights art. 14 uses the term *notably* to indicate this nonexhaustivity.

2. Despite numerous prohibited grounds in France, most discrimination litigation in France is based on union membership, a more traditional and legitimate ground in labor law. The supreme court has stated that violations of union rights are not systematically discriminatory acts: see Cass. soc., Oct. 8, 2014, No. 13-16720. See Marie Mercat-Bruns & Emmanuelle Boussard Verrecchia, *Appartenance syndicale, sexe, âge et inégalités: vers une reconnaissance de la discrimination systémique?* 11 Rev. Dr. Travail 660 (2015).

3. Prohibited grounds in federal law can be different from the prohibited grounds in each state (which may be more numerous).

4. See two more recent studies of French employment discrimination case law for the Ministry of Justice: EVELYN SERVERIN & FRÉDÉRIC GUIOMARD, *DES REVENDICATIONS DES SALARIÉS EN MATIÈRE DE DISCRIMINATIONS ET D'ÉGALITÉ: LES ENSEIGNEMENTS D'UN ÉCHANTILLON D'ARRÊTS EXTRAIT DE LA BASE JURICA (2007-2010)* (2013); BERNARD BOSSU, *LES DISCRIMINATIONS DANS LES RELATIONS DE TRAVAIL DEVANT LES COURS D'APPEL: LA RÉALISATION CONTENTIEUSE D'UN DROIT FONDAMENTAL* (2014). For another study on the implementation of discrimination law, see MARIE MERCAT-BRUNS & JEREMY PERELMAN (EDS.), *LES JURIDICTIONS ET LES INSTANCES PUBLIQUES DANS LA MISE EN ŒUVRE DU PRINCIPE DE NON-DISCRIMINATION: PERSPECTIVES PLURIDISCIPLINAIRES ET COMPARÉES* (forthcoming 2016).

5. Marie Mercat-Bruns, *La personne au prisme des discriminations indirectes*, 37 RECUEIL DALLOZ 2475 (2013).

6. Marie Mercat-Bruns, *Les discriminations multiples et l'identité au travail au croisement des questions d'égalité et de libertés*, 1 REV. DR. TRAVAIL 28 (2015) [hereinafter Mercat-Bruns, *Les discriminations multiples et l'identité au travail*].

7. Even if, in the United States, the fight against sex discrimination also helped the fight against race discrimination. See generally SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW AND CIVIL RIGHTS REVOLUTION (2011) [hereinafter MAYERI, REASONING FROM RACE]; Marie Mercat-Bruns, *La discrimination professionnelle fondée sur le sexe aux États-Unis: une notion juridique sous tension*, 28 TRAVAIL GENRE SOCIÉTÉ 63 (2012) [hereinafter Mercat-Bruns, *La discrimination professionnelle fondée sur le sexe aux États-Unis*].

8. Which does not signify that the use of ethnoracial statistics was not contested in the United States as early as 1954, with the segregation of schools. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1471 (2004).

9. Now, Treaty on the Functioning of the European Union [TFEU] art. 157.

10. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

11. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (referring to the idea of diversity for the first time).

12. The Federalist Society is a group of conservatives and libertarians seeking to reform the American judiciary system to adhere to an originalist interpretation of the U.S. Constitution, placing emphasis on the original intent of those who drafted the law.

13. Act No. 2008-496 of May 27, 2008, art. 2 (introducing several measures for adapting to community antidiscrimination law).

14. Applicable to differences in treatment based on age.

15. See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). See also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

16. And in the representative bodies of listed companies (Act No. 2011-103 of Jan. 27, 2011, on the balanced representation of women and men on boards of directors and supervisory boards and workplace equality). See also Law of 2014 on real equality (*Loi 2014-873 du 4 août 2014 (pour l'égalité réelle entre les femmes et les hommes)*), which extends the parity rule in the public sector, *supra* Chapter 4.

17. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

18. See *supra* the developments in Chapter 2, "Models of Equality."

19. The article has since been published. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

20. See *supra* Chapter 1, "I. The Origins of Antidiscrimination Law," David Oppenheimer interview, and Chapter 4, "I. The Strengths and Limitations of Disparate Impact Discrimination," Robert Post interview, on Supreme Court cases with regard to race and equal protection.

21. *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013).

22. *Vance v. Ball State University*, 570 U.S. ____ (2013).

23. Since the *Vance* case, a plaintiff must now show that an individual committing harassment had the ability to take a tangible employment action against the plaintiff in order for that individual to be considered a "supervisor" in the context of a hostile work environment claim. After the *Nassar* case related to retaliation under Title VII, an employee must now demonstrate that retaliatory motivation was the but-for cause of an adverse

employment action and not simply a motivating factor. In other words, the plaintiff must prove that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action of the employer.

24. See Reva Siegel's observations in Chapter 2 describing these different conceptions of equality through constitutional case law.

25. See MAYERI, *REASONING FROM RACE*, *supra* note 7 (examining the influence of sex discrimination case law on racial discrimination case law, in particular in disparate impact cases).

26. On the reasons why the United States has not yet achieved a postracial society, see generally JOHN A. POWELL, *RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY* (2012).

27. This repression of discrimination first began in the United States in response to "smoking gun" evidence in the form of discriminatory comments that reveal the proximity of an act of discrimination. In Europe, see C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn*, 2008 E.C.R. I-5187. The many recent decisions in France deal more frequently with incitement to racial hatred or racist statements; see, e.g., Cass. crim., June 19, 2001, JCP 2002, II; Cass. crim., June 7, 2011, No. 10-85,179.

28. See *Slack v. Havens*, 522 F.2d 1091 (1975) ("Colored folks . . . clean better"). See also *Ash v. Tyson Foods*, 546 U.S. 454 (2006) (discussing the significance of the use of comments, names, or expressions conveying stereotyped images). The case involved the use of the term *boy* without any reference to color. The court found this sufficient, from a legal point of view, to establish discriminatory intent: *Ash*, 546 U.S. at 556 ("Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage").

29. See *supra* Chapter 1 and Chapter 4.

30. It must be understood that European Union law, in principle, does not distinguish between discrimination grounds: see Directive 2000/78. This is not the case in the United States, where a series of different legal regimes exists; see *infra* sections on the grounds of age and disability.

31. Compare the fierce debates on affirmative action with those on the Americans with Disabilities Act (see *infra* Chapter 5, "VI. Disability and Age Discrimination," and Chapter 5, "IV. Discrimination on the Basis of Family Status," on the statutes and case law on discrimination based on sex, pregnancy, and age).

32. See the guidelines on collecting race data since 2000, U.S. Census Bureau, <http://www.census.gov/topics/population/race.html>.

33. See the essay by Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 937-38 (2006) (relating that racial data collection was not always authorized in the United States either) ("During the 1950s and 1960s, however, the civil rights movement was quite wary of government collection of racial data, viewing it as a practice likely to entrench segregation. After *Brown*, the Supreme Court [suggested that] government collection of racial data—for example, [the compulsory designation of race] on ballots—either manifested or stimulated racial prejudice, and therefore violated the antidiscrimination principle.") See *Anderson v. Martin*, 375 U.S. 399, 402 (1963), and *Tancil v. Woolls*, 379 U.S. 19 (1964) (confirming the lower court decision from *Hamm v. Virginia State Bd. of Elections*, 230 F.Supp. 156, 158 (E.D. Va. 1964) invalidating laws that separated voting and property records based on race, but upholding a law requiring that divorce decrees designate the race of the divorcees). See also *Whitus v. Georgia*, 385 U.S. 545, 551 (1967) (holding that the practice of selecting jury members from tax records indicating race is discrimi-

natory). Certain state fair-employment laws even prohibited employers from keeping ethnoracial statistics on their employees. For a thorough interpretation of “color blindness,” see Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 265 (1971). “Views about the constitutionality of racial data collection began to shift with the enactment of the 1964 Civil Rights Act, which incorporated racial data collection into the enforcement apparatus of the nation’s new antidiscrimination legislation. With passage of the 1964 Act, racial record-keeping was not only permitted, it was now required by federal antidiscrimination law,” Balkin & Siegel, *supra* note 33, at 938. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88–352, tit. IV, § 402, 78 Stat. 247 (codified as amended at 42 U.S.C. § 2000c-1 (2000)) (requiring a survey of race to determine equal opportunity in education). “Passage of the Act prompted reassessment of the purposes for which government or employers might be collecting racial data, and so altered assumptions about the compatibility of racial data collection practices with the antidiscrimination principle. During the 1960s, as government began to change the form and function of racial data collection, the attitude of the civil rights movement toward the practice shifted markedly,” Balkin & Siegel, *supra* note 33, at 938.

34. The Supreme Court has reiterated this point on many occasions. As expressed in the Justice Stone’s famous footnote 4 in *Caroleene*, 304 U.S., at 153 n.4:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment that are most other types of legislation [. . .]. Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious [. . .] or national [. . .] or racial minorities, [. . .] whether prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

35. RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE* 31 (2005).

36. *Id.*, at 25.

37. In reference to the riots that followed the death of Michael Brown, an eighteen-year-old black man who was shot and killed by police officer Darren Wilson in Ferguson, Missouri, on August 9, 2014, and Baltimore protests in reaction to the death of Freddie Gray following police custody on April 19, 2015. Debate also arose after the death, linked to the use of a police choke hold, of Eric Garner in New York on July 17, 2014.

38. See International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) on Dec. 21, 1965 (entering into force on Jan. 4, 1969), art. 1.

39. This international convention on racial discrimination drew inspiration from the Universal Declaration of Human Rights art. 2; see also International Covenant on Civil and Political Rights art. 2.

40. But as observed by Marie-Thérèse Lanquetin, the directive mentions the difficulty of referring to race in recital 6 (“The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of these theories.”), which may explain why the term *ethnic origin* is included. Marie-Thérèse Lanquetin, *Discrimination*, 109 RÉPERTOIRE DE DROIT DU TRAVAIL 6 (2010).

41. The race category is a real challenge for CJEU judges. See DENIS MARTIN, ÉGALITÉ ET NON-DISCRIMINATION DANS LA JURISPRUDENCE COMMUNAUTAIRE: ÉTUDE CRITIQUE À LA LUMIÈRE D’UNE APPROCHE COMPARATISTE 199 (2006).

42. See the innovation brought by C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn*, 2008 E.C.R. I-5187 (condemning discriminatory statements relating to origin in a case without a specific victim).

43. Treaty Establishing the European Community (TEC) arts. 12, 39.

44. Case 152/73, *Sotgiu v. Deutsche Bundespost*, 1974 E.C.R. 153.

45. Julie C. Suk, *Disparate Impact Abroad* (paper presented at the University of Michigan Law School symposium on the Civil Rights Act at fifty, Oct. 11, 2013).

46. Anastasia Iliopoulou, "*Le temps des gitans*": à propos de la libre circulation des Roms dans l'Union, in 1 EUROPE (Jan. 2011).

47. In France, see Cass. crim., June 7, 2011, No. 10–85.179 (on statements labeling the Roma people as dangerous); see the controversial 2012 guidelines by the French Minister of the Interior on the dismantling of Roma camps, signed also by the Ministers of Housing and Labor and a department head of the Ministry of Education.

48. Jean-Philippe Lhernould, *L'éloignement des Roms et la directive 2004/38 relative au droit de séjour des citoyens de l'UE*, 11 DR. SOC. 1024 (2010).

49. For a study of the functional conception of equal treatment with respect to nationality, see JEAN-SYLVESTRE BERGÉ & SOPHIE ROBIN-OLIVIER, INTRODUCTION AU DROIT EUROPÉEN 138 (2008).

50. Case C-83/14 *CHEZ Razpredelenie Bulgaria AD* (July 16 2015):

The concept of "discrimination on the grounds of ethnic origin," . . . [in] . . . Directive 2000/43/EC of 29 June 2000 . . . must be interpreted as being intended to apply in circumstances such as those at issue before the referring court—in which, in an urban district mainly lived in by inhabitants of Roma origin, all the electricity meters are placed on pylons forming part of the overhead electricity supply network at a height of between six and seven metres, whereas such meters are placed at a height of less than two metres in the other districts—irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure.

51. See Zéhina Aït-El-Kadi, *Traitement des demandes d'asile de citoyens européens*, AJDA 14 (2010) (note under CE, Dec. 30, 2009, *OFPPA v. Covaciu*, No. 305226): "The Council of State considers that a citizen of a Member State of the European Union may only seek asylum in another Member State of the European Union in limitatively listed cases." In this case, OFPPA (Office français de protection des réfugiés et apatrides) challenged a Refugee Appeals Board (Commission des recours des réfugiés [CRR]) decision recognizing the refugee status of a Romanian national of Roma origin because of the persecution he faced due to his membership in the Roma community and his father's political militancy in Romania. As of the date of the board's decision, Romania had become a member of the European Union. The Conseil d'État, pursuant to Protocol No. 29 appended to the treaty establishing the European Community, recalled that Member States of the European Union are by definition considered to be safe countries of origin in matters of asylum.

52. See Thien Uyen Do, *A Case Odyssey into 10 Years of Anti-Discrimination Law*, 12 EUR. ANTI-DISCRIMINATION L. REV. 11, 14–15 (2011). This article describes discrimination against the Roma people, outside of the field of employment, involving racist remarks, access to the same quality of education, the right to housing, and even immigration control by British officers operating at the Prague airport (*R. v. Immigration Officer at Prague Airport* (2004), UKHL 55).

53. European Convention art. 14 lists thirteen grounds for prohibited distinction or discrimination, and this list is not exhaustive: sex, race, color, language, religion, political

or other opinion, national or social origin, association with a national minority, property, birth or other status. Except for association with a national minority, these grounds are the same as those listed in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

54. By applying European Convention on Human Rights [ECHR] art. 14 (on discrimination) in conjunction with ECHR Protocol 1, art. 1 (on the right to peaceful enjoyment of possessions) (*Gaygusuz v. Austria*, App. No. 17371/90, 23 Eur. H.R. Rep. 364 (1996); *Koua Poirrez v. France*, App. No. 40892/98, 40 Eur. H.R. Rep. 34 (2003)) or with ECHR art. 8 (on the right to private and family life) (*Petrovic v. Austria*, App. No. 20458/92, 33 Eur. H.R. Rep. 307 (1998); *Niedzwiecki v. Germany*, App. No. 58453/00, 42 Eur. H.R. Rep. 33 (2006), and *Okpisch v. Germany*, App. No. 59140/00, 42 Eur. H.R. Rep. 32 (2006); *Wagner v. Luxembourg*, App. No. 76240/01, Eur. Ct. H.R. (2007)), the European Court was able to expand the application of the antidiscrimination principle to property rights and thereby the right of access to social benefits.

55. See *Jersild v. Denmark*, App. No. 15890/89, 19 Eur. H.R. Rep. 1 (1994); *Timishev v. Russia*, App. Nos. 55762/00 and 55974/00, 44 Eur. H.R. Rep. 37 (2005). However, the ECtHR does not prohibit contracting parties from treating groups differently in order to correct factual inequalities, although it has accepted that in certain circumstances, to compensate factual inequalities, it is legitimate to allow differences of treatment on the basis of ethnic origin. In *Orsus v. Croatia*, App. No. 15766/03, judgment of Mar. 16, 2010, § 157, the court took the view that “temporary placement of Roma children in a separate class on the grounds they lack adequate command of the language is not, as such, automatically contrary to ECHR art. 14. It might be said that in certain circumstances such placement would pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such measure disproportionately or even, as in the present case, affects members of a specific ethnic group, then appropriate safeguards have to be put in place.” Olivier de Schutter, EUROPEAN COMMISSION, THE PROHIBITION OF DISCRIMINATION UNDER EUROPEAN HUMAN RIGHTS LAW 19 (2011).

56. The court can take account of the particular circumstances of applicants. See *Aksu v. Turkey*, App. Nos. 4149/04 and 41029/04, 56 Eur. H.R. Rep. 4 (2010) (applying to Roma people).

57. The benefit of the court’s intervention is to identify discrimination based on ethnic origin in all areas where it is revealed, with respect to the condemnation of Spain for non-payment of a survivor’s pension to a widow who had married in accordance with Roma rites (*Muñoz-Díaz v. Spain*, App. No. 49151/07, 50 Eur. H.R. Rep. 1244 (2009); however, more recently no violation of ECHR art. 14 was found in conjunction with art. 1 of Protocol 1 for a difference in treatment between civil and Islamic marriages. *Şerife Yiğit v. Turkey*, App. No. 3976/05, Nov. 2, 2010. Compare with the EU Court of Justice reflexion on stereotypes associated with Roma, CJEU *CHEZ*, point 82, *supra* note 50: “Observations submitted to the Court that, in various cases [...] *CHEZ* RB asserted that in its view the damage and unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin. Such assertions could in fact suggest that the practice at issue is based on ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds.”

58. See generally *Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81, and 9474/81, 7 Eur. H.R. Rep. 471 (1985); *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. H.R. Rep. 1 (2002).

59. See more recently a case of police brutality motivated by racism and strong biases against the Roma people: *Ciorcan and Others v. Romania*, App. Nos. 29414/09 and 44841/09, Eur. Ct. H.R., Jan. 27, 2015.

60. *Timishev*, *supra* note 55, at § 56. Timishev, an ethnic Chechen lawyer living as a forced migrant, was refused entry at one checkpoint and forced to make a 300-kilometer detour to another checkpoint, based on oral instructions from the Minister of the Interior not to admit people of Chechen origin. The court held that there was a violation of ECHR art. 14 (on discrimination) taken conjunction with art. 2 of Protocol No. 4 (on the right to freedom of movement).

61. *Timishev*, *supra* note 55, at § 58.

62. The ECtHR considers that, in view of the fundamental importance of the prohibition of discrimination on grounds of race, no waiver of the right not to be subjected to discrimination on such grounds can be accepted as it would be counter to an important public interest; see *D.H. v. Czech Republic*, App. No. 57325/00, 47 Eur. H.R. Rep. 59 (2007), § 204 (concerning the education of Roma children).

63. *Dimitrescu v. Romania*, App. No. 3028/04, Eur. Ct. H.R. (2008) (on schooling for Roma children).

64. See *Van Raalte v. Netherlands*, App. No. 20060/92, 24 Eur. H.R. Rep. 503 (1997) (on the obligation for unmarried childless men to pay contributions to child benefits). See also in this direction, *Larkos v. Cyprus*, App. No. 29515/95, 30 Eur. H.R. Rep. 597 (1999); *Thlimmenos v. Greece*, App. No. 34369/97, 31 Eur. H.R. Rep. 411 (2000); *Koua Poirrez v. France*, App. No. 40892/98, 40 Eur. H.R. Rep. 34 (2003).

65. Even if technically in European law there is no hierarchy among prohibited grounds.

66. *Timishev v. Russia*, App. Nos. 55762/00 and 55974/00, 44 Eur. H.R. Rep. 37 (2005), § 55.

67. See *Aksu v. Turkey*, App. Nos. 4149/04 and 41029/04, Mar. 15, 2012; the applicant alleged that three publications—a book and two dictionaries—having received government funding included remarks and expressions that reflected anti-Roma sentiment. The author had stated that Gypsies were engaged in illegal activities, lived as “thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers,” and were polygamist and aggressive. The applicant relied on ECHR art. 14 taken in conjunction with art. 8. Although art. 14 was applicable and, as a Roma, he considered that these statements constituted an attack on his Roma identity, the court observed that “the case does not concern a difference in treatment, and in particular ethnic discrimination, as the applicant has not succeeded in producing prima facie evidence that the impugned publications had a discriminatory intent or effect.” But other grounds have led the way in pointing out stereotyping: see *Konstantin Markin v. Russia* (App. No. 30078/06) (pertaining to sex); *Alexandra Timmer, Towards an Anti-Stereotyping Approach for the European Court of Human Rights*, 4 HUM. RTS. L. REV. 707 (2011); *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 908 (2011) (pertaining to disability). It was held to be unlawful discrimination under the European Convention on Human Rights for a government to refuse to grant a residence permit on the basis of HIV-positive status. Since it was dealing with a vulnerable group, the State had only a narrow margin of appreciation.

68. See decisions on indirect discrimination after *D.H. v. Czech Republic*, App. No. 57325/00, 47 EUR. H.R. REP 59 (2007), § 204. Relying on ECHR art. 8 in conjunction with art. 14, applicants from Ghana submitted that it amounted to indirect discrimination against them when applying for family reunion, that persons who were born Danish citizens were exempt from the attachment requirement altogether, whereas persons who had acquired Danish citizenship at a later point in life had to comply with the twenty-eight-year rule before being exempted from the attachment requirement. In the present case that would entail that the first applicant could not be exempted from the attachment requirement until 2030, thus after twenty-eight years of Danish citizenship, and after having reached the age of fifty-nine. The ECtHR ruled no violation. A refusal to exempt the applicant from the attachment requirement after such a short time (first applicant, no ties to Denmark) cannot

in the Court's view be considered disproportionate to the aim of the twenty-eight-year rule; namely, to exempt from the attachment requirement a group of nationals who, seen from a general perspective, had lasting and long ties with Denmark. *Biao v. Denmark*, App. No. 38590/10, Eur. Ct. H.R., Mar. 25, 2014, request for referral to the Grand Chamber pending.

69. Even though origin is a tricky ground: The Supreme Court decided that an employer's refusal to hire a person because he or she is not a United States citizen does not constitute employment discrimination on the basis of "national origin" in violation of § 703 of the Civil Rights Act of 1964. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). Marie Mercat-Bruns & Louis Imbert, *Les discriminations fondées sur la nationalité: Perspectives américaines*, 103 PLEIN DROIT 60 (2014).

70. See generally DANIELE LOCHAK, *LE DROIT ET LES JUIFS, EN FRANCE DEPUIS LA RÉVOLUTION* (2009). See guidelines by Minister of Justice Christiane Taubira for quicker and harsher prosecution of racist or xenophobic acts, Jan. 12, 2015, following the *Charlie Hebdo* and kosher supermarket attacks. However, the kamikaze attacks in Paris on Nov. 13, 2015, were followed by the adoption of a state of emergency for three months, which facilitates a wide scope of criminal investigations to prevent future terrorist attacks: *Law 55-385 of Apr. 3, 1955, on the State of Emergency* (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>).

71. See art. 1 of the French Constitution of 1958; art. 31, Act No. 78-17 of Jan. 6, 1978 (on information technology, data files and civil liberties), and art. 8 (applying specific restrictions on the collection of personal data); HALDE decision No. 2006-31 of Feb. 27, 2007; Versailles, June 17, 2009, No. 08/03751 (against the use of keeping "ethnic" data). See also art. 63 of the draft legislation on immigration and integration, known as the "loi Hortefeu," Sept. 2007 (authorizing the collection of ethnic statistics), and CC [Conseil constitutionnel] decision No. 2007-557 DC, Nov. 15, 2007 (holding art. 63 unconstitutional); Veil Report, released in December 2008 by the committee headed by Simone Veil, refusing to revise the Preamble to the French Constitution to introduce the idea of diversity; report by the Committee for the Measurement of Diversity and Discrimination (Comité pour la mesure de la diversité et des discriminations [COMEDD]), released in February 2010.

72. See Katell Berthou, *La preuve des discriminations à l'embauche en raison de l'origine*, 11 REV. DR. TRAVAIL 635 (2010) (commenting on the Toulouse Court of Appeal decision of Feb. 19, 2010, on the ban (or limitation) of the use of ethnoracial statistics). It is possible to approach the issue from a different angle, showing a contradiction in the logic in France: if "race" as a social construct does not exist, why have a law (1978) to prohibit something that does not exist? This is the question posed by Professor Randall Kennedy at Harvard Law School in a 2010 conversation with the author in preparation for this book.

73. The judges reason by default. A lack of objective evidence explaining an arbitrary difference in treatment enables them to infer the possibility of discrimination based on origin, if no other factor exists to explain such delayed career development, Cass. soc., Feb. 7, 2012, No. 10-19505. The Défenseur des Droits (successor to HALDE), to combat this lack of evidence, helped create a website to allow citizens to alert directly a platform of organizations if they are victim of racial comments or racial micro-aggressions (including in employment); see <http://www.egalitecontreracisme.fr/>.

74. An increase in cases involving racist statements made outside of the workplace has been observed. See Cass. crim., Mar. 15, 2011, No. 11-1738; Cass. crim., June 7, 2011, No. 11-2763; Cass. crim., June 19, 2001, No. 98-83.954 (involving a French mayor who, in an exclusive interview given to a German journalist, made comments constituting incitement to racial hatred and violence). The mayor was found guilty of aiding an act of defamation when, without her knowledge, the interview was published in a French newspaper. The journalist was prosecuted as the principal offender. With this decision, the Criminal

Chamber overturned the Aix-en-Provence Court of Appeal's decision of Mar. 9, 1998, in which the trial courts considered that "by granting an interview to the journalist for publication, [the mayor] intended to make her comments public and obtained the means to do so" and that "although her consent was materially given only to this journalist, it must be considered applicable to any publication, provided that her comments are faithfully reproduced."

75. Michel Danti-Juan, *Discriminations*, 41 RÉPERTOIRE DR. PÉNAL (1996). "Evidence of intent to discriminate, indispensable to the demonstration of the offense, presents notable practical difficulties whenever this intent has not been manifested by written or oral statements or other expressions enabling judges to perceive the frame of mind of the person denying a good, service or employment." See CRIMINAL CODE [CODE PÉNAL] art. 225-1.

76. On Jan. 8, 2014, France's administrative supreme court (Conseil d'État) declared null and void a lower court's injunction suspending the effects of a mayor's ban on stand-up comedian Dieudonné's show because of anti-Semitic comments. The court's reasoning is based on the infringement of dignity of the human person as part of public order, Ordonnance No. 374508. On Dieudonné's being fined €22,500 on Mar. 19, 2015, because of racist comments against a Jewish journalist made during his show, see *Propos anti-sémites de Dieudonné : le jugement mis en délibéré au 19 mars*, LE MONDE, http://www.lemonde.fr/societe/art/2015/01/28/dieudonne-comparait-en-justice-pour-ses-propos-sur-patrick-cohen_4564674_3224.html; <http://www.francebleu.fr/infos/dieudonne-condamne-22-500-euros-d-amende-pour-des-propos-contre-patrick-cohen-2228721>.

77. See the 2010 annual report of the HALDE (former equality body, succeeded by Défenseur des Droits), available at http://www.halde.fr/IMG/pdf/DP_RA_HALDE_2010.pdf. Origin was consistently the leading factor of discrimination claims. The breakdown by ground of discrimination has remained relatively constant since 2005, with origin accounting for 27–29 percent since 2007, handicap and health 19 percent, sex (including pregnancy) 9 percent, age 6 percent, and union activity 5 percent. The annual report of the Défenseur des Droits mentions a few cases involving racial discrimination, racial comments, use of foreign surnames, and progress in using a "panel" method of comparison to prove discrimination; see decision No. MLD-2013-98 of July 1, 2013, <http://www.defenseurdesdroits.fr/decisions/ddd/MLD-2013-98.pdf>.

78. The figures have hardly changed in criminal law, despite this 2008 testimonial by a legal practitioner: Thierry Sagardoytho, *Le droit pénal de la discrimination, un droit à construire*, 7–8 ACTUALITÉ JURIDIQUE PÉNAL 313 (2008). See also the 2014 annual report of the Défenseur des Droits (in French), RAPPORT ANNUEL D'ACTIVITÉ 15 (2014).

79. Cass. crim., Dec. 1, 1992, No. 89–82.689, Bull. crim., No. 398 (finding that an employer is not criminally liable for publishing a racially discriminatory job offer where it has been established that the offer was published after outsourcing the recruitment mission to a service provider). The director of publication may not be held responsible as the principal offender or as an accomplice unless materiality and intent elements have been established, or a knowing participation in the punishable principal act, which was not the case here.

80. For example, Cass. crim., Nov. 14, 1989, No. 88–81.817, Bull. crim. No. 416; Paris, 11th Ch. B, Oct. 17, 2003, *Moulin Rouge*, No. 03–00.387, REV. JURIS. SOC. (2004), No. 171; Michel Miné, note under TGI Paris, 31st Ch. corr., Nov. 22, 2002, 660 DR. OUVRIER 270 (2003); Paris, 11th Ch. A, June 7, 2004; Nantes criminal court of July 17, 2006; Cass. crim., June 23, 2009, Adecco, No. 07–85.109, Bull. crim., No. 126; ACTUALITÉ JURIDIQUE PÉNAL 408 (2009) (note by Jérôme Lasserre Capdeville); Jean-Baptiste Thierry, *Parce qu'elles ne le valaient pas bien*, 12 REV. DR. TRAVAIL 722 (2009).

81. On the limitations of criminal proceedings: “Although the arsenal of repression may seem impressive, the criminal approach to discrimination remains largely unsatisfactory. This widely shared observation has several causes, the main ones being a complex delimitation of the contours of the discrimination offense, the difficulties of proving discrimination and the relatively feeble financial sanctions ordered.” Elisabeth Fortis, *Réprimer les discriminations depuis la loi du 27 mai 2008: entre incertitudes et impossibilités*, 7 ACTUALITÉ JURIDIQUE PÉNAL 303 (2008). For the difference between civil and criminal proceedings in terms of evidence of discrimination, see CC decision No. 2011–455 DC, Jan. 12, 2002, J.O. 1053 (Jan. 18, 2002); Cass. crim., Apr. 3, 2007, No. 870, REV. JURIS. SOC. (2007).

82. See a very rare labor court decision refusing a promotion “because of inexperience.” The employee considered, because of highly positive appraisals, that the refusal was discriminatory, based on “origin” and “skin color.” The court observed that the employee was qualified for the promotion and that three colleagues with similar or lower qualifications were hired as risk analysts. Conseil des prud’hommes de Paris (decided by professional judge after a tie vote between union and employer acting as judges), Dec. 27, 2012, No. 11–01105, Natixis Corporation. Sometimes no objective justification is produced by employer for the direct discrimination; see Court of Appeal, Colmar, Apr. 24, 2008, No. 1020765. In other instances, candidates of a certain origin were probably selected because of their place of residence, but at that time, place of residence was not a ground for discrimination, and anonymity of selection process was used to reject discrimination claim; see Cass. soc., June 16, 2015, No. 13–28129.

83. Cass. soc., Dec. 15, 2011, No. 10–15873, Airbus (considering that since the lower court had held that the plaintiff has presented elements suggesting discrimination upon recruitment and that it had noted the employer’s failure to demonstrate that its selection of another applicant was based on that applicant’s level of education or work experience, it had legally justified its decision).

84. Jérôme Lasserre Capdeville, *Le testing*, ACTUALITÉ JURIDIQUE PÉNAL 310 (2008) (“the legal recognition of testing did not greatly affect the fight against discrimination, especially repressive criminal sanctions in this area. In fact, testing currently only plays a subsidiary role in criminal law, which is not expected to develop in the future, given that this approach can be easily disputed in the absence of outside corroborating evidence. Testing can, however, be useful to measure discriminatory mechanisms before the fact”). This is why the current government is pushing to generalize testing procedures; see the recommendations made in the May 19, 2015, report by the French Ministry of Labor, *supra* Chapter 3, note 28.

85. Cass. soc., Jan. 18, 2012, No. 10–16926 (finding discrimination in a case where a deputy HR manager asked a highly recommended job candidate to return in two weeks when her boss, who “does not trust women from the Maghreb,” would be on vacation); Cass. soc., Nov. 10, 2009, No. 08–42.286 (holding that an employer’s request that an employee change his name from Mohamed to Laurent, particularly at the time of hiring, constitute discrimination on the basis of origin). In the latter case, the circumstantial fact that several employees in the company or department are also named Mohamed was not in itself an objective justification of such as request. The appellate court’s decision to reject the plaintiff’s claim for damages for discrimination, arguing that the employee had accepted the change of name at the time of hiring and that at the time the employment contract was signed, there were four other employees in the company with the same first name, was struck down.

86. Cass. crim., June 23, 2009, No. 07–85.109, BULL. CRIM. 2009, No. 126 (ruling that the recruitment campaign conducted by two companies, excluding non-European or nonwhite

people from their search for women to promote a hair care product, unjustified by the nature of the product being promoted, was discriminatory on the basis of origin). Candidates were sought to meet these requirements: aged 18 to 22, size 40 maximum (U.S. size 8–10), and BBR, an abbreviation standing for “bleu, blanc, rouge” (blue, white, red, the colors of the French flag).

87. Racial discrimination in promotion or job transfer decisions is harder to prove unless the job opportunities are given to less-experienced or less-skilled nonminority workers. See Conseil des prud’hommes de Paris, Dec. 27, 2012, Natixis Corporation, No. 11–01105.

88. In a case where educational qualifications were presented as selection criterion only after hiring, an assumption could be made that the unsuccessful applicant’s name of North African origin was the cause for the denial of recruitment. This was the reasoning of the Cour de cassation, Cass. soc., Dec. 5, 2011, No. 10–15873, confirming the decision of the Toulouse Court of Appeal of Feb. 19, 2010, sentencing Airbus to a €18,000 fine for damages for discrimination on the ground of origin.

89. Cass. soc., Dec. 15, 2011, No. 10–15873. A short-term worker was not recruited for a long-term position and the employer could not justify that the refusal decision was based on education or work experience. In the absence of an objective justification, the court recognized discrimination based on origin and surname. The French supreme court is encouraging judges to infer discrimination in cases of unequal treatment of workers, if employers refuse to produce objective evidence. For a case of unequal pay, see Cass. soc., June 12, 2013, No. 11–14458.

90. The European Commission against Racism and Intolerance (ECRI), the human rights body of the Conseil de l’Europe, made up of independent experts, published its Fourth Report on France on June 15, 2010. Improvements were observed, such as reinforced legal provisions to combat discrimination, thanks in particular to the role played by the HALDE, especially against racism. The ECRI, however, pointed out the persistence of discrimination on the basis of “race,” color, language, religion, nationality, and national or ethnic origin in access to employment, education, housing, and goods and services. Likewise, the report denounced the unacceptable living conditions of Roma and Travelers, with the number of stopping places still insufficient. See the summary in 25 JCP G 706 (2010). See also LA LUTTE CONTRE LE RACISME, L’ANTISÉMITISME ET LA XÉNOPHOBIE, the 2014 report on racism, xenophobia, and antisemitism, by the French Commission on Human Rights (Commission nationale consultative des droits de l’homme [CNCDH]) and the interview of its president, available at <http://www.cncdh.fr/fr/actualite/rapport-annuel-sur-le-racisme-lantisemitisme-et-la-xenophobie> (the 2015 report is forthcoming), and the 2015 report on discrimination by the ILO and the Défenseur des Droits, describing the types of discrimination in recruitment faced by workers of foreign origin, available at <http://www.ilo.org/public/french/region/eurpro/paris/actualites/download/barom8synthese.pdf>. Recently certain cases have prevailed in the courts with regard to racial profiling of police during routine ID checks; see Court of Appeals, Paris June 24 2015, 13/24261.

91. Éric Fassin, *Statistiques raciales ou racistes? Histoire et actualité d’une controverse française*, in LES NOUVELLES FRONTIÈRES DE LA SOCIÉTÉ FRANÇAISE 430 (Éric Fassin ed., 2010): “In particular, what delineates the battlefield in the recent controversy is the problematic relationship between the race question and the immigration question. Do ethnic statistics refer to origin, i.e., once again to immigration? Or, on the contrary: does the dispute over statistics signify a new recognition of racial discrimination?” See also the Constitutional Council’s censorship of the introduction of ethnic statistics in the act relating to the control of immigration, integration, and asylum, CC decision No. 2007–557 DC, Nov. 15, 2007:

Section 63 of the statute referred for review, which is the results of an amendment passed by the National Assembly on first reading, amends II of section 8 and I of section 25 of the Act

of January 6, 1978 referred to hereinabove. It is designed to allow processing of personal data “indicating, directly or indirectly, the racial or ethnic origins” of persons for the carrying out of studies on diversity of origin, discrimination and integration, and subject to the authorization of the National Committee of Data Processing and Individual Liberties.

92. See Law 211–672 of June 16, 2011, on immigration, integration, and citizenship, J.O., June 17, 2011, p. 10290, which focuses on procedures for returning illegally staying third-country nationals, reinforces the means by which the government can monitor third-country nationals pending their return and plans amendments to the administrative return procedure, which also includes community nationals under certain conditions (art. L. 511–3–1); these measures can impact Roma people. See Olivier Lecucq, *L'éloignement des étrangers sous l'empire de la loi du 16 juin 2011*, 34 AJDA 1936 (2011).

93. See DE LA QUESTION SOCIALE À LA QUESTION RACIALE? REPRÉSENTER LA SOCIÉTÉ FRANÇAISE (Didier Fassin & Éric Fassin eds., 2009); ÉRIC MAURIN, LE GHETTO FRANÇAIS: ENQUÊTE SUR LE SÉPARATISME SOCIAL 61 (2004); HUGUES LAGRANGE, LE DÉNI DES CULTURES 115 (2010); ÉRIC FASSIN ET AL., ROMS & RIVERAINS: UNE POLITIQUE MUNICIPALE DE LA RACE (2014).

94. Edmond Preteceille, *La ségrégation ethno-raciale a-t-elle augmenté dans la métropole parisienne?*, 50 REV. FR. DE SOCIOLOGIE 489 (2009); MARCO OBERTI, L'ÉCOLE DANS LA VILLE, SÉGRÉGATION—MIXITÉ—CARTE SCOLAIRE (2007); ÉMEUTES URBAINES ET PROTESTATIONS: UNE SINGULARITÉ FRANÇAISE (Hugues Lagrange & Marco Oberti eds., 2006).

95. See the occupational categories used by France's national statistics body, INSEE, <http://www.insee.fr/fr/methodes/default.asp?page=nomenclatures/pcs2003/pcs2003.htm>. This classification is fundamental to all sociological studies in France. The new version of these Occupations and Socio-occupational Categories [Professions et Catégories Socioprofessionnelles] introduced in 2003 is the result of work in progress since 1982. The updated version groups occupations for which the distinction has now become obsolete and similarly breaks down other categories to reflect the appearance of new occupations (in the fields of the environment and new information and communication technologies, for example), as well as occupations that are not specific to a particular industry (methods, quality control, logistics).

96. Since French Law No. 2012–954 of Aug. 6, 2012, the list of grounds refers to family name instead of name. See Cass. soc., Nov. 10, 2009, No. 08–42286: “By deciding that requesting that the employee change his name from Mohamed to Laurent constitutes discrimination on the basis of origin and that the circumstance that several employees were named Mohamed was not an objective element justifying the decision, the appellate court violated the statute referred to hereinabove.” See also the analysis by Thérèse Aubert-Monpeyssen, *Vous avez dit 'Laurent'?*, 3 REV. DR. TRAVAIL 169 (2010): “By finding discrimination based on origin, the Social Chamber interprets the law with emphasis on its actual end purpose, demonstrating the coherence of the list of protected grounds and their nonexhaustive nature. In so doing, it widens the spectrum of behavior that can be sanctioned based on this ground. In particular, it makes it possible to fight forms of discrimination of which, according to the Fauroux report, “the offenders themselves are not always aware” but that “harshly affect victims [and] participate in the disintegration of society, undermining it from within.” ROGER FAUROUX, MINISTÈRE DE L'EMPLOI, DE LA COHÉSION SOCIALE ET DU LOGEMENT, LA LUTTE CONTRE LES DISCRIMINATIONS ETHNIQUES DANS LE DOMAINE DE L'EMPLOI 8 (2005).

97. The ground of place of residence was added to LABOR CODE [CODE DU TRAVAIL] art. L.1132–1 by Law 2014–173 of Feb. 21, 2014, enforced since Feb. 23, 2014, on city planning and urban cohesion. The HALDE had published a deliberation on Apr. 18, 2011, on discrimina-

tion based on place of residence, calling for the adoption of a legislative measure adding “residential address as a prohibited ground of discrimination without legitimate reason” to the list of prohibited criteria in the Labor Code (Délibération relative aux discriminations à raison du lieu de résidence: un nouveau critère à inscrire dans la loi no 2011-121 du 18 avril 2011); see Emmanuel Duguet et al., *Les effets du lieu de résidence sur l'accès à l'emploi: une expérience contrôlée sur des jeunes qualifiés en Île-de-France*, in 128 DOCUMENT DE TRAVAIL 17 (Centre d'études de l'emploi, 2010) (observing that discrimination on the basis of place of residence particularly affects women).

98. See Marie-Thérèse Lanquetin, *Discriminations*, 109 RÉPERTOIRE DE DROIT DU TRAVAIL: “Furthermore, origin can also refer to social origin, a ground not explicitly listed in art. L. 1134-2, but that has been included in Convention No. 111 of the ILO, ratified by France in 1981 and in force since 1982. This ground has also been included in the EU Charter on Fundamental Rights.” Case law in employment involving this ground is still not abundant. See Cass. soc., Apr. 8, 1992, No. 90-41.276, RECUEIL DALLOZ 293 (1992) (note by Antoine Lyon-Caen).

99. The author reflects on the difference between social origin and social condition and the difficulty in using standards to identify the ground. Diane Roman, *La discrimination fondée sur la condition sociale, une catégorie manquante du droit français*, RECUEIL DALLOZ 1911 (2013).

100. Proposition de loi visant à lutter contre la discrimination à raison de la précarité sociale [draft legislation aiming to fight discrimination based on social insecurity], Bill No. 378, introduced by Socialist senator Yannick Vaugrenard and adopted unanimously with some abstentions by the conservatives on June 18, 2015, available at <http://www.senat.fr/leg/pp14-378.html>. The bill must now be passed by the National Assembly; see <http://www.assemblee-nationale.fr/14/propositions/pion2885.asp>; the grounds cover “a particular vulnerability caused by an apparent or known economic situation.”

101. See the decision to remove the general culture test from the entrance examination to Sciences Po law school, available at <http://www.sciencespo.fr/node/8952>.

102. On percentage plans seen from a French perspective, see the report published by the French-American Foundation in November 2007 on the findings of the study tour conducted by the Foundation to the University of California at Berkeley and the University of Texas at Austin, available at http://www.frenchamerican.org/sites/default/files/documents/media_reports/percentageplans_report_fr.pdf, and new measures similar to the Texas percentage plans adopted in France in 2013.

103. See *supra* Chapter 2, and the work by Daniel Sabbagh on his classification of “indirect positive discrimination” and the threat of the Supreme Court’s *Fisher v. University of Texas* decision on affirmative action programs.

104. Mercat-Bruns, *La discrimination professionnelle fondée sur le sexe aux États-Unis*, *supra* note 7, at 63.

105. *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) on June 20, 2011 (“The certification of the nationwide class of female employees was not consistent with Federal Rule of Civil Procedure 23(a), which requires the party seeking class certification to prove that the class has common questions of law or fact”): The nationwide class alleging discrimination in pay and promotions by Wal-Mart failed to satisfy commonality prerequisite for class action certification under method requiring “significant proof” of general policy of discrimination, despite social framework analysis by expert who testified that employer has “strong corporate culture” that makes it “vulnerable” to gender bias, where he conceded that he could not calculate whether 0.5 percent or 95 percent of employment decisions might be determined by stereotyped thinking.

106. Plaintiffs' Motion for Class Certification in No. 3: 01-cv-02252-CRB (ND Cal.), Doc. 99, p. 13.

107. 222 F.R.D. 137, 166.

108. Plaintiffs' Motion for Class Certification in No. 3, *supra* note 105, at 16.

109. 222 F.R.D. 137, 155.

110. *Id.* at 159.

111. Two cases justify the adoption of the Pregnancy Discrimination Act (P.L. 95-555) of 1978. In 1974, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the U.S. Supreme Court held that pregnancy was not a sex-based classification and therefore California was permitted to exclude pregnancy-related disability from its temporary disability benefits program under the Equal Protection Clause. In 1976, in *General Electric v. Gilbert*, 429 U.S. 125 (1976), the U.S. Supreme Court held that denying disability benefits to pregnant workers was also not sex discrimination under Title VII. In light of the Pregnancy Discrimination Act, the Supreme Court has held recently that the courts must evaluate the extent to which an employer's policy treats pregnant workers less favorably than nonpregnant workers with similar inabilities to work and determine whether there are any legitimate reasons for such differences; see *Young v. United Parcel Services, Inc.*, 575 US __ (2015).

112. Pregnancy Discrimination Act (P.L. 95-555) of 1978.

113. ELISABETH BADINTER, *LE CONFLIT: LA FEMME ET LA MÈRE* (2011).

114. On the "lack of interest argument," see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

115. Today, the unemployment rate is much lower, e.g., 5.6 percent in December 2014.

116. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

117. See *supra* Chapter 3, interview with Christine Jolls, for more about the Implicit Association Test (IAT).

118. See also on the economic analysis of accommodation, Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

119. *Jespersen v. Harrah's*, 2004 U.S. App. LEXIS 26892 (9th Cir).

120. Family status discrimination can be linked to the couple: Cass. soc., Feb. 10, 1999, No. 96-42998 (finding it discriminatory to prohibit access to departments with "sensitive" information to prevent leaks because the husband of the employee works for a competitor); Cass. soc., June 30, 2010, No. 08-41936 (finding it discriminatory to fire an employee who had not prevented his spouse from insulting the employer). HALDE decision. No. 2011-13, Jan. 31, 2011 (finding family status discrimination when an employer reserves summer jobs for children of employees); HALDE decision No. 2007-366, Feb. 11, 2008 (finding a collective bargaining agreement providing leave for family events exclusively for married employees to be discriminatory); HALDE decision No. 2011-62, Apr. 18, 2011 (finding discriminatory a refusal to offer training to a play stage technician because of a maternity leave). However, specific benefits can be offered to women when the difference of situation can be justified with other workers—see Cass. soc., Feb. 26, 2002, No. 99-44671 (involving pay advantages given to head of households)—as long as these differences do not conceal differences of treatment based on sex (Case C-173/13, *Leone and Leone*, Feb. 27, 2014) or sexual orientation (Cass. soc., July 9, 2014, No. 10-18341, finding discriminatory based on sexual orientation to give an advantage in a collective bargaining agreement only to married couples).

121. Case C-243/95, Kathleen Hill, June 17, 1998, point 42 ("Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities.

Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community law”).

122. Cass. soc., Oct. 8, 1996, No. 92-42291; Cass. soc., Feb. 27, 1991, No. 90-42239; Cass. soc., May 4, 2011, No. 09-72206.

123. Disadvantages that can stem from living far away from the workplace: Cass. soc., Oct. 11, 2000, No. 98-46.433.

124. Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 111 COLUM. L. REV. 1 (2010).

125. Vicki Schultz, *Feminism and Workplace Flexibility*, 42 Conn. L. Rev. 1203 (2010).

126. Vicki Schultz & Allison Hoffman, *The Need for a Reduced Work Week in the United States*, in JUDITH FUDGE & ROSEMARY OWEN EDS., *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* (2006).

127. JERRY JACOB & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY AND GENDER INEQUALITY* (2004).

128. See interview with Vicki Schultz in MARIE MERCAT-BRUNS, *DISCRIMINATIONS EN DROIT DU TRAVAIL: DIALOGUE AVEC LA DOCTRINE AMERICAINE* 109-111 (2013), in which she identifies four models of antidiscrimination based on a historical analysis:

At the moment, probably all four frameworks are in competition with each other. [...] You can have a notion of discrimination as a violation of a kind of norm of impartiality. [...] There is a conservative view of this that says that any time you take race into account or sex, that is a violation of the norm of impartiality, and so this is close to the majority view in the *Ricci v. DeStefano* Supreme Court case. So the disparate impact principle itself becomes a violation of the norm of impartiality. [...] You could have a different understanding of discrimination: I call this one the perpetuation of past discrimination. What's wrong with a standardized test is that it projects into one sphere, the sphere of the workplace, the degradation and insubordination and inequality that was practiced elsewhere. So if you understood that the reason why Afro-Americans did less well on standardized tests was their history of inferior schooling, then you would say the antidiscrimination principle is violated when you allow one sphere to be infected with the discrimination in another sphere, without a really compelling justification for the violation of the "Rawlsian" spheres of justice principle. [...] Now each of these models developed a critique which leads to the birth of the next, so the third model I call the diversity model. It comes out of the critique of the past discrimination model, and those critiques are that there is a notion that a cumulative disadvantage is practiced upon historically subordinated groups. So the focus is always: what is wrong with them? ... Wouldn't it be a good thing to have diversity, because it would recognize that there is something about us as women that we bring to the table, maybe because we have historically been discriminated against? There is something virtuous that should be celebrated and accommodated in the workplace. This is the essence of the diversity model: one could also call it an accommodation model; it is more a multicultural model. In a way, it seeks to promote integration, but through a notion of accommodating difference—exogenous difference produced outside the workplace sphere under investigation. The proponents of the fourth model, which I call the disruption model, are wary about these globalizing claims of exogenous difference and want to be very careful about making them. The disruption model, I think, in contrast to the diversity model, looks for both structural and micro-level interactions within institutions that actually produce difference, so that difference is not treated as exogenously given to the institution, but is taken as a phenomenon to be investigated. So you're like a detective trying to figure out whether or not there is something the employer or the union or the interaction between the employees is doing that is actually creating sex in a very context-specific way.

129. Hélène Périvier & Rachel Silvera, *Maudite conciliation*, 24 TRAVAIL GENRE SOCIÉTÉS 25 (2010).

130. Reference to pregnancy, giving birth, and breastfeeding.

131. Bona Fide Occupational Qualification (BFOQ): see Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, section 703(e) (“It shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”); art. 14 of Directive 2006/54/EC of the European Parliament and of the Council of July 5, 2006 (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (“Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate”)); Case C-273/97, *Sirdar v. Army Board*, 1999 E.C.R. I-7403.

132. There is a very important issue in France concerning equal access to retirement for men and women who have raised their children full-time and therefore paid fewer contributions into the retirement system. See Annie Junter & Caroline Ressot, *La discrimination sexiste: les regards du droit*, 114 REVUE DE L’OFCE 106 (2010). The CJEU has found that the apparently neutral French rule benefitting employees who have taken leave from work to raise children must not indirectly disadvantage men: see Case C-173/13, *Leone and Leone*, Feb. 27, 2014. The CJEU also found no indirect discrimination against women because of part-time work in the level of disability pensions: C-527/13, *Fernandez v. Instituto Nacional de la Seguridad Social*, Apr. 14, 2015.

133. Case 184/83, *Hofmann v. Barmer Ersatzkasse*, 1984 E.C.R. 3047; Directive 92/85/EEC of Oct. 19, 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

134. On a brief definition of gender as a social construct and the role assigned to men and women based on their sex, see GENEVIÈVE FRAISSE, À CÔTÉ DU GENRE: SEXE ET PHILOSOPHIE DE L’ÉGALITÉ 299 (2010); see also ELSA DORLIN, SEXE, GENRE ET SEXUALITÉS: INTRODUCTION À LA THÉORIE FÉMINISTE (2008) [hereinafter DORLIN, SEXE, GENRE ET SEXUALITÉS]. In the United States, the fight continues. For a description of the pending Silicon Valley case, see Audrey Dilling, *Sex Discrimination Trial Puts Silicon Valley Under the Microscope*, available at <http://www.npr.org/2015/03/17/393347548/sex-discrimination-trial-puts-silicon-valley-under-the-microscope>, in which Joan Williams, professor at the University of California, Hastings College of Law, questions whether, in the world of venture capital, you can be seen as “too masculine to be likeable” and “too feminine to be competent.”

135. Family status is mentioned as a ground in LABOR CODE [CODE DU TRAVAIL] art. 1132-1. See recently, a case involving a father on parental leave, who claimed unequal treatment rather than discrimination based on family status: Cass. soc., Sept. 24, 2014, No. 13-14226.

136. *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10–277) illustrates the risk of systemic sex discrimination: see *Dukes v. Wal-Mart*, Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Class in Wal-Mart Certification (n.d.; retrieved May 17, 2006, from <http://www.walmartclass.com/staticdata/walmartclass/brief2.html>), in which it is described how Wal-Mart does not give objective guidelines to select its employees for training, allowing them to use subjective grounds; Wal-Mart does not systematically circulate training opportunities to all staff; and there is no policy in place for monitoring gender disparities in pay and promotion. See also Mercat-Bruns & Boussard Verrecchia, *supra* note 2, at 660; Marie Mercat-Bruns, *Comparaison entre les discriminations fondée sur l’appartenance syndicale, l’âge et le sexe, révélatrice de la discrimination systémique* 11 REV. DR. TRAVAIL 672 (2015).

137. See Linda Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in *SEX DISCRIMINATION IN EMPLOYMENT* 295, 304 (Faye Crosby et al. eds., 2007).

138. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishes the *prima facie* case of discrimination). See *supra* Chapter 3.

139. See MAYERI, REASONING FROM RACE, *supra* note 7 at 9.

140. See Case C-96/80, *Jenkins v. Kingsgate*, 1981 E.C.R. 911; Case C-300/06, *Voss v. Land Berlin*, 2007 E.C.R. I-10573.

141. Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-9981, and Case C-555/07, *Kücükdeveci v. Swedex*, 2010 E.C.R. I-365, refer to this.

142. These are acquired rights that stem from CJEU case law, incorporated subsequently in EU directives; see, for example, CJCE Defrenne I, II, III.

143. Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-9981.

144. See MAYERI, REASONING FROM RACE, *supra* note 7, at 9, citing ELLEN DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848–1869* (1999); Mercat-Bruns, *La discrimination professionnelle fondée sur le sexe aux États-Unis*, *supra* note 7, at 63.

145. See DANIEL MOYNIHAN, *THE NEGRO FAMILY: A CASE FOR NATIONAL ACTION*, OFFICE OF PLANNING AND POLICY RESEARCH 5–14, 29–31, 35–36 (1965), cited by MAYERI, REASONING FROM RACE, *supra* note 7, at 24.

146. MAYERI, REASONING FROM RACE, *supra* note 7, at 29.

147. When the HALDE (now the Defender of Rights) was created, half of the sex discrimination claims brought before it were by men. In the United States; see *Diaz v. Pan American Airways*, 442 F.2d 385.

148. For a recent potential glass ceiling case, see Court of Appeal, Orléans, Apr. 23, 2015, 14/00500. In this case, a female employee introduced a complaint based on sex discrimination because all of the executive jobs were held by men in comparable situations. The court considered this insufficient to prove sex discrimination. Among the court’s arguments was this one, based on the employer’s defense: more and more women are climbing the corporate ladder, and the employee in question had neither requested a promotion nor been refused one.

149. DOMINIQUE MÉDA & HÉLÈNE PÉRIVIER, *LE DEUXIÈME ÂGE DE L’ÉMANCIPATION: LA SOCIÉTÉ, LES FEMMES ET L’EMPLOI* (2007); MARGARET MARUANI, *TRAVAIL ET EMPLOI DES FEMMES* (2011).

150. See LABOR CODE [CODE DU TRAVAIL] art. L.1142–2, para. 1 (“If a member of one or the other sex is an essential and determining requirement and if the aim is legitimate and the requirement proportionate, the prohibition of discrimination of art. L.1142–2 is not applicable. LABOR CODE [CODE DU TRAVAIL] art. L.1142–2, para. 2 refers to a decree validated by the Conseil d’État. It determines, after consulting unions and employers on a national level,

a list of jobs that require one of the sex as a determining condition for employment. This list is reexamined regularly”). French law turns to EU law, which sets a judicial standard to determine the scope of this exception to sex discrimination. *See* Case C-248/83, *Commission v. Germany*, 1985 E.C.R. 1459; Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651; Case C-285/98, *Kreil v. Germany*, 2000 E.C.R. I-69. Generally, from this case law, it seems that the Member States have a certain “margin of appreciation” to exclude certain jobs on the grounds of sex if the jobs are specifically listed and the Member States review their list regularly to narrow the targeted professions so that these exclusions can be temporary and exceptional.

151. On the United States, see Leslie Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 96 (2011).

152. U.S. and EU case law seem to follow the same standard of scrutiny toward a more concrete evaluation of the skills required for the job: *see* Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651; Case C-318/86, *Commission v. France*, 1988 E.C.R. 3559; Case C-285/98, *Kreil v. Germany*, 2000 E.C.R. I-69. For U.S. law, *see* *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Diaz v. Pan American World Airways*, 311 F. Supp. 559 (S.D. Fla. 1970); *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981).

153. Katell Berthou, *Différences de traitement: esquisse des exigences professionnelles déterminantes après la loi du 27 mai 2008*, DR. SOC. 410 (2009).

154. More recently, indirect discrimination based on unequal pay in the French postal service between employees with a public status and a private short-term contract status was not considered as creating a particular disadvantage towards women. The court showed a rather narrow appreciation of indirect discrimination, looking only at the fact that there are still more women in long-term contracts compared to short-term contracts instead of globally comparing the professional status of men and women. *See* Cass. soc., Oct. 22, 2014, No. 13-16936.

155. See the impetus of EU law, Case C-127/92, *Enderby v. Frenchay Health Authority*, 1993 E.C.R. I-5535.

156. In the United States, *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), demonstrated that certain human resources strategies in multinational corporations could be challenged through discrimination law, even though litigation could be unsuccessful. *See* Wexler, *supra* note 151; Marie Mercat-Bruns, *Égalité salariale, discriminations individuelles et systémiques: un éclairage de la jurisprudence américaine*, 114 REV. DE L'OFCE 129 (2010).

157. SÉVERINE LEMIERE & RACHEL SILVERA, COMPARER LES EMPLOIS ENTRE LES FEMMES ET LES HOMMES: DE NOUVELLES PISTES VERS L'ÉGALITÉ SALARIALE 11 (2010) [hereinafter LEMIERE & SILVERA, COMPARER LES EMPLOIS ENTRE LES FEMMES ET LES HOMMES].

158. Thérèse Aubert-Monpeysen & Nicolas Moizard, *Égalité: des exigences trop fortes?* 3 REV. DR. TRAVAIL 128 (2012).

159. In equal pay cases, the Cour de Cassation first rejected the comparability of two jobs of equal value, considering the work was not the same; the comparison was between male executives and a female executive; *see* Cass. soc., June 26, 2008, No. 06-46204. In a very similar case, the court reversed its standard and considered that the “Court of Appeals must appreciate a comparable amount of professional knowledge, attested by a title, a degree or professional practice, skills acquired through experience, responsibilities and endured nervous or physical hardship.” *See* Cass. soc., July 1, 2009, No. 07-42691; *see also* Cass. soc., July 6, 2010, No. 09-40021; Cass. soc., Oct. 22, 2014, No. 13-18362.

160. Conseil d'Etat, Jan. 30, 2008, No. 273438, AJDA 2008 IR 1223; Isabelle Meyrat, *L'égalité de traitement à la croisée des chemins*, 11 REV. DR. TRAVAIL 648 (2008); LUCIE CLUZEL-MÉTAYER & MARIE MERCAT-BRUNS, DISCRIMINATIONS DANS L'EMPLOI: ANALYSE COMPARATIVE DE LA JURISPRUDENCE DU CONSEIL D'ÉTAT ET DE LA COUR DE CASSATION 24 (2011).

161. Cass. soc., Mar. 17, 2010, No. 08-43088.

162. Law 2014–873 of Aug. 4, 2014 (on real equality between women and men). This is the last of a series of laws that also attempted to promote equal pay through mandatory collective bargaining and monitoring of wage disparities: Law 2010–1330 of Nov. 9, 2010, implemented through Decree 2011–822 of July 7, 2011; Law 2006–340 of Mar. 23, 2006.

163. Krieger, *supra* note 137, at 317. Three mechanisms—mandatory arbitration agreements with confidentiality clauses as conditions of recruitment, confidential clauses in settlements, and court orders to prohibit disclosing to the EEOC and OFCCP information obtained through discovery—prevent the public from obtaining data on employers who violate their obligations with respect to discrimination. Individual women in the job market and women’s associations are unable to find out which employers treat women less favorably than men or vice versa.

164. On recent cases of dismissal following maternity leave in France, see Cass. soc., Apr. 30, 2014, No. 13–12321; Cass. soc., July 2, 2014, No. 12–29385; Cass. soc., July 2, 2014, No. 13–12496; Cass. soc. Mar. 3, 2015, No. 13–23521. Some cases are not favorable to women out on sick leave, after maternity leave; see Cass. soc. July 8, 2015, No. 14–15979.

165. LEMIERE & SILVERA, *COMPARER LES EMPLOIS ENTRE LES FEMMES ET LES HOMMES*, *supra* note 157, at 25.

166. Catharine MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (Catharine A. MacKinnon ed.) (1987).

167. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L. J. 815 (2007). See also Reva B. Siegel, *The Constitutionalization of Abortion*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1057 (Michel Rosenfeld & Andras Sajó eds., 2012).

168. See recently on pregnancy discrimination and work accommodations, *Young v. United Parcel Service*, Docket No. 11–2078, Argument on Dec. 3, 2014, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1226.htm>.

169. Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH J.L. REFORM 835 (1985).

170. For a general view of the law, see FRANCIS CABALLERO, *DROIT DU SEXE* (2010). For a more critical view of the law, see DANIEL BORILLO, *DROIT DES SEXUALITÉS* (2009).

171. In the United States, see diversity programs for women and Frank Dobbin’s remarks on systemic discrimination, *supra* Chapter 4.

172. See Law 2006–340 of Mar. 23, 2006 (on equal pay between men and women), which sought to eliminate pay disparities between men and women by Dec. 31, 2010; it was amended by Law 2010–1330 of Nov. 9, 2010 (on retirement). Decree 2011–822 of July 7, 2011, established a fine for the failure of any company with more than fifty employees to implement a plan or collective bargaining agreement on equality at work (law entering into force on Jan. 1, 2012) or, where a plan or agreement does exist, for the termination of said plan or agreement. See also on the report on sexism in the workplace in France, CONSEIL SUPERIEUR DE L’ÉGALITÉ PROFESSIONNELLE ENTRE HOMMES ET FEMMES, *LE SEXISME DANS LE MONDE DU TRAVAIL: ENTRE DENI ET REALITÉ* (2015).

173. See, on the origins of the Family and Medical Leave Act (FMLA) and true equality between men and women, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1986–1987 (2003).

174. *Vulnerable* has different meanings: vulnerable because of her pregnancy and maternity, because she is the only link with the fetus in gestation, and because she can represent, according to her choices, a danger for the viability of the fetus. Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 342 (1992) [hereinafter Siegel, *Reasoning from the Body*].

175. *Muller v. Oregon*, 208 U.S. 412 (1908).

176. Law of Nov. 2, 1892 (limiting the working hours of women and children and organizing the profession of labor inspectors). From the 1860s, there are declarations on rights of women that cover the private and professional sphere (core civil rights, access to education, work and equal pay). See MICHELE RIOT-SARCEY, *HISTOIRE DU FEMINISME* 53 (2008).

177. *Lochner v. New York*, 198 U.S. 45 (1905); see generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

178. Siegel, *Reasoning from the Body*, *supra* note 174, at 366:

Regulators may adopt particular means for protecting unborn life because stereotypical assumptions about the maternal role lead them to underestimate the impact of fetal-protective regulation on women. If one examines the conventional structure of abortion-restrictive regulation, it does indeed appear that such regulation must rest on traditional assumptions about women's natural obligations or instrumental uses as mothers. Absent such attitudes about women, it is reasonable to assume that legislatures would adopt at least some measures to offset the consequences of compelled motherhood for women, whether by compensating them, or by protecting their employment and education opportunities, or by affording them needed medical services and child care. Normally, some remuneration reward, support, and/or recognition is offered to those asked to perform services for the community, whether they are asked to provide foster care for children, volunteer or are drafted for military service, or are compelled to alienate property to the state. If no offsetting or compensating measures are adopted or even contemplated when the state engages in fetal life-saving by compelled pregnancy, it is clear that abortion-restrictive regulation is indeed premised on certain views about women as well as the unborn: that women's physical and intellectual and emotional energies as mothers can be publicly appropriated without recompense, that their lives can be subordinated to the work of gestation and nurturance without consequence.

179. Siegel, *Reasoning from the Body*, *supra* note 174, at 369:

Abortion-restrictive regulation has several characteristics that make it particularly suitable for analysis under even the most constrained application of antisubordination principles. . . . The clearest illustration of this orientation is the requirement that plaintiffs challenging the discriminatory impact of facially neutral state action must show that state actors adopted the challenged policy with discriminatory purpose. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274, 279 (1979). . . . The results in many of the Court's gender discrimination cases might well be different if the Court inquired, not whether the state's decision to regulate on the basis of sex was substantially related to important governmental ends, but instead: Has the challenged action harmed women in ways that enforce, perpetuate, or aggravate their subordinate social status?

See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 117 (1979); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). We are reminded that in the United States, constitutional case law does not recognize indirect discrimination under the principle of the equal protection of the laws. In *Washington v. Davis*, 426 U.S. 229, 248 (1976), the Court considered that the contrary would "perhaps invalidate . . . a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and average black than the more affluent white." According to Siegel, *supra* note 174, at 369–70:

First, abortion-restrictive regulation is sex-based state action: It is regulation directed at women as a class, and not dispersed across the citizenry at large. Second, the most dramatic and vis-

ible of its effects—the continuation of an unwanted pregnancy—is an intended consequence of social policy. Indeed, as I have already argued, it is fair to characterize forced childbearing as the principal purpose of abortion-restrictive regulation. Third, abortion-restrictive regulation has historically functioned as caste legislation. Finally, today, as in the past, the injury inflicted on women by compelling them to bear children is a specific form of status harm, one that plays a central role in women's subordination.

180. The Equal Rights Amendment (ERA) was never adopted.

181. *Reed v. Reed*, 404 U.S. 71 (1971).

182. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

183. *Craig v. Boren*, 429 U.S. 190 (1976).

184. Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

185. See LABOR CODE [CODE DU TRAVAIL] art. L.1225-1 and following (“The Labor Code protects the pregnant woman once she has informed her employer and produced a medical certificate attesting the pregnancy, detailing dates of departure and return from maternity leave. The pregnant employee can then request accommodations of her working conditions, temporary reassignment to a different job because of a medical risk or night work. The pregnant employee can also request authorizations to miss work and to be present at mandatory medical exams.”).

186. See Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés v. Thibault*, 1998 E.C.R. I-2011; Case C-471/08, *Parviainen v. Finnair Oyj*, 2010 E.C.R. I-6533.

187. Cass. soc., Sept. 15, 2010, No. 08-43299, *Marie Mercat-Bruns, La portée de l'interdiction de licenciement au moment du congé maternité*, 1 REV. DR. TRAVAIL 31 (2011). Or discrimination can begin before maternity leave and continue after the leave; see recently a series of cases: Cass. soc., July 2, 2014, No. 12-29385; Cass. soc., Apr. 2, 2014, No. 12-27849; and Cass. soc., Jan. 15, 2014, No. 12-22751, after a parental leave.

188. See Case C-595/12, *Napoli v. Ministero della Giustizia*, Mar. 6, 2014 (postponing training without giving any new date because of maternity leave, delaying promotion, and affecting wages and conditions of employment).

189. Cass. soc., Dec. 16, 2008, No. 06-45262.

190. This is the case at the European level: Case C-177/88, *Dekker v. VJV Centrum*, 1990 E.C.R. I-3941.

191. On maternity leave, LABOR CODE [CODE DU TRAVAIL] arts. L.1225-16 to L.1225-34, L.1225-66 to L.1225-69, D.1225-4-1, R.1225-18, and R.1225-19; on specific paternity leave, LABOR CODE [CODE DU TRAVAIL] arts. L.1225-35, L.1225-36, and D.1225-8.

192. After two cases, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric v. Gilbert*, 429 U.S. 125 (1976), the Pregnancy Discrimination Act (P.L. 95-555) of 1978 extended protection from discrimination to pregnant women.

193. Pregnancy Discrimination Act (P.L. 95-555) of 1978.

194. In France, parental leave (LABOR CODE [CODE DU TRAVAIL] arts. L.1225-47 to L.1225-60, R.1225-12, and R.1225-13, recently amended): To be entitled to the full period of leave, three months cannot be transferred to the spouse, in accordance with the revised parental leave, Directive 2010/18/EU. See also the extension of rights from women to men: Case C-104/09, *Roca Alvarez*, 2010 E.C.R. I-08661 (involving the grant of breastfeeding leave to a spouse for bottle feeding); Case C149/10, *Chatzi*, 2010 E.C.R. I-8489 (holding that parental leave is not a right of the child but a right of the parent).

195. LABOR CODE [CODE DU TRAVAIL] arts. L.3142-1 and L.3142-2: leave for family events.

196. Since Law No. 2010-209, Mar. 2, 2010, a leave for solidarity can be taken by any employee who needs to assist a loved one suffering from a terminal illness (the leave can be arranged rapidly, is only for a limited time, and is taken without pay (unless more favorable measures are provided for in the collective bargaining agreement)) (LABOR CODE [CODE DU TRAVAIL] arts. L. 3142-16 to L. 3142-21 and LABOR CODE [CODE DU TRAVAIL] Decree 3142-6 to D. 3142-8).

197. Case C-116/08, Meerts, 2009 E.C.R. I-10063 (involving parental leave). *See also recently* CJEU Case C-222/14, Maistrellis, July 16, 2015.

198. Cass. soc., Mar. 17, 2010, No. 09-44127 (when the position offered to the employee returning from parental leave is not equivalent to the job level held before the leave). Even calculation of redundancy payment after illegal dismissal following parental leave must take into account previous full-time work: recently, CJEU Case C-588/12, Lyreco Belgium NV v. Rogiers, Feb. 27 2014.

199. Directive 2010/41/EU of the European Parliament and of the Council of July 7, 2010 (on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC).

200. The CJEU is also focused on facilitating State income support to women without work because of pregnancy and maternity: “art. 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth *retains the status of ‘worker’*, within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.” *See* CJEU Case C-507/12, Saint Prix v. Secretary of State for Work and Pensions, June 19, 2014, point 48.

201. Case C-232/09, Danosa v. LKB Lizings SIA, 2010 E.C.R. I-11405.

202. CJEU Cases C-167/12, C.D. v. S.T., and C-363/12, Z. v. A Gov’t Dep’t and the Board of Mgmt. of a Community Sch., Mar. 18, 2014.

203. The European Court of Human Rights has decided to protect the citizenship rights of children of surrogates for those coming from a country like France that bans surrogacy contracts. If the children’s nationality is not registered despite the father’s French citizenship, “[t]he Court considers, having regard to the consequences of this serious restriction on the identity and right to respect for private life of the third and fourth applicants [children], that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation.” ECtHR, *Mennesson v. France*, App. No. 65192/11, June 26, 2015.

204. *See* litigation on breach of contract involving women lawyers returning from maternity leave who could not be protected by rules on unjust dismissal because they were independent workers: Court of Appeals, Paris, Oct. 11, 2011, No. 11-10802. Under the impetus of Directive 92/85/EEC (protecting pregnancy and maternity discrimination) and Directive 2010/41/EU (on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity), the new law on “real equality between women and men” (Law No. 2014-873 of Aug. 4, 2014) reversed the case law and awarded protection against discrimination, even for the self-employed.

205. Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases*, PLI Order No. 11091, October 2007, Hastings College of Law; regarding family responsibility discrimination and discrimination based on caregiving, both can be considered as either sex or disability discrimination; *see* ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, www.eeoc.gov/policy/docs/caregiving.html.

206. Sylvaine Laulom, *La protection de la parentalité*, 1489 SEM. SOC. LAMY, Supp. 22 (2011).

207. On the interaction of sex and age, see Jourdan Day, *Closing the Loophole—Why Intersectional Claims Are Needed to Address Discrimination Against Older Women*, 75 OHIO ST. L.J. 447 (2014).

208. On positive action: art. 3 of Directive 2006/54/EC and art. 7 of Directive 2000/78/EC; Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051; Case C-409/95, Marschall v. Land Nordrhein Westfalen, 1997 E.C.R. I-6363; Case C-158/97, Badeck v. Landesanwalt beim Staatsgerichtshof des Landes Hessen, 1999 E.C.R. I-1875; Case C-407/98, Abrahamsson Fogelqvist, 2000 E.C.R. I-5539.

209. Joan Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HIST. REV. 1054 (1986).

210. See DORLIN, SEXE, GENRE ET SEXUALITÉS, *supra* note 134, at 7.

211. See Kelly Oliver, *French Feminism in an American Context*, in FRENCH FEMINISM READER vii, ix (Kelly Oliver ed., 2000).

212. See generally SIMONE DE BEAUVOIR, *LE DEUXIÈME SEXE*, tomes I et II (1949).

213. See Christine Delphy, *The Invention of French Feminism: An Essential Move*, 87 YALE FRENCH STUD. 190 (1995); CHRISTINE DELPHY, *L'ENNEMI PRINCIPAL*, 2. PENSER LE GENRE (2001).

214. See generally COLETTE GUILLAUMIN, *SEX, RACE ET PRATIQUE DU POUVOIR: L'IDÉE DE NATURE* (1992).

215. See generally MONIQUE WITTIG, *LA PENSÉE STRAIGHT* (2001).

216. See PIERRE BOURDIEU, *LA DOMINATION MASCULINE* 103 (1998).

217. GENEVIÈVE FRAISSE, *À CÔTÉ DU GENRE: SEXE ET PHILOSOPHIE DE L'ÉGALITÉ* 299 (2010).

218. Françoise Héritier, *La valeur différentielle des sexes*, in FEMMES, GENRE ET SOCIÉTÉS: L'ÉTAT DES SAVOIRS 54 (Margaret Maruani ed., 2005).

219. See generally MARGARET MARUANI, *TRAVAIL ET EMPLOI DES FEMMES* (4th ed. 2011).

220. See generally LEMIERE & SILVERA, *COMPARER LES EMPLOIS ENTRE LES FEMMES ET LES HOMMES*, *supra* note 157.

221. Jacqueline Laufer, *Entre égalité et inégalités: les droits des femmes dans la sphère professionnelle*, 53 L'ANNÉE SOCIOLOGIQUE (2003) 143; Jacqueline Laufer, *Égalité professionnelle, principes et pratiques*, 12 DR. SOC. 736 (1984); Jacqueline Laufer, *L'égalité professionnelle*, in FEMMES, GENRE ET SOCIÉTÉS: L'ÉTAT DES SAVOIRS 239 (Margaret Maruani ed., 2005).

222. See generally 114 REV. DE L'OFCE (2010), *LES DISCRIMINATIONS ENTRE LES FEMMES ET LES HOMMES* (Françoise Milewski & Hélène Périvier eds., 2011); Hélène Périvier, *La logique sexuée de la réciprocité dans l'assistance*, 114 REV. DE L'OFCE 237 (2010); Annie Junter & Caroline Ressot, *La discrimination sexiste: les regards du droit*, 114 REV. DE L'OFCE 65 (2010); Marie-Thérèse Lanquetin, *Discriminations: la loi d'adaptation au droit communautaire du 27 mai 2008*, 7/8 DR. SOC. 778 (2008); Marie-Thérèse Lanquetin, *L'égalité des rémunérations entre les femmes et les hommes, réalisée en cinq ans?* 6 DR. SOC. 624 (2006).

223. Périvier, *supra* note 222, at 281.

224. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* (1993).

225. Christine Delphy, *Rethinking Sex and Gender*, in FRENCH FEMINISM READER 63 (Kelly Oliver ed., 2000).

226. See Delphine Gardey, *Bruno Latour, guerre et paix, tours et détours féministes*, in SOUS LES SCIENCES SOCIALES, *LE GENRE: RELECTURES CRITIQUES DE MAX WEBER À*

MICHEL FOUCAULT 203 (Danielle Chabaud-Rychter et al. eds, 2010) [hereinafter *SOUS LES SCIENCES SOCIALES, LE GENRE* (Chabaud-Rychter et al. eds.)].

227. Danielle Chabaud-Rychter, Introduction, *Question de genre aux sciences sociales normales*, in *SOUS LES SCIENCES SOCIALES, LE GENRE* (Chabaud-Rychter et al. eds.), *supra* note 226, at 9.

228. FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 9 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003).

229. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

230. Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996).

231. See DUNCAN KENNEDY, SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 145 (1993); WILLIAM N. ESKRIDGE & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 65, 22, 584 (2004).

232. ÉRIC FASSIN, L'INVERSION DE LA QUESTION HOMOSEXUELLE 218 (2008).

233. ÉRIC FASSIN, LE SEXE POLITIQUE: GENRE ET SEXUALITÉ AU MIROIR TRANSATLANTIQUE 238 (2009).

234. DANIEL BORILLO, LE DROIT DES SEXUALITÉS (2009); CAROLINE MÉCARY, DROIT ET HOMOSEXUALITÉ 2 (2000); MARCELA IACUB, LE CRIME ÉTAIT PRESQUE SEXUEL ET AUTRES ESSAIS DE CASUISTIQUE JURIDIQUE 20 (2009).

235. See generally FRANCIS CABALLERO, DROIT DU SEXE (2010).

236. See 2 Rev. Juris. Critique (2011) (focusing on the theme of gender); see also La loi & le genre: études critiques de droit Français (Stéphanie Hennette-Vauchez, Marc Pichard, & Diane Roman eds., 2014).

237. Stéphanie Hennette-Vauchez, *Vademecum à l'usage de la Cour européenne des droits de l'homme: La théorie féministe du droit au secours d'une juridiction menacée "splendide isolement"*, 20 RECUEIL DALLOZ 1360 (2011).

238. Geneviève Pignarre, Les frontières du consentement: de la confrontation du pouvoir aux marges de l'autonomie, 2 REV. DES CONTRATS 611 (2011).

239. See Libby Adler, *Teaching Sexuality and Gender as Distributional Issues*, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER (Society of American Law Teachers ed., 2011).

240. No deprivation of personal freedom without due process. Both rights are rooted in interpretation of the Fourteenth Amendment to the Constitution.

241. During his second presidential campaign, Obama declared support for same-sex marriage.

242. The Employment Non-Discrimination Act (ENDA) is a bill that has been proposed every year since 1994 to prohibit employment discrimination on the basis of sexual orientation and gender identity at the federal level, but has never passed. An amended version of the ENDA was approved by the Senate on Nov. 7, 2013, by a bipartisan vote of 64–32, but the House never brought up the measure for a vote. On Nov. 26, 2014, a Republican-controlled panel in the U.S. House rejected a last effort to pass a version of ENDA as part of major defense legislation before Congress adjourned. This latest version of ENDA had a religious exemption along the lines of Title VII of the Civil Rights Act of 1964. Unlike the version of ENDA the Senate passed in 2013, the new version of ENDA would bar LGBT discrimination at religious-affiliated businesses for nonministerial positions. However on July 21, 2014, President Obama signed an executive order barring federal contractors from engaging in anti-LGBT workplace discrimination. The new rule for the executive order was signed on December 3, 2014.

243. HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 2004).

244. MORAL VALUES PROJECT, <http://www.law.georgetown.edu/moralvaluesproject>.

245. Chai R. Feldblum, *The Moral Values Project*, in *MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD* 205 (Gordon A. Babst et al. eds., 2009).

246. LGBT stands for “lesbian, gay, bisexual, and transgender.”

247. See Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996); Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992 (1997); Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 147–48 (2005).

248. The EEOC has since recognized, in a landmark decision, that anti-transgender discrimination is covered under the ban on sex discrimination found in Title VII. See *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

249. Since this interview, the EEOC has confirmed that discrimination based on sexual orientation, when resulting from stereotypes or assumptions about certain sexes, also falls under the ban on sex discrimination. See *Veretto v. U.S. Postal Service*, No. 0120110873, 2011 WL 2663401 (E.E.O.C. July 1, 2011); *Castello v. U.S. Postal Service*, No. 0520110649 (E.E.O.C. Dec. 20, 2011), available at <http://www.eeoc.gov/decisions/0520110649.txt>.

250. See MAYERI, *REASONING FROM RACE*, *supra* note 7, at 106.

251. As explained by Krieger, research categories based on mathematical research conducted, for example, at the University of California, Berkeley.

252. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 54 (2010).

253. Queer theory, as it is generally defined, considers gender as a construct and not a biological fact and therefore enables an understanding of identity that is not restricted by the normative standards of a society built around a binary division of human beings and around the idea that the heterosexual couple is the main manifestation of this complementarity of sexual difference. See Butler, *supra* note 224; E.K. Sedgwick, *Queer Performativity: Henry James's The Art of the Novel*, 1 GLQ 1 (1993); MICHAEL WARNER, *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (1994).

254. See Janet Halley, *What Is Family Law?: A Genealogy, Part II*, 23 YALE J.L. & HUMAN. 189 (2011); Janet Halley, *What Is Family Law?: A Genealogy, Part I*, 23 YALE J.L. & HUMAN. 1 (2011).

255. Debate reopened, for example, by Obama's support of same-sex marriage during his reelection campaign and by the adoption of same-sex marriage in additional states at that time.

256. See *supra* note 242 on the last failed attempt in 2014 to pass ENDA.

257. The Equal Employment Opportunity Commission (EEOC) has determined that a transgender woman's claim of employment discrimination based on gender identity, change of sex and/or transgender status is viable under Title VII of the Civil Rights Act. The case, *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) was brought by Mia Macy, a former male police detective who contends she was denied a job as a ballistics technician with the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (the “Agency”) on account of her decision to become a woman. The EEOC's finding that Macy may proceed with this cause of action could have an influence on the private sector, in the absence of a federal law like ENDA. On President Obama's executive order concerning public contracts, see *supra* note 242.

258. And European case law recognizing an increasing of gay rights. See Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R. I-1757 (concerning a

survivor's pension); Case C-147/08, *Römer v. City of Hamburg*, 2011 E.C.R. I-3591 (concerning a supplementary retirement pension paid to married couples); Case C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 2013 (concerning homophobic comments); see also Jean-Philippe Lhernould, *La discrimination en raison de l'orientation sexuelle: essai de synthèse en attendant Römer*, in *REV. JURIS. SOC.* 261 (2011).

259. See Lhernould, *supra* note 258.

260. Nicolas Moizard, *Clarifier le cadre juridique de la lutte contre les discriminations au travail*, in Thérèse Aubert-Montpeysson & Nicolas Moizard, *Égalité: des exigences trop fortes?*, 3 *REV. DR. TRAVAIL* 128, 131 (2012).

261. Case C-267/12, *Hay v. Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres*, 2013 E.C.R. I-0000; *Cass. soc.*, May 23, 2012, No. 10-18,341. The question referred to the CJEU for a preliminary ruling was whether a collective bargaining agreement granting days off work and a bonus for married employees constituted indirect discrimination against employees in a registered civil union.

262. See Jean-Philippe Lhernould, *Les discriminations indirectes fondées sur le sexe et la Cour de Cassation*, 11 *REV. JURIS. SOC.* 731, 733 (2012).

263. Law 2013-404 of May 17, 2013 (extending marriage to same-sex couples).

264. Case C-267/12, *Hay v. Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres*, CJEU, judgment of Dec. 12, 2013, at § 44: "The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed." See French decision handed down to conform to the CJEU interpretation, *Cass. soc.*, July 9, 2014, No. 10-18341.

265. See Case C-528/13, *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes* and *Établissement français du sang*.

266. See *HOMOPHOBIE DANS L'ENTREPRISE* (Christophe Falcoz ed. 2008) (study on homophobia in the workplace, conducted for the HALDE).

267. *Cass. soc.*, Apr. 17, 1991, No. 90-42,636, *DR. SOC.* 485 (1991) (sexton fired because he was gay). See, e.g., Court of Appeal, Versailles, Jan. 10, 2012, *B. v. Sitel France*, 10/04996, 6th Ch. An employee was denied a promotion in Morocco due to his sexual orientation (a letter clearly stated that the reason for the refusal was his homosexuality). The court recognized the discriminatory nature of the denial of promotion. However, the employee also claimed to have been subjected to homophobic insults from colleagues and his direct manager, using a feminine-sounding nickname. For the judges, this abusive behavior did not constitute discrimination, although it did demonstrate a breach of the employer's obligation to ensure the safety of its employees. But this breach was not sanctioned by the judge, who awarded only damages for discrimination to the employee.

268. C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 2013, at § 49: "A defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters."

269. *Cass. soc.*, Nov. 6 2013, No. 12-22,270 (finding that taking an account away from an employee after he revealed his homosexuality and then dismissing him for serious misconduct constitutes possible evidence of discrimination based on sexual orientation). See also *Cass. soc.*, Apr. 24, 2014, No. 11-15204 (presumption of discrimination raised after several refused promotions).

270. Eighteen states and Washington, D.C., also prohibit discrimination based on gender identity. Although these laws provide protection, according to a 2013 General Accounting Office (GAO) report, relatively few complaints of discrimination based on sexual orientation have been filed in these states. For California civil rights law and legislation, see <http://oag.ca.gov/civil>.

271. See *supra* note 242 on the latest attempt to pass ENDA, in 2014. Some authors believe Title VII would be more favorable to LGBT rights than the adoption of ENDA; see Alex Reed, *Abandoning ENDA*, HARV. J. ON LEGIS. 277 (Summer 2014).

272. See the progression of case law from *Bowers v. Hardwick*, 478 U.S. 186 (1986) to *Lawrence v. Texas*, 539 U.S. 558 (2003). See also Janet Halley, *Reasoning about Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

273. See *Romer v. Evans*, 517 U.S. 620 (1996) (declaring unconstitutional an amendment to the Constitution of the State of Colorado, adopted in a referendum, prohibiting Colorado cities and counties from enacting laws affording protection from discrimination based on sexual orientation and thereby preventing the treatment of sexual orientation as a protected category, like race).

274. *Obergefell v. Hodges*, 576 U.S. ____ (2015).

275. Twenty-six by court decision: Alabama (Feb. 9, 2015), Alaska (Oct. 17, 2014), Arizona (Oct. 17, 2014), California (June 28, 2013), Colorado (Oct. 7, 2014), Connecticut (Nov. 12, 2008), Florida (Jan. 6, 2015), Idaho (Oct. 13, 2014), Indiana (Oct. 6, 2014), Iowa (Apr. 24, 2009), Kansas (Nov. 12, 2014), Massachusetts (May 17, 2004), Montana (Nov. 19, 2014), Nevada (Oct. 9, 2014), New Jersey (Oct. 21, 2013), New Mexico (Dec. 19, 2013), North Carolina (Oct. 10, 2014), Oklahoma (Oct. 6, 2014), Oregon (May 19, 2014), Pennsylvania (May 20, 2014), South Carolina (Nov. 20, 2014), Utah (Oct. 6, 2014), Virginia (Oct. 6, 2014), West Virginia (Oct. 9, 2014), Wisconsin (Oct. 6, 2014), Wyoming (Oct. 21, 2014). Eight by state legislature: Delaware (July 1, 2013), Hawaii (Dec. 2, 2013), Illinois (June 1, 2014), Minnesota (Aug. 1, 2013), New Hampshire (Jan. 1, 2010), New York (July 24, 2011), Rhode Island (Aug. 1, 2013), Vermont (Sept. 1, 2009). Three by popular vote: Maine (Dec. 29, 2012), Maryland (Jan. 1, 2013), Washington (Dec. 9, 2012). Washington, DC legalized gay marriage on Mar. 3, 2010, the date marriage licenses became available to same-sex couples. The governors of Puerto Rico, of the Northern Mariana Islands, and the Virgin Islands announced after the Supreme Court's June 26, 2015, ruling that same-sex marriage would begin in their territory within a certain time frame.

276. See Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159 (2002).

277. See ROBERT C. POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 27 (2001) (exposing an element of absurdity in attempts to prohibit discrimination based on appearance).

278. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PENN. L. REV. 1 (1995).

279. See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

280. Transgender in its popular use appeared in Québec and describes people whose gender (personal and social identity, related to concepts about men and women) does not correlate with their biological sex.

281. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding discriminatory the refusal to promote a female employee as partner due to her behavior that did not correspond to her employer's idea of womanly behavior). The employer's argument was also based on physical appearance: he advised Hopkins to "walk more femininely, talk

more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

282. Courts have found that discrimination based on certain stereotyped ideas of sex-appropriate behavior constitutes sex discrimination. See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (a transsexual firefighter suspended after dressing as a woman); *Schroer v. Billington*, 424 F.Supp.2d 203 (D.D.C. 2006) (in which a counterterrorism expert and retired U.S. Army colonel, having been offered a research position at the Library of Congress, saw the job offer withdrawn after revealing her intention to transition from male to female); *Mitchell v. Axcan Scandipharm, Inc., Civ. A.*, No. 05-243, 2006 WL 456173 (W.D. Pa., Feb. 17, 2006) (a similar case of termination of employment after the employee announced his intention to make a gender transition). These cases of discrimination for gender nonconformity often involve occupations with a particularly masculine image (e.g., firefighting or counterterrorism).

283. Michelle Goldberg, *What Is a Woman? The Dispute Between Radical Feminism and Transgenderism*, NEW YORKER (Aug. 4, 2014), <http://www.newyorker.com/magazine/2014/08/04/woman-2>.

284. The *Schroer* case goes a step further because rather than using the sex-stereotyping theory to qualify sex discrimination, the Court took a direct approach, considering that discrimination against transsexuality is in fact sex discrimination: “Schroer is not seeking acceptance as a man with feminine traits. She seeks to express her female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it.” According to certain judges, Title VII (prohibiting discrimination in employment because of sex) protects against discrimination based on sex and gender, in particular the failure to “conform to socially constructed gender expectations.” See *Schwenk*, F.3d, *supra* note 282.

285. The EEOC’s position is important not only because it recognizes Macy’s particular situation as sex discrimination, but also because it emphasizes that any discrimination based on “gender identity, change of sex, and/or transgender status” (Macy’s complaint) is entitled to the protections of Title VII. That kind of discrimination inherently takes sex into account: “That Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term ‘gender’ encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.” EEOC Decision No. 0120120821, *Macy v. Holder*, 2012 WL 1435995 (Apr. 20, 2012).

286. *Hamm v. Weyauwega Milk Prod.*, 332 F.3d 1058 (7th Cir. 2003); *DeSantis v. Pacific Tel. and Telegraph*, 608 F.2d 327 (9th Cir. 1979).

287. Sex being more closely related to sexual identity and self-perception on this level.

288. See, for example, Christine Bard, *La peur rancie de l’indifférenciation sexuelle*, LE MONDE (Feb. 7, 2014), http://www.lemonde.fr/idees/art/2014/02/07/la-peur-rancie-de-l-indifferenciation-sexuelle_4361425_3232.html. In the academic world, a petition of law professors followed suit against the same-sex marriage legislation; however, other schools have promoted reflection on law and gender: <http://etudiant.lefigaro.fr/les-news/actu/detail/art/a-sciences-po-on-enseigne-le-gender-depuis-trois-ans-4284/>.

289. Cass. soc., Jan. 11, 2012, No. 10-28.213, JurisData No. 2012-000191. See Marie Mercat-Bruns, *L'apparence physique du salarié rapportée à son sexe: l'émergence de la discrimination fondée sur le genre?*, 10 JCP 281 (2012).

290. Cass. soc., Mar. 5, 2014, No. 12-27701: in this recent case, the court rejected the claim of discrimination based on the employer's refusal to retrain an employee returning from parental leave, whose "esthetic capacities" were called into question by a choreographer. The EU is turning to disability to protect discrimination associated with weight, since physical appearance is not a protected ground. The European Equal Treatment in Employment Directive of 2000 prohibits discrimination based on disability. The Advocate General stated on July 23, 2014, that obesity may meet the definition of "disability" for the purposes of discrimination law, if it has reached such a degree that "it plainly hinders participation in professional life." The CJEU decision is pending as of October 2015. See the Advocate General's opinion in C-354/13, *Kaltoft v. Municipality of Billund*, Denmark.

291. HALDE decision No. 2010-272, Dec. 13, 2010. Other characteristics are weight (HALDE decision No. 2007-251, Oct. 1, 2007) and hairstyle (Court of Appeal, Rennes, Ch. Prud'h. 5, Sept. 6, 2005, 04/00583, *Chalot v. SAS*; Court of Appeal, Reims, Mar. 6, 1996, JCP E 350 (1997); JurisData No. 1996-043654).

292. LABOR CODE [CODE DU TRAVAIL] art. L. 1132-4.

293. Since the case of the employee who was dismissed for wearing Bermuda shorts to work: Cass. soc., May 28, 2003, No. 02-40.273.

294. LABOR CODE [CODE DU TRAVAIL] art. L. 1134-1.

295. Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn*, 2008 E.C.R. I-5187.

296. Philippe Reigné, *Sexe, genre et état des personnes*, 42 JCP G 1140 (2011).

297. In the ECtHR, gender discrimination and stereotypes are often mentioned. See, for example, *Goodwin v. the United Kingdom*, No. 28957/95, 35 Eur. H.R. Rep. 18 (2002); and on gender stereotypes and men, *Konstantin Markin v. Russia*, App. No. 30078/06, judgment of Mar. 22, 2012.

298. See *Y.Y. v. Turkey*, App. No. 14793/08, Mar. 10, 2015.

299. We note the difficult question of bisexuality and the pros and cons of its invisibility: see Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 1 STAN. L. REV. 353 (2000).

300. See Jean-Yves Frouin, *La protection des droits de la personne et des libertés du salarié*, 99 CAHIERS SOC. DU BARREAU DE PARIS 123 (1998).

301. The potential implications of antidiscrimination law can be seen the issue of drug and alcohol testing in the workplace for health-related reasons. See Alexia Gardin, *Consommation d'alcool et de drogues en milieu de travail: entre impératifs sécuritaires et considérations sanitaires*, 8-9 REV. JURIS. SOC. 593, 597 (2011).

302. As of the "Bermuda shorts" decision, some scholars predicted that "the respect due to clothing choices may be claimed on the basis of principles other than 'freedom of dress,' notably, certain protected grounds of discrimination. And, in that case, it is not certain that the employer can provide legitimate justification." LES GRANDS ARRÊTS DU DROIT DU TRAVAIL 332 (Jean Pélissier et al. eds., 2008) at § 69.

303. See HALDE decision No. 2011-16, Apr. 4, 2011 (on appearance and religious dress) (Court of Appeal, Paris, Ch. 18, Sect. C, June 19, 2003, *Tahli v. Téléperformance*, No. 03/30212, JurisData No. 2003-219940); or HALDE decision No. 2007-107, Apr. 2, 2007 (on appearance and skin color).

304. See also on religious discrimination, *infra* Chapter 5, Part VII.

305. Lise Casaux-Labrunée, *La confrontation des libertés dans l'entreprise*, 11 DR. SOC. 1032, 1033 (2008).

306. See Agathe Lepage, *La vie privée du salarié: une notion civiliste en droit du travail*, 4 DR. SOC. 364 (2006).

307. Antoine Lyon-Caen & Isabelle Vacarie, *Droits fondamentaux et droit du travail*, in *DROIT SYNDICAL ET DROITS DE L'HOMME À L'AUBE DU XXI^e SIÈCLE: MÉLANGES EN L'HONNEUR DE JEAN-MAURICE VERDIER* 421 (2000).

308. See Mercat-Bruns, *La discrimination professionnelle fondée sur le sexe aux États-Unis*, *supra* note 7, at 63.

309. See Marie Mercat-Bruns, *La doctrine américaine sur les discriminations et le genre: dialogue entre la critique du droit et la pratique*, 3 *JURIS. CRITIQUE* 93, 97 (2011).

310. See Janet Halley, *Sexuality Harassment*, in *Directions in Sexual Harassment Law* 182, 189, 193 (Reva B. Siegel & Catharine A. MacKinnon eds., 2003). See in France, Cass. soc., Sept. 23, 2015, No. 14-17143 (love notes in text messages do not constitute sexual harassment). There is an increase in litigation on sexual harassment since the new French law of 2012 (duty to protect employee from repeated sexual assault), Cass. soc., Jan. 15, 2015, No. 13-17374 (liability of employer if no prevention of harassment is organized). Dismissing harasser does not avoid liability: Cass. soc., Mar. 11, 2015, No. 13-18603; no sanction for claiming sexual or moral harassment by apprentice except if bad faith of plaintiff is proven, see Cass. soc., June 10, 2015, No. 14-13318.

311. In this case, the female employee lost before France's supreme court: Cass. soc., May 21, 2014, No. 13-12666. See Marie Mercat-Bruns, *Enquête interne, atteinte à la vie privée et obligation de sécurité*, 9 *REV. DR. TRAVAIL* 554 (2014).

312. Marie Mercat-Bruns, *Harcèlement sexuel au travail en France: entre rupture et continuité*, in *LA LOI ET LE GENRE 201* (Stéphanie Hennette-Vauchez et al. eds, 2014).

313. For the first time, the CJEU examined discrimination based on two grounds, age and disability, in the same decision, rejecting direct discrimination based on age but acknowledging indirect discrimination based on disability. The claim involved a reduction in severance pay for laid-off employees as they neared retirement age (the age at which they were entitled to a state pension). Because workers with disabilities retire at an earlier age, they received less severance pay than nondisabled employees in the same situation. Case C-152/11, *Odar v. Baxter Deutschland GmbH*, E.C.R. I-0000. Today the Convention on the Rights of Persons with Disabilities offers a perspective on persons with disabilities who encounter barriers to inclusion in society. See <http://www.un.org/disabilities/convention/signature.shtml> and art. 1: "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. 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."

314. This interview was conducted just before the adoption of the Patient Protection and Affordable Care Act, Public Law 111-148, May 1, 2010.

315. See Susan Sturm's work, *supra* Chapter 4.

316. See also Christine Jolls, *Accommodation Mandates*, 53 *STAN. L. REV.* 223 (2000). Some authors disagree with this analysis: "Those who wish to defend civil rights laws must defend them as the interventions into the economy that they are, rather than treating them as beyond challenge or defense," Samuel R. Bagenstos, *Rational discrimination, Accommodation, and the Politics of (Disability) Civil Rights*, 89 *VA. L. REV.*, 825, 832 (2003).

317. Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 *J. Pol. Econ.* 915, 917 (2001).

318. I present preliminary evidence in Christine Jolls, *Identifying the Effects of the Americans with Disabilities Act Using State-Law Variation: Preliminary Evidence on Educational Participation Effects*, *AMERICAN ECONOMIC REVIEW, Papers and Proceedings*, 2004.

319. See *supra* Chapter 4.
320. Americans with Disabilities Act, July 26, 1990, Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. § 12101; ADA Amendments, Sept. 25, 2008, PL 110-325, 42 USCA § 12101, 12102, 12111 to 12114, 12210, 12206 to 12213.
321. Americans with Disabilities Act, Title 42, § 12102.
322. Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429 (2010).
323. See *supra* Chapter 4 on reasonable accommodation.
324. However, some case law has proven to be discriminatory when a collective bargaining agreement gives advantages based on the cause of the physical inability (work-related or not). See Marie Mercat-Bruns, *Inaptitude physique non professionnelle et discrimination directe dans une convention collective*, 2 REV. DR. TRAVAIL 119 (2015).
325. ADA, Title 42, § 12102 (2) ("For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working . . . For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").
326. ADA, Title 42, § 12102 (1).
327. ADA, Title 42, § 12112 (A) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment").
328. See Ruth B. Colker, *The ADA's Journey through Congress*, 39 WAKE FOREST L. REV. 1 (2004).
329. Sec. 12101, ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553 ("Congress finds that (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers").
330. Linda Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 481 (2000).
331. *Id.*
332. ADA § 12101 (B):

The purposes of this Act are (1) to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA; (2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures; (3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973; (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the

definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled,’ and that to be substantially limited in performing a major life activity under the ADA ‘an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives’; (5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for ‘substantially limits,’ and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis; and (6) to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act.

333. Before the 2008 amendments reversed more restrictive case law, *Bragdon v. Abbott*, 524 U.S. 624 (1998) recognized that the reproductive function was a major life activity.

334. In § 12102 (“The term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008. (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active”).

335. It excludes illness: Case C-13/05, *Chacón Navas v. Eurest Colectividades*, 2006 E.C.R. I-6467.

336. Case C-354/13, *Fag og Arbejde (FOA)*, pt. 65 (ruling that “the obesity of a worker constitutes a ‘disability’ within the meaning of [Council Directive 2000/78/EC] where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.”).

337. Sec. 12101 note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110–325, § 2, Sept. 25, 2008, 122 Stat. 3553, provided that one of the purposes of the ADA is “to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act.”

338. Chai R. Feldblum, *Following in Paul Miller’s (Very Large) Footsteps*, 86 WASH. L. REV. 702 (2011).

339. In looking to reassign workers, sometimes employers limit themselves to equivalent jobs and do not consider how some jobs can be modified to eliminate nonessential tasks that cannot be performed by workers with disabilities.

340. *Rehrs v. Iams Co.*, 486 F.3d 353 (8th Cir. May 15, 2007): the essential functions of a job can include the ability to work rotating shifts.

341. For example, the employer justifies the essential nature of the task by looking at the job profile, the time spent on the task, the consequences if the task is not completed, definitions of tasks and jobs in collective bargaining agreements, the experience workers can share about the job, and the current experience at the job.

342. *Huber v. Wal-Mart*, 486 F.3d 480 (8th Cir. May 30, 2007) (No. 06–2238): A Wal-Mart employee, disabled after an accident at work, sought as a reasonable accommodation to be reassigned to a vacant and equivalent position. Ultimately, Wal-Mart filled that position

with a nondisabled applicant, stipulating that Huber was not the most qualified candidate. She was eventually placed at another facility in a lower-level job as a maintenance associate (a janitorial position). The Court concluded that the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.

343. Chai Feldblum, Kevin Barry, & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187–240 (2008).

344. See *supra* Chapter 4, even if recent EU case law seems a little more favorable to expand disability to cases of obesity, *supra* note 336, and reasonable accommodations to worktime adjustments, see *infra* note 345.

345. See Law 2005–102 of Feb. 11, 2005 (on equal treatment, equal opportunity, participation, and citizenship of people with disabilities). An amendment to add “loss of autonomy” as a ground for discrimination was introduced on Sept. 16, 2015 in Parliament to the bill entitled “Adjusting law to aging.” See Marie Mercat-Bruns, *Lutte contre les discriminations: nouveau critère tiré de la perte d'autonomie*, RECUEIL DALLOZ 1957 (2015).

346. Lisa Waddington, *Future Prospects for EU Equality Law: Lessons to Be Learnt from the Proposed Equal Treatment Directive*, 36 EUR. L. REV. 163, 174 (2011).

347. See also Preamble (e) to the Convention (“Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”). The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on Dec. 13, 2006.

348. Joined Cases C-335/11 and C-337/11, *Ring v. Dansk*, 2013.

349. Case C-312/11, *Commission v. Italy*, 2013 E.C.R. I-000.

350. Case C-303/06, *Coleman v. Attridge Law & Steve Law*, 2008 E.C.R. I-5603.

351. *Id.* at point 64.

352. Marie Mercat-Bruns, *La discrimination fondée sur l'âge: un exemple d'une nouvelle génération de critères discriminatoires?* 6 REV. DR. TRAVAIL 360 (2007) [hereinafter Mercat-Bruns, *La discrimination fondée sur l'âge*].

353. Reducing severance pay for older workers based on their retirement age does not constitute direct discrimination: Case C-152/11, *Odar v. Baxter Deutschland GmbH*, E.C.R. I-0000.

354. Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-9981; C-388/07, *Age Concern England*, 2009, I-01569; Case C-88/08 *Hütter v. Technische Universität Graz*, 2009 E.C.R. I-5325; Case C-341/08, *Petersen*, 2010 E.C.R. I-47; Case C-45/09, *Rosenblatt*, 2010 E.C.R. I-09391; Case C-499/08, *Andersen*, 2010 E.C.R. I-9343; Case C-159/10, *Fuchs*, 2011 E.C.R. I-6919; joined Cases C-297/10 and C-298/10, *Hennigs v. Eisenbahn-Bundesamt und Land Berlin v. Mai*, 2011 E.C.R. I-0796; Case C-447/09, *Prigge v. Deutsche Lufthansa AG*, 2011 E.C.R. I-8003. In French case law, see Marie Mercat-Bruns, *Retour sur la discrimination fondée sur l'âge*, 10 REV. DR. TRAVAIL 587 (2010); Marie Mercat-Bruns, *Age and disability differential treatment in France—Contrasting EU and national courts' approaches to the inner limits of anti-discrimination law*, INT'L J. DISCRIMINATION & L. (Nov. 12, 2014), <http://jdi.sagepub.com/content/early/2014/11/12/1358229114558383.abstract>. See more recently, for example, CJEU Case-C529/13, *Felber* (Jan. 21, 2015); Case C-417/13, *Starjakob* (Jan. 28, 2015); Case C-20/13, *Daniel Unland* (Sept. 9, 2015); Case C-432/14, *Bio Philippe Auguste SARL* (Oct. 1, 2015).

355. Cass. soc., Apr. 4, 1990, No. 88–43555 (*Folies Bergères* case).

356. See Marie Mercat-Bruns, *La CJUE et les présomptions sur l'âge*, 12 REV. JURIS. SOC. 815, 817 (2011) [hereinafter Mercat-Bruns, *La CJUE et les présomptions sur l'âge*]; joined

Cases C-297/10 and C-298/10, *Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Mai*, 2011 E.C.R. I-0796; Case C-530/13, *Schmitzer* (Nov. 11 2014).

357. Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202. EU cases on younger workers are starting to come up and are not necessarily more favorable to younger workers; for example, the CJEU decided that the grant of a payment on the expiry of a fixed-term employment contract is intended to compensate for insecurity and justifies the exclusion of young people working during their school holidays or university vacations who necessarily go back to school, Case C-432/14, *O. v. Bio Philippe Auguste SARL* (Oct. 1, 2015).

358. See Cass. soc., Apr. 30, 2009, No. 07-43945 (rejecting the claim of indirect discrimination resulting from the introduction of a cap on the length of service (twelve years) taken into account to calculate redundancy payments upon dismissal).

359. For further discussion of age discrimination, see Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813 (1996).

360. Phyllis Moen, professor, McKnight Presidential Chair in Sociology University of Minnesota. She and Professor Erin Kelly codirect the Flexible Work and Well-Being Center. Her works include Phyllis Moen, *A Life-Course Approach to the Third Age*, in DAWN CARR & KATHRIN KOMP, *GERONTOLOGY IN THE ERA OF THE THIRD AGE: IMPLICATIONS AND NEXT STEPS* 13 (2011).

361. See *WORKPLACE FLEXIBILITY: REALIGNING 20TH-CENTURY JOBS FOR A 21ST CENTURY WORKFORCE* (Kathleen Christensen & Barbara Schneider, eds., 2010).

362. Major program areas of the Alfred P. Sloan Foundation, *available at* <http://www.sloan.org/major-program-areas/>.

363. See Mercat-Bruns, *La discrimination fondée sur l'âge*, *supra* note 352, at 360.

364. MARIE MERCAT-BRUNS, *VIEILLISSEMENT ET DROIT À LA LUMIÈRE DU DROIT FRANÇAIS ET DU DROIT AMÉRICAIN* (2001) [hereinafter *MERCAT-BRUNS, VIEILLISSEMENT ET DROIT*].

365. See a case of the Conseil d'Etat that explains why mandatory retirement for air traffic controllers is "justified" and proportionate: "age can affect endurance, vigilance and performance," CE, Apr. 4, 2014, App. No. 362785.

366. Case C-229/08, *Wolf*, 2010 E.C.R. I-1.

367. Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 602 and § 623; for case law on Bona Fide Occupational Qualification, see *Western Airlines v. Criswell*, 472 U.S. 400 (1985).

368. In EU law, there is a narrow interpretation of this exception: see C-447/09, *Prigge v. Deutsche Lufthansa AG* 2011 E.C.R. I-8003, Pt. 74 (to invoke this defense, one must prove that its application is legitimate and proportionate); C-416/13, *Vital Pérez v. Ayuntamiento de Oviedo*, EU:C:2014:2371, Nov. 13, 2014 (recently rejecting an age limit of thirty to recruit policemen). In France, an exception was also recently rejected because it was applied to refuse the recruitment of older ski instructors: Cass. soc., Mar. 17, 2015, No. 13-27142.

369. See Mercat-Bruns, *La CJUE et les présomptions sur l'âge*, *supra* note 356, at 817.

370. The specific nature of litigation on age discrimination in EU law and American law is that it often focuses on the application of the exceptions to age discrimination (in EU, the legitimacy and proportionality test of art. 4 and art. 6 of Directive 2000/78/EC). See Marie Mercat-Bruns, *Retour sur la discrimination fondée sur l'âge*, 10 REV. DR. TRAVAIL 587 (2010); Marie Mercat-Bruns, *Age and Disability Differential Treatment in France—Contrasting EU and National Courts' Approaches to the Inner Limits of Anti-discrimination Law*, INT'L J. DISCRIMINATION & L. (Nov. 12, 2014), *available at* <http://jdi.sagepub.com/content/early/2014/11/12/1358229114558383.abstract> [hereinafter *Mercat-Bruns, Age and Disability Differential Treatment in France*].

371. Some authors refer to the “life cycle” theory based on the “economic structure of career employment” to justify the disadvantages of older workers: see Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution*, 72 N.Y.U. L. REV. 780 (1997).

372. The French Cour de Cassation recently held that it was discriminatory to refuse an employee access to training because he or she is close to retirement age: Cass. soc., Feb. 18, 2014, No. 13–10294.

373. Cass. soc., Apr. 9, 2015, No. 13–27550.

374. See Case C-555/07, Küçükdeveci v. Swedex, 2010 E.C.R. I-365.

375. See Case C-152/11, Odar v. Baxter Deutschland GmbH, E.C.R. I-0000.

376. LOUIS CHAUVEL, *LE DESTIN DES GÉNÉRATIONS: STRUCTURE SOCIALE ET COHORTES EN FRANCE DU XX^e SIÈCLE AUX ANNÉES 2010* 15 (2011).

377. Indirect discrimination based on health status: see Cass. soc., July 3, 2012, No. 10–230013; Cass. soc., June 6, 2012, No. 10–21489; Cass. soc., Feb. 12, 2013, No. 11–27689.

378. Cass. soc., Apr. 30, 2009, No. 07–43945; Cass. soc., Oct. 19, 2010, No. 08–45254.

379. In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court extended disparate impact discrimination in an age discrimination case; the ADEA did not provide for this protection. Indirect discrimination based on age is explicitly prohibited in French law (Law 2001–1066 of Nov. 16, 2001, amended by Law 2008–496 of May 27, 2008).

380. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009): in mixed motive cases, since the CRA of 1991 does not concern age discrimination, the motivating-factor instruction does not apply to age. See also the legislative attempts to improve older workers’ protection in the United States, *Protecting Older Workers Against Discrimination Act*, H.R. 3721, 111th Cong. (1st Sess. 2009), and on the proposed bill, see David Sherwyn et al., *Experimental Evidence That Retaliation Claims Are Unlike Other Employment Discrimination Claims*, 44 SETON HALL L. REV. 455 (2014).

381. See *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 35 (1991); extending to all employment discrimination cases, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011).

382. See Case C-123/10, *Brachner v. Pensionsversicherungsanstalt*, 2011 E.C.R. I-000. In France: Cass. soc., Sept. 30, 2013, Nos. 12–14752 and 12–14964.

383. The ADEA protects workers over forty; when both workers are over forty, the law protects only older workers over younger workers: *General Dynamics Land Systems, Inc. v. Dennis Cline*, 2004 WL 329956.

384. Joined Cases C-297/10 and C-298/10, *Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Mai*, 2011 E.C.R. I-0796; Case C-499/08, *Ingeniørforeningen i Danmark on behalf of Ole Andersen v. Region Syddanmark*, 2010 E.C.R. I-9343 (Oct. 12, 2010); Case C-159/10, *Fuchs*, 2011 E.C.R. I-6919.

385. Case C-88/08, *Hütter v. Technische Universität Graz*, 2009 E.C.R. I-5325; joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12, *Thomas Specht et al.* (2014). In France recently, Cass. soc., May 20, 2014, No. 12–29565 (in which the mandatory retirement of a worker was justified by an exception to age discrimination: the benefit of a full pension and the recruitment of younger workers to promote younger generations in this job category).

386. See Case C-141/11, *Hörnfeldt v. Posten Meddelande AB*, 2012 E.C.R. I-0000; see more recently Case C-515/13, *Ingeniørforeningen i Danmark acting on behalf Landin* (Feb. 26, 2015).

387. See EU case law, which considers that intergenerational fairness in the workplace is a legitimate exception to age discrimination, joined Cases C-250/09 and C-268/09, *Georgiev*, 2010 E.C.R. I-11869; *Frédérique Rolin*, *Quelques précisions quant à la nature et au régime de justification des discriminations fondées sur l’âge*, 3 RAE 610 (2011); *Mercat-Bruns*, *Age and Disability Differential Treatment in France*, *supra* note 370.

388. See Law 2013–185 of Mar. 1, 2013 (on the “generation contract”) and amendments in Law 2014–288 of Mar. 5, 2014. It aims to promote the hiring of young people under twenty-six and the continued employment of older employees by creating junior-senior pairs to support transfer of know-how from the older worker to the younger worker. The mechanism includes a government subsidy for small- and medium-sized companies (fewer than three hundred employees): €4,000 a year for three years for each young worker hired under an intergenerational agreement. In companies with more than fifty employees, a collective bargaining agreement may be negotiated but is no longer a prerequisite.

389. But this right to retirement can be less favorable for workers with disabilities who are required to retire earlier than workers without a disability; in this case, the rule disproportionately disadvantages older workers with disabilities: Case C-152/11, *Odar v. Baxter Deutschland GmbH*, E.C.R. I-0000, Pt. 72.

390. 2012 was the European Year for Active Ageing: EUROPEAN YEAR FOR ACTIVE AGEING AND SOLIDARITY BETWEEN GENERATIONS, <http://ec.europa.eu/archives/ey2012/>.

391. See one of the federal reports on aging, Report of the Taskforce on the Aging of the American Workforce (2008).

392. As the case law shows, economic layoffs can justify limited redundancy for older workers about to retire as well as the legitimate aim to balance the workforce. Judicial scrutiny of these exceptions to age discrimination was harsher in the past: Cass. soc., June 27, 2012, No. 10–27220; Cass. soc., Oct. 9, 2012, Nos. 11–23142 to 11–23146; Cass. soc., May 11, 2010, No. 08–45307; Cass. soc., Feb. 16, 2011, No. 09–72061; Cass. soc., Dec. 21, 2006, No. 05–12816, examining the individual situations of the older workers involved. Now the judges are more deferent to the need to cater to the young unemployed generation (Cass. soc., Nov. 26, 2013, Nos. 12–21758 and 12–22200, 12–24690, 12–22208; Cass. soc., May 20, 2014, No. 12–29565; Cass. soc., May 13, 2014, No. 13–10781; Cass. soc., Apr. 15, 2015, No. 13–18849; Cass. soc. July 9, 2015, No. 14–16009 (financial advantages linked to a severance pay plan cannot be refused to employees who do not consent to early retirement plan) and follow the CJEU’s more lenient standard of appreciation of national age policies; see recently CJEU Cases C-515/13, *Ingeniørforeningen i Danmark* (Feb. 26, 2015), and C-529/13, *Georg Felber v. Bundesministerin für Unterricht, Kunst und Kultur* (Jan. 21, 2015) (finding that a civil servant retirement system that does not take into account years of service before the age of eighteen because of the technical obstacle of contributing to a public scheme is not discriminatory); Case C-20/13, *Daniel Unland* (Sept. 9, 2015) (concerning a transitional pay scheme); there is no valid point of reference under the old pay scheme of civil servants and, contrary to the argument by the applicant, neither a category of “young judges” are at a disadvantage as a result of that law nor a category of “older judges” who are placed in a more favourable position as a result of those laws; a transitional pay scheme does not perpetuate discriminatory categories.

393. *MERCAT-BRUNS, VIEILLISSEMENT ET DROIT*, *supra* note 364, at 257.

394. Conseil Constitutionnel decision No. 2007–557 DC, Nov. 15, 2007, striking down art. 63 of the Act of Oct. 25, 2007 (on the control of immigration, integration, and asylum).

395. SIMONE DE BEAUVOIR, *OLD AGE* 602–603 (Patrick O’Brien, trans., 1977).

396. Law 2010–1330 of Nov. 9, 2010, and Decree No. 2011–823 of July 7, 2011 (on the obligation to negotiate an action plan or a collective bargaining agreement on work hardship factors), and Decree No. 2014–1156 of Oct. 9, 2014 (creating a points system to keep track of hardship factors and enable workers exposed to these factors to retire earlier).

397. See PIERRE-YVES VERKINDT, *LES C.H.S.C.T. AU MILIEU DU GUÉ*, Feb. 28, 2014 (report to the French government on the representative body in charge of working conditions), available at <http://www.travailler-mieux.gouv.fr/Rapport-etabli-par-le-professeur.html>.

398. For more emphasis on this issue in the United States, see HOWARD EGLIT, *ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* 23 (2004).

399. NICOLE CATALA, *L'EMPLOI DES SENIORS: ENQUETE D'ENTREPRISES* 35 (2005).
400. Samia Benallah, *La surcote: premiers éléments de bilan d'une mesure emblématique de la réforme des retraites de 2003*, 60 RETRAITE ET SOCIÉTÉ 43 (2011).
401. See Pierre Bailly & Jean-Philippe Lhernould, *Discrimination en raison de l'âge: sources européennes et mise en oeuvre en droit interne*, 3 DR. SOC. 223 (2012); Sylvaine Laulom, *L'interdiction des discriminations fondées sur l'âge*, 1489 SEMAINE SOCIALE LAMY 25 (2011); Frédérique Michéa, *Le traitement judiciaire du critère discriminatoire de l'âge*, 11 DR. SOC. 1060 (2010).
402. For sociological accounts on age cohorts, see EVELYNE SULLEROT, *L'ÂGE DE TRAVAILLER* 47 (1986); ANNE-MARIE GUILLEMARD, *L'ÂGE DE L'EMPLOI: LES SOCIÉTÉS À L'ÉPREUVE DU VIEILLISSEMENT* (2003). In management, see ELÉONORE MARBOT & JEAN-MARIE PERETTI, *LES SENIORS DANS L'ENTREPRISE* 93 (2004).
403. Without dwelling on the damaging effects of extensive early retirement policies in France from the late 1960s onward, see MERCAT-BRUNS, *VIEILLISSEMENT ET DROIT*, *supra* note 364, at 98.
404. See generally ISABELLE RICHET, *LA RELIGION AUX ÉTATS-UNIS* (2001).
405. Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 511 (2005).
406. See CAMILLE FROIDEVAUX-METTERIE, *POLITIQUE ET RELIGION AUX ÉTATS-UNIS* (2009); DENIS LACORNE, *DE LA RELIGION EN AMERIQUE: ESSAI D'HISTOIRE POLITIQUE* (2007).
407. See the EEOC guidelines on religious accommodation according to Title VII, offering a narrower definition than the one applied to reasonable accommodation for persons with disabilities, available at http://www.eeoc.gov/policy/docs/religion.html#_Toc203359518.
408. See generally Kent Greenawalt, *Five Questions About Religion Judges Are Afraid to Ask*, in *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATIONS IN PLURALIST DEMOCRACIES* 196–244 (Nancy Rosenblum ed., 2000).
409. For an example of a French company having decided to provide reasonable accommodation, see *Capitalising on the Rich Diversity of Our Workforce*, GROUPE CASINO, <http://www.groupe-casino.fr/en/committed-employer/capitalising-on-the-rich-diversity-of-our-workforce/> (last visited on Jan. 27, 2015).
410. See Emmanuelle Bribosia et al., *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?*, 17 MAASTRICHT J. EUR. & COMP. L. 137 (2010).
411. See the novel by ABD AL MALIK, *L'ISLAM AU SECOURS DE LA RÉPUBLIQUE* (2013).
412. On activities such as day care, see the saga of the French *Baby Loup* case, which ended with a Cour de Cassation case justifying the dismissal of a day care deputy manager who wanted to wear her hijab to work. The court based its argument on the nature of the activity: taking care of children required workers to not wear conspicuous religious symbols: see Cass. ass. plén., June 25, 2014, No. 13–28369.
413. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
414. A madrassa is an Islamic school.
415. 42 U.S.C. § 2000e-2(e) (2010):

It shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such

program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

416. Pub. L. No. 103–141, 107 Stat. 1488, 42 U.S.C. § 2000bb (Nov. 16, 1993).

417. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ____ (2014).

418. Legal experts have not reflected on religion as much as experts in other fields: see Nancy Green, *La religion aux États-Unis comme catégorie d'analyse; la religion en France comme catégorie d'analyse*, in *LES CODES DE LA DIFFÉRENCE* 74, 80 (Riva Kastoryano ed., 2005); MAX WEBER, *SOCIOLOGIE DES RÉLIGIONS* (Jean-Pierre Grossein ed. & trans., Gallimard, 1996); OLIVIER BOBINEAU & SÉBASTIEN TANK-STORPER, *SOCIOLOGIE DES RÉLIGIONS* (2007).

419. See RICHARD FORD, *HEADSCARVES, HAIRSTYLES AND CULTURE AS A CIVIL RIGHT* 9 (French-American Foundation & Sciences Po, 2011), http://www.frenchamerican.org/sites/default/files/documents/media_reports/ford_headscarves_report_en.pdf (expressing qualms about religious accommodations):

The headscarves controversy in France and elsewhere has captured world-wide attention and provoked a great deal of criticism from defenders of religious liberty. Many American commentators insist that European nations—France in particular—should adopt an American approach to religious liberty and accommodate distinctive religious practices as a matter of civil rights. These criticisms overstate the extent to which American law requires the accommodation of religious practices and unfairly dismiss the concerns that underlay rules prohibiting conspicuous religious symbols. Indeed, the American experience with civil rights requiring the accommodation of distinctive group practices and cultural affections largely vindicates the concerns of the French. Often the supposedly authentic practices of a minority group are in fact imposed by more powerful members of the group on others who prefer a less conspicuous or less traditional way of expressing their racial, ethnic or religious identifications—here, a right to accommodation reinforces the power of these dominant group members. Legal rights to accommodation can also encourage the most divisive and illiberal aspects of a minority group's culture, since these are precisely the aspects of any group culture that would be subject to censure in the absence of rights to accommodation.

420. See François Gaudu, *La religion dans l'entreprise*, 1 DR. SOC. 65 (2010).

421. Reference to the First Amendment of the U.S. Constitution (“Congress shall make no law respecting an establishment of religion”).

422. Art. 1 of the 1958 French Constitution (“France is a secular, democratic and undividable republic. It ensures equality before the law to all its citizens regardless of their origin, race or religion”); Decision No. 2004–505 DC, Nov. 19, 2004, and CE, Mar. 16, 2005, Rec. Lebon 168 (recognizing the constitutional principle of “*laïcité*”); Law of Dec. 9, 1905 (on the separation of church and state).

423. This is the translation of the neutrality of *laïcité*. We might be overlooking “its essence”: see Patrice Adam, *La crèche et l'au-delà*, 1527 SEM. SOC. LAMY 30 (2012). See on the distortion of the concept, STÉPHANIE HENNETTE-VAUCHEZ & VINCENT VALENTIN, *L'AFFAIRE BABY LOUP OU LA NOUVELLE LAÏCITÉ* (2014).

424. Jean Rivero, *La notion juridique de laïcité*, 31 RECUEIL DALLOZ 137 (1949); see also the recommendation of the Conseil d'État on the wearing of a veil at school, Nov. 27, 1989, RFD ADM. 1 (1990).

425. For a description of the important role of the Catholic Church, especially during the prerevolutionary period, see *HISTOIRE DE LA FRANCE RELIGIEUSE* (Jacques Le Goff & René Remond eds., 1988); for an essay relating how the United States was founded by

groups seeking religious freedom, see DENIS LACORNE, *DE LA RELIGION EN AMERIQUE: ESSAI D'HISTOIRE POLITIQUE* (2007).

426. See *Appel-Irrgang v. Germany*, App. No. 45216/07, Eur. Ct. H.R. (2009) (defending the idea of the state's neutrality with regard to religion).

427. See the five decisions by the Conseil d'État, July 19, 2011, No. 308544, on the compatibility of *laïcité* and financial support of local government to religion institutions.

428. On the production of norms to reinforce or justify the principle of *laïcité*, see Remy Libchaber, *À la croisée des interprétations: le voile et la loi*, RTD Civ. 161 (2004).

429. Law 2010–1192 of Oct. 11, 2010.

430. Circular of Mar. 2, 2011, J.O. 4128 (Mar. 3, 2011) (on the implementation of the law of 2010).

431. CC decision No. 2010–613 DC, Oct. 7, 2010 (the Conseil Constitutionnel applies a narrow proportionality test balancing principles of religious freedom with the principle of equality in the aim of preserving public order, which is constitutionally protected).

432. Anne-Marie Leroyer, *La circulaire et le voile: interrogations sur une notion émergente: les exigences minimales en société*, RTD Civ. 399 (2011).

433. See *Dahlab v. Switzerland*, 2001–V, Eur. Ct. H.R. 447 (2001) (supporting the principle of *laïcité* in conformity with the European convention, regarding a veil ban for Swiss teachers); see also *Karaduman v. Turkey*, App. No. 16278/90, 74, Eur. Com. H.R. Dec. & Rep. 93 (1993).

434. See Libchaber, *supra* note 428.

435. *Arslan v. Turkey*, App. No. 41135/98 § 2, Eur. H.R. Rep. (2010); Jean-Pierre Marguénaud, *La liberté de porter des vêtements religieux dans les lieux publics ouverts à tous*, RTD Civ. 682 (2010). But recently, in *SAS v. France*, App. No. 43835/11, Eur. Ct. H.R. (2014), the French law on the burqa ban was considered justified by the French government's attachment to the ability to "live together" (*vivre ensemble*).

436. For example, in *Eweida v. United Kingdom*, Nos. 48420/10, 59842/10, 51671/10, and 36516/10, Eur. Ct. H.R. (2013), British Airways uniform code must allow wearing a cross if it also allows other visible religious symbols like the hijab and turban.

437. See Minow's interview, *supra* Chapter 5, Part VI:

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.

438. Law 2001–504 of June 12, 2001 (to reinforce the prevention and suppression of sects).

439. Art. 14 of the HRC and art. 2 of Directive 2000/78/EC.

440. The Strasbourg Court recognizes freedom of religion as a substantive right of the convention. Gérard Gonzalez, *LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME ET LA LIBERTÉ DES RELIGIONS* 42 (1997)

441. ECHR art. 9.

442. See Charter of Fundamental Rights of the European Union art. 10.

443. JEAN-FRANÇOIS RENUCCI, *DROIT EUROPÉEN DES DROITS DE L'HOMME* 134 (2010); *X v. United Kingdom*, App. No. 7291/75, Eur. Cm. H.R., Oct. 4, 1977, 11 DR 55.

444. *Welsh v. United States*, 398 U.S. 333, 339 (1970).

445. See Law 2001–504 of June 12, 2001 (on sects), unsuccessfully contested before the ECtHR: Nov. 6, 2001, *Fédération chrétienne des témoins de Jéhovah de France v. France*, Rec. 2001–XI, 15.

446. *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. (G.C.).

447. RENUCCI, *supra* note 443, at 28.

448. *Giniewski v. France*, 2006–I Eur. Ct. H.R. 468 (2006) (holding that criticism against Pope John Paul II was a form of freedom of expression).

449. RENUCCI, *supra* note 443, at 132.

450. Gérard Gonzalez, *Liberté de pensée, de conscience et de religion*, in *DICTIONNAIRE DES DROITS DE L'HOMME* 636 (Joel Andriantsimbazovina et al. eds, 2008)

451. RENUCCI, *supra* note 443, at 133: no deadline can be imposed to recognize the status of a religious faith, *Jehovas v. Austria*, No. 40825/98, Eur. Ct. H.R., July 31, 2008; *Verein der Freunde des Christengemeinschaft v. Austria*, No. 76581/01, Eur. Ct. H.R., Feb. 26, 2009.

452. Corporations do not have religious rights: Comm. EDH, Feb. 27, 1979, *X v. Switzerland*, D. 16/85. In the United States, this position is different: see recently *Burwell v. Hobby Lobby Stores*, 573 U.S. ____ (2014) (the first time the Supreme Court has recognized a closely held for-profit corporation's claim of religious belief).

453. *Kosteski v. Former Yugoslav Republic of Macedonia*, App. No. 55170/00, 2006 Eur. Ct. H.R. 403.

454. *Buscarini v. San Marino*, 1999–I Eur. Ct. H.R. 605.

455. See legislative history of law of 1964 (Title VII), which covers religion: 110 Cong. Rec. 2548, 2607 (1964).

456. RENUCCI, *supra* note 443, at 136; *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993); *Church of Bessarabia v. Moldova*, App. No. 45701/99, 2001–XII Eur. Ct. H.R. (2001).

457. Court of Appeal, Lyon, July 28, 1997, *Ministère public v. Veau*; see also Claire Brisseau, *La religion du salarié*, 9–10 *DR. SOC.* 969 (2008).

458. *Welsh v. United States*, 398 U.S. 333, 339 (1970).

459. *Welsh*, 398 U.S. at 339; THOMAS HAGGARD, *UNDERSTANDING EMPLOYMENT DISCRIMINATION LAW* 144 (2008).

460. 29 C.F.R. § 1605.1 (EEOC guidelines on discrimination because of religion).

461. *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995); the constitutional standard applied to religious freedom is more restrictive when applied in the context of abortion rights.

462. No discrimination in the case of denying an employee the right to eat cat food in the company cafeteria due to the employee's personal beliefs: *Brown v. Pena* 441 F.Supp. 1382 (S.D.Fla. 1977).

463. See *Young v. Southwestern Savings & Loan*, 509 F.2d 140 (5th Cir. 1975) (“The racist and anti-Semitic philosophy of the Ku Klux Klan has been held not to qualify as a *religion*, even though it allegedly derives from Biblical sources”); THOMAS HAGGARD, *UNDERSTANDING EMPLOYMENT DISCRIMINATION LAW* 144 (2008).

464. Cass. soc., Mar. 24, 241998, *DR. SOC.* 614 (1998): a Muslim butcher who, after two years, made a request to stop working with pork, which the employer refused. The Cour de Cassation found no fault in requesting that an employee perform the job he was hired to do. In France, an employer has no duty to accommodate, similar to the United States; see also Cass. soc., June 2, 1993, No. 91–44476 (involving a request to not work on Fridays).

465. See also *Siebenhaar v. Germany*, Eur. Ct. H.R. (2011), 5 RJS 357 (2011); *Obst v. Germany*, App. No. 4205/03, Eur. Ct. H.R. (2010); *Schüth v. Germany*, Eur. Ct. H.R. (2010), 1 RJS 11 (2011).

466. Court of Appeal, Versailles, Jan. 23, 1998, No. 95–9736; Court of Appeal, Nancy, June 30, 2006, No. 04–1847.

467. Even though the “justification that the employer has to deal with customers can be considered more or less legitimate, . . . it is up to the judge of the employment contract to examine, on a case by case basis, the type of market targeted by the company and the type of product sold, which could require a restriction of religious freedom (fashion apparel? home appliances?).” See Adam, *supra* note 423, at 33; Court of Appeal, Saint Denis de la Reunion, Sept. 9, 1997, RECUEIL DALLOZ 546 (1998) (involving a requirement for elegant attire and a veiled salesperson); Labor Court (CPH), Paris, Dec. 17, 2002, DR. SOC. 360 (2004). And the Cour de Cassation has recently asked the CJEU for a preliminary ruling on the legality of a company ban of the veil imposed on a female engineer seen as an essential requirement for the job because of customer preference, Cass. soc. Apr. 9, 2015, No. 13-19855.

468. The behavior of the employee cannot affect the image of the company that supports a certain religious faith. Court of Appeal, Toulouse, Aug. 17, 1995, DR. OUVRIER 369 (1996).

469. See HALDE deliberation No. 2011-67, Mar. 28, 2011, and the lack of an adequate legal framework to regulate religious practices in the private sector.

470. In some cases, the veiled Muslim employee has won at the Labor Court level based on LABOR CODE [CODE DU TRAVAIL] art. L.1121-1 (employer’s references to surveys of public opinion disapproving the veil cannot justify a ban of the veil based on customer preference). However, the court rejected the argument based on religious discrimination: Labor Court of Lyon (Conseil de prud’hommes de Lyon en département), Sept. 18, 2014.

471. *Id.*, at 9.

472. Cass. ass. plén., June 25, 2014, No. 13-28369. This was the second time the French supreme court heard the case: this decision emanated from the plenary assembly because the court of appeal, on remand, considered a second time that the dismissal of the veiled employee was for just cause. In Assemblée Plénière, the judges are in a sort of en banc composition, one from each chamber. The first decision of the Cour de Cassation on this case had sided with the employee, considering that the principle of neutrality did not apply to the private sector. See Cass. soc., Mar. 19, 2013, No. 11-28.845; see also PATRICE ADAM, *L’INDIVIDUALISATION DU DROIT DU TRAVAIL* (2005); Patrice Adam, *Baby Loup: horizons et défense d’une jurisprudence anathème*, 6 REV. DR. TRAVAIL 385 (2013); Patrice Adam, *L’affaire Baby Loup: vues du sommet*, 10 REV. DR. TRAVAIL 607 (2014); STÉPHANIE HENNETTE-VAUCHEZ & VINCENT VALENTIN, *L’AFFAIRE BABY LOUP OU LA NOUVELLE LAÏCITÉ* (2014).

473. Labor Court (CPH) of Mantes La Jolie, Dec. 13, 2010.

474. Court of Appeal, Versailles, Oct. 27, 2011, No. 10-05642.

475. No objective justification, foreign to any discrimination.

476. See *supra* note 472.

477. *Id.*

478. Adopted by the Senate in 2012, the bill was supposed to be debated in March. On Mar. 19, 2015, the Commission on Human Rights intervened and suggested its withdrawal from the agenda: see *Laïcité dans les crèches: la CNCDH veut le retrait de la proposition de loi*, VOUSNOUSILS: L’E-MAG DE L’ÉDUCATION (Mar. 23, 2015), <http://www.vousnousils.fr/2015/03/23/laicite-dans-les-creches-la-cncdh-veut-le-retrait-de-la-proposition-de-loi-565704>.

479. François Gaudu, *L’entreprise de tendance laïque*, 12 DR. SOC. 1186, 1188 (2011), and the amended bill in the French Senate of Oct. 25, 2011, No. 56, and Report by High Council on Integration, opinion given on Sept. 1, 2011.

480. On the astonished reactions of public law experts on the application by the Labor Court of the principle of *laïcité* to the private sector, see Halima Boualili, *Laïcité et port du foulard islamique au travail*, 7-8 DR. SOC. 779, 781 (2011).

481. It was an NGO: see HALDE deliberation No. 2009-117, Apr. 6, 2009 (“*laïcité* imposes upon civil servants a strict neutrality in the performance of their work”) (“there is no equivalent in labor law” applying to the private sector).

482. Gaudu, *supra* note 479, at 1188.

483. In the United States, amendments to Title VII in the CRA 1991 (Pub. L. 102-166) confirmed that disparate impact discrimination applies to religious discrimination reversing previous case law; EEOC v. Sambo’s of Georgia, 530 F. Supp. 86 (N.D. Ga. 1981).

484. See *supra* note 479.

485. François Gaudu, *Droit du travail et religion*, 9-10 DR. SOC. 959 (2008).

486. *Id.* at 959: “French labor law and religion are maintaining armed peace.”

487. The Labor Court of Lyon, Sept. 18, 2014, decided a case where a supermarket cashier was fired for not removing her veil, as required by the company’s internal dress code. The labor court viewed this as an unjust dismissal but refused to qualify the act as religious discrimination. It did, however, reject the employer’s argument that the dismissal decision was based on survey results showing that clients were hostile to the veil.

488. For a case in which a consultant was dismissed for refusing to take off her Islamic veil while working at a client’s site (Cass. soc., Apr. 9, 2015, No. 13-19855), a referral was made to the CJEU. The CJEU will have to say whether Directive 2000/78 considers a requirement to not expose religious clothing as a condition of employment.

489. First Amendment to the U.S. Constitution (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

490. Strict interpretation of reasonable accommodation in the public sector, *Sherbert v. Verner* 374 U.S. 398 (1963), *Emp’t Div., Dep’t. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990); *Goldman v. Weinberger*, 475 U.S. 503 (1986).

491. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1988).

492. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

493. Isabelle Desbarats, *De la diversité religieuse en milieu de travail. Regards croisés en droit français et en droit canadien*, 3 REV. RECHERCHE JUR. DROIT PROSPECTIF 1447 (2010).

494. 31 Fed. Reg. 8370 (1966); see also *Ansonia Board of Education v. Philbrook* 479 U.S. 60 (1986).

495. Under 703 (a) (1) Title VII, an employer can justify undue hardship to refuse to make reasonable accommodations for the religious practices of his employees and prospective employees; see *TWA Inc. v. Hardison*, 432 U.S. 63 (1977).

496. 575 US __ (2015); see also Marie Mercat-Bruns, *EEOC v. Abercrombie & Fitch Stores, Inc: l’image de l’entreprise dévoilée*, 2 REV. DR. TRAVAIL 2016 (forthcoming).

497. Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159 (2002).

498. See Gaudu, *supra* note 420, at 71.

499. Jean Savatier, *Liberté religieuse et relations de travail*, in DROIT SYNDICAL ET DROITS DE L’HOMME À L’AUBE DU XXI^e SIÈCLE: MÉLANGES EN L’HONNEUR DE JEAN-MAURICE VERDIER 455 (2001).

500. Cass. soc., Dec. 16, 1981, Bull. No. 968 (finding that the dismissal of an employee who did not report to work because of the Muslim feast of Eid-el-Kabir was for just cause, without serious misconduct).

501. Jean-Christophe Sciberras, *Travail et religion: une cohabitation sous tension*, 1 DR. SOC. 72, 74 (2010).

502. The issue of the employee’s “personal life” refers to the worker as a person: it is a better qualifier than the one chosen by Michel Despax, “life outside the workplace,” which seems to indicate an application outside of the workplace: see Michel Despax, *Life outside the workplace and its effect on the employment contract*, JCP I 1776 (1963).

503. Jean-Yves Frouin, *La protection des droits de la personne et des libertés du salarié*, 99 CAH. SOC. DU BARREAU DE PARIS 123 (1998).

504. Antidiscrimination law targets the person beyond the employee: Antoine Lyon-Caen, *Droit du travail et protection sociale: brèves observations sur un couple*, 11 DR. SOC. 1014 (2009) (“The process of generalization reaches its ultimate phase when labor law selects the person as its subject, a universal being encompassing all individuals, whether salaried or independent, working or not working, a citizen or a foreigner . . . As universal rights distinct from the employment contract, fundamental rights play a central role here”). See Patrice Adam, *La dignité du salarié (deuxième partie)*, 4 REV. DR. TRAVAIL 244 (2014).

505. Even if the grounds of religion and race often intersect: see *infra* Chapter 5, VIII, on intersectionality.

506. Jean-Emmanuel Ray, *D’un droit des travailleurs aux droits de la personne au travail*, 1 DR. SOC. 3 (2010).

507. Lepage, *supra* note 306, at 4.

508. *Id.* at 376.

509. PHILIPPE WAQUET, L’ENTREPRISE ET LES LIBERTÉS DU SALARIÉ 174 (2003).

510. Lepage, *supra* note 306, at 376 (“the standard of relevancy of information and the prohibition of discrimination restricts the use of information more than its access”).

511. Natacha Gavalda, *La liberté de la correspondance ou l’intrusion de la vie privée dans l’entreprise*, JCP S 1194 (2010) (discussing the notion of intrusion “as an element of representation of workers”).

512. Philippe Waquet, *La vie personnelle du salarié*, in DROIT SYNDICAL ET DROITS DE L’HOMME À L’AUBE DU XXI^e SIÈCLE: MÉLANGES EN L’HONNEUR DE JEAN-MAURICE VERDIER 181 (2001).

513. See Cass. soc., May 3, 2011, No. 09–67464; note Danielle Corrigan-Carsin, *Vie personnelle-vie professionnelle: la cloison est-elle étanche?*, JCP S 1311 (2011); Cass. soc., May 21, 2014, No. 13–12666; Marie Mercat-Bruns, *Enquête interne, atteinte à la vie privée et obligation de sécurité*, 9 REV. DR. TRAVAIL 554 (2014).

514. It is the judge’s role: see Evelyne Collomp, *La vie personnelle au travail, Dernières évolutions jurisprudentielles*, 1 DR. SOC. 43 (2010).

515. If we adopt Morgan Sweeney’s definition: “Positive actions are measures based on prohibited grounds of discrimination (age, sex, real or presumed membership of and ethnic or racial group, disability, religion, sexual orientation, etc.) in order to remedy, compensate, or prevent discrimination suffered by a particular population (women, homosexuals, etc.). Subsequently this membership determines access to an advantage.” Morgan Sweeney, *Les actions positives à l’épreuve des règles de non-discrimination*, 2 REV. DR. TRAVAIL 88 (2012).

516. On the same issue regarding freedom of expression: Cass. soc., Dec. 8, 2009, No. 08–17191, JCP S 1213 (2010).

517. Pascal Lokiec, *Le travailleur et l’actif*, 11 DR. SOC. 1018 (2009).

518. Pascal Lokiec, *L’adaptation du travail à l’homme*, 7–8 DR. SOC. 755 (2009).

519. By analogy, when one discrimination hides another: Cass. soc., Jan. 28, 2010, No. 08–44486, JCP S 1196 (2010).

520. For cases involving an older woman, see Court of Appeal, Poitiers, Feb. 17, 2009, 08/00461; Court of Appeals, Versailles, May 7, 2014, 13/03766, *Madame L. v. SAS ERES*: refusal of job transfer to another lingerie shop cannot be justified by female employee’s age and physical appearance.

521. Multiple discrimination encompasses different experiences. Marie-Thérèse Lanquetin shows the variety of forms it can take. She refers to the idea of multiple discrimination as “sequential discrimination.” For example, a woman with a disability can be affected by employment decisions her whole life. She will have a harder time finding a first job

because of the required reasonable accommodation linked to her disability. Then, during her career, if she takes time off for maternity leave, she is more likely to be discriminated against in promotion decisions because of family responsibilities. Lanquetin also describes multiple discrimination as “combined discrimination” affecting subordination at different levels, associated with the meshing of different grounds. For instance, compared to nonimmigrant women, immigrant women might have access only to fixed-term, less-qualified employment, such as domestic work, and be paid less than immigrant men. European scholarship also embraces the idea of “intersectional” discrimination, drawing directly from Kimberlé Crenshaw’s work *infra* note 523: in this case, new stereotypes are perceived as emerging as a result not simply of additive forms of discrimination but assumptions, for example, made about women of certain origins. They can be associated with certain types of biases influencing the employer’s evaluation of the employee’s conduct at work: Muslim workers wearing veils may be seen as subordinated to their spouses, or black women may be assumed to be single mothers with less flexibility in terms of working hours. See Marie-Thérèse Lanquetin, *Égalité, diversité et discriminations multiples*, 21 TRAVAIL, GENRE ET SOCIÉTÉS 91 (2009); Marie Mercat-Bruns, *Le jeu des discriminations multiples*, 4 REV. DR. TRAVAIL 254 (2013); Marie Mercat-Bruns, *Discrimination multiple: le défi de la preuve*, in *Droit et Genre*, 16 RECUEIL DALLOZ 954 (2014); Mercat-Bruns, *Les discriminations multiples et l’identité au travail*, *supra* note 6, at 28.

522. GENDERACE: THE USE OF RACIAL ANTIDISCRIMINATION LAWS: GENDER AND CITIZENSHIP IN A MULTICULTURAL CONTEXT, FINAL REPORT 2010 (Isabelle Carles & Olga Jubany-Baucells eds., 2010), available at <http://genderace.ulb.ac.be/rapports/GENERACE%20FINAL%20REPORT%20sent.pdf>.

523. “The U.S. Equal Employment Opportunity Commission (EEOC) and private plaintiffs today announced their mutual resolution of the lawsuit EEOC v. Abercrombie & Fitch Stores, Inc., Case No. CV-04-4731 SI, which was filed on November 10, 2004, in the United States District Court for the Northern District of California in San Francisco. The lawsuit alleged that Abercrombie & Fitch violated Title VII of the Civil Rights Act of 1964 by maintaining recruiting and hiring practices that excluded minorities and women and adopting a restrictive marketing image, and other policies, which limited minority and female employment.” EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch, <http://www.eeoc.gov/eeoc/newsroom/release/11-18-04.cfm>.

524. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, U. CHI. LEGAL F. 139, 149 (1989) [hereinafter Crenshaw, *Demarginalizing the Intersection of Race and Sex*];

Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in an intersection, her injury could result from sex discrimination or race discrimination. . . . But it is not always easy to reconstruct an accident: Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm.

In social science, the theory of intersectionality was then used to analyze how forms of oppression, such as race and gender, work together in producing injustice. For a French description of the theory, see LAURE BERENI ET AL., INTRODUCTION AUX ÉTUDES SUR LE GENRE 280 (2012). See also Alexandre Jaunait & Sébastien Chauvin, *Représenter l’intersection*, 62 REV. FRANÇAISE SCIENCES POLITIQUES 5 (2012); Eleonore Lepinard, *Doing*

Intersectionality: Repertoires of Feminist Practices in France and Canada, 28 GENDER & SOCIETY 877 (2014).

525. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 523, at 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*]; Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992).

526. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* 11–12 (1990):

If women are allegedly passive and fragile, then why are Black women treated as “mules” and assigned heavy cleaning chores? If good mothers are supposed to stay at home with their children, then why are US Black women on public assistance forced to find jobs and leave their children in day care? If women’s highest calling is to become mothers, then why are Black teen mothers pressured to use Norplant and Depo Provera? In the absence of a viable Black feminism that investigates how intersecting oppressions of race, gender, and class foster these contradictions, the angle of vision created by being deemed devalued workers and failed mothers could easily be turned inward, leading to internalized oppression. But the legacy of struggle among U.S. Black women suggests that a collectively shared Black women’s oppositional knowledge has long existed. This collective wisdom in turn has spurred U.S. Black women to generate a more specialized knowledge, namely, Black feminist thought as critical social theory.

527. *Id.*; see also ANGELA DAVIS, *WOMEN, RACE, AND CLASS* (1983).

528. Directive 2000/43/EC (Recital 3) and Directive 2000/78/EC (Recital 3); Decision of Parliament and of the Council, May 17, 2006, European Year of Equal Opportunities for All (point 10); ACTION OF THE COMMISSION: STRATEGY FOR EQUALITY BETWEEN MEN AND WOMEN (2010–2020).

529. See *supra* note 521.

530. “Sex +” cases are U.S. antidiscrimination cases involving at least one ground of discrimination outside of sex.

531. RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE* 125 (2005).

532. Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182 (Reva B. Siegel & Catharine A. MacKinnon eds., 2003).

533. MERCAT-BRUNS, *VEILLISSEMENT ET DROIT*, *supra* note 364.

534. See *infra* Chapter 4 on indirect discrimination.

535. See *infra* Chapter 5, Part VII.

536. In India, for example.

537. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

538. Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC’Y REV. 991 (2011).

539. Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 2 DUKE L.J. 365 (1991); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2011) [hereinafter Carbado & Gulati, *The Fifth Black Woman*]; Cheryl Harris, *Finding Sojourner’s Truth: Race, Gender and the Institution of Property*, 18 CARDOZO L. REV. 309 (1997); Peggy Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN’S LAW J. 21 (1991); Virginia Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

540. Ivy Kennelly, *That Single Mother Element: How White Employers Typify Black Women*, 13 GENDER & SOC’Y 168 (1999).

541. Carwina Weng, *Individual and Intergroup Processes to Address Racial Discrimination in Lawyering Relationships*, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE AND LAW 64 (Shayne Jones ed., 2008).

542. Rachel Kahn Best et al., *supra* note 534, at 991.

543. Case C-555/07, Küçükdeveci v. Swedex, 2010 E.C.R. I-365.

544. Case C-152/11, Odar v. Baxter Deutschland GmbH, E.C.R. I-0000.

545. Case C-303/06, Coleman v. Attridge Law & Steve Law, 2008 E.C.R. I-5603.

546. Sieglinde Rosenberger & Birgit Sauer, *Governing Muslim Headscarves: Regulations and Debates in Europe*, in THE LIMITS OF GENDERED CITIZENSHIP: CONTEXTS AND COMPLEXITIES 159 (Elzbieta H. Olesky et al. eds., 2011)

547. DENISE M. HORN, WOMEN, CIVIL SOCIETY AND THE GEOPOLITICS OF DEMOCRATIZATION 3 (2010).

548. Dagmar Schiek, *Organizing EU Equality Law Around the Nodes of "Race," Gender and Disability*, in EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY: INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY DISCRIMINATION 12 (Dagmar Schiek & Anna Lawson eds., 2011).

549. Case C-123/10, Brachner v. Pensionsversicherungsanstalt, 2011 E.C.R. I-000.

550. See GENDERACE, *supra* note 521.

551. *Id.*, at 274–76.

552. See Malha Naab, *De la place des femmes dans le syndicalisme français à une négociation collective à travers le prisme du genre*, 2 JURIS. CRITIQUE 173 (2011); Cécile Guillaume et al., *Genre, féminisme et syndicalisme*, 30 TRAVAIL, GENRE & SOCIÉTÉ 29 (2013). See also Cass. soc., May 19 2015, No. 13–27.763 (on an older male union member).

553. Cass. soc., Jan. 11, 2012, No. 10–28.213.

554. Cass. soc., Nov. 3, 2011, No. 10–20765.

555. *Id.*

556. See the first case where the Cour de Cassation set aside the requirement of comparability, involving a woman who was discriminated against in promotion decisions after taking part in a strike but who could not produce any elements to compare her status with that of coworkers with the same qualifications: Cass. soc., Nov. 10, 2009, No. 07–42849. The court simply compared her career path before and after the strike. Multiple discrimination in this case offers a way to analyze the effects of the combination between the ground of sex and the freedom to strike.

557. Case C-177/88, Dekker v. VJV Centrum, 1990 E.C.R. I-3941.

558. Case C-147/08, Römer v. City of Hamburg, 2011 E.C.R. I-3591.

559. See Cass. soc., May 11, 2010, No. 08–45307, and No. 08–43681, in which the Cour de Cassation attempted to apply the principle of effectiveness of the EU directives to France.

560. For examples outside of employment, see Crenshaw, *Mapping the Margins*, *supra* note 524, at 1241.

561. C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn, 2008 E.C.R. I-5187.

562. Carbado & Gulati, *The Fifth Black Woman*, *supra* note 538, at 701.; See also recent examples of identity performance in French case law, Mercat-Bruns, *Les discriminations multiples et l'identité au travail*, *supra* note 6, at 28.

563. Carbado & Gulati, *The Fifth Black Woman*, *supra* note 538, at 711.

APPENDIX

1. I interviewed thirteen professors of law (Martha Minow, Dean of Harvard Law School; Robert Post, Dean of Yale Law School; Janet Halley, Professor at Harvard; Richard Ford,

Professor at Stanford; Linda Krieger, Professor at the University of Hawaii; Vicki Schultz, Professor at Yale; Susan Sturm, Professor at Columbia; Julie Suk, Professor at Cardozo; Chai Feldblum, on leave as Professor at Georgetown while serving on the Equal Employment Opportunity Commission; Ruth Colker, Professor at Ohio State; David Oppenheimer, Professor at Berkeley, Christine Jolls, Professor at Yale, Reva Siegel, Professor at Yale) and two sociologists (Frank Dobbin, Professor at Harvard; and Devah Pager, Professor at Princeton).

2. Martha Kegel was the president of the American Civil Liberties Union (ACLU) in Louisiana. She is currently an attorney and Executive Director of UNITY, an award-winning nonprofit providing housing and services to the homeless in New Orleans.

3. *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court ruled that a Georgia law criminalizing private, consensual sodomy between gay adults was constitutional; this decision was overturned in *Lawrence v. Texas*, 539 U.S. 558 (2003).

4. Lauren Edelman is a professor of law and sociology at the Berkeley Law. She has conducted fascinating work on the internalization of law in organizations: see *When The Haves Hold Court: Speculations on the Organizational Internalization of Law* (with Mark C. Suchman), 33 *LAW & SOC'Y REV.* 941 (1999); *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth* (with Christopher Uggen & Howard S. Erlanger), 105 *AM. J. SOCIOLOGY* 406 (1999); *Constructed Legalities: Socio-Legal Fields and the Endogeneity of Law*, in *HOW INSTITUTIONS CHANGE: INSTITUTIONAL DYNAMICS AND PROCESSES* (Walter W. Powell & Daniel L. Jones eds., forthcoming); *Symbols and Substance in Organizational Response to Civil Rights Law* (with Stephen M. Petterson), in 17 *RESEARCH IN SOC. STRATIFICATION & MOBILITY* 107 (1999); *Legal Readings: Employee Interpretation and Enactment of Civil Rights Law* (with Sally Riggs Fuller & Sharon F. Matusik), 25 *ACAD. MGMT. REV.* 200 (2000).

5. A reference to Halley's book *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

6. RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008).

7. These books have since been published: RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* (2011); and RICHARD THOMPSON FORD, *UNIVERSAL RIGHTS DOWN TO EARTH* (2011).

8. In relation to queer theory, see *supra* Chapter 1 on the limitations of constitutional norms and nondiscrimination as fundamental rights.

9. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

10. DAVID B. OPPENHEIMER ET AL., *COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW: CASES, CODES, CONSTITUTIONS, AND COMMENTARY* (2012).

11. Jim Crow laws mandated racial segregation in public facilities from the end of the Civil War to the mid-1960s.

12. See *supra*, Chapter 2.

13. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516 (2015).

14. Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 *U. ILL. L. REV.* 405.

15. Color blindness.

16. Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 *STAN. L. REV.* 73 (2007).

17. Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 *WASH. U. L. REV.* 1315 (2008).

18. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 *COLUM. L. REV.* 1 (2010).

19. Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW (Deborah Hellman & Sophia Moreau eds., 2013); Julie C. Suk, *Gender Quotas After the End of Men*, 93 B.U. L. REV. 1123 (2013); Julie C. Suk, *Work-Family Conflict and the Pipeline to Power: Lessons from European Gender Quotas*, 2012 MICH. ST. L. REV. 1797; Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. (I*CON) (2012).

