

From Disparate Impact to Systemic Discrimination

Disparate impact discrimination has been under fire in the United States since the landmark *Ricci v. DeStefano* case in 2009.¹ The debate is equally topical in France, where its supreme court, the Cour de Cassation, more recently handed down several rulings recognizing indirect sex discrimination,² in an effort to “flush out more subtle forms of discrimination.”

European equality law distinguishes between direct discrimination, that is, intentionally treating a person less favorably because he or she has a protected characteristic, and indirect discrimination, which occurs when a general measure that seems to treat people equally on the surface has a disproportionately prejudicial effect on people with a protected characteristic.³ Save a few nuances, which will be clarified, these same concepts are referred to as “disparate treatment” and “disparate impact” discrimination in the United States. Systemic discrimination is not defined specifically in French law but is mentioned more and more in the public debate on equality. The Equal Employment Opportunity Commission (EEOC) has given examples of these more structural forms of discrimination, including the glass ceiling effect on women.⁴

I. THE STRENGTHS AND LIMITATIONS OF DISPARATE IMPACT DISCRIMINATION

Ricci v. DeStefano is commonly cited when discussing disparate impact and has been extensively discussed in legal scholarship. The background of the case is as follows: after taking a test that would determine their eligibility for promotion, white firefighters in New Haven, Connecticut, passed at a much higher rate than black firefighters. Concerned about its liability for disparate impact discrimination,

the city of New Haven discarded the test. White and Hispanic firefighters, who lost their chance of promotion when the test was thrown out, sued the city for race discrimination. In a five-to-four decision written by Justice Kennedy, the Supreme Court found that the city had committed an act of disparate treatment and failed to show a “strong basis in evidence” that it would have faced disparate impact liability if it had not voided the test. Fear of litigation alone was insufficient justification.⁵

In her dissent, Justice Ginsburg predicted that this ruling would not have “staying power” and would remain an exceptional case.⁶ She wrote that the test results showed “stark disparities” that “sufficed to state a prima facie case under Title VII’s disparate-impact provision,” because the passing rate of minorities fell well below the four-fifths standard set by the EEOC. Justice Ginsburg also criticized the Court for failing to explain the “strong basis in evidence” it requires.⁷ Rather than elaborate on the standard of proof of disparate impact liability required to justify a race-conscious remedy, the Court merely stated that crossing a certain significant threshold of statistical disparity was not sufficient in itself.⁸ The Court also held that “the City could be liable for disparate impact discrimination only if the examinations were not job-related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt.”⁹

Reactions to the controversial decision were spirited, with some scholars seeing it as a challenge to the very legitimacy of the disparate impact rule, its enforcement, and how it differs from disparate treatment. The *Ricci* outcome continues to occupy the foreground of debate on disparate impact discrimination. Robert Post, Linda Krieger, and Julie Suk comment on the case, but first Christine Jolls, Susan Sturm, David Oppenheimer, Richard Ford, and Julie Suk discuss the application, background, and purpose of disparate impact theory in the United States.

Christine Jolls discusses how today’s forms of discrimination are different from in the past.

CHRISTINE JOLLS: One of the most important things to understand about discrimination, I believe, is the way in which some of its forms have changed with time while others have remained relatively constant. If we consider the example of race discrimination, a generation ago in America it was still not uncommon to see direct reference to someone’s race in a variety of job settings. And it was not until the 1976 decision of the Supreme Court of the United States in *Runyon v. McCrary* that national law in the United States was applied to prohibit race-based exclusion of black children from private schools and camps.

Today, of course, such explicit discrimination on the basis of race in America is not common—but other forms of race discrimination remain. A prominent illustration is the use of facially neutral selection criteria that disproportionately disadvantage or exclude black Americans and are not

“job related and consistent with business necessity,” in the words of Title VII of the Civil Rights Act of 1964. In a recent case under this provision of U.S. law, a well-known pizza franchise [Domino’s Pizza] was successfully sued for race discrimination after it adopted a policy disallowing beards among its male pizza delivery people.¹⁰ The company argued that some patrons feared bearded delivery people and that its policy was racially neutral, applying to whites and nonwhites alike. The court found, however, that while essentially all white men are able to comply with no-beard requirements, a significant fraction of black men cannot comply because of a skin condition in which facial hair becomes ingrown as a result of shaving. Because, the court concluded, a no-beard rule was not “job related and consistent with business necessity” for the non-food-preparation job of pizza delivery person, the fact that the rule screened out a disproportionate number of black workers meant that it violated Title VII.

This form of liability for race discrimination is called “disparate impact liability.” It operates to constrain employers who—because of racial bias or other factors—adopt practices that screen out black workers without good reason. Without disparate impact liability, an employer seeking to avoid having members of a particular group in its workforce might be able clandestinely to achieve that impermissible objective through the use of a facially neutral screening rule.

Disparate impact liability has a wide range of potential applications. Most familiarly, some forms of standardized testing may disproportionately disadvantage nonwhite Americans and, at the same time, may not be well-suited to measuring the skills and attributes actually required for successful performance of a given job. In such cases, Title VII prohibits hiring on the basis of the test scores. Hiring measures that, while facially neutral, disproportionately screen out applicants on the basis of race and are not “job related and consistent with business necessity” represent a form of race discrimination that still occurs in America today and is kept in check by Title VII’s disparate impact branch.¹¹

David Oppenheimer looks back on the development of disparate impact theory, which preceded Title VII and the Civil Rights Act (CRA) and the *Griggs* decision explicitly citing the concept.

DAVID OPPENHEIMER: Before the Civil Rights Act was passed, there were disparate impact cases litigated in the states. There was a big case against Motorola, and it was discussed in the Congress.

MARIE MERCAT-BRUNS: *So there is an effect of state law on employment discrimination developments?*

DO: Sometimes state law has been influential, mostly because it is an alternative source of law, and sometimes state decisions have influenced either the Congress in passing legislation or the EEOC or the Courts in interpreting

legislation. The states have played an important role. State law is often broader in a number of ways. In California, for example, it includes sexual orientation discrimination.¹²

MM-B: *If I were to look at some interesting states in employment discrimination law, what states would you advise I concentrate on?*

DO: California, Illinois, Michigan, New Jersey, New York.

In the early 1960s, there was an important disparate impact case against Motorola in Illinois, and there was debate about the case in the Senate. The Senate actually adjusted the language of Title VII to take account of that. There is a pretty good argument that the Congress intended to prohibit disparate impact discrimination, which is sometimes called indirect discrimination.¹³

Then in the *Griggs* case, the Court said unanimously that the Congress intended to reach disparate impact as well as disparate treatment. There is evidence in the legislative history. It is what the Court said in *Griggs*. It was a unanimous decision. Conservative members of the Court (Justice Harlan, for example, who was quite conservative on civil rights matters) did not dissent.

Congress soon after passed amendments to CRA, and then in 1990–1991, Congress reaffirmed *Griggs*. It is pretty clear that *Griggs* was correctly decided, but now the Court keeps narrowing the concept. This Court is very hostile to the enforcement of civil rights and I think it's fair to say it is because they have an anti-civil rights agenda.

MM-B: *Is this a law and economics position? Let the market play its role and performance will thrive regardless of race or sex?*

DO: First of all, there is a counternarrative to the law and economics model of employment discrimination, which is that even though employment discrimination is an economic inefficiency, there are enough social advantages for whites who are averse to contact with blacks that racial discrimination may be efficient for particular employers. If that's true, then you can't expect employers to stop discriminating for reasons of economic efficiency.

MM-B: *Does the economic argument influence the Court, or is it an argument that some members of the Court will point to justify their decisions?*

DO: There is at least one case where the law and economics argument did influence the Court, where it was used to justify a very bad decision. That was a case against Ford.¹⁴ The case concerned the obligation of a plaintiff to mitigate her damages, and the Court put this terrible burden on the plaintiff and justified it in economic terms. I think they were persuaded because they were following a line of economic reasoning.

MM-B: *Does the fact that you can win extensive damages make the law more efficient in the United States compared to France?*

DO: Yes, in the United States you can potentially be awarded millions of dollars, but it is very, very rare. If you win a jury trial, the median verdict in California

is around \$200,000, but you have to subtract from that some of the litigation costs and fees. So if you are awarded \$200,000, you may actually receive \$100,000, and from that \$100,000, you may have to pay as much as \$50,000 in income tax. The settlements are smaller.

MM-B: *How much?*

DO: I don't have data on that because most settlements are confidential, but the typical settlement amount should be lower than the typical judgment.

MM-B: *Do you have any additional observations on disparate impact and Griggs? Where are we now in terms of the judicial interpretation of disparate impact?*

DO: Four members of the Court appear to believe that, at least with regard to a state employer, the entire theory of disparate impact discrimination may violate the Fourteenth Amendment to the U.S. Constitution. This is from the *Ricci* case.¹⁵

This was a statutory employment discrimination case. They did not reach the Constitutional question. It is suggested that if they had reached the Constitutional question, four of the Justices believe that the State may never take account of race in preventing discrimination. I use the word *State* in the French meaning here, to include what we would describe as "government" employment.

MM-B: *But it can have a symbolic effect on them regarding the interpretation of disparate impact. Now, what are the positive effects of disparate impact discrimination law, pinpointing the structural effects of discrimination?*

DO: The great thing about disparate impact is that you can have liability without fault.

MM-B: *Your negligence theory.*¹⁶

DO: That is right. It does illustrate the structure of racial inequality. It comports with reality. It is consistent with what we have learned on implicit bias, what we have learned on how people make decisions.

MM-B: *Can it be said that disparate impact has had an effect on employers' selection processes?*

DO: Yes. Employers are probably much more self-conscious about their decision-making process because of the adverse impact model of discrimination law.

After Oppenheimer, Richard Ford shares his assessment of the selection methods that are potentially discriminating and the problems they pose.

MARIE MERCAT-BRUNS: *Does combating discrimination incur a cost for businesses?*

RICHARD FORD: Even when you are dealing with something costly like accommodation, it is understood under the rubric of discrimination that if you don't reasonably accommodate, then that is discriminating against. But the truth is, we are doing something different than that. Something that cannot quite be understood in practice as just getting rid of bias.

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

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

You can even see it in the race and sex context to a lesser degree. Disparate impact is a good example: the employer has a standardized test that has a disparate impact and might be using the test as a proxy to get at race or sex. But lots of the time, that is probably not what employers are doing. They are using the test because it is easy and cheap. It is not perfect, but it is cheap and it is what they have always done, so why not use it?

For employers, you could probably make the case, in the balance, that they are better off using the standardized test whether it has a disparate impact or not, because they do not want to spend a lot of money having a more narrowly tailored test that really tests for job-related skills. It is just expensive. They would not get enough benefit out of it to make it worth doing. So if they were just looking “beady-eyed” at the bottom line, employers would say, “No, we are going to keep our standardized test, despite the disparate impact.” The law does not allow you to do that. You can see this in both the race and sex context.

With race, it is often a standardized written exam that has a disparate impact. With sex, it is often a physical exam: there are cases of police departments where you had to run an eight-minute mile or lift a certain amount of weight. The police departments said, “It is better to have a physically fit workforce than one that is not physically fit.” They were required to revisit that, because it had a disparate impact on women. You could make the following case for the departments: “We have a big field of people who are qualified and we don’t care whether they are men or women; it is easier to do this, this way. We are better off using our standardized test.” But we won’t let them do that, because we have a social goal to integrate the workforce. That is more than saying we are just getting rid of bias.

MM-B: *I understand that, and in France, the virtues of indirect discrimination are gradually getting more press. There is also talk about the company’s interests in other circumstances.¹⁷ However, the issue of bias with respect to discrimination and its relationship to antidiscrimination law is often not mentioned at all.*

[Later in the interview, Ford comes back to the topic of proving disparate impact.]

RF: How much of disparate impact do we need to have before we are worried?

The EEOC came up with the four-fifths rule. What you come up with is going to be arbitrary: why four-fifths?

MM-B: *Could you explain the rule?*

RF: In disparate impact doctrine, the challenged practice is presumptively discriminatory if the disparity is more than four-fifths, or 80 percent. So, if the percentage of blacks who pass the test is less than 80 percent of whites, then it is presumptively discriminatory. You have got a number now. The question of what is “job-related” is another one that has been explained by the EEOC. *[These tests for disparate impact will be discussed later.]*

Comparative equality law scholar Julie Suk discusses the role played by judges in sanctioning indirect discrimination.

JULIE SUK: I’m just not sure that the concept of discrimination can be stretched far enough to pursue the normative commitment to substantive equality that is often articulated in the landmark decisions like *Griggs*. I am not sure that courts as institutions are capable of bringing about structural transformation. My doubts are even stronger when it comes to French courts, which, due to the very interesting legal history of the judiciary since the Revolution in France, have never been seen in France as instruments of change. And they don’t need to be, largely because the French parliamentary system does not face the same impediments to substantive policy making as our system.

MARIE MERCAT-BRUNS: *Interesting. I do think the French judiciary is evolving under the influence of the HALDE and the CJEU, but I agree that the judge’s role is historically different. I also think that judicial reasoning is different: judges do not start with the facts and then proceed to draw analogies, as is the case in common law and antidiscrimination law.*

JS: The French judiciary is evolving, but the differences are vast, and it’s not clear to me that the American model is worth emulating, even if we were to assume that an evolution towards the American model is remotely feasible, as a normative matter.

The following commentaries by Robert Post, Linda Krieger, and Julie Suk on the *Ricci* case shed light on the application of the indirect discrimination provision, its scope, and its origins in Europe, without promoting the Supreme Court’s interpretation of disparate impact.

Yale dean Robert Post begins by discussing the hostility of the American conservatives to this concept.

ROBERT POST: Disparate impact, as you know, measures antidiscrimination norms in terms of their structural impact on the class. It is inherently redistributive. It will pay attention to the structure of the decision making rather than to any particular discrete acts of prejudice, and the Right in this country

has been hostile to it. The Court issued a number of decisions hostile to it in the late eighties,¹⁸ and Congress reaffirmed it in the statute in CRA 1991.

And in its most recent decision in *Ricci*, Kennedy writes for the court that the most important form of antidiscrimination law is disparate treatment. It tells you how deeply hostile the Right is to using disparate impact as a structural tool for fighting against discrimination.

MARIE MERCAT-BRUNS: *How important is Kennedy's reading of disparate impact? He does not eliminate it. He just says the employer did not have to voluntarily comply and anticipate the disparate impact of certain tests.*

RP: Right. It is not a disparate impact case. It is affirmative action case in which the question is in what ways you can rectify the situation of minorities and avoid disparate impact, which, I think, is an incoherent opinion.

We have to understand what that means: it is illegal under the law, under the statute; I am not saying that this means it is unconstitutional to provide an impact standard to the states. I know there are some Justices who might take that line. Could it be what is hinted here?

MM-B: *Since disparate impact is structural, this means that it was made to prevent discrimination. So they are taking away what is great about disparate impact.*

RP: [Justice Kennedy] is writing a very narrow opinion. It is hard to know what he means. What he is saying essentially is that you can't anticipate [disparate impact] by setting aside the result of an otherwise valid test. That is the narrowest statement of the Court. Now, how generalizable is that? What do they mean by an otherwise valid test? It is murky. Technically, you can read it very narrowly. On the other hand, you could read it as a sign as that changes are ahead. It could be subject to multiple interpretations.

William S. Richardson School of Law professor Linda Krieger asserts that the *Ricci* decision will not set a precedent.

MARIE MERCAT-BRUNS: *Does the Ricci decision say that companies should not engage in self-criticism and that New Haven should not have chosen voluntary compliance and withdrawn its test, which had a disparate treatment on black minorities? Does this decision mark the end, or a limit, to the fight against disparate impact discrimination?*

LINDA KRIEGER: I actually think a little more is read in the *Ricci* decision than has to be. Here is my take on it: in order to use preferential forms of affirmative action, the Supreme Court has long showed that an employer had to make a prima facie showing that discrimination has occurred in the workplace or there are longstanding barriers to entry that nothing short of these preferences have been able to address. Disparate treatment context has only one level of inquiry: whether discrimination is affecting selection.

There is a predicate that employers have to show before they can use preferential forms of affirmative action. It is to show that controlling for other

variables, race, sex, or ethnicity had a significant effect on selection in the past and that group membership was going to be used as one factor among many in selecting among otherwise equally qualified applicants. So the disparity was redressed and the preference would no longer be needed.

In earlier cases, there was a requirement that the employer make a pretty strong *prima facie* showing that their system was amenable to legal challenge.

Now in disparate impact cases, there is not one level of inquiry; there are two. The first level of inquiry, which is the disparate impact analysis, looks at whether a selection device, like a test, selects members of one group at a rate that is statistically lower than the rate of the selected members of the advantaged group. Let's say the answer is yes. That is not the end of the case. The second stage has to be whether the device that is being used validates or rejects performance on the job.¹⁹ There is a violation of Title VII only if the answer to the first inquiry is positive and second inquiry answers to the negative: no, there is no validity to the test that is being used.

What the Court says in *Ricci* is if you are going to cancel a test (I don't think you can cancel a test once it has been given, but I will come back to that), you have to make a strong evidentiary showing not just on the impact element but also on the lack-of-validity element, and that had not been done. The Court found it had not been done. The case will go back down, and we will see how that plays out. The Court basically says it is not enough to show disparate impact, but you also have to have a showing of lack of test validity.

The other factor here is that the Supreme Court has always been very hesitant, actually unwilling, to permit affirmative action if it takes something away from the group that is not being preferred by the affirmative action. We have more than one decision where the Court says you can't use preferential forms of affirmative action in deciding who to lay off because that imposes too great a burden on the nonpreferred group. I think it really matters here that the test had already been given, that people had already got their test results. I think that if they had run a pilot study and found that it had disparate impact and they had not shown it had validity, they probably could have cancelled the test *ex ante*, but in *Ricci* they cancelled the test *ex post*. I think that made a difference.

MM-B: *Canceling the test created the disparate treatment toward the nonpreferred group of whites and Hispanics?*

LK: Yes, but the dissent said the people who had taken the test did not have a job yet so they didn't have a tangible job detriment. There was, though, a psychological job detriment. So we have to make sure when reading Justice Ginsburg's decision that if the roles were reversed, and African Americans thought they had been disadvantaged and did not have a tangible job detriment, how would we feel about the decision then? I would not have liked it one little bit, because I think that a lot of job detriments are dignitary harms. Studying for a

test, taking a test, getting the results of a test, and then having the test cancelled does in fact create a dignitary harm for the group who has passed the test. It is hard enough to know that a test that members of the group have historically done well on is not now being used to make selection decisions. For example, I hope to see the day when the test that French schoolchildren take will no longer be used to “determine” the rest of their lives. Upper-class, bourgeois families are not going to feel so good about that change because historically this system has worked relatively well for them. Imagine that you have been accepted in a prestigious lycée in Paris and now the test gets canceled.

MM-B: *So you agree with the majority in the Ricci case?*

LK: I am not sure I disagree with the majority on the legal issue. What I do disagree about is how strong a showing an employer should have to make on that second element in order to be able to cancel a test. When I read the record below, there was evidence of lack of validity, so my view of the decision is that they got the facts wrong, and that’s why they got to the wrong legal decision. I do think that in terms of the continuity of the *Ricci* decision with earlier Supreme Court affirmative action cases, there was some doctrinal justification for requiring some predicate on both the disparate impact element and the validity element. Some of my colleagues might have more quarrels with the decision than I have.

Also I think as a practical matter, the danger is that the decision comes to be understood as rejecting disparate impact theory. I don’t think that that’s what the Court did. I think this Court has been hostile to disparate impact theory for a long time. I think the Rehnquist and Roberts Courts are hostile to all structural theories of discrimination. I think if the majority has their way, we would be like rats in a trap.

MM-B: *Coming back to Ricci, I also thought the fact there was voluntary compliance was great. What do you think about voluntary compliance? Don’t you think companies will read this as a sign not to go in that direction?*

LK: I am all in favor of voluntary compliance. Companies will react according to how good their legal counsel is. It matters more what people think the law is than what the law is. So if people think that what just happened was that the Supreme Court did away with disparate impact theory or said that employers cannot take affirmative action, then the decision will have an extremely negative effect. That is very real danger. I don’t think that is what the Court said, but again what people think matters more than what actually happened.

Julie Suk discusses the impact of *Ricci* on employment practices.

MARIE MERCAT-BRUNS: *How can tools for remedying direct discrimination and those for remedying indirect discrimination be combined?*

JULIE SUK: Sometimes, multiple strategies for combating discrimination on one ground (e.g., race) may conflict with each other, and we have to choose

in individual instances which strategy is more valuable, by reference to the normative underpinnings of equality law. The *Ricci* case is a rich illustration of this conflict. (I think, by the way, that the Supreme Court chose wrongly in *Ricci*.)

MM-B: *This is a perfect transition: tell me why the Court chose wrongly and more generally what you think about the decision, its scope, the impact it may have on voluntary compliance by employers in the future, and how disparate treatment and disparate impact interact.*

JS: I will send you a short piece that I wrote for the Florence conference on the Evolution of Equality Law and Theory that answers that question as well as some of the other issues that we have discussed so far.²⁰ But, very quickly, I think that *Ricci* will make it very hard for employers to pursue diversity or equal opportunity in the future. After this decision, if an employer decides to get rid of an employment practice upon discovering that it benefits whites and disadvantages blacks, the employer could face disparate treatment liability unless it has a strong basis in evidence to believe it would lose a disparate impact suit. As you probably know, it is very hard for plaintiffs to *win* disparate impact suits, so it is only in a pretty narrow set of cases that an employer would have a strong basis in evidence to believe it would *lose* such a suit. Without that strong basis in evidence, the employer *cannot* abandon an employment policy that benefits whites because it denies them of an employment opportunity, or changes their terms or conditions of work, on the basis of race, in violation of Title VII.

Decisions like *Ricci* tend to confirm my view that the concept of discrimination is limited and unhelpful, and possibly even an impediment, to the pursuit of substantive equality understood as the eradication of the lingering effects of past subordination of racial minorities and women.

MM-B: *I see that you do not approve of antidiscrimination law and yet I see exciting avenues for this law, via concepts such as reasonable accommodation, which introduces an obligation to act but has been interpreted differently by the courts. Don't you think that the problem is that the American courts have taken a stance against antidiscrimination law and its concepts, and not that the law or the concepts themselves have failed?*

JS: I wonder if we'd be better off if we repealed Title VII and then tried to rewrite an equality law explicitly pursuing the goal I've articulated above. In 1964, the concept of discrimination converged pretty well with that goal. Today, it doesn't and the strategy thus far is to try to stretch the concept of discrimination, but the concept seems to stretch the same way a rubber band does—it stretches pretty far (to include, say, reasonable accommodation) and then it contracts back to its original tighter configuration.

MM-B: *Interesting. You have responded to my observation about reasonable accommodation, but what do you think about my idea that it is the Supreme Court and conservative federal courts who are to blame, not the concept itself?*

JS: My answer to that question is complicated, and perhaps will not come across quite so clearly in this medium. But in short, I don't think that the judges that are deciding discrimination cases are all conservatives. I think that courts have institutional limits. With regard to discrimination, however we decide to define it legally, it does have a certain colloquial meaning closely connected with a formal conception of equality, and it's not going to disappear as a result of our attempts to broaden the concept. I guess I would turn the question back on you: why do you think discrimination is a useful concept? The main reason we rely on it is path dependence.

MM-B: *I think it is useful because it is contextual. French law is so substantive: it carries a certain view of reality all the time, locking in stereotypes and confining itself to protections that are of course essential but do not always take into account the complexity of individual situations or other sources of expertise in the legal arena, psychology and economics, for example. Everyone realizes that these issues of equality and difference are not simple at all, and I think the principle of antidiscrimination allows for a more procedural way of dealing with the issues case by case. In my research on age and aging, I saw how the issues of employment and the physical aptitude of older workers are all intertwined. This does not mean that I do not appreciate the positive contributions of the welfare state, but I do think it is important to think about and resolve these questions on different levels.²¹*

Comparative Perspectives

France introduced a ban on indirect discrimination in employment in a law dated November 16, 2001, driven by European litigation. Since then, overcoming some initial reservations, French judges have been gradually applying the concept.²²

In the United States, as Oppenheimer indicates, the appearance of disparate impact theory in antidiscrimination law was less straightforward than is generally described. Its neglected history is worth telling, especially to those who foresee an imminent rejection of disparate impact theory by American judges. It will also provide perspective on the interpretation of this concept by European courts, enabling us to discover whether they started from a different premise.²³ Before engaging in a comparative study of the contours and implications of indirect discrimination, in light of the commentary from American scholars,²⁴ and how an indirect discrimination strategy can be combined with direct discrimination and other tools to achieve equality such as affirmative action (or positive action, as it is called in Europe), we will chart the development of disparate impact theory in the United States.

The Little-Known History of Disparate Impact in America

The story that is commonly told implies that disparate impact theory appeared with a bang in the Supreme Court's decision in *Griggs*,²⁵ the Court's first ruling proscribing indirect discrimination. The truth is that although *Griggs* case was emblematic, it reflected an interpretation of discrimination that had been steadily taking hold in the United States. The Court concluded in *Griggs*,

Nothing in the Act precludes the use of testing or measuring procedures; they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force, unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job, not the person in the abstract.²⁶

This recognition of disparate impact liability was codified into the language of the amended Civil Rights Act of 1991.²⁷ However, as David Oppenheimer and Susan Carle²⁸ assert, states were already using effects-based analysis to address racial discrimination as early as the 1950s. An even more surprising discovery, made when examining the civil rights social movements of the time, is the broader context in which the idea to devise a strategy to fight disparate impact discrimination germinated.

From 1910 to 1930, in response to the conservative jurisprudence on civil rights from the Supreme Court and outside of the initiatives taken by individual states,²⁹ organizations such as the National Urban League sought to ferret out systemic causes of racial employment discrimination, notably a lack of training opportunities.³⁰ This conciliatory, and probably more moderate, approach, far removed from the litigation-based handling of direct discrimination claims, paved the way for new antidiscrimination strategies. The objective was to experiment with more flexible regulatory strategies and persuade employers to voluntarily expand employment and training opportunities for racial minorities.

As Oppenheimer and Carle have noted, below the federal level, some pioneering states developed legislation prohibiting discrimination in employment,³¹ which included disparate impact analysis from the start. The New York State Commission Against Discrimination, the antidiscrimination enforcement agency established in 1945, the year the Ives-Quinn Anti-Discrimination Bill was enacted, and other minority-rights organizations were confronted with not only issues about intentional discrimination but also the need to detect the causes of the structural exclusion of certain groups in the sphere of employment.³²

When Congress adopted the Civil Rights Act in 1964, the preparatory work had been largely inspired by this previous thinking, language, and analysis relating to subtler forms of discrimination and by important litigation such as

Myart v. Motorola, as mentioned by Oppenheimer. In this 1963 case, Motorola rejected Leon Myart, a black job applicant, after he failed a general aptitude test for a position as an electrician, despite his previous work experience. However, the company could not produce his test results, and when Myart took the test anew for the Fair Employment Practices Commission, he passed. The examiner's work, which contributed to the subsequent enactment of the federal Civil Rights Act of 1964, showed that the first test, which disregarded Myart's extensive work experience, "did not lend itself to equal opportunity to qualify for the hitherto culturally deprived and the disadvantaged groups."³³ Although the term "disparate impact discrimination" was not yet being used, the concept was already present in the minds of civil rights organizations, judges, and state antidiscrimination agencies. Furthermore, by 1963, half of the American states had already enacted legislation banning discrimination in employment. Therefore, when the CRA of 1964 was adopted, the intentions and goals of the drafters extended far beyond fighting disparate treatment only. The *Griggs* case is simply the clear articulation of this implicit goal,³⁴ reiterating the fact that Title VII does not only aim to find discriminatory intent but also to remove "built-in headwinds" for minority groups and barriers to equal opportunity.³⁵

This assessment of the historic development of disparate impact is particularly important in light of the U.S. Supreme Court's current jurisprudence on discrimination,³⁶ as illustrated in *Ricci v. DeStefano*³⁷ and more recently *Lewis v. Chicago*,³⁸ which is feared by some scholars, including Suk and Oppenheimer, to be a near-fatal blow to disparate impact liability.³⁹ It serves to counter the argument advanced by the majority of the current Court, who challenge the legitimacy of disparate impact and consider the *Griggs* decision to be an expansive interpretation of equality and nondiscrimination.⁴⁰ It is in fact possible to demonstrate that even before the CRA of 1964, there was a move to eradicate structural discrimination in the workplace, in addition to pursuing those guilty of disparate treatment discrimination.⁴¹

How does this new understanding of the genesis of disparate impact in the United States reframe the European history of indirect discrimination? In Europe as well, the concept existed before the enactment of more recent EU directives.⁴² It was developed in CJEU jurisprudence to rectify measures implemented by member states creating barriers to the free movement of people, goods, and services across national markets, before the notion of restriction took over.⁴³ Antidiscrimination principles did continue to be strenuously enforced in the goods and services industry, as shown in a 2010 ruling (*Test-Achats v. Council of Ministers*),⁴⁴ which had the effect of prohibiting sex discrimination in insurance policies. So it was relatively easy for the concept of indirect discrimination to be adopted in European case law involving discrimination on the grounds of nationality and then sex. In *Sotgiu*,⁴⁵ the CJEU held that disadvantaging employees who reside in another member state, with respect to the payment of an allowance, was indirect

discrimination based on nationality, borrowing the idea of “effectiveness” from the antidiscrimination principle to reach that conclusion. Far removed from concerns about fundamental rights, the Court used indirect discrimination to identify access barriers to all national markets.

Following this pragmatic approach focusing uniquely on economic concerns, the Court would then recognize indirect discrimination in the employment market in *Jenkins*.⁴⁶ Because an overwhelming majority of part-time workers were women, paying a lower hourly wage for part-time work disproportionately affected women over men. The Court of Justice would nevertheless maintain in this case that discriminatory intent was a necessary element of disparate impact discrimination. *Griggs* also suggests that certain acts of disparate impact discrimination are intentional: in this instance, the policy with disparate impact was introduced in the wake of a new law banning disparate treatment discrimination. However, the U.S. Supreme Court did not recognize a need for a discriminatory motive to establish disparate impact. In fact, it is precisely in cases of facially neutral practices,⁴⁷ where discriminatory intent is even more elusive, that a disparate impact discrimination theory can prevent attempts to circumvent discrimination law, by considering the effects of these practices rather than their intent.

It was not until *Bilka*⁴⁸ that the CJEU definitively abandoned the idea of discriminatory intent as a condition for indirect discrimination and focused on providing concrete proof of the disproportionate impact of the practice or rule on a given population. In this case, the Court clarified other requirements for establishing indirect discrimination: any practices with discriminatory effect must be objectively justified by a legitimate aim, and the means to achieve this aim must be “appropriate and necessary.” This wording was later codified in the EU Directive 97/80 on the burden of proof, the Racial Equality Directive 2000/43, and the Employment Equality Framework Directive 2000/78.⁴⁹

In its early decisions, the CJEU does not discernibly seek to explain the purpose of indirect discrimination provisions. It appears to be motivated by a broad effort to eradicate structural discrimination reproduced in a system or in a business activity (to borrow the expression used in *Griggs*, “built-in headwinds”⁵⁰) and a desire to encourage employers to scrutinize their employment practices to root out the causes of their indirect impact. As articulated much later in the *Voss* case,⁵¹ the CJEU’s reasoning often seems to be rather mechanical: the idea is to observe, on a case-by-case basis, the consequences of applying a selection mechanism based on an apparently neutral provision, criterion, or practice. In the end, it is up to the national court to assess whether the aim is legitimate and whether the measure is proportionate, which could explain the Court’s cautious approach. However, a less supportive attitude toward the value of testing discrimination has come to the surface, as shown first in the joined cases of *Hennigs* and *Mai*.⁵² In its decision, the CJEU accepted the “protection of the established rights” of workers as a legitimate aim, ruling that a temporary pay scheme discriminating on the

grounds of age was appropriate and necessary because it ensured that employees already in post would not suffer any loss in income in the transition to a new system. Regarding the resulting discrimination, the Court added that “the discriminatory effects will tend to disappear as the pay of employees progresses.”⁵³ The *Brachner* case,⁵⁴ involving a measure affecting low pension holders that disproportionately impacted women, shows that indirect discrimination liability can apply, even symmetrically, to system-wide mechanisms in matters of social security.⁵⁵ A recent CJEU case extends the scope of indirect discrimination to situations of disadvantage, outside of employment, affecting residents who are not Roma in an urban district mainly inhabited by people of Roma origin.⁵⁶ Today, French judges also understand the concept of indirect discrimination, even when the legitimacy of a collective benefit scheme is called into question.⁵⁷

What are the concrete steps to establishing an indirect discrimination case in France or the United States? Before comparing the different approaches, a clarification of the contours of an indirect discrimination strategy is in order.

*Establishing Indirect Discrimination: A Two-Step Test and a Reversal
of the Burden of Proof*

The American scholars interviewed here offer fresh perspectives on “indirect discrimination.” In France, the debate on this issue is often a narrow one, because it relies on French and European case law, which does not always afford a comprehensive overview of the prohibition of these seemingly neutral but discriminatory practices.

Among other scholars, Post, Krieger, Jolls, and Ford emphasize the importance of disparate impact discrimination.⁵⁸ Ford has pointed out it can help courts to strike a balance between “what they have done in the past—what is easy to do because it is familiar—and a social policy that an individual employer might not take up on his or her own” but that promotes social harmony and helps subordinated groups “throw off the burden of the past.” As Jolls explains, a disparate impact discrimination approach eliminates obstacles to integration, whether or not they are conscious attempts to cloak disparate treatment discrimination.

Disparate impact discrimination takes a step forward by widening the spectrum of less noticeable forms of discrimination, a point Jolls has insisted upon, encompassing a broad range of neutral criteria such as no-beard policies and standardized testing. These barriers to equality are not necessarily embodied by an individual personally responsible for a discriminatory policy: disparate impact discrimination does not require the employer to have committed a fault. The mechanism eliminates the need for a discriminatory motive, bringing to mind no-fault liability or involuntary negligence as mentioned by Oppenheimer.⁵⁹

This analogy to strict liability is significant because it facilitates the understanding that in European and, most importantly, national law, the indirect discrimination approach serves to demonstrate a discriminatory effect and provide a systematic remedy, regardless of the intent or frame of mind of the person behind

the decision or practice. The organization as a whole is responsible for an error in judgment in selecting the criteria for a difference in treatment, which are indirectly discriminatory. This form of discrimination does not target an individual person, which explains how the identification of facially neutral but discriminatory criteria can then be repeated in other organizations. A powerful vision of equality is inherent to the search to eliminate indirect discrimination, even if this multistep process is an intricate one.⁶⁰

The scholars discuss how disparate impact is established, and how this process is different for disparate treatment discrimination. As Ford, Post, and Krieger have noted, to satisfy a judge of the existence of disparate impact liability, plaintiffs must demonstrate the discriminatory effect of a facially neutral practice, but the practice constitutes discrimination only if it is not job-related or not consistent with business necessity.⁶¹ In Europe, the two conditions set out in the Employment Equality Directive (2000/78) are similar to those codified in the Civil Rights Act of 1991, although worded differently and in a somewhat more roundabout manner: “Indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation⁶² at a particular disadvantage compared with other persons unless: that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”⁶³

So, even if the discriminatory impact of a neutral practice has been proven, employers can justify the practice by arguing that it achieves an appropriate, necessary, and objective business aim. In the United States, the cornerstone for proving disparate impact discrimination is the employer’s defense. As stated in *Griggs*, “The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”⁶⁴ The jurisprudence in the United States, where the collection of ethnoracial data is permissible, tends to be relatively sophisticated because statistics can be used to prove the disparate impact on groups.

The amended Civil Rights Act of 1991 and the guidelines published by the EEOC outline the method of proof and where the burden of proof initially lies, which is with the plaintiff. To establish an unlawful employment practice based on disparate impact, a plaintiff must demonstrate that the defendant used “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin” and either failed to “demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity,” or refused to adopt “an alternative employment practice” that the plaintiff has shown was available.⁶⁵

A close examination of the method of proof used in the United States reveals the complexity of establishing disparate impact.⁶⁶ There are two prevailing standards for showing statistical disparity: the four-fifths rule mentioned by Ford and

statistical significance testing.⁶⁷ When assessing a selection test using the four-fifths rule, for example, there is a discriminatory difference in selection rates if the pass rate of a minority group is less than four-fifths of that of the group with the highest selection rate.⁶⁸ We are therefore comparing people in a protected group with people who are not in a protected group, after application of the selection method; we are not comparing minorities in an applicant pool with minorities who have been hired by a company, for example.⁶⁹ When performing statistically significance testing, a difference in selection rates can be challenged when the confidence level is sufficiently high—usually between 80 and 95 percent—that the difference is meaningful and not due to random chance.⁷⁰

The use of statistics is not mandatory in European law. This lower standard of proof offers an opportunity to bypass the difficulties of obtaining statistics for certain categories of employees (in France, statistics on race, for example), but it may also cloud the visibility of certain discriminatory impacts. As evidenced by certain court decisions, the discriminatory impact of an apparently neutral rule can be proven only if it can be shown that its direct effect on disadvantaged groups is disproportionate. This is more problematic when the protected group or category of people is not defined in law, as is the case for age discrimination in Europe, for example.⁷¹ Age is not a yes-or-no criterion determined by inclusion in a defined group.⁷²

The notion of the comparability of situations is central to determining discrimination—even indirect discrimination—but the approaches differ. For example, in *Römer*,⁷³ the CJEU first examined the effect of the rule on certain persons and only then looked at whether they made up the majority of the people who had suffered the disadvantage.⁷⁴ On the European level, direct discrimination necessarily begins with a comparison of situations before the reason for this difference of treatment is sought. French courts diverge from European jurisprudence on this point, increasingly taking the stand that comparability is not a determining factor in demonstrating direct discrimination.⁷⁵ This does not seem to be true for indirect discrimination, with the exception of one significant case.⁷⁶

The second step in establishing disparate impact in the United States involves the employer's claims regarding the business necessity and job relevance of the challenged practice.⁷⁷ In Europe, proof sought is that "this provision, criterion or practice is [not] objectively justified by a legitimate aim and that the means of achieving that aim are [not] appropriate and necessary."⁷⁸ The EEOC's Uniform Guidelines on Employee Selection Procedures⁷⁹ offer some rules about this defense used by the employer: the employer must show a high correlation between the test or other selection procedure and important elements of job performance, demonstrating a relationship between the selection procedure scores and job performance.⁸⁰

The EEOC's guidelines propose three methods that can be relied on by employers to validate their tests (i.e., to show that the tests are job-related and consistent

with business necessity): these methods are known as criterion-related studies, content studies, and construct validity studies. Criterion-related studies are used to validate selection methods tied to certain job criteria and involve providing empirical data demonstrating that the selection procedure is significantly correlated with important aspects of job performance; this implies a statistically significant relationship between passing the test and an objective measurement of work performance.

Content studies are so called because they focus on content and require data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the applicants are to be evaluated. The test can be applied to operationally defined knowledge, skills, or abilities that are a prerequisite to successful job performance (typing, for example, for an administrative assistant).

The third method, the construct validity study, uses specific data to select work behaviors that are important to the job and will be evaluated. This is the most challenging and least used validation test method. It attempts to identify a psychological characteristic or behavior (a construct), such as a warm personality in a receptionist, that underlies job performance. The employer then develops a selection test based on the extent to which this characteristic or behavior is found in the individual.⁸¹ The principal difficulty for employers is that they bear the burden of establishing this justification.⁸² This complete reversal of the burden of proof constitutes one of the main differences from disparate treatment discrimination—which provides for a shifting of the burden of proof—and was curtailed for a time by the Supreme Court after its *Wards Cove* ruling.⁸³

Due to the various options available to employers to justify their practices, proving disparate impact in the United States appears to be a difficult task. Suk confirms this statement in her interview. In France, the situation is visibly different, as illustrated by the *MSA* case,⁸⁴ the first to find that the employer's justification for indirect discrimination failed the proportionality test, with respect to an apparently neutral measure. In European case law involving indirect discrimination, once the discriminatory effect has been identified, the requirement to show legitimate aim and proportionality seems to pose less of an obstacle.⁸⁵ Could this relative ease be explained by the absence of specific rules defined in legislation or jurisprudence for validating the employer's justification, unlike in the United States? Or might it reflect the fact that it is already difficult to prove the discriminatory effect of the neutral measure, not only because the use of statistics is optional, but because such data are rarely available? Indirect discrimination is a game of proportion or rather a lack of proportion in the impact of a neutral provision, of which evidence needs to be provided.⁸⁶ But French case law shows a certain indulgence toward the ways in which this disproportionate effect can be ascertained: in *MSA*, for example, showing that "the measure affects a significantly higher proportion of people of one sex" has been sufficient.⁸⁷

How is it possible to show that an impact is disproportionate without using statistics? Although tricky, it can be done. The discriminatory effect of the provision must be easy to detect. For example, taking absences into account when calculating compensation directly impacts a large proportion of people who have taken sick leave and share the same characteristic:⁸⁸ an absence that translates into an interruption in the performance of their work contracts. This clarity required in European law for indirect discrimination claims not supported by statistics applies only to facially neutral rules such as those involving seniority or experience, which do not always relate to a prohibited ground in the same way. For example, if an employer chooses to make compensation or hiring decisions based on experience or seniority, it is not certain whether the rule will benefit or disadvantage younger or older workers. The answer may depend on the industry or education level.

To prove that discrimination occurred, the first step is to prove that persons in certain age brackets are particularly disadvantaged by the “neutral” rule, which may require the use of statistics, depending on the company involved. Once again, the use of statistics will depend on the type of practice being challenged: if an easily identifiable category, such as part-time workers, is the focus, then statistics are more readily accessible because this is a group of workers already tracked by employers. The criteria used by the defendant in the *MSA* case were objective but determined on a case-by-case basis and difficult to calculate. The high cost of producing statistics may be hindering the implementation of indirect discrimination strategies in Europe. It would appear that the supportive role of providing this information in order to prove or disprove the existence of indirect discrimination falls with the *Défenseur des Droits* (Defender of Rights), the agency in charge of enforcing antidiscrimination law in France. Since 2012, the *Cour de Cassation* has asked employers to justify their discriminatory practices using a proportionality test to assess whether the practice is necessary and proportionate. Regarding the refusal by AGIRC (*Association générale des institutions de retraite des cadres*), the French organization governing supplementary retirement pensions for management-level employees, to assign a management level to certain occupations in which a majority of the positions are held by women, resulting in a disadvantage for this group, the Court found that AGIRC’s methods were neither relevant nor consistent. Although the AGIRC’s justification was an alignment with industry practice, as attested by closely related collective bargaining agreements, in order to ensure the stability, consistency, and long-term survival of the supplementary retirement program, no consideration was given to the actual management duties performed, which would have been expected in this case.⁸⁹

Cost is also an issue in developing selection methods and evaluating employees, as Ford observed. Given the prohibitive cost of developing and deploying customized selection tests, employers may find it more convenient to administer a standard test using simplified selection criteria with no regard to job description or classification.⁹⁰

Is Indirect Discrimination the Answer to the No-Comparator Dilemma?

Another point deserves attention: in indirect discrimination claims, the need to provide a basis of comparison is not regarded with the same level of importance as in direct discrimination cases. This observation comes to mind when Krieger explains the preliminary step required in the United States to prove disparate treatment discrimination: making a prima facie case. To show that a selection method is explicitly or implicitly based on origin or sex, for example, one must compare the situation of disadvantaged persons with that of other groups. Interestingly, in France, as mentioned earlier, the Cour de Cassation has been less adamant about requiring a comparator to prove direct discrimination.⁹¹ A surprising decision by France's Supreme Court, although unpublished, implicitly suggests that one of the advantages of the indirect discrimination argument may be to overcome the hurdle of a lack of comparability, for instance, in a case where the employee's situation is so extremely disadvantaged that no comparison is possible.⁹²

What are we comparing? Under European law, direct discrimination refers to past, present, or potential unfavorable treatment of a person following a discriminatory decision (Article 2 of the Employment Equality Directive 2000/78), unlike French law, which does not accept a hypothetical comparator (using evidence about the treatment of other people in similar but not identical situations).⁹³ Indirect discrimination looks first at the neutral practice and analyzes it to determine whether it has a discriminatory effect for larger proportions of one group than another. People in very different employment situations can therefore show that they suffer a discriminatory disadvantage. But no element of comparability exists other than the fact that a large proportion of people in the disadvantaged group share a protected characteristic.

The CJEU's decision in the *Römer* case is very enlightening on this point.⁹⁴ The question posed was whether a supplementary retirement pension granted exclusively to married couples discriminates against couples in registered civil unions. This case is of particular interest because it shows that the issue of comparability, widely discussed in the decision, is a legal knot in direct discrimination—in Europe, at least—that indirect discrimination can untangle. In *Römer*, the Court found that this difference of treatment constituted direct discrimination against registered same-sex partners because their situation was similar to that of married couples. The refusal to grant them the supplementary pension could not be objectively justified by the need to protect the institution of marriage or the family.

In other EU member countries where there is no civil union alternative to marriage, making it difficult to use married couples as a comparator, claiming indirect discrimination based on sexual orientation could be effective. Rather than focusing on a nonexistent comparator, the debate would focus squarely on the discriminatory effects of a rule restricting eligibility for a benefit to married couples. In France, where comparability is not compulsory, the Cour de Cassation used this reasoning in a direct discrimination case against an illegal immigrant working as a

domestic helper, whose employment was terminated without notice or severance pay. Proving direct discrimination was not an option, because as an illegal worker, the plaintiff was not protected by the employment code and did not have the right to claim unfair dismissal or the accompanying antidiscrimination law.⁹⁵

With indirect discrimination, the issue of the comparability of situations, addressed by the Cour de Cassation,⁹⁶ depends on the “scope of comparison.”⁹⁷ According to certain scholars, who refer to Article 157 of the Treaty of the Functioning of the European Union,⁹⁸ the comparison will depend on the rule’s scope of application, determining the set of people included in the comparison.⁹⁹ The size and breadth of the comparator group can vary, encompassing people doing the same job, at the same classification level, at the same work site, or in the same company. Claimants must refrain from choosing too broad of a group, which will make it more difficult to highlight the rule’s disproportionate effect. The larger the scope, the harder it will be to show that the unequal distribution of rights can be explained only by the protected ground and not by a different, legitimate factor of differentiation. Although the scope of comparison indicates the set of people affected by the employment rule, lower court judges have the discretion to decide how to assess the comparator. According to some commentators, judges may choose to compare the responsibilities held in the differently treated groups, as in the *MSA* case, or more generally consider the nature of the activities assigned to the employees, their training requirements, and their working conditions,¹⁰⁰ consistent with European case law.¹⁰¹ In fact, unlike the comparability test used in “equal pay for equal work”¹⁰² claims focusing on the job description, it appears that it is not possible to establish a standard comparison methodology for indirect discrimination cases because the comparison will always hinge on the neutral practice or provision being challenged. As the budding case law in France is beginning to show, in addition to employment status, challenged provisions may also be related to eligibility for employment benefits, opening a much larger field that covers concepts related to the person, such as marriage¹⁰³ and parenthood,¹⁰⁴ that control access to rights.

Potential Limitations for Indirect Discrimination: Narrow Interpretation and Conflict with Direct Discrimination

Several of the scholars interviewed have commented on the *Ricci v. DeStefano* decision,¹⁰⁵ which was closely followed by a similar case involving the use of an eligibility test with disparate racial impact.¹⁰⁶ The *Ricci* case is interesting on several levels. First, it could jeopardize the future recognition of disparate impact in the United States, if interpreted narrowly. Suk and Oppenheimer especially refer to this threat. In the opinion of some scholars, certain Supreme Court justices have never accepted the legitimacy of disparate impact theory, due to its structural emphasis, which is absent in intentional discrimination.¹⁰⁷ As Post observed, unlike disparate treatment discrimination, disparate impact discrimination conveys the idea that

action should be taken to eliminate institutional mechanisms that seem to be fair on the surface but actually perpetuate the exclusion of minority groups. It is closer to a logic of redistribution and equal opportunity.¹⁰⁸ The Supreme Court has never recognized challenges to the disparate impact of government policies under the equal protection of the laws granted in the Fourteenth Amendment.¹⁰⁹ The *Ricci* opinion, which accentuated the level of evidence that employers must provide to justify any action they volunteer to take to rectify disparate impact, is emblematic of the resistance to disparate impact. In his concurring opinion in *Ricci*, Justice Scalia even seemed to suggest that, inevitably, the “evil day” would come when the Supreme Court would entirely disavow the disparate impact provisions of Title VII in order to satisfy the Fourteenth Amendment.¹¹⁰

Suk does not believe that the American judges are effectively fighting discrimination in a systematic manner despite the disparate impact provisions.¹¹¹ Echoing Oppenheimer’s comments, she explains that proving disparate impact is already an arduous task and that the supplementary proof required will only serve to further reduce the number of disparate impact claims and prevent plaintiffs from succeeding in their cases. According to Suk, additional government policies, programs, or legislation is a prerequisite to achieving any substantial change; the narrow trajectory taken by antidiscrimination law may undermine advances in other areas of public policy to reconcile family and work life.¹¹² She argues that discrimination concepts are not infinitely expandable and sees a certain appeal in completely rewriting antidiscrimination law. Sanctioning employers who seek to voluntarily avoid disparate impact liability, as the city of New Haven did when it withdrew its discriminatory test, will dissuade employers from making any effort in this area. *Ricci* will therefore also affect attempts to prevent disparate impact, if the Court’s interpretation in this case is followed. It is true that there have been relatively few disparate impact cases since the 1991 amendment to the Civil Rights Act, which places the burden of justifying the business necessity of the discrimination on the employer.¹¹³

If we choose to play the role of doomsayer, at first glance the *Ricci* case is a dead end for the expansion of antidiscrimination law. If the fight against discrimination focuses on disparate impact strategies, leading to the dismantling of measures causing the disparate impact, this can produce other forms of discrimination—involving disparate treatment, additional disparate impact, or even reverse discrimination.¹¹⁴ Many commentators assert that despite the message of *Ricci*, the United States can hardly be said to have entered a post-racial era.¹¹⁵ The complexity of reconciling the interests of the different groups and individuals affected by antidiscrimination laws, due to indirect discrimination resulting from “neutral” criteria, has already been illustrated in European law. *Cadman*,¹¹⁶ in which length of service was found to be a legitimate, neutral criterion for a difference in treatment, even if it adversely impacted women with less experience, and the *Hennigs/Mai* joined cases and subsequent cases,¹¹⁷ in which age was factored into the pay

scale as a measure of experience, underscore the intricacy of identifying the neutral criteria that can have discriminatory effects based on the group in question. The relative strength of direct and indirect discrimination strategies continues to be a hot topic, as attested by recent cases showing that, according to the required qualification, a plaintiff can win or lose a case.¹¹⁸ If a rule appears to be neutral but systematically excludes a protected category of people, either a direct or indirect discrimination strategy can be used.¹¹⁹ Success will depend on the justification provided by the employer or lawmakers, because the review of justifications is not the same and does not have the same consequences. An objective justification with a legitimate and proportionate means that the neutral practice is not discriminatory, while no justification is accepted if direct discrimination is found.

But a more optimistic interpretation of *Ricci*, shared by Post and Krieger, exists. As they explain, the *Ricci* decision does not necessarily challenge disparate impact. It can be analyzed from another angle. First, as Krieger noted, disparate treatment discrimination was a valid claim, because the whites and Hispanics who had passed the test would no longer be eligible for promotion. If the test had been withdrawn before it was used, the Court's conclusion may have been different. Second, as Krieger noted, the city did not consider all the aspects of disparate impact theory in its analysis. In addition to showing that the test had a statistically significant disadvantage on a minority group, it should also have determined whether the test was related to the job for which it was designed and consistent with business necessity.¹²⁰ But the city did not provide all of these elements and therefore did not establish disparate impact liability, allowing direct discrimination against white and Hispanic firefighters who had passed the test to emerge. Krieger does not, however, agree with the Court's conclusion that the basis of evidence of disparate impact should be more stringent.¹²¹

Post concurs that *Ricci* is not about disparate impact. It is a decision about *affirmative action* drawn from a disparate treatment discrimination case, and it asks the question: what can an employer do to remedy inequality in the workplace without committing disparate treatment discrimination? This was the issue raised by the plaintiffs who opposed the decision to withdraw the test, which they saw as intentionally discriminatory in favor of minorities. So the decision's effect on disparate impact theory does not directly come into play. The Supreme Court and state courts have already been interpreting the legitimacy of affirmative action narrowly for some time.

It is preferable to refocus on the aim of disparate impact discrimination law, which is to motivate employers to take steps to prevent disparate impact and understand what acts are admissible, while disparate treatment discrimination pushes employers to avoid action and avoid differences in treatment based on a prohibited ground.

Whichever view one prefers to take of the *Ricci* decision,¹²² disparate impact or indirect discrimination poses a particular challenge for judges in any country.

In these cases, the judge must consider a context that is larger than the individual suit, which a tricky task in any situation. It can also be observed that most Supreme Court justices and certain federal judges seem to narrowly interpret the entire corpus of antidiscrimination law, including, of course, disparate impact provisions. Meanwhile, the CJEU, the ECtHR,¹²³ and the Cour de Cassation, like European judges, seem to be driving novel interpretations of antidiscrimination law. Undoubtedly, this comparison should be nuanced and situated on a theoretical level: what does the indirect discrimination approach ultimately aim to achieve? Is it compatible with positive and affirmative action? In light of the observed retreat from the case law in the United States and the commentary by the interviewed scholars, where do these two equality tools meet or compete?

*Indirect Discrimination and Positive Action in the Fight Against
Systemic Discrimination: Match or Clash?*

Stirring under the surface of the *Ricci* decision, the debate over disparate impact can be felt. The discussion it engenders is useful for the European perspective, because the ban on indirect discrimination in Europe was more heavily based on an understanding that this type of discrimination was intentional, using the neutral measure as a pretext. The insight gained by this comparative study suggests that the prohibition of indirect discrimination can be understood from a new angle, one that is familiar in Europe in the area of disability: there is a duty to accommodate. In disability discrimination, this means making adjustments in the workplace for the individual with the disability. The main difference here is the scale of the measure taken. “Appropriate measures” in the field of disability are often determined on an individual basis depending on the disability in question. But indirect discrimination deals with a different order of magnitude, frequently affecting a group of people, because it results from a rule and not an individual decision.¹²⁴

If Justice Roberts,¹²⁵ an ardent supporter of the protection of formal equality, giving discrimination its narrowest meaning—that is, that of disparate treatment, is right in proclaiming that “the way to stop discrimination . . . is to stop discriminating,” then what disparate impact discrimination accomplishes is closer to affirmative or positive action. It advocates proactive programs by employers to promote equal opportunity and institution-wide integration.¹²⁶ As Jolls has written, the ban on disparate impact discrimination may incite employers to take concrete steps to eliminate the institution-wide, systematic exclusion of minorities.¹²⁷ This is precisely what alarms the Supreme Court.¹²⁸ As Post notes, once a disparate impact has been identified, one of the ways to offset its effect is to use proactive measures to include minorities.¹²⁹ Employers fearful of incurring disparate impact discrimination liability are encouraged to apply numerical quotas, regardless of their illegality, to compensate for the discriminatory effect of their selection methods. In *Connecticut v. Teal*, the Court clearly stated that disparate impact discrimination, like reasonable accommodation, required the employer to not only provide

an objective justification of its discriminatory practice but to prevent liability by promoting workforce diversity: this does not imply any obligation to implement affirmative action programs. European law follows the same line of reasoning: the disadvantage produced by indirect discrimination must not be assessed *after* other measures have been taken to counteract it.¹³⁰

In the prevention of disparate impact discrimination, in the United States, where the jurisprudence has a longer history, what encounters the most resistance among judges are the disparate impact testing and the subsequent action taken by employers rather than actually establishing disparate impact discrimination. Affirmative action and, in Europe, positive action are confronted with the same problem. What role should be given to measures of preferential treatment that can lead to “positive” discrimination?¹³¹ The CJEU seems to opt for a restrictive interpretation of positive action, wary of the direct discrimination that can result.¹³² How is it possible to reconcile the interests of the various groups or individuals affected by these antidiscrimination rules without committing disparate treatment discrimination, as Ford has questioned?

In the United States, affirmative action has lost its legitimacy; its constitutionality is gauged with respect to its potential for disparate treatment discrimination.¹³³ Is indirect discrimination jurisprudence following the same path? Reverse discrimination, which has garnered little attention in France, is a form of direct discrimination. Given the symmetric nature of sex and race discrimination provisions, it is easy to see how they can be used by persons outside of the minority groups, when these persons suffer an economic prejudice due to preferential treatment for minorities. One has only to imagine the consequences of a deteriorated economy, even in Europe, to comprehend that employment discrimination can become an issue for anyone, even those not initially perceived by the law to be potential victims.

Indirect discrimination jurisprudence raises one last question: what types of rules or practices are targeted by the ban on indirect discrimination? Do some facilitate the detection and justification of indirect discrimination? An openly communicated selection test or method is likely to be scrutinized by job applicants or judges, although the CJEU has shown some indulgence toward trade unions, giving them a certain leeway with respect to potentially discriminatory categories used in their collective bargaining agreements.¹³⁴

It is probably for this reason that in the United States, and France as well, legal requirements to combat discrimination have been translated into best practices and other soft law. Measures to promote diversity through training and management techniques are not easily reached by law: sociologists like Frank Dobbin and Lauren Edelman¹³⁵ explain the fascinating ability of organizations to internalize legal norms relating to antidiscrimination and diversity. The outcomes may be mixed,¹³⁶ but the approach is a valid consideration. Equality of outcome and equal opportunity in recruitment and promotion and access to fair pay increases are

the shared goals of disparate impact discrimination provisions, positive action, and affirmative action. Which of these legal instruments are the most flexible and best suited to help employers achieve the necessary temporary and longer-term adjustments?

Some commentators see a contradiction¹³⁷ in attempts to combine positive action measures with a prohibition of disparate impact discrimination to protect the rights of groups with protected characteristics, but as Post notes, employers can always choose to simply measure the objective relevance and transparency of their selection methods against the job's requirements and its potential evolution.¹³⁸ All of these tools allow employers to justify their acts, whether they are proactive or not.

In the next part of this chapter, American scholars share their thoughts on other subtle practices implemented by companies to address systemic discrimination, in an environment where collective bargaining is rarer than in France and Europe.

II. DIVERSITY AND PREVENTION OF SYSTEMIC DISCRIMINATION

Disparate impact litigation targets internal company policies and practices such as working hours, physical tests, and dress codes. Although seemingly neutral, these practices can be unintentionally alienating and inherently discriminatory in terms of recruitment, pay, and promotion—against women, older workers, or people with gender identity issues, for example. The scholars' commentary on disparate impact leads naturally to a broader questioning about the implementation of structural measures, in addition to the prohibition of direct and indirect discrimination, to prevent unfair distinctions. Looking back at what has been accomplished, some consider that these two bans, essentially designed to discourage employers from taking certain types of action, are not achieving enough. As Suk observed in recent informal discussions, plaintiffs in the United States are also encountering procedural challenges in antidiscrimination litigation because some cases raised the burden of pleading on plaintiffs and the requirements for class actions are more restrictive.¹³⁹ Although litigation is important for bringing to light purportedly objective requirements perpetuating workforce segregation, prevention is key to eliminating systemic discrimination.¹⁴⁰ The scholars express an interest in institutional change focusing on mechanisms of inclusion over causes of exclusion: exploring other measures inciting people to take preventive action against the causes of discrimination or to establish institution-wide safeguards.

Is diversity one such measure? Diversity, achieved through affirmative action or other strategies, is an especially important concept in the United States: its Supreme Court has accepted to rule on the compliance of certain affirmative action measures with the Constitution's equal protection guarantee. Some commentators fear, given the opinion of the majority of Supreme Court justices on the

issue, as seen in the *Fisher* case, that the principle of affirmative action will lose its credibility in the United States.¹⁴¹ Fisher was denied admission to the University of Texas and challenged the selection methods used by the school, a combination of neutral provisions (the top 10 percent of each high school graduating class was automatically admitted, regardless of ethnic, racial origin, or residence)¹⁴² and an affirmative action program (other applicants could still gain admission by scoring highly in a process that took race into account). She filed suit, alleging discrimination on the basis of race in violation of her Fourteenth Amendment right to equal protection.

Writing for the majority, Justice Kennedy concluded that the Fifth Circuit failed to apply strict scrutiny in its decision affirming the admissions policy. "Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without closely examining how the process works in practice."¹⁴³ Kennedy argued that, since *Grutter v. Bollinger*, the courts "must assess whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." Quoting Reva Siegel:

Today, the strict scrutiny framework recognizes differences in social position among racial groups as a reason for allowing affirmative action.¹⁴⁴ . . . The opinions of Justices Powell, O'Connor, and Kennedy understand concerns about social cohesion as a reason to allow, as well as to limit, race-conscious state action. In various ways, their opinions recognize that in a racially divided society, allowing government to engage in some forms of race-conscious state action may actually transform the experience of race sufficiently to promote social cohesion.¹⁴⁵ . . . Even if government has compelling reasons to take race into account to promote diversity in education¹⁴⁶ and to promote equal opportunity and end racial isolation,¹⁴⁷ Justice Kennedy is insistent that courts oversee the means by which government pursues these ends because of the many harms that racial classifications inflict on all citizens and society as a whole.¹⁴⁸

In the conversations that follow, some scholars, such as Julie Suk, Richard Ford, and Frank Dobbin, comment on the variable effectiveness of diversity programs in employment. Others discuss how diversity and equal opportunity can be approached differently by exploring the inner workings of the institutions producing the discrimination and the interests of groups other than the victims of the discrimination and by taking into account other factors of exclusion, such as employment level or complex decision-making processes. The scholars also respond to indispensable social science input in evaluating the internalization of law in the workplace, as organizations move to comply with changing regulations, and comment on the implications of focusing on groups versus individuals, a core issue in the fight against discrimination. Lastly, they consider how the reasonable accommodation requirement, with respect to disabilities, and anti-harassment laws are the only legal mechanisms that contain an obligation to act.

Diversity Policies: Scope and Limits

Julie Suk begins by looking at diversity from a comparative approach.

MARIE MERCAT-BRUNS: *What do you think of the concept of diversity?*

JULIE SUK: A few thoughts about diversity: In the United States we're talking about a few different things. First, the need for diversity arises as a way of undoing the effects of past discrimination. In this formulation, it appears that diversity is really just a means of getting to a world in which Americans cease to see the differences between each other. Second, American diversity embodies a commitment to pluralism—the idea that a variety of incompatible cultures, religions, world views should all find a home in our democracy. On this model, the differences should last forever. They're two very different concepts. France has traditionally been very skeptical of the second model, especially when it comes to schools. So I am still trying to make sense of the new diversity talk in France.

MM-B: *Yes. We can come back to France later. I do not necessarily agree that France is skeptical about diversity. Probably a certain amount of skepticism is due to the fact that the diversity discourse is sometimes used for political aims. But I would like to come back to what you said: I think the first meaning of diversity is in a way distinct from the context from which diversity emerged and is actually closer to formal equality? What do you think?*

JS: The project of pursuing diversity as a means to integration suggests that the concept is being shaped by the historical, social, and political context in which it is being deployed.

MM-B: *What I mean refers back to diversity in the Bakke and Grutter opinions: diversity that is not linked to racial imbalance. So I guess my observation is more about your second definition of diversity as a very individualistic way of looking at differences as what makes a person unique: each individual has his or her own talents and contributes in his or her own way, so groups and their contexts seem to be forgotten. This idea seems to be closer to formal equality, which is blind to differences and upholds the principle that each individual citizen has the same rights.*

JS: On the one hand, *Grutter* seems to invoke a concept of diversity as pluralism; on the other hand, the twenty-five-year time limit on affirmative action as a means of achieving diversity suggests that the diversity concept is really being used to achieve old-fashioned racial integration. Closer to formal equality than to what?

MM-B: *In France we distinguish between two forms of equality: formal equality, that is, treating everyone the same way, and a more substantial, "concrete" equality, that is, treating people in different situations differently.*

JS: It's not a uniquely French conception. American political and legal theorists are also very preoccupied with the distinction between formal and substantive

equality, which is elaborated in Rawls's *Theory of Justice*. But I think that the ways in which the two are opposed to each other vary from country to country.

For instance, in the United States, we oppose “formal” equality of opportunity to “substantive” equality of opportunity; in France, the very idea of “equality of opportunity” is linked to formal equality, whereas substantive equality requires more than equal opportunity alone; it seems to be measured in terms of equal outcomes.

MM-B: *So you think that equal opportunity in France means equal outcomes? I'm not so sure about that, personally. In the same spirit, do you think that French law recognizes systemic discrimination, whether it results from disparate treatment of a group or from norms that have a disparate effect?*

JS: I am talking about *égalité des chances* in France, which I would translate as equality of opportunity in the United States. The French far left is somewhat critical of the emphasis on equality of opportunity or *égalité des chances*, on the grounds that substantive equality requires more. The question of systemic discrimination in France is complicated. On the one hand, I don't think there is any resistance to the idea in France that there are “systemic” and “structural” features of institutions that tend to exclude certain classes of people—the resistance is to the idea that such people be identified as members of racial or ethnic groups rather than as the social underclass.

MM-B: *So it not just a question of not understanding the instruments used like disparate impact/indirect discrimination which do not rely on intentional discrimination?*

JS: I think that the concept of discrimination, and antidiscrimination law by extension, is very limited in addressing what we call structural discrimination or institutional racism or systemic inequalities. We put a lot of hope in concepts like disparate impact or indirect discrimination and tend to be disappointed with the results.

Suk's reflections seem to resonate with Richard Ford's thoughts about strategies other than repression to prevent discrimination.

MARIE MERCAT-BRUNS: *There are both criminal and civil sanctions in French law for discrimination. Linda Krieger showed us that criminal sanctions are not effective in instances where there is unconscious bias.*

What do you think about the whole discourse on preventing discrimination, especially in career advancement? In France, collective bargaining agreements have been signed requiring employers above a certain size to implement policies to promote diversity. In your opinion, is this merely rhetoric and soft law?

RICHARD FORD: I am sure it helps, if it is done right.

MM-B: *For example, they are having managers undergo diversity awareness training, using role-playing and case studies.*

RF: I have mixed feelings. On the one hand, I think that it makes a big difference. That that is where the interaction happens. When you wind up in court, everyone has already lost. It is a way to create incentive for the employer to take proactive measures. I have a few misgivings about it because of the touchy-feely aspect of a lot of this: diversity consulting for example. Everybody has diversity training and they come back and do what they would have done before. The president of L'Oréal says "We have a great diversity program" because of five hours of training a year. I also worry about the management science aspect. Management science is not bad, but it does have its peculiarities.

MM-B: *In creating other norms?*

RF: That is good. It can make a difference if it is done right. Having said all of that, I still think—to get back to statistics in a way—I am for benchmarks. I am for objective measures. Diversity training is great, but I want to be able to see some real improvement too. See more women in the workforce. People react and say, "Oh my God, we are going to have quotas!" You can distinguish benchmarks and quotas in a lot of ways. Statistics are evidence. You can say to an employer, "We think you are consistently behind where you ought to be."

MM-B: *In France, there is a law that requires employers to show that, over time, the difference in wages by sex has diminished to a certain point. That is something you can measure.*

RF: I think you need that.

Comparative Perspectives

The commentary by Suk and Ford tends to confirm certain limitations to the diversity rationale in the United States, which often promotes cultural differences or a temporary remedy for past discrimination with the overarching objective of achieving equal opportunity. This is what emerges from Supreme Court jurisprudence on the issue.¹⁴⁹ However, Julie Suk has explained recently that "properly understood, the consequences of quotas should not justify the categorical rejection of quotas."¹⁵⁰ What diversity does not do is seek to address economic inequality in the labor market and how it intersects with employment discrimination based on origin or sex, the two forms most often addressed by the redistributive positive discrimination policies implemented in France.¹⁵¹ In all countries, diversity remains an unclear concept,¹⁵² chiefly associated with the pursuit of equality and coupled with other ideas. In Canada, for example, diversity and equity are often cited together.¹⁵³

What is interesting about diversity is that it turns the logic of antidiscrimination law on its head: it considers the enumerated grounds of discrimination as factors of inclusion of people into the workplace rather than factors of exclusion.¹⁵⁴ A person's identity is one way to challenge legal classifications, by showing that one individual—a black disabled person, an elderly woman, an obese gay person, and so on—can belong to more than one protected category,¹⁵⁵ literally embodying

diversity. Recognizing the problems of equality that can be faced by individuals who do not fall within strictly defined categories can be one step toward designing strategies for integration that dispense with stereotyped ideas about the needs of victims of discrimination.¹⁵⁶

But outside of the relatively rare case of fighting multiple discrimination, what are the benefits of affirmative action—or positive action as it is known in Europe—taken by employers in implementing diversity initiatives, above and beyond any stratagems used to avoid discrimination liability suits?¹⁵⁷

According to some American scholars, concrete benefits have been observed when companies take conscious and voluntary steps to include people with diverse characteristics, but without using quotas. The first benefit, which has already been mentioned, is the reduction of implicit biases. Social psychology research¹⁵⁸ and behavioral economics studies applying American cognitive theory to economics¹⁵⁹ show that the appointment of a person representing a minority or other protected group (a woman, for example) to an executive position can contribute to diminishing implicit biases against this group among other employees or managers.¹⁶⁰ Knowing that a discriminatory motive can be unconscious, positive actions such as these can send out a positive signal that is intuitively received by employees at all levels of the company and by the company's customers.¹⁶¹ The basis for these measures is the observation that, because of implicit biases,¹⁶² even if employees seem to consciously accept diversity as a valid principle and internalize it in the company, it cannot be promoted from within the company. The movement must flow in the other direction, from the outside to the inside, by giving preference to certain groups in order to establish a new normative standard. This positive action will lead to more equitable decision-making processes and in turn enable the company to effectively promote diversity.

Other American scholars consider that this artificial improvement of the condition of disadvantaged groups will perpetuate the stereotypical assumption that the affirmative action process systematically disregards skills and abilities. They fear that the backlash produced by such programs is just as destructive as the initial inequality.¹⁶³

Still others object to this “showcasing” of diversity and the detrimental message it conveys about the individuals being exhibited due to their origin, age, or sex, for example.¹⁶⁴ To assign a position to a person based on his or her value as a message-sender and instrument of implicit communication is to undermine that person's legitimate status in the organization. The employee is perceived as a mere token used to obtain recognition outside of the company, with no regard for the competitiveness of the employment market or the person's real assets. Being used in this way is degrading in itself and undercuts the logic of nondiscrimination. Instead of an achievement of diversity, the individual represents a means to accomplish a business goal.¹⁶⁵ Within the organization, people hired in the name of diversity face a tougher struggle to earn respect for their merits and, if they are seen to be

privileged, are less likely to benefit from shared attitudes of mutual respect and concern in the workplace.¹⁶⁶

In fact, the real question is not whether diversity is justified but rather how this rationale can be used in legal settings to amalgamate correlation and causality. American courts have found affirmative action in employment to be permissible under the Title VII prohibition of discrimination, in limited circumstances.¹⁶⁷ There may therefore be a correlation between employers that promote diversity in hiring and employers that do not discriminate, but this relationship is not necessarily one of cause and effect. It is interesting to note that within French organizations, the actors implementing diversity are not necessarily those in charge of handling discrimination:¹⁶⁸ although companies may not overtly claim diversity measures as a defense against discrimination allegations, employers accused of discriminating have often riposted with a generous display of diversity measures.¹⁶⁹ So diversity initiatives are at times used to circumvent antidiscrimination law and at times considered to be catalyzers and drivers of emulation, producing organic, institution-wide change rather than a response to an individual incident.

All this diversity debate has a crucial role today in France,¹⁷⁰ where it is illegal to discriminate based on race but where the government chose to introduce the constitutional notion of gender parity¹⁷¹ on company boards¹⁷² in the law adopted on January 27, 2011, extended in 2014.¹⁷³ This law does send out a signal, but it may have been received differently¹⁷⁴ than intended and, as we have seen, not necessarily in a positive way. The conclusions of American studies, regarding the impact of diversity, are mixed. Certain cognitive and anthropological investigations show that risk perceptions related to diversity vary based on the individual's values and worldviews: researchers at Yale¹⁷⁵ developed a four-dimension framework showing a possible correlation between an individual's beliefs and his or her position within this framework.¹⁷⁶

Alternatively, France's gender parity law may indicate that governance practices in large companies worldwide are changing. In the United States, since the crisis in confidence in the financial markets, laws were passed, in particular the Dodd-Frank Act,¹⁷⁷ requiring boards to better assess risks faced by companies. Board diversity could have an effect on the decisions made to take into account changes in corporate law and new systems of governance.¹⁷⁸ Some scholars,¹⁷⁹ inspired by critical race theory,¹⁸⁰ offer a different, more nuanced analysis, putting forward the idea that no law can truly modify the power relations between board members and individual shareholders and employees with their diverse backgrounds, but that one way to better align the interests of management and the group of employees and individual shareholders would be to effectively diversify the composition of boards of directors.¹⁸¹

A closer look at the board decision-making processes rather than structure, however, calls for some prudence in assessing the influence that the positions of board members representing minority groups have on the board majority. Boards

negotiate a delicate balance between seeking a consensus and stimulating debate when a difference of opinion arises from the discussion. Studies show that minority or women members, for example, are expected to contribute in more ways than white male executives, of whom only the power of persuasion is required, before they can earn credibility; but if there are at least three board members that represent their minority, then this goal is easier to achieve.¹⁸²

The reach of the French law on gender parity on corporate boards is limited in several ways and can be further restricted simply by the weakness of the “signal” it sends. The first limitation is the scope of application of the law, which does not apply to smaller companies operating as a limited-liability *société à responsabilité limitée*, the most common corporation form in France.¹⁸³ Although it gives the illusion of being widespread, the scope of the law could be significantly expanded by including other legal forms of companies. Nevertheless, the recent law of August 4, 2014, on real equality between women and men has extended the parity requirement to unlisted companies, but only to large, profit-making companies.¹⁸⁴ Benchmarking tools must be clearly defined once the law comes into effect.¹⁸⁵

The second limitation relates to the decision-making powers within a company. The gender parity requirement does not apply to many strategic committees and circles of power in companies, despite the fact that a large number of important decisions are made by these bodies and not just boards of directors, not to mention the numerous management levels where women should be better represented to achieve critical mass in positions of power within the company. Third, some commentators are skeptical about racial diversity measures that reach only the highest echelons of the company without bringing change for minorities at the bottom.¹⁸⁶ The same reasoning can be applied to the empowerment of women in general. Broader consideration should be given to the effect of antidiscrimination law on employees at different skill levels and the decision-making processes that influence employee selections.

Sociological Views of Diversity Policies

Devah Pager discusses diversity awareness-raising programs in organizations from her viewpoint as a sociologist.

MARIE MERCAT-BRUNS: *I have one last question on diversity training: as a sociologist, do you think it can help to modify hiring practices? And do you think the law or other norms, like collective bargaining agreements in France on diversity, can make a difference?*

DEVAH PAGER: My sense is that the evidence is fairly pessimistic about the impact of diversity training. Frank Dobbin would be the one to answer this. But my sense of his and other research on the topic is that diversity training does very little to change actual behavior. If you want to change behavior, you have to focus on outcomes. Policies that actively encourage diversity can have

a huge impact, provides that “diversity” is clearly defined and evaluated as an outcome, not just a fuzzy ideal. Ironically, some forms of diversity training can backfire, as they make hiring managers feel that they’ve done their part, without having actually achieved any real change.

These reflections are enriched by Frank Dobbin’s thoughts on certain diversity policies that can detract attention from the real issues of discrimination and maintain a status quo in terms of antidiscrimination measures.

MARIE MERCAT-BRUNS: *What do social scientists and lawyers have to learn from each other about fighting discrimination?*

FRANK DOBBIN: Social scientists have a lot to learn from lawyers about how courts react to corporate antidiscrimination measures. What kinds of measures do they like to see, and what kind do they actually give employers credit for? In some areas of the law, for instance sexual harassment, this is crystal clear. We know that the courts like to see training and other educational efforts, and they like to see clear antiharassment policies at the firm level, and clear mechanisms for dealing with grievances. The Supreme Court set out these standards. But in the case of gender and race and ethnic discrimination in hiring, promotion, and firing, we don’t have a clear idea of what the courts favor. Lauren Edelman at Berkeley and her colleagues are doing some very interesting work on that front right now.

Social scientists also have much to learn from lawyers on two fronts. First, there are a few lawyers, such as Susan Sturm at Columbia, who are doing social-scientific studies of corporate and academic diversity programs, adding qualitative evidence about how programs work. Sturm gives us some new hypotheses to test, and confirms a lot that we know from organizational sociology about putting someone in charge of promoting diversity and using professional expertise to design management systems.

Second, a number of lawyers, such as Linda Krieger, have written reviews of the social scientific research from the perspective of the law. Krieger’s work explores what has been found in psychology and psychology about discrimination, in the context of how this is relevant to court cases. This helps us to see what kinds of social scientific evidence might be relevant to legal cases.

Going in the other direction, from social science to the law, I would hope that lawyers would be more attentive to the kind of evidence now available on the efficacy of diversity training, performance evaluations, and other programs and would push in legal settlements to get firms to commit to putting their efforts into the kinds of programs—recruitment, mentoring, taskforces—that have proven effective and to cut their expenditures on the kinds of programs—diversity training, diversity performance evaluations, affinity networks—that have not proven effective at increasing opportunity.

Comparative Perspectives

American sociologists cite legal scholarship on the same subjects with fascinating ease. The ideas mentioned by Frank Dobbin in his interview are discussed more extensively in his book *Inventing Equal Opportunity*.¹⁸⁷ His sociological analysis is based on the way that companies have interpreted the law to apply it within their organizations: the perceived constraints of antidiscrimination law may not match the intended scope of the norms as they were written. As Dobbin explains, “the personnel profession’s favorite compliance strategies came to define equal opportunity and discrimination.¹⁸⁸ . . . Judges were not empowered to invent new compliance standards from scratch. So judges looked to leading employers when asked how firms should comply with fair employment laws. . . . The executive branch agencies charged with overseeing equal employment and affirmative action likewise looked to private employers to develop guidelines and their own best-practices lists.”¹⁸⁹

In other words, human resource managers translated the legal constraints as they saw fit to protect their employers from discrimination liability. It should be noted that the financial stakes for companies accused of discrimination are high.¹⁹⁰ Confronted with a lack of specific guidelines emanating from the government on how to implement the norms, each company developed its own internal regulations and employee handbooks, with the encouragement of the public authorities.

At first, the companies’ strategy was to show that diversity efforts could serve as a defense in the event of litigation: for example, companies developed methodologies to validate selection tests or appointed consultants to protect themselves from disparate impact liability.¹⁹¹ Then, as affirmative action programs came under attack during the Reagan Administration, companies focused on building a business case for diversity as a factor of economic efficiency.¹⁹² Again, human resource managers, not lawyers, were the ones to pilot this change and rename their equal opportunity efforts as diversity management.¹⁹³ Programs and policies developed in the 1970s adopted new designations in the ’80s and ’90s—mentoring for women and minorities, career planning, diversity task forces, diversity culture audits, and diversity training—but continued to pursue the same aim. What is striking about the new rhetoric is what it produced. Internal diversity norms and best practices not only protected companies from lawsuits but provided a replacement for affirmative action, construed by some to equate with arbitrary preferential treatment for a group.¹⁹⁴ This shift in corporate terminology follows the same pattern as the language of the Supreme Court: the legal qualification of equal opportunity changed from affirmative action to diversity in the field of education; redressing past discrimination was abandoned in favor of promoting the diversity reflected by individual talents.¹⁹⁵

As human resources turned away from the pursuit of equality to instead aspire for social justice, they did more than redirect the goal of antidiscrimination law.

In some cases, they sparked an organizational impulse in the workplace, transforming certain structural policies and ways of functioning such as work-family policies, fueled by the growing presence of women in the human resources profession.¹⁹⁶ The change of language poses a problem only if, under the guise of fighting for diversity and eradicating bias, it camouflages harmful discrimination.¹⁹⁷ how can it still be evidenced in certain instances in court when, at the same time, proactive policies of employers seem to show their good faith efforts to change things?

Dobbin is not the only scholar to have analyzed how antidiscrimination law has been integrated, interpreted, and transformed by companies. Berkeley professor Lauren Edelman has conducted in-depth research on how legal norms such as antidiscrimination law¹⁹⁸ and diversity rules are interpreted by companies and therefore transformed when applied to real situations to prevent litigation: this is what she calls the “internalization of law.”¹⁹⁹ Edelman’s postulate is that the relationship between law and corporate governance in the United States has undergone four major phases: the first is the legalization of corporate governance; the second is the growth of private dispute resolution; the third is the development of in-house counsel; and the fourth is the rebirth of private policing. According to Edelman, these processes have interacted with each other to transform large bureaucratic organizations:²⁰⁰ from being relegated to the role of players within the public legal system, they have grown into private regulators in their own right.²⁰¹ Although certain disadvantaged groups, the “have-nots,”²⁰² may in the short term benefit from the introduction of “citizenship norms” into the workplace, the internalization of law by organizations can in subtle ways tip the balance between democratic²⁰³ and bureaucratic forces in all of society, potentially reinforcing elite power and control.²⁰⁴

The legalization of organizational rules can transform many companies into private political spaces with a large number of “citizenship rights,” but often these rights do not include the right to vote or even the freedom of speech. Likewise, even if the dispute resolution processes²⁰⁵ in place provide a forum for reporting grievances, they tend to favor “therapeutic” remedial solutions rather than access to a formal complaints procedure. In-house counsels themselves follow managerial guidelines and the organization’s basic orientations, rarely offering pro bono advice to employees voicing complaints or defending the public interest, which is nevertheless one mission of their profession. Lastly, although private policing uses the same rational methods as the public police, the standards and protections applied with regard to searches, surveillance, and secrecy are not the same. Ultimately, “internalization benefits the ‘haves’ not so much because it undercuts legal neutrality or formality, as because it undercuts democratic governance.”²⁰⁶

Diversity and Institutional Change

Susan Sturm explores the concept of “institutional citizenship” and diversity.

MARIE MERCAT-BRUNS: *Could you add your views about the effectiveness of Title VII and the diversity rationale?*

SUSAN STURM: I prefer generally to talk about my scholarship on these questions, and you can complete this by looking at the website of the Center for Institutional and Social Change.²⁰⁷

We can look at the way institutions/organizations interact with the larger community, the way in which they deliver their services, the way in which they in fact do advance or impede full participation of people. So this is really thinking very much about the relationship between organizations, as in workplaces, and institutions that have a project in a larger system.

MM-B: *Do the norms you are looking at all come from the same sources? I suppose you also look at how they interact?*

SS: Legal norms?

MM-B: *Right.*

SS: You cannot just think about legal norms; you need to think about legal norms in interaction with other norms. If what you are really interested in is creating change in conditions, in the way they are experienced, and in opportunities, you can't just think about the legal norms.

Legal norms are important. One of the big moves that I have made is to suggest that is really important to situate legal norms quite explicitly in a normative and institutional framework and that it is quite different to think about problems or barriers to discrimination in the context of a larger affirmative project than to define the project solely in the terms of discrimination.

So the substantive piece I am writing now and the frame I am developing is the frame of institutional citizenship²⁰⁸ as one example of what it looks like to articulate a positive, normative vision that requires, as part of it, antidiscrimination norms and apparatus but that is not fully defined by antidiscrimination.

MM-B: *Can antidiscrimination legal norms be counterproductive because they set up oppositions?*

SS: They can be counterproductive but even so are necessary. Part of the real work, which is not really done, is to explicitly navigate the relationship between the systems. So you are asking the questions, What is the relationship? Who are the primary actors? That is a very different stance for public law than the norm, but it is necessary if you are going to influence how norms actually shape practice and the ultimate goal of affecting the conditions of people's lives. I have also become really clear that institutions are a focal point of this work, because institutions shape the micro-level and because institutions are a location where you can get traction at the level of policy.

MM-B: *Don't you think institutions can create resistance?*

SS: That is why they need to be engaged, because they create the conditions that are going to determine whether you are advancing or impeding participation.

MM-B: *Is the EEOC necessarily directly linked to norms and diversity practices and therefore involved in this process? Do you study what the EEOC does?*

SS: Yes. The EEOC is an example of a government intermediary and institutional intermediaries are important. This is actually the subject of a big project on institutional intermediaries. We have looked at some government intermediaries, but we have looked primarily at regulators or compliance organizations as one form of intermediary. The EEOC is a compliance intermediary that is enabling but can be limited in terms of what it can do. Even in the proactive work that the EEOC is doing, organized around building capacity, is limited as is the core mission of the organization, which is compliance. That is the kind of information that they collect and also the way institutions interact with the EEOC. All that is extremely important, but it also means that you are talking about projects that are targeting the cutting edge of the positive deviance. The organizations, the institutions are constructing the vision: what positive institutional citizenship actually looks like. There are organizations that are likely to be doing that in the context of a compliance model.

MM-B: *What is limiting about the compliance model?*

SS: Apparently, it is the way in which the norm is defined. If you are talking about compliance, you are talking about compliance in relation to a norm that you are in a position to mandate. So the norms requiring the EEOC, for example, to advance are limited to the antidiscrimination project. You can go beyond that, but the more the EEOC goes beyond the antidiscrimination project, the less legitimacy it has as an institution. So its purview is limited by the scope of the project that it can ultimately pursue. It is also limited by the fact that it has enforcement powers in the form of being able to litigate or on behalf of classes of people.

MM-B: *How is that limiting?*

SS: It is enabling and limiting. It is enabling in the sense that it can actually mobilize state resources to induce change that can be subject to mandate, particularly before organizations that are negative outliers, that are not up to the norm, as defined by the legal norm. So it has that capability to mobilize resources and attention to try to get the problematic actors in relation to the norm, engaging in intentional discrimination or that have systemic patterns of discrimination that are subject to proof. It can in that context actually mobilize institutional transformation through the remedial project.

MM-B: *You mean financial compensation and the like?*

SS: I mean sanctions . . . that also prompt consent decrees, that also give rise to an impetus at all levels for more global organizational change.

Damages also prompt negative publicity and get attention at the top, so they can actually have an impact: the Texaco situation or Wal-Mart²⁰⁹ are

instances in which litigation—sex litigation—has really had an impact, one that we have not really fully appreciated. So it is true that the EEOC has a really important role. The EEOC has a lot of underdeveloped roles that it could advance and that it doesn't now. That is one intermediary.

My take is that the way the EEOC thinks about its work, it doesn't really construct itself as an intermediary: it's actively engaging with other intermediaries, some of which are not compliance agency intermediaries, and it thinks about itself (this is true of a lot of intermediaries) as being part of a system.

MM-B: *Is it due to confidentiality rules or power plays? Is it about a lack of recognition of this part of its role?*

ss: Organizations tend to be siloed and to develop the mission of organization itself as the goal. This is not to say they are entirely self-serving, but they are internally self-referential. This is changing: organizations are now more networked and have that possibility, especially the big organizations. There are other intermediaries, even government intermediaries like the NSF [National Science Foundation], which I wrote about in the architecture of inclusion. It is one example of a public intermediary that is in a position to do things that the EEOC can't do, but there are also things the NSF cannot do.

A whole set of intermediaries are in a position to mobilize norms of different kinds and that architecture to move towards those norms and accountability in relation to that architecture. In order to think about that in a multifarious way, one must have a set of overarching frames that provide a way to link the different sets of norms and systems of projects. That is where institutional citizenship (I am not suggesting it is the only one)—if you thought about the project of employment as advancing institutional citizenship—would lead to a very different way of defining the problem with attention to what the work is.

MM-B: *Could you say that this boils down to looking at the problem rather than the person, which would be stigmatizing?*

ss: You are looking at the problem, but you are also looking at the intentions. Part of the recognition is to only eliminate the problem even if you do it in a structural way. You might even plague the institutional arrangements that re-create the problem. You are not required to envision what it is you actually want in the workplace. All you need to do is to articulate what you think the problem is and you want to eliminate it. You can do that as part of the larger question; it is not that you can avoid doing the problem identification.

But if you want to transform institutional conditions, you have to ask what do you want to transform them towards? People tend to participate differently when they are participating to create something than when they are participating to correct something.

MM-B: *This seems slightly contradictory. Won't you be formatting people to think about participation in a certain way and perpetuating the attitudes that you are actually trying to combat?*

SS: If you don't have a way to deal with entrenched problems for which there is no incentive for change, any effort to do any affirmative social work will be in vain. *[Later in the interview, Sturm comes back to the issue of diversity.]*

MM-B: *If one adopts your perspective of full participation, what would be the employer's incentive to act differently?*

SS: The whole business case for diversity. There is much more motivation to do that; there are intersecting motivations. There is the positive deviance: the small group that is doing it because of the way it defines responsibility in the larger community. I said that even though it is a very small group, it is very important to have that as a frame.

Because it is important and that is where we would like institutions to move to. But you can't base your regulatory system around that because it is too small a group. There are incentives around proactivity as companies define them: What relationship with the capacity to do the work in different companies? There are various things happening to differential degrees in many companies. There is consumer pressure and public pressure coming from the authority intermediaries to ensure positive and negative compliance.

Comparative Perspectives

Susan Sturm recognizes the need to combine litigation of disparate treatment and impact cases with voluntary processes that directly engage institutions at multiple levels in order to change internal social practices engendering discrimination. This overarching approach seems to diverge from European litigation solutions but may be echoed in practices such as the gender mainstreaming promoted by the European Union. This EU initiative is similar to Sturm's model in that it operates at several levels to include and integrate women, engaging both structural and individual aspects in employment, housing, services, and benefits. Unlike Sturm's architecture of inclusion, however, it applies to only one ground, sex.

The European Union has not adopted mainstreaming as a general approach to diversity issues²¹⁰ because of the difficulty of employing this technique simultaneously for multiple protected classes, some of which are not identifiable in all countries, such as victims of racial discrimination.²¹¹ Concern about territorial cohesion has been growing, however, as Europe continues to be enlarged and questions have emerged regarding migrant populations, such as the Roma people.²¹² As a result, the diversity issue is being pushed to center stage. A multilevel approach is not a new idea, as seen in initiatives such as Equal or other programs supported by the European Social Fund (ESF).²¹³ Like the architecture-of-inclusion framework, these programs seek to empower those who indirectly advance diversity goals through "soft" law (such as agreements or charters) by highlighting corporate best

practices. The European Union seems to insert questions about workplace diversity into these broader concerns about cohesion; for example, in its green paper on territorial cohesion called “Turning Territorial Diversity into Strength”: “The European Employment Strategy, an integral part of the Lisbon strategy, makes an important contribution to the development of human capital through better education and the acquiring of new skills in different territories. In addition, the Employment Guidelines include territorial cohesion as one of their three overarching objectives.”²¹⁴

European initiatives to promote gender parity are monitored and assessed on a regular basis, but this equality goal focuses only on discrimination based on sex. The European Commission also takes action to combat discrimination on the basis of race and age. But what is unique about Sturm’s theory is that it targets many groups of people suffering from discrimination: it emphasizes the causes of exclusion and factors of integration rather than the individual, stigmatizing injuries to each protected group.

Sturm seems to indicate that it is useful to act through law as well as outside of the law and on multiple levels, because the law does not always reach every root source of discrimination. This is a crucial issue and probably points to an added dimension in Europe: equal opportunity must be ensured for employees, as well as the self-employed, and apply to the provision of goods and services. The rapid growth of workers under France’s recently introduced *auto-entrepreneur* status for the self-employed glaringly evidences the breadth of the problem.

The definition of *worker* is of primary importance in European law²¹⁵ and plays a role in acquiring certain social benefits.²¹⁶ Too much emphasis cannot be placed on the need for directives extending the principle of equal treatment and equal opportunity to the self-employed and the liberal professions, in particular with respect to pregnancy,²¹⁷ as well as a functional approach to the needs of family workers.²¹⁸ Nondiscrimination and equal opportunity take on a systemic form due to a paradigm shift in the worker’s access to fundamental rights, considered to be a human right, without attention to the status of the worker. The focus here is no longer on the application of an economic law simply based on the traditional vision of the risk of discrimination inherent in the employee’s role as a subordinate.

In the European framework, legal norms are still being used to expand the reach of discrimination law, rather than nonlegal, behavioral norms as Sturm recommends. The EU’s flexicurity strategy, rarely mentioned recently,²¹⁹ aiming to improve employment security while providing employers with workforce flexibility, seems to be the only structural mechanism addressing gaps in the social and legal protection of workers. Regrettably, it maintains the normative, binary distinction between salaried employees and self-employed workers, adopting a somewhat neoliberal vision of the labor market.²²⁰ The Working Time Directive defines the worker more broadly, indirectly offering a more functional interpretation of workplace issues and work-family balance. The directive on parental leave and the

proposed revision of the directive pertaining to pregnant workers, which has been stalled, appear to more closely follow the reasoning of labor unions, providing for a suspension of the employment contract and maternity protection for salaried employees.²²¹

Sturm's analysis of the architecture of inclusion and the preceding commentaries on indirect or systemic discrimination consistently look at norms or practices from a group perspective. The concept of diversity encompasses both an individual and a collective approach to difference. This bifurcation is a recurring issue in an international comparison, as seen in the following conversations. The way that groups are perceived seems to be a key element in a comparison of antidiscrimination law.

*Diversity Policies, the Individual, and the Group:
Finding Common Ground?*

Chai Feldblum considers whether discrimination is an individual or a group issue, and how the needs of people with intersectional identities, such as LGBT people, can be reconciled.

MARIE MERCAT-BRUNS: *Is the conflict between the needs of intersectional groups even perceived? If so, how is it resolved? When I tried to flesh out this conflict of interests, I was accused of violating religious freedom.*

CHAI FELDBLUM: A common theme throughout my scholarship has been the notion that the classical liberal notion of equality is not sufficiently robust to allow us to achieve complete equality for marginalized groups, such as LGBT people. That is because the basis for denying equality to such groups is a very sincerely held and deeply experienced feeling and belief that such individuals are not morally equivalent to those who are not LGBT.

Because of that simple fact, I believe we need to address head-on the public's moral assessment of LGBT people—and indeed, to change the majority's moral view of such individuals. From 1996 to 2004, I argued that we should start this conversation solely within scholarly and internal advocacy circles. After the American elections in 2004, however, when “moral values” was used quite destructively in the public rhetoric, I argued that that we should move this conversation into the public domain.

I created a website called The Moral Values Project (MVP)²²² and wrote a chapter explaining the goals and premises of that project.²²³ An important outcome of the MVP analysis is that it helps us understand why people who feel homosexuality is immoral may feel attacked when legislatures enact pro-gay-rights legislation. As I wrote recently in an unpublished piece, “Conversations about substantive moral values along these lines could also help raise the consciousness of LGBT people themselves. I believe many people who believe homosexuality is immoral (either because of their religious or secular beliefs)

experience themselves as ‘under siege’ today as society begins to extend equal protection to its LGBT citizens.²²⁴ Perhaps if LGBT people understood the reasons why such individuals felt besieged in today’s environment, they might do better in responding to such fears.”

This approach of trying to put oneself in the shoes of others who are experiencing themselves “on a tilt” from society is something that I began in my “Rectifying the Tilt” work.²²⁵ Given the complexity and richness of our modern society, and the good that I believe exists in supporting pluralism in our society, it seems essential to me to keep pushing ourselves to understand how both the absence of civil rights for some groups and the acquisition of civil rights for previously marginalized groups will affect different people in society differently.

Susan Sturm contrasts the individual or the group approach.

MARIE MERCAT-BRUNS: *In your work, you refer to different actors and different institutions as part of a more global approach to diversity.*

SUSAN STURM: I may add, there must be explicit attention to the theory of action, to the relationship among the different actors. There is a complicated idea, which is part of the problem, that whatever your location, you think in relation to a much larger picture, and you act differently when you are thinking about what you are doing in relation to a bigger picture. There are things you don’t do, because there are other actors that are better located to do those things. Also, there may be people you bring to the table because they do something different, even though they are not the primary participant in what you are doing.

MM-B: *Where does the individual stand in all this? It seems to me that the individual is excluded from this analysis.*

SS: The individual is positioned in part through the ways in which institutions structure the possibility of individuals to express and participate and have their issues addressed. That is one way. Then, individuals experiencing a problem are able to access the legal system to obtain remedies for conduct that is sufficiently problematic that it violates the legal norms.

I haven’t exactly decided what I think about trying to expand the antidiscrimination norm to include individualized sanctions for behaviors that are systemically rigged, unless individuals are part of a class.

Comparative Perspectives

From these various comments about the group, a common idea emerges of the group as subjected to, and a beneficiary of, antidiscrimination law and reflected in the diversity initiatives taken in the United States. They also convey a different idea of the role of group identification in U.S. antidiscrimination law. These observations must be weighed against European law and French law in particular, which also classify workers, but the nature and origin of the classifications are different.

In France, a consensus exists to reject the idea of groups as categories of the population whose members are identified based on their origin or defined by racial characteristics they are assumed to have in common,²²⁶ even if this definition does not apply to women,²²⁷ older workers,²²⁸ or workers with disabilities²²⁹ whose numbers are recorded. The broader base on which this negation of groups rests is France's republican tenet by which all citizens regardless of origin²³⁰ enjoy equal rights. French republicanism posits that citizens enter into a contract under which they delegate their political power directly to the government, whose role is to define and promote the common good.²³¹ This situation is to be contrasted with the European employment context. Inspired by Durkheim's ideas on the division of labor in society and Weber's theory of status groups, the social sciences in continental Europe have built on classifications based on recognized occupational categories formally defined by national institutions and not on racial or religious categories.²³²

Some clarification must also be made regarding the treatment of personal characteristics. In France, legal rules in labor and employment law focus squarely on certain categories of people based on characteristics other than those related to origin. Status, profession, occupational classification, age, and sex are often used to place workers or job seekers into rigidly divided groups. Such groups are even used to determine nonemployability: for example, employment vulnerability and family situation are criteria used in the selection of employees for layoff.

These examples are provided to support the position that a comparative perspective of diversity must not be limited by the debate on groups based on ethnic or racial divisions. Identification with a group can be stigmatizing and corrosive. But if the role of group identification is to pull systemic levers to fight against discrimination, as Sturm describes, then recognizing the incomplete "participation of people" provides an immediate understanding of the institutional causes of this exclusion and precludes preoccupation solely with assessing the injury suffered and counting the number of victims. The division of employees into functional categories used in every source of labor law, especially the occupational classification system, enables access to keys to integration held only by the institution.²³³

In France, however, these same institutional mechanisms can more subtly perpetuate the exclusion of certain employees by placing them in occupational categories. Case law on the principle of equality demonstrates the importance of occupational categories in a varying light: judges follow a logic of deconstruction in their assessment of equal treatment when they consider whether the categories used to divide employees and to determine access to certain rights are justified. There are two paths by which judges can take this approach: the review of equality through the lens of the facially neutral, functional principle of "equal pay for equal work" and the assessment of equal treatment in the grant of benefits to different categories of employees in collective bargaining agreements.²³⁴ The sole risk

is an excessive deference shown by judges to established occupational categories defined by the French social partners (labor unions and employers' organizations), but case law reveals that judges often assess a category's relevance case by case. It seems, for example, that the Cour de Cassation requires lower court judges to subject differences in treatment to strict scrutiny with respect to the objective or purpose of the categorization, which must reflect specific aspects of the situation of employees in a given category, in particular aspects related to working conditions, career advancement, compensation, and even social benefits.²³⁵

So the key question is, what are the objective, relevant²³⁶ justifications for historical occupational categories, given that the legal classification itself engenders differences in treatment that can be more or less favorable? These differences can indirectly reveal occupational segregation or a glass ceiling effect hindering the promotion of certain categories and preventing diversity within employee groups inside the organization. This approach has already been taken with respect to discrimination based on union membership, as the case law shows, because union activity is often closely tied to occupation, making it easier to compare and to detect situations involving stalled careers or wages.²³⁷ Equal treatment litigation seeking to compare "equal value" situations may have temporarily neglected to look at analogous situations between men and women, as illustrated by equal pay claims.²³⁸ However, some cases target specifically work of comparable worth.²³⁹

In equality case law, once the barrier of comparability of situations has been removed, a more thorough examination of the proportionality of the differential treatment yields a deeper understanding of the systemic coherence of organizational rules or practices. As Sturm pointed out, it is important to know what the goal is: is it possible to judge the extent to which the purpose of the differential treatment based on occupational category acts against the interest of the group, while at the same time validating the existence of the category and therefore its value for all of its members?²⁴⁰ Whether the category is relevant depends on the specifics of the employees' situation, but these particularities must be objectively assessed. Following such an assessment, the act of eliminating categories that are no longer relevant can indirectly help to integrate people with protected traits. This is illustrated in another approach taken by judges in assessing the inequality of differential treatment based on an occupational category: judicial scrutiny of professional assessment systems, which can reveal quotas that an analysis of the employees' skills and performance fail to justify²⁴¹ and the presumption of discrimination in the absence of any professional assessment.²⁴²

Workplace Flexibility for Diverse Groups

Outside of the debate on the relevance of a group rationale, scholars consider the opportunity for lawmakers and employee and employer organizations to promote diversity in a more systemic manner.

Chai Feldblum is a commissioner of the EEOC, nominated by President Barack Obama. She helped to implement two of the Obama administration's priorities in fighting systemic discrimination. The first is to directly monitor and enforce anti-discrimination norms, which she contributes to through her role on the EEOC. The other is to engage in a more general reflection on the production of norms to promote workplace flexibility. In this context, flexibility should not be construed as it is commonly used, as a certain elasticity introduced into norms to theoretically increase the economic efficiency of businesses. Feldblum has thought about how to shift the frame of reference showing the differences among people targeted by diversity programs. What measures could be taken to better integrate LGBT people, religious people, parents, and people with disabilities, among others? In the following conversation, Feldblum considers diversity and the "flexibility" of the employment market.

MARIE MERCAT-BRUNS: *You mentioned the need for new types of norms applying to companies in the United States. (In France, companies have moved toward the adoption of collective agreements on diversity.)*

CHAI FELDBLUM: The concept that we need a new normal is key to my theory of change and to my theory of equality, "disrupting the normal." The new normal would address disability, religion, sexual orientation, gender, parenting, gender orientation, and gender roles. I didn't have race in my original model, but I will add that: the issue of affirmative action versus color blindness.

We must, as a society, value the caregiving that is given to kids and to aging parents more than we do right now. We need a new cultural norm so that people who are doing caregiving—not to biological kids or parents, but to society overall—are respected as well. It should be understood that people like that have had full lives.

We need both men and women to recognize what kid caregiving requires. We need society overall to be more engaged. I'm referring to Kathleen Gerson's new book, *The Unfinished Revolution*.²⁴³ Her previous book was *The Time Divide*, with Jerry Jacobs (Harvard University Press, 2004). Her new book covers the younger generation's views of caregiving equality. Her theme is the tension between changing individuals and resistant institutions.

We need to change the frame—this is still an individual choice.

Women are in a bind, a catch-22: if you contest the norm, as long as the norm still reigns supreme, then you can be devalued. So we need to disrupt the normal. First we need to disrupt the norm with a wide range of stakeholders.

We have a cultural norm that tells us not be disconnected individuals, like George Clooney's isolated character in *Up in the Air*. But, as a society, we have no structures to help us out in being connected: it's all your problem; go deal with it.

About Workplace Flexibility 2010²⁴⁴ and the six-circles theory of advocacy. This was Paula Rubin's proposal:²⁴⁵ comp time instead of overtime pay. Assume you're covered under the FLSA [Fair Labor Standards Act]:²⁴⁶ for any hours over forty hours a week worked, you get time-and-a-half pay. The Republican proposal was to amend the FLSA so it would be like it is in the government sector, where you work overtime and take it in compensatory time: work three hours overtime and get four and a half hours off.

There was a diet of ideas and it constipated; it was employer versus employee: nothing moved. There was no perceived alignment of interests. But there were common interests to be achieved for both employers and employees, so we expanded the table.

Our first Congressional briefing was on aging workers; we explained that they want to work differently. We want to ride the wave. Workplace flexibility is key for aging baby boomers—that's the wave. We had to move the conversation away from just women! It requires a larger group saying we need to change. It can't just be women saying it.

Comparative Perspectives

Having participated in drafting the Americans with Disabilities Act,²⁴⁷ Feldblum observes that as long as the implicit norm framing employment relationships does not include all individuals, then any effort to defend the rights of victims of discrimination will be considered as a deviation from the norm that requires compensation or an alignment with standards.

In France, with the current debate on taking work hardship—difficult working conditions—into account, reflection on how norms can translate the adaptation of work to people is an increasingly urgent matter.²⁴⁸ Feldblum suggests that work needs to be thought out to include vulnerable and marginalized people from the start. What's new about the idea is how it builds around the needs of workers who are not the traditionally imagined mid-career white men. Instead, she suggests organizing work to accommodate workers with specific issues to be resolved to allow them to perform their work. As a result, everyone's work would be transformed, improving general well-being at work, the recognition of work hardship, work-life balance, ergonomic work conditions, and psychosocial risk management and prevention. Some conflicts of interest may arise, as Feldblum mentions, between accommodating religious beliefs and the protecting the rights of gay employees, for example, but in her opinion these issues are not insurmountable when the initial premise in producing these norms is to defend certain values, such as caregiving. All employees ultimately benefit from an employer's efforts to offer them work-life balance and take their nonwork concerns into account. The workplace flexibility²⁴⁹ campaign supported the development of tools to achieve this ambition through national debate, dialogue about workplace flexibility

policies, and proposals for legal mechanisms involving leave entitlements, workplace accommodation, and flexible working hours.

III. SYSTEMIC DISCRIMINATION, REASONABLE ACCOMMODATION, AND HARASSMENT

This discussion on systemic discrimination would not be complete without examining two concrete mechanisms enabling a more structural approach to the causes and manifestations of unequal treatment. One is reasonable accommodation, emerging from the Americans with Disabilities Act prohibiting discrimination based on disability, and the other is harassment. How are these two mechanisms encompassed by or separate from positive action? Outside of their vital role in fighting discrimination based on disability and sex, how does the individual or group view promoted by these mechanisms provide an alternative way to perceive differences?

Reasonable accommodation and harassment do not typically occupy the foreground in discussions of systemic discrimination. The following interviews will show why they should: these legal concepts emerge when a discriminatory difference in treatment is identified, but they often evoke a need to investigate flaws in the organization of employment relationships within the company at a more structural level than the individual work situation.

Discrimination and Reasonable Accommodation

Robert Post discusses antidiscrimination law and reasonable accommodation,²⁵⁰ a term drawn from the Americans with Disabilities Act, which requires employers to take appropriate measures²⁵¹ to fight discrimination based on disability.

ROBERT POST: Accommodation, to my mind, is the same structure as disparate impact. Only now we are applying it to what are considered normal working conditions. Just like antidiscrimination law presupposes a certain concept of what a person is—a male, a single person—the workplace is designed around the needs of what is imagined to be the typical, normal person. What accommodation does is to say, “No, maybe you shouldn’t design it around this image; the person can also be a woman who has children.” What counts as the normal person, around which the workplace is designed, is up for grabs under accommodation law.

Under accommodation law, you have to redesign the workplace to change the notion of what is normal, to accommodate this enlarged picture of what a person is. It has basically the same redistributive properties that disparate impact has.

MARIE MERCAT-BRUNS: *It actually takes a functional view of the person because it understands that the conflict arises from relationships and the context, not the*

disability. I have a hard time seeing where the liability falls. Are both the worker and the employer responsible for making the adjustments, or is it solely up to the employer to redesign the workplace to make it accessible?

RP: It depends whether you are talking substantive law or normative law. For example, there are technical requirements to mediate on accommodations. But let me talk not of the technical requirements of ADA²⁵² and accommodation but how we want to think of the problem normatively. The problem is that the workplace is created and structured by management, and it is structured in order to attain the goals of the workplace. One of the responsibilities of management is to make employees work in ways that are suited to attain the goals of the workplace. So there isn't this opposition between workers and management; workers are, in the eyes of the law, the instrumentalities of management.

When you impose a duty of accommodation of the workplace, you are saying that people responsible for structuring the workplace are responsible for the accommodation. As a technical legal matter, that means it is the responsibility of the employer to affect the behavior of employees such that they make the accommodation effective. So I would reject that it is only the responsibility of employers.

MM-B: *So there is a kind of dialogue there.*

RP: There has to be. What is ultimately important is that the workplace be accommodated. The responsibility of accommodation applies to the workplace. The workplace is the product of the people; the workplace consists of what employees do, and what employees do is under the responsibility of employers.

Ruth Colker discusses the means available to enforce reasonable accommodation and affirmative action.

MARIE MERCAT-BRUNS: *What means are available to enforce the reasonable accommodation requirement?*

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

For people earning eight to ten dollars an hour, it is not worth it for lawyers to take their case on a contingency basis. It is true that a lawyer can get money as the "prevailing party," but that is only if the lawyer actually goes to trial and gets a judgment from the judge or jury. If a case settles, it is not possible to go to a judge and get money for representing the prevailing party. Most cases settle, and therefore the lawyer is stuck with a contingency award, which would usually be very low. Plaintiffs have a low chance of winning, and some

lawyers can't afford to take these cases where the plaintiff is not going to pay the bill.

MM-B: *Just to go a little bit farther on that. So you are saying that this is not a group issue; the way it plays out in litigation is an individual issue. Wouldn't it be better to have proactive measures of diversity? For example, in France, there are more and more collective bargaining agreements on diversity issues, applying to people with disabilities and implementing voluntary compliance to do something different. This type of initiative would be less costly because the focus is on the group, the various forms of disabilities, and how the workplace can adjust to integrate several types of groups into the workforce—but this is a larger issue.*

You seem to be saying that the way the litigation plays out is not very effective, because no one wants to take the pay cases. In addition, these are individual cases, so the change they bring about in the workplace is slow.

RC: Your alternative would be what we call in the United States “affirmative action.” Many people in the United States are not very fond of affirmative action (a four-letter word in the United States). Do you see the semantical difference? The United States favors reasonable accommodations but not affirmative action.

Diversity initiatives in France are not necessarily seen as measures of affirmative action, where you have two individuals with similar qualifications and you select the person who is a member of a protected group even if that person is less qualified. In France, diversity is really about preventing discrimination. The workplace is organized in a certain way so that, before employers make any selection decision, they are prepared to welcome people with disabilities. This is different from affirmative action in France, where it is associated with quotas. In fact, quotas exist for the hiring of people with disabilities.²⁵³

MM-B: *As you said, the underlying principle is different, but collective bargaining agreements on diversity, mainly to address the integration of workers with disabilities, cannot be called affirmative action. There may be a need for a certain financial investment to promote this diversity, but it is not an order, as in some litigation in the United States.*

RC: The analogy in the United States would be the Title III²⁵⁴ approach, which is that buildings should be made accessible. Proactive approaches do make perfect sense. It is less expensive to make building accessible to begin with rather than retrofitting.

In the workplace, efforts have been made for physical accessibility, but that is not good enough. For people with a mobility impairment, the world has been transformed because they can get around better than they could twenty years ago. Young people with disabilities are getting in and out of buildings much better than when I was a young person. That helps the workplace

because it allows some people to work, but that is just the tip of the iceberg. It does not deal with all the problems that people with disabilities face.

MM-B: *So you could say we have the European approach in Title III.*

Could you not anticipate problems and apply a similar logic to other workers, such as older workers, parents with strollers, workers needing more flexible work hours due to work hardship or caregiving duties, for example? This is one direction we're moving in in France: diversity initiatives that focus on shared needs of workers.²⁵⁵ Employers accommodating workers with disabilities could also analyze the jobs of other categories of workers requiring accommodation (workstation adaptations, flexible working hours and leave, greater access to training and career opportunities by improving the circulation of information in the company, etc.).

RC: You couldn't have the logic in the United States: the idea that people could take leave and not have their employment terminated. The problem in the United States is you are not compensated for that medical leave. So, how many people can afford to take leave? Obviously not receiving a salary is very problematic in most people's lives. The very key is not losing your job for people who are in chemotherapy, for example, or recovering from giving birth. The FMLA [Family Medical Leave Act] was one of the first laws passed during the Clinton Administration.²⁵⁶ That is more like the European approach to find the commonalities between parents, pregnant women, disabled workers, and older workers. (Interestingly, some parts of this law have been struck down as unconstitutional; it is hard to impose these kinds of rules on the public workplace in the United States.)

[Later in the interview, Colker comes back to the topic of reasonable accommodation.]

RC: I have not said much on voluntary compliance. There are many employers that go out of their way to hire people with disabilities and accommodate them. I have worked with a fabulous university coordinator on disability issues. I think my employer does fabulous things to accommodate people with disabilities. So I do not mean to say that all employers do not comply and discriminate. I think, in the end, the ADA amendments will be taken seriously and will cause them to take a stand on their willingness to accommodate people with disabilities.²⁵⁷ So I do think the 2008 amendments have had a meaningful effect on people's lives.

The harder question is for those people who do not work in institutions like that and are subject to discrimination: do I think the amendments will have an effect on their lives? My answer is that I doubt it. They will face the same hurdles they always face—even worse in a recessionary economy—finding lawyers who can afford to take their cases and fight for them in a way that will let them prevail. With the recession, it will be harder to arrive at settlements.

MM-B: *Will employers use the undue burden defense, if accommodation creates this undue burden?*

RC: Employers have less money: their finances are tight, and they might choose not to spend money. You don't see this at the trial level in front of judges and juries. It is the argument the employer makes who then offers a settlement to plaintiff and the plaintiff agrees. So I am not optimistic for those plaintiffs who pursue litigation that the 2008 amendments will make a meaningful difference in their lives. But I do think that the amendments will give room for employers engaging in good faith to make a difference in their lives. So it is a mixed bag.

MM-B: *So has the ADA sometimes prevented employers from hiring workers with disabilities?*

RC: With the recession, it is hard for everyone right now and even more so for people with disabilities, even with the 2008 amendments. I don't think the ADA can do anything about that. I find it difficult to tackle an employment rate through an antidiscrimination law. You are going to need another model if you want to tackle a higher unemployment rate: an entitlement model or court-ordered model or civil action model. And that is not going to happen in the United States. It isn't going to happen anywhere.

Comparative Perspectives

Like disparate impact, the concept of reasonable accommodation created somewhat of a revolution in American antidiscrimination law:²⁵⁸ it introduced an obligation for the employer to take action and accommodate qualified employees or applicants with disabilities who needed certain adjustments to perform the essential functions of a job.²⁵⁹ A similar obligation to accommodate had already made its appearance in the United States in cases of religious discrimination, although it was not defined in Title VII of the CRA of 1964.²⁶⁰

The Americans with Disabilities Act (ADA) of 1990 not only bans discrimination against "a qualified individual, with or without a reasonable accommodation,"²⁶¹ it provides a nonexhaustive list of concrete examples of such accommodation, which include "making existing facilities used by employees readily accessible and usable by individuals with disabilities," "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies," and "the provision of qualified readers or interpreters." So the statute is pragmatic and precise in this respect.

The ADA was also ambitious in spirit.²⁶² The lawmaker's intention was, as Post mentioned, to define a framework integrating the differences arising from disabilities. Instead of attributing differences to individuals,²⁶³ the law acknowledges that the work environment and working conditions are often designed around a certain perception of the standard, typical worker.²⁶⁴ Once it has been established that an individual with a disability is qualified for a position, the employer and employee should agree on how to adapt the employment relationship to absorb

differences impacting job performance, which the employer had failed to take into account. This is different from affirmative action, which as Colker explains is perceived in an increasingly negative light in the United States. The aim is not to benefit less-qualified candidates to promote equal opportunity.²⁶⁵ Nor is the goal to compensate for an imagined inability for individuals with disabilities to perform to standards. The ambitious new vision of disabilities in the workplace proposed with the reasonable accommodation concept consists in assessing and remedying the shortcomings of the employment relationship. Although the mechanism tends to address individual situations, it undeniably has a systemic dimension as well.

Employers may balk at making an accommodation if the associated cost²⁶⁶ is excessive.²⁶⁷ As Colker explains, individuals with disabilities struggle to even reach the litigation stage, because the amount at stake is often too small to find lawyers who are prepared to take their case.²⁶⁸ According to Colker, the ADA Amendments Act of 2008, which broadened the definition of *disability* after it was narrowly interpreted in a series of Supreme Court decisions, will not necessarily brighten the situation.²⁶⁹ On the other hand, she says, for employers with a sincere desire to eliminate discrimination by accommodating individuals with disabilities, the amendments are helpful. Reasonable accommodation offers a functional view of disability discrimination, transforming a sanction into a mechanism urging employers to meet their employees' needs (and not those identified by the occupational physicians). The new approach can overcome the perception of individuals with disabilities as perpetual victims.

The challenge here is to compare the U.S. definition of *reasonable accommodation* with its European equivalent²⁷⁰ and the "appropriate measures"²⁷¹ referred to in French labor law, usually in the context of a reassignment requirement.²⁷² In the private sector, case law rarely refers uniquely to the appropriate measures requirement or the nondiscrimination principle.²⁷³ This is particularly true in hiring, as more clearly shown in the deliberations of the HALDE:²⁷⁴ most often, litigation is based on the fact that employers violate their reassignment obligation, and the discrimination sanction is added. When employers do not accommodate, they pay a fine for not reaching the quota and having less than 6 percent of workers with disabilities among their employees.

In European law,²⁷⁵ "instead of requiring people with disabilities to conform to existing norms," the aim of the appropriate measures requirement is "to develop a concept of equality which requires adaptation and change."²⁷⁶ Eliminating the obstacles arising from the interaction between individuals with disabilities and their physical and social environments that prevent them from performing a specific task or job in a standardized manner²⁷⁷ is an unfamiliar concept in many EU countries and is not explicitly stated in EU law.²⁷⁸ The United Kingdom, Ireland, and Sweden are the only countries to have enacted law incorporating this idea prior to the passing of the Employment Equality Framework Directive 2000/78 and the development of case law on the subject.²⁷⁹ Recent European case law,

inspired by the UN Convention on the Rights of Persons with Disabilities, has been more vigilant concerning the scope of the European obligation to provide “appropriate measures”²⁸⁰ and its implementation by Member States.²⁸¹

The concept of appropriate measures, however, does not fully reflect the controversy over reasonable accommodation. The two main problems arising in enforcement involve the scope of the requirement and the meaning of the term *reasonable*, which is not necessarily synonymous with *appropriate*: what extent of accommodation is considered to place a “nonexcessive” burden on the employer, and what type of accommodation is necessary or effective? When considered under the lens of contract law, *appropriate* seems to carry a less precise meaning. In assessing the balance of contractual obligations, both the employer’s commitment to adjust the job and the adaptation required by the employee with a disability must be executed in good faith. This evaluation could be based on the legal reference to the “reasonable” nature of the accommodation.

In addition to “appropriate measures,” employers in France must comply with a requirement to reassign employees who are unable to perform their job due to an accident or illness, whether or not it was tied to their work. Is the legal basis the same for these two obligations, which both aim to protect employment?²⁸² Outside of those cases where a dismissal is found after the fact to be discriminatory and must be sanctioned by reinstatement,²⁸³ appropriate measures such as the reassignment requirement primarily seek the continuity of the employment relationship.²⁸⁴ However, unlike the failure to take appropriate measures, a failure to reassign employees who are unfit for their jobs²⁸⁵ does not always produce the same consequences. Some courts classify this failure to reassign as a dismissal without genuine and serious cause,²⁸⁶ while others pronounce the dismissal void.²⁸⁷ Some terminations of employment are voided when employers have not followed the proper procedure in reassigning the employee, in particular regarding mandatory medical examinations,²⁸⁸ or when employees have been subjected to harassment due to their incapacity for work²⁸⁹ or have been pressured to resign due to this inability.²⁹⁰

The application of both norms (a discriminatory violation of the duty to reassign) would constitute the appeal of this sanction—voiding the dismissal—for failure to reassign a qualified employee with a temporary, partial, relative, or permanent disability. The two obligations—to reassign and to take appropriate measures²⁹¹—could be combined and definitively abolish the idea that the inability to perform is a fault on the part of the challenged employee.²⁹² According to some scholars, the duty to reassign would amount to an obligation to combat discrimination.²⁹³ Some courts are clearly progressing in this direction, even if other elements are often presented to reveal the discrimination, such as a disciplinary sanction.²⁹⁴

The difficulty posed by this combination of concepts is that assessing whether an employer has fulfilled the duty to reassign depends on the recommendations of

the occupational physician and compliance with the proper procedure documenting the inability to work.²⁹⁵ This medical view of the inability²⁹⁶ as a deficiency with respect to employability²⁹⁷ is the basis on which reassignments²⁹⁸ are proposed. A preferable approach would be to examine how the work relationship is inadequately adapted to the qualified employee's needs.²⁹⁹

Is the difficulty caused by the fact that employability and, consequently, unemployment are not legally defined? An occupational physician determines whether an employee is fit for work by comparing the employee's ability with the position to be filled. There is no room here for a quantitative assessment of invalidity or reference to objective criteria. Full responsibility for the decision is borne by the physician, unless a labor inspector is called in. This is a performative procedure because there is no reference to a preexisting category.³⁰⁰ Does this "flexibility" afforded by the law, in allowing for case-by-case assessments, also create a risk of discrimination in assessing what measures are appropriate?

It is only when the employment relationship has been terminated that antidiscrimination law comes back into play.³⁰¹ A judge will pronounce void a dismissal that does not specify the impossibility of reassigning the employee to another position,³⁰² if the employee's health is given as justification of the dismissal,³⁰³ or a dismissal pronounced following an examination of the financial consequences of replacing the employee considered unfit for the job.³⁰⁴ So rather than promoting work arrangements enabling the moderate presence of certain more vulnerable workers in the organization through remote work, antidiscrimination law tends to focus only on the absence of these workers from the workplace. Its vision of the unfit employee is implicitly negative, in comparison to conceiving work adjustments as part of the appropriate measures required by antidiscrimination law. The Cour de Cassation is patently aware of this difference, since the Court ruled for the first time, in a case where the employer calculated working time on a less favorable basis for the employee who was absent on sick leave, that indirect discrimination on the basis of sickness had occurred.³⁰⁵

Finally, a comparison of "appropriate measures" and "reasonable accommodation"³⁰⁶ should not be confined to commonalities in the nature of the requirements they impose—an obligation to take action—while antidiscrimination law generally indicates a prohibition of action. Reasonable accommodation requires the employer, the judge, and the plaintiff alike to focus on an aspect that is increasingly discussed: the assessment of "capability"³⁰⁷ as the potential³⁰⁸ of a salaried employee with any form of disability or incapacity for work.³⁰⁹ This approach assesses the employee's freedom to access rights rather than promoting equality. In other words, the focus is on the individual's capability or potential to choose to perform a job rather than an inability or lack of freedom to choose to perform the job as others do. The logic is that since the work environment has not been set up to capture the potential of qualified (and only qualified) workers who can perform the essential (and not the marginal, nonessential) functions of the job, employers

then propose adaptations to the work or the work environment to benefit from the employee's potential, in accordance with the extent of the employee's needs and the company's resources. This balancing of interests does not stigmatize individuals by highlighting an inability to perform: from an antidiscrimination perspective, the duty to adapt should not fall solely on the employee's shoulders.

The French procedure for determining reassignment, based on a medical perspective of disability,³¹⁰ is inherently focused on these limitations of ability. A likely reason for this is an administrative desire to align this requirement with allowances and benefits provided for by employment, health care, and social security laws in France. A more explicit reference by judges to appropriate measures beyond the reassignment requirement would probably reinforce the legitimacy of the employee's expectations and rights. The motivation for taking these measures is not only the employee's health, protected by the social security regime, but the employee's inherent professional skills, which can be potentially enhanced by the "disability." However, recent French case law seems to maintain the focus on smoking out discrimination in collective bargaining agreements based on compensation for employees unfit to work.³¹¹

Discrimination and Harassment

Harassment can be a sign of individual and systemic discrimination,³¹² so by detecting harassment, employers can prevent some forms of discrimination. In France, the concepts of moral harassment and sexual harassment first developed outside the realm of discrimination law.³¹³

In the United States, harassment is inextricably tied to discrimination. As a judicial concept, it emerged in the context of racial discrimination³¹⁴ and was then expanded to include sexual harassment³¹⁵ and unwelcome conduct based on sex and other discriminatory grounds. The following conversations with scholars reveal the systemic nature of harassment, regardless of the ground of discrimination. Sexual harassment in the United States is not limited to quid pro quo harassment, in which a superior offers employment benefits in exchange for sexual favors, but also covers same-sex harassment.³¹⁶ Litigation also considers the later repercussions of harassment on employment,³¹⁷ whether or not the sexual relationship was consensual at a given time.

An evolution has been observed in French case law before the enactment of the new law of 2012,³¹⁸ which now addresses harassment incidents between colleagues occurring outside the workplace. France's definition of sexual harassment has been inspired by European law³¹⁹ and is also included in its criminal code.³²⁰ Article 2 of Directive 2006/54/EC defines sexual harassment as "where any form of unwanted verbal,³²¹ non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment." No repeat conduct is required. Since France adopted Law No. 2012-954

of August 6, 2012, Article L.1153-1 of the French Labor Code addresses two scenarios: (1) sexual harassment consisting of repeated words or behavior with sexual connotations that violate the dignity of a person due to their degrading or humiliating nature or create an intimidating, hostile or offensive situation for the person, or (2) conduct assimilated to sexual harassment, consisting of any serious form of pressure, even where there is no repetition, used with the real or apparent aim of obtaining an act of a sexual nature, whether for the benefit of the person engaging in the conduct or a third party.³²² It is noted that the first prong of the new definition refers deliberately to a “hostile situation” instead of a “hostile environment,” explicit in EU law, as if the word *environment* is too vague and reflects resistance on the part of the French legislature regarding the possible systemic nature of sexual harassment.

In French law, it was probably necessary to first take the route of discriminatory harassment based on sex in order to introduce the notion of sexual harassment focusing on the consequences of that harassment: namely, the creation of a hostile environment linked to a particular ground. The law of May 27, 2008, adapting antidiscrimination provisions in the French Labor Code, eliminated the need for harassment to be a repetitive act and included as prohibited discrimination any act based on a protected ground and any act with a sexual connotation suffered by a person with the aim or effect of violating his or her dignity or creating a hostile, degrading, humiliating, or offensive environment. Recent case law distinguishes separate and cumulative remedies for harassment and discrimination.³²³

Despite this cacophony of definitions, French courts have begun to address cases of sexual harassment having the same consequences as psychological harassment.³²⁴ But even at the European level, some commentators question the relevance of Europe’s definition of sexual harassment as only a form of sex discrimination.³²⁵ American scholars shine the light on issues such as abuse of authority, individual and institutional causes, and impact on employment relationships for the different forms of sexual harassment.

Vicki Schultz talks about sex segregation, stereotyping, and sexual harassment.

MARIE MERCAT-BRUNS: *Am I simplifying if I say that you have a structural view of the workplace and how it can exclude women or make it difficult for them to have significant careers, and you contrast that with a very strong focus in the United States on stereotypes? In France, there is less reflection on the impact of stereotypes. There is a criminal sanction for racist insults, but before passing the law, the prohibition of sexist comments was taken out.*

VICKI SCHULTZ: I think there are different ways of understanding stereotyping. I am less interested in things like the IAT Implicit Association test (Harvard) and the sort of cognitive approach to stereotypes, but I am terribly interested in stereotyping as a basic social psychological phenomenon. The way I view it, a focus on the harm of stereotyping is not at all at odds with the focus on the

structural forms of discrimination I have mentioned. In fact, the two support each other.

There is a large body of research by both sociologists and psychosociologists that I have drawn on fairly strongly in my own work, which shows the dynamic interaction between these two phenomena. For example, it's pretty widely understood where women, or any group, are part of numerically rare group; for example, there are very few women among the skilled trades. A handful of women and a zillion men are carpenters. You can expect those women to be stereotyped: stereotyping arises, is more prevalent, in contexts of segregation where a new group is numerically scarce. We don't really understand why this is the case; there are different theories why this would be the case. That is the bad news.

The good news is, in contexts where integration is achieved and there is a fifty-fifty representation of those two groups, the problems that are associated with stereotypes tend to decline. For example, there is research showing that when it comes to sexual harassment and sexual comments, which can be perceived as very threatening by women where they are numerically rare, [in environments] where women are well represented and well integrated, sexualized comments are not even perceived to be harassment. This suggests that segregation creates a background context in which the same behavior can be understood as threatening or sexist in the highly segregated environment or as nonsexist or nonthreatening in the context where women have greater numbers and perhaps more power. So I think it is very important to understand stereotyping both from the perspective of those who do the stereotyping and from the perspective, as social psychology is pursuing, of those who are subjected to stereotypes as well, and to understand the linkage between the cognitive and social phenomena of stereotyping and the larger structural context of segregation in which that conduct appears.

Comparative Perspectives

A comparative analysis of the concept of sexual harassment should begin with a brief look at how American legal scholarship and judicial decisions shaped harassment as a form of sex discrimination.³²⁶ This legal approach has sparked criticism from scholars for its role in crystallizing a certain perception of gendered identities and of sexuality between men and women.³²⁷ United States case law has enshrined two forms of sexual harassment: quid pro quo harassment, involving the solicitation of sexual favors,³²⁸ and harassment creating hostile environment.³²⁹

Vicki Schultz's ideas on how anti-harassment norms can form the core of a wider reflection on systemic discrimination are echoed in the following comments by employment discrimination expert Susan Sturm:

SUSAN STURM: Think about sexual harassment: sexual harassment is a problem that requires a systemic look—not only looking at the problem, but looking

at the workplace you would like to create. There is a need for women of color to be full participants in a workplace: they cannot fully participate if they are located in only one portion of the organization that is stereotyped in a certain way, which makes it more likely they will be harassed. You have to be able to ask those types of questions. The question of how to address this requires engaging on what it means to have a workplace environment that is responsive to the needs and interests of women, and employees more generally, even though that is not the employment discrimination question.

In her commentary and in-depth research on sexual harassment, Schultz explains that a correlation can be drawn between sex segregation in an occupation and the likelihood that women performing occupations in which they are a minority will be harassed. She also argues that too much emphasis on sexual conduct in harassment can be harmful to all employees.³³⁰ Her observations, which also draw on other sociological studies, have been used in litigation and challenge the sources and systemic effects of sexual harassment. According to Schultz, sex discrimination in employment tends to condition workplace behavior and is responsible for an occupational segregation by gender in which secretarial tasks are predominantly performed by women and construction site supervision is mainly reserved for men.³³¹ American scholars have exposed the dissuasive effect of harassment, which can discourage qualified candidates from claiming their rights to training or promotion in certain professional sectors, without any specific discriminatory act committed by the employer against women or minorities.³³²

What is interesting about this American approach, with respect to French and European law, is that it directs the analysis toward the nature of the work relationship and work organization causing the harassment rather than toward the individual injury suffered by the victim of the harassment. This is where the U.S. perspective intersects with new orientations in the French treatment of sexual harassment and psychological harassment,³³³ with the latter form involving a difference in treatment that is not necessarily tied to a prohibited ground.

As in the United States, legal definitions of sexual harassment in France and Europe have evolved and are no longer focused on the power imbalance between the harasser and the victim or the sexual nature of the harassing conduct but increasingly on the nature of the work relationship between the two parties.³³⁴ The new law also sanctioning the crime of sexual harassment³³⁵ provides a more explicit vision of the dynamic of sexual harassment. The new provisions filled the gap left when the Constitutional Council ruled on May 4, 2012, that the provisions on sexual harassment (Article 222–33) in the French Criminal Code were insufficiently precise and therefore unconstitutional.³³⁶

Regarding civil lawsuits, France has taken an important stride forward by moving past the traditional distinction between harassment occurring inside and outside the workplace. In the past, this distinction has allowed certain employers and

offenders to go unpunished,³³⁷ even though today the difference in age can contribute to the presumption of sexual harassment.³³⁸ Judicial decisions have enabled certain conduct to be defined as sexual harassment based not on the time or place it occurred but on the work relationship between the people involved.³³⁹

The fact that the roots of sexual harassment are embedded in the work relationship supports the need for workplace prevention initiatives.³⁴⁰ These initiatives can include an obligation to act: if both horizontal and vertical gendered segregation in the labor market is a factor of sexual harassment, then individual sexual practices are not being blamed. Instead, one should seek out the structural causes of sexual harassment, such as neglecting the interests of women in male-dominated work environments or favoring the interests of men in a female-dominated work environments. Without venturing into an analysis of occupations by gender, it can be observed that certain work environments are more hostile to women, in terms of meeting organization, working hours, access to training, and promotion, for example.

Psychological harassment, or “moral” harassment as it is known in France, has no legal counterpart in the United States, where harassment must be of a discriminatory nature to be actionable. However, an analysis of the consequences of harassment—harm to the employee’s dignity, physical and mental state, and future career—can be a part of a more general search for the causes of differences of treatment of employees.³⁴¹ Unlike an isolated act of discrimination, harassment pollutes and contaminates the work environment (the metaphor is important).³⁴² The development of sexual harassment laws in the United States and Europe crossed paths at this juncture. Laws prohibiting harassment based on race in the United States led to the recognition of sexual harassment as a difference in treatment affecting the work environment. Meanwhile, in France, moral harassment was first used as a framework to appraise the arbitrary deterioration of workplace relationships, before the European lead was followed and harassment was declared to be a form of discrimination.³⁴³

Where the French have innovated is in incorporating sexual harassment issues into the employer’s obligation to provide a safe and healthy workplace:³⁴⁴ this removes the need to prove the intent to harass and helps to destigmatize employees. There is no need to communicate complaints to the sexual harasser, as the Cour de Cassation has more recently specified.³⁴⁵ By requiring employees to take preventive action against harassment in the workplace and sanctioning management practices that harass employees, this approach adds a robust structural dimension to the French definition of harassment that seems stronger than its U.S. equivalent. To establish that harassment has occurred, instead of proving that the harasser is at fault, victims can provide more specific evidence of the existence of repeated acts of harassment³⁴⁶ and their repercussions and more easily obtain compensation. This sends a systemic message to employees: “If you produce this behavior, it is already too late; you have failed to identify working conditions leading to excessive

harm to workers, regardless of the specific profile of the harasser.” A work environment that is not designed to prevent such arbitrary acts is a hostile environment.³⁴⁷

Judges in the United States have invited employers involved in sexual harassment cases to implement measures to prevent such behavior. In instances of both hostile environment harassment and *quid pro quo* sexual harassment, employers were found guilty if there were no adequate grievance procedure accessible to the victim or to other people having witnessed the harassment. As a result, as the sociologist Frank Dobbin commented, most companies set up procedures to facilitate the in-house complaints process. These procedures were then used as a defense against individual claims of harassment.

As Lauren Edelman³⁴⁸ comments in her co-authored work and as Dobbin explains in his book on equal opportunity,³⁴⁹ while this type of bureaucratization of sex harassment claims does not necessarily prevent harassment from happening, it provides a potential defense for employers. The U.S. Supreme Court clearly supports this view: in a case of hostile environment harassment, it asked the lower courts to determine whether the employer had made efforts to prevent harassment by creating an effective grievance procedure for victims.³⁵⁰ The implication is that, in the United States, employers have an obligation of means, represented by grievance procedures, for example, and not an obligation of results, as is the case in France, in fighting workplace harassment. More generally, this comparison points to a need for caution with respect to company norms or procedures: they propose apparently systemic solutions to individual behaviors that probably have systemic roots. The apparent neutrality of an internal policy such as whistle-blowing procedures do not in themselves guarantee a workplace free of discrimination or harassment. Investigations can lead to intrusive questioning of workers without anticipating some of the consequences of these investigations, as the recent French case law has shown.³⁵¹ They serve as evidence of the “good faith” of the employer, seen to have limited power to prevent the risk of occasional deviant acts committed by individuals in the company.

The obligation in France to provide a certain result—a safe, healthy workplace—ensures that the mere existence of possibly superficial initiatives, to prevent psychosocial risks in the case of moral harassment, for example, is insufficient. Because employers have an obligation of result, if harassment is proven, judges can immediately conclude that the initiatives are insufficient. However, in recent cases of moral harassment, judges have considered that remedies can be evaluated separately: those based on a lack of prevention of the employer, on the one hand, and those compensating a personal harm to the worker, on the other.³⁵²

As a final observation, in Europe, workplace harassment is mainly interpreted as an attack on an employee’s dignity, which can also be disempowering.³⁵³ A dignity-oriented strategy might just be less stigmatizing in terms of gender: it emphasizes that the harm can be suffered by individuals regardless of sex. The incorporation of dignity into the definition of harassment was inspired by the

German constitutional tradition and its fundamental rights, although equality strategies were very effective in fighting harassment in the United States. Susanne Baer suggests combining these two concepts, equality and dignity, and promoting “a call for equal respect, for dignified equality. . . . Sexual harassment law, . . . from a comparative perspective, seems to be best grounded in this interrelated approach. The question is not ‘dignity or equality?’ but what features the law has to offer to guarantee individual dignity on an equal basis for all.”³⁵⁴

The following chapter will look at how these aspects of direct and indirect discrimination can be applied to various grounds of discrimination.