

## APPENDIX

The appendix first includes the links to the complete official biographies of the academics interviewed. Moreover, for a deeper understanding of the insights offered by these American scholars on employment antidiscrimination law, it is worthwhile to hear, in their words, how and why some of them became involved in antidiscrimination law.<sup>1</sup>

### LINKS TO COMPLETE BIOGRAPHIES

**Ruth Colker:**

<http://moritzlaw.osu.edu/faculty/professor/ruth-colker/>

and her blog: <http://moritzlaw.osu.edu/sites/colker2/>

**Frank Dobbin:**

<http://scholar.harvard.edu/dobbin>

**Chai Feldblum:**

<http://www.eeoc.gov/eeoc/feldblum.cfm>

**Richard Ford:**

<https://law.stanford.edu/directory/richard-thompson-ford/>

**Janet Halley:**

<http://www.law.harvard.edu/faculty/directory/10356/Halley>

**Christine Jolls:**

<http://www.law.yale.edu/faculty/CJolls.htm>

**Linda Krieger:**

<https://www.law.hawaii.edu/personnel/krieger/linda>

**Martha Minow:**

<http://hls.harvard.edu/faculty/directory/10589/Minow>

**David Oppenheimer:**

<https://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=135>

**Devah Pager:**

<http://sociology.fas.harvard.edu/people/devah-pager>

**Robert Post:**

<http://www.law.yale.edu/faculty/RPost.htm>

**Vicki Schultz:**

<http://www.law.yale.edu/faculty/VSchultz.htm>

**Reva Siegel:**

<http://www.law.yale.edu/faculty/RSiegel.htm>

**Susan Sturm:**

[http://www.law.columbia.edu/fac/Susan\\_Sturm](http://www.law.columbia.edu/fac/Susan_Sturm)

**Julie Suk:**

<http://www.cardozo.yu.edu/directory/julie-c-suk>

## PERSONAL NARRATIVES

Some scholars have chosen to share a personal narrative of their research or involvement in antidiscrimination law.

## RUTH COLKER

I started out by working in the Civil Rights Division of the Department of Justice. I taught at Tulane University Law School. I met Martha Kegel<sup>2</sup> and worked as a volunteer mainly in gay rights law pre-*Bowers* time.<sup>3</sup> I received an outstanding service award for having won a class action race discrimination lawsuit against the State of Georgia. I wrote to William Bradford, Assistant Attorney General in charge of civil rights, to donate the prize money to a project for the protection of the right to sexual privacy. I then won a Louisiana Attorney of the Year award for my work defending the rights of people with AIDS, based on the Rehabilitation Act, the law in force before the Americans with Disabilities Act (ADA) of 1990. Scott Burris, an expert in the issue of AIDS and law, opened my eyes to the limits of this old disabilities law. I talked to Chai Feldblum about the limits of the concept of disability and how it should introduce the AIDS question. In 1992 I had my first child, and I joined the faculty at the University of Pittsburgh School of Law teaching a course in disability discrimination following the enactment of the new ADA law in 1992. Chai Feldblum, who had helped to draft the act sent me her materials and I then wrote my own materials and published them. I continued my volunteer work defending people with disabilities and people suffering from AIDS and in the area of abortion rights. In 1997, I joined the faculty at Ohio State and became interested in the primary education for children with disabilities, following the birth of my second child in 1997, who has a disability. I ultimately sued on my own school district successfully so that my child could receive the auxiliary aids he needed to follow classroom instruction. Based on my experience and empirical research on the experience of others, I wrote a book about the limitations of the special education laws.

## FRANK DOBBIN

I've taught sociology at Harvard since 2003, and before that taught at Princeton for fifteen years. I did my undergraduate degree in sociology at Oberlin College, and my PhD at Stanford. At Stanford I began to study corporate equal opportunity programs when John Meyer,

Dick Scott, and Ann Swidler asked me to join a project on due process protections in organizations. My graduate student collaborator on that project was Laurie Edelman,<sup>4</sup> and she and I traveled around the San Francisco Bay Area interviewing personnel directors on the origins, and structures, or their due process procedures for workers. Those procedures guaranteed that workers had an internal venue for airing complaints about treatment at work, and we discovered that most of them had been implemented as part of an effort to uncover, and prevent, discrimination on the part of managers that contravened U.S. fair employment laws.

I had grown up in a household where the civil rights, anti-war, and feminist movements were part of daily life. We discussed these movements around the dinner table, and went to demonstrations in Boston (I grew up in a suburb), New York, and Washington. Boston itself underwent a contentious school desegregation program while I was growing up in a nearly all-white suburb, which I watched with great interest at close hand. Having seen the heyday of the civil rights movement as a small child, what really sparked my interest in the effects of the movement was the seeming disappearance of visible political action. By the end of the 1970s, the marches, the protests, and the urban conflagrations that had characterized the 1960s were all but gone. The struggle continued as school districts and workplaces sought to desegregate, but it had nearly vanished from the public political arena.

Throughout my career I've been interested in how the civil rights and feminist movements have been institutionalized: brought into organizations and transformed into bureaucratic procedures and corporate cultures. In 2009 I published a book, *Inventing Equal Opportunity* (Princeton University Press) that charts the history of the civil rights movement within the firm. And with my colleague Alexandra Kalev, and several current graduate students, I continue to study the effects of equal opportunity and diversity programs on the workforce.

#### RICHARD FORD

I went to law school in the 1980 and early 90s—the height of ideological conflict in law schools and at Harvard in particular. Students and faculty split into camps and I found Critical Legal Studies especially compelling, both because I shared the general left political outlook, because I had studied critical social theory in college, and most of all, because I thought the “crits” were the most honest and realistic about the nature of law and legal decision making. Whereas most approaches to law tried to make it seem as if legal decisions were principled and consistent, CLS frankly admitted that a lot of legal decision-making involved highly contested political questions and the law reflected ideological struggle—just as legislative and policy decisions reflected the political struggles of elected officials. My big influences at Harvard were Duncan Kennedy and Jerry Frug.

My study took two distinct paths: one, I wanted to learn to apply “fancy” continental social theory to legal questions and, two, I was very interested in urban issues: the development of cities as what you might call machines of capital formation and accretion, housing patterns, the sorting of labor, residential segregation, cultural production, etc. These diverged and came together in many ways—sometimes I did policy analysis (I worked on housing policy issues for the city of Cambridge) and other times I worked on jurisprudence. They came together in work on the ideological and material effects of territorial boundaries—a set of ideas I developed in several articles in my early career as a law professor.

I was always interested in issues of race, but unsatisfied with the way they were usually addressed in law. In particular, I disliked the identity politics that was all the rage in the '80s

and '90s—with its emphasis on emotion and subjectivity, its ideology of authenticity and narrow focus on individual injuries to dignity and status. But I also didn't trust the typical left alternative: class analysis that sought to describe the racial questions as nothing more than symptoms of class struggle. So I address race issues somewhat orthogonally, by looking at the systemic effects of legal rules on racial segregation in my work on local government, cities and territory. This allowed me to avoid a direct conflict with identity politics while developing a subtle critique of it.

My encounters with Janet Halley—my dear friend and former colleague at Stanford—inspired me to take on identity politics more directly. Janet's work had evolved from ambivalently but centrally feminist and gay rights advocacy to a much more skeptical and critical relation to these identity movements—to the point that she eventually would advocate “taking a break” from feminism.<sup>5</sup> As she was developing these ideas, I was working on a similar critique of identity politics and multiculturalism which eventually became my first scholarly monograph—*Racial Culture: A Critique*. Writing *Racial Culture* was cathartic and let me drop a lot of ideological dogma and break a lot of taboos. Writing the book was an important turning point in my work, because for the first time I put critical analysis first and ideology second. I also decided to write in more accessible and less jargony style and discovered—as George Orwell had argued—that trying to say something in the most straightforward and accessible way possible forces one away from obfuscation and bullshit. As a result a lot of ideological dogma that I had either never examined or avoided challenging out of solidarity had to go. Ultimately I decided it was okay to make arguments that might be called “conservative” if that was where my analysis led me. As a result, I wrote a book that was more ideologically eclectic and contrarian than I had intended.

My next book was written for a popular audience. My goal was to bring the insights of critical legal theory to what I thought had become an impoverished discussion of racial justice in the United States.

*The Race Card*<sup>6</sup> was the result—another ideologically contrarian book, but again, one I think presses the most important critical insights to the hilt: the premise underlying my entire analysis there is that racial injustice is largely the result of deeply imbedded systemic and structural inequities—not simply a matter of bigots acting with animus. I've continued to write in this vein, drawing on the CLS critique of rights in two new books soon to be published: *Rights Gone Wrong: How Law Corrupts the Struggle for Equality* and *Universal Rights Down to Earth*—which deals with the international human rights movement.<sup>7</sup>

I am currently working on several projects, one of which is a transnational overview of antidiscrimination law. I'm working with David Oppenheimer from U.C. Berkeley to create an online course on equality law, which will include videotaped interviews from various experts from around the world and taped lectures on antidiscrimination concepts. The course will be taught at Stanford and Berkeley in 2015 and we hope to offer it to other schools worldwide shortly thereafter.

#### JANET HALLEY

MM-B: *How has queer theory<sup>8</sup> inspired your work on law and power? For Europeans, it can be interesting to understand how legal theory can draw from other disciplines, sometimes in a very pragmatic way.*

JH: Let me say a couple of words how I experience the connection between queer theory and legal studies.

I came into legal studies having been trained in literary criticism. I got a PhD in English literature and while I was in literary studies we began to see the rise of queer theory in American thought generally.

Later on I went to law school and eventually decided I would be a legal academic. While I was in law school, long before I thought of becoming a law professor, there was a decision of the Supreme Court called *Bowers v. Hardwick*<sup>9</sup> that held that it was perfectly constitutional and not a violation of anyone's rights for a state to prohibit and to criminalize same-sex sodomy. I was strongly affiliated at that time with the gay rights bar. We were wanting to expand the rights of homosexuals and it was horrible living under *Bowers v. Hardwick*; it was a terrible decision. It was really a low point in the jurisprudence of the Supreme Court and many of us dedicated ourselves to getting it reversed.

The first thing that happened, though, was that lower courts started expanding it. The courts began to say: well, you can prohibit the conduct so you can also not hire people in the workplace who are likely to commit the conduct; the greater deprivation of rights includes the lesser. Now that's a move from conduct to identity and that expansion of *Bowers v. Hardwick*. In a way, the criminalization of sodomy was narrow: who is really going to get punished for committing sodomy? The police are never going to see you doing it, right? But you do need a job and so the courts were making *Bowers* much more expansive.

Where I came in was trying to understand the conduct/identity relationship. What was the relationship of an act to an identity? And as it happens, the French philosopher Michel Foucault gave me the key in his book *The History of Sexuality, Volume I*. Foucault helped me to understand how slippery and contingent the relationship between conduct and identity was.

I came in as a law professor still trying to do gay rights—my stance was, we need rights—but I was also dedicated to doing it using French critical theory. I wrote a whole bunch of articles on *Hardwick*; then Congress passed the “don't ask, don't tell policy” that said that you could be kicked out of the military if you showed a propensity to engage in same-sex conduct and created this whole semiotic system in the military, construing troops' behavior to detect manifestations of a propensity. So I came in analyzing these contraptions through the tools that were given to me by Foucault. The result was my book *Don't: A Reader's Guide to the Military's Antigay Policy*.

The thing that really astonished me was that, as I worked my way into these arguments, the rights claims weren't watertight; you could not find absolute decisive rights claims that everybody had to accept. The rights I thought we needed were not logically built into the law. I continually found a gap, a hole, a place where there needed to be a political move, there needed to be an alliance; there need to be some kind of decision on behalf of the judge or the legislator.

Our Constitution and our rights regime didn't mandate those rights; they just made them possible and that was just a severe surprise to me to see that and that made me understand how contingent legal rights are on politics. I had my loss of faith moment. That's when I turned from being a rights person to becoming a member of the critical legal studies movement which understands law as a contingent social network of practices rather than as a mandatory normative order.

So it was a process for me I had to move through these stages; first critical social and discursive theory was necessary and then the critical theory about law was necessary. I hope that was a clear answer.

DAVID OPPENHEIMER

I can't remember when I didn't want to be a civil rights lawyer. I grew up during the height of the Civil Rights movement, and the most heroic people of that time were ministers and lawyers. I knew I wasn't going to be a minister, so that left lawyer, and while I drifted from the path briefly from time to time, and taught high school before going to law school, I always returned to it.

When I graduated from law school (Harvard) I thought I'd open my own civil rights office in Berkeley or Oakland, California. But good luck kept getting in the way. First I was offered a clerkship with Rose Bird, the Chief Justice of the California Supreme Court (and a very courageous woman). Then I went to work for the California state agency that prosecuted civil rights cases, where I tried lots of cases. Then I was invited to design and direct a discrimination law clinic at Berkeley Law. I've been an academic ever since.

I've been teaching employment discrimination law, and then comparative anti-discrimination law, for over twenty-five years now. For several years I also consulted on anti-discrimination cases, and I still sit on the legal committee of the Northern California ACLU, but as my administrative and scholarly work has increased, I've mostly given up any practice. (Though I've kept up my bar membership in case a really righteous case comes along.)

Most of my writing now is on comparative anti-discrimination law, including the first American casebook in the field, which was published by Foundation in 2012, titled *Comparative Equality and Anti-Discrimination Law*.<sup>10</sup> Working with two U.S. coauthors and five contributing authors from Europe has broadened my vision, and I'd like to think our work on equality has helped many of our students enter the field as advocates and scholars. As to the value of studying comparative equality, I hope it helps us all get a little closer to Gandhi's talisman:

Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man [woman] whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him [her]. Will he [she] gain anything by it? Will it restore him [her] to a control over his [her] own life and destiny? In other words, will it lead to swaraj [freedom] for the hungry and spiritually starving millions? Then you will find your doubts and your self melt away.

DEVAH PAGER

I was born and raised on the island of Hawaii, a multiethnic community that boasts the title as the only American state which, in terms of its racial and ethnic composition, is a "majority minority." Hawaii has the highest rate of intermarriage in the United States, and, likewise, there is a tremendous amount of interpersonal mingling among subgroups. It was not until I arrived in Los Angeles for college that I witnessed the tremendous social and spatial segregation characteristic of most American cities. While UCLA was nestled in the

western hills, close to the homes of glamorous movie stars, just twenty minutes south and east were areas of concentrated poverty where Latino and African American communities were concentrated. The four years I spent in Los Angeles provided an education far beyond the classroom; it was here that my interest in racial inequality and discrimination first began.

In 1995, I was awarded a Rotary Ambassadorial Scholarship to pursue a master's degree in Sociology at the University of Cape Town in South Africa. During this year, I conducted research on post-apartheid education reform in a black township outside of Cape Town. The eighteen months I spent in South Africa during this critical period of transition (one year after the end of apartheid) provided an opportunity to witness the upheaval of deeply racialized institutions of social and political power. This formative experience abroad gave me new perspective on the issues facing American society, challenging me to consider both the unique and the universal in struggles of racial conflict.

In graduate school at the University of Wisconsin–Madison, I returned to a focus on racial inequality in the United States. But this time a new institution came to my attention. The incarceration rate in the United States had been growing steadily since the early 1970s, with its effects disproportionately felt by African American men. Nearly one in three young black men will spend time in prison by their early thirties. I wanted to understand the implications of this significant institutional intervention. In particular, I wanted to understand how the experience of incarceration affected subsequent employment opportunities, and how race interacted with criminal background in shaping employment trajectories. To study this question, I adopted an experimental approach to study hiring discrimination on the basis of race and criminal record. I hired young men to pose as job seekers and sent them all over the city—with matched resumes reflecting identical levels of education and work experience—to apply for real, low-wage jobs. The results were staggering. Those with criminal records were only half as likely to receive a callback or job offer relative to those with clean records. But even more surprising, a black candidate with a clean record fared no better than a white applicant who reported just having been released from prison. In the minds of these employers, being black seemed equivalent to having a felony conviction.

After completing my dissertation, I was awarded a Fulbright grant to spend the year in Paris. There I conducted research on the French criminal justice system, examining how the concentration of immigrants and their descendants in certain areas shaped the severity of punishment. France is a highly centralized country and it is often assumed that state-level bureaucracies like the criminal justice system function similarly irrespective of geography. By contrast, I found that the severity of punishment—rates of pretrial detention, convictions, and length of sentences—varied significantly across local areas, even after controlling for crime rates. The strongest predictor of this variation was the percentage of North African immigrants. This ecological analysis did not allow me to directly test mechanisms, and can only be considered suggestive of an underlying causal relationship. The difficulties of studying race in France leave one to wonder whether the absence of racial statistics reduces racial inequality or simply makes it harder to document.

At the end of that year I returned to the United States, teaching at Northwestern for two years and Princeton for nine years before moving to Harvard. During that time I resumed my experimental work on hiring discrimination in New York City. Once again, despite the

larger and more cosmopolitan context, we see similar rates of discrimination. The experimental method has been helpful in communicating the ongoing problems of discrimination because it produces clear and easy to interpret results. I continue to use these methods, in addition to seeking out complementary strategies for studying discrimination and its longer term consequences both for job seekers and employers.

REVA SIEGEL

Professor Reva Siegel is Nicholas deB. Katzenbach Professor at Yale University. Professor Siegel's writing draws on legal history to explore questions of law and inequality and to analyze how courts interact with representative government and popular movements in interpreting the constitution. Professor Siegel is a member of the American Academy of Arts and Sciences and an honorary fellow of the American Society for Legal History, and serves on the board of the American Constitution Society and on the General Council of the International Society of Public Law. In our interview, Siegel described the focus of her work.

RS: One distinguishing feature of my work on inequality law is that I bring legal historical background to the problem. I look at the way in which law deals with inequality dynamically, that is to say, in history over time. I am very much interested in processes of contestation, modification, and adaptation of regimes of status inequality. This is the framework in which I did much of my early work on the dynamic I call "preservation through transformation."

In that body of work, I sought to understand how persisting forms of group status inequality persist long after the society prohibits discrimination on the basis of race or sex. That was my own historical situation when I came into the legal academy: the society had prohibited race and sex discrimination and yet pervasive forms of social stratification along lines of race and sex persisted. I was fascinated by the coexistence of those two social facts. I became interested in looking at the development of inequality law in the past as a way of thinking about the logic of equality law in the present. I looked in the nineteenth century at how the abolition of slavery was followed by a Jim Crow regime of racial apartheid: a legal order that prohibited slavery and yet sanctioned new social arrangements that preserved the secondary position of African Americans in the United States.<sup>11</sup>

I also considered how the nation eliminated many of the old marital status rules for women and ended the disenfranchisement of women, and how women's social exclusion from politics and employment persisted through other social practices, often with the assistance of law.

Through this process of reflection on the past, I began to explore how status conflict over equality law can modernize the ways a society legitimates continuing forms of inequality.

The claim is not that nothing changes. The claim is not that all is equally bad, but rather only and more modestly that it is possible for much to change and fundamental forms of social stratification to persist in new forms. Looking to the past, we can see that law guaranteeing equality can play a role in rationalizing persisting inequality. The question is, what is the relationship? How might this dynamic persist in the present? It is a critical inquiry that forces us to ask whether laws guaranteeing equality break with the past, or whether the



enforcement of equality laws might preserve, and legitimate in new forms, parts of the past we claim to repudiate.

In the past, I have looked at that question as a way to explore the law of domestic violence, the law of harassment, and the law of marital property. And throughout my career questions of this kind have shaped the way I look at the evolution of equal protection doctrine concerning race in the United States.<sup>12</sup> Recently, I have carried these concerns with preservation through transformation into a recently published article that analyzes demands for religious liberty exemptions from laws governing women's health (in the areas of abortion, contraception, and assisted reproduction) and from laws guaranteeing equality to LGBT persons (in marriage and employment).<sup>13</sup>

#### JULIE SUK

Julie C. Suk is a Professor of Law at the Benjamin N. Cardozo School of Law–Yeshiva University in New York City, where she teaches comparative law, employment law, and civil procedure. She has been a visiting professor at the Harvard Law School, the University of Chicago Law School, and UCLA School of Law, and held research fellowships at Princeton University and the European University Institute. In our interview, Suk described her professional path.

JS: I arrived at law school in 2000 with two experiences that shaped my interest in comparative antidiscrimination law. First, I had begun doctoral work at Oxford in 1997 in political theory, focusing on normative debates about the cultural rights of minority groups. I had arrived as an American in the United Kingdom shortly after the racist murder of a young black teenager, Stephen Lawrence. The suspects were acquitted, after which the Home Secretary launched a public inquiry that eventually concluded that the police had been “institutionally racist.” The Stephen Lawrence Report, as it was known, included 70 reform recommendations to address institutional racism, not only in the police, but also in a wide range of public institutions. Although there were many analogues to the Stephen Lawrence case in the United States, the British state's response of opening up a national conversation about the subtle forms of discrimination known as “institutional racism” seemed novel. Years later, I returned to the U.S.-U.K. comparison on race relations in my article, “Antidiscrimination Law in the Administrative State” (*University of Illinois Law Review*).<sup>14</sup>

Second, I had studied English, American, and French literature as an undergraduate in the 1990s, having traveled to Paris to learn about the Négritude movement of the 1930s and its parallels to the Harlem Renaissance in the United States. I was struck by the different historical trajectories of the concept of race-blindness<sup>15</sup> in the two societies, as well as the emerging public consciousness in France of the problem of racial discrimination throughout the 1990s. After I became a law professor, I wrote several articles comparing French and American approaches to race discrimination: “Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law” (*American Journal of Comparative Law*, 2007), “Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict” (*Stanford Law Review*, 2007),<sup>16</sup> and “Procedural Path Dependence: Discrimination and the Civil-Criminal Divide” (*Washington University Law Review*, 2008).<sup>17</sup>

I came to the study of U.S. antidiscrimination law with the critical theoretical perspectives generated by comparison. On the one hand, the United States is often seen as

the global pioneer of antidiscrimination law; it was only after 2000 that many European countries passed laws against discrimination due to EU directives adopted in that year, and created administrative agencies to enforce antidiscrimination law. At the same time, these countries had other legal mechanisms for promoting equality, which have had mixed effects on minorities and women. My scholarship has focused on race and gender inequality and the solutions offered by law and public policy in different national context. Differences, however small, in constitutional tradition, institutional design, class structure, the history of religious and ethnic conflict, and social movements, can shape how law and public policy can protect or promote equality, and sometimes undermine it. At Yale Law School, I learned constitutional antidiscrimination law from Reva Siegel and Kenji Yoshino, the American civil justice system from Judith Resnik, and comparative law from Jim Whitman. These experiences put me on the path of trying to highlight the parts of a legal regime that may seem natural to its inhabitants, but turn out not to be universal, and in fact uniquely good or bad, when considered in global perspective.

This method deepened my appreciation for the wide range of institutional, political, and social factors that contribute to, and undermine, the pursuit of equality. In this vein, my research is now focusing on the interaction between laws prohibiting sex discrimination, on the one hand, and social welfare policies that protect the rights of mothers in the workplace, on the other hand, as manifested in my article, "Are Gender Stereotypes Bad for Women?" (*Columbia Law Review*, 2010).<sup>18</sup> My more recent work examines the puzzle of gender and race quotas in several constitutional orders in Europe and Latin America.<sup>19</sup> U.S. antidiscrimination law regards quotas as discrimination; but several other constitutional democracies are reconciling quotas with antidiscrimination law, and embracing them as necessary to legitimize democratic equality. The purpose of my work is to show how the success and failures of antidiscrimination law depend on background conditions that vary across legal cultures, such as the role of the state in providing social welfare, regulating businesses, prohibiting offensive speech, and promoting shared ideas of the good life. Viewing American equality in comparison with European approaches, particularly those arising from strong republican state traditions like the French, can develop a new language for critiquing the current impasse in U.S. antidiscrimination law, without fully embracing European conceptions of equality.