

PREFACE

The “Why” and the “Who” of This Book

THE “WHY”

The interactive format of this book requires some explanation in terms of methodology. Why choose to interview American scholars in order to discuss American, European, and French law on discrimination at work? This method is generally uncommon in law, but comparative law always entails a more contextual analysis of issues.¹

How could a comparative study successfully bridge the gap between countries with such distinct legal heritage? I have always felt it difficult to convey a stimulating analysis of foreign law, even though comparative law is so insightful on topics such as discrimination. Furthermore, law is a practice in every country and the most vivid examples come from cases that tell stories. How could I expose these narratives in a transatlantic perspective?

Social science provided a key to this challenge. Surveys and interviews are commonplace in sociology.² Fieldwork through the use of questionnaires and semistructured interviews can enhance knowledge in a particular sphere, drawing from the qualitative experience and data of those interviewed. Outside the realm of social science, I also discovered that journalists like Bill Moyers have written books based on interviews on various topics, comparing the perspectives of different experts in the field.³

Why not try this in comparative law to help clarify the historical construction of legal concepts like equality and antidiscrimination and their interpretation and their critique outside of formal legal sources? Intuitively, I began seeking out ways to integrate interviews with those who applied and taught discrimination law in the United States. This approach allows readers (lay or expert) to make up their

own mind on themes that can involve very different grids of analysis of law. The questions can vary a little from one expert to another according to their area of expertise.

I interviewed American scholars who had contrasting points of view on discrimination at work, and then I took advantage of this dialogue to pinpoint how similar questions were dealt with in France and Europe. In this way, readers do not end up with a dogmatic, unilateral view of discrimination at work but an open-ended debate and different solutions and queries on the relevant issues raised. Readers are empowered to draw their own conclusions on the subject. In a globalized world, issues of discrimination are pervasive and antagonizing, but a universal debate thrives on what constitutes effective policies of enforcement.

The next challenge was to choose the right sample of experts. In social science, the point of entry is important. Through my PhD experience on a comparative study of aging and the law in the United States and France, I had met outstanding American law professors who were either familiar with discrimination law or who reflected in a critical way on concepts of equality and liberty. Using a social science technique called snowball, or chain, sampling, I relied on such contacts to recruit other experts in the field among their acquaintances. Most of the experts I selected had been named several times by their colleagues, and this cross-referencing confirmed the need to include them.

As a result, the fifteen professors I interviewed do not necessarily cover all topics in employment discrimination, but they illustrate some of the essential trends in the field and a network of thinkers among the elite in American academia. Sometimes they even respond to each other in the book. This mechanism of co-opting does not necessarily restrain the debate since the interviews are themselves a pretext for the comparative study. The dialogue is almost an excuse to think out of the box and question French and European law by distancing myself from the way the French and European usually frame the debate.

This justifies the pedagogical format of the book. The comparative perspectives presented after each set of interviews are grouped within an overarching theme. The structure follows the traditional table of contents found in law books useful to researchers, students, and laypersons. It targets the main issues of antidiscrimination law. This study starts with the legal construction of concepts of equality and antidiscrimination and covers the contours of disparate treatment and disparate impact discrimination to finish with the different grounds of discrimination.

THE “WHO”

Before presenting the biographies of the scholars I interviewed, let me summarize what attracted me most in the first pieces I read by them and give examples of their seminal articles that illustrate the critical view of antidiscrimination law that

I needed to enrich the transatlantic comparison. Susan Sturm's work on diversity and "The Architecture of Inclusion" offered a creative perspective on equality and institutional change.⁴ I was also struck by Martha Minow's groundbreaking work on new ways of framing concepts of equality: *Making All the Difference: Inclusion, Exclusion, and American Law*.⁵ Robert Post explained brilliantly the underpinnings of antidiscrimination law in his article "Prejudicial Appearances: The Logic of American Antidiscrimination Law."⁶

I discovered Reva Siegel through her historical work with Jack Balkin that covers equal protection and the role of civil rights groups: "Principles, Practices, and Social Movements."⁷ David Oppenheimer's work on the theory of negligence and discrimination is central to understanding certain aspects of the nature of discrimination law in practice.⁸ Christine Jolls, from the perspective of behavioral economics,⁹ and Linda Krieger, from the perspective of a legal practitioner interested in social psychology,¹⁰ attracted my attention with their in-depth work on implicit bias, absent in the French debate on discrimination law. Richard Ford's book *Racial Culture: A Critique*¹¹ and Janet Halley's book *Split Decisions: How and Why to Take a Break from Feminism*¹² draw from a critical legal studies perspective and offered me great insight on the limits of antidiscrimination law. Julie Suk, from a comparative perspective, allowed me to revisit the interaction between stereotypes, antidiscrimination law, and work-family conflict.¹³ Vicki Schultz enlightens brilliantly the relationship between sexual harassment and sex segregation of the workforce.¹⁴ Ruth Colker's work on the history of disability discrimination in the United States was decisive to understanding the construction of disability law in the United States.¹⁵ Finally, in order to develop an interdisciplinary perspective on discrimination in the field of employment, the debate had to include the work of two sociologists: Frank Dobbin in his book *Inventing Equal Opportunity*¹⁶ as well as the extensive research of Devah Pager and her studies on racial bias in recruitment.¹⁷

Before turning to the interviews, brief biographies of the scholars are needed to show the scope of their work in the field of equality law. In addition, the appendix of the book covers a couple of more intimate conversations with some of them on what motivated them to investigate discrimination law and includes links to more extensive versions of their biographies.

Ruth Colker

Ruth Colker is the Distinguished University Professor and Heck-Faust Chair in Constitutional Law at the Moritz College of Law at the Ohio State University. She received her AB in Social Studies from Harvard (cum laude) and her JD from Harvard Law School. Before joining the faculty at Ohio State, Professor Colker taught at Tulane University, the University of Toronto, the University of Pittsburgh, and in the women's studies graduate program at George Washington University.

She also spent four years working as a trial attorney in the Civil Rights Division of the United States Department of Justice, where she received two awards for outstanding performance.

Her primary research interests are special education, disability discrimination, and LGBT issues. Professor Colker is one of the leading scholars in the country in the areas of constitutional law and disability discrimination. She is the author of twelve books, two of which have won book prizes. She has also published more than fifty articles in law journals.¹⁸

Frank Dobbin

Frank Dobbin received his BA from Oberlin College in 1980 and his PhD from Stanford University in 1987. Dobbin, a professor of sociology at Harvard, studies organizations, inequality, economic behavior, and public policy.¹⁹ With Alexandra Kalev, he is developing an evidence-based approach to diversity management. Innovations that make managers part of the solution, such as mentoring programs, diversity taskforces, and special recruitment programs, have helped to promote diversity in firms, whereas programs signaling that managers are part of the problem, such as diversity training and diversity performance evaluations, have not. These findings have been covered by the *New York Times*, the *Washington Post*, the *Boston Globe*, *Le Monde*, CNN, and National Public Radio.

Chai Feldblum

Chai Feldblum received her BA in Ancient Studies and Religion from Barnard College and her JD from Harvard Law School. She is currently on leave from her position as a law professor at Georgetown University Law Center and is serving as a Commissioner of the Equal Employment Opportunity Commission (EEOC). Nominated to the post by President Barack Obama in September 2009, she was renominated and confirmed by the Senate to serve a second term ending on July 1, 2018. A former law clerk to First Circuit Court of Appeals Judge Frank M. Coffin and Supreme Court Justice Harry A. Blackmun, Professor Feldblum has worked to advance the rights of persons with disabilities and the rights of lesbian, gay, bisexual, and transgender people to health-care and social security benefits in employment-related contexts. She played a leading role in drafting and negotiating the Americans with Disabilities (ADA) Act of 1990 as well as the ADA Amendments Act of 2008. She also helped draft and negotiate the bill prohibiting discrimination based on sexual orientation as well as various medical privacy bills and regulations. Professor Feldblum has written numerous articles and books on sexual orientation, morality and the law, disabilities rights, and the practice of law in a legislative advocacy context. In 2003, Professor Feldblum founded Workplace Flexibility 2010, a policy enterprise focused on finding common ground between employers and employees on workplace flexibility issues; she co-directed it until 2009.

Richard Ford

Richard Thompson Ford is the George E. Osborne Professor of Law at Stanford Law School. He received his BA from Stanford and his JD from Harvard Law School. An expert on civil rights and antidiscrimination law, Richard Ford has distinguished himself as an insightful voice and compelling writer on questions of race and multiculturalism. His scholarship combines social criticism and legal analysis,²⁰ and he writes for both popular readers and for academic and legal specialists. His work has focused on the social and legal conflicts surrounding claims of discrimination and on the causes and effects of racial segregation. Methodologically, his work is at the intersection of critical theory and the law. Before joining the Stanford Law School faculty in 1994, Professor Ford was a Reginald F. Lewis Fellow at Harvard Law School, a litigation associate with Morrison & Foerster, and a housing policy consultant for the City of Cambridge, Massachusetts. He has also been a Commissioner of the San Francisco Housing Authority. He has written for the *Washington Post*, the *San Francisco Chronicle*, the *Christian Science Monitor*, and *Slate*, where he is a regular contributor.

Janet Halley

Janet Halley is the Royall Professor of Law at Harvard Law School. She has a PhD in English Literature from UCLA and a JD from Yale Law School. She is the author of *Split Decisions: How and Why to Take a Break from Feminism* (Princeton 2006), and *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (Duke 1999). With Wendy Brown, she coedited *Left Legalism/Left Critique* (Duke 2002), and with Andrew Parker, she coedited *After Sex? On Writing Since Queer Theory* (Duke 2011). She is the coeditor with Kerry Rittich of a collection of essays entitled *Critical Directions in Comparative Family Law* (*58 American Journal of Comparative Law* 753, 2010), and the author of "What is Family Law?: A Genealogy," published in 2011 in the *Yale Journal of Law and the Humanities*. Her current book projects are *The Family/Market Distinction: A Genealogy and Critique* and *Rape in Armed Conflict: Assessing the Feminist Vision and Its Law*.²¹ She was recently awarded the Career Achievement Award for Law and the Humanities by the Association for the Study of Law, Culture and the Humanities. She teaches Family Law, Gender and the Family in Transnational Legal Orders, Gender in Postcolonial Legal Orders, Trafficking and Labor Migration, and courses on the intersections of legal theory with social theory.

Christine Jolls

Christine Jolls is the Gordon Bradford Tweedy Professor at Yale Law School, a chair previously held by Nobel Laureate Oliver Williamson. She is also the Director of the Law and Economics Program at the National Bureau of Economic Research (NBER). Previously she served as a law clerk at the Supreme Court of

the United States in the chambers of Justice Antonin Scalia and at the United States Court of Appeals for the District of Columbia Circuit to Judge Stephen F. Williams. Professor Jolls received her JD, magna cum laude, from Harvard Law School and her PhD in Economics from MIT, where she was a National Science Foundation Graduate Fellow. She earned her undergraduate degree at Stanford University, where she was elected to Phi Beta Kappa in her sophomore year and won the Robert M. Golden Medal. She has published numerous research articles on behavioral economics, employment law, privacy law, and other fields of law, in reviews, including the *Harvard Law Review*, the *Stanford Law Review*, and the *American Economic Review/Papers and Proceedings*.²²

Linda Krieger

Linda Hamilton Krieger is a professor of law and Director of the Ulu Lehua Scholars Program at the University of Hawaii, William S. Richardson School of Law. She received her AB at Stanford University in 1975 and her JD at the New York University School of Law in 1978. A former federal employment discrimination litigator, she joined the faculty at the University of California, Berkeley, School of Law in 1996. Her scholarship centers on interdisciplinary perspectives on anti-discrimination law and policy and on judgment and decision making in law and public policy.²³

Martha Minow

Martha Minow is the Morgan and Helen Chu Dean and Professor of Law at Harvard Law School, where she has taught since 1981. An expert in human rights with a focus on members of racial and religious minorities and women, children, and persons with disabilities, her scholarship has also addressed private military contractors, management of mass torts, transitional justice, and law, culture, and social change. She has published more than 150 scholarly articles and books.²⁴ Following nomination by President Obama and confirmation by the Senate, she serves as Vice-Chair of the Board of the Legal Services Corporation.

A Phi Beta Kappa graduate of the University of Michigan and the Harvard Graduate School of Education, Minow received her law degree at Yale Law School before serving as a law clerk to Judge David Bazelon and Justice Thurgood Marshall of the Supreme Court of the United States.

David Oppenheimer

David B. Oppenheimer is Clinical Professor of Law and Director of Professional Skills at Berkeley Law. Following his graduation from Harvard Law School, Professor Oppenheimer clerked for California Chief Justice Rose Bird. He then worked as a staff attorney for the California Department of Fair Employment and Housing, prosecuting discrimination cases, and was the founding director of the Boalt Hall

Employment Discrimination Clinic. He has published articles on discrimination law in the *Pennsylvania Law Review*, the *Cornell Law Review*, the *Columbia Journal of Human Rights Law*, the *Berkeley Women's Law Journal*, the *Berkeley Journal of Employment and Labor Law*, and *Droit et Cultures*.²⁵

Devah Pager

Devah Pager is Professor of Sociology and Public Policy at Harvard University. Her research focuses on institutions affecting racial stratification, including education, labor markets, and the criminal justice system. Pager's research has involved a series of field experiments studying discrimination against minorities and ex-offenders in the low-wage labor market. Her book *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (University of Chicago, 2007) investigates the racial and economic consequences of large-scale imprisonment for contemporary U.S. labor markets.²⁶ Pager holds masters degrees from Stanford University and the University of Cape Town, and a PhD from the University of Wisconsin-Madison.

Robert Post

Robert Post is Dean and Sol and Lillian Goldman Professor of Law at Yale Law School. Before coming to Yale, he taught at the University of California, Berkeley, School of Law (Boalt Hall). Dean Post's subject areas are constitutional law, First Amendment, legal history, and equal protection. He has written and edited numerous books, including *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (2012); *For the Common Good: Principles of American Academic Freedom* (with Matthew M. Finkin) (2009); *Prejudicial Appearances: The Logic of American Antidiscrimination Law* (with K. Anthony Appiah, Judith Butler, Thomas C. Grey, & Reva B. Siegel) (2001); and *Constitutional Domains: Democracy, Community, Management* (1995).²⁷ He is a member of the American Philosophical Society and the American Law Institute and a fellow of the American Academy of Arts and Sciences. He has an AB and PhD in History of American Civilization from Harvard and a JD from Yale Law School.

Vicki Schultz

Vicki Schultz is the Ford Foundation Professor of Law and the Social Sciences at Yale Law School, where she teaches courses on employment discrimination law; proving discrimination in social science and the law; workplace theory and policy; work, gender and the law; and feminist theory. She also runs the Workplace Theory and Policy Workshop and the Work and Welfare group, interdisciplinary groups that explore economic and other forms of inequality.

Schultz has written and lectured widely on a variety of subjects related to anti-discrimination law, including workplace harassment, sex segregation on the job,

work-family issues, working hours, and the meaning of work in people's lives.²⁸ Schultz's work has been influential in scholarly circles in both law and the social sciences; her work has also been cited widely by courts and the national news media (the *New York Times Magazine*, the *New Yorker*, *Ms. Magazine*). She has appeared on *NewsHour with Jim Lehrer*, the *CBS Evening News*, ABC's *World News Tonight*, *Good Morning America*, and National Public Radio. Schultz is a past president of the Labor and Employment Section of the Association for American Law Schools and a past Trustee of the Law and Society Association. A former trial attorney at the United States Department of Justice, Civil Rights Division, Schultz began her academic career at the University of Wisconsin Law School where she became interested in sociological approaches to law. She has a BA from the University of Texas and a JD from Harvard.

Reva Siegel

Reva Siegel is the Nicholas de B. Katzenbach Professor of Law at Yale Law School. Professor Siegel's writing draws on legal history to explore questions of law and inequality and to analyze how courts interact with representative government and popular movements in interpreting the Constitution.²⁹ She serves on the board of the American Constitution Society and on the General Council of the International Society of Public Law. She has a BA from Yale College, an MPhil from Yale University, and a JD from Yale Law School.

Susan Sturm

Susan Sturm is the George M. Jaffin Professor of Law and Social Responsibility and the founding director of the Center for Institutional and Social Change at Columbia Law School. She received her BA from Brown University (magna cum laude) and her JD from Yale Law School. Her areas of teaching and research include institutional change, structural inequality in employment and higher education, diversity and innovation, employment discrimination, public law remedies, conflict resolution, and civil procedure. She has published numerous articles, case studies, and books on "the architecture of inclusion," institutional change, transformative leadership, workplace equality, legal education, and inclusion and diversity in higher education.³⁰ She collaborates with a wide variety of organizations and networks involved in initiatives aimed at increasing full participation, including Syracuse University, Imagining America, Rutgers Future Scholars, Liberal Arts Diversity Officers (LADO), University of Michigan, the American Commonwealth Project, the Reentry Education Network, the Criminal Justice Consortium at Columbia University, the Kirwan Institute, and Harvard Business School. Her research on strategies for facilitating constructive multiracial interaction in police training is featured on the Racetalks website (www.racetalks.org). Professor Sturm was one of the architects of the 2008 national conference

“The Future of Diversity and Opportunity in Higher Education.” She is currently cochairing a working group on Transformative Leadership, as part of a Ford Foundation–funded project, Building Knowledge for Social Justice. She is also currently the principal investigator on a Ford Foundation grant awarded to develop the architecture of inclusion in higher education.

Julie Suk

Julie C. Suk is a professor of law at the Benjamin N. Cardozo School of Law–Yeshiva University in New York City, where she teaches comparative law, employment law, and civil procedure. Professor Suk recently served as Chair of the Association of American Law Schools (AALS) Section on Comparative Law and the Section on Employment Discrimination. Before entering law teaching, she clerked for Harry T. Edwards on the U.S. Court of Appeals for the DC Circuit. She obtained an AB summa cum laude from Harvard in English and French literature, a JD from Yale Law School, and a DPhil in Politics from Oxford University, where she was a Marshall Scholar. Professor Suk is a leading scholar of comparative equality law. Her research has developed a transnational perspective on the theory and practice of antidiscrimination law. Professor Suk’s articles compare European and American approaches to a broad range of problems, including the stakes of criminal, civil, and administrative enforcement of antidiscrimination norms, the state’s role in mitigating work-family conflict, the law of Holocaust denial and hate speech, and constitutional limits on race-consciousness and affirmative action.³¹ Her current research examines race and class quotas in Brazil and gender quotas in Europe.

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