



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

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Dear friends and colleagues,

Welcome to the May 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 students Talia Harris and Nicole Khoury.

This issue was edited by Petra Foubert and Angelo Capuano, with assistance from Berkeley students Talia Harris and Nicole Khoury. Thank you.

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Areheart, Bradley A.: [Organizational Justice and Antidiscrimination](#). 104 *Minnesota Law Review* 1921 (2020)

Despite eighty years of governmental interventions, the legal system has proven ill-equipped to address workplace discrimination. Potential plaintiffs are reluctant to file discrimination claims for a host of social and economic reasons, and the relatively few who do file face steep structural barriers. This Article argues that the most promising way to curb workplace discrimination is not through amending statutes or trying to change the behavior of individual bad actors; instead, we must modify the workplace itself. Specifically, this Article argues that Organizational Justice—a theory empirically grounded in behavioral science—provides novel guidance for how to proactively restructure workplace policies around the principles of fairness and equity. This Article further claims, based upon empirical evidence, that Organizational Justice can do the work of antidiscrimination by: (1) decreasing discrimination in the first place, (2) moderating the effects of discrimination, and (3) increasing internal reporting of harassment and discrimination. Finally, this Article provides insights for how to design policies that promote both actual justice and perceptions of justice in the workplace.

Bagenstos, Samuel R.: [Legitimacy and Agency Implementation of Title IX](#). *Harvard Journal of Law and Gender*, Vol 42 (2020)

Because Title IX of the Education Amendments of 1972 involves a subject that remains highly controversial in our polity (sex roles and interactions among the sexes more generally), and because it targets a highly sensitive area (education), the administration of that statute by the Department of Education's Office for Civil Rights has long drawn criticism. The critics have not merely noted disagreements with the legal and policy decisions of the agency, however. Rather, they have attacked the agency's decisions for being illegitimate—for reflecting the agency's improper imposition of value judgments on the statute. Three key applications of Title IX have drawn the most controversy in this regard: gender equity in intercollegiate athletics; transgender students' rights; and sex-based harassment and assault on college campuses. This symposium essay argues that the critique is misplaced. One may agree or disagree with OCR's applications of Title IX in these three key areas. But these applications are not illegitimate. To the contrary, they are implementation decisions made consistent with the longstanding "core" conception of discrimination — intentional disparate treatment. These decisions are inherently contestable, because even the "core" conception can be instantiated in many ways. But there are strong reasons to believe that OCR is best positioned to choose which instantiations to adopt. This essay thus shows how disputes over Title IX implicate



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broader questions of what discrimination means, as well as broader debates involving the legitimacy of the administrative state.

Banović, Damir: [Philosophical and Legal Foundations for LGBT Rights](#).

The article deals with philosophical and legal foundations for LGBT rights as two separate, but important ways of conceptualizing human rights. It practically seems impossible to specify what specific would that be in order to base LGBT rights different from any other individual human rights. Theoretically, I follow conceptions of human rights (and not specific conceptions). This is one of the important premises but also one of the conclusions. What seems to be a necessary step is to critically read concepts of sexuality, marriage, relationships, human goods, human nature etc. influenced both by philosophy of morals and science and to apply this different understanding in the already existing naturalistic and political concepts of human rights. Human dignity, diversity, autonomy, freedom, human nature play an important role both in explaining and founding human rights (of LGBT people).

Bartos, Vojtech; Michal Bauer; Jana Cahlikova; and Julie Chytilová: [Covid-19 Crisis Fuels Hostility Against Foreigners](#). Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2020-03

Intergroup conflicts represent one of the most pressing problems facing human society. Sudden spikes in aggressive behavior, including pogroms, often take place during periods of economic hardship or health pandemics, but little is known about the underlying mechanism behind such change in behavior. Many scholars attribute it to scapegoating, a psychological need to redirect anger and to blame an out-group for hardship and problems beyond one's own control. However, causal evidence of whether hardship triggers out-group hostility has been lacking. Here we test this idea in the context of the Covid-19 pandemic, focusing on the common concern that it may foster nationalistic sentiments and racism. Using a controlled money-burning task, we elicited hostile behavior among a nationally representative sample ($n = 2,186$) in a Central European country, at a time when the entire population was under lockdown and border closure. We find that exogenously elevating salience of thoughts related to Covid-19 pandemic magnifies hostility and discrimination against foreigners, especially from Asia. This behavioral response is large in magnitude and holds across various demographic sub-groups. For policy, the results underscore the importance of not inflaming racist



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sentiments and suggest that efforts to recover international trade and cooperation will need to address both social and economic damage.

Bell, Mark: [People with intellectual disabilities and labour market inclusion: What role for EU labour law?](#) *European Labour Law Journal* 2020, Volume: 11 issue: 1, page(s): 3-25. Article first published online: October 21, 2019; Issue published: March 1, 2020

People with intellectual disabilities occupy a peripheral position in the labour market. They have low rates of participation in employment and this often takes the form of sheltered employment in settings segregated from persons without disabilities. Although their working lives have received limited attention in legal scholarship, this article argues that law can play a positive role in fostering greater inclusion. Taking into account the UN Convention on the Rights of Persons with Disabilities, this article analyses EU legislation and case law in order to identify how these apply to those working in sheltered employment and how they may assist in tackling barriers to participating in the open labour market. While EU labour law already contains measures that have the potential to improve the position of people with intellectual disabilities, the article identifies scope for enhancing the effectiveness of these instruments.

Carbone, June; William K. Black: [The Problem with Predators](#). 43 *Seattle University Law Review* 441 (2020)

Both corporate theory and sex discrimination law start with presumptions that CEOs seek to advance legitimate ends and design the internal organization of business enterprises to achieve such ends. Yet, a growing literature questions why CEOs and boards of directors nonetheless select for Machiavellianism, narcissism, psychopathy, and toxic masculinity, despite the downsides associated with these traits. Three scholarly literatures—economics, criminology, and gender theory—draw on advances in psychology to shed new light on the construction of seemingly dysfunctional corporate cultures. They start by questioning the assumption that CEOs—even CEOs of seemingly mainstream businesses—necessarily seek to advance “legitimate” ends. Instead, they suggest that a persistent issue is predation: the exploitation of asymmetries in information and power to the disadvantage of shareholders, creditors, customers, or employees. These literatures then explore how such CEOs may rationally choose to employ seemingly dysfunctional practices, such as “masculinity contests,” which reward employees more likely to buy into ethically dubious activities that range from predatory lending to sexual harassment. This



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Article maintains that questioning the presumption of legitimacy has profound and largely unexplored implications for corporate theory and anti-discrimination law. It extends the theory of “control fraud” central to white-collar criminology to a new concept of “control predation” that includes conduct that is ethically objectionable, if not necessarily illegal. This Article concludes that only by questioning the legitimacy of these practices in business terms can gender theory adequately address women’s workplace equality.

Chowdhury, Shyamal; Evann Ooi; and Robert Slonim: [Racial Discrimination and White First Name Adoption: Evidence from a Correspondence Study in the Australian Labour Market](#). IZA Discussion Paper No 13208

We design and implement a correspondence study where we sent fictitious résumés with Chinese names and White names in response to both high-skilled and low-skilled job advertisements. Consistent with similar research elsewhere, we find that there is a large gap in getting interview offers when résumés with first and last Chinese names are used compared to résumés with White first and last names. To tease apart whether the gaps can be better explained by statistical or taste-based discrimination, we also sent out résumés of 'Adopters' with a Chinese last name but White first name. The benefit of having an adopter name was economically meaningful, reducing the gap by about the same amount as would occur if the applicant with a Chinese first and last name had instead received an additional year of honours education. To examine the extent and nature of discrimination, we collected two data sets with administrative population statistics. The administrative information shows that Adopter names signal different characteristics, including educational outcomes and parent background which is consistent with statistical discrimination. In addition, the pool of Chinese applicants is a mixture of international and domestic applicants with the domestic pool being higher achievers whereas the international applicants are much lower achievers. This mixture might be disadvantaging the domestic pool and providing an economic motive for becoming an Adopter. We discuss how our results may help formulate policies for parental investments and employers' education to reduce employment and wage gaps observed between minorities and majorities in labour markets.

Donley, Greer; Beatrice Chen; and Sonya Borrero: [The Legal and Medical Necessity of Abortion Care Amid the COVID-19 Pandemic](#). Journal of Law & the Biosciences, Forthcoming



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In response to the COVID-19 pandemic, states have ordered the cessation of non-essential healthcare. Unfortunately, many conservative states have sought to capitalize on those orders to halt abortion care. In this short paper, we argue that abortion should not fall under any state's non-essential healthcare order. Major medical organizations recognize that abortion is essential healthcare that must be provided even in a pandemic, and the law recognizes abortion as a time-sensitive constitutional right. Finally, we examine the constitutional arguments as to why enforcing these orders against abortion providers should not stand constitutional scrutiny. We conclude that no public health purpose can be served by this application because abortion uses less scarce resources and involves fewer contacts with healthcare professionals than prenatal care and delivery assistance, which is continuing to be provided in this public health emergency.

Epstein, Deborah: [Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment.](#)

For decades, federal and state laws have prohibited sexual harassment on the job; despite this fact, extraordinarily high rates of gender-based workplace harassment still permeate virtually every sector of the American workforce. Public awareness of the seriousness and scope of the problem increased astronomically in the wake of the #MeToo movement, as women began to publicly share countless stories of harassment and abuse. In 2015, the Equal Employment Opportunity Commission's Task Force on the Study of Harassment in the Workplace published an important study analyzing a wide range of factors contributing to this phenomenon. But the study devotes only limited attention to a factor that goes straight to the heart of the problem: our reflexive inclination to discount the credibility of women, especially when those women are recounting experiences of abuse perpetrated by more powerful men. We will not succeed in ending gender-based workplace discrimination until we can understand and resist this tendency and begin to appropriately credit survivors' stories.

How does gender-based credibility discounting operate? First, those charged with responding to workplace harassment—managers, supervisors, union representatives, human resource officers, and judges—improperly discount as implausible women's stories of harassment, due to a failure to understand either the psychological trauma caused by abusive treatment or the practical realities that constrain women's options in its aftermath. Second, gatekeepers unjustly discount women's personal trustworthiness, based on their demeanor (as affected by the trauma they often have suffered); on negative cultural



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stereotypes about women's motives for seeking redress for harms; and on our deep-rooted cultural belief that women as a group are inherently less than fully trustworthy.

The impact of such unjust and discriminatory treatment of women survivors of workplace harassment is exacerbated by the larger "credibility economy"—the credibility discounts imposed on many women-victims can only be fully understood in the context of the credibility inflations afforded to many male harassers. Moreover, discounting women's credibility results in a particular and virulent set of harms, which can be measured as both an additional psychic injury to survivors, and as an institutional betrayal that echoes the harm initially inflicted by harassers themselves.

It is time—long past time—to adopt practical, concrete reforms to combat the widespread, automatic tendency to discount women and the stories they tell. We must embark on a path toward allowing women who share their experiences of male abuses of workplace power to trust the responsiveness of their employers, judges, and our larger society.

Eyer, Katie R.: [Claiming Disability](#). Boston University Law Review, Forthcoming 2021

We stand at the cusp of a potentially transformative moment for disability rights. For decades, the disability rights movement has been burdened by a profound obstacle: many of its potential constituents do not self-identify as disabled. Disability has long been constructed in our society as quintessentially associated with intrinsic limitation, and especially an inability to work. Although modern disability civil rights law includes no such requirement, it has not yet transformed entrenched colloquial understandings. As such, many people who qualify as disabled under contemporary civil rights law nevertheless do not self-identify in that way.

But numerous factors make this a uniquely opportune moment to transform this state of affairs. The ADA Amendments Act, enacted in 2008, for the first time has provided a definition of disability that is broad, inclusive, and untethered to functional limitation. So too the growth of disability pride movements, social media, and the development of new academic ideas in disability theory all hold promise for encouraging a mass movement of disability identity. If only a fraction of those who qualify as disabled under the ADAAA were to "claim disability" and embrace a disabled identity, millions of Americans would identify as disabled for the first time.



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Such “claiming” of disability has the potential to be transformational for disability rights. As scholars have long observed, the disability movement has struggled to dislodge bias against people with disabilities, even as the law has formally afforded them with rights. Even in a time where bias against other stigmatized groups has rapidly decreased, disability bias has remained unyielding. This Article suggests that “claiming disability” holds the potential to radically disrupt this state of affairs, by vastly expanding the scope of who people think of as “disabled,” including, potentially, themselves.

In addition to its benefits for disability rights, this Article argues that “claiming disability” may also be individually transformational. For too many people, the experience of medical or mental health impairment is one of enforced silence; of closeting and covering; of hiding pain and difficulty; and of not taking pride in identity. Moreover, it is too often the case that societal tropes of deficiency and limitation associated with impairment can be internalized in the absence of a positive disability frame. Claiming disability thus holds the potential to offer a liberatory alternative to the current experience of impairment, even as it paves the way for broader transformations in disability rights.

Freamon, Bernard: [Toward the Abolition of Slavery under the Aegis of Islamic Law](#). The Comparative Jurist – William and Mary Law School’s International and Comparative Law Blog.

Slavery and slave trading are both universally abolished, statutorily and very often constitutionally, in all the world’s jurisdictions. The juridical reach of these abolitions is quite thorough and far-reaching. Indeed, very few people in the world can now claim that they are unaware of the anti-slavery norm in human relations. This world-wide secular and normative state of affairs is reflective of a juristic consensus that is clearly expressed in customary international law principles, the provisions of all major international agreements, conventions, and treaties touching on the subject, and in general principles of international law, particularly the *jus cogens* peremptory norms. These provisions all unequivocally declare slavery and slavery-related practices to be unlawful and severely punishable as international crimes and strictly remediable as civil wrongs. They condemn any effort to justify slavery and slavery-related practices, including slave trading and trafficking, in any and all circumstances, including war or national emergency. Scholars, government officials, diplomats, journalists, and many others were therefore shocked to see that partisans of ISIS, Boko Haram, and, later, Abu Sayyaf, actively employed purported Islamic ideology permitting the enslavement of captives and prisoners of war based on interpretations of core Islamic texts and opinions of medieval and early modern Islamic jurists.



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Guerrero, Marion: [Strategic litigation in EU gender equality law](#). Citation

This report examines strategic litigation (SL) in the area of sex discrimination law, both at the national and at the EU level. 'Strategic litigation' describes the employment of litigation strategies to elicit social, legal or policy change and is often carried out by civil society organisations and/or lawyers as a form of activism. In the realm of gender equality, this approach has been used both at the Court of Justice of the European Union (CJEU) and at the national level. Both legal and extra-legal factors contribute to the success of SL. This report aims to determine such factors, focusing on the area of sex discrimination law in the ambit of the six EU gender equality directives and including best-practice examples.

Hirsch, Moshe; [Cognitive Sociology, Social Cognition and Coping with Racial Discrimination in International Law](#). European Journal of International Law (Vol. 30,2019); Hebrew University of Jerusalem Legal Research Paper No. 04-20

Cognitive science is the interdisciplinary study of mental processes involved in the acquisition, classification, organization and interpretation of knowledge in the human environment, and the decision taken on the appropriate action based upon it. The point of departure is that people do not directly sense information; cognitive processes mediate between sensory input from the environment and behaviour. These cognitive processes are influenced by neurological, psychological, socio-cultural and other factors. In recent years there has been growing scholarly interest in the study of cognitive sociology, focusing on the interactions between culture and cognition. This stream in sociological literature draws upon and complements cognitive psychological literature. The prohibition on discrimination constitutes one of the fundamental rules in international human rights law, but studies reveal that racial discrimination is pervasive and persistent in many states. Non-compliance with this international legal rule is significantly related to cognitive processes through which people acquire and interpret incoming information about other people. Racial groups are socially constructed, and deeply ingrained socio-cognitive biases feed and reproduce racially discriminatory behaviour. These biased mental processes, however, are not inevitable and may change over time. Effective struggle against racial discrimination requires that international legal mechanisms also address the socio-cognitive infrastructure which facilitates and sustains racial discrimination. Consequently, this study also discusses some international legal strategies aimed at



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mitigating cognitive biases and enhancing compliance with treaties prohibiting racial discrimination.

Katri, Ido: [Trans-Arab-Jew: A Look Beyond the Boundaries of In-Between Identities.](#)

In this article, Mizrahi (Jews of Arab descent) and trans legal claims will serve to expose the law as a tactic of stability. These experiences, positioned at the in-between of stable legal categories, embody the “other” of law, the affective ideologies that the law refuses. If transgender as an identity category emerged from the violent process of separating homosexuality and transsexuality to constitute gayness as normative, Mizrahi emerged from pitting the Jew and the Arab against each other to constitute the “new Jew,” a coherent member of a normative (whitened) nation. Yet the Arab and the Jew, the trans and the homo, are not separate spheres of being but constitute one another, exposing the excesses of gender/sex and race/ethnicity. The Mizrahi and the trans experience cannot escape the desire for normalization or the trauma of otherness, whose materialization into rights and property they critique. Still, the realities of in-betweenness hold the possibility of exceeding coherence, in a state of constant transition between mutually exclusive categories of being. Both positions serve as an affective intervention if they are considered as transitional spaces where one can dare to question the stability of reality and accept its shifting compromise formulation.

Kochenov, Dimitry; Uladzislau Belavusau: [Same-Sex Spouses: More Free Movement, but What About Marriage? Coman: Case C-673/16, Coman et al. v. Inspectoratul General Pentru Imigrări, Judgement of the Court of Justice \(Grand Chamber\) of 5 June 2018, EU:C:2018:385.](#) Common Market Law Review 57(1), pp. 227–242, 2020

This paper provides a critical annotation of the case of Coman, where the Court of Justice clarified that the meaning of the term ‘spouse’ in Directive 2004/38 was gender-neutral, opening up the door for same-sex marriage recognition for immigration purposes all around the EU, thus destroying the hetero-normative misinterpretations of the clear language of the Directive practiced in a handful of Member States. The state of EU law after Coman is still far from perfect, however: we underline a line of important questions which remain open and which the Court will need to turn to in the near future to ensure that marriage equality in moves beyond mere proclamations in the whole territory of the Union. A more detailed analysis of the Case is provided by the authors in the pages of the



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Maastricht Journal of European and Comparative Law (2020) and has also appeared, in draft, as an EUI Working Paper.

Lanctot, Catherine J.: [Women Law Professors: The First Century](#). Villanova Law Review, Vol. 65, Forthcoming

This article addresses the history of women as law professors from 1896 to 1996. It discusses the discrimination faced by women in legal academia over time, and also illustrates the contributions women have made to legal education.

Persad, Govind: [Why Disability Law Permits Evidence-Based Triage in a Pandemic](#). 130 Yale Law Journal Forum ____ (2020, Forthcoming); U Denver Legal Studies Research Paper No. 20-10

This paper explains why the two core goals of policies proposed or adopted in response to the COVID-19 pandemic that allocate scarce medical resources by using medical evidence—saving more lives and saving more years of life—are compatible with disability law. Disability law, properly understood, permits considering medical evidence about patients' probability of surviving treatment and the quantity of scarce treatments they will likely use. It also permits prioritizing health workers, and considering patients' post-treatment life expectancy. All of these factors, when assessed based on medical evidence and not inaccurate stereotypes, are legal to consider even if they disadvantage some patients with specific disabilities.

It then discusses why triage policies that use medical evidence to save more lives and years of life, which I call "evidence-based triage," are ethically preferable for people with and without disabilities. In doing so, I explain why recent critiques err by treating people with disabilities as a monolith, overlooking the political disadvantages of less-visible victims, and treating the social origins of scarcity as a justification for sacrificing vulnerable lives. Evidence-based triage should be recognized as similar to other responses to COVID-19, like physical distancing and postponing some medical procedures, that may burden people with specific disabilities but are nevertheless justified because they save more patients with and without disabilities.



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Rushin, Stephen; Griffin Sims Edwards: [An Empirical Assessment of Pretextual Stops and Racial Profiling](#). Stanford Law Review, Forthcoming

This Article empirically illustrates that legal doctrines permitting police officers to engage in pretextual traffic stops may contribute to a statistically significant increase in racial profiling. In 1996, the U.S. Supreme Court held in *Whren v. United States* that pretextual traffic stops do not violate the Fourth Amendment. As long as police officers identify an objective violation of a traffic law, they may lawfully stop a motorist—even if their actual intention is to use the stop to investigate a hunch that by itself does not amount to probable cause or reasonable suspicion.

Scholars and civil rights activists have widely criticized *Whren*, arguing that it gives police officers permission to engage in racial profiling. But social scientists have historically struggled to develop an empirical methodology to evaluate how *Whren* influenced police behavior.

The State of Washington presents a unique opportunity to test the effects of pretextual stop doctrines on police behavior. In the years since the *Whren* decision, Washington has experimented with multiple rules that provide differing levels of protection against pretextual stops. In 1999, the Washington Supreme Court held in *State v. Ladson* that their state constitution barred police from conducting pretextual traffic stops. Then in 2012, the court eased this restriction on pretextual stops in *State v. Arreola*.

By relying on a comprehensive dataset of 8,257,527 traffic stops conducted by the Washington State Patrol from 2008 through 2015, we find that the *Arreola* decision is associated with a statistically significant increase in traffic stops of non-white drivers relative to white drivers. Further, we find this increase in traffic stops of non-white drivers concentrated during daytime hours, when officers can more easily ascertain a driver's race through visual observation. We also find evidence that police officers search the vehicles of non-white drivers more frequently than white drivers after *Arreola*.

Combined, this data provides compelling evidence that judicial decisions like *Whren* and *Arreola* may increase the probability of racial profiling by police officers. We conclude by discussing the implications of these findings for the literature on police accountability.



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Schoenbaum, Naomi: [The New Law of Gender Nonconformity](#). *Minnesota Law Review*, Vol. 105, Forthcoming; GWU Legal Studies Research Paper No. 2020-29; GWU Law School Public Law Research Paper No. 2020-29

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.

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



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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.

Shamir, Hila; [Feminist Approaches to the Regulation of Sex Work: Patterns in Transnational Governance Feminist Law Making](#). Cornell International Law Journal, Vol. 52, 2019

Worldwide, through the effective spread of feminist ideas and modes of governance (Governance Feminism), two main feminist regulatory approaches to sex work/prostitution became widely accepted: neo-abolitionism and regulation and decriminalization. This Article argues that in reality both feminist approaches are characterized by inherent flaws in their implementation that end up causing distinct harms to the most vulnerable sex workers. As a possible alternative to both of these regulatory approaches, this Article uses an Israeli case study to propose a hybrid approach to the regulation of sex work. This approach consists of a formally declared abolitionist goal with wide informal characteristics of decriminalization — a form of what Annelise Riles calls, in a different context, a formalist law with a “hollow core.” I argue that such postmodern law making of a symbolic gesture with no content, such an apparently contradictory approach, can be beneficial, in certain circumstances and political climates, to sex workers, compared with both of the traditional governance feminist approaches. The hybrid approach is far from perfect, but in an imperfect world, it can possibly lead to a better outcome from the perspective of the most vulnerable sex workers than that achieved by the two distinct feminist approaches. The Article stresses the advantages that are potentially embedded in a policy intended to create a gap between law in books and law in action, as well as its costs, and explores why transnational governance feminist regulatory stances tend to reject this regulatory approach.

Siegler, Alison; William Admussen: [Discovering Racial Discrimination by the Police](#). 115 Northwestern University Law Review (Forthcoming)

For decades, it was virtually impossible for a criminal defendant to challenge racial discrimination by police or prosecutors. In *United States v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court set an insurmountable standard for obtaining discovery in support of a selective prosecution claim. Lower courts subsequently applied this same standard to selective law enforcement claims alleging race-based discrimination by the



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police, leading them to deny discovery and stifle potentially meritorious claims. Recently, a new wave of challenges has arisen in the context of “fake stash house” operations, through which federal law enforcement agencies like the ATF and the DEA approach people — overwhelmingly people of color — and induce them to rob a non-existent drug stash house. Defense attorneys have argued these practices constitute racially selective law enforcement. Federal courts of appeals have responded by recognizing the differences between prosecutors and law enforcement officers and lowering the discovery standard for defendants alleging racial discrimination by the police. We argue that federal and state appellate courts should follow suit. Although the recent cases arose in the stash house context, the new discovery standard applies to any claim of racial discrimination by the police.

This Article is the first to describe this important development in equal protection jurisprudence. Recognizing that federal courts hear only a fraction of race discrimination claims, this Article embraces the spirit of federalism and proposes an innovative state-level solution: a state court rule lowering the insuperable discovery standard to which most states still cling. This Article draws on a recent Washington State Supreme Court rule aimed at preventing racial discrimination in jury selection to propose that state courts adopt a similar court rule setting a new discovery standard for racially selective law enforcement claims. Such a rule would ensure that state-level equal protection claims are not blocked at the discovery stage, thus enabling courts to adjudicate those claims on the merits.

Soucek, Brian; Vicki Schultz: [Sexual Harassment by Any Other Name](#). 2019 U. Chi. Legal F. 227

The New York Times won a Pulitzer and helped ignite the #MeToo movement with its reporting on sexual harassment. But the Times still doesn't understand what sexual harassment is. In its official definition and the stories it pursues, the Times employs a sexualized conception of sexual harassment that is twenty years out of date in the law. It's also disconnected from the lived experience of most people and from the findings of social science research. In this, the Times is not alone. Even the two leading enforcers of federal antidiscrimination law — the EEOC and the Department of Justice — still at times issue pronouncements that fail to reflect current Title VII law or even those agencies' own enforcement priorities.



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Lost in these outdated but still pervasive definitions of sexual harassment are the many ways employees are undermined, excluded, sabotaged, ridiculed, or assaulted because of their sex, even if not through words or actions that are “sexual” in nature. “Put-downs” and not simply “come-ons,” these types of sexual harassment are even more pervasive than the overtly sexualized forms. Relegating them to another category or term such as “gender harassment” or “sex-based harassment” treats them as secondary to the sexualized forms, causes society to misunderstand the dynamics at play even in the latter, and skews the focus of workplace training (and subsequent reporting) about sexual harassment. With the #MeToo movement giving unprecedented attention to the problem of sexual harassment, now is the time to better understand that term.

Thomas, Suja A.: [The Customer Caste: Lawful Discrimination by Public Businesses.](#) *California Law Review*, Vol. 109, Forthcoming; University of Illinois College of Law Legal Studies Research Paper No. 20-14

It is legal to follow and watch people in retail stores based on their race, give inferior service to restaurant customers based on their race, and place patrons in certain hotel rooms because of their race. Congress enacted Title II of the Civil Rights Act of 1964 to protect black and other people of color from discrimination and segregation in public accommodations — places where people receive goods, food, services, and lodging. Scholarship has not analyzed how well Title II and Section 1981 of the Civil Rights Act of 1866 have functioned in this arena. An examination of this case-law shows that courts find numerous discriminatory and segregatory actions by places of public accommodation legal. An abbreviated look at Section 1982 of the Civil Rights Act of 1866 shows that courts have interpreted that law in the same manner as Section 1981. An assessment of the legislative history and text of Title II and Section 1981, in addition to a comparison to the interpretation of laws with similar purposes, demonstrate that the federal judiciary has incorrectly constrained the law by, among other actions, adopting the heavily-criticized employment discrimination case-law and requiring a common law-like contractual relationship. Jim Crow laws ceased to exist in the 1960s, but these interpretations have created “the customer caste,” whereby people of color are subject to legal, daily discrimination in retail stores, restaurants, gas stations, hotels, banks, and airplanes.



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Wachter, Sandra; Brent Mittelstadt; Chris Russell: [Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI.](#)

In recent years a substantial literature has emerged concerning bias, discrimination, and fairness in AI and machine learning. Connecting this work to existing legal non-discrimination frameworks is essential to create tools and methods that are practically useful across divergent legal regimes. While much work has been undertaken from an American legal perspective, comparatively little has mapped the effects and requirements of EU law. This Article addresses this critical gap between legal, technical, and organisational notions of algorithmic fairness. Through analysis of EU non-discrimination law and jurisprudence of the European Court of Justice (ECJ) and national courts, we identify a critical incompatibility between European notions of discrimination and existing work on algorithmic and automated fairness. A clear gap exists between statistical measures of fairness as embedded in myriad fairness toolkits and governance mechanisms and the context-sensitive, often intuitive and ambiguous discrimination metrics and evidential requirements used by the ECJ; we refer to this approach as “contextual equality.”

This Article makes three contributions. First, we review the evidential requirements to bring a claim under EU non-discrimination law. Due to the disparate nature of algorithmic and human discrimination, the EU’s current requirements are too contextual, reliant on intuition, and open to judicial interpretation to be automated. Many of the concepts fundamental to bringing a claim, such as the composition of the disadvantaged and advantaged group, the severity and type of harm suffered, and requirements for the relevance and admissibility of evidence, require normative or political choices to be made by the judiciary on a case-by-case basis. We show that automating fairness or non-discrimination in Europe may be impossible because the law, by design, does not provide a static or homogenous framework suited to testing for discrimination in AI systems.

Second, we show how the legal protection offered by non-discrimination law is challenged when AI, not humans, discriminate. Humans discriminate due to negative attitudes (e.g. stereotypes, prejudice) and unintentional biases (e.g. organisational practices or internalised stereotypes) which can act as a signal to victims that discrimination has occurred. Equivalent signalling mechanisms and agency do not exist in algorithmic systems. Compared to traditional forms of discrimination, automated discrimination is more abstract and unintuitive, subtle, intangible, and difficult to detect. The increasing use of algorithms disrupts traditional legal remedies and procedures for detection,



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investigation, prevention, and correction of discrimination which have predominantly relied upon intuition. Consistent assessment procedures that define a common standard for statistical evidence to detect and assess prima facie automated discrimination are urgently needed to support judges, regulators, system controllers and developers, and claimants.

Finally, we examine how existing work on fairness in machine learning lines up with procedures for assessing cases under EU non-discrimination law. A 'gold standard' for assessment of prima facie discrimination has been advanced by the European Court of Justice but not yet translated into standard assessment procedures for automated discrimination. We propose 'conditional demographic disparity' (CDD) as a standard baseline statistical measurement that aligns with the Court's 'gold standard'. Establishing a standard set of statistical evidence for automated discrimination cases can help ensure consistent procedures for assessment, but not judicial interpretation, of cases involving AI and automated systems. Through this proposal for procedural regularity in the identification and assessment of auto-mated discrimination, we clarify how to build considerations of fairness into automated systems as far as possible while still respecting and enabling the contextual approach to judicial interpretation practiced under EU non-discrimination law.

Widiss, Deborah A.: [Equalizing Parental Leave](#). *Minnesota Law Review*, Vol. 105, 2021; *Indiana Legal Studies Research Paper No. 3587979*

The United States is the only developed country that fails to guarantee paid time off work to new parents. As a result, many new parents, particularly low-wage workers, are forced to go back to work within days or weeks of a birth or adoption. In recent years, a growing number of states have passed laws to address this gap in American labor policy, and in December 2019, Congress enacted legislation providing paid parental leave for federal workers. This Article offers the first detailed analysis of these new laws, and it exposes how their structure — probably unintentionally — disadvantages single-parent families.

In America, unlike most other countries, leave is provided on a sex-neutral basis as an individual benefit to each parent of a newly-born or newly-adopted child. This structure is intended to shift gender norms around caretaking within (different-sex) marriages, but it means that single-parent families receive only half as much support. This is a significant problem, as forty percent of new mothers in the United States are unmarried. Under state family laws, most single mothers, disproportionately poor and working-class women of



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color, bear sole legal responsibility for the care of their children. The new laws are an important step forward from the prior baseline of no paid leave, but they shortchange the families that are likely to need them the most.

Prior theoretical and doctrinal assessments of equality in the context of parental leave discuss the relative merits of treating mothers and fathers identically, versus providing “special” supports to mothers. This focus obscures other important considerations, such as whether families or children are treated equally. Additionally, since women are far more likely than men to be single parents, privileging ideals of formal equality in this context has the practical effect of disadvantaging women. Drawing on models used in other countries, this Article proposes that parents with sole custody should be eligible to receive an extended period of benefits, which they could use themselves or transfer to a different familial caregiver. This approach would not unduly burden businesses, because the financing mechanism for these laws already spreads costs across the tax base.

Xenidis, Raphaële; Linda Senden: [EU Non-Discrimination Law in the Era of Artificial Intelligence: Mapping the Challenges of Algorithmic Discrimination](#). Ulf Bernitz et al (eds), *General Principles of EU law and the EU Digital Order* (Kluwer Law International, 2020), pp. 151-182

While most studies on the topic of AI, algorithms and bias have been conducted from the point of view of ‘fairness’ in the field of information technologies and computer science, this chapter explores the question of algorithmic discrimination – a category that does not neatly overlap with algorithmic bias – from the specific perspective of non-discrimination law. In particular and by contrast to the majority of current research on the question of algorithms and discrimination, which focuses on the United States context, this chapter takes EU non-discrimination law as its object of enquiry. We pose the question of the resilience of the general principle of non-discrimination, that is, the capacity for EU equality law to respond effectively to the specific challenges posed by algorithmic discrimination. Because EU law represents an overarching framework and sets minimum safeguards for the protection against discrimination at national level in EU Member States, it is important to test out the protection against the risks posed by the pervasive and increasing use of AI techniques in everyday life applications which this framework allows for. This chapter therefore maps the challenges arising from artificial intelligence for equality and non-discrimination, which are both a general principle and a fundamental right in EU law. First, we identify the specific risks of discrimination that AI-based decision-making, and in particular machine-learning algorithms, pose. Second, we review



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how EU non-discrimination law can capture algorithmic discrimination in terms of its substantive scope. Third, we conduct this review from a conceptual perspective, mapping the friction points that emerge from the perspective of the EU concepts of direct and indirect discrimination, as developed by the Court of Justice of the European Union (CJEU). In the final step, we identify the core challenges algorithmic discrimination poses at the enforcement level and propose potential ways forward.



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