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The Trajectories of European and American Antidiscrimination Law

Gráinne de Búrca*

The essays in this symposium present an apparently sharp contrast in the respective state of antidiscrimination law in Europe and the United States at present. In Europe, antidiscrimination norms are proliferating, within both the European Union and the Council of Europe systems, and elaborate networks and programs of implementation are being established and funded. The grounds of discrimination are widening, the norms are being strengthened and the new laws are being actively litigated. In the United States, by comparison, decades of social and political backlash have significantly weakened the corpus of antidiscrimination law that emerged from the civil rights movement, and the courts have become an arena for ideological battle. Yet, even if certain juridico-cultural differences in conceptions of equality and discrimination between the two jurisdictions are evident, none of the likely explanations for such a stark contrast between the state of antidiscrimination law and policy in each seems fully convincing. On a closer analysis, it seems that the future of antidiscrimination law and policy in Europe faces equally daunting challenges, even if the body of law in question is decades younger and less tested than its U.S. counterpart. One of the themes emerging from this collection of essays, however, is that there are similarities in the way problems of entrenched inequality are being addressed and in some of the solutions being tested both in the United States and in Europe. In particular, there has been a shift away from traditional judicial remedies and towards renewed administrative as well as other more innovative approaches in both jurisdictions. In the United States, this seems to be prompted in part by disillusionment with the current legal stalemate, while in Europe some of the novel approaches—including the spread of equality bodies, parity democracy, and proactive public duties—are being promoted by international and European institutions.

A. A Stark Transatlantic Comparison

The past decade and a half has witnessed a dramatic development and expansion of European antidiscrimination law. At the regional level, both the European Union and the Council of Europe have adopted important new instruments. Notably, the European Union has enacted a Charter of Fundamental Rights and an ambitious series of legislative measures,¹ and the Council

* Professor, NYU Law School. The papers contained in this symposium issue of the AJCL emerged from two workshops held at the European University Institute, Florence in 2010, and at Harvard Law School in 2011. Ruth Rubio-Marín and I are very grateful to these two institutions for the support they provided for the workshops. Thanks are also due to all of the participants at these events for their advice and comments.

¹ CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Official Journal of the EU (2010) C 83/389. The EU has adopted several major pieces of antidiscrimination legislation since 2000, notably Council Directive 2000/78/EC of Nov. 27, 2000, establishing a general framework for equal treatment in employment and occupation

of Europe has adopted Protocol no. 12 to the European Convention on Human Rights that complements and expands the existing antidiscrimination provision of Article 14 ECHR.² These high-profile legal and political moves have both generated and been accompanied by significant domestic and transnational mobilization around European antidiscrimination norms. Funded in some cases by the EU Commission,³ and in other instances by major foundations and organizations like the Open Society Institute, strategic litigation in the fields of race, sexual orientation and disability discrimination has been brought by NGOs and legal activists before national and regional tribunals, including the European Court of Human Rights in Strasbourg and the European Social Charter's European Committee on Social Rights.⁴ These initiatives have sought to build in particular on the strategies and perceived successes of the movement for gender equality across Europe in previous decades.⁵ With a raft of new legislation and treaty provisions, new institutions such as the EU Fundamental Rights Agency,⁶ renewed civil society

[2000] OJ L303/16, Council Directive 2000/43/EC of June 29, 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 and Directive 2006/54/EC of the European Parliament and Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

² Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000, Council of Europe, European Treaty Series no. 177.

³ The Commission also funds a network of independent legal experts (from the twenty-seven member states and three applicant states) in the non-discrimination field, which provides advice and information on implementation to the Commission. The network of experts also prepares and produces the bi-annual publication the European Anti-Discrimination Law Review. See http://www.migpolgroup.com/projects_detail.php?id=19 and http://www.migpolgroup.com/publications_info.php?id=17.

⁴ See, for example, the three year project on 'Implementing European Anti-Discrimination law' and the manual prepared by the European Roma Rights Center, Interrights, and the Migration Policy Group, and funded the Open Society Justice Initiative: on *Strategic Litigation of Race Discrimination in Europe: From Principles to Practice* (2004) http://www.migpolgroup.com/projects_detail.php?id=29. See also the contribution in this symposium issue by Samantha Besson, *Evolutions in Antidiscrimination Law within the European Convention on Human Rights and the European Social Charter System*. 60 AM. J. COMP. L. (2012).

⁵ CATHERINE HOSKYN, INTEGRATING GENDER, WOMEN, LAW AND POLITICS IN THE EUROPEAN UNION (1996). RACHEL CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE (2007).

⁶ The EU Fundamental Rights Agency was established in 2007 to subsume and replace the previous EU Monitoring Center for Racism and Xenophobia: see Council Regulation 168/2007, Official Journal L53/1 (2007).

activism and a string of notable judicial victories for equality advocates,⁷ the condition of European antidiscrimination law and policy today—despite Europe’s economic and financial woes—seems energetic and the outlook optimistic.

In contrast with this depiction of vitality and optimism, the landscape of U.S. antidiscrimination law today presents a more somber picture. The socially transformative energy of the U.S. civil rights movement of the 1960s seems to have been drained and the powerful corpus of constitutional and federal antidiscrimination law that it brought with it has been significantly weakened following decades of political and legal backlash. The courts have become an arena for social and ideological conflict as different groups and interests have mobilized to use the judiciary to contest, rather than to promote or enforce, antidiscrimination laws and programs that were intended to redress social inequity.⁸ Several of the key provisions and conceptions of U.S. antidiscrimination law with their origins in the civil rights movement have been rejected or sharply limited by state and federal judiciaries. Broad legislative definitions of disability have been judicially narrowed,⁹ the “disparate impact” doctrine of discrimination has been

⁷ In the field of ethnic and racial equality, see, e.g., App No. 57325/0 DH and Others v. Czech Republic, judgment of the Grand Chamber of the European Court of Human Rights, Nov. 13, 2007, Orsus and Others v. Croatia, Grand Chamber, App. no. 15766/03, judgment of the Grand Chamber of the ECHR of Mar. 16, 2010, and Case C-54/07 *Firma Feryn* [2008] ECR I-5187 of the European Court of Justice; on mental health, see App. No 11223/04, X v. Croatia, judgment of the ECHR of July 17, 2008, App. No. 38832/06 Alajos Kiss v. Hungary, judgment of the ECHR of July 20, 2010 and Complaint No. 13/2002 Autism Europe v. France, decision of the European Committee for Social Rights of Nov. 4, 2003; on sexual orientation and transgender discrimination see, e.g., App. no. 28957/95 Goodwin v. UK, ECtHR, judgment of July 11, 2002, App. No 30141/04 Schalk and Kopf v. Austria, judgment of the Grand Chamber of the European Court of Human Rights of June 24, 2010, and Case C-267/06 *Maruko* [2008] ECR I-1757.

⁸ See, e.g., Reva Siegel *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

⁹ See the contribution of Elizabeth Emens to this symposium, *Disabling Attitudes: U.S. Disability Law and the ADA Amendment Act*, 60 AM. J. COMP. L. (2012).

significantly restricted,¹⁰ and many forms of affirmative action are now constitutionally suspect¹¹ or have even been prohibited by legislation or by state constitutions.¹²

Such contrasting depictions of the current state of antidiscrimination law in Europe and the United States seem in themselves to warrant some explanation. What makes such a contrast all the more interesting and surprising, however, is that many parts of the two bodies of law share similar origins. More specifically, several of the core concepts and provisions of EU antidiscrimination law—which in turn have influenced recent European Court of Human Rights case law on discrimination¹³—were drawn from the United Kingdom’s antidiscrimination laws of the 1970s.¹⁴ These UK laws, in particular the 1975 Sex Discrimination Act and the 1976 Race Relations Act, were in turn strongly influenced by U.S. law at the time,¹⁵ and have even been described as being “imported straight” from the United States.¹⁶ Similarly, Gerard Quinn and

¹⁰ See *Washington v. Davis* (1976) 426 U.S. 229, and *Ricci v. De Stefano* (2009) 129 S.Ct.2658.

¹¹ See *Grutter v. Bollinger* 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Parents Involved in Community Schools v. Seattle and Meredith v. Jefferson* 551 U.S. 701 (2007).

¹² State prohibitions on various forms of affirmative action were introduced in Michigan, Nebraska, Arizona, California, Florida and Washington state, and several—including that of Michigan—are currently under challenge before federal courts. See *Coalition to defend Affirmative Action (BAMN) v. Regents of the University of Michigan et al.*, judgment of the 6th Circuit of July 1, 2011. For a discussion of the move towards “indirect” affirmative action (both in the United States and in France) as a consequence of resistance against overt race-based policies, see Daniel Sabbagh, *The Rise of Indirect Affirmative Action*, 63 *WORLD POLITICS* 470 (2011).

¹³ See App No. 57325/0 DH and Others v. Czech Republic, judgment of the Grand Chamber of the European Court of Human Rights, Nov. 13, 2007, [85]-[91], [187], App Nos. 65731/01 and 65900/01 *Stec v. UK*, judgment of the European Court of Human Rights of Apr. 12, 2006 [58].

¹⁴ See Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Ltd* [1981] ECR 911, where the European Court of Justice followed the opinion of the British Advocate General Warner in the case and applied the idea of indirect discrimination (known in the United States as “disparate impact” discrimination) as part of EU law. Advocate General Warner cited both *Griggs v. Duke Power Co.*, (1971) 401 U.S. 424 and *Dothard v. Rawlinson* (1977) 433 U.S. 321 in his Opinion, at 936.

¹⁵ See, e.g., Philip Sooben, *The Origins of the Race Relations Act*, University of Warwick Centre of Research in Ethnic Relations Research Paper No. 12 (1990), part 5.

¹⁶ See Mahlia Malik, *Anti-Discrimination Law in Britain*, in *GLEICHBEHANDLUNGSRECHT*, 135 (Beate Rudolf & Matthias Mahlmann eds., 2007): “British anti-discrimination law was imported from the United States. It has now been exported to Europe through its influence on the directives that regulate discrimination in the European Union.” See also Bob Hepple, *The European Legacy of Brown v. Board of Education* 605, at 609, *U. ILL. L.R.* (2006), arguing that “disparate impact,” or “indirect discrimination” as it was renamed, was drawn directly from U.S. law (in particular from the Supreme Court ruling in *Griggs v. Duke Power Co.*) into British law and then in turn “borrowed” by the European Court of Justice, and later again introduced into the major pieces of EU

Eilionóir Flynn’s contribution to this symposium issue describes how European Union disability discrimination law borrowed heavily from the United States model, in particular from the Americans with Disabilities Act.¹⁷ Bruno de Witte’s essay, too, traces the origins of the idea of national equality bodies, which are currently proliferating across Europe, to the creation of the Equal Employment Opportunity Commission by the U.S. Civil Rights Act in 1964.¹⁸ What can then account for the fact that these related bodies of antidiscrimination law and policy, which share so many similar origins as well as key concepts and features, have apparently fared so differently—stalling in the United States while flourishing in Europe?

B. Scrutinizing the Contrast

A number of explanations could be offered to explain the apparently different fate of antidiscrimination law and policy on either side of the Atlantic. While there are many other significant differences between the United States as a federal state on the one hand, and the European Union (and the Council of Europe) as regional political and legal systems on the other, three specific kinds of explanation for the divergent trajectories of U.S. and European antidiscrimination law will be suggested here.

(i) A first possible explanation is cultural and ideological: although the particular legal and jurisprudential seeds originated and were first sown in the United States, it seems plausible that

antidiscrimination legislation. *See*, at 620, “I have tried to show that Brown and its progeny—in both legislation and case law—were major stimuli for legal interventions in Britain from the 1960s and (much later) in other parts of Europe.”

¹⁷ Gerard Quinn & Eilionóir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 AM. J. COMP. L. (2012).

¹⁸ Bruno de Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*, 60 AM. J. COMP. L. (2012).

the cultural soil in Europe may ultimately have proved more fertile and more receptive to the idea of redressing social, political and economic inequality through legal norms of equal treatment and non-discrimination. Even if there are as many different conceptions of welfare in Europe as there are European states, Europe as a continent and as a transnational political system can nonetheless broadly be said to share the idea that the provision and promotion of the human and social welfare of their peoples is a core aspect of the responsibility of states. The U.S. constitutional and political system, by comparison, and the culture in which it is rooted and which it has produced, is conventionally seen as privileging the idea of individual freedom, and viewing the state's primary role as that of providing the conditions for the individual pursuit of freedom rather than promoting or supporting any particular conception of welfare or equality. Julie Suk's contribution to this symposium may seem to lend support to this explanation, since it outlines how the contrasting approaches of EU and U.S. law on the issues of mandatory maternity leave and retirement reflect such different cultural and political values.¹⁹ Similarly, Gerard Quinn and Eilionóir Flynn's essay contrasts the civil-rights approach underpinning U.S. disability discrimination law with the welfarist origins of the European model. And Ruth Rubio-Marín's essay suggests that European developments in gender equality towards parity democracy are very unlikely to be seen in the United States, for a mixture of historical, cultural and ideological reasons, including the history of slavery in the United States, the contemporary influence of religious fundamentalism, and the prevalent anti-classification/anti-stereotyping model of U.S. discrimination law.²⁰ Yet while different ideas and conceptions of equality and welfare are indeed likely to underpin certain aspects of antidiscrimination law in Europe and the

¹⁹ Julie Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. (2012).

²⁰ Ruth Rubio-Marín, *Parity Democracy: A New European Sex Equality Model and Why it Won't Fly in the United States*, 60 AM. J. COMP. L. (2012).

United States, the plausibility of a more encompassing cultural or ideological explanation for the expansion and flourishing of EU antidiscrimination law by comparison with the narrowing and ossification of U.S. antidiscrimination law at crucial junctures has been questioned. Katerina Linos, in her analysis of the divergent case law of the U.S. Supreme Court and the European Court of Justice on a series of important questions in the field of antidiscrimination has rejected the proposition that differences in public opinion or citizen attitudes towards the protection of minority interests in the United States as compared with Europe could explain the different pathways taken.²¹ She points to relevant public opinion surveys that suggest that European citizens are no more tolerant of specific minority groups or of social programs that protect and promote their interests than American citizens.²² Further, even if we accept that different values and ideological commitments underpin certain legal-doctrinal approaches to antidiscrimination law, this would not in itself provide sufficient explanation for the apparent fact that U.S. antidiscrimination law has become a bitterly contested and blocked terrain, while EU and European antidiscrimination law appears to be expanding and thriving.

(ii) A second possible explanation relates to the nature of the respective political and institutional systems. The United States has a famously polarized political system,²³ and sharp ideological cleavages result not infrequently in deadlock over social programs and policies, including affirmative action and other antidiscrimination agendas.²⁴ The European Union political system, by comparison, is far more diffuse, as well as being highly technocratic and de-politicized in

²¹ Katerina Linos, *Path-dependence in Discrimination Law: Employment Cases in the US and the EU*, 35 YALE J. INT'L L. 115 (2010).

²² *Id.*, at 126-29.

²³ See recently Richard Pildes, *Why the Center does not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. (2011) 273-333.

²⁴ See, e.g., DESMOND KING & ROGERS SMITH, *STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA'S AMERICA* (2011), also NOLAN MCCARTY, KEITH POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006).

important respects.²⁵ And since much of the antidiscrimination law adopted in recent years by European states has been mandated by EU legislation, it might be argued that the consensus mode of European politics and the lack of sharp political cleavages at the EU level help to explain the smooth enactment and spread of antidiscrimination law in Europe. Yet this explanation is also not entirely convincing. Even if the political and legislative system of the European Union operates in a markedly consensual way and its judiciary has been notably deferential to EU policies and legislative measures promoting integration,²⁶ EU laws nonetheless have to be implemented and given effect at the national level. In the field of antidiscrimination law, which is dominated by EU Directives rather than by directly effective Regulations, the enactment of domestic legislation or other implementing measures is required.²⁷ And it can hardly be argued that national political systems within the European Union operate in a consensual or depoliticized way. On the contrary, sharp conflict over issues of race, religion, immigration and multiculturalism has come to dominate politics in many European states, and there has been a notable rise in the number and political strength of extreme right-wing parties across Europe in recent decades.²⁸

²⁵ On the consensual, interest-based and non-conflictual mode of EU “policy without politics,” see VIVIEN SCHMIDT, *DEMOCRACY IN EUROPE: THE EU AND NATIONAL POLITICS* (2006). See also Simon Hix, *Why the EU needs (Left-Right) Politics: Policy Reform and Accountability are Impossible without It* and Stefano Bartolini, *Should the Union be ‘Politicised’? Prospects and Risks*, Notre Europe Policy Paper No. 19 (2006).

²⁶ The European Court of Justice has been notably more reluctant to invalidate EU legislative and other measures as compared with Member State measures, and has been accused of double-standards in fashioning more aggressive and effective procedures for judicial review of Member State acts than of EU acts. See, e.g., Ewa Biernat *The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community*, Jean Monnet Working Paper 12/03.

²⁷ On the implementation of EU antidiscrimination law, see the project of the Migration Policy Group, Interrights, and the Roma Rights Center, *supra* note 4.

²⁸ See, e.g., Hans-Georg Betz, *The New Politics of Resentment: Radical Right-Wing Populist Parties in Western Europe*, 25 *COMPARATIVE POLITICS* 413-27 (1993). See also MABEL BEREZIN, *THE RISE OF ILLIBERAL POLITICS IN NEOLIBERAL TIMES: CULTURE, SECURITY AND POPULISM IN THE NEW EUROPE* (2009), and DAVID ART, *INSIDE THE RADICAL RIGHT: THE DEVELOPMENT OF ANTI-IMMIGRANT PARTIES IN WESTERN EUROPE* (2011).

(iii) A third possible explanation is primarily temporal. In other words, it may be that what appears initially as a sharp difference between the United States and the European Union in the current state of antidiscrimination law and policy can be explained largely by the fact that the United States is several decades ahead of the European Union in this respect. Europe, in other words, has not yet experienced the powerful social and political backlash that probably awaits an ambitious program of antidiscrimination law and policy, particularly in times of economic hardship and crisis. This explanation seems intuitively plausible. Apart from EU laws on sex equality in the employment context, which date back to the 1970s, most of the corpus of EU antidiscrimination legislation is of relatively recent origin, having been adopted only since 2000, and implemented by Member States several years after that. Nor has the implementation process been a particularly smooth one. The EU Commission reported in 2007, several years after the expiry of the respective implementation dates, that it was pursuing legal proceedings against no fewer than fourteen Member States for tardy or inadequate implementation of the Race Equality Directive 2000/43, and against seventeen Member States in respect of the Framework Equality Directive 2000/78.²⁹ Apart from these enforcement proceedings brought by the Commission, only a relatively small number of cases arising from two of the most important of the new antidiscrimination laws, the Framework Equality Directive and the Race Directive of 2000, have so far made their way to the European Court of Justice.³⁰ Furthermore, even when EU antidiscrimination law has been formally implemented in the Member States through the

²⁹ See the European Commission's EU ACTION AGAINST DISCRIMINATION ACTIVITY REPORT 2007-2008, sec. 2.1.1., available at ec.europa.eu/social/BlobServlet?docId=3044&langId=en.

³⁰ Most of these have been on the issue of age discrimination, including C-411/05 *Palacios de la Villa* [2007] ECR I-8531, C-227/04 *Lindorfer* [2007] ECR I-6767, C-411/05 *Palacios de la Villa* [2007] ECR I-8531, C-427/06 *Bartsch* [2008] ECR I-7245, C-388/07 *Age Concern England* [2009] ECR I-1569; C-88/08 *Hütter* [2009] ECR I-5325; C-555/07 *Küçükdeveci*, Jan. 19, 2010, Case C-499/08 *Andersen*, Oct. 12, 2010; Case C-45/09 *Rosenblatt*, Oct. 12, 2010; Cases C-250 and 268/09 *Georgiev*, Nov. 18, 2010; a handful on disability (C-303/06 *Coleman* [2008] ECR I-5603 and C-13/05 *Chacón Navas* [2006] ECR I-6467) race and sexual orientation discrimination: C-267/06 *Maruko* [2008] ECR I-1757 and F-86/09 *W v. Commission*, Oct. 14, 2010. For an analysis, see MARZIA BARBERA, THE ECJ JUDGMENTS ON THE ANTI-DISCRIMINATION DIRECTIVES: ALREADY A DOCTRINE? (2011).

adoption of legislation and the creation of new agencies, this has not necessarily yet resulted in substantive change in either policy or practice. A recent study of the implementation of these laws in France and Germany has suggested that while EU antidiscrimination law managed to “stir and reframe debates about integration in some of the old immigrant countries . . . the introduction of new concepts and procedures is not always compatible with existing legal and mobilization cultures.”³¹ There have been some notable recent instances of political resistance to the enforcement of new (or renewed) European antidiscrimination laws on behalf of the most marginalized groups, such as the Roma and Travellers, which attracted international media attention.³² Similarly, despite the recent dramatic surge in discrimination litigation before the European Court of Human Rights,³³ resulting in some notable decisions in the fields of race, disability and sexual orientation discrimination, many of these rulings have either not been implemented or have not resulted in the relevant policy reform.³⁴ In this sense, transnational

³¹ Virginie Guiraudon, *Equality in the Making: Implementing European Anti-discrimination Law*, 13 CITIZENSHIP STUDIES 527 (2009).

³² For discussion of repressive political campaigns—including fingerprinting, evictions, and expulsion—against Roma communities by France, Italy and Denmark in particular, see Kristi Severance, *France’s Expulsion of Roma Migrants: A Test Case for Europe*, Migration Policy Institute (2010), available at <http://www.migrationinformation.org/>. In July 2008, the UN Special Rapporteur on racism, the Independent Expert on minority issues, and the Special Rapporteur on the Human rights of Migrants issued a statement expressing extreme concern about the Italian government proposal to fingerprint all Roma individuals. Human Rights Watch has drawn repeated attention to the rise in discriminatory and repressive action against the Roma people across Europe, more recently in its 2011 report: see <http://www.hrw.org/world-report-2011/european-union>. A further recent instance concerned the eviction of Irish travellers from their halting site in the United Kingdom, which drew condemnation from the Council of Europe Commissioner on Human Rights and the UN Committee on the elimination of racial discrimination (CERD): see <http://www.guardian.co.uk/uk/2011/sep/02/dale-farm-travellers-eviction-solution>.

³³ To give a striking example of this surge in one particular field, the European Court of Human Rights up until 2010 had given sixty-eight rulings (some on admissibility, some on the merits) on questions of racial discrimination against the Roma, of which fifty-five were given within the past ten years.

³⁴ See the analysis from the European Roma Rights Center by Istvan Haller, *The Mendacious Government: Implementation of the Romanian Pogrom Judgments*, <http://www.errc.org/cikk.php?page=3&cikk=3613> (2010). Similarly, the Open Society Institute, which tracks the implementation of key litigation in which it was involved, reported in 2011 that the path-breaking ECHR Grand Chamber ruling on Roma education in *D.H. v. Czech Republic* in 2007 has not been implemented. They have submitted their concerns to the Committee of Ministers that is charged with overseeing the implementation of ECHR rulings, and they report that “new laws introduced by the government are inadequate and have had little effect. Special schools have merely been re-named as ‘practical primary schools.’ Positive measures suggested by the court such as preparatory classes have been underutilized.” See <http://www.soros.org/initiatives/justice/litigation/czechrepublic>. For a more general analysis of the question of

European antidiscrimination law, whether emanating from the European Union or the Council of Europe, arguably faces even more significant obstacles to its impact in practice than federal U.S. or Canadian law.

Further support for the suggestion that a significant part of the explanation for the contrasting state of antidiscrimination law in the United States and Europe at present is temporal can be drawn from the recent resistance by Member States to the enactment of any new EU antidiscrimination legislation. By comparison with the Race Equality Directive and the Framework Equality Directive which were smoothly adopted in 2000, as part of a more general effort of the European Union to boost its social legitimacy and its human face at a time of rising Euro-skepticism and xenophobia,³⁵ the Commission's recent attempt to extend and strengthen legislative protection against discrimination has met with a rather different political reception. Its proposal for a new Directive to counter discrimination on grounds of sexual orientation, religion, disability and age, which would have extended the kinds of provisions already in place for racial and sex discrimination to these other grounds, has encountered robust opposition from a range of Member States in the Council of Ministers, and after three years of inconclusive discussion the proposal seems unlikely to be adopted in the foreseeable future.³⁶ Similarly, in the field of EU

the impact of ECHR case law in these fields, see Dia Anagnostou, *Does European Human Rights Law Matter: Implementation and Domestic Impact of Strasbourg Court Judgments on Minority-related Policies*, 14 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 721 (2010).

³⁵ See Adam Tyson, *The Negotiation of the European Community Directive on Racial Discrimination*, VOLUME? EUROPEAN JOURNAL OF MIGRATION AND LAW 199 (2001), and more generally MARK BELL, *ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION* (2002).

³⁶ Commission Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 and the Working Document accompanying the proposal, SEC(2008) 2180. Following significant opposition from Germany and other states at earlier Council meetings to discuss the proposal, it was declared, at the most recent Council meeting in June 2011 during which the proposed Directive was discussed, that although that a majority of Member States were favorable "in principle" to the idea of a new general Directive, nevertheless several Member States questioned the need for such a measure and its compatibility with the subsidiarity principle, and all Member States retained general scrutiny

gender discrimination law, the attempt by the Commission and the European Parliament to extend the period of maternity leave for pregnant workers encountered significant political opposition in the Council and the adoption of this provision has been postponed yet again.³⁷

Thus while Europe may be several decades behind the United States in the creation and development of its broad body of antidiscrimination law, its future trajectory may not be so dissimilar. In particular, it seems reasonable to assume that Europe is likely to experience some of the ideological conflict and strong political and social opposition that the United States has experienced in recent decades in relation to attempts to redress social and economic inequality through antidiscrimination law.

C. Nuancing the Analysis

At the workshop in which antidiscrimination law scholars from both Europe and North America participated, and which led to the publication of these symposium papers, the contrast between the optimism of the European scholars and the deflated spirit of the U.S. scholars about the potential of antidiscrimination law was palpable, and became a matter of discussion. Yet as the conference proceeded, a more nuanced picture and a more qualified assessment emerged, revealing both the obstacles and problems of European antidiscrimination law as well as the

reservations on the proposal. *See* EU Council Document 10615/2011, Report of the Presidency to the Committee of Permanent Representatives.

³⁷ COM (2008) 637. This draft directive also reached an impasse after a sharp division of opinion arose between the European Parliament, which had put forward an amendment to extend the Commission's proposed eighteen-week period to twenty weeks, and many of the Member States in the Council. *See* Council Document 10541/11, Report of the Presidency to the Committee of Permanent Representatives of May 31, 2011.

initiatives taking place in the United States and elsewhere to promote the objectives of antidiscrimination law through novel, and often non-court-centered means.

The four substantive fields on which the symposium focused were those of sexual orientation, disability, gender, and race discrimination, and the papers that emerged from the symposium discussion explore a broadly linked series of themes in comparing European and North American antidiscrimination law. A first theme, mentioned above, examines the influence of U.S. antidiscrimination law on the emergence and development of its European counterpart.³⁸ A second theme considers the different paths taken by European and North American antidiscrimination law on certain key issues, which seem to reflect distinct cultural, historical and ideological commitments and trajectories.³⁹ A third perspective reflects on the gap between legal prescription and social change, between the adoption of progressive antidiscrimination norms and the realities of social practice, and on some of the reasons for the glaring nature of this gap in certain domains.⁴⁰ A fourth theme considers the introduction of novel and non-court centered approaches to combating the problems that antidiscrimination law seeks to address.⁴¹

Theme 1 - The influence of U.S. law on Europe:

The contributions of Gerard Quinn and Eilionóir Flynn, and Bruno de Witte draw attention to the way in which key aspects of European antidiscrimination law were heavily influenced by U.S.

³⁸ This is addressed in the contributions of Gerard Quinn and Eilionóir Flynn, and Bruno de Witte.

³⁹ This is addressed in the contributions of Julie Suk, Mark Bell, Ruth Rubio-Marín, Luc Tremblay, Gerard Quinn and Eilionóir Flynn, and Samantha Besson (who examines the differences that exist as between two Council of Europe antidiscrimination regimes).

⁴⁰ This is addressed in the contributions of Elizabeth Emens and Renata Uitz.

⁴¹ This is addressed in the contributions of Sandra Fredman, Bruno de Witte and Ruth Rubio-Marín.

models. This influence, as noted above, has been the subject of previous comment and analysis in the fields of EU race discrimination and sex discrimination law.⁴² More recently, scholars have analyzed the influence of U.S. civil-rights and public-interest litigation on the strategies of NGOs before European courts, including the ECtHR.⁴³

Gerard Quinn and Eilionóir Flynn's article draws attention to the lesser known fact that EU disability discrimination law has also borrowed, albeit less directly, from the United States in this field. Despite the apparent differences between the U.S. "civil rights" model of disability discrimination as compared with the initial European "social welfare" approach, Quinn and Flynn suggest that "the underpinnings of EU antidiscrimination law and policy as applied in the disability field are unmistakably and recognizably American." Quinn and Flynn's article examines the respective strengths and weaknesses of the civil rights and the social welfare models, and suggests that a "creative melding" of the two approaches within the EU context has not yet occurred. He also describes how the European Union was, in its turn, influential in the shaping the more recent international disability discrimination law (the UN Convention on the Rights of Persons with Disabilities), and argues that the UN Convention manages to bridge the U.S. civil rights model and the EU social welfare/antidiscrimination approach in interesting ways. This new international instrument, in turn, seems likely to put fresh pressure on the European Union—and on the United States, especially if it ratifies the Convention—to broaden and intensify reform in the field of disability discrimination.

⁴² See *supra* notes 15-16.

⁴³ Morag Goodwin, *White Knights on Chargers? Using the US Approach to Promote Roma Rights in Europe*, 5 GERMAN LAW JOURNAL 1431 (2004). For advocacy of the use of U.S.-style public interest litigation in Europe, including Central and Eastern Europe, see James Goldston, *Race Discrimination Litigation in Europe: Problems and Prospects* (<http://www.errc.org/cikk.php?cikk=1566>), and James Goldston, *Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges*, 28 HUMAN RIGHTS QUARTERLY 492 (2006).

Bruno de Witte similarly traces the origins of the recent proliferation of European equality institutions to the creation of the U.S. Equal Employment Opportunity Commission in 1964. Yet while this idea may have originated in the United States, de Witte describes the confluence of a range of other factors and influences that led over time to the spread and adaptation of broadly similar institutions from the United States to the United Kingdom, to the Netherlands and subsequently—via the impact of EU legislation—to a large number of European states. He identifies four specific sources of influence and incentive in this respect: (a) the influence of the Scandinavian ombudsman tradition; (b) the international movement, as reflected in the so-called Paris Principles of 1993, towards the creation of human rights institutions; (c) the development and spread of independent administrative authorities within European public law; and (d) the EU's interest in effective implementation and application of EU law across the Member States. He notes, however, that the range and diversity in the nature and tasks of the various equality institutions across different European states shows that they are far from being replicas of the original U.S. prototype, and that they are also far from converging towards a single European model.

Theme 2 – Divergence and convergence between antidiscrimination regimes:

The contributions of Julie Suk and Ruth Rubio-Marín examine how European and U.S. antidiscrimination norms have followed distinct paths on certain issues in the field of gender equality and age, while Mark Bell's paper notes the parallel paths—similar in some respects but

different in others—of the United States and the European Union in the fields of transgender and sexual orientation discrimination.

Julie Suk examines the sharp divergence between U.S. and European gender and age discrimination law as far as mandatory retirement norms and mandatory maternity leave rules are concerned. She explores the implicit theories of the state that underlie the American free-choice and anti-stereotyping arguments against such mandatory laws, as compared with the European justification of mandatory laws as a means of promoting the availability of a balanced lifestyle (whether desired or not) for all. On the one hand, the EU's approach—which accepts the compatibility of various national mandatory maternity leave and retirement regimes with EU law, and itself stipulates a minimum period of mandatory maternity leave—has been criticized for its reinforcement of stereotypes and its paternalistic generalizations as well as forcing able-bodied workers out of their chosen employment. On the other hand, the U.S. approach—which treats both mandatory maternity leave and mandatory retirement as discriminatory, and as violations of individual liberty and constitutional due process—is criticized for its implicit insistence that all citizens are able-bodied, willing and active market participants at all stages of their lives, and for neglecting the welfare and dignity especially of those individuals who are not. In a careful analysis of both jurisdictions, Suk suggests that there are arguments to be made in favor of each model: the U.S. approach is more likely to promote individual liberty and choice, while the European approach is more likely to promote a collective conception of welfare and to counter inequalities resulting from the lack of collective action on matters like parental leave.

Ruth Rubio-Marín's article deals also with the field of gender equality law. Her focus, however, is on the spread of the notion of parity democracy in Europe. The term parity democracy reflects the idea that the under-participation and disempowerment of women in public and private life reflects a deficiency of democracy and a problem of citizenship. More can be achieved, in other words, by viewing gender equality through the lens of democracy and participation than only or primarily through the conceptual lens of discrimination. Rubio-Marín points out that the move towards parity democracy, which promotes the idea of quotas for women in political and corporate contexts across many European countries, has been influenced in part by the supranational policies of the European Union and the Council of Europe. Reflecting on the very different approaches of Europe and the United States on this issue, Rubio-Marín notes that there is no current indication or future likelihood of any such move in the United States, despite the fact that problems of gender inequality may be at least as serious in the United States as in Europe. Ultimately she offers a range of factors—historical (slavery and the role of race in the United States), cultural (anti-essentialist and anti-stereotyping), ideological (the commitment to individualism, meritocracy and market forces) and political (the role of religion in conservative politics)—to explain the likely resistance in the United States to the introduction of any notion of parity democracy.

Mark Bell's contribution compares developments in U.S. law on sexual orientation and gender identity discrimination with those in Europe, and finds broad similarities in the trajectory of the law in both jurisdictions but also certain differences on key issues. For example, he notes that unlike many U.S. courts, the regional European courts, including the European Court of Justice and the European Court of Human Rights, have been willing to construe discrimination related to

gender assignment as sex discrimination, while transgendered persons in the United States have been able to gain some legal protection from the prohibition on sex-stereotyping. But the judicial moves in the European Union and the United States so far have tended to assume a fixed gender identity rather than seeking to protect against discrimination on the basis of gender non-conformity, and there has been little political momentum in either jurisdiction towards introducing legislative protection for transgendered persons. Conversely, Bell notes, the courts in both the United States and the European Union have not played a significant role in the field of sexual orientation discrimination, and most of the progressive reform on this issue has come through legislative initiatives. In each jurisdiction, there is much less willingness to introduce antidiscrimination measures in the area of family life and marriage than in the field of employment equality. He argues by way of conclusion that for questions of sexual orientation and transgender alike, a human rights-based approach dedicated to the dismantling of stereotypes and social parameters related to gender, rather than a more formal comparator-based approach, would best serve both jurisdictions.

Samantha Besson looks not at the similarities and differences between the United States and Europe, or between the European Union and the ECHR, but instead at the similarities and differences between two of the Council of Europe's antidiscrimination regimes: the well-known jurisprudence of the European Court of Human Rights under Article 14 ECHR and Protocol 12, and the lesser-known jurisprudence of the European Committee on Social Rights that monitors compliance with the European Social Charter (ESC) of 1961 and the Revised European Social Charter (RESC) of 1996. She begins by drawing attention to the fact that Article E of the 1996 ESC was in fact modelled on Article 14 ECHR, and notes that there has been significant

convergence between the two bodies in the field of equality and antidiscrimination law. Nevertheless, Besson's article also points out that while the European Court of Human Rights has begun to articulate an antidiscrimination jurisprudence that recognizes the notion of indirect discrimination (disparate impact doctrine, in U.S. terms), it is the European Committee on Social Rights that has produced the more innovative and progressive decisions on discrimination and equality. In particular, the ECSR has increasingly promoted a collective approach to equality with an emphasis on the positive duties of states. Besson's analysis suggests that the differences between the approaches of the two bodies may be explained in part by reference to a number of the differences between the bodies themselves and their institutional context. A first such factor is the nature of the rights whose enforcement the two bodies are mandated to monitor, namely the more collective nature of the European Social Charter rights, as compared with the traditionally politico-civil nature of the ECHR guarantees. A second factor is the nature of the procedures before the two bodies, with the ECHR being a judicial forum receiving mainly individual complaints, while the ESC and ECSR is primarily (though not only) a report-based monitoring and data-collection system, with a more recently introduced collective complaints mechanism. There are also a larger number of states parties to the ECHR than to the relevant provisions of the ESC or RESC, and the European Social Charter has a narrower scope of application than the ECHR. It may also be that the greater inclination of the ECSR to be more demanding and far-reaching in its interpretation of the obligations of states in this respect is at least in part a function of its lack of any strong enforcement machinery, while the legitimacy and reputation of the ECHR have come to depend in part on the success of its rulings in generating state compliance, which may explain the greater caution of the Strasbourg Court.⁴⁴ Besson concludes her essay by arguing that further convergence in the approaches of the two European

⁴⁴ See, e.g., Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L L. 115 (2011).

bodies would be desirable, and that each could usefully learn from aspects of the antidiscrimination jurisprudence of the other.

Luc Tremblay looks neither at Europe nor at the United States, but at a jurisdiction that many see as combining elements of both the American and the European approaches to discrimination law, namely Canada. He suggests that even within Canadian equality law, which resembles elements of the European model in its embrace of both a substantive conception of equality and the legitimacy of affirmative action, the prohibition of discrimination in Article 15(1) of the Canadian Charter also reflects something of the U.S. anti-stereotyping conception, meaning that it would invalidate certain kinds of affirmative action otherwise permitted under Article 15(2). Canadian equality law, in his view, contains and reflects both “recognition” and “redistribution” elements. He argues that the prohibition on discrimination in Article 15(1) reflects a recognition or anti-stereotyping conception, while the provision for the legitimacy of affirmative action in Article 15(2) reflects both a recognition and a redistribution dimension. He takes issue with the reasoning of the recent case law of the Canadian Supreme Court concerning aboriginal rights, and maintains that attempts to address socio-economic inequality through redistributive forms of affirmative action must, if they are to be compatible with the Charter, take care not to reinforce prejudices or false stereotypes, and should be assessed on the basis of proportionality.

Theme 3: The limits of law’s power to address discrimination:

While many of the papers discussed above are concerned with exploring and explaining the commonalities and differences within aspects of European and North American discrimination law, the contributions by Elizabeth Emens and Renata Uitz focus, in different contexts and in different jurisdictions, on how legal intervention to combat discrimination fails to translate into real social change. Both of them are concerned with the issue of societal responses to difference, and with how fear, prejudice and the failure of empathy can and do undermine attempts to redress inequity through law.

Elizabeth Emens examines the recent legislative amendment to the Americans with Disabilities Act (the ADAA 2008), which, among other things, removed the availability of “reverse discrimination” claims and broadened the definition of disability in various ways. She suggests that in a sense, these legal interventions are in themselves potentially positive because they reverse the deliberate judicial narrowing of the scope of the earlier Americans with Disabilities Act (ADA) and because they bar the kinds of reverse discrimination challenges to affirmative action policies that have been seen in the United States in the area of race and gender.⁴⁵ Yet, they also reflect the low social status of disability and potentially exacerbate existing societal fear and anxiety about it. Emens also argues that the ADAA’s new distinction, especially with regard to the obligation to provide reasonable accommodation, between persons who are “disabled” and those who are “regarded as disabled” is an unfortunate and disappointing limitation of the statute. She presents the judicial narrowing of the original ADA as an example of the gap between societal attitudes and legislative demands, and cautions that pervasive societal attitudes are similarly likely to determine the fate of the new legislation through litigation and judicial action. Paradoxically, Emens suggests, the expansion of the definition of disability by the ADAA

⁴⁵ See *supra* notes 10 & 11.

is likely to strengthen social anxiety by revealing the permeability of the category of disabled persons, and by removing the clear “legal buffer zone” between those who are formally deemed disabled and those who are not. She draws attention to the fact that disability, unlike many other arenas of discrimination, is notably absent from the positive “diversity” discourse and agenda. Like Gerard Quinn and Eilionóir Flynn, however, Emens sounds a potentially more optimistic note by pointing to the UN Convention on the Rights of Persons with Disabilities. She suggests that its coming into force may provide fresh impetus for the endeavor to address the attitudinal barriers to social change with regard to disability, in particular through its provisions on “awareness raising.”

Renata Uitz examines the role of social prejudice, religiosity and political populism in determining the fate of progressive legal reforms in the field of sexual orientation discrimination in Central and Eastern Europe. Focusing on three states (Poland, Hungary and the Czech Republic) that share certain relevant features but differ in other key respects, she shows the disjuncture between reformist legislative and judicial initiatives to combat sexual orientation discrimination on the one hand, and the evident political and social resistance to the implementation of such reforms on the other. Uitz cautions against the assumption that compliance with EU laws or ECHR rulings on sexual orientation issues implies either an improved situation on the ground for gay people, or a new social atmosphere of tolerance within the state. She argues further that the full picture with regard to discrimination and prejudice against gay and lesbian people can only be appreciated if we broaden the frame to look not just at legal developments within antidiscrimination law properly so called, but also at other intersecting fields of law and policy including family law, migration, labor and criminal law.

Underscoring the role of what she calls “veto-players,” such as conservative political actors, religious organizations and right-wing social movements, Uitz outlines how European equality and antidiscrimination laws in the three jurisdictions she is exploring are often implemented for strategic political reasons such as the avoidance of conflict with EU institutions, but are then resisted in other ways that effectively undermine their aims. Ultimately she argues that close attention to both of these features, namely the opportunities available to veto-players to promote a conservative agenda (including at the European level), and the importance of the intersection of different fields of law, is crucial if genuine progress is to be made in addressing prejudice and discrimination against gays and lesbians in these and other states.

Theme 4: Novel approaches to combating the problems of inequity and discrimination:

The final theme of the symposium reflected in several of the papers is the emergence on both sides of the Atlantic of novel, in particular non-court-centric, approaches to the problems of exclusion, prejudice and stereotyping, as well as to the varieties of socio-economic injustice that antidiscrimination law typically seeks to address. A body of academic work in the United States has been promoting the idea of moving beyond a conventional discrimination framework to address the problems of social inequity in a more holistic and deliberative way, with less emphasis on the role of courts and litigation⁴⁶ and more emphasis on the interaction of

⁴⁶ See in particular the work of Susam Sturm, *Second General Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001), *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education* 29 HARV. JNL OF LAW AND GENDER 247 (2006). *The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J. LAW & GENDER (2007), and S Sturm, Reframing the Equality Agenda, conference paper, Harvard Law School workshop, May 2011, and the institute she established on institutional and social change: <http://www.changecenter.org/>. See also Olatunde Johnson, *Disparity Rules*, 107 COLUM. L. REV. 375 (2007) and Julie Suk, *Antidiscrimination Law in the Administrative State*, ILLINOIS L. REV. 405 (2006).

democratic movements with legal institutions.⁴⁷ Some of this work examines the role of both public and private institutions other than courts in tackling social exclusion and inequity, while others have begun to scrutinize the potential of the growing role of the corporate sector in the United States in promoting workplace equity and redressing discrimination.⁴⁸ These moves have the advantage of reframing the discrimination analysis in a broader way, addressing problems of exclusion, prejudice, marginalization and inequity beyond the context of litigation, avoiding some of the problems of ideological conflict and deadlock, as well as addressing the underlying problems in a more proactive and participatory manner.

In this symposium issue, the contributions of Sandra Fredman, and to some extent those of Bruno de Witte, Samantha Besson and Ruth Rubio-Marín, address this theme in the European context. Samantha Besson's article draws attention to the less well-known jurisprudence of the European Committee on Social Rights, which unlike the European Court of Human Rights and the European Court of Justice has emphasized the collective rather than the individual dimension of equality, and has focused on the positive duties of public authorities to promote equality. While the ECSR lacks strong enforcement mechanisms and has until now had a low profile as well as a rather modest influence, Besson suggests that its approach may over time come to influence other European equality bodies and tribunals. Bruno de Witte examines the network of equality bodies and institutions that have been established in recent years, and considers whether the data-gathering, problem-solving, awareness-raising and educational mandate of these non-judicial fora may contribute to a less court-centric and more holistic approach.⁴⁹ Ruth Rubio-

⁴⁷ See Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide* 89 B.U.L. REV. 539 (2009).

⁴⁸ Kenji Yoshino, *LGBT Rights, Inc.?* (2011, manuscript on file with author).

⁴⁹ Bruno de Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*. See also Gráinne de Búrca, *Stumbling into Experimentalism: The EU Anti-Discrimination*

Marín focuses on the potential of the European “parity democracy” paradigm to address gender inequality in radical ways based on an understanding of inequality as a problem of democracy and citizenship, and focused on increasing the participation of women in political and corporate decision-making.

Sandra Fredman discusses an instance of what she terms “fourth generation anti-discrimination law” in the United Kingdom, which is the legal imposition on public authorities of a duty to have “due regard” to the need to promote equality of opportunity and to eliminate unlawful discrimination in relation to race, disability and gender. Unlike individual judicial remedies, the imposition of public law duties of this kind holds out the promise of a broader, more pro-active and more collective approach to the structural problems of inequality. Fredman argues that, properly designed, the duty to have due regard could provide an opportunity to facilitate a more deliberative and reflexive approach, by placing an onus on public authorities to pay genuine attention to these issues in their policymaking. However, her appraisal of the functioning of this public law duty over a ten-year period in the United Kingdom is not positive. She notes first that the duty under UK law requires due regard to be paid to the interests of identity-based groups and is not focused on socio-economic disadvantage; second that most of the enforcement has taken place through the courts rather than by equality bodies such as the Commission on Racial Equality which was originally active in assessing the compliance of public bodies with the duty; and third, that the courts have been excessively deferential to public authorities in the challenges which have been brought before them and have not given life to a genuinely deliberative process.

Regime, in EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE 215 (Charles F. Sabel & Jonathan Zeitlin eds., 2010), and *EU Race Discrimination Law: A Hybrid Model?*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 97 (Gráinne de Búrca & Joanne Scott eds., 2006), and Mark Dawson & Elise Muir, *Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma* 48 COMMON MKT LAW REV. 751 (2011).

Fredman's ultimate response to the question posed early in her paper, namely whether judicial review provides an adequate external stimulus to trigger a deliberative response, and to give a voice to groups otherwise marginalized in the decision-making process, is that the duty and the standard it introduced under UK law are too open-ended to promote an equality agenda. Nevertheless, despite this negative appraisal, she argues that one positive effect the "duty of due regard" has so far had is to provide opportunities for civil society mobilization, including through judicial review. Her article concludes with a number of suggestions for amending the legislative standard and articulating the aims of the duty in a way which could bring about substantive change in terms of actual equality.

Conclusion

At the outset of this symposium, the apparent contrast between the vigor and expansion of antidiscrimination law and policy in Europe, and the ideological conflict and narrowing of this field in the United States, seemed to call for an explanation. Further, the unquestionable influence of the United States on EU and European equality and antidiscrimination law rendered the contrast all the more worthy of note. Three possible explanations were canvassed: cultural differences between the United States and Europe in relation to the role of the state in the provision of welfare; the differences between the polarized American political system and the technocratic and elitist EU system; and finally the difference in time—the existence of several decades between the introduction and expansion of these bodies of law and policy in North America as compared with its emergence across much of Europe. While it seems likely that each of these possible explanations has some purchase, the significance of the temporal explanation

has been particularly emphasized here. In other words, while it seems clear that different cultural assumptions about the role of the state and society underpin various aspects of European and North American antidiscrimination law and may help to explain the different paths they have taken on several key issues; and while it seems clear that the United States is both a more polarized political system and one in which elements of popular democracy are significantly stronger than within much of Europe and the European Union, it would seem both premature and unconvincing to argue that the prospects for European antidiscrimination law are much brighter and more secure than the trajectory of the United States would predict. It seems clear that political enthusiasm for the enactment of antidiscrimination measures is waning at the EU level, that there is significant pushback and resistance from political and societal forces within European states, and that Europe's economic woes have exacerbated the kind of anti-immigrant sentiment that underlies much of Europe's particular brand of racism. Related to this is the fact that Europe's regional antidiscrimination law, that of the European Union but also of the Council of Europe and the ECHR system, is in many respects a top-down system of law and policy-making, and that even the European civil society that is engaging in litigating and enforcing EU antidiscrimination law is in many cases funded and organized by the European Union itself. All of these features suggest that Europe may be in the early stages of the unfolding of the implications of its equality law and policy, and that there may well be political resistance and significant social conflict ahead.

These comments imply that it would be rash to herald the health and success of the expanding body of European antidiscrimination law, or to accept too readily the sharply contrasting pictures of U.S. and European law with which this introduction began. The discussions that took place

within this symposium, and the papers that have emerged from it, point not only to significant challenges confronting European antidiscrimination law and policy, but also to some interesting and similar sets of developments taking place within the two jurisdictions. While the entrenched conflicts within U.S. antidiscrimination law and jurisprudence have given rise to proposals to change the framework for thinking about social inequity and injustice, and to develop novel, non-court-centric ways of addressing these problems, a different set of dynamics lie behind the emergence of alternative or innovative approaches in Europe. These have less to do with U.S.-style disillusionment with conventional legal and judicial fora, and more to do with the role of regional and supranational organizations and the emergence of a range of “new governance” approaches in Europe to deal with the complexities of a transnational regime.⁵⁰ Ultimately, even though an appraisal of the success of deliberative, non-court-centric and experimental approaches in tackling entrenched problems of social inequity requires further empirical inquiry, it would seem that both the recent history of civil rights and discrimination law in the United States and the challenges currently confronting European social law and policy point strongly towards the desirability of such experimentation and innovation.

⁵⁰ See, e.g., the essays contained in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 49. Compare, however, R. DANIEL KELEMAN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011).