



**BERKELEY CENTER ON
COMPARATIVE EQUALITY
& ANTI-DISCRIMINATION
LAW**

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Dear friends and colleagues,

Welcome to the March issue of the electronic journal of the [Berkeley Center on Comparative Equality & Anti-Discrimination Law](#). In January 2020 we began distributing abstracts and links to newly published papers ourselves, instead of engaging the Social Science Research Network to distribute them for us. We believe this will allow us to substantially expand the scope of the scholarly material we publicize and provide a more interesting journal. You are welcome to share this journal to anyone you believe would find it interesting.

The journal is intended to inform our members about interesting new papers in our field, by distributing abstracts and links to the papers. We will produce the journal here at Berkeley Law, with co-editors rotating each month, assisted by our editorial assistants, Berkeley student Talia Harris and Nicole Khoury.

This issue was edited by Mark Bell and Nausica Palazzo. Thank you Mark and Nausica.

Warm regards,

David

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Brierly-Hay, Monica; Liam Elphick; [Riding Towards Inclusion in the Film Industry: Quotas and Special Measures Under Australian Discrimination Law](#). U of Melbourne Legal Studies Research Paper No. 859

Diversity has long been a problem in the film industry, whether for actors, directors, or crew members. Various groups are under-represented in film, particularly women, persons with a disability, LGBTI+ persons, and those from diverse racial, cultural and linguistic backgrounds. To address this, Academy Award winner Frances McDormand used her 2018 Oscars acceptance speech to draw attention to inclusion riders. An inclusion rider is a clause that actors can incorporate into their contracts with film companies to require the film company to hire a more diverse range of candidates both on- and off-screen in a way that reflects the demography of a film's setting. Various actors and film companies have since flagged their plans to implement inclusion riders, yet their lawfulness remains largely unexamined. We consider how Australian discrimination law would apply to inclusion riders, focusing particularly on the 'special measures' provisions found in the four federal discrimination Acts. These provisions exempt otherwise unlawful discriminatory acts where they seek to further the opportunities of historically disadvantaged groups, thereby allowing for the use of quotas and other positive action in certain circumstances. We argue that inclusion riders would likely be lawful under these provisions, but that the inconsistency and complexity of special measures provisions in Australia renders further reform necessary in order to encourage and empower actors and film companies to take up inclusion riders.

de Brouwer, Anne-Marie; Eefje de Volder; Christophe Paulussen: [Prosecuting the Nexus between Terrorism, Conflict-Related Sexual Violence and Trafficking in Human Beings Before National Legal Mechanisms: Case Studies of Boko Haram and Al-Shabaab](#). T.M.C. Asser Institute for International & European Law, Asser Research Paper 2020-03.

UN Security Council Resolution 2331 (2016) recognizes that 'acts of sexual and gender-based violence, including when associated to trafficking in persons, are known to be part of the strategic objectives and ideology of certain terrorist groups, used as a tactic of terrorism and an instrument to increase their finances and their power through recruitment and the destruction of communities.' In the same resolution, the Council noted that such trafficking, particularly of women and girls, 'remains a critical component of the financial flows to certain terrorist groups' and is 'used by these groups as a driver for recruitment'. Boko Haram and Al Shabaab are among the main terrorist groups that have



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used human trafficking (including for sexual exploitation) and conflict-related sexual violence as tactics of terrorism, also called ‘sexual terrorism’. This article will: 1) explain the nexus between these three crimes; 2) focus on its different manifestations in the context of these terrorist organizations; and 3) reflect on the possibilities for national criminal prosecution. To assist in the fight against impunity and increase accountability, this article provides suggestions to facilitate the successful prosecution of sexual terrorism in a more survivor-centric way. This article is a working draft, the final version of which will be included in the Special Issue on Justice and Accountability for Sexual Violence in Conflict: Progress and Challenges in National Efforts to Address Impunity, being edited by both the Journal of International Criminal Justice and the UN Team of Experts on the Rule of Law and Sexual Violence in Conflict.

Fleischer, Miranda Perry; Daniel Jacob Hemel: [The Architecture of a Basic Income.](#) University of Chicago Law Review, 2020, Forthcoming

The notion of a universal basic income (“UBI”) has captivated academics, entrepreneurs, policymakers, and ordinary citizens in recent months. Pilot studies of a UBI are underway or in the works on three continents. And prominent voices from across the ideological spectrum have expressed support for a UBI or one of its variants, including libertarian Charles Murray, Facebook co-founder Chris Hughes, labor leader Andy Stern, and — most recently — former President Barack Obama. Although even the most optimistic advocates for a UBI will acknowledge that nationwide implementation lies years away, the design of a basic income will require sustained scholarly attention. This article seeks to advance the conversation among academics and policymakers about UBI implementation.

Our prior work has focused on the philosophical foundations of a basic income; here, we build up from those foundations to identify the practical building blocks of a large-scale cash transfer program. After canvassing the considerations relevant to the design of a UBI, we arrive at a set of specific recommendations for policymakers. We propose a UBI of \$6000 per person per year, paid to all citizens and lawful permanent residents via direct deposit in biweekly installments. We argue — contrary to other UBI proponents — that children and seniors should be included, that adjustments for household size and cost of living should be rejected, that recipients should have a limited ability to use future payments as collateral for short- and medium-term loans, and that the Social Security Administration should carry out the program. We also explain how a UBI could be financed through the consolidation of existing cash and near-cash transfer programs as well as the imposition of a relatively modest surtax on all earners.



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Importantly, the building blocks of a UBI do not necessarily determine its outward face. By this, we mean that economically identical programs can be described in very different ways — e.g., as a UBI with no phaseout, a UBI that phases out with income, and a “negative income tax” — without altering any of the essential features. To be sure, packaging matters to the public perception of a UBI, and we consider reasons why some characterizations of the program may prove more popular than others. Our article seeks to sort the building blocks of a UBI out from the cosmetic components, thereby clarifying which elements of a UBI shape implementation and which ones affect only the outward appearance.

Havelková, B.: [Women on Company Boards: Equality Meets Subsidiarity](#). (2019) 21 *Cambridge Yearbook of European Legal Studies* 187

This article explores the justifications for, and objections to, the proposed European Union ‘women on company boards’ Directive. It notes that Member State opposition to the measure had different emphases. The new, post-socialist Member States that intervened prominently questioned the Commission’s understanding of the underlying social reality of gender inequality and the measure’s focus on results, while the old Member States that intervened raised mainly the issue of subsidiarity and challenged the need for legislative action, and/or particularly the need for legislative action at EU level. The article further argues that the Commission weakened its case by emphasising economic rationales for the measure, and submits that a principled justification fits the proposal better. Finally, the article argues that subsidiarity-related arguments are available also to justify non-cross-border, non-economic projects, such as that of gender equality.

Hellman, Deborah: [Sex, Causation, and Algorithms: Equal Protection in the Age of Machine Learning](#). Virginia Public Law and Legal Theory Research Paper No. 2020-26.

U.S. constitutional law prohibits the use of sex as a proxy for other traits in most instances. For example, the Virginia Military Institute [VMI] may not use sex as a proxy for having the “will and capacity” to be a successful student. At the same time, sex-based classifications are constitutionally permissible when they track so-called “real differences” between men and women. Women and men at VMI may be subject to different training requirements, for example. Yet, it is surprisingly unclear when and why some sex-based classifications are permissible and others not. This question is especially important to examine now as the use of predictive algorithms, some of which rely on sex-based classifications, is growing increasingly common. If sex is predictive of some trait of



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interest, may the state – consistent with equal protection – rely on an algorithm that uses a sex-based classification?

This Article presents a new normative principle to guide the analysis. I argue that courts ought to ask why sex is a good proxy for the trait of interest. If prior injustice is likely the reason for the observed correlation, then the use of the sex classification should be presumptively prohibited. This Anti-Compounding Injustice principle both explains and justifies current doctrine better than the hodge-podge of existing rules and concepts and provides a useful lens through which to approach new cases.

Junker, Matthew: [Ending LGBTQ Employment Discrimination by Catholic Institutions.](#) (2019) 40 *Berkeley Journal of Employment and Labor Law* 403.

This note examines the legal doctrines that enable Catholic institutions in the United States to discriminate against LGBTQ employees and urges these institutions to adopt an equitable policy modeled after the Catholic Church in Germany. Part I first argues that terminating LGBTQ employees contradicts the Church's call to respect LGBTQ people and undermines the Church's shifting pastoral emphasis under Pope Francis. Part II then surveys the gaps in non-discrimination laws covering sexual orientation and gender identity. Part III reviews the First Amendment ministerial exception that protects religious institutions from employment discrimination claims. Part IV examines the religious exemptions in Title VII. Part V then discusses Catholic institutions' widespread use of morals clauses in employment contracts. After detailing the narrow legal recourse created by inadequate non-discrimination law, religious exemptions, and morals clauses, Part VI advocates for Catholic institutions to adopt an equitable employment policy like the Catholic Church in Germany and identifies likely allies among diocesan bishops, religious institutes, and labor unions.

Lin, Shirley: ['LGBTQIA + Discrimination' in Employment Discrimination Law & Litigation.](#) "Chapter 27: LGBTQIA+ Discrimination" in *Employment Discrimination Law & Litigation*, Thomson West 2019

This Chapter in *Employment Discrimination Law & Litigation* provides guidance in asserting and defending the employment rights of lesbian, gay, bisexual, transgender, queer, intersex, and asexual or agender people (LGBTQIA+). Increasing awareness and acceptance of LGBTQIA+ individuals in U.S. society, does not mean that society has not always been sexually diverse, or that sex has only recently been recognized as socially, rather than "biologically" defined. The Supreme Court's recognition that the Due Process



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and Equal Protection Clauses must protect the right of same-sex couples to marry in *Obergefell v. Hodges* reflected on the continuing prejudices in “law and social convention” that have prevented equality and dignity from reaching everyone. *Obergefell* aspired to look beyond prejudice in its opening line: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”

Title VII surpasses constitutional doctrine in recognizing whether an impermissible trait — whether because of sex, or also race, color, religion, or national origin — played a motivating role, or factor, in workplace misconduct. Yet constitutional theories provide a baseline of rights, as in the traditional theory of sex stereotyping, which relies on both expression or perceptions of our sex and gender. Accordingly, notions about sex drive employer’s or coworkers’ desire to impose conformity. The Court observed, “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” Workplace law has evolved through Congressional amendment and judicial interpretation, and where gaps have appeared through narrow views, the federal executive and local governments have served as models.

The law has been slower than medical and social sciences in acknowledging that “sex,” rather than an immutable binary of female or male, is comprised of several characteristics including: genetic or chromosomal sex, gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex/gender of rearing, and gender identity (i.e., self-identified sex). Reflecting understanding and greater visibility of sexual and gender diversity, governments acknowledge in their administrative laws with respect to access to updating one’s sex marker or inclusion of non-binary sex markers.

Despite a dramatic increase in public acceptance of LGBTQIA+ individuals in recent decades, during the administration of President Trump, public tolerance for accepting LGBTQIA+ individuals declined. Because there is no comprehensive federal protection against sexual orientation discrimination, and because LGBTQIA+ people face significant hostility and misunderstanding from a variety of social forces, lawyers pursuing for equal treatment for their LGBTQIA+ clients must innovate and educate as well as advocate. Not only does discrimination in the workplace harm individual workers, it stigmatizes LGBTQIA+ people as a group.

Fortunately, although many battles remain to be fought, there are several trends in favor of civil rights for, and equal treatment of, LGBTQIA+ people, such as the right to marry



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embraced by the U.S. Supreme Court. Most important is the shattering of the silence about the reality and diversity of the lives of LGBTQIA+ people. As more and more people become aware of the LGBTQIA+ community, neighbors, family members, friends, and professionals, withholding basic civil rights protections in employment becomes increasingly untenable.

Ringelheim, Julie: [The Burden of Proof in Antidiscrimination Proceedings. A Focus on Belgium, France and Ireland.](#) European Equality Law Review, No 2, 2019

This article aims to clarify the meaning and operation of the rules governing the burden of proof in discrimination cases under EU law. In addition to the text of the anti-discrimination directives, it looks at the guidelines provided by the Court of Justice of the European Union and at the application of these rules at the domestic level, focusing on three Member States: Belgium, France and Ireland.

Section 1 describes the basic operation of the burden of proof provision inserted in EU anti-discrimination directives, clarifies the respective obligations it entails for claimants and respondents and highlights differences resulting from whether direct or indirect discrimination is at stake. Section 2 considers in more detail the means of evidence that can be used to establish discrimination, with particular emphasis on statistics and situation testing. Section 3 examines the issue of complainants' access to information held by the alleged discriminator and Section 4 offers conclusions.

Schoenbaum, Naomi: [The New Law of Gender Nonconformity.](#) Minnesota Law Review, Vol. 105, Forthcoming

A central tenet of sex discrimination law is the protection of gender nonconformity: unless a feature of biological sex requires it, regulated entities may not expect that individuals will conform their gender performance to the stereotypes of their sex. This doctrine is critical to promoting the antistereotyping aims of sex discrimination law by allowing gender nonconformers from aggressive women to caregiving fathers to challenge expectations that would limit them to the gender performance that accords with their sex. More recently, courts have extended gender nonconformity protection to transgender persons in cases where discrimination is due to the transgender person's gender performance. The Supreme Court will consider this new law of gender nonconformity this term in *EEOC v. R.G. & G.R. Harris Funeral Homes*, which asks whether sex discrimination law of the workplace covers transgender discrimination.



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Notwithstanding its partial success, the gender nonconformity doctrine is the wrong path for pursuing transgender rights. The doctrine has led to losses when transgender persons are discriminated against not for their gender performance, but for seeking recognition as their identified sex rather than the sex they were assigned at birth. Transgender plaintiffs are likely to continue to lose under the doctrine when seeking such recognition in the long list of contexts—like bathrooms, dress codes, sports, schools, and beyond—that are still lawfully sex segregated. Even transgender plaintiffs' successes under the doctrine are Pyrrhic victories. Under the gender nonconformity doctrine, a plaintiff who was designated male at birth but who identifies as female is an effeminate man rather than a woman. The doctrine thus reinforces the notion that transgender persons are their birth-designated sex, contrary to substantial medical and legal authority, and to the claims of transgender persons seeking recognition as their identified sex. And treating transgender plaintiffs as gender nonconformers risks harm not only to transgender rights, but to protection for gender nonconformity, by raising the bar to prove such claims, even in paradigm cases. Regardless of the outcome in *Harris*, this Article has implications for transgender rights throughout sex discrimination law.

These losses and harms are not inevitable. They all stem from one error—misunderstanding transgenderism as a matter of gender rather than sex—that can be corrected. As a few courts have suggested, discrimination on the basis of seeking recognition for one's identified sex is discrimination on the basis of sex. Contrary to the concerns of some courts and scholars, extending protection to transgender discrimination would advance rather than undermine the antistereotyping aims of sex discrimination law. Doing so under the right theory can protect transgender persons while promoting sex discrimination law's historic role in fighting sex stereotypes.

Trispiotis, Ilias: [Religious Freedom and Religious Antidiscrimination](#). (2019) 82 *Modern Law Review* 864.

This article develops a theoretical framework that prompts a new understanding of the role of religious freedom and religious antidiscrimination in human rights law. Proceeding from the prevailing theoretical and doctrinal uncertainty over the relationship between the two rights, which are currently seen as either synonymous or as distinct and in competition, the article develops an account of the moral right to ethical independence and argues that religious freedom and religious antidiscrimination share their main normative basis on that moral right. However, religious freedom and religious antidiscrimination have different



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emphasis, and both are essential to secure fair background circumstances for the pursuit of different individual plans of life. The proposed framework illuminates the relationship of individual and collective aspects of religious freedom with discrimination law. The analysis has crucial implications for human rights interpretation in cases involving state interference with liberty, in relation to religion or belief, and more broadly.

Ward, Angela: [The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?](#) (2018) 20 *Cambridge Yearbook of European Legal Studies* 32.

This article explores the influence of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union in the development of EU equal treatment law, with emphasis on forms of discrimination precluded by Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. The author contends that although Articles 20 and 21 are primary measure of EU law, their impact in the development of case law elaborated pursuant to the Directives is relatively muted. This may have stunted the development of jurisprudence on the relationship between Articles 20 and 21 of the Charter, and rules contained in Title VI of the Charter governing its interpretation and application, such as Article 52(3) on the relationship between the Charter and the European Convention on Human Rights, and Article 52(1) on justified limitations. The author forewarns against the emergence of incoherence in the case law in this context, and with respect to the role of Articles 20 and 21 in disputes over the meaning of Directives 2000/43 and 2000/78 and calls for fuller reflection on Charter rules in disputes based on an allegation of discrimination.

Ward, Angela; Jacquelyn MacLennan: [Citizenship and Incremental Convergence with Fundamental Rights?](#) (2019) *Cambridge Law Journal* 283.

This article examines the decision of the Court of Justice of the European Union in Case C-673/16 *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* on the rights to free movement within the EU for a married same-sex couple.



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